THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no. 308/2011
Reportable

In the matter between

BEWEGING VIR CHRISTELIK-VOLKSEIE ONDERWYS	**First Appellant**
CVO SKOOL PRETORIA	**Second Appellant**
GYSBERT JOHANNES JANSEN VAN RENSBURG	**Third Appellant**
TINA VAN DEVENTER	**Fourth Appellant**

and

THE MINISTER OF EDUCATION	**First Respondent**
THE SOUTH AFRCAN QUALIFICATIONS AUTHORITY	**Second Respondent**
UMALUSI	**Third Respondent**
THE COMMITTEE OF UNIVERSITY PRINCIPALS	**Fourth Respondent**
THE COMMITTEE OF TECHNICON PRINCIPALS	**Fifth Respondent**
HIGHER EDUCATION SOUTH AFRICA	**Sixth Respondent**

Neutral citation: *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* (308/2011) [2012] ZASCA 45 (29 March 2012)

Coram: **MPATI P, FARLAM, SNYDERS, MAJIEDT JJA and PLASKET AJA**

Heard: **5 March 2012**

Delivered: **29 March 2012**

Summary: **Practice and procedure – application for condonation for late filing of replying affidavit refused – Sections 7(1) and 9 of Promotion of Administrative Justice Act 3 of 2000 – application for extension of 180-day period for launching review proceedings refused – undue delay in launching application for declaratory orders – condonation refused.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Pretorius J sitting as court of first instance):

The appeal is dismissed and the appellants are directed, jointly and severally, to pay the costs of the first respondent, including the costs of two counsel.

JUDGMENT

PLASKET AJA (MPATI P, FARLAM, SNYDERS and MAJIEDT JJA concurring)

[1] The appellants applied, in the North Gauteng High Court, Pretoria, for three declaratory orders concerning the binding effect on them of certain government notices promulgated by the first respondent, the Minister of Education, setting out curriculum policy and religious education policy for schools, as well as three orders in which they sought the setting aside of certain aspects of these policies. I shall refer, for convenience, to the content of these government notices as the new curriculum. In the court below, Pretorius J dismissed the application with costs, together with an application for an extension of time for the filing of the main application (the extension application) and one for condonation for the late filing of the replying affidavit in the extension application. The appellants appeal to this court with the leave of Pretorius J.

[2] The first appellant (Beweging vir Christelik-Volkseie Onderwys – BCVO) is a section 21 company that has as its main objects the development, implementation and promotion of a pure Christian Afrikaans ethnic education system based on the Christian reformed faith and Afrikaner culture and to promote the establishment and operation of Christian Afrikaans ethnic educational institutions on all levels of the education system. The second appellant (CVO Skool Pretoria) is an independent school affiliated to BCVO. The third appellant is the father of three children who attend the CVO Skool Pretoria. The fourth appellant is the mother of two children of school-going age whom she educates at home.

[3] In addition to the Minister, a further five respondents – all statutory bodies involved in education – were cited as the second to sixth respondents. They are: the South African Qualifications Authority; Umalusi (the Council for General and Further Education and Training Quality Assurance); the Committee of University Principals;

the Committee of Technicon Principals; and Higher Education South Africa. No relief was sought against the second to sixth respondents in the court below, none of them opposed the application and none took part in these proceedings.

[4] The appellants object to the contents of three government notices. They are Government Notice 710 of 31 May 2002 entitled 'National Policy Regarding General Education and Training Programmes: Approval of the Revised National Curriculum Statement Grades R-9 (Schools)'; Government Notice 1407 of 6 October 2003 entitled 'National Policy Regarding Further Education and Training Programmes: Approval of the National Curriculum Statement Grades 10-12 (General) as National Policy'; and Government Notice 1307 of 12 September 2003 entitled 'National Policy on Religion and Education'.

[5] In the three notices, the Minister stated that he had determined the national policy in terms of s 3(4)(*l*) of the National Education Policy Act 27 of 1996. The notice concerning the new curriculum for grades R to 9 stated that it would be phased in from 2004 to 2008 and that it replaced the previous curriculum. The notice concerning the new curriculum for grades 10 to 12 stated that it was to be implemented incrementally from 2006 to 2008. The third notice contains a statement of policy on religion and education.

[6] Section 3(4)(*l*) of the National Education Policy Act provides:

'Subject to the provisions of subsections (1) to (3), the Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system and, without derogating from the generality of this section, may determine national policy for-

. . .

(*l*) curriculum frameworks, core syllabuses and education programmes, learning standards, examinations and the certification of qualifications, subject to the provisions of any law establishing a national qualifications framework or a certifying or accrediting body.'

[7] The appellants contend that these government notices are not binding on independent schools because no regulations have been promulgated by the Minister to give effect to the policy statements that they contain. They also allege that certain provisions of the notices – such as approval for the phasing in of the curriculum – are

invalid insofar as they purport to impose legally binding obligations on the appellants.

[8] The court below did not determine the merits of the application. When Pretorius J dismissed the extension application (brought under a different case number from that of the main application) she dismissed the main application as well.

[9] The issues that arise in this appeal will be dealt with as follows: first, the question whether the late filing of the reply in the extension application should have been condoned will be determined; then the question whether the court below was correct in dismissing the extension application will be decided; then, if the appeal on the second issue succeeds, it will be necessary to consider the merits of the main application; and finally, it will be necessary to decide the question of costs.

The extension application: condonation for the late filing of the reply

[10] The main application was served on 10 September 2007. In the answering affidavit filed on behalf of the Minister (deposed to on 31 October 2007), the point was taken that the appellants sought, in effect, to review administrative action and that the application had been brought outside of the 180-day time limit provided for by s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) with the result that the main application fell to be dismissed on this basis alone.

[11] This induced the appellants to launch an application in which they sought an extension of the 180-day period to the date of the launching of the main application. This extension application was served on the State Attorney on 12 December 2007. The answering papers were filed on 27 February 2008. The replying papers were only filed some 18 months later, on 8 October 2009.[1] The appellants applied for condonation for this delay. The affidavit in which the delay is explained was deposed to by a retired judge, Mr Justice I W B de Villiers, who had played the role of BCVO's legal advisor. (I shall refer to him in what follows as De Villiers.)

[12] In a nutshell, his excuse for the delay is that his capacity for work had diminished with age and he was busy with another case until October 2008. He accepts responsibility for the delay. It is not necessary to deal with the first excuse, save to say that if De Villiers was not able to do the work promptly because of his age

1 There is no indication in the appeal record when the replying papers were served and filed so I have relied on the date indicated in the judgment of the court below. There is no dispute in this regard. The various affidavits that constitute the reply were signed between 17 and 28 September 2009.

he should have declined to accept the responsibility of doing the work. It is, however, necessary to outline the detail, such as it is, in relation to the second aspect.

[13] De Villiers stated that he received the Minister's answering papers to the extension application towards the end of February 2008, shortly after they were served. He sent copies to three people, Mr R E Pohl, Mr T J de Wet and Mr Leendert van Oostrum, with a request that they revert to him with their comments. Pohl and De Wet reverted to him within a week or two but Van Oostrum took longer to respond. All that was said in the affidavit attached to the founding affidavit in the condonation application was that Van Oostrum reverted to him in 2008. In the replying affidavit, all he could say was that this was 'heelwat later' than the one or two weeks taken by De Wet and Pohl.

[14] The problem that confronted De Villiers was that he had taken on legal work for one of the CVO schools towards the end of 2007 and this had kept him busy until October 2008. Although he received some help from the appellants' attorney, he had to draft the replying papers on his own, and had to do so while he was working on the other matter. To compound his problems, he underwent an operation in July 2008 and was out of action for two months. In addition, his personal affairs were in disarray because he had been working so hard on that other matter. He was consequently not in a position to give his full attention to the drafting of the replying papers. Despite all of this, he continued to work on the replying papers from time to time, but due to the problems that he had mentioned, he was not able to finish drafting them any sooner than he did.

[15] The reply took more time than expected to draft because the answering papers covered a great deal of ground. He also devoted a lot of time to the information he had requested from Van Oostrum about the new curriculum and about education policy prior to 2002, although he later discarded all of this because it was not relevant to the extension application. The process of preparing the reply was a slow one because a number of people had to depose to affidavits, some did not live in Pretoria and some were not readily available. In addition, throughout 2008 and 2009 he was approached for advice by a number of CVO schools. In October 2008 two office bearers of BCVO changed, resulting in a break in continuity.

[16] Throughout the period during which he was working on the reply, De Villiers received queries about his progress. He reported on progress from time to time, either orally or in writing. In May 2009, after the appellants changed their attorneys, one Van Jaarsveld of the new firm of attorneys requested De Villiers to write a report on his progress for BCVO's annual general meeting which was to be held the following month. He did so.

[17] De Villiers eventually produced a draft of the replying papers in July 2009. He e-mailed the papers to the people who were to depose to affidavits. After he received comments, he e-mailed what I presume would have been revised papers to the deponents in September 2009. The affidavits were signed in that month and served in early October 2009.

[18] Apart from the occasional request for a progress report from office-bearers of BCVO and CVO Skool Pretoria, it is evident that both they and the attorneys who represented the appellants did precious little to ensure that the reply was filed without undue delay. Indeed, they appear to have left matters in the hands of De Villiers. The first contact he had with the third appellant was in July 2009 and he states in this regard:

'Die Derde Applikant het ek baie selde gesien. Hy het my nie gevra oor die vordering van die saak nie. Ek neem aan dat hy gewag het dat ek hom oor verwikkelinge sou inlig. Ongelukkig het ek dit eers gedurende Julie 2009 gedoen.'[2]

[19] It was only in September 2009 that De Villiers met the fourth appellant. He said the following in relation to her:

'Die Vierde Applikant het ek eers op 21 September 2009 ontmoet. Die tussenganger tussen ons was gemelde Van Oostrum. Nadat hy gedurende 2008 sekere inligting oor die gebeure in die onderwys vòòr 2002 aan my verskaf het, het ons nie meer met mekaar kommunikeer nie totdat ek gedurende Julie 2009 per e-pos konsep repliserende verklarings aan hom laat stuur het.'[3]

Van Oostrum, on the other hand, stated that, having provided De Villiers with the information he requested, he heard nothing more from him. He assumed that the

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2 'I saw the Third Applicant very seldom. He never asked me about the case's progress. I presume that he was waiting for me to inform him of developments. Unfortunately, I only did this during July 2009.' (My translation.)

3 I met the Fourth Applicant for the first time on 21 September 2009. Our go-between was the said Van Oostrum. After he provided me with certain information, during 2008, about events in education *before* 2002, we no longer communicated with each other until, during July 2009, I had draft replying affidavits e-mailed to him.' (My translation.)

matter was, for one or other reason, no longer proceeding.

[20] The picture that emerges from these facts is one of a failure on the part of everyone involved to ensure that the replying papers were filed without delay, or to ensure that De Villiers did what was required of him; of neglect on the part of both the appellants and their attorneys to take any interest in the conduct of the litigation; and an abdication, on the part of the firms of attorneys that represented the appellants, of their professional responsibility.

[21] What of the explanation for the delay given by De Villiers? In my view, his explanation is far from convincing. As a retired judge he ought to understand the importance of complying with the rules of court and, as a former practitioner, he ought to have known that it is no excuse to rely on a reduced capacity for work, on the one hand, and having another case to work on to the detriment of the present matter, on the other. In these circumstances he should have told the appellants that he was unable to do the work timeously and that other arrangements would have to be made.

[22] The delay of 18 months must be placed in context. The answering papers in the extension application were 42 pages long, the main answering affidavit that had to be replied to being 35 pages long. The replying papers were 56 pages long. The main replying affidavit was 24 pages long and the supporting affidavit of De Villiers himself was eight pages long. For the rest, the eight remaining affidavits vary between two and four pages in length and are standard confirmatory affidavits that should literally have taken a few minutes to draft. The issues that were raised in the answering affidavits were not complex and I do not understand what research was required on the part of De Villiers that could have slowed the preparation of the replying papers to any marked extent. Of the ten deponents to the affidavits that form part of the reply, eight (including De Villiers) lived in Pretoria while one lived in Potgietersrus and another lived in Orania. Even if some were not always available, it is hard to imagine that appointments could not have been made to consult with them within a month of the answering affidavits having been filed.

[23] When the evidence of De Villiers is analysed, it appears to me that the difficulty in meeting with witnesses is a smoke screen: he had all he needed to draft the replying papers sometime during 2008 but he only had a draft on which to consult with

the potential deponents in July 2009. And then it took him a further three months to finalise the papers after he had sent them to the deponents.

[24] Finally, the affidavit of De Villiers in which he seeks to offer an explanation for the delay is vague and it fails to account for the whole period of 18 months. It is vague, for instance, in respect of precisely what progress he had made in drafting the papers by October 2008 and even shorter on detail for the following year when this matter was, it would appear, his primary concern and duty. Not one of the progress reports that he claims to have written, including the report of May 2009, is attached to the papers and it is difficult to imagine what he would have reported if he only had completed a draft of the papers by July 2009.

[25] Rule 27(3) of the Uniform rules provides that a 'court may, on good cause shown, condone any non-compliance with these rules'. In *United Plant Hire (Pty) Ltd v Hills & others* Holmes JA stated:[4]

'It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides.'

The various factors that are to be considered 'are not individually decisive but are interrelated and must be weighed one against the other' with the effect, for instance, that 'a slight delay and a good explanation may help to compensate for prospects of success which are not strong'.[5]

[26] In *Darries v Sheriff, Magistrate's Court, Wynberg & another*[6] Plewman JA distilled from the case law the guiding principles in the exercise of this discretion. He stated:

'I will content myself with referring, for present purposes, only to factors which the circumstances of this case suggest should be repeated. Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the appellant's

4 *United Plant Hire (Pty) Ltd v Hills & others* 1976 (1) SA 717 (A) at 720E-F.
5 At 720G.
6 *Darries v Sheriff, Magistrate's Court, Wynberg & another* 1998 (3) SA 34 (SCA) at 40H-41E. (References omitted.)

prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

[27] The delay in this case – 18 months for the filing of a replying affidavit – is excessively long. No effort was made to apply for the condonation of the delay as soon as possible, and no explanation is given for this failure. Condonation was only applied for when the reply was eventually filed, and De Villiers, making a virtue out of necessity, stated that the filing of the reply was slowed down by the fact that a condonation application had to be drafted as well. The explanation for the delay of 18 months is unacceptable. Indeed, it is no explanation at all because of its vagueness and the long periods that remain unexplained. I consider the non-observance of the rules to be so flagrant and gross that there is no need to consider the prospects of success in the extension application. There are simply no factors that I can find that favour the grant of condonation. In the result, however strong those prospects of success could be, condonation for the late filing of the reply must be refused.

[28] It follows that Pretorius J was correct in dismissing the application for condonation for the late filing of the reply in the extension application. Consequently, the appeal against the dismissal of that application must fail.

The extension application

[29] The extension application was brought on the basis that, if the relief that was claimed amounted to a review of administrative action in terms of the PAJA, an extension of the period within which the application should have been launched would be sought. Counsel for the Minister argued that even if the PAJA did not apply, the common law delay rule did and the applicants had delayed unreasonably in bringing their application.

[30] Section 7(1) of the PAJA provides:

'(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without

unreasonable delay and not later than 180 days after the date-

(*a*) subject to subsection (2)(*c*), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(*a*) have been concluded; or

(*b*) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[31] Section 9(1) provides, however, that the 180-day period 'may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned'. Section 9(2) provides that such an application may be granted 'where the interests of justice so require'.[7] As s 7(1) and s 9 apply only in respect of proceedings in which administrative action is reviewed in terms of s 6(1) of the PAJA, the operation of these sections is limited to administrative action as that term is defined in s 1 of the PAJA.

[32] Prayers 1, 4 and 5 of the notice of motion in the main application seek declarators to the effect that the policies set out in government notices 710 of 31 May 2002, 1407 of 6 October 2003 and 1307 of 12 September 2003 are not binding on the appellants because they are not legislation, regulations or rules.

[33] The argument advanced by the appellants was that the Constitutional Court, in *Minister of Education v Harris*,[8] had made it clear that policy determinations made by the Minister in terms of the National Education Policy Act were not binding on independent schools. In that matter Sachs J had held:[9]

'Policy made by the Minister in terms of the National Policy Act does not create obligations of law that bind provinces, or for that matter parents or independent schools. The effect of such policy on schools and teachers within the public sector is a different matter. For the purposes of this case, it is necessary only to determine the extent to which policy formulated by the Minister may be binding upon independent schools. There is nothing in the Act which suggests that the power to determine policy in this regard confers a power to impose binding obligations. In the light of the division of powers contemplated by the Constitution and the relationship between the Schools Act and the National Policy Act, the Minister's powers under s 3(4) are limited to making a policy determination and he has no power to issue an edict

7 In practice, s 9 is treated as a condonation provision. Usually, an applicant who is out of time applies in the founding papers for condonation for launching the application outside of the 180-day limit, rather than bringing a separate application, prior to the hearing of the application, for an extension of the period. That is not to say that the appellants can be faulted for the procedure that they followed.

8 *Minister of Education v Harris* 2001 (4) SA 1297 (CC).

9 Para 11.

enforceable against schools and learners.'

[34] In respect of the prayers for declarators, no decision is taken on review, whether directly or indirectly, no exercise of public power is sought to be set aside and the PAJA has no bearing on the relief claimed because no administrative action is implicated. That being so, s 7(1) and s 9 of the PAJA have no application. The relief claimed being discretionary, however, the appellants were obliged to have launched their application within a reasonable time.[10] In other words, the common law delay rule, as articulated in cases such as *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*,[11] applies to determine whether the application in respect of this relief was brought timeously and, if not, whether any unreasonable delay should be condoned.

[35] Prayers 2, 3 and 6 seek the setting aside of aspects of the policy contained in the three government notices insofar as they purport to impose legally binding obligations on the appellants. The thrust of these prayers, read with the relevant allegations in the founding papers, is that effect is being given to the policy and it is being imposed on the appellants. The policy is, in other words, being implemented. On the assumption that the appellants' allegations are true (and so determining this issue as if on exception), I am of the view that the relief sought amounts to a review of the implementation of the policy in terms of the PAJA.[12] That appears to be the appellants' understanding too. In paragraph 15 of BCVO's founding affidavit the following is stated:

'Vir sover bedes 2, 3 en 6 van die kennisgewing van mosie op hersiening neerkom, is die aansoek gebaseer op die bepalings van Artikel 6(2)(a)(i) en (f)(i) van Wet 3 van 2000 en is dit nie nodig om die prosedure neergelê in Reël 53 van die Hooggeregshofreëls te volg nie aangesien daar nie 'n oorkonde bestaan wat ingevolge die bepalings van gemelde reël voor die Agbare Hof geplaas moet word nie.'[13]

[36] From the appellants' own categorisation of prayers 2, 3 and 6, the conclusion is

10 Lawrence Baxter *Administrative Law* (1984) at 715.

11 *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A).

12 I have approached this question in the same way as Bozalek J did in *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA & another* 2006 (2) SA 52 (C).

13 'Insofar as prayers 2, 3 and 6 of the notice of motion amount to a review, the application is based on the provisions of Section 6(2)(a)(i) and (f)(i) of Act 3 of 2000 and it is not necessary to follow the procedure provided for in Rule 53 of the Supreme Court Rules because a record does not exist that, in terms of the provisions of the said rule, has to be placed before the Honourable Court.' (My translation.)

inescapable that they intended to review aspects of the policy insofar as it was being applied to them. In *Harnaker v Minister of the Interior*[14] Corbett J said the following of the argument that a challenge to the validity of a proclamation under the Group Areas Act 41 of 1950 was not a review:

'Mr *Molteno's* argument that the present action is not a review because it does not seek to impugn the proceedings of any body but attacks the result of a certain act is, in my view, not a sound one. As I have already indicated, the proceeding known as "review at common law" is generally regarded as applying in the case where an individual has exceeded the statutory powers conferred upon him or has done some act or taken some decision which is assailable upon what are often referred to as "review grounds".'

[37] Even though, now, the review jurisdiction of the courts is no longer a common law jurisdiction,[15] the above statement, which I consider to be correct, applies with equal force to the facts of this case. The appellants seek to have certain provisions set aside on the basis of two grounds of review which they identify: according to paragraph 15 of BCVO's founding affidavit, the grounds upon which their challenge is mounted is that the administrator who took the action concerned was not authorised to do so[16] and the action complained of 'contravenes a law or is not authorised by the empowering provision'.[17] In the result, the application in respect of prayers 2, 3 and 6 is, no matter what its form, an application for review in substance.

[38] The imposition of the policy created through the 'empowering' mechanism of s 3(4) of the National Education Policy Act amounts to the implementation of that legislation. (In effect, it is the appellants' contention that the policy is being imposed as if it was legislation.) In *President of the Republic of South Africa & others v South African Rugby Football Union & others*[18] the Constitutional Court made it clear that when deciding on whether an exercise of public power constitutes administrative action the primary focus is on the function rather than the functionary exercising that power, and that the function of implementing legislation constitutes administrative action for purposes of s 33 of the Constitution.

[39] The next issue is whether the imposition of the policy constitutes administrative

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14 *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 377H-378A.
15 *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) paras 45 and 51.
16 Section 6(2)(*a*)(i) of the PAJA.
17 Section 6(2)(*f*)(i) of the PAJA.
18 *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) paras 141-142.

action for purposes of the PAJA. The term is defined in s 1. Leaving aside those aspects of the definition not relevant to this case, administrative action is any decision taken by an organ of state when exercising a public power or performing a public function in terms of legislation which adversely affects rights and has a direct, external legal effect.

[40] I am of the opinion that the conduct on which prayers 2, 3 and 6 is premised falls within the definition of administrative action in the PAJA. The imposition of the policy on the appellants involved a decision – the imposition of a condition or the making of a demand or requirement[19] -- as envisaged by the PAJA. This would constitute the performance of a public function by an organ of state. The appellants allege that this would have the effect of adversely affecting their rights in terms of s 29(3) of the Constitution and the right of scholars at CVO schools to culture, religion and language in terms of s 31 of the Constitution. The decision would have a direct, external legal effect.[20]

[41] My conclusion then is that because the application in respect of prayers 1, 4 and 5 of the notice of motion is not a review, and consequently could not have been brought in terms of the PAJA, the common law delay rule applies to them, while the application for prayers 2, 3 and 6 is a review in terms of the PAJA and the time limit set out in s 7(1), read with the condonation provision in s 9, applies to them. This is a consequence of the legislature's decision, when enacting the PAJA, to depart from the flexibility of the common law delay rule in respect of challenges to one species of public power – the narrowly defined administrative action for purposes of the PAJA. Despite the differences between the formulation of the delay rule and the time limit and condonation provisions of the PAJA, however, the approach to the application of both is similar and the approach to the latter is, in truth, inspired by the delay rule.

[42] It was argued by counsel for the appellants that we were required to decide the merits before considering whether the application was brought out of time or after undue delay and, if so, whether or not to condone the defect. Reliance was placed on a statement made by Froneman J in *Bengwenyama Minerals (Pty) Ltd & others v*

19 See subsections (d) and (e) of the definition of 'decision' in s 1 of the PAJA.
20 As to the meaning of these last two aspects of the definition of administrative action for purposes of the PAJA, see *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) para 23.

Genorah Resources (Pty) Ltd & others[21] to the effect (as it was framed in supplementary heads of argument) that 'the court should first determine the merits in order to give full effect to a finding of invalidity before considering whether circumstances would justify the exercise of a discretion against the granting of relief'.[22]

[43] When the passages in Froneman J's judgment are read in context, however, it is clear that they refer not to the discretion to withhold a remedy because of undue delay or because an application is brought out of time but to the amelioration of the logical result of a finding of invalidity – the setting aside of the unlawful action or conduct – in order to achieve justice and equity. This refers in the first instance to s 172 of the Constitution which reads:

'(1) When deciding a constitutional matter within its power, a court –

(*a*) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(*b*) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[44] It was to these discretionary remedies and their equivalent in s 8 of the PAJA that Froneman J was referring, and not to the delay rule or s 7(1) of the PAJA. Even though a court exercises a discretion when deciding to condone an undue delay or extend a time period, when it refuses to do so it does not award a remedy. The effect is the opposite – the withholding of a remedy. It dismisses the application because of the delay or lateness. This is borne out by *Bengwenyama Minerals* itself. Froneman J dealt with the question of delay, finding that the application had not been brought out of time, before dealing with the merits.[23] As there is no need to deal with the merits first, I proceed to consider the question of delay.

[45] In general terms, the purpose of the delay rule was, in *Louw v The Mining Commissioner, Johannesburg*,[24] rather quaintly intimated to be to non-suit a litigant who 'wishes to drag a cow which has been long dead out of the ditch'. More recently,

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21 *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC).

22 Reference was made in the supplementary heads to paras 84-87 of the judgment.

23 Paras 56-60 deal with delay while paras 61-80 deal with the merits.

24 *Louw v The Mining Commissioner, Johannesburg* (1896) 3 OR 190 at 200.

this court, in *Gqwetha v Transkei Development Corporation Ltd & others*,[25] gave a fuller explanation of its purpose and function. Nugent JA (for the majority) said the following of the rule:

'[22] It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule - reiterated most recently by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321 - is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E - F (my translation):

"It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - *interest reipublicae ut sit finis litium*. . . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule."

[23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiers Afslaers*, above, at 42C).'

[46] In the application of both the delay rule and ss 7 and 9 of the PAJA, a two stage approach is required. That is the way the courts have always applied the delay rule and the structure of the PAJA requires two distinct enquiries. The first question that arises is whether the delay in launching an application was unreasonable, or whether it was launched more than 180 days after internal remedies had been exhausted or the applicant had been informed of, had knowledge of or ought to have had knowledge of the administrative action under challenge.[26] The second question is

25 *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) paras 22-23.See too *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) para 46.

26 I leave aside the possibility that an applicant may be non-suited even if the delay in launching the application is less than 180 days: s 7(1) requires proceedings to be instituted 'without unreasonable delay and not later than 180 days after . . .'. This issue does not arise in this case because a delay of 180 days would not have been unreasonable. See *Thabo Mogudi Security Services CC v Randfontein Local Municipality & others* [2010] 4 All SA 314 (GSJ) para 59.

whether, if the first question is answered in the affirmative, the delay ought to be condoned or whether it is in the interests of justice that the 180-day period be extended (or the failure to bring the application timeously should be condoned).[27]

[47] In both instances, once the first stage has been determined against an applicant, the delay will only be condoned if the explanation for it is acceptable. That, by its nature, involves the exercise of a discretion.[28] The approach to the condonation of delay in terms of the PAJA was dealt with by this court in *Camps Bay Ratepayers' and Residents' Association v Harrison*[29] as follows:

'The appellants "might reasonably have been expected to have become aware" of the infringement when they first inspected the original plan and proceedings for review on that ground ought ordinarily have been commenced within 180 days of that date. Section 9(2) however allows the extension of these time frames where "the interests of justice so require". And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.'

[48] I turn now to the facts concerning the time taken to launch the application. Thereafter I shall determine whether that time exceeds 180 days for the purposes of the PAJA and if it constituted an unreasonable delay for purposes of the common law. If so in both instances, I shall decide, finally, whether the interests of justice require an extension of time in respect of the application for prayers 2, 3 and 6, in terms of the PAJA, and whether condonation should be granted in respect of the application for prayers 1, 2 and 6, for purposes of the delay rule.

[49] The first relevant government notice was published on 31 May 2002, with the policy articulated in it being implemented from 2004 to 2008. The following two government notices were published on 12 September 2003 and 6 October 2003. Although the appellants claim that they only became aware of the first government

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27 *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* (note 11) at 39C-D; *Associated Institutions Pension Fund v Van Zyl* (note 25) para 47.

28 *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* (note 11) at 39C-D; *Associated Institutions Pension Fund v Van Zyl* (note 25) para 48.

29 *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54 (confirmed on appeal in *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC)). See too *Price Waterhouse Coopers Inc & others v Van Vollenhoven NO & another* [2010] 2 All SA 256 (SCA).

notice in 2005 and the other two in 2007, I have my doubts that this could be so. Both BCVO and its affiliate, CVO Skool Pretoria, are involved in education and ought to take an active interest in government policy and action in relation to education. If they did not know of the existence of these instruments until 2005 and 2007 they have only themselves to blame, particularly as the new curriculum for grades R to 9 was implemented from 2004 and that for grades 10 to 12 was implemented from 2006. Ms Penelope Vinjevold, the deponent to the answering affidavit on behalf of the Minister, made the point that the development of the new curriculum did not occur overnight, required a great deal of work prior to implementation and involved much consultation and publicity aimed at those involved in education.

[50] Even if the appellants had managed to remain unaware of these developments from 2002 until 2004, it is clear that they became aware of the second government notice by April 2005. Mr Jacobus Fourie, an attorney who is also a director of CVO Skool Pretoria and a parent of children who attend that school, deposed to an affidavit on its behalf. He stated that, on 26 April 2005, the school received a letter, dated 11 April 2005, from the acting senior manager of the district of North Gauteng of the Department of Education addressed to 'The Principal, SMT and SGB of all Schools'.[30] It extends an invitation to the principal, the members of the SMT and one parent member of the SGB to attend a workshop on 'the subject offerings for grade 10 learners in 2006'. The opening sentence of the letter states that, as everyone is aware, 'the implementation of the National Curriculum Statement (Grades 10 to 12) will be happening in 2006'.

[51] If Fourie did not bring this development to the attention of BCVO as the body to whom the school he represented was affiliated, someone else must have because in mid-2005, the annual general meeting of BCVO discussed the new curriculum and took certain decisions. BCVO decided that its affiliated schools would implement some aspects of the new curriculum but that other parts of it would not be implemented. It did nothing to challenge the new curriculum, even though it accepted that it applied to its affiliated schools, and it must have been in no doubt that the Department considered CVO schools to be bound to implement the new curriculum. Indeed, attached to the affidavit of Fourie are seven media statements released by the Department of Education, dated 30 September 2004, 27 May 2005, 18 July 2005, 20

30 From the body of the letter, it is apparent that the acronym SMT stands for School Management Team and SGB stands for School Governing Body.

July 2005, 30 May 2006, 31 August 2006 and 6 June 2007 that make it clear that the new curriculum was going to be implemented throughout the country and that, as far as the Department was concerned, it was to be implemented by all schools. The appellants took no steps to investigate the lawfulness of the imposition on them of the new curriculum until much later.

[52] Fourie complained that Umalusi, the Council for General and Further Education and Training Quality Assurance, demanded of the school that it implement the new curriculum, both in respect of grades R to 9 and grades 10 to 12. He referred to a document that emanated from Umalusi entitled 'Draft criteria for the accreditation & monitoring of independent schools' which is dated September 2005. Although Fourie did not state when it came to the attention of CVO Skool Pretoria, it must have done so in 2005. According to the document, one of the areas that would be considered for the accreditation of independent schools was teaching and learning. The document stated in this regard:

'This focus area includes criteria around the core business of an independent school. It includes national curriculum, learning programmes and certification, delivery, teaching, assessment of learning, staff expertise and development, and learner support.'

[53] Under a heading entitled 'Criterion 4: Curricula, learning programmes and certification', the document states that the quality of the 'subject mix, learning programmes and certification' would be measured by taking into account, inter alia, the extent to which 'the school complies with national policies in respect of the curriculum'. Umalusi would expect schools, in order to meet the criteria concerning teaching and learning, to have learning programmes based 'on the national curriculum as reflected in the national curriculum statements of the department of education' and to 'meet all the policy requirements'. In an appendix headed 'Summary of Accreditation Criteria for Independent Schools', '[c]ompliance with legislation and policies' is listed as a sub-criterion for teaching and learning. There was no doubt in Fourie's mind as to the import of the Department's letter of 11 April 2005 and Umalusi's criteria for accreditation. He concluded his affidavit by complaining that Umalusi considered the new curriculum to be binding on independent schools, just as the Department did.

[54] BCVO was also concerned that Umalusi was trying to force CVO schools to implement the new curriculum. Its concerns arose when it received a letter dated 19

September 2005 from Umalusi, dealing with the evaluation of BCVO's application for accreditation as a private assessment body, and which required it to submit 'a sample of curricula and learning programmes for scrutiny by Umalusi to evaluate the degree of compliance with the requirements of the senior certificate core curriculum'. BCVO's founding affifavit concludes as follows in respect of Umalusi:

'Aangesien Umalusi by CVO-Skole en by die Eerste Applikant aandring dat die Hersiene Nasionale Kurrikulumstelling deur hulle toegepas moet word ten einde voorlopige akkreditasie as verskaffers te verkry, is dit ook om hierdie rede vir die Applikante van wesenlike belang dat die Agbare Hof die aangevraagde regshulp verleen sodat daar duidelikheid sal bestaan of sodanige Kurrikulum bindend is al dan nie.'[31]

[55] During the first half of 2006, BCVO was advised by De Villiers that it was not bound to implement the new curriculum. In mid-2006, this advice was shared with Van Oostrum, the executive officer of a body called the Pestalozzi Trust, which describes itself on its letterhead as 'the legal defence fund for home education'. According to Van Oostrum's affidavit, the basis for the conclusion that the new curriculum was not binding was that it had not been determined in terms of s 6A of the South African Schools Act 84 of 1996 and no regulations in terms of s 61(*c*) and (*d*) of that Act had been promulgated. Van Oostrum wrote a letter to the Minister, dated 26 June 2006, in which he asked to be informed of the references of the government notices in which the new curriculum had been determined and regulations had been promulgated. No reply was received.

[56] Further undisclosed discussions occurred at BCVO's annual general meeting in mid-2006, after the letter had been sent. Nothing more appears to have happened until 6 December 2006 when BCVO's chairperson at the time wrote to the Minister. He stated that the new curriculum had not been determined and the necessary regulations had not been promulgated, that the government notices in issue in this case had only stated policy and that in terms of the *Harris* case, that was not binding. Paragraphs 11 and 12 of the letter stated:

'11. Indien u sou toegee dat die Hersiene Nasionale Kurrikulum nie ingevolge art. 6A bepaal is nie, dat geen regulasies daaromtrent ingevolge art. 61(c) en (d) in die Staatskoerant afgekondig is nie, en dat gemelde Kurrikulum dus slegs beleid en nie bindend is nie, sal ons

31 'In view of the fact that Umalusi insists that the Revised National Curriculum Statement must be applied by CVO-Schools and the First Applicant in order to obtain provisional accreditation as providers, it is for this reason too that it is of importance for the Applicants that the Honourable Court grants the relief applied for so that clarity can be obtained as to whether the said Curriculum is binding or not.' (My translation.)

dit waardeer indien u dit so spoedig moontlik skriftelik aan ons sal bevestig en dit natuurlik ook, vanweë die groot nasionale belang daarvan, aan alle skole en die publiek bekend sal maak.

12. Indien ons teen 22 Januarie 2007 nog nie 'n antwoord op hierdie brief van u ontvang het nie, sal ons aanvaar dat ons siening korrek is en dat u stilswyend toegee dat die Hersiene Nasionale Kurrikulum inderdaad nie ingevolge art. 6A bepaal is nie, dat regulasies ingevolge art. 61(c) en (d) nie afgekondig is nie, en sal ons verplig wees, om duidelikheid te verkry oor 'n aangeleentheid van groot nasionale belang, die Transvaalse Provinsiale Afdeling van die Hooggeregshof by wyse van aansoek vra om 'n verklarende bevel te verleen dat die Hersiene Nasionale Kurrikulum slegs beleid is en nie bindend is nie. In so 'n geval sal ons waarskynlik 'n kostebevel teen u in u hoedanigheid as Minister van Onderwys aanvra omdat u versuim het om te reageer op hierdie brief en ons verplig het om 'n aansoek daaromtrent na die hof te loods.'[32]

[57] The date for the expiry of the ultimatum came and went. As it happened, the Minister replied to the letter but it went astray and was never received by BCVO. The application was only launched on 10 September 2007 (when it was served), the notice of motion being dated 20 August 2007. That means that the application was launched more than nine months after the letter of demand was sent, and more than seven and a half months after the ultimatum had expired.

[58] In order to determine whether the appellants delayed unduly the first question that requires an answer is precisely when the clock started ticking. In *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another*[33] the Constitutional Court dealt with this issue. Brand AJ held:

'Whether or not the Supreme Court of Appeal was correct in its approach, first raises the issue regarding the interpretation of s 7(1)(*b*) of PAJA. In terms of the section, the 180-day period starts to run when the "person concerned . . . became aware of the action and the reasons for

32 '11. If you concede that the Revised National Curriculum Statement has not been determined in terms of s 6A, that no regulations concerning it have been promulgated in the Government Gazette in terms of s 61(c) and (d), and that the said Curriculum is thus only policy and is not binding, we would appreciate it if you would confirm this in writing as soon as possible and, of course, because of the great national importance thereof, also inform all schools and the public.

12. If we have not received an answer to this letter from you by 22 January 2007, we shall assume that our view is correct and that you have tacitly conceded that the Revised National Curriculum Statement has indeed not been determined in terms of s 6A, that regulations have not been promulgated in terms of s 61(c) and (d), and we will be obliged, in order to obtain clarity concerning a matter of great national importance, to approach the Transvaal Provincial Division of the High Court by way of an application to ask that a declaratory order be granted that the Revised National Curriculum Statement is only policy and is not binding. In that event we shall probably ask for a costs order against you in your capacity as Minister of Education because your failure to respond to this letter will have obliged us to launch an application in court.' (My translation.)

33 *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC) para 57.

it". Before "the action" nothing happens. In the final analysis it is awareness of "the action" that sets the clock ticking. That raises the question: what "action" did the legislature have in mind? The answer, I think, is the "administrative action", and, according to the definition of that term in PAJA, "the decision" that is challenged in the review proceedings. What that decision entails is a question that cannot be answered in the abstract. It must depend on an evaluation of the facts.'

[59] In my view the clock started ticking, at the latest, on 26 April 2005 when CVO Skool Pretoria received a letter, sent to all schools, from the Department of Education to inform it of a workshop on the new curriculum and that it was going to be implemented. That was followed by the media statements that I have referred to above that also made it clear that the Department took the view that all schools had to implement the new curriculum in accordance with the time frames set out in the government notices of 31 May 2002 and 6 October 2003. In the light of this, the decision was taken at the BCVO annual general meeting in mid-2005 to implement those aspects of the new curriculum that it found unobjectionable and not to implement the rest.

[60] The appellants were not entitled to adopt a supine attitude. Once they were adversely affected by the Department's action of imposing the new curriculum on them they were obliged to take steps to investigate the lawfulness of that action. They did not do so, they should have, and there is no acceptable explanation why they did not. This court has held that delay prior to a litigant becoming aware of the reviewability of administrative action cannot necessarily be disregarded. In *Associated Institutions Pension Fund & others v Van Zyl & others*[34] Brand JA held:

'In my view there is indeed a duty on applicants not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision. These considerations are, in my view, also reflected in both s 7(1) of PAJA and in the provisions of s 12(3) of the Prescription Act 68 of 1969. Whether the applicants in a particular case have taken all reasonable steps available to them in compliance with this duty, will depend on the facts and circumstances of each case.'

[61] Even after legal advice had been given to BCVO in the first half of 2006, that the Minister could not lawfully require independent schools to implement the new

34 Note 25 para 51.

curriculum, no steps were taken to challenge the decision that the new curriculum had to be implemented by all schools. Instead, the advice was conveyed to Van Oostrum who wrote an inconsequential letter to the Minister requesting information. BCVO did nothing further for the rest of the year until it wrote its letter of 6 December 2006 putting the Minister to terms and telling her, rather strangely, that if she agreed with BCVO that the policy was not binding, it would launch proceedings for a declaratory order. There is, in truth, no explanation for this delay. Still nothing happened from the expiry of the ultimatum until 10 September 2007 when the application was launched.

[62] The explanation for this delay is that further research was necessary and that BCVO had to find further applicants, apparently to bolster its case. Both explanations are unacceptable. BCVO knew about the *Harris* case. This was the centrepiece of its challenge. To the extent that research had to be undertaken into BCVO's standing, that could and should have been done in two days at the most. The search for any determinations in terms of s 6A and regulations in terms of s 61(c) and (d) of the South African Schools Act appears to have taken months. This research could have been concluded in minutes with the aid of the internet, or perhaps a bit longer by perusing the Department's website. A telephone call to the Department may also have wielded a speedy answer. The search for applicants also took months. If it was necessary at all, it should have been done much earlier and when it was done, it was done at a leisurely pace. The explanation for the long delay from mid-2006 until the launching of the application – a delay of at least a year and three months – is unacceptable.

[63] The delay from 26 April 2005 until 10 September 2007 is about two years and four and a half months. All things considered, that is an unreasonably long delay from when the clock began to tick, and obviously the proceedings were instituted outside of the 180-day limit provided for in s 7(1) of the PAJA.

[64] The explanation for the delay, as I have said, is unacceptable. In some instances, no explanation at all is tendered, while in others it is so threadbare as to amount to no explanation. Throughout, there is a dearth of detail and where explanations were offered, they tend to indicate that the appellants dragged their heels throughout and did not take steps to safeguard their interests with reasonable expedition. The delay was lengthy and its cause was the laxity and indifference of the appellants. In summary, no full and reasonable explanation has been given for the

entire period of the delay.

[65] It is not necessary to consider the appellants' prospects of success as the dispute has largely been overtaken by events: another curriculum has replaced the one that the appellants object to and the appellants accept that the procedural steps necessary to make the policy binding on independent schools have been complied with.[35] That curriculum is being implemented. In the result, an issue that is now of little practical import has been lingering, unfinished, for some six years at least. The interests of justice militate against condonation for the unreasonable delay in applying for the declarators and for the lateness of the application for the review and setting aside of aspects of the government notices.

[66] In the result, the application for an extension of time in respect of prayers 2, 3 and 6 could not succeed and the condonation for the delay in bringing the application in respect of prayers 1, 4 and 5 could not be granted. That means that the main application had to be dismissed without the merits even being considered. Pretorius J's outcome was thus correct. The appeal against the dismissal of the extension application and the main application must fail.

Costs

[67] It was argued on behalf of the appellants that if the appeal was to be dismissed, they should not be required to pay the costs of the Minister, either in the court below or in this court. Reliance was placed on the principle enunciated by the Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources & others*[36] to the effect that in litigation between 'the government and a private entity seeking to assert a constitutional right . . . ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs'.

[68] That principle is subject to exceptions. So, the Constitutional Court held, if 'an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award'.[37] Furthermore, the issues 'must be genuine and substantive,

35 See Government Notices 722 and 723 of 12 September 2011.
36 *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) para 22.
37 Para 24.

and truly raise constitutional considerations relevant to the adjudication'.[38] Whether proceedings are manifestly inappropriate is a question of fact to be determined in the light of all of the evidence. In my view, an application would be manifestly inappropriate if an applicant had delayed unreasonably before launching it and ought to have known that its prospects of having the delay condoned were slight.[39]

[69] While I do not consider the bringing of the application in this matter to have been frivolous or vexatious, it was, in view of the inordinately long delay, manifestly inappropriate for the appellants to have proceeded with it in the circumstances. They must have known that, given the long delay and the paucity of the explanation for it, the chances of the application being dismissed on account of that delay were strong and the chances of the matter being decided on the merits were slight. To the extent that they held a contrary view, that view was unreasonably held.

[70] I can appreciate the basis and rationale of the *Biowatch* principle when a genuine case concerning constitutional rights is decided against an applicant and in favour of a government respondent on the merits[40] and even in preliminary proceedings in the ordinary course. The purposes it seeks to achieve are not undermined, however, by the application of the usual rule that costs follow the result when an application fails before the substantive issues are reached because of an applicant's own laxity in circumstances where it is manifestly inappropriate. In circumstances such as those it would be unfair to expect the successful government respondent to bear its own costs.

[71] For the above reasons, all of which apply to the appellants in this case, I am of the view that they should be ordered, jointly and severally, to pay the costs of the Minister in this court and that there is no justification for an interference with the costs order made by the court below. The costs of two counsel are warranted.

The order

[72] The appeal is dismissed and the appellants are directed, jointly and severally, to pay the costs of the first respondent, including the costs of two counsel.

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38 Para 25.

39 See by way of analogy, *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape & others* 2005 (6) SA 123 (E).

40 See *Biowatch Trust v Registrar, Genetic Resources & others* (note 36) para 23.

C PLASKET
ACTING JUDGE OF APPEAL

APPEARANCES

Appellants:	R J Raath SC and R J Groenewald
	(Heads of argument by S J Du Plessis SC and R J Groenewald)
	Instructed by:
	Gouws Attorneys, Pretoria
	Naudes Incorporated, Bloemfontein
First Respondent:	J H Dreyer SC and N Janse van Nieuwenhuizen
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein