IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

CCT case number: 21/21; 28/21; 29/21; 44/21
LAC case number: J500/20

In the matter between:

PUBLIC SERVANTS ASSOCIATION AND FIVE OTHERS	First to fifth applicant
SOUTH AFRICAN DEMOCRATIC TEACHERS UNION AND TWO OTHERS	Sixth to eighth applicant
NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	Ninth applicant
NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS UNION	Tenth applicant
and	
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	First respondent
MINISTER OF BASIC EDUCATION	Second respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third respondent
MINISTER OF POLICE	Fourth respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth respondent
MINISTER OF FINANCE	Sixth respondent
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh respondent
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	Eighth respondent

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MINISTER OF FINANCE'S OPPOSING AFFIDAVIT

I, the undersigned,

DONDO MOGAJANE

do hereby make oath and say that:

1. I am the Director-General of National Treasury. I was appointed to this position on 8 June 2017, after previously serving in various senior positions in National Treasury (*inter alia* as Deputy Director-General: Public Finance). By virtue of my position as Director-General I am duly authorised to depose to this affidavit and to oppose the unions' applications for leave to appeal.

2. The facts to which I depose in response to the multiple affidavits filed by various unions – comprising a total of 140 pages of affidavit alone – fall within my personal knowledge, or are contained in documents under may control. To the best of my knowledge and belief they are true and correct.

3. To the extent that I express matters of opinion, particularly regarding the application of public finance principles and policy in South Africa, I respectfully submit that I am qualified to do so. I refer in this regard to my *curriculum vitae*, comprising annexure "NT1" to my affidavit filed *a quo*. It reflects my academic qualifications and vocational experience in public

finance. These include being employed by National Treasury since 1999; honours degrees in Public Management, and Human Resources and Industrial Relations (University of Durban Westville); a master's degree in Public Management (University of Maryland, USA); and participating in a course by the Kennedy School of Government's Programme in Budgeting and Public Financial Management (Harvard University, USA).

4. I further rely in this regard on National Treasury's institutional expertise. National Treasury's relevant officials have extensive experience and unparalleled expertise in the field of public finance and the fiscal effect of the relief for which the applicants contend for the South African economy and its people. I draw on National Treasury's institutional knowledge in deposing to this affidavit, and confirm the correctness of the budgetary material and analyses which are, in my capacity as Director-General, in my possession or within my control. They have been produced as part of Government's extensive sets of answering affidavits filed in the court *a quo*. I am advised that they should not be attached to this affidavit.

5. Where I make legal submissions, I rely on advice from National Treasury's internal and external legal advisers and representatives.

6. I depose to this affidavit in opposition to some trade unions' attempt to apply for leave to appeal against a unanimous judgment by the Labour Appeal Court. The latter court, in the exercise of its discretion and also compelled by the doctrine of legality, refused to grant a year-on-year inflation-beating, private-sector-outperforming wage increase amounting to tens of billions of Rands in the current Covid-19 fiscal and humanitarian crisis. The Labour Appeal Court confirmed Government's extensive evidence to the effect that this was not lawful, affordable, or just and equitable.

7. In doing so the Labour Appeal Court anchored its analysis in this Court's caselaw, applied common-cause facts, and exercised its broad discretion both in respect of remedy and the unions' defence based on delay. No adequate basis for interfering with the Labour Court's discretion is established by any of the unions. In any event, non-compliance with the empowering provision is also self-evident. The union's central contention attempting to circumvent this legal reality amounts to the proposition that Cabinet could somehow lawfully usurp a power conferred explicitly, by the Constitution and national legislation, on National Treasury and departments of State. This, I am advised, is self-destructive.

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8. At its core the unions' case directly contradicts the constitutional principle which this Court confirmed applies equally to the conclusion of collective agreements: the principle of legality. *AMCU v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) entirely defeats the unions' case on the "merits". Despite the Minister of Finance specifically citing this important precedent *a quo*, and despite the unions' attempted reliance on a range of caselaw in their founding affidavits filed in this Court, *AMCU* is not addressed in a single one of the multiple affidavits filed by the unions. Confronted *a quo* with *AMCU* they have failed to addressed this important precedent in the Labour Appeal Court and now before this Court. Thus the absence of any prospects of success or arguable case is self-evident.

9. The unions' case also contradicts another key judgment by this Court: *Barkhuizen v Napier* 2007 (5) SA 323 (CC), and cases applying it – including *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC). This in that the unions demand the payment of many billions of Rands which Government cannot fiscally or equitably afford, particularly not in the current Covid-19 world-wide economic crisis. Government is compelled by the Covid-19 pandemic to spend public funds (which are already in deficit) to alleviate the plight of the poor and vulnerable. The pre-existing budget deficit is caused *inter alia* by cumulative public-sector salary increases out of kilter with revenue, GDP, and private-sector salary

increases. The deficits are exacerbated by drastically reduced tax and other revenue consequent on the Covid-19 pandemic and Government's increased socio-economic constitutional obligations arising from the pandemic. Yielding to the unions' claim under these circumstances is precluded by Government's Bill of Rights obligations, the rule of law, the principle of legality, and the doctrine of separation of powers. Under such circumstances this Court's caselaw confirms the correct application of the common law maxim *pacta sunt servanda*. Since it is subservient to the Constitution (as this Court confirmed), the maxim does not in the current circumstances support a claim for specific performance. Concluding accordingly, as the court *a quo* did (*inter alia* in the exercise of its discretion to refuse specific performance), does not impact on any wider or broader concern over collective bargaining or the enforcement of collective agreements outside Covid-19 conditions. Nor, in any event, does the court *a quo*'s judgment do anything other than confirm and apply principles already established by this Court *inter alia* in *AMCU*.

10. In summary, the outcome for which the applicants contend is not only *not* just and equitable. It is also unaffordable, unbudgeted and unauthorised by law. This renders the collective agreement invalid. This legal result applies under both the common law of contract (which the applicants *a quo* sought to apply *simpliciter*) and *a fortiori* under the Constitution – which

not only governs every exercise of public power (including the conclusion of collective agreements by Government), but also gives content to the common law of contract. The Labour Appeal Court accordingly correctly came to that conclusion. Furthermore, and in any event, the court *a quo* also judicially exercised its discretion: firstly, to overlook delay; and, secondly, not to grant the far-reaching remedy requested by the unions. There is accordingly no prospect of success in any appeal to this Court; the interests of justice are not served by entertaining any appeal; and no arguable point of law in the public interest warrant burdening this Court with revisiting factual issues which cannot be resolved in favour of the unions, applying well-established principles confirmed by this Court – which the unions do not impugn. The interests of justice are, furthermore, not served by entertaining this application at this late stage of the period during which clause 3.3 operates. It expires imminently (as does the rest of the collective agreement) on 31 March 2021.

11. In amplifying the above, the remainder of this affidavit is structured as follows

(a) First, I provide an overview of the factual and procedural background to the proceedings culminating in the court *a quo*'s judgment.

(b) Second, a summary of the key findings and conclusion by the court *a quo* (many of which not impugned) is provided.

(c) Third, on the basis of the aforegoing the main grounds of opposition are identified and amplified to the extent required at this stage.

(d) Fourth, some of the more material principles of fiscal and public finance policy and their application to this case are extracted from my affidavit filed *a quo*.

(e) Fifth, I traverse the main averments advanced in the four founding affidavits filed on behalf of the unions, to the extent that I am advised is appropriate for present purposes.

(f) Finally, I conclude by making submissions on what I submit is an appropriate order: the dismissal of this application with costs.

A. Factual and procedural overview

12. The competing (and in certain crucial respects *contradicting*) applications for leave to appeal to this Court result from the unions' divergent procedural approaches *a quo*.

13. The PSA-aligned applicants advanced before the Labour Court an application which sought to enforce what was presented as purely and merely a "contractual" cause of action. No constitutional right was invoked

in the founding papers. Not even the right to fair labour practices entrenched by section 23 of the Constitution. The PSA applicants' founding affidavit merely asserted that

- clause 3 of the collective agreement sought to be enforced had been incorporated in the employment contracts of civil servants;
- the relevant Government respondents were in breach of clause 3.3; and
- the PSA applicants (being the five trade unions cited as applicants in CCT case no. 21/21) were accordingly "entitled" to the relief they sought on behalf of their members: specific performance of clause 3.3.

14. I am advised that the case for the applicants at first instance had to be made out – on clear authority also by this Court – in their founding affidavit. Cognisant of this clear requirement, the PSA applicants specifically elected to institute their claim on an exclusively contractual basis, with no constitutional claim at all. The other unions themselves signally failed to advance any coherent constitutional contention. The consequence moreover is that important constitutional considerations, to which my answering affidavit *a quo* referred (and which I summarise in this affidavit), have been left entirely out of account by the unions in their quest to enforce clause 3.3.

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15. What none of the unions could counter is the public-law context in which the agreement sought to be enforced was concluded. The statutory nature of the agreement to which the Department of Public Service and Administration purportedly bound the State is singular. It applies not only against non-signatory departments of State, but also to members of non-signatory trade unions. Many trade unions' members – so the founding affidavit *a quo* disclosed – did not give their unions a mandate to agree to clause 3. And it was not contended *a quo* – and is not now contended before this Court (despite this being pointed out in my previous answering affidavit) – that any members of any of the trade unions had actually provided a mandate to enforce clause 3.3 under the current Covid-19 circumstances.

16. Similarly, no mandate was provided to Government's negotiators to conclude clause 3 in the terms advanced at the crucial 25 January 2018 meeting. This appears to be common cause. In the light of the-then prevailing (and now exacerbated) budgetary deficit – fully disclosed to the trade unions at the time – specific approval for the required funding had to be made pursuant to the governing law. Under the empowering provision authorising Government to enter into collective agreements such arrangements had to be approved by National Treasury and agreed in writing by the other departments concerned.

17. No such approval or consent was granted.

18. This is a key fact which is dispositive of the entire matter. It was not disputed coherently *a quo*. Nor is any competent factual dispute advanced (to the extent that this would assist them) in this crucial respect by the unions before this Court.

19. A further key factual feature of this case relates to the fiscal constraints operating on Government. These have been compounded significantly by Covid-19. They already operated, however, by the time of concluding the collective agreement in 2018. It is, as a matter of incontrovertible fact, impossible to implement clause 3.3 of the collective agreement without allocating additional funding. Such funds have not been allocated, and are not available to be allocated at this stage or in the foreseeable future. Government already had had to reallocate public spending for purposes of Covid-19 relief. It must now also fund Covid-19 vaccines. This at a cost to the fiscus of between R20 billion and R24 billion. It is imperative to save lives and livelihoods that public funds be found for this emergency expenditure. But the budgetary deficit is (as a result of the shortfalls in tax revenue resulting *inter alia* from the pandemic) at least, on favourable current forecasts, some R230 billion. As a study by the United Nations Development Programme projects, "South Africa's economy will

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recover slowly through 2024, with some 54 percent of households that have been pushed out of formal jobs at risk of falling into poverty. A return to pre-2019 economic activity may require at least five years without major, far-reaching interventions."

20. A further procedural aspect of this case concerns some of the unions' attempt to subject the far-ranging fiscal and constitutional issues to bargaining council dispute resolution processes. But they all eventually participated in the court proceedings *a quo*, in which they were from the outset cited as respondents (by their aligned counterparts acting as applicants in the PSA's application). All parties agreed to request the Labour Appeal Court to exercise its first-instance jurisdiction to determine the matter. This occurred *at the instance of Government* after the matter suffered delays and complications as a result of the inconsistent procedural approaches adopted *a quo* by the unions. In order to introduce coherence and expedition to the proceedings *a quo*, the Government respondents were required to apply for a stay of the Bargaining Council proceedings.

21. While the unions presented their aligned interest through multiple applications and active litigants, the State presented a consolidated approach which conduced to the expeditious adjudication of the matter. Hence only two Government respondents actively participated in the

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proceedings *a quo*. Addressing the fiscal issues which the unions accepted concerned National Treasury, the Minister of Finance filed a separate substantive answering affidavit. Simultaneous with that answering affidavit the Minister of Finance also lodged, to the extent that this could be considered necessary, a counter-application to declare clause 3.3 of Resolution 1 of 2018 of the Public Service Co-ordinating Bargaining Council unlawful, invalid and unenforceable. No notice of opposition had been filed against this relief, and no objection had been made against it – whether on the ground of delay or otherwise.

22. The Minister of Public Service and Administration was the other active State respondent. He filed an extensive answering affidavit introducing comprehensive annexures. Subsequently a formal counter-application was also brought by the latter Minister based on the contents of his answering papers. It is the latter counter-application which galvanised some of the unions (cited as respondents *a quo*) to participate actively in the proceedings below. They did so by filing answering affidavits to the Minister of Public Service and Administration's counter-application. In some of them certain unions also stated that their responses were intended to address the Minister of Finance's answering affidavit. But none of them detracted from or contradicted the factual, fiscal and legal considerations

raised in the Government respondents' papers – least of all in the affidavit filed *a quo* on behalf of the Minister of Finance.

23. The illegality of clause 3.3 (and in any event the inequity and public interest concerns arising from its implementation) could not be gainsaid. Instead, various diversions were advanced. None of them had any merit, as the Labour Appeal Court correctly, with respect, confirmed.

B. Overview of Labour Appeal Court's judgment

24. The judgment is attached as first annexure to each of the unions' founding affidavit, and accordingly does not require to be attached again. Despite attaching it, none of the unions provides an accurate and coherent analysis of it.

25. The judgment commences by identifying an overarching difficulty faced by the unions in this case (para 1). It is courts' recognition that in a constitutional democracy polycentric issues involving budgetary allocations are difficult to resolve adequately through litigation. This Court has confirmed the implications of this reality, and none of the unions cavils with it. But to admit it is not to meet it.

26. The judgment notes that the cost involved in implementing clause 3.3 is R37.8 billion as *contended* by the Government respondents (para 4). As the rest of the judgment reflects (see e.g. paras 17-18 and 28), whether the amount was this sum or the lesser amount for which some unions contended (never less than R13.2 billion) was not material to the issue of principle disposing of the merits, nor the issue of discretion relating to remedy and delay. The unions' papers before the court *a quo* created no genuine factual dispute in this regard. There is no basis now, in this application, to contend that the court *a quo* was wrong in any material respect, when what the unions plainly now seek to do is to rummage in annexures. In any event, the exact figure is not dispositive of the issues. On any approach billions of Rands are involved in what the unions do not deny indeed raises complex polycentricity and conflicting budgetary obligations.

27. As indicated, the factual issue now purportedly pressed by the unions did not form the subject-matter of a proper ventilation before the court *a quo*. Purporting to raise it now before this Court is, I am advised, not in the interests of justice. Nonetheless, National Treasury has conducted a current calculation for purposes of assisting the Court should this issue for any reason warrant its attention. The calculation is based on facts and figures as they currently stand, considering *inter alia* changes in

employment levels and operative inflation rates. The calculation shows that on present data the cost of implementing clause 3.3 under current conditions amounts to some R29 billion. This represents a 5.2% increase in current spending. It has a cumulative effect on future spending in that subsequent wage settlements will be negotiated off this increased base, were clause 3.3 to be implemented. Thus the cost of implementing clause 3.3 does not amount to "only" some R13.2 billion, as some of the unions contend. Therefore no proper basis exists, I am advised, for interfering in the court *a quo*'s exercise of its discretion on this factual premise.

28. Returning to the judgment, it also spells out (para 5 and para 50) that the matter was treated at the hearing as inextricably involving both the main application (for the enforcement of clause 3.3) and the counter-application (involving whether clause 3.3 was valid and enforceable). Self-evidently, with respect, this approach is correct. Enforceability is a precondition for enforcement. None of the unions contends otherwise. This is the short answer to the delay issue which some of them nonetheless attempt to pursue before this Court.

29. Thereupon the judgment correctly records a crucial common-cause fact, which – again – none of the unions addresses or contests in their founding

affidavit. It is that despite Government's attempt to reach agreement with the unions to revise clause 3.3, the unions refused and insisted on its implementation (para 9).

30. The court *a quo* specifically recorded in its judgment that "a range of legal issues was raised by the various parties" (para 11). But the "key question for determination of both the application and the counter-application was whether clause 3.3 is invalid in that the collective agreement … was concluded in contravention of Regulations 78 and 79 of the Public Service Regulations" (para 11). This is, with respect, correct. None of the unions has demonstrated that this approach was incorrect or that any consideration key to the true inquiry had been ignored by the court *a quo*.

31. Nor did any of the unions contest that it is, as the court *a quo* correctly held (para 12), Regulation 78 of the Public Service Regulations which empowers the Executive to negotiate and conclude collective agreements. Nor the legal requirements imposed by Regulations 78 and 79 read together (para 14). Nor the dispositive factual finding that the motion record reflects that "the costs of the collective agreement could not be covered solely from the budget of the [DPSA]", and that "[n]o written commitment was provided by National Treasury to provide additional funding" nor any

"written agreement by any other department or agency" coupled with Treasury approval to fund the deficit (para 15).

32. The court *a quo* specifically referred to and considered the unions' only real argument on the merits (*viz* cabinet approval somehow sufficed), and rejected it (paras 15-21). Factually there demonstrably was no basis for denying or disregarding the contemporaneous evidence adduced by Government (paras 22-23).

33. The judgment squarely dealt with the delay issue raised in an attempt to outflank the merits (paras 24-33). In doing so the court *a quo* considered and applied this Court's caselaw, including judgments like *Khumalo, Kirland* and *Merafong* and even the lower courts' caselaw cited by the unions (paras 25-26 and 29-30). On the basis of *Khumalo* the court *a quo* by implication rejected the mainstay of the unions' delay argument, contending incorrectly that a formal condonation application had been required (para 29, quoting *Khumalo* confirming the converse). Explicitly exercising a discretion rooted in and guided by this Court's caselaw, the court *a quo* considered the facts (which include the prevailing, and wholly unprecedented, Covid-19 fiscal crisis) and held that the question of legality could not be immunised from judicial scrutiny as the unions sought to achieve (para 31).

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34. The judgment thereupon considered the unions' only real argument on the issue of legality, which (as mentioned) conflated Cabinet with National Treasury (paras 32-33). It correctly held, with respect, that the unions' claim that Cabinet approval substituted Treasury approval was untenable (para 33).

35. Hence the issue of remedy arose, which the court *a quo* carefully considered (paras 34-48). Significantly, the issue of remedy did not arise in a context where it was concluded that the contract was lawful but unaffordable. It arose in the context where a demonstrably unlawful contract, so found, was nonetheless sought to be enforced by the unions. In addressing it the court *a quo* made extensive reference to this Court's judgment in *Gijima* (paras 34-40, 43 and 46). There is correctly no suggestion that *Gijima* had been misapplied. Nor that the mere *application* of the principles it articulates constitutes a matter for this Court's consideration under either basis of this Court's special jurisdiction. Particularly not in circumstances where, as the court *a quo* held (and the unions accept), the discretion depends on the facts of the particular case (para 45). The complex circumstances of the present dispute (para 44), and the extraordinary current financial circumstances did not render the relief for which the unions contended just and equitable, the court *a quo*

concluded (para 45). Least of all, as the judgment specifically reasons, in circumstances where the unions' members' jobs are (unlike jobs in the private sector) secure; they have been paid full salaries; and their yet further salary increases could well imperil social grants and medical costs caused by the pandemic (para 45).

36. The court *a quo* accordingly exercised its discretion on the basis, as it put it, "the normative vision of the Constitution which aims that everyone living in the country should live a dignified life" (para 46). This required the exercise of a discretion on the facts of the current case which served to assist "those most in peril", being "millions of South Africans who barely survive on a day to day basis" (para 46). The court *a quo*'s approach in this regard is not challenged by any of the unions.

37. As regards the unions' resort to a "compromise" (para 47) or "phased in" (para 42) remedy the court *a quo* recorded that no details were provided by any of the unions to show how the staggered approach obliquely contended for as fallback could work. This is correct. None of the unions demonstrated or suggested in their founding affidavits that the court *a quo* overlooked any detail at all. But in fact there was none – other than Governments' evidence to the effect that for the foreseeable future no

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phasing-in of clause 3.3 was feasible. This was supported *inter alia* on the basis of the United Nations study to which I have already referred.

38. The court a quo also correctly referred in this context to new negotiations already engaged in for purposes of the new wage cycle commencing imminently (para 47). Phasing in an historical deal would interfere with such a negotiation process and render it unworkable and unbudgetable. As the court *a quo* correctly held (para 48), it would extend beyond the realm of judicial intervention to direct a phased implementation of clause 3.3 in these circumstances and the prevailing economic and social context. This applied particularly, the court *a quo* pointed out, in the absence of any evidence or guidance provided by the unions as regards the extraordinary last-ditch remedy for which they contended (para 48). The absence of evidence and guidelines suggested by the unions is common cause. No evidence had been produced or ventilated *a quo*. Nor any in the founding affidavits. Thus the separation of powers considerations operating against the unions *a quo* – requiring, as the court *a quo* recognised (para 48), "difficult fiscal balancing" by the judiciary – are now compounded also by this Court's consistent acknowledgement that it is not in the interests of justice for this Court to consider issues as a court of first and final instance. But this Court is not even put to that: <u>still</u> no adequate body of evidence has been put up by the unions.

C. Summary of grounds of opposition

39. The above analysis leads to the first ground of opposition to the application for leave to appeal before this Court. It is the lack of prospects of success, which – with other considerations – renders it not in the interests of justice to entertain this matter, and renders such points of law to which the unions now retreat unarguable.

40. Therefore on both bases of jurisdiction exercisable by this Court the application for leave to appeal falls to be dismissed: it is not in the interests of justice to entertain it; and it does not raise an arguable point of law warranting this Court's attention in the public interest. This I demonstrate with reference to both the common law contractual requirement of lawfulness and the constitutional requirement of legality governing all exercises of public power, and yet further considerations – many of which articulated already in this Court's established caselaw.

(1) Illegality of clause 3.3

41. I am advised that section 1(c) of the Constitution confers public power on organs of State only insofar as they act within the law. The law conferring

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the power to conclude a collective agreement like Resolution 1 of 2018 is the Public Service Act.

42. Pursuant to regulations 78 and 79 prescribed under the Public Service Act the first respondent is authorised to enter into collective agreements. But this authority is specifically limited. Under regulation 78(2)(c) a collective agreement may "only" be "entered into" if "the fiscal requirements contained in regulation 79" are met. Regulation 79, in turn, authorises entering into a collective agreement with financial implications only if the executive authority concerned can cover the cost from his or her departmental budget; or on the basis of a written commitment by National Treasury to provide the additional funds; or if the cost can be covered from the funds of other departments or agencies *with their written consent* and National Treasury's approval.

43. As mentioned in the above factual overview, in this case there was no such consent or approval or commitment; and the cost could not be covered from the DPSA's budget.

44. This is reflected in the-then Minister of Finance's letter dated 14 February 2018. It comprises annexure A12 to the DPSA's answering affidavit filed *a quo*. In it Minister Gigaba recorded that he had been requested to

consider increasing the medium-term envelope available for salaries by R15 billion. The applicable budget baseline for "compensation" (i.e. salaries of state employees) was R110 billion. The increase was necessary to fund the increases contemplated by clause 3.

45. The Minister recorded that National Treasury had "carefully examined the request against funds available within the fiscal framework". He responded that this exercise established that "no additional funding can be made available to fund the wage negotiations" beyond the "funding envelope over the 2018 MTEF".

46. In his letter Minister Gigaba confirmed that National Treasury was only prepared to approve an approach whereby R12 billion was freed up through voluntary early retirement of 19 000 public servants. Even then the cost-of-living adjustments could not exceed the explicit parameters recorded in Minister Gigaba's letter. Early retirement (a crucial condition completely absent form Resolution 1 of 2018) apart, the cost-of-living adjustments extended by clause 3 significantly exceeded the limits reflected in Minister Gigaba's letter.

47. Minister Gigaba's letter required that cost-of-living adjustments not *exceed* the following:

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	2018/19	2019/20	2020/21
Salary levels 1-7	CPI + 0.15%	CPI + 0.25%	CPI + 0.50%
Salary levels 8-10	CPI + 0.00%	CPI + 0.20%	CPI +0.30%
Salary levels 11-12	CPI + 0.00%	CPI + 0.00%	CPI + 0.20%

48. Contrary to National Treasury's approval as conveyed in Minister Gigaba's letter, clause 3 of Resolution 1 of 2018 contrived the following:

	2018/19	2019/20	2020/21
Salary levels 1-7	CPI + 1.50%	CPI + 1.00%	CPI + 1.00%
Salary levels 8-10	CPI + 1.00%	CPI + 0.50%	CPI +0.50%
Salary levels 11-12	CPI + 0.50%	CPI + 0.00%	CPI + 0.00%

49. Thus clause 3 quite clearly exceeded what National Treasury had approved.

50. There had furthermore been no commitment (written or otherwise) by National Treasury to provide additional funds to bridge the deficit. National Treasury specifically referred, in a subsequent letter (dated 11 July 2018) by then Minister Nene (comprising "NT2" to my answering affidavit *a quo*), to the fact that "the cost implications of the wage agreement amount to R30 billion over and above the 2018 MTEF baseline compensation budget." The letter further records that "[t]his money is not provided for in the current fiscal framework." Accordingly the shortfall had to be addressed by some 20 000 employees leaving the public service, the letter recorded. It is the money required for this "exiting" (through voluntary early retirement) which, it was contemplated, could be made

available "through the budget process". But the final amounts to be approved would depend, Minister Nene recorded, *inter alia* "on the number of applications [for early retirement], the overall fiscal strategy and obtaining the requisite budgetary approvals." By the date of Minister' Nene letter (11 July 2018) – thus *after* the conclusion of Resolution 1 of 2018 – neither National Treasury nor Parliament approved the R30 billion shortfall.

51. Nor had there subsequently been any purported *post hoc* approval, appropriation or ratification (nor purported "condonation"). None of the subsequent budgets made provision for this deficit. Instead, they consistently cautioned against the adverse fiscal effects wrought by the wage bill.

52. Therefore Resolution 1 of 2018 falls foul of the constitutional principle of legality on account of violating Public Service Regulations 78 and 79.

53. It is also incongruent with section 216 of the Constitution, which provides for the establishment of National Treasury and national legislation which prescribe measures to ensure transparency and expenditure control in each sphere of government. National Treasury's important constitutional control role had been negated. Under the constitutionally-mandated

legislation establishing National Treasury, the Public Finance Management Act 1 of 1999 ("the PFMA"), it consists of the Minister of Finance and the national department responsible for financial and fiscal matters. Thus both political accountability (by the Minister) and subject-matter expertise (contributed by appropriately qualified officials) comprise the intended constitutional and statutory treasury control.

54. Resolution 1 of 2018 similarly flouts sections 213 of the Constitution. Section 213 provides for payments from the National Revenue fund only insofar as money has been appropriated by Parliament, or as a direct charge authorised under national legislation. As mentioned, there has been no appropriation, nor compliance with the relevant national legislation. It follows that also national and subordinate legislation giving effect to section 213 of the Constitution (e.g. section 39 of the PFMA) had been breached.

55. Simultaneously section 215 of the Constitution was also infringed. Section 215 provides for effective financial management of the economy, debt and the public sector through budgetary processes. The public sector's unbudgeted wage bill resulted in debilitating debt. It also bypassed financial management as contemplated by the Constitution and national legislation.

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56. For the above reasons, Resolution 1 of 2018 is unlawful, invalid and unenforceable. This constitutes the first, independent *and dispositive*, ground on which the Minister of Finance opposed the enforcement of clause 3.3 *a quo*, and now opposes the application for leave to appeal against the Labour Appeal Court's unanimous judgment upholding the Minister's case.

57. The judgment *a quo* is unassailable in the light of this Court's judgment in *AMCU v Chamber of Mines of South Africa*, to which I have already referred in the introduction. In *AMCU* this Court confirmed that the doctrine of legality applies equally to collective agreements. A collective agreement concluded or extended in contravention of the applicable empowering provision is accordingly unlawful, invalid, and unenforceable. The Labour Appeal Court correctly so concluded and ruled. The unchallenged legal principle, and clear precedent, of *AMCU* are the short answer to this application.

(2) Unconstitutionality of implementing clause 3.3

58. Secondly, the Labour Appeal Court's judgment is also for a further reason unassailable. This, too, is supported directly by this Court's caselaw. In *Barkhuizen v Napier* (to which I have also already referred) this Court held

that public policy precludes specific performance of "a contractual term if its enforcement would be unjust or unfair". This is clearly such a case, as the uncontested facts confirm.

59. The unions do not deny that the public wage bill escalated through rolling year-on-year increases which perpetually beats inflation and outperform private sector salary increases. The resulting bloated wage bill is a significant contributing factor of government's crippling debt. It is unsustainable, particularly under Covid-19 circumstances. Government currently spends some 51% of tax revenue on the civil servants' wages. There are 1.3 million civil servants, while the South African population is over 59 million. Thus 51% of revenue is spent on 2% of the population.

60. Both the private sector and higher echelons public servants have accepted salary cuts. Unions in the steel sector had agreed to a wage freeze for 2019 already in light of the pressures experienced in that sector. But before this Court the active unions seek not only to sustain the current – already disproportionately increased – salaries. This while simultaneously also benefitting from job security (unlike the private sector, where job security could not survive Covid-19). They actually seek yet further increases. This when the entire economy and country, like the rest of the world, had to

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make sacrifices in solidarity with vulnerable people more severely hit by the consequences of the pandemic.

61. In such circumstances the claim that clause 3.3 be enforced is contrary to the Constitution. It frustrates section 7(2) of the Constitution, which obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights. In order to comply with this constitutional injunction, government cannot be compelled to withdraw scarce public resources from budgeted obligations and emergency allocations required by the Covid-19 crisis.

62. If clause 3.3 is enforced, the amount available to the State to allocate to basic education, healthcare and similar constitutional rights will necessarily be reduced by a further R37.8 billion. Some of these rights (e.g. rights to healthcare and social assistance) require progressive realisation, which precludes regressive service delivery. Regression would unavoidably result from reduced funding. Reduced funding is inevitable if an increase in the wage bill amounting to tens of billions of Rands is to be funded from other votes. And enforcing clause 3.3 will force Government to siphon funds from other votes. The result is in principle the same, even if the unions' quantification is correct. There would still be multiple

billions of Rands spent on clause 3.3 instead of competing and higher constitutional obligations to more vulnerable right-bearers.

63. Moreover, rights like those entrenched in sections 28 and 29 require, I am advised, immediate realisation. Thus they are not even subject to the availability of funding. They will perforce be affected adversely if available funding is withdrawn pursuant to a reallocation of the budget consequent to a court order enforcing clause 3.3. As the Minister recently acknowledged in a public response, Government will be obliged to obey such court order and unavoidably divert public funds from other constitutional commitments.

64. In such circumstances, and particularly in the context of the Covid-19 crises, the enforcement of clause 3.3 is inconsistent with the public interest and public policy, to which the Constitution gives content.

(3) Judicial exercise of court *a quo*'s remedial discretion

65. The Labour Appeal Court was vested with a wide discretion (i.e. a discretion in the strict or narrow sense) to grant just and equitable relief. The relief sought by the PSA applicants (namely specific performance) is inherently discretionary. In the circumstances of this case it had correctly

been accepted by all parties concerned that just and equitable relief had to be granted, and that this entails the exercise of the court *a quo*'s discretion.

66. The Government respondents' answering affidavits *a quo* demonstrated that an order of specific performance compelling the implementation of clause 3.3 did not amount to just and equitable relief in the circumstances of this case. This, too, relates (as the previous basis of opposition) to Government's competing constitutional commitments to respect, protect, promote and fulfil the rights in the Bill of Rights particularly pending the pandemic. But it operates at the discretionary level of remedy.

67. The relief claimed by the unions requires a radical realignment of Government's emergency Covid-19 special budget. The budget formed the subject of extensive submissions by both National Treasury and the Department of Public Service and Administration in the papers filed *a quo*. None of this was placed in issue by the unions. It is common cause that the budget is indeed under tremendous pressure. And one of the biggest burdens on the budget is the bloated public wage bill.

68. As mentioned, public servants have been the beneficiaries of decades' above-inflation salary increases outperforming private sector salaries. In such circumstances it is simply not just and equitable to claim yet further

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increases. Least of all in the current circumstances. Government had been compelled by the Covid-19 economic conditions to expend additional funds to protect vulnerable people, some rendered destitute by job losses or salary cuts in the private sector. Others are now in desperate need of accelerated progressive realisation of the right to healthcare, food, sanitation or social welfare as the Covid-19 circumstances compel. Yet others are entitled to the immediate realisation of the right to basic education and children's rights, whose realisation is now rendered more burdensome on the budget. And in order to prevent the indefinite prolonging of the pandemic and the suffering it causes, Government is compelled to make available billions of Rands to fund vaccines.

69. Nothing in the founding papers filed before this Court (and less still before the court of first instance) establishes that the Labour Appeal Court exercised its remedial discretion unjudicially. I am advised that this Court confirmed repeatedly that a court of appeal will not readily interfere with a discretion exercised by a court of first instance, especially not where the court *a quo* exercised a "true discretion". And the discretion brought to bear in granting just and equitable relief is a discretion in the true sense, this Court confirmed.

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(4) Judicial exercise of the court *a quo*'s discretion regarding "delay"

70. Similar considerations arise as regards the court *a quo*'s exercise of its discretion to overlook the contended delay in lodging a collateral review.

71. The Labour Appeal Court correctly applied this Court's judgment in *Khumalo*. There is therefore no basis for interfering with the exercise of its discretion. Demonstrably no prejudice in the contemplated sense is suffered by the unions. They do not contend that any delay has prejudiced them in the prosecution of their case.

72. Conversely, the public interest compels – particularly amid Covid-19 – that the legality of the clause sought to be enforced at the cost of billions of Rands should, as it did, receive judicial scrutiny before the court's imprimatur is superimposed on the unions' unprecedented and unparalleled purported enforcement of specific performance – which itself, as mentioned, is a discretionary remedy.

73. The Labour Appeal Court was entirely correct, with respect, in holding that the validity and enforceability of the clause is inextricably bound up with the legality issue raised in the counter-applications. There is no coherent

attack on this conclusion by any of the unions. It follows that there is also no viable basis for impugning the court *a quo*'s exercise of its discretion to overlook – to the extent that this was required – any undue delay attributable to the Government respondents in instituting any counter-application, if such application was indeed needed.

(5) Unaffordability, frustration and unforeseeability

74. As my affidavit *a quo* stated without any contraction, none of the Covid-19 consequences had been foreseen or was reasonably foreseeable when Resolution 1 of 2018 was concluded. In fact, not even the adverse fiscal developments pre-dating the Covid-19 pandemic had been (or could reasonably be) foreseen. This, too, has not been seriously contested by the unions *a quo*. It had been Government's explicit premise that the budgetary deficit resulting from Resolution 1 of 2018 would be reduced by early voluntary retirement. But this had not occurred. Instead, it had been frustrated (as the DPSA's answering affidavit filed *a quo* demonstrated) by the unions.

75. There has therefore been, in multiple respects, a material change of circumstances which renders the enforcement of clause 3.3 contrary to the substratum of the purported agreement. This constitutes an independent

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contractual defence under the existing common law of contract, even if a purely private-law approach is to be adopted (as the PSA's case *a quo* presumed).

76. I have nonetheless requested in my answering affidavit *a quo* that in the event that the court should for any reason conclude that the existing common law of contract does not provide a defence to enforcement under the peculiar circumstances of this case, that the common law be applied, alternatively developed, pursuant to section 39 of the Constitution to preclude enforcement of clause 3.3 in the current extraordinary circumstances. As my previous affidavit submitted, this outcome could be obtained *via* various approaches. For instance, by special application of the doctrine of objective impossibility (as it applies under South African law); adopting and applying the doctrine of frustration (as it applies in English law); or recognising the *clausula rebus sic stantibus* (as accepted and applied both under international law and comparable foreign law as a manifestation of the good faith criterion underlaying the principle *pacta sunt servanda* governing also the enforcement of agreements).

77. Significantly none of the unions seriously objected *a quo* against such application or development of the common law pursuant to section 39 of the Constitution. Nor could they. Section 39 of the Constitution enjoins

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courts to apply or develop the common law as required to give effect to the Constitution. This is to be done on the basis of the common cause facts set out fully in Government's answering affidavits filed *a quo*. The unions have had an opportunity to ventilate these facts fully. None of the relevant facts is materially in issue.

78. To the extent that ground of opposition may arise, despite the previous grounds on the merits being dispositive, I understand that further legal argument will be addressed on this legal issue at the appropriate stage.

79. Any or all of the above five bases of opposition on the merits constitutes a sufficient basis for refusing leave to appeal. This is further confirmed by the imminent mootness of the relief for which the unions contend.

(6) <u>Mootness</u>

80. The unions lodged both their litigation in the Labour Court and their parallel arbitration proceedings in the ordinary course. They made no attempt to expedite the matter.

81. Exacerbating this, despite the Labour Appeal Court delivering its judgment now sought to be appealed already on 15 December 2020, the unions

awaited the last day – under the extended *dies inducia* applicable to the ensuing festive season – to lodge their applications for leave to appeal. They have accordingly had an effective one and a half months to prepare their application and, despite the national crisis, and the looming date for expiry of the agreement, used the entire period to do so.

82. Even then one of the unions (the South African Policing Unions) asserted an entitlement to file its application belatedly, and thereafter attempted to exercise the entitlement to file an answering affidavit within the times allowed for parties *opposing* applications for leave to appeal. This resulted in an exchange of correspondence culminating in SAPU filing a notice to abide, thus effectively exiting – albeit belatedly – the litigation. Yet another union had accepted the need for condonation, and indicated their intention to file their affidavits over a week after the extended due date had expired. I shall deal with the condonation application of the relevant union, the National Union of Public Service and Allied Workers, below. For present purposes the point is that the unions have throughout the proceedings litigated at their leisure.

83. All the unions have accepted that the Government respondents should file consolidated answering affidavits to be delivered within the stipulated time under this Court's rules as calculated from the date of the last founding

affidavit. Accordingly the answering affidavits fall due on 22 February 2021. Despite the difficult time of year, in which both the State of the Nation Address and the budget is to be delivered, Government shall make best endeavours to achieve or even anticipate this deadline.

84. The unions, for their part, have made no attempt to contend for or procure any expedited or even urgent hearing. No urgency is even alleged in any of the founding affidavits.

85. Yet, in its own terms, clause 3.3 demonstrably can operate only until 31 March 2021. The Labour Appeal Court pointed this out in exercising its remedial discretion. As a consequence of the imminent expiry of Resolution 1 of 2018 new salary negotiations for the next wage cycle have been underway, as the judgment reflects, even before the hearing in the Labour Appeal Court. By the time that this Court will be in a position not only to hear the matter but also deliver a judgment the implementation of clause 3.3 will be moot. It is not sought to be enforced retrospectively, and no relief is framed (whether in this Court or *a quo* by the unions) to implement the clause *post hoc* or in increments or on any alternative basis other than in accordance with the strict terms of the clause itself.

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86. Nothing in the founding papers establishes that it nonetheless, extraordinarily, in the interests of justice to consider this matter despite the mootness arising next month. It had been manifest since, at the latest, the Labour Appeal Court's judgment (which referred correctly to the pending negotiations to which the parties referred). Entertaining a moot matter may impede the parties' ability to negotiate freely and constructively, and is therefore also for this reason not in the interests of justice. Less still in the public interest.

(7) Public interest

87. Finally, it is also not in the public interest to entertain the matter. This is, firstly, for the reasons set out above as grounds of opposition on the merits. Secondly, there is no merit in the arguments advanced by the unions in an attempt to justify this Court's exercise of its special jurisdiction.

88. Demonstrably the sensational contention that anything other than specific performance would sound the death knell to collective bargaining is untenable. In its own terms it invites the riposte that specific enforcement in the circumstances of this case would sound the death knell to the rule of law, Covid-19 remedial measures, the recovery of the economy, and

compliance with all Government's competing constitutional obligations including those to the most vulnerable members of society.

89. The unions' contention is in any event also otherwise untenable. Enforcement of the clause in question involves peculiar issues which are context and fact-specific. Thus refusing specific enforcement in the circumstances of this case does not have implications for collective bargaining – other than confirming that collective bargaining is, as this Court already concluded in *CUSA*, not immune from constitutional discipline.

90. These and other grounds of oppositions will be amplified, to the extent appropriate at this stage, in summarising the relevant fiscal facts and thereafter traversing the array of founding affidavits.

D. Principles of fiscal and public finance policy and their application to the facts of this case

91. The answering affidavits filed by the Government respondents in the court *a quo* fully record the extensive budgetary data, documents, and deficit. All of these are contained in contemporaneous material fully ventilated before Parliament and available to the unions. Much of the material facts were known to the unions even before launching their litigation, and at least

the crux of the pre-Covid-19 fiscal difficulty was well-known at the time of negotiating Resolution 1 of 2018. The adverse fiscal situation and the major contributing factor (the bloated wage bill) are not open to contestation. Nor did any of the unions attempt to raise any issue in this regard. It suffices therefore, at least for present purposes, to provide a shortened summary of the precarious situation more fully essayed in Government's answering affidavits *a quo*.

92. First, the 2017 Medium Term Budget Policy Statement ("MTBPS") publicly recorded facts widely known to negotiators involved in the subsequent wage resolution being negotiated at the time. It is that Government could not afford wage increases above CPI.

93. Second, the public service has a legacy of above CPI salary increases. Over the decade preceding the 2017 MTBPS the average increase was more than 2 percentage points above CPI. This has disproportionate cumulative financial effects for Government. Year-on-year growth above inflation results in a wage bill both distorted and distended, ill-aligned to the buying power of the increased salaries, and drastically divorced from revenue realities (which depend on GDP and GDP growth). The fiscal deficit resulting from multiple years' above-inflation salary increases is ever-increasing.

94. Third, since 2017 the public sector wage bill continued to account for a large and ever-growing proportion of consolidated Government spending. It represents the fastest growing item in the budget for the previous decade, and increased at an average of 11.2% annually. It is the increase in wages and remuneration (not increases in employment numbers) which creates this staggering trend. It was further compounded by the termination of the so-called practice of "clawing back". The effect was that in the many years that inflation was lower than projected, public servants maintained a higher wage than was negotiated. This yet further detached the growth in the public sector wage bill from the economic reality.

95. Fourth, during the 2018 MTBPS period GDP has grown more slowly, resulting in wage bill expenditure rising from 8.9% to 11.6% of GDP. This necessarily haemorraged public funds available for spending on goods and services and capital expenditure. What this means is that Government has not been able, as it would otherwise have done, to allocate public financial resources more munificently to fulfill its section 7(2) constitutional obligations. Whereas socio-economic rights had to be realised progressively, it is the wage bill which increased – rapidly. This increase in compensation spending is at the expense of necessary non-compensation spending (e.g. textbooks, teaching materials, school nutrition and transport;

and their equivalents in respect of other fundamental rights). It is also at the expense of the headcount. The correct ratio between e.g. teachers and school children (or health workers and healthcare recipients) is required for fulfilling fundamental rights.

96. Fifth, the above trend continued during the subsequent financial years. A very large proportion of national expenditure has historically been attributable to state employees' salaries. By 2019 it grew to 35.4%. This steadily-increasing trajectory means that public spending on other important inputs and capital equipment required to fulfil constitutional obligations are adversely affected.

97. Sixth, not only Government's ability to afford its other constitutional obligations is compromised. Also the public service itself suffers. This is since Government's budget for compensation necessarily requires a trade-off between employee numbers and remuneration figures. The more rapid the rise in remuneration, the slower the increase in personnel numbers. When salaries rise faster than the budget as a whole, an increase in salaries results in departments' having to reduce headcounts. Thus the ballooning wage bill is also prejudicial to employment levels and job creation. Accordingly at best for the unions any section 23 argument is net neutral.

98. Seventh, although revenue growth in South Africa has occurred slowly since the world-wide financial crisis of 2008, between 2006 and 2019 spending on public servants' salaries has more than tripled. This resulted mostly from above-inflation remuneration increases. The effect of this trend is that public servants in the national and provincial spheres of government earn some 20% of all wages received in the non-agricultural formal sector of the entire economy. Even on a conservative estimate (which does not account for temporary workers, of which there are many in Government's expanded public works programme) the average annual increase in public service remuneration has been more than 10% faster than the rate of increase of employees in the rest of the economy. This figure still understates the true gap, however, because private sector salaries have risen fastest amongst the highest earners, with increases for ordinary workers and employees being somewhat lower than the private sector average as a whole. It nevertheless confirms the ever-expanding gap between public sector and private sector remuneration growth.

99. Eighth, spending on government employees' salaries has grown much more quickly than the budget and tax revenues. Whereas government spending on compensation increased by 261% between 2006/07 and 2019/20, the economy grew by only 170%. As a result compensation spending accounted for 42% of tax revenue in 2019/20. Debt increased

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by 293% during the decade ending in Government's 2019/20 financial year. A key driver of this increase was the burgeoning wage bill. The wage bill not only contributed to government debt, but of course also to the rapidly rising cost of servicing debt. The rise the cost of servicing debt is a consequence of Government's credit downgrading below investment grade. And the downgrade is, in turn, a result *inter alia* of debt levels (of which the wage bill is a considerable contributor). Thus the wage bill creates a vicious fiscal circle.

100. The wage bill's ballooning is not a result of substantial growth in the number of public servants. The latter has increased by only 15% from 2006/07 to 2019/20 from 1.147 million employees to 1.317 million. During the same period the average remuneration in the public sector increased by 193%. What this means is that 78% of the increase in the public wage bill is attributable to higher remuneration, and 22% is attributable to additional appointments. The result is an increase over the same period of public service salaries at an average of 9.4% per year. This when the average inflation rate was only 6.5%.

101. The cumulative inflation-adjusted effect of salary increases, adjustments and progression is (on some estimates) a 44% increase between 2006/07 and 2019/20. However, this estimate substantially understates the reality.

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Corrected to counteract the occluding effect of retirement by more senior officials (who are replaced by more junior officials remunerated at lower salary scales), the inflation-adjusted remuneration for public servants increased on average by 70%. This is exorbitant and unsustainable.

102. If the fiscal consequences of Covid-19 are not carefully controlled, South Africa may face a sovereign debt crisis. Examples of such crises – even absent any pandemic – abound. Two other BRICS countries, Brazil and Russia, have endured sovereign debt crises. Ukraine, Pakistan, Uruguay, Turkey and Mexico have similarly experienced debt crises. The Covid-19 pandemic may cause more countries to succumb to sovereign debt. A close neighbour and fellow SADC state, Zambia, in recent weeks already has.

103. It is therefore fiscally untenable to continue expending increasingly scarce public finance resources on ballooning public service salaries. It is unaffordable, it inflates Government debt, it increases the cost of financing debt, and it impedes service delivery (and the provision of infrastructure critical to service delivery). Inflated government debt raises macroeconomic risks, which retard growth across the economy as a whole by raising the cost of capital and slowing down investment. Unless brought under control, ultimately South Africa will be impoverished to the extent

that it is altogether impossible to afford any aid to its most vulnerable individuals.

104. The the enforcement of clause 3.3 will yet further exacerbate a stark reality: public servants' salary increases are incurred at the expense of social welfare. This in a context where, between 2007/08 and 2019/20, some 33% of all government spending was in respect of state employees' remuneration. Transfers to households (which include social grants) comprised less than half of this: 16%.

105. In order to stabilise government debt, recent budgets have sought to reduce allocations to a number of government functions and departments. These had already been introduced in the previous budgets, but also featured in the 2020 Budget. The latter include a reduction of R13.2 billion in respect of public transport; reductions of R5.2 billion in respect of basic education and higher education; and reductions of R3.9 billion in respect of the Department of Health. There is therefore no scope for yet further reductions to counteract the fiscal effect of enforcing clause 3.3.

106. The unavoidable Covid-19 fiscal relief package extended by Government in 2020 inevitably exacerbated the budgetary situation. Government has had to introduce a set of economic relief measures amounting to billions of

Rands. These combine tax relief, loan guarantees, balance sheet drawdowns, and spending measures. The spending measures amount to R190 billion, of which R145 billion was provided immediately, as outlined in the supplementary or adjustments budget tabled on 24 June 2020. They seek to respond to the devastating consequences of the Covid-19 pandemic. The R145 billion relief package came at a cost of suspending R100.9 billion of spending on national and provincial departments. The latest estimates from National Treasury are that R165 billion of the spending measures and balance sheet drawdowns have been utilised as at 31 January 2021. The immediate net effect was an increase in the expenditure ceiling by R36 billion.

107. At the same time Government has had to adopt also special Covid-19 tax measures. These amount to R70 billion of deferred or foregone revenue, some resulting from job losses suffered in the private sector. As at 31 January 2021, the National Treasury estimates that R53 billion of these measures have been utilise and continued demand is likely as the Covid-19 pandemic continues to spread.

108. Public sector jobs are at present secure. But, as the Minister's Covid-19 budget speech recorded, throughout the world tens of millions of jobs have been destroyed; and unemployment in South Africa itself had increased

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to 30.1% even before the effects of Covid-19. The result is the most extensive collapse in global *per capita* income since 1870.

109. The fiscal framework for 2020/21 reflects a consolidated budget deficit of R761.1 billion. South Africa's spending will exceed R2 trillion. Tax revenue collected thus far for the 2020/21 period is already R35.3 billion behind target. By the time of deposing to my previous answering affidavit it was expected that the tax target for the 2020/21 period will ultimately be missed by over R300 billion. The National Treasury's latest estimate for tax revenue shortfall remains significantly in excess of R200 billion for the 2020/21 financial year. As mentioned, the most recent estimates provided by some economists adopt a more optimistic outlook, suggesting that the shortfall may be between R230 and R280 billion. The bottom-line is that the deficit is in the order of hundreds of billions of Rands.

110. Incurring additional debt is fiscally untenable under the Covid-19 circumstances. The pandemic resulted in South Africa's public finances being dangerously overstretched, as the 2020 supplementary budget speech cautioned. This was further confirmed by the Medium-Term Budget Policy Statement, which estimates that government debt will rise to R3.9 trillion in the 2020/21 financial year, further increasing to R4.5 trillion in 2021/22. South Africa is thus in danger of being overwhelmed by debt.

If it occurs, devastating consequences will be felt especially by the poor, and essential service delivery on education and other public policy priorities entrenched by the Constitution. Examples of countries where this had occurred include, as the 2020 supplementary budget speech reflects, Argentina, Germany, Greece, Zimbabwe, and even apartheid South Africa.

111. The State is increasingly financing operational activities through borrowed funds and using one set of borrowings to service other debts. According to the 2020 Medium-Term Budget Policy Statement, short-term borrowings increased to R143 billion in 2020/21, compared to R36.1 billion in the previous financial year, while at the same time R66.9 billion of debts had to be redeemed or settled in 2020/21, a figure which is set to rise to R150.6 billion in 2022/23. In this manner, cash reserves are being periodically sourced through borrowings in order to redeem or settle other debt obligations that are coming due. The explanatory memorandum accompanying the extraordinary Covid-19 budget review reflects that there are simply no residual financial resources available to fund the implementation of clause 3.3. Even one of the most crucial and immediate constitutional obligations, basic education, has seen a net reduction in funding of R2.095 billion. This reduction affects 12 million school children, and is to be seen in the light of the reduction in the vote on employment and labour (which amounts to R262 million).

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112. Government already spends 51% of tax revenue on the civil servants' wages. If clause 3.3 (for which, as mentioned, the budget made no provision) were to be implemented, the figure creeps closer to 60%. This in circumstances where the average remuneration in national and provincial government exceeded the average remuneration in the private sector during 2019/20 by 40%. This gap is currently increasing.

113. The public sector of South Africa is remunerated at a level which is also higher than public servants in comparable countries. IMF data reflects that South Africa pays 31% more than the emerging market average viewed as a ratio of earnings to GDP *per capita*. Similarly the Organisation for Economic Co-operation and Development reported that in 2017 that the country's compensation of public servants accounted for a larger share of GDP than any country in South Africa's peer group. Relative to each country's GDP per capita, South African police officers are paid more than any other country surveyed by the OECD. Doctors and nurses in the South African public service receive respectively 12 and 4.5 times more than the level of GDP per capita. Their colleagues in comparable income group countries are paid only 2.2 and 2.7 times the level of GDP per capita. South Africa has fewer public servants per capita than is the norm. Yet a higher

proportion of GDP is spent on public sector remuneration than is the norm in other countries.

114. The wage bill deficit is incapable of being bridged by increasing taxes. Despite the large tax increases introduced between 2015/16 and 2017/18, the tax-to-GDP ratio did not improve. Instead, the shortfall in expected revenue grew progressively larger. There are, moreover, no gaps in the tax system capable of generating significant increases in revenue. This is, firstly, because personal income taxes already amount to almost 40% of all tax revenue. This is relatively high compared to South Africa's peers. Secondly, the Davis Tax Commission concluded that wealth tax is unlikely to generate significant revenue. Thirdly, VAT has already been increased to 15% without the desired effect. Fourthly, corporate tax rate is already high compared to South Africa's peers and the quantum of taxable profits has diminished. In any event, increasing corporate tax has adverse impacts on the prices of goods and services, and on job creation by corporations. Increasing taxes risks further retarding economic growth by reducing the expected returns for investing in businesses. Fifthly, the Covid-19 pandemic depletes taxpayers' taxable income. Personal income is, as the 2020 Supplementary Budget Review recorded, under significant pressure resulting from job losses, labour unavailability and employers' inability to pay full salaries arising from the Covid-19 pandemic. This renders it

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inequitable and indeed impossible to tax individuals yet further. Particularly for purposes of affording above-inflation increases to public servants' salaries that are already higher than salaries in the private sector.

115. Similarly the wage bill deficit is incapable of being funded from elsewhere. As the 2020 Supplementary Budget Review reflects, in 2020/21 South Africa's consolidated budgetary deficit is projected to increase yet further (from 6.8% as estimated in the 2020 Budget) to 15.7% of GDP. This trend is to be *reversed* (not accelerated by incurring yet further debt) in order to prevent a sovereign debt crisis. Otherwise debt will quickly spiral beyond 140% of GDP. Already at this stage, however, the large deficit confirmed the unaffordability of implementing clause 3.3. Now that the deficit has been increased by the Covid-19 pandemic's destruction of productive capacity, and required extensive Government interventions with far-reaching fiscal consequences, funding for clause 3.3 simply does not exist and cannot be created.

116. National Treasury established the above fiscal facts before the court *a quo* by adducing multiple expert affidavits and extensive budgetary materials. It did so to ventilate Government's fiscal situation as fully as possible, and to enable full judicial scrutiny insofar as this is required and would assist the adjudication of the matter. As my previous affidavit observed, National

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Treasury has already defended Government's difficult budgetary decisions before Parliament, and effectively placed Government's books before court. In doing so this Court's caselaw confirming the appropriate mutual respect by the different arms of government for one another was expressly acknowledge, including the policy-laden and polycentric nature of decisions falling within the heartland of the executive domain – which warrant the appropriate degree of judicial deference.

E. Traversal of the founding affidavits

117. The various founding affidavits filed in this Court span, as mentioned, collectively some 140 pages. It is unfortunate that the unions, although co-litigants below and pursuing the same core relief, did not ease the Court's task by avoiding a plurality of affidavits, and instead advancing, quickly, a single case. Despite their multitude, the unions' affidavits fail, as shown above, to demonstrate that (a) the Labour Appeal Court exercised its discretion in a manner susceptible to interference on appeal; (b) there is any prospect of success; (c) the interests of justice support granting leave to appeal; and (d) there is an arguable point of law which in the public interest warrants this Court's attention.

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118. In what follows I traverse only the more material parts of the founding affidavits as may require, I am advised, a response. In doing so I shall deal with the founding affidavits (which contain considerable overlap) in the sequence received, attempting to avoid undue repetition. Any averment advanced in the unions' affidavits which is inconsistent with this affidavit or the Government respondents' papers filed *a quo* is denied as if specifically set out and traversed.

Ad paragraphs 7 to 15 of NEHAWU's founding affidavit: Overview

119. I am advised that the question whether this matter properly falls within this Court's jurisdiction is not determined by the considerations on which NEHAWU relies. That this Court is "the next" (para 8) court is not the question. The question is whether there has been compliance with the two jurisdictional facts contained in the Constitution. Both involve an inquiry into prospects of success. None exists. Therefore this case does not properly engage this Court's jurisdiction.

120. Furthermore, the new averment now that "[t]his application raises important constitutional matters and complex issues of law" (para 9) is not supported by NEHAWU's approach *a quo*. It simply sought to enforce a contractual clause before the bargaining council with no jurisdiction to

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entertain important constitutional or complex legal issues. In its answering affidavit filed *a quo* it construed the case as one concerning "policy considerations", and section 23 of the Constitution was simply invoked once (and once only) as the very last of a range of considerations in support of the conclusion that policy considerations could somehow counter Government's reliance on the rule of law, the Constitution, and the content the Constitution gives to public policy considerations arising (*pace* this Court's judgment in *Barkhuizen*).

121. Moreover, NEHAWU's characterisation of the case is completely incorrect. The case does not concern "whether the State is permitted to renege on a collective agreement … on [sic] the guise that the agreement is invalid" (para 10). The straightforward issue before the court *a quo* was whether – in the light of clear non-compliance with the empowering provision, which none of the unions contradicted even at the most elementary factual level – a contract could be enforced despite non-compliance with mandatory legal preconditions. The answer is self-evident, and the Labour Appeal Court unanimously came to the correct conclusion.

122. As regards the jurisdictional issue NEHAWU seeks to raise, this is, firstly, self-destructive. If it is correct that this is a matter "properly" to be

subjected to bargaining council processes, then it demonstrably does not warrant this Court's exercise of its important jurisdiction. Secondly, any contention that the bargaining council has "exclusive jurisdiction" (as para 12 implies, and para 55 goes on to claim explicitly) is inconsistent with this Court's judgments in *Baloyi v Public Protector* 2021 (2) BCLR 101 (CC) and *Fredericks v MEC for Education and Training Eastern Cape* 2002 (2) SA 693 (CC). If, on the other hand, the bargaining council did not have exclusive jurisdiction, then the court *a quo* demonstrably did not – as NEHAWU's seeks to convince this Court for purposes of exercising its appeal jurisdiction – "err" in exercising its own jurisdiction. Relitigating the issue of jurisdiction in labour *fora* yet again – and this in the teeth of this Court's extensive caselaw on this topic – is simply not in the interests of justice.

123. Furthermore, the attempt now for the first time to attribute the fiscal shortages to "corruption" (para 13) is ill-founded. Before the court *a quo* NEHAWU alleged (through the same deponent) that "one of the major reasons for any difficulty of implementation, which I deny, is that the employer has failed to run the country efficiently" (para 55 of NEHAWU's answering affidavit). No corruption (other than an oblique reference to Eskom) had been alleged, least of all proved.

124. Corruption is a serious crime, and National Treasury and the rest of Government should be assisted by public servants in counteracting it. Regrettably NEHAWU's deponent asserts corruption in unhelpfully bald terms. No factual basis for this allegation is advanced before this Court, and none was – as mentioned – provided *a quo*. In these circumstances it is vexatious and scandalous. Raising it in this litigation in an attempt to achieve an appeal to this Court, and to outflank National Treasury's reliance on the rule of law and human rights, is self-serving. Such tactic furthermore presupposes that any corruption is perpetrated by the disembodied State singlehandedly. This when the State necessarily acts through its amanuensis: the public service. The latter either actively or passively participates in, or is witness to, the corruption which NEHAWU's deponent purports to invoke. If he has personal knowledge of corruption, then he should disclose the relevant details: what it involves, who perpetrated it, and to which authority he had reported it, and when.

125. Their *post hoc* and vague nature apart, NEHAWU's allegations regarding corruption provide, in any event, no defence to the legality issue. If NEHAWU's allegation is to be accepted, then it only serves to confirm that the required funding was (and still is) not available – albeit as a consequence of the corruption. But if the funding was not available, then the collective agreement could not have been concluded. The empowering

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provision does not render it otherwise depending on the *reason* for the lack of funds. It deals with financial impossibility, not fictitional fulfilment contrary to concrete fiscal facts.

126. Finally, the question is not whether it is "permissible" to "resile" (i.e. exit) from a contract on the basis of "[i]nability to pay or unaffordability" (para 13). The question is whether *entering* into the contract for which the necessary funding was not available (and is still less available now) was lawful under the empowering provision, and is enforceable. The court *a quo* correctly held that it was not. Neither NEHAWU nor any other union meets this case by demonstrating that the court *a quo*'s conclusion – which is consistent with the text, context, and object of the empowering provision, and the Constitution – was incorrect. It follows that there is no prospect of success.

127. There is accordingly no merit in the allegations advanced in the paragraphs under traversal. It is demonstrably incorrect that Government's reliance on the legal requirements or the counter-application could somehow be construed as having "its sole purpose" as "being to subvert the rule of law" or employees' constitutional rights. No factual basis for such allegation is established in this Court, and the allegation was not even advanced in the

court *a quo*. Thus the Labour Appeal Court did not err in this or any other respect.

Ad paragraphs 16 to 31 of NEHAWU's founding affidavit: Factual overview

128. These paragraphs purport to provide the factual background to the negotiation and conclusion of the collective agreement in question. To the extent that it is inconsistent with Government's papers filed in the court *a quo* it is denied. The legal conclusion regarding the resolution's binding nature is similarly denied for the reasons set out in Government's papers *a quo*, and summarised in this affidavit.

Ad paragraphs 32 to 55 of NEHAWU's founding affidavit: Subsequent events

129. These paragraphs, too, are subject to the full treatment of the extensive factual position ventilated in the papers *a quo*. It is correct, however, that Government indeed sought repeatedly to engage the unions on renegotiating clause 3.3, and that the unions' members have enjoyed the full benefit of clauses 3.1 and 3.2 – which had already been implemented at tremendous cost to public funds. It is also quite accurate that, like its counterparts, NEHAWU had consistently ("always") adopted the "stance" that there had to be "compliance" with clause 3.3 in its terms. The unions

were not amenable even to meaningfully discussing any alternative. They have made their election in this regard. They cannot now contend for a staggered implementation or renegotiation, and cannot seek such undefined relief now before this Court. They unfortunately chose to refuse Government's extensive attempts to achieve this through *bona fide* negotiations. NEHAWU itself explicitly asked that Government's counter-application be "dismissed" outright; not that clause 3.3 be renegotiated or implemented incrementally.

Ad paragraphs 56 to 62 of NEHAWU's founding affidavit: Engaging this Court's jurisdiction?

130. The paragraphs under traversal reflect NEHAWU attempts to convince this Court to exercise its jurisdiction on the basis that the Labour Appeal Court's order "itself" gives rise to "constitutional questions" which "engag[e]" this Court's jurisdiction (para 60). This is not correct.

131. The order resulted from the relief sought *a quo* by Government. The grounds now raised by NEHAWU in an attempt to procure an appeal to this Court was not pleaded by NEHAWU in its answering affidavit filed in response to Government's counter-applications.

132. It is therefore simply spurious to accuse the Labour Appeal Court of failing to consider NEHAWU's "evidence and submissions" (para 62). Implying that "a fair hearing" was not afforded *a quo* and therefore must be provided by this Court is unfounded.

133. NEHAWU seeks to raise a new case before this Court. Even this case enjoys no prospect of success, and is unarguable. This is because the Labour Appeal Court's judgment is not assailable on any of the grounds of appeal identified in the paragraphs under traversal. This is demonstrated below in traversing the grounds of appeal separately.

Ad paragraphs 56 to 62 of NEHAWU's founding affidavit: First ground of appeal

134. NEHAWU's first and foremost argument sought to be advanced in any appeal before this Court is that the Labour Appeal Court's judgment "negates important context" (para 63). This context is contended to be "the climate [sic] in which the agreement was concluded" (para 64). The "climate", in turn, is "section 23(5) of the Constitution" (para 64). Such "climate" is explicitly sought to be invoked "directly" as the source of power to conclude a collective agreement.

135. I am advised that direct reliance on section 23(5) is legally incompetent. It is in any event not in the interests of justice to invoke this provision for the first time on appeal, I am further advised. Importantly, such reliance is also untenable in its own terms. Neither section 23(5) of the Constitution nor section 23 of the Labour Relations Act supports the proposition that a collective agreement which had been concluded invalidly could somehow bind the purported parties. Any such construct is, I am advised, clearly inconsistent with well-established principles of interpretation, and the principle of legality.

136. Furthermore and in any event, the correct position is that Regulation 78 and 79 is, as the Labour Appeal Court's judgment correctly held, the applicable and direct empowering provision. It has not been impugned as inconsistent with section 23(5) of the Constitution or any other superior provision. It follows that there is – *inter alia* on the basis of this Court's caselaw most recently confirmed in *Public Protector v Commissioner for the South African Revenue Service* [2020] ZACC 28 (15 December 2020) at paras 25-27 – no prospect of success and the application for leave to appeal falls to be dismissed on this score.

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137. It follows that NEHAWU's deponent's attempt obliquely to invoke the doctrine of subsidiarity (para 70) is self-destructive. It operates directly against granting leave to appeal.

138. The order of the Labour Appeal Court is itself not subject to any criticism purportedly resting on the doctrine of subsidiarity. This is because the order does not – contrary to the impression created by NEHAWU (in para 70) – directly rely on sections 213 and 215 of the Constitution without more. The order specifically refers to these constitutional provisions in conjunction with Regulations 78 and 79. It is, as paragraphs 49 and 50 of the judgment clearly reflect, by virtue of non-compliance with the composite statutory framework that the conclusion of the agreement had been unlawful.

139. Therefore the court *a quo*'s judgment and order is not subject to any tenable criticism that it impermissibly relied directly on the Constitution contrary to the doctrine of subsidiarity.

Ad paragraphs 63 to 76 of NEHAWU's founding affidavit: Second ground of appeal

140. There is simply no merit in the contention that the Labour Appeal Court's order "unjustifiably limited" the right to collective bargaining and that "no

reasons" were provided for the limitation of section 23 rights. This is, firstly, because section 23 does not confer a right to conclude an invalid collective bargain. Secondly, the Labour Appeal Court provided compelling reasons for the order of invalidity.

141. The rule of law and the principle of legality preclude entering into and enforcing collective agreements inconsistent with legal requirements. This Court itself confirmed that a collective agreement is indeed subject to legality review in such circumstances. National Treasury explicitly invoked this Court's judgment to this effect before the Labour Appeal Court. NEHAWU correctly does not contend that this Court's judgment is clearly incorrect and liable to being overruled by this Court on appeal.

142. There is thus evidently no merit in the second ground of appeal.

Ad paragraphs 77 to 102 of NEHAWU's founding affidavit: Third ground of appeal

143. The argument advanced as third ground of appeal seeks to piggyback on various budget documents adduced *not* by any of the unions but by Government as part of its papers before the court *a quo*. There is therefore – in its own terms – clearly no basis for the argument. It explicitly

relies from the "outset" on the accusation that the court *a quo* did not take NEHAWU's "evidence and submissions" into account (para 78).

144. What NEHAWU's deponent seeks to establish by reference to Government's evidence is that the budget and related instruments somehow support the proposition that public resources could and should have been managed in a manner which could have saved the tens of billions of Rands now required for the wage bill. This argument interchangeably invokes "mismanagement of the economy" (para 87) and "rampant corruption … on government's watch" (para 90). It explicitly invokes the sufficiency of evidence adduced by Government to establish the unaffordability of implementing clause 3.3. (para 97).

145. But this is, firstly, not an issue warranting this Court's determination. The sufficiency of evidence or otherwise is a factual matter which does not engage this Court's jurisdiction. Secondly, the allegation is simply spurious. Government adduced very extensive evidence before the Court *a quo*. National Treasury itself amplified the budgetary material for all applicable financial years; confirmed their contents on oath; and submitted multiple substantive confirmatory affidavits and analyses by many internal experts in the field of public finance and budgeting. Not a single union tendered any evidence at all which contradicted Government's fiscal

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evidence. There is therefore no prospect of the unions convincing this Court on appeal (if it were to entertain an appeal on the sufficiency of evidence) that Government's uncontested expert evidence on fiscal facts is somehow insufficient.

146. Much is sought to be made in NEHAWU's affidavit about Eskom and its affairs. This is, firstly, not an issue properly ventilated *a quo* nor in respect of which appropriate relief had been sought by any union. Whether and to what extent salary bills etc of Eskom officials should have been incurred or instead spent on other Government employees is not an issue properly arising on the facts of this case. Neither Eskom nor any of its officials, executives or directors have been cited in this litigation or participate in the proceedings in this Court. Secondly, it is both in law and logic extraneous to the legality and remedy inquiry that expenditure on Eskom or other budget line items could or should have been incurred differently. The legality issue is whether the necessary budgetary allocations for purposes of Resolution 1 of 2018 had been made at the relevant time. The remedy issue is whether funds should be syphoned from Covid-19 relief measures and other Bill of Rights obligations to pay public servants a yet further unbudgeted increase. Whether the national electricity utility should sink or swim or be sacrificed for the benefit of 1.3 million civil servants' serial

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salary increase is simply not an issue appealable to this Court in the current case.

Ad paragraphs 103 to 104.5 of NEHAWU's founding affidavit: Fourth ground of appeal

147. This argument rolls up multiple issues, some of which have already been addressed above (e.g. the sufficiency of evidence regarding "the amount … budgeted").

148. National Treasury presented extensive evidence before the court *a quo* confirming that Resolution 1 of 2018 indeed was not within the budget. It is demonstrably false to represent to this Court that "[t]here was simply no evidence placed before the LAC, save for the bald allegation, that the amount was not budgeted for in that it exceeded the compensation envelope" (para 104.4). Multiple deponents have confirmed the incontrovertible evidence as regards the unbudgeted expenditure beyond the compensation envelope which would result from enforcing clause 3.3. There was no (and still is no) tenable attempt to contradict this aspect. It turns on expert fiscal fact. Any genuine controversy over this factual state of affairs is, in any event, simply not a matter warranting this Court's exercise of its bespoke jurisdiction.

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149. This addresses the repetitive second limb of the rolled-up fourth ground of appeal.

150. The first limb rests on a new-found legal argument, contending that Cabinet approval should somehow have been taken on judicial review. This new argument is clearly wrong. Cabinet's approval had no direct and external legal effect. It is not the law, I am advised, that whatever is discussed and approved in Cabinet raises immutable legal consequences immune from the fate of the actual exercise of public power by the statutorily designated Cabinet member, department or agency. In this case the conclusion of the contract in question had been reviewed and set aside. It is casuistry to contend for the latter's survival in law on the basis that an entirely extraneous purported approval by Cabinet has not also been included in the declaratory order granted *a quo*.

151. The deponent's residual reliance on the Minister of Finance somehow having been the cabinet member "who place[d] the matter before cabinet" (para 104.4.10) has no factual foundation. No evidence is offered in support. If an inference is the basis, it is conjectural and it is wrong. The Minister of Finance did not do so. Thus also in this respect the factual substratum of the application for leave to appeal is self-destructive.

152. I note the throwaway reference to delay in the last subparagraph under traversal. This is not a ground of appeal sought to be invoked by NEHAWU. In any event, the court *a quo* exercised a judicial discretion also in this regard. Nothing in NEHAWU's affidavit demonstrates any basis for interfering with that discretion. It simply asserts baldly that the court *a quo* "erred" (para 104.5). It is in any event quite incorrect to contend that no explanation for the delay was provided. Government explained, to the extent that this was required, that the legality and enforceability of clause 3.3 was not a matter fit for judicial review prior to the exhaustion of the engagements which Government initiated.

Ad paragraphs 105 to 108 of NEHAWU's founding affidavit: Fifth ground of appeal

153. The final ground of appeal again resorts to the sufficiency of evidence. It also attempts to argue that the absence of evidence (relating to or establishing that the State had approached government departments as regards compliance or otherwise with Regulation 79(c)(iii)) is a "shortcoming" in the court *a quo*'s conclusion. It is not. Compliance with Regulation 79(c)(iii) requires National Treasury to approve in writing any agreement by such other government department to fund the wage bill in issue. National Treasury provided direct evidence that it did *not* approve

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any such agreement, and that none existed. There is therefore no evidentiary "shortcoming" in any "finding". Neither is a finding appealable. Less still to this Court on the basis of the alleged inadequacy of evidence.

154. On every level the last ground of appeal is therefore demonstrably unarguable. It fails, with respect, at the most elementary level of logic. It does so in each of its constitutive parts.

155. Firstly, the fact that the offer comprised any "revised" "manifestation" does not affect its legal status. Clearly the "revised" "offer" did not address the Minister of Finance's conditions for approval spelled out in his 14 February 2018 letter. Thus however revised any manifestation of the offer could conceivably be contended to be, it evidently did not comply with conditions for approval.

156. Secondly, it is precisely *because* the so-called "counter offer" [sic] had indeed not been retracted that the issue of illegality exists. That it had or had not been retracted does not prove compliance with the conditions of the 14 February 2018 letter. What matters is that there had been no retraction of the 14 February 2018 letter. Clearly the subsequent "revised"

"manifestation" of the "counter-offer" did not comply with the 14 February letter.

157. Third, the same applies to the making of the counter-offer "in full view of the economic climate". It was indeed "in full view" of the clear economic situation that the unions snatched at an unauthorised bargain presented by an agent acting outside his mandate in January 2018. Thus the economic climate known to all at the time only serves to operate against the unions. It is not just and equitable in the circumstances then prevailing and least of all those operating now to enforce clause 3.3.

158. Finally, there is no merit in the deponent's final point. He attempts to rely on the proposition that the legal argument advanced at the hearing on behalf of the DPSA and National Treasury were "at odds". The difference invoked turns on whether it is Resolution 1 of 2018 *in toto* or only clause 3.3 (as at the time of its own entry into effect) which is invalid. This does not amount, as NEHAWU contends, to Government having "probated [sic] and reprobated in circumstances not permitted in law" (para 108). The correct legal construct is a matter for the court, not a litigant. Neither Government nor any other party before court can by its categorisation of a contract (least of all a contract concluded by a public entity) commit a court to a particular legal approach. The court *a quo* was therefore not

constrained to adopt the construct which counsel for "the employer" deployed in oral argument.

Ad paragraphs 109 to 110 of NEHAWU's founding affidavit: Conclusion

159. For the reasons provided above I deny the conclusory assertions in the paragraphs under traversal. No case for leave to appeal has been established in NEHAWU's founding affidavit.

160. Accordingly NEHAWU's application for leave to appeal ought to be dismissed.

Ad paragraphs 10 and 11 of SADTU's founding affidavit: Outline

161. None of the three bases identified in "outline" in SADTU's founding affidavit has any merit. They are dealt with in traversing the paragraphs attempting to amplify the outline. What is clear, however, from the outset is that SADTU significantly does *not* aver here that the court *a quo* erred in its conclusion as regards clause 3.3's unlawfulness. SADTU only invokes two grounds of appeal in its "outline". The first is delay (para 10.1 and 10.2, arguing that the "LAC did not have a basis to overlook …

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unreasonable delay"). The second is remedy. Signally SADTU does not establish that the court *a quo* misdirected itself in respect of the latter. It only contends that the court *a quo* "erred". This does not suffice, I am advised, for purposes of persuading a court of appeal to interfere with a discretion exercised *a quo*.

Ad paragraphs 12 to 30 of SADTU's founding affidavit: Parties

162. For present purposes no issue arises from the citation of the parties.

Ad paragraphs 31 to 54 of SADTU's founding affidavit: Collective agreement's conclusion

163. These paragraphs demonstrate the fatal flaw in SADTU's and other unions' argument on the merits. They attempt to contend for compliance with Regulation 78 and 79 on the basis that Cabinet (through a committee, it is variously contended) approved the agreement (para 37). The flaw is twofold.

164. First, Cabinet is not the authorised decision-maker under the empowering provisions. Thus the unions contend for an unlawful usurpation in an attempt to somehow inconsistently meet Government's case based on legality.

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165. Second, mere *approval* of the agreement (whether by Cabinet or the actual authorised decision-maker/s) is not what the empowering provision requires. It requires a commitment to provide additional funding. It is not alleged that Cabinet committed additional funds. This never occurred. Nor is it contended that Cabinet is competent to change adopted budgets. It is not.

166. There is therefore demonstrably no prospect of successfully contending that the Labour Appeal Court erred as regards the crucial issue of legality.

167. As regards remedy, the paragraphs under traversal also confirm a crucial common cause fact destructive of *some* of the unions' extraordinary retreat. It is indeed common case, as SADTU's deponent again concedes repetitively, that the unions have persistently and repeatedly "rejected" categorically any tempering of clause 3.3 (para 50). They have "insisted" on its implementation "in [its] terms" (para 51). They have always been "demanding" that the clause be complied with not in "any" amended form (para 50), but precisely "as contemplated in the collective agreement" (para 52). They repeatedly sent letters of demand to this effect (para 54). All the unions that participated actively in the litigation persisted in this absolutist stance.

168. Yet some of the unions now contend for the relaxing of the implementation of clause 3.3. As I shall show, this is in any event in law incompetent.

169. As a matter of fact it is entirely inequitable to grant extraordinary relief to parties which emphatically and persistently repudiated any negotiated alternative implementation. Government has in the many months which have passed in the meantime had to make emergency Covid-19 commitments on the basis of the unions' rejection of any alternative implementation of clause 3.3. It is not just and equitable to the beneficiaries of such emergency relief (including vaccinations needed for healthcare workers) that an extraordinary remedy now be sought from this Court to rewrite history, rearrange emergency funding, and reverse the unions' election to repudiate any renegotiation of clause 3.3.

Ad paragraphs 55 to 64 of SADTU's founding affidavit: Referral of dispute

170. The paragraphs under traversal make two significant concessions. They are fatal to the unions' case.

171. The first is that SADTU indeed contended *a quo* that condonation was required by Government, and that it was "in the absence of an application for condonation" that the delay for which it contended could not be

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overlooked (para 61). The correct legal position is, I am advised, that condonation is not required for purposes of a legality review (as this Court held in *Khumalo supra* at para 44). Thus SADTU's case on delay was simply legally untenable. It now seeks to make a new one before this Court. It, too, is inconsistent with this Court's caselaw, as I shall show below.

172. The second defect in SADTU's case is its correct recognition of an important consideration operating *a quo*. It is that "the application to enforce the collective agreement and the government's collateral challenge [w]as inextricably linked" (para 64). The Labour Appeal Court indeed so "considered", as I have shown. It was clearly correct in so considering. Neither SADTU nor any other union contends that the Labour Appeal Court erred or misdirected itself in this respect. Since the legality of the agreement was indeed crucial to any attempt to enforce it (as the unions purported to do *a quo*), the legality issue could not simply have been ignored on the basis of any alleged delay in lodging the collateral challenge. The court *a quo* was obliged by this Court's judgment in *Khumalo* to consider the values of the Constitution (thus legality, the rule of law, and the furtherance of Government's Bill of Rights obligations particularly towards vulnerable individuals under Covid-19 conditions) in determining the impact of any delay. The Labour Appeal Court did so.

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The exercise of its discretion is not tenably attacked on the basis of a misdirection in doing so. Instead, it is contended by SADTU that the court *a quo* "erred". This is both misdirected and wrong in its own terms, as I shall show.

Ad paragraphs 65 and 66 of SADTU's founding affidavit: The LAC's judgment

173. In these two paragraphs the deponent apparently attempts to summarise what are considered to be the key components of the Labour Appeal Court's judgment. The judgment speaks for itself. The factual accuracy of these paragraphs accordingly does not arise for traversal, I am advised.

174. I note the limited (and in any event inaccurate) analysis of the judgment in SADTU's affidavit. For instance, the court *a quo*'s approach to polycentricity is nowhere impugned. Correctly not. It is clearly consistent with this Court's own caselaw, which confirms its implications for the separation of powers. In this and other respects SADTU fails to establish a basis for interfering with the twofold discretion exercised *a quo* regarding remedy and delay. Also the merits involve polycentricity, because – as my answering affidavit *a quo* specifically stated and the empowering provision recognises – every Rand spent on the wage bill must be sacrificed from

other parts of the budget, and therefore requires approval in writing by National Treasury and the affected State department.

175. The limited analysis of and attack on the Labour Appeal Court's unanimous judgment is, however, by no means confined to SADTU's founding affidavit. The same applies to the other unions' founding affidavits. They, too, fail to establish a proper case for leave to appeal in this and other respects.

Ad paragraphs 67 to 69 of SADTU's founding affidavit: List of grounds of appeal

176. These paragraphs contradict the overview and are in any event also internally inconsistent.

177. The deponent now contends, initially, that leave to appeal is sought on two bases: "that the LAC erred in overlooking the government's delay" and in "finding that the collective agreement was constitutionally invalid and unlawful" (para 68). As mentioned, the overview section of SADTU's founding affidavit referred only to delay (twice) and remedy as grounds of appeal.

178. Yet the affidavit proceeds to attempt to attribute the "LAC's error" to its "incorrect understanding" of three aspects. The first is delay (para 68.1). The second relates to the merits, contending that approval by Cabinet constitutes approval under the empowering provision (paras 68.2-68.3). The third argues that the court *a quo* "erred" in determining the just and equitable relief in the circumstances" (para 68.4).

179. As I shall show in traversing the subsequent paragraphs seeking to flesh out these grounds, none is arguable. *A fortiori* none bears any prospect (let alone reasonable prospect) of success. They are, in any event, flawed for explicitly relying on the alleged "error" of the Labour Appeal Court (paras 67, 68.1, 68.2, 68.4, 69), and not a misdirection warranting the interference with a discretion.

Ad paragraphs 70 to 92 of SADTU's founding affidavit: Delay

180. SADTU asserts that the Labour Appeal Court erred as regards the issue of delay for having "failed to consider and apply" this Court's judgments in *inter alia Gijima* (para 68.1). The criticism is manifestly misdirected.

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181. It is SADTU which entirely failed to cite or refer to *Gijima*. Not in its main heads of argument filed *a quo*. Nor in its "note for argument" presented on the day of the hearing did it as much as mention *Gijima*.

182. Conversely, the Labour Appeal Court cited and applied *Gijima* extensively. It did so in paragraphs 34, 35, 36, 37, 38, 39, 40, 43, 44 and 46 of its judgment. In doing so the court *a quo* carefully analysed and anchored its discretion in *Gijima*. It held that the dispute in this case is far more complex; Government's financial position and the impact of the Covid-19 pandemic rendered the factual situation distinguishable; and that the exercise of a discretion of the kind set out in *Gijima* requires that consideration be given to the effect on the public purpose in general and the impact on millions of South Africans who barely survive on a day to day basis and need all the help the State may be able to provide. None of the unions – SADTU included – contends that the Labour Appeal Court misdirected itself in this respect.

183. Thus this Court's judgment in *Gijima* was – contrary to SADTU's mistaken premise for approaching this Court – specifically applied by the court *a quo*. *Gijima* and its unimpugned application by the court *a quo* quite clearly contradict the unions' case.

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184. The delay point is, furthermore, in multiple additional aspects unarguable.

185. Firstly, it is incorrect in law, I am advised, to contend (as SADTU's deponent is driven to argue) that "[t]he LAC could only consider the merits of the government's collateral challenge after finding that the delay was reasonable" (para 71). The correct position is, I am advised, that the merits are important for considering whether or not to overlook a delay. This Court so concluded in *Khumalo* (*supra* at para 57), confirmed it in *Buffalo City* (*supra* at paras 55 and 134), and reiterated it in *Tasima* (*supra* at para 163). SADTU's argument by design or result requires this Court to undo a long line of its own caselaw. Yet SADTU does not contend that this Court's caselaw is clearly wrong, and accordingly cannot raise a legally recognisable argument before this Court in any appeal.

186. Second, SADTU decries the Labour Appeal Court's reasoning, which considered prejudice to the parties and the public interest, as "wrong" (para 72). It alleges that in doing so the court *a quo* applied "the wrong test" (para 72). It is, however, SADTU's approach, I am advised, which is wrong. This Court itself confirmed repeatedly – *inter alia* in *Gijima* itself, which in turn cites *Merafong* and *Tasima* (both of which specifically consider prejudice) – that prejudice is indeed a pertinent consideration.

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187. Third, it is in any event also factually incorrect that "[o]n the government's version, the government was aware that the Minister had not complied with the Constitution of the Republic of South Africa and regulations 78 and 79 of the Public Service Regulations when the Minister took the decision to conclude the collective agreement" (para 78). This is not consistent with Government's answering affidavits *a quo*.

188. It is also internally inconsistent. SADTU's founding affidavit in fact later records that "[o]n the Minister of Finance's version, the unlawfulness was only realised when clause 3.3 of the collective agreement had to be enforced on 1 April 2020" (para 84). The deponent's attempt to argue around this fact is risible. He contends that the Minister's factual version is "wrong" because according to "the LAC's findings the collective agreement was unlawful from the date of its conclusion" (para 84). This is specious. What the Labour Appeal Court found is quite clear. It is that in law the invalidity operated *ex tunc*. It did not find that knowledge was attributable to National Treasury "from the date of its [the collective agreement's] conclusion".

189. It is also factually incorrect that "[o]n the Minister of Finance's version, the fact that there may have been non-compliance with regulation 79 was alluded to in the letter of 14 February 2018" (para 79). The collective

agreement had not been concluded by then. There therefore could not have been and also was not any reference to the regulations in the February letter. It follows that the different factual findings for which SADTU strenuously contends (paras 76-84) to be made by this Court on appeal is inconsistent with this Court's caselaw regarding disputes of fact on motion. SADTU's case is, therefore, firstly unarguable. Secondly, it does not engage this Court's jurisdiction. This Court does not act as a third referee of fact.

190. Fourth, there is no merit in the insinuation that the Labour Appeal Court erred – in that it did not apply a High Court judgment (which referred to a delay which was unreasonable in the absence of an explanation), and that this Court too should somehow consider itself bound by the same High Court judgment – by failing to consider the explanation for any delay (para 86-87). The Labour Appeal Court specifically referred to the position adopted by the Government respondents (para 28). Their affidavits explain why, on their approach, there had indeed been no delay and why they acted as and when they did. However, even if a different approach is adopted, and pursuant to such approach it is considered that there had in law been an undue delay, then the same explanation exists. It applies equally. Thus there *had* been an explanation. Therefore the High Court judgment (*Central Energy Fund*) which SADTU now invokes does not assist it.

Significantly, also this judgment – now raised in its application for leave to appeal – was (just like *Gijima*) not cited in either SADTU's heads of argument or note on oral argument *a quo*. It is both newfound and ill-founded.

191. Fifth, SADTU asserts – without disclosing its own failure to cite *Gijima* and *Central Energy Fund* – that "the government … did not rely on the *Gijima* principle" (para 89). This is false. National Treasury's heads of argument specifically cited *Gijima*, invoking paragraphs 38-41 and 52. What the deponent asserts amounts to the *Gijima* principle is found in para 52 of that judgment. It supports Government, not the unions. Which is why Government, not SADTU, cited *Gijima*.

192. The Labour Appeal Court extensively applied *Gijima*, and did so correctly. And the mere *application* of a principle already established by this Court does not engage this Court's jurisdiction, least of all in circumstances where it is not established that the court *a quo* misdirected itself in applying the principle.

193. Sixth, SADTU misconstrues the applicable principle. What this Court held in *Buffalo City* (*supra* at para 66) with reference to *Gijima* is simply that where the illegality is clear and uncontested, then a court must make a

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declaration of invalidity. This does *not* mean that if illegality is contested (whether meritoriously and genuinely or otherwise) that a court is precluded from making a declaration of invalidity. In this case, even on the unions' own argument the illegality is self-evident. Whereas the requisite approval had to be provided by National Treasury, it was not; only Cabinet is contended to have granted approval – but even then the unions do not claim that Cabinet approved *the allocation of funds* which was required.

194. Seventh, the complaint that the court *a quo* did not "engage with the *dictum* of this Court" regarding the right to engage in collective bargaining is unwarranted (para 90). The Labour Appeal Court explicitly addressed the unions' reliance on the right to bargain collectively. It also specifically referred to public interest concerns (which is the first consideration identified in the *dictum* SADTU invokes). The judgment also extensively deals with the rule of law, which is, as the *dictum* concludes, the crucial consideration in enforcing agreement. The Labour Appeal Court correctly held that it could not enforce the agreement in question, because doing so would violate the rule of law. This conclusion is compelled by this Court's caselaw, including not only *CUSA* but also *Barkhuizen* and *Beadica*.

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195. Finally, the conclusion that "[t]he Labour Appeal Court erroneously considered the prevailing economic circumstances and decided that they warranted the Court to overlook the delay" (para 92) is incorrect. The correct position is, I am advised, that this Court confirmed in *Gijima* (*supra* at para 49) that the discretion to overlook delay should indeed be exercised on the basis of "facts placed before [the Court] by the parties or objectively available factors." Extensive facts were placed before the court *a quo* by Government, and the fiscal conditions are in any event objectively available factors. These facts and factors are irrefutable. They established that it was not in the public interest to permit the illegality to stand in the face of the evident inequitable consequences which would arise from implementing clause 3.3.

196. Accordingly the court *a quo*'s exercise of its discretion is unassailable, and SADTU's attempt to do so is inconsistent with this Court's caselaw.

Ad paragraphs 93 to 109 of SADTU's founding affidavit: Challenge to the enforcement of the collective agreement

197. SADTU's submissions on the question of legality are self-destructive. SADTU's case is that "the LAC erred in finding that Treasury did not approve the conclusion of the collective agreement" (para 98). But it is common cause that this factual finding is correct.

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198. SADTU seeks to circumvent the dispositive finding of fact by contending that Cabinet's approval suffices. But it does not. The empowering provision is pellucid. It is National Treasury whose approval was required. Cabinet is not the authorised decision-maker. Nor did Cabinet approve the use of funds as was necessary in fact and required in law under the empowering provision. Thus even if the "principle of collective Cabinet responsibility" (para 100) could somehow apply to circumvent the unions' factual dilemma, then the principle still does not suffice. Not even Cabinet is contended to have made the required budgetary commitments. Nor is it Cabinet's constitutional competence to redraw approved budgets. This is Parliament's constitutional function. It follows that the Cabinet responsibility doctrine sought to be invoked by SADTU fails even on SADTU's own argument.

199. Furthermore, SADTU's argument misconstrues the doctrine. What it actually amounts to, I am advised, is that "the President and the other members of the Cabinet are individually responsible to Parliament for powers exercised individually, and collectively responsible for powers exercised collectively. … Ministers are individually responsible for the exercise of powers conferred on them by ordinary legislation, which is not of a nature where the approval of Cabinet is necessary." In this case the

empowering provision requires approval by individual departments of State. Thus the correct application of the doctrine operates *against* the unions.

200. The extraordinary suggestion that the "recent" Supreme Court of Appeal judgment in *Esau* somehow "articulated" the principle of cabinet collective responsibility in a manner supportive of SADTU's contentions is contrived. *Esau* was indeed delivered only very recently – on 28 January 2021, well *after* the court *a quo*'s decision. Whether it is subject to this Court's consideration pursuant to any potential appeal is not known to me. What is clear, however, is that the three paragraphs cited in SADTU's founding affidavit do not support its case.

201. Instead, the cited paragraphs commence by invoking this Court's judgment in *Republic of South Africa v South African Rugby Football Union*. The paragraph from *SARFU* cited in *Esau* refers with approval to Baxter's discussion of "cases where a functionary vested with a power does not of his or her own accord decide to exercise the power, but does so on the instructions of another." This amounts to a failure by the authorised decision-maker to take the decision, rendering the decision unlawful and invalid. It is precisely this *modus operandi* which the unions attempt to attribute to the Government respondents.

202. *Esau* also cites *Chonco*. In the latter this Court clarified conclusively what section 92 of the Constitution actually means. It means what it says. It is that "[t]he Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President" (section 92(1)). It is in this context that section 92 goes on to provide that "members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions" (section 92(2)). It is the powers and functions assigned to them by the President that forms the subject-matter of section 92(2) and collective accountability to Parliament. Ministers and their departments are accountable to courts – which are the only arbiters of legality – for the exercise of public power conferred by statute.

203. This is precisely what *Esau*'s citation of *Chonco* contemplates. In *Chonco* this Court explicitly referred to powers and functions assigned by the President to members of the national executive (paras 36-37). Langa CJ held that it is in fulfilling the national executive functions set out in section 85(2) that Cabinet members act collectively with the President and in respect of which they are collectively and individually accountable to Parliament under section 92(2) of the Constitution. However, where the President acts alone as Head of State under section 84 of the Constitution,

he performs powers and functions vested exclusively in himself. In the latter scenario no collective responsibility exists. It is quite clearly the latter scenario which applies under Regulations 78 and 79. These empowering provisions vest power exclusively in the entities explicitly identified.

204. In any event, how non-members of Cabinet (like the National Director of Public Prosecutions) should somehow be bound by Cabinet's decisions regarding the NDPP's budget is not explained by SADTU. Thus also for this reason the doctrine of Cabinet responsibility cannot apply on the facts of this case to the collective agreement in question under the operative regulatory regime. Regulation 79 requires the requisite commitment from the applicable department of state "or agencies". The NDPP is such agency. Agencies are not headed by Ministers forming part of Cabinet.

205. There is also no merit in the residual argument that the court *a quo* erred in relying on the prevailing (i.e. supervening) economic circumstances amid the Covid-19 pandemic for purposes of determining the legality of the agreement (para 101). The court simply did not do so. It held that the agreement was invalid at inception for violating the mandatory empowering provisions (para 33). SADTU itself significantly deposed earlier in the same affidavit that "[a]ccording to the LAC's findings, the

collective agreement was unlawful from the date of its conclusion" (para 84).

206. The collective agreement was indeed, as SADTU puts it, "invalid when it was concluded" (para 106). The attempt to drive a wedge between the oral submissions advanced on behalf of the respective Ministers *a quo* is therefore unavailing (paras 103-106). There is accordingly no merit in seeking to derived from their "conflicting positions" in oral argument any springboard for the disclosure of the COM minutes. The COM minutes is not the source of counsel's oral argument, was not cited by counsel, and cannot conceivably become a basis for the assertion that the Labour Appeal Court "erred in failing to order" the disclosure of the COM minutes (para 107). It is <u>not</u> any of the unions' case that the COM minutes somehow constitutes the "written commitment from the Treasury to provide additional funds" or the "written agreement" by other departments or agencies coupled with "Treasury approval" as required by Regulation 79. Nor can it be. Accordingly the COM minutes cannot constitute compliance with the empowering provision, and cannot provide proof of such compliance. Least of all in the teeth of direct evidence on affidavit by National Treasury to the contrary.

207. SADTU's claim that minutes of this cabinet committee should somehow have been "ordered" to be "disclose[d]" and considered by the court *a quo* is accordingly misconceived. Nonetheless, what SADTU fails to disclose is that the minutes were tendered to the court *a quo* by Government. However, as the judgment implies, the minutes could not contradict direct evidence adduced by National Treasury regarding the absence of approval by itself.

208. There is therefore demonstrably no arguable case, less still one bearing any reasonable prospect of success, on the merits as regards the issue of legality.

Ad paragraphs 110 to 114 of SADTU's founding affidavit: Remedy

209. Nothing in the paragraphs under traversal establishes any misdirection warranting interference with the court *a quo*'s exercise of its wide remedial discretion.

210. Significantly, in this context SADTU explicitly accepts, as it must, the "breach of the provisions of regulation 79" (para 111). This concession is not advanced in the alternative to any assertion that there had been compliance with this empowering provision.

211. Similarly SADTU also correctly concedes that it indeed failed to provide any detail regarding the staggered or phased-in implementation of clause 3.3 (para 112). However, it incorrectly imputes to the Labour Appeal Court some suggestion that such implementation was "impermissible" on account of SADTU's failure to ventilate the issue properly. What the court *a quo* held was that

> "[a]bsent some clear guidance as to how a compromise remedy could be crafted, the Court would be left on its own to exercise such a discretion in circumstances in which clear polycentric consequences stand to be considered. There was simply no evidence nor guidance provided to the Court. In these circumstances, it would be inappropriate for the Court to attempt such a difficult fiscal balancing measure. And it is not the role of a court to so do."

212. None of the unions has engaged with this reasoning. It is, with respect, quite clearly correct.

213. It is incorrect, however, to contend (as SADTU's deponent does) that this Court's approach in *Tasima* and *Black Sash Trust* provides scope for "creative remedies" in the circumstances of the current case (para 114). Instead, *Tasima* confirmed that the public interest is paramount to the court's exercise of its remedial discretion. This is the consideration specifically applied by the court *a quo*, as *inter alia* paragraph 46 of the judgment reflects. Furthermore, what this Court ordered in *Tasima* was

simply that the transfer be accomplished within a stipulated time, but that "in light of conceivable changes in circumstances, the parties must meet within 10 days to agree on how the transfer is to be facilitated." This rider provides no foundation for the unsubstantiated and extraordinary relief for which SADTU contends.

214. *Black Sash Trust*, in turn, concerns a case in which this Court ordered that National Treasury's approval be obtained for changes to the contractual payment regime. This confirms the importance of appropriate approval by National Treasury. The Court further cautioned that judicial remedial powers were limited. In that case the illegality precipitated a national crisis, and it required extraordinary relief. In this case an even greater national crisis in the form of the Covid-19 pandemic subsists. It requires that extraordinary relief (implementing a contract outside its period for implementation and operation, and well outside the available budget) be refused. This is what the court *a quo* did in the exercise of its discretion.

Ad paragraphs 115 to 117 of SADTU's founding affidavit: Jurisdiction

215. There is no merit in the proposition that this Court's jurisdiction is engaged in this matter. Demonstrably there are, for the reasons provided above (with reference to this Court's recent judgment in *Public Protector v Commissioner, SARS*), no reasonable prospect of success. This is

confirmed by SADTU's explicit contention that "[t]he government should not be entitled to undermine the constitutional right to collective bargaining by enforcing collective agreements in a piecemeal manner or selectively" (para 116). What this means is that SADTU invokes a constitutional provision to trump national legislation giving effect to collective bargaining. The latter legislation (in the form of Regulations 78 and 79) precludes the relief for which SADTU contends. It follows that, in order to enjoy any prospect of success, SADTU was obliged to attack the validity or Regulations 78 and 79. Its failure to do so precludes (as this Court held in *Public Protector v Commissioner, SARS*) granting leave to appeal.

216. There is equally no merit in SADTU's fallback reliance on this Court's extended jurisdiction to entertain an arguable point of law in the general public interest. The point of law purportedly invoked is "about [sic] whether an employer may rely on intervening [sic] circumstances that adversely affect the employer's ability to comply with its obligations in terms of a collective agreement as a basis for refusing to comply with its obligations" (para 117). This point of law does not even arise. The Labour Appeal Court correctly held that the collective agreement was invalid since inception. Therefore the issue of supervening (or "intervening") circumstances, which may justify refusal to perform or non-enforcement by court, is – at best for the unions – academic. Furthermore, it has always

been the law that a court retains a discretion to refuse specific performance, and this Court confirmed that in the public interest a court may and should refuse to do so. There is therefore no arguable point of law on this score.

217. As this Court confirmed, in order to qualify as "arguable" a point of law must at least have some prospect of success. In this case there is clearly none, because the point is inconsistent with this Court's judgments in *Barkhuizen* and *Beadica*. It is not permissible to contend, as SADTU does, that leave to appeal should simply be granted so that "the conclusions of the LAC (whether upheld or set aside) are considered by this Court" (para 117). To qualify for consideration by this Court the jurisdictional requirements set out in the Constitution must be met. They are not.

Ad paragraphs 118 to 122 of SADTU's founding affidavit: Interests of justice

218. I have already demonstrated that there is no reasonable prospect of success. This strongly militates against granting leave to appeal in the interests of justice, I am advised. Thus SADTU's first basis (prospects of success) on which it invokes the over-all interests of justice criterion operates against it.

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219. The second basis is fundamentally misconceived. SADTU claims that the court *a quo*'s judgment "has far-reaching implications on [sic] collective bargaining and the enforcement of agreements concluded as a result of collective bargaining" (para 119). This is incorrect. The judgment merely applies the rule of law and the principle of legality. The applicable principles and precedents have been articulated and applied by this Court since *Fedsure* and *Barkhuizen*. This Court further confirmed in *CUSA* that the same principles apply to collective agreements. Thus the principles and precedents are well-established. They do not warrant this Court's application, again, to the facts of this case.

220. The third basis on which SADTU contends leave to appeal should be granted in the interests of justice is self-defeating. SADTU effectively contends for, but forebears putting this sufficiently explicitly (as the PSA did, albeit contending for the application of estoppel, as I shall show), some adaptation of the Turquand rule to be extended to apply to Government. SADTU argues that leave to appeal should be granted presumably to establish, vindicate or apply the proposition that trade unions are entitled to accept that Government's conduct in concluding contracts are "lawfully mandated" and that offers by Government may be accepted and result in a binding collective agreement. This means that Government becomes the guarantor of legality, and whatever it thinks the legal position is becomes

binding. This is not the law. The law is that the public interest is served by upholding the rule of law. Government cannot be bound by what the law precludes. This is why neither estoppel nor the Turquand rule applies against Government, I am advised. NEHAWU effectively argues for the development of the law by this Court as court of first and final instance to drastically change a fundamental principle, and in so doing dilute the doctrine of legality. This is, with respect, inconceivable and clearly not in the interests of justice.

221. It follows that the interests of justice would clearly be undermined, with respect, by granting leave to appeal.

Ad paragraph 123 of SADTU's founding affidavit: Conclusion

222. For the reasons provided above I deny the conclusion for which SADTU contends. The proposition that any appeal "will also have a considerable public impact" cannot but detract from SADTU's case. The court *a quo* carefully considered the extensive public impact of the outcome for which SADTU and the other unions contended. The "impact" is far-reaching, and would precipitate severe prejudice to the public. It is therefore significant that whereas the "public impact" is invoked by the unions, SADTU cannot and does not aver that any such impact would be positive. The interests of

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justice are not served by granting an appeal resulting in considerable public prejudice if the appeal were to succeed.

223. Accordingly also SADTU's application for leave to appeal falls to be dismissed.

Paragraphs 1 to 25 of the PSA's founding affidavit: Formal recordals and citation of parties

224. The first quarter of the PSA's founding affidavit consists of formal recordals and the parties' details. None of this is contentious.

225. Much of the rest of the PSA's founding affidavit advances averments already addressed in traversing the previous founding affidavits. I shall accordingly limit the traversal to the more material matters, and seek to avoid unnecessary repetition.

Paragraphs 26 to 39 of the PSA's founding affidavit: Overview

226. It is correct that clause 3.3, which the unions seek to enforce in this litigation, operates only for the 2020-2021 financial year (para 30). It ends imminently, on 31 March 2021. The consequences of this fact for the relief ultimately sought by the unions are not addressed in the PSA's or any of

the other unions' founding affidavits. Nor the impact this has on their application for leave to appeal.

227. It is also true that the unions' claim "involves the potential payment of billions of Rand (para 33). The mere quantum of this claim already sets it apart from other collective agreements. So does the Covid-19 circumstances, which impose an unprecedented additional demand on already overburdened public funds, in which these billions of Rands are claimed.

228. It is also so that the point of law which the unions purport to pursue in the putative appeal to this Court "pertains to the enforceability of clause 3.3 of Resolution 1 in the circumstances of this particular dispute" (para 37). What this means is that the point of law purportedly pursued is peculiar to the parties and the facts of this specific case. The point of law purportedly raised is *not* one of general public interest. Moreover, this Court has already confirmed that contracts concluded contrary to law, and their enforcement contrary to public policy, cannot be countenanced. And it also already confirmed that the rule of law applies to all exercises of public power, including collective agreements. There is therefore no residual point of law of general public importance which remains to be determined by this Court for purposes of disposing of this matter. Were leave to be

granted, the matter merely entails the *application* of established principles to the facts of the "particular dispute", as the deponent puts it.

229. Save as aforesaid, the PSA's arguments advanced are denied. Clearly it is untenable to contend that the court *a quo*'s judgment "may indeed sound the death knell for collective bargaining as we know it" (para 38). If the deponent expresses his wish to continue concluding collective agreements which impose unbearable burdens on public funds, result in unsustainable and inequitable year-on-year inflation-beating and private-sector-outperforming salary hikes, and all of this in conflict with the empowering provision, then his nostalgia for a *modus operandi* "as we know it" is misplaced. It is also internally inconsistent to accept that the point of law "pertains" only to the "circumstances of this particular dispute" but then to contend for a general "death knell" to collective bargaining applying even beyond the public sector. The "death knell" construct is contrived and inconsistent with this Court's caselaw, which cautions against raising bogeys.

Ad paragraphs 40 to 58 of the PSA's founding affidavit: Background to the matter

230. I note the deponent's concession that the court *a quo*'s judgment indeed "accurately summarised" the "background to this matter" (para 40).

231. It is similarly noted that the PSA does not dispute the DPSA's description of the offer leading to Resolution 1 of 2018 as *unmandated* (para 44). It is quite correct that "no explanation why an unmandated offer was made" exists. But this only serves to exacerbate the illegality.

232. The same applies to the PSA recognition that what the "COM resolved" was "to seek guidance from a full Cabinet" (para 48). Thus if it is contended that the members of the COM acted through the resolution of COM, then this only serves to confirm the legality difficulty discussed above with reference to this Court's judgment in *SARFU*, its citation of Baxter, and the Supreme Court of Appeal's judgment in *Esau*.

233. Furthermore, the resolution by Cabinet was, the PSA accepts, simply that "the State could not withdraw the January offer" (para 49). Thus it is indeed common cause that even Cabinet did not approve or make the necessary budgetary commitments required by Regulation 79.

234. It is also not suggested by the PSA that National Treasury or the Minister of Finance at any stage reversed the position adopted in the 14 February 2018 letter, in which approval was conditional on prerequisites

which the unions themselves emphatically depose they have indeed "rejected" (para 50).

235. As regards the contents of the contractual clauses extensively reproduced in the paragraphs under reply, this. The contents of clause 3 are not in issue. It is the validity and enforceability of clause 3.3 which are contested. This is, as its founding affidavit *a quo* implies, why the PSA instituted an application under section 77(3) of the Basic Conditions of Employment Act 75 of 1997 instead of initiating dispute resolution processes before the bargaining council. Some of the other unions adopted the latter approach. This the PSA's founding affidavit *a quo* described as "incompetent".

236. The State has indeed given effect to clauses 3.1 and 3.2 in the previous financial years. If a further increase since 1 April 2020 is to be exacted on the CPI-beating base created by clauses 3.1 and 3.2, then the fiscal effect would be felt for years to come. This would unduly burden the State and impede its ability to comply with its constitutional obligations.

237. Conversely, if clause 3.3 is *not* implemented, the salaries which are already out of sync with the private sector would remain at their inflated level. The State did not seek to counteract the effect of clauses 3.1 and 3.2 (or any other benefit to employees conferred by any other provision of the

Resolution) in opposing the implementation of clause 3.3. This, too, bears on the issue of just and equitable relief, and demonstrates that even if it arises for consideration the court *a quo*'s exercise of its discretion is unassailable.

238. The same applies to the unions' persistent refusal "[b]etween 25 February and 25 March 2020" to entertain the State's attempts to obtain the unions' agreement to revise clause 3.3. Also the PSA proclaims that the unions "refused and insisted on implementation" (para 57) of clause 3.3 in its terms without any amelioration. In such circumstances the extraordinary relief now sought by some of the unions, requiring this Court to direct the parties to renegotiate clause 3.3 is not just and equitable. Renegotiation was spurned by the unions. Repeatedly and emphatically.

239. Before this Court the unions provide no principled basis for such stance, nor any rationale for now seeking this Court's intervention to permit them to adopt a directly contradictory posture. None of them even attempted to depose to any version denying that their conduct (namely to refuse renegotiation and insist on implementation of clause 3.3 in its terms) constitutes a binding election. I am advised and submit that it does, and that this precludes the relief for which some unions contend – while

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simultaneously also conceding the extraordinary (or "creative") nature of such relief.

Ad paragraphs 59 to 67 of the PSA's founding affidavit: Ratio of the LAC's judgment

240. I reiterate that the judgment speaks for itself. It deals explicitly in footnote 4 with the amount by which clause 3.3 exceeded the budget. There is therefore no merit in the contention that "[i]nsofar" as the LAC found that the budget was exceeded by R37.8 billion in respect of clause 3.3 instead of by R13.2 billion it was "wrong" and that this "impacted" on the court's conclusion that clause 3.3 was unenforceable (para 62). The correct position is that the court *a quo* concluded that the collective agreement did not comply with the empowering provision and was therefore invalid. The unenforceability was based primarily on invalidity, not the quantum by which available funds were exceeded.

241. There is no merit in the PSA's deponent's singular suggestion that National Treasury's presentation (which had been included as part of the annexures to Government's answering papers) somehow suffices or substitutes for approval as required under Regulation 39, if this is what the proposition in paragraph 65 obliquely suggests. The presentation explicitly states in bold

that "South Africa requires a public service wage settlement that keeps to the compensation ceilings, reverses the worsening composition of spending, and doesn't use up our limited contingency reserves". The presentation further records that the January 2018 offer exceeded the R110 billion baseline. It tables proposals intended to reduce the shortfall. (But these proposals were, the unions in unison depose, rejected by themselves.) National Treasury's presentation further identified two scenarios. The first entailed staying within the compensation budget. The second involved implementing the January 2018 offer, which exceeded the compensation budget, and in any event also required headcount reductions (which never occurred), and further engagements "to expeditiously resolve the impasse". The presentation concludes by recommending that "[t]he fiscal framework approved for the 2018 MTEF [had] to be upheld through implementing cost saving initiatives to boost confidence and enhance sustainability of public finances". It is therefore inconsistent with the terms of the presentation itself to suggest, as the PSA appears to attempt, that the January 2018 offer somehow enjoyed National Treasury's tacit acceptance (since "Treasury makes no attempt to disavow the proposed agreement" (para 65)). Least of all absent the implementation of the cost-cutting measures spurned by the unions.

242. Finally, the deponent's point regarding whether or not National Treasury had or should have stopped the transfer of funds to an organ of State if a serious or persistent material breach of prescribed measures occurred does not bear on the issues in this litigation. The jurisdictional facts for stopping transfers of funds have not been ventilated in the papers *a quo*, because this is extraneous to the relief sought. No mandamus or review regarding the implementation of clauses 3.1 and 3.2, and whether this qualified for intervention by National Treasury, was sought *a quo*. If the oblique contention is that the implementation of clause 3.3 must be inferred to be lawful because the transfer of funds had not been stopped before the implementation of clauses 3.1 and 3.2, then the logic fails in any event. Legality or illegality is not established or determined by past conduct.

Ad paragraphs 68 to 69 of the PSA's founding affidavit: List of grounds of appeal

243. None of the grounds of appeal identified in these paragraphs, and amplified subsequently, qualifies for this Court's consideration. They are neither arguable, nor in the interests of justice to consider (*inter alia* for lacking reasonable prospects of success). These jurisdictional requirements are

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conspicuously addressed only baldly in the "overview" section of the PSA's affidavit.

Ad paragraphs 70 to 76 of the PSA's founding affidavit: Substantial compliance

244. There is no merit in the first ground of appeal. Nor is it arguable.

245. I have already addressed the unions' attempt to contend that Cabinet's approach to Resolution 1 of 2018 somehow can substitute for the mandatory legal requirements governing Government's conclusion of collective agreements with fiscal implications. Furthermore, the specific resort to inferential reasoning by the PSA's deponent is directly contradicted by primary evidence in the form of Government's extensive affidavits. There is no genuine dispute of fact regarding the absence of a written (or any other) commitment by National Treasury, or written (or any other) agreement by other departments or agencies (least of all any such agreement approved, as Regulation 39 requires, by National Treasury). This factual dispute cannot be resolved in favour of the unions. Nor is such dispute of fact a matter which properly engages this Court's jurisdiction.

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246. In any event the PSA's resort to "substantial compliance" fails to meet this Court's caselaw. The latter makes it clear that that approach is outmoded. The PSA does not aver that the purpose of the statutory provision in question has been met by the form of "compliance" for which it contends. It therefore fails the test established by this Court in *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC), confirmed and applied in cases like *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC). The purpose of the statutory provision has not been met. Its purpose is precisely to prevent majority decision-making at Cabinet level. It specifically recognises the Constitution's specific status conferred on National Treasury as department of State with independent responsibility for fiscal affairs. As I have shown, this Court similarly recognised National Treasury's specific approval powers in *Black Sash Trust*, which is the offshoot of *Allpay*.

247. The statutory regime further recognises that budgets of specific departments should only be tapped into with their own specific consent, and not by *inference* as a consequence of collective Cabinet conduct. Cabinet conduct could rest on multiple mixed reasons and even political expediency. The conclusion of collective agreements with fiscal consequences requires the State department responsible for the budget as

contemplated by the Constitution to consider the issue from a public finance, not political or any other, perspective.

248. Similarly the statutory regime recognises that State agencies' budgets cannot be redrawn by Cabinet; instead, the written agreement by the agency in question is required. This is particularly important on the facts of this case. The State agency concerned in this case is the National Prosecuting Authority. Its Investigative Directorate is the independent national anti-corruption agency required – as this Court confirmed in its *Glenister* line of cases – by the Constitution, Article 5 of the African Union Convention on Preventing and Combating Corruption, and Article 36 of the United Nations Convention Against Corruption. Its constitutional independence is affected by the inference sought to be drawn by the PSA and other unions in support of their "substantial compliance" construct. It is constitutionally incompetent, factually incongruent, and at every level unarguable.

249. The PSA's argument is further untenable for attributing an entirely incorrect construct to the Labour Appeal Court's "findings", and what the deponent construes as the "implication of this logic" (para 72). The Labour Appeal Court did not "render findings" which "suggest" (the diffidence is justified) that clause 3.3 alone (and not Resolution 1 of 2018) is in breach of Regulation 79. The judgment is not susceptible to any such construct.

Nor are *findings* appealable, I am advised. It is quite correct, as the PSA accept, that "Regulation 79 provides that a collective agreement cannot be entered into at all unless there is compliance with the regulations" (para 73). The Labour Appeal Court specifically so held: it in terms held that "the collective agreement breached … Regulation 78 and 79" (para 33 of the judgment). None of its "findings" suggests that it is only clause 3.3 "alone" which violated Regulation 79. Nor its order, which is correctly not criticised on this or any other basis. The order reflects Government's stance that the past implementation of clauses 3.1 and 3.2 should not be undone, and that the unions' members be permitted to retain the benefits of these and other clauses of Resolution 1 of 2018. This, too, impacts on the issue of just and equitable relief.

250. Nor is National Treasury's *post hoc* conduct capable of constituting compliance with Regulation 79 (as para 74 contends). Firstly, the documents invoked for this proposition do not bear this out, as I have already demonstrated. Secondly, Regulation 79(b)(iii) requires "written agreement" by the departments and agencies concerned, together with the approval of National Treasury. Thus the *post hoc* informal ratification construct for which the PSA apparently contend cannot constitute compliance with Regulation 79(b)(iii). It is indeed this provision which, the PSA correctly accepts, is the applicable empowering provision.

Therefore the attempt to criticise the court *a quo* for not considering National Treasury's *post hoc* conduct is untenable.

251. It follows that there is no prospect of success on the first point. It is, in fact, unarguable.

Ad paragraphs 77 to 94 of the PSA's founding affidavit: Null and void

252. The second ground of appeal comprises various rolled-up subtopics. None is tenable.

253. The specious suggestion that voidness or nullity is not the result of non-compliance with the empowering provision is inconsistent with this Court's caselaw, the rule of law and the doctrine of legality. In *AMCU* this Court confirmed that the exercise of public power in concluding a collective agreement must "conform to minimum standards of lawfulness and non-arbitrariness." This Court also confirmed in *Khumalo* that the State must operate "within the confines of the law" in order to "remain[] accountable to those on whose behalf it exercises power." This is, as the Court confirmed in *EFF*, because the Constitution made "a decisive break from the unchecked abuse of State power and resources", and "adopted accountability, the rule of law and the supremacy of the Constitution as

values of our constitutional democracy." Hence this Court's insistence on Government's compliance with legal requirements intended to protect the public interest and resources by ensuring that public funds are applied in a democratically accountable manner.

254. The approach for which the PSA contends not only undermines the rule of law. It also repudiates this Court's conclusion in *EFF* that Government officials are slaves to the resources allocated to them. It enables the Executive effectively presenting Parliament with a *fait accompli*, forcing the reallocation of public funds away from constitutional imperatives to which Parliament through national legislation is required to give effect within limited financial resources (as this Court recognised in *Black Sash Trust*).

255. Contrary to the PSA's argument, it is quite clearly, I am advised, constitutionally impermissible to seek – as the PSA did *a quo* (and now seek to do before this Court) – specific performance of a contract despite non-compliance with the applicable statutory fiscal requirements. Even in a purely contractual setting (as the PSA pitched its case *a quo*, only now attempting to attribute to it some constitutional dimension) constitutional control continues to operate, as this Court confirmed in *Barkhuizen*. And even under a purely common law approach to the law of contract

agreements which are contrary to public policy are not enforced. Public policy is now derived from the Constitution. It requires accountability in the allocation of public resources, and compliance with the rule of law.

256. It has always been and still is, I am advised, the general legal position that even if (as the PSA's deponent puts it) "[n]o mention is made of agreements concluded in breach of the Regulations being null and void" (para 78.1) then the legal effect is nonetheless to render an unauthorised transaction null and void. Otherwise the very effect which the law seeks to prevent materialises. In this case the statutory intention is to prevent incurring fiscal consequences for which no funding exists. It can only be prevented if contracts concluded contrary to the regulations be visited with voidness. No statutory penalty exists under the regulatory regime, and no other statutory remedy is provided. Therefore, the ordinary outcome in instances of infringements of statutory provisions is also in this case the only competent interpretation of the empowering provision. This accords with the text of the provision (which provides that "only" if the fiscal conditions are met may the State enter into a collective agreement); the constitutional principle of legality; and the statutory purpose. It is imperative, I am advised, to give effect to these considerations. Neither the text, nor the constitutional context, nor the purpose of the provision supports the extraordinary construct for which the PSA contends.

257. The PSA's deponent's attempt to invoke what he construes as the purpose of Regulation 79 is demonstrably self-destructive. He states that the purpose of Regulation 79 is "to ensure that public sector employees can conclude a collective agreement safe in the knowledge that it has been properly budgeted for" (para 79). But this purpose is not served by the PSA's approach. As the facts of this case demonstrate, public sector employees could not conclude the agreement "safe" in such knowledge. They had actual knowledge at the time, as the papers *a quo* established, that no proper budgetary allocation existed or could be made. They knew, on their own affidavits, that cost-cutting measures were required. They emphatically repudiated any such measures, as their affidavits roundly record. Thus there is no purposive argument which supports the PSA's or any other union's construct.

258. It is, furthermore, clearly incorrect to contend, as the PSA is driven to do, for "the primacy of collective agreements" (para 78.3). The words "subject to any collective agreement" in section 2(a) does not render the Regulations subject to a collective agreement. It renders conditions of employment yet to be prescribed subject to a pre-existing and still operative collective agreement. It is specious to contend, as the PSA does (para 78.3), that national legislation is subjugated to agreements. This fails

to comprehend the rule of law. Law trumps contracts, not the other way round. Neither Government nor organised labour is in a constitutional state permitted to overrule the law, whether by contract or otherwise.

259. As regards the PSA's related reliance on the status of collective bargaining (paras 80-87), this fails to recognise this Court's judgment in *AMCU* to which I have already referred. To recapitulate, *AMCU* confirmed that also in concluding collective agreements Government must comply with the principle of legality. Thus non-compliance with empowering provisions results in nullity.

260. As regards the PSA's reliance on *pacta sunt servanda* (paras 88-91), this is inconsistent with first principle and precedent.

261. Firstly, the argument fails in logic. The legal effect of non-compliance with a statutory provision (i.e. whether "voidness/nullity" ensues) cannot conceivably be determined by this maxim. The maxim presupposes a valid pact, otherwise there would be no *pacta* capable of *servanda*. If the maxim could conceivably have found application to answer the question as regards the correct legal effect of non-compliance, then the principle of legality (which is also a common law requirement for a valid contract) would *never* find application. On such construct, consensus *sans* legality would suffice

for a binding contract. This is, I am advised, not the law: it is an essential requirement for the conclusion of a valid contract that the agreement be lawful. Therefore the deponent's criticism of the court *a quo* for supposedly ignoring some High Court judgment on this common law maxim for purposes of determining the effect of violating the rule of law (para 89) is flawed.

262. Secondly, the argument is inconsistent with precedent in the form of this Court's judgments in *Barkhuizen* and *Beadica*. These judgments confirm and reiterate the now well-established legal position: the principle *pacta sunt servanda* is itself subject to the Constitution and public policy. Public policy precludes specific performance in circumstances where this would result in unjust and unfair outcomes. Government specifically pleaded that withholding emergency Covid-19 remedial resources from the most vulnerable members of society for purposes of instead affording a year-on-year inflation-beating and private-sector-outperforming pay hike for public servants (who are also, unlike the private sector, the beneficiaries of job security in these difficult times) is not just and equitable. None of the unions denied this. It is a common cause and dispositive issue of fact. It is not an issue of law, least of all one of general public importance engaging this Court's jurisdiction. It is also not one which in the interests of justice should be entertained by this Court: it bears no prospect of success; it is an

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issue of *fact*; it is not even in issue; and it merely involves the application of established precedents by this Court.

263. Finally, the suggestion that "misrepresentations by the State" (paras 92-94) could somehow change the legal consequences of non-compliance with the empowering provision is equally untenable. It is, firstly, in law flawed. The same result must follow from a proper interpretation of the empowering provision. It cannot depend on the conduct (least of all *post hoc*) of the parties.

264. Secondly, in fact, there is no foundation for the allegation of any misrepresentation by the State. The founding affidavit provides no basis for this accusation. It is common cause that Government required cost-cutting measures because Resolution 1 of 2018 did not fall within the budget; that National Treasury required that the wage agreement remain within the budgetary ceiling; and that the unions unanimously refused any cost-saving measure. There was therefore no misrepresentation that the wage settlement was within budget. National Treasury furthermore explained the circumstances in which the non-compliance with Regulation 79 was detected. The PSA's founding affidavit is therefore also in this respect factually incorrect in asserting that "[n]o explanation has

been given" (para 93). Thus also on this basis the allegation regarding "misrepresentations by the State" is irresponsibly advanced.

265. Thirdly, and in any event, the proposition that a "misrepresentation" as regards compliance with an empowering provision could result in consequences prohibited by the empowering provision is legally incompetent. It is well-established, I am advised, that a contractant cannot confer powers to contract on itself by misrepresentation. Similarly, estoppel does not apply against the State, and in any event cannot be applied to create results which the law does not permit.

266. It follows that none of the arguments advanced by the PSA in support of its contention that voidness and nullity does not result from a violation of a clear and peremptory empowering provision is tenable.

Ad paragraphs 95 to 99 of the PSA's founding affidavit: Just and equitable relief

267. There is no merit in any of the allegations under traversal. The court *a quo*'s exercise of its discretion did not depend on the amount by which the compensation envelope had been breached. Even if the amount had been "only" R13.2 billion in 2018, this still forms a very substantial part of the

funds required for Covid-19 vaccinations and other constitutional obligations towards particularly vulnerable and poor constitutional right-bearers. The latter have at least an equal entitlement to have their constitutional rights respected.

268. The PSA's argument that the State is somehow solely responsible for breaching the compensation envelope, *ergo* it is just and equitable to enforce the wage agreement (despite the absence of available funds, and at the expense of the entire public amid the pandemic) is unfounded. Firstly, it is *because* the unions refused cost-cutting measures that the compensation envelope was breached. In such circumstances it is not just and equitable to reward organised labour's willful persistence in an unworkable wage settlement by enforcing clause 3.3. Doing so would incentivise the adoption of bargaining positions which inevitably result in unsustainable wage bills, with the resulting effect on the entire economy and budget. The unsustainable wage increases were, moreover, the progeny of an unmandated offer. With full knowledge (or at the very least constructive knowledge) of the fiscal fiasco wrought by a ballooning wage bill the unions insisted on a wage agreement along the lines of the unmandated offer. It is therefore incorrect to contend that the State has singlehandedly created the unsustainable situation.

269. What is, however, correct (but not disclosed with the same alacrity as *a quo*) is that the State singlehandedly sought to ameliorate the situation. Singlehandedly, because the unions have refused to negotiate in good faith when clause 3.3's unaffordability was broached.

270. Government's attempts to renegotiate clause 3.3 commenced even before Covid-19 struck South Africa. Unfortunately, despite the obligation under clause 16.3 of the bargaining council's constitution to attempt to agree on a negotiation process (thus to negotiate in good faith), the trade unions refused to engage and insisted on the implementation of clause 3.3 (as paras 38.5 and 39.5 of the PSA's founding affidavit filed *a quo* reflect). As the same deponent deposed on behalf of the PSA *a quo*, the unions were "not willing to engage" (para 39.5 of the PSA's founding affidavit filed *a quo*). The PSA persisted – even, in its own words, "during the period of the national lockdown" – in its stance (para 40 of the PSA's founding affidavit filed *a quo*). The PSA resolutely resisted even subsequent attempts by Ms Yoliswa Makhasi (the Director-General of the DPSA) to implore Mr Leon Gilbert (the PSA's deponent) to return "to the [bargaining] council to continue engagements through council processes" (as an annexure to the PSA's founding affidavit *a quo* reveals). Indeed, the PSA emphatically and consistently "reject[ed] <u>any</u> renegotiation of clause 3.3" (para 44 of its founding affidavit *a quo*, emphasis added).

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271. Furthermore, even if fault is the relevant criterion in granting just and equitable relief, and even if all fault could somehow be attributed to Government, then it is still not just and equitable to prejudice the public. The public is entirely innocent of the whole affair. Yet it is the public that will suffer should the so-called "just and equitable" relief for which the PSA contends to be granted. The relief for which it contends is, I reiterate, yet another year-on-year increase, outperforming both inflation and the private sector's salaries. This in Covid-19 economic conditions. And it is sought in the exercise of this Court's remedial discretion, which requires the substitution of the discretion exercised unanimously by the court *a quo*. But no tenable case for interfering with the court *a quo*'s exercise of its discretion is established.

272. The PSA's attempt now to make out a case on the basis of just and equitable relief is inconsistent with its founding affidavit *a quo* and the context in which this matter was brought before court and the framework in which it must be determined.

273. The PSA's founding affidavit filed *a quo* explicitly claimed section 77(3) of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA") as basis on which the court *a quo*'s jurisdiction was invoked. The BCEA's

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purpose is "to advance economic development and social justice by fulfilling the primary objects of this Act". The Act's primary objects are to give effect to the right to fair labour practices (which the PSA did not even invoke), and to give effect to South Africa's obligations as a member of the International Labour Organisation ("the ILO").

274. At the time of deposing the Government's answering papers *a quo* the ILO's data on the impact on the labour market of the Covid-19 pandemic already demonstrated the devastating effect on workers, particularly in the informal economy, and on hundreds of millions of enterprises worldwide. It reported that 1.6 billion workers in the informal economy (comprising almost half of the global workforce) stand in immediate danger of having their livelihoods destroyed. These employees are the most vulnerable in the labour market, the ILO states. In South Africa the most secure employees are those employed in the public sector.

275. The ILO data further reflects that the first month of the Covid-19 crisis is estimated to have resulted in a drop of 60% in the income of informal workers globally, and a drop of 81% in Africa. Without alternative income sources, these workers and their families will have no means to survive, the ILO observes.

276. The latest South African data reflects that the ILO's projections were sound. These are contained in StatsSA's Quarterly Labour Force Survey for the third quarter of 2020. It only became available after deposing to my affidavit *a quo*, and contains incontrovertible statistical data capable of easy verification. The survey records that during the third quarter of 2020 there had been 1.7 million fewer people employed than in the same quarter of the previous year. This signifies a decline in employment of more than 10%. As the ILO predicted, the more vulnerable employees' jobs were particularly affected. In South Africa 13% of domestic workers and 18% of workers in the informal sector had lost their jobs.

277. In this light the South African Government was clearly required to adopt wide-ranging emergency measures to avert fatalities from financial and medical conditions following the pandemic. In doing so it has heeded the ILO's "calls for urgent, targeted and flexible measures to support workers and businesses, particularly smaller enterprises, those in the informal economy and others who are vulnerable." At the same time Government not only continued to preserve public sector jobs. It also continued to pay the full salaries of the category of civil servants represented by the unions participating in this litigation. These salaries, I reiterate, have already been inflated by multiple increases over many years – above both inflation and private sector salaries.

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278. Civil servants in other categories (i.e. those on salary levels 13 to 16, namely senior managers) have since 2008/09 consistently received increases at or below CPI. Similarly, since 2019 members of Parliament and provincial legislatures and executives of public entities forewent salary increases. With effect from 1 December 2019 Cabinet members, Premiers and MECs' salaries were frozen at then-current levels. Although a 3% increase was recommended by the Independent Commission for the Remuneration of Public Office-Bearers, Cabinet members received no increase at all. The Commission recommended a 4% increase in salaries of members of Parliament. However, they accepted an increase of only 2.8% (which is below inflation, and therefore not an increase in real terms). And, as mentioned, unions in the steel sector accepted wage freezes already in 2019.

279. Thus the unions' members are not only in a vastly more favourable position when compared to their peers internationally or to the private sector, but also when regard is had to their more senior colleagues in the public sector. As the relatively recently published StatsSA's Quarterly Employment Survey reflects, salaries and wages paid in the third quarter of 2020 in the private sector were over 9% lower than in the same quarter of the previous

year. However, the public sector experienced an aggregate salaries and wage *increase* of 1%.

280. Therefore the suggestion that it is, in all the above circumstances and the current Covid-19 conditions, just and equitable to pay a yet further salary increase by implementing clause 3.3 – and this despite its illegality – is unarguable. No basis for interfering with the court *a quo*'s exercise of its discretion exists, and nothing in the paragraphs under traversal (or any other part of any of the unions' papers) establishes the contrary.

Ad paragraphs 100 to 101 of the PSA's founding affidavit: What this Court "is to provide"

281. The PSA's founding affidavit concludes by making the curious request that this Court "is to provide some guidelines as to what ought to happen in matters such as the present one". What these "guidelines" should or could entail is not suggested, and has not been thought up or ventilated by the PSA or anyone else *a quo*.

282. Clearly such "guidelines" cannot conceivably relate to renegotiation. When Government sought to engage the unions, these attempts were (as mentioned) roundly rejected by them. The unions refused throughout to

accept a responsibility to negotiate and renegotiate in good faith. First by holding Government to an unmandated offer. Then by refusing to renegotiate, even despite the crushing effect of Covid-19.

283. It follows that also the PSA's founding affidavit fails to acquit itself of the burden resting on the unions to establish a case properly engaging this Court's jurisdiction for purposes of granting leave to appeal.

Ad NUPSAW's affidavits

284. The final union seeking leave to appeal is the National Union of Public Service and Allied workers ("NUPSAW"). It filed its founding affidavit well out of time.

285. In NUPSAW's accompanying condonation application the reason for the non-compliance with the Rules of this Court is simply that its attorney had been on holiday for the entire period of *dies non* and its counsel had contracted and recovered from Covid-19.

286. NUPSAW's counsel's recovery is good news, but it is not a good basis for condonation. This is because there is no substantiated averment that his self-isolation (he is not stated to have been ill) prevented the settling of the

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very short affidavit eventually filed at any earlier opportunity. This under any circumstances would have been effected electronically anyway.

287. In this and other respects NUPSAW's affidavit filed in support of its condonation application does not, I am advised, comply with this Court's clear and well-established caselaw governing condonation. It does not provide the full and detailed information required. It signally fails to explain why an affidavit that merely piggybacks on the PSA's affidavit (and which comprises only four pages, apart from the citation of the parties) required a delay of six court days in addition to the six days since NUPSAW's counsel's two-week isolation period expired.

288. The prejudice to the administration of justice is clear: it truncates the already limited time before the expiry of the operation of clause 3.3 for this Court to dispose of this matter. It also required the Government respondents to make alternative arrangements to address the founding affidavits in a coherent and consolidated form within the ten court days permitted. Furthermore and in any event, the prospects of success are – for the reasons provided in this affidavit – poor.

289. Indeed, the poor overall prospects of success already demonstrated in traversing the other unions' founding affidavits are compounded by

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NUPSAW's founding affidavit. It specifically resorts to estoppel, and expressly seeks to invoke it (para 4.9). In this respect NUPSAW's approach is consistent with SADTU's and the PSA's stance. Both of the latter unions' cases depend, albeit more obliquely, on estoppel effectively being applied. Applying estoppel to undermine a mandatory legal requirement is clearly contrary to the rule of law. It is legally incompetent on well-established authority which none of the unions ask this Court to overrule. Overruling it would, moreover, require this Court to change the law dramatically while sitting as a court of first and final instance. This on a crucial issue with far-reaching consequences, also for the rule of law itself. Hence any case relying directly, indirectly, explicitly, implicitly, wittingly or unwittingly on estoppel – as the unions' case quite clearly does – is unarguable and should not be entertained in the interests of justice.

290. None of the other propositions baldly advanced in NUPSAW's founding affidavit has any legal merit, I am advised. They range from the risible reliance on the "old age [sic] principle of *caveat subscriptor*" to the contention that Government has "condoned" its own non-compliance with fiscal restrictions. They are clearly flawed in their own conclusory terms. And they are in any event asserted in terms which do not, I am advised, contain any factual version requiring traversal.

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291. Finally, the accusation that Government's reliance on the rule of law and the legality of clause 3.3 and Resolution 1 of 2018 is "self-serving" (para 4.2) is unfounded. In advancing it without providing any factual basis, NUPSAW's deponent simultaneously also forebears to engage at all with Government's extensive affidavits *a quo*. They establish Government's concern to act in the best interests of the country, all its people (not only public servants), and particularly the poor and those devastated by the Covid-19 pandemic.

292. It is, with respect, the unions' approach which is self-serving. They litigate only in the financial interests of their members. They have exploited an unsustainable situation to the prejudice of the whole country.

293. While the entire nation and the world stare severe strive in the face as a result of job losses and salary sacrifices consequent on Covid-19 economic conditions, the unions claim a yet further year-on-year inflation-beating and private-sector-outperforming salary increase involving billions of Rands. This when the State must scrape together whatever funds (currently estimated as in deficit by over R200 billion) can be mustered to fund vaccines and provide other emergency relief (estimated to require between R20 billion and R24 billion).

F. Conclusion

294. Resolution 1 of 2018 is clearly invalid and in any event unenforceable. The Labour Appeal Court's unanimous conclusion to this effect is demonstrably correct. This is *inter alia* because the collective agreement in general and clause 3.3 in particular infringes, firstly, the legal requirements governing its conclusion, and therefore the principle of legality. Secondly, it violates the doctrine of separation of powers, in that Parliament did not approve or ratify the expenditure. Third, it is repugnant to public policy, manifested now by constitutional values, and prejudicial to the public interest, both of which require that Government's section 7(2) constitutional obligations to fulfil fundamental rights be given effect. Fourth, enforcing the clause does not qualify as just and equitable relief in the current circumstances, where the Covid-19 pandemic impacts severely on Government's fiscal constraints, and the plight of the poor enjoins Government to apply such funds as can be sacrificed to alleviate human suffering and save lives.

295. Neither the papers filed in this Court nor the papers filed *a quo* suggest that even one single civil servant has suffered or is suffering severe prejudice as a result of the non-implementation of clause 3.3 of Resolution 1 of 2018. They are still being paid full salaries. For the past decade now public-

sector salaries have outperformed increases in the private sector, and consistently outpaced inflation. There is therefore no equitable basis on which the Labour Appeal Court could have come to a different conclusion. Nor is there any basis for interfering with the exercise of its discretion.

296. The unions accordingly have failed to establish either of the two bases on which this Court exercises appeal jurisdiction. It follows that the application for leave to appeal falls to be dismissed.

DONDO MOGAJANE

The deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at PRETORIA on this the 19th day of February 2021, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

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DIVISION: VISIBLE POLICING
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