**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**
Case No: 986/2016

In the matter between:

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| **ANTONY LOUIS MOSTERT NO** | **APPELLANT** |

and

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| **THE REGISTRAR OF PENSION FUNDS** | **FIRST RESPONDENT** |
| **THE CHIEF MASTER OF THE HIGH COURT** | **SECOND RESPONDENT** |
| **THE MINISTER OF FINANCE** | **THIRD RESPONDENT** |
| **RAYMOND S HISLOP** | **FOURTH RESPONDENT** |

**Neutral citation:** *Mostert NO v The Registrar of Pension Funds* (986/2016) ZASCA 108 (15 September 2017)

**Coram:** Lewis and Saldulker JJA and Tsoka, Gorven and Ploos van Amstel AJJA

**Heard:** 24 August 2017

**Delivered:** 15 September 2017

**Summary**: Promotion of Administrative Justice Act 3 of 2000: 180 day period in s 7(1): whether court a quo could have raised the delay *mero motu:* when the period commenced to run: whether there was compliance with s 7(1).

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**ORDER**

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**On appeal from:** Gauteng Local Division, Johannesburg (Van der Linde J sitting as court of first instance).

The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

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**JUDGMENT**

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**Ploos van Amstel AJA (Lewis and Saldulker JJA and Tsoka and Gorven AJJA concurring):**

[1] The issue in this appeal is whether the court a quo erred in dismissing an application for a review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) on the basis that the proceedings were not instituted within the period of 180 days prescribed in s 7(1) of PAJA. Allied to this is the question whether the court a quo could have raised the delay *mero motu*, or whether the third respondent should have been allowed to contend in argument that the court had no power to hear the review for want of compliance with s 7(1), when it had not done so in the papers.

[2] The appellant is one of the joint liquidators of the Picbel Groepvoorsorgfonds (the Fund), a pension fund under the provisions of the Pension Funds Act 24 of 1956 (the PFA). He sought an order in the Gauteng Local Division, Johannesburg, declaring

regulation 35(4) of the regulations promulgated in terms of s 36 of the PFA to be ultra vires and unenforceable. In the founding affidavit the scope of the attack on the regulation was broader than this. It was contended there that the making of the regulation constituted an administrative action for the purposes of PAJA and that it was in breach of s 6(2) thereof in that it was not authorised by the empowering provision, and was not rationally connected to the purpose of the empowering provision. It was further contended that it was otherwise unconstitutional and in breach of s 1(*c*) of the Constitution.

[3] The application was dismissed by Van der Linde J, who held that he had no power to entertain the review as the application was not instituted within the period of 180 days specified in s 7(1)(*b*) of PAJA. There was no application before him to extend the period in terms of s 9. The appeal before us is with his leave.

[4] It was contended before us, on a number of grounds, that the learned judge erred, that his decision should be set aside and that the application should be referred back to the local division for a decision on the merits.

[5] The appellant launched the application in the court a quo and prosecuted the appeal before us with the written authority of his co-liquidator. The Registrar of Pension Funds, who is the first respondent, delivered a notice to the effect that his only interest in the matter relates to the merits and that he abides the decision of this court. The second respondent is the Chief Master of the High Court and the fourth respondent a

former representative of the members of the Fund. Neither of them participated in the proceedings in the court a quo, nor in the appeal. The Minister of Finance, who is the third respondent, opposed the appeal and supported the order made by the court a quo. For the sake of brevity I shall refer to him as 'the Minister'.

[6] Regulation 35(4) was made by the Minister pursuant to his powers in terms of section 36 of the PFA and published in the Government Gazette on 22 April 2003. The parties approached the matter in the court a quo on the basis that the making of the regulations by the Minister constituted administrative action as defined in PAJA, and the court a quo adopted the same approach. Van der Linde J referred to the decision in *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC) and said that in view of the approach by the parties before him it would be inappropriate to investigate whether in this case also the making of the subsidiary legislation constituted 'administrative action'.

[7] The appeal before us was argued on the same basis as the appellant was constrained to accept that the making of reg 35(4) constituted administrative action and was subject to PAJA. This was the case that he sought to make in the court a quo and this was the basis on which the case was decided there.

[8] A word of caution may not be out of place. *New Clicks* is no authority for the proposition that the making of regulations by a minister, in general, is administrative

action for purposes of PAJA. It seems, with respect, that the statements in some of the other judgments in that case, to the effect that this is what Chaskalson CJ held, were based on a misinterpretation of what he said. The learned Chief Justice said what is or is not administrative action for the purposes of PAJA is determined by the definition in section 1.[1] He analysed the regulations in question[2] in the light of the definition, concluded that legislative administrative action has not been excluded from the definition of administrative action, and said:

'It follows that the making of the regulations *in the present case* by the Minister on the recommendation of the Pricing Committee was "a decision of an administrative nature". The regulations were made "under an empowering provision". They had a "direct, external legal effect" and they "adversely" affected the rights of pharmacists and persons in the pharmaceutical industry. They accordingly constitute administrative action within the meaning of PAJA'. (My emphasis).

[9] In a separate judgment Ngcobo J expressed the view that PAJA applied to the specific power to make regulations conferred by s 22G (2)(a)-(c) of the Medicines and Related Substances Act 101 of 1965 (Medicines Act). He emphasised that he refrained from deciding whether PAJA is applicable to regulation-making in general. Two of the judges in that matter expressed their agreement with this approach while Sachs J held that PAJA was not applicable, save in the specific respect of fixing the precise amount chargeable as a dispensing fee. Moseneke J held that it was unnecessary to decide

[1] Para 132.
[2] The regulations were those promulgated on 30 April 2004 by the Minister of Health, purportedly in terms of s 22G of the Medicines and Related Substances Act 101 of 1965 (the Medicines Act).

whether PAJA applied to ministerial regulation-making, and four judges concurred in his judgment.

[10] In dealing with the applicability of PAJA to regulation-making Chaskalson CJ was therefore not speaking for the majority of the court, and, as I have tried to show, in any event confined himself in this regard to the specific regulations that the court was dealing with. It seems, with respect, that in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) the position was also stated too widely (para 10). The final word on regulation-making and the applicability of PAJA to it may therefore not have been spoken. And as this matter shows, not all the provisions of PAJA, and particularly s 7, are tailored for the review of a regulation.

[11] The appellant's main approach before us was that the court a quo erred in allowing the s 7 point to be argued. It was also submitted that the time-bar in s 7(1) does not apply in the present matter and that the court a quo in any event erred in finding that the proceedings had not been instituted within the 180 day period mentioned in the section.

[12] Section 7(1) provides that any proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became

aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.[3]

[13] In terms of s 9 of PAJA the period of 180 days may be extended for a fixed period by agreement between the parties or, failing such agreement, by a court on application by the person or administrator concerned. Such an application may be granted where the interests of justice so require.

[14] I think it will be useful to have regard to the papers that were before the judge in the court a quo as their content would have been relevant to the approach that he took. The following facts were set out in the appellant's founding affidavit.

[15] The Fund was established on 21 October 1971 as a defined benefit fund, to incorporate the various pension fund organisations operated by its then principal employer, Picardi Beleggings Beperk (Picardi). By 1 July 1994 the Fund had no active members and only 62 pensioners. Picardi's business activities had by then been reduced to that of an investment holding company under the control of the Pickard family. The Fund was closed to new members with effect from 31 December 2001 and all active members were transferred out of the Fund.

[16] The business of the Fund was provisionally placed under curatorship on 17 October 2005 in terms of the Financial Institutions (Protection of Funds) Act 28 of 2001.

[3] The provisions of s 7(1) regarding internal remedies are not relevant for current purposes.

The appellant was one of the two curators appointed by the court. The order was made final on 13 December 2005.

[17] On 18 April 2008 the Fund was dissolved voluntarily in terms of s 28(1) of the PFA and the appellant was appointed as one of the joint liquidators.

[18] The appellant said it became clear soon after his appointment as curator that the records of the Fund were incomplete, inaccurate and inconsistent. This made it difficult to determine the Fund's historic membership and to trace its former members. Attempts to do so met with little success. The relevance of this lies in s 15B of the PFA.

[19] Section 15B(1)(*a*) requires the board of every fund that commenced prior to 7 March 2002 to submit to the registrar a scheme for the proposed apportionment of any actuarial surplus in the fund. Subsection (4) provides that the board shall determine who may participate in the apportionment of actuarial surplus and shall include in such apportionment existing members and any former members who left the fund in the period from 1 January 1980 to the surplus apportionment date. The proviso to subsection (4) provides that the board may exclude from participation former members, in respect of whom the board satisfies the registrar that insufficient records are available, to enable the additional benefits that may be due to such former members to be calculated, after the board has taken reasonable steps to obtain or construct such records in the manner set out in subsection 4(*a*). Subsection (4)(*b*), which is also part of the proviso, states that, rather than excluding former members whose individual benefits

cannot be determined, the board may set aside a portion of the actuarial surplus in a contingency reserve account explicitly established to satisfy claims of former members in terms of subsection (5)(*e*).

[20] Subsection 5(*e*) provides that the board shall determine how, in the case of existing members and former members, the allocated portion of actuarial surplus shall be applied for their benefit, provided that the board may allocate a portion of the actuarial surplus to be used for former members to a contingency reserve account, which will be used to satisfy the claims of former members who have been identified in subsection (4)(*a*) but who cannot be traced, or who substantiated their claim only after the end of the period referred to in subsection (5)(*e*)(ii).

[21] The surplus apportionment scheme submitted by the Fund, which was approved by the registrar on 11 May 2012, reflected that at the surplus apportionment date the Fund's membership, for purposes of its surplus apportionment, consisted of 55 pensioners and 12082 former members who exited from the Fund between 1 January 1980 and 30 June 2004. The appellant said the latter group may, in terms of s 15B(4), be eligible to receive a share in the surplus if their minimum benefits can be calculated. The majority of them have, however, not been traced and it is highly unlikely that they will be traced.

[22] Regulation 35(4) reads as follows: 'Where a board is able to determine the enhancements due in respect of a particular former member in terms of s 15B(5)(*b*) or

(*c*) of the Act, but is unable to trace that former member in order to make payment, the board shall put the corresponding enhancement into a contingency reserve account specific for the purpose. Notwithstanding anything in the rules of the fund, moneys may not be released from such contingency reserve accounts except as a result of payment to such former members or as a result of crediting the Guardians Fund or some other fund established by law to include such amounts.'

[23] The appellant said a sum of approximately R41,8 million will have to be dealt with in terms of reg 35(4) as unclaimed benefits and will ultimately have to be deposited into the Guardians Fund or some other fund established by law, as there is little or no prospect of these benefits being paid to the former members contemplated in the regulation. He contended that once the money has been deposited into the Guardians Fund it will effectively be lost to members of the Fund. He says if the review application succeeds and reg 35(4) is set aside, the money will be used, in terms of a revised surplus apportionment scheme, for top-ups to former members who had received less than the minimum benefits they were entitled to.

[24] In those circumstances the appellant applied for an order declaring reg 35(4) irrational, ultra vires and unenforceable.

[25] Against this background the question arose whether the review proceedings were instituted within the 180 day period mentioned in s 7(1). The point was first raised in the appellant's heads of argument in the court a quo. He said nothing about it in his

papers nor did he apply for an extension of the period in terms of s 9. None of the respondents took the point in the answering affidavits either. Counsel for the Minister informed us from the bar that this was an oversight.

[26] The submission was made in the appellant's heads of argument that the Minister had not raised the question of undue delay in the answering affidavit and that as such, to the extent necessary, he had tacitly consented to the extension of the period of 180 days. It was also submitted, with reference to *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC) para 53, that the court was not precluded from raising the issue of undue delay *mero motu* if it was satisfied that the delay was inordinate and that the applicant had been given an opportunity to explain the delay. The submission was made that there had been no delay and that, in any event, the applicant had not been called upon or given an opportunity to explain any delay. It was also submitted that the 180 day period could only commence when the enforcement of the regulation affected the Fund directly, and not on the date that it was published in the Government Gazette.

[27] The Minister contended in his heads of argument that the review application was not properly before the court in the absence of a condonation application for the late institution of the review proceedings. It was submitted, with reference to *Opposition to Urban Tolling Alliance & others v The South African National Roads Agency Ltd & others* [2013] 4 All SA 639 (SCA), that if the application was out of time, and in the absence of condonation, the court had no authority to deal with the application. The

court was therefore obliged to determine whether the application was out of time. It was disputed that the Minister had agreed to an extension of the 180 day period, and pointed out that there was no evidence to this effect. It was submitted that the period commenced to run when the regulation was promulgated, alternatively at the very least on 1 July 2004, which was the surplus apportionment date of the Fund. It was further pointed out that the appellant was appointed as a curator of the Fund on 17 October 2005 and as a liquidator on 18 April 2008, and that the Fund's surplus apportionment scheme was approved by the registrar on 11 May 2012. It was submitted that the regulation at the latest affected the Fund at that time. The application for the review was launched on 26 February 2015.

[28] The appellant's heads of argument in the court a quo were dated August 2015, the Minister's heads of argument were dated 4 February 2016 and the matter was argued on 14 June 2016.

[29] When the matter came before the court a quo the appellant did not apply for leave to deliver a further affidavit in order to deal with the alleged delay, or with the question when the 180 day period started to run. Nor was there an application for an extension of the period in terms of s 9, or a request for an opportunity to make one. There is no indication in the judgment that the appellant objected to the point being argued. The application was then fully argued, including the issue whether the application had been instituted within the period of 180 days, with two counsel on each side.

[30] Van der Linde J held that he had no power to entertain the review as the application had not been instituted within the period of 180 days. He dismissed the application and, as had been agreed between the parties, made no order as to costs.

[31] The first issue raised by the appellant in this court is whether the court a quo could *mero motu* have raised the question of non-compliance with s 7(1), and whether it should have allowed the Minister to argue the point, in circumstances where he had not raised it in his answering affidavit.

[32] As I have mentioned, the point was first raised in the appellant's own heads of argument, dealt with in the Minister's heads of argument and raised by counsel in argument. In those circumstances it cannot be said that the learned judge raised the point *mero motu*.

[33] In any event, in *Camps Bay Ratepayers* Brand AJ said (para 53) that there is authority for the proposition that at common law it is open to a court to raise the issue of inordinate delay in bringing a review application *mero motu*. He said this is in accordance with the established principle that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party was guilty of unreasonable delay in initiating the proceedings. He said he could think of no reason in principle why this should not be the position under the Constitution and PAJA as well. He then added the following:

'Of course, similarly to what was held in *Mamabolo*, a court will only raise section 7(1) of PAJA of its own accord where the delay is manifestly inordinate and even then, only when the applicant had been given an opportunity to explain the delay'.

This does not literally mean that the court will not raise the point *mero motu* unless the applicant had been given an opportunity to explain the delay. In *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) Mthiyane JA said (para 10) that where a court wishes to raise the point, the least it should do is give an applicant an opportunity to supplement the affidavits in order to deal specifically with the apparent delay.

[34] The approach under PAJA to a delay is not the same as under the common law. Under the common law a court may refuse to hear a review if there has been an unreasonable delay in instituting the proceedings. What would constitute an unreasonable delay would depend on the circumstances. See in this regard *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) para 79. Section 7(1) of PAJA provides that proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the dates specified in subsections (a) and (b). In *Opposition to Urban Tolling Alliance* Brand JA said (para 26):

'At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned… Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue

of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all.'

[35] It follows in my view that where it appears to the court on the papers that there has been a manifest delay and that the proceedings may not have been instituted within the period of 180 days, it will be entitled to raise the point itself as such a delay will be unreasonable per se and the court will not have the power to entertain the review. As was said in *Camps Bay Ratepayers and Residents' Association* the applicant should then be given an opportunity to deliver a further affidavit to explain the apparent delay, or apply for an extension in terms of s 9. It will, of course, be entitled not to do so and to argue the matter on the papers as they stand.

[36] This brings me to the question whether the court a quo erred in allowing the Minister to raise the point when he had not done so in his papers. Where it appears from the applicant's papers that there had been a delay of more than 180 days, and there is no application for an extension of the period, a respondent is in my view entitled to raise the point in argument that the court has no power to hear the review. This is not raising a defence – it is a submission that, on the applicant's own papers, the court has no power to entertain the review. If the court is entitled to raise the point *mero motu* then there can be no reason why the respondent should not be allowed to raise it. It was in any event dealt with by both parties in their heads of argument, and the appellant elected not to seek leave to file a further affidavit.

[37] I do not agree with the submission that the time bar in s 7(1) is the same as a special defence of prescription. Section 17(1) of the Prescription Act 68 of 1969 provides that a court shall not of its own motion take notice of prescription. Sub-section (2) provides that a party to litigation who invokes prescription shall do so in the relevant document filed of record. There is no similar provision in PAJA. Where the proceedings were not instituted within the periods specified in s 7(1) a court has no power to hear the review.

[38] I do not consider that in those circumstances the learned judge erred in allowing argument on the s 7 point. It does not follow that every applicant for judicial review in terms of PAJA has to demonstrate in the founding papers that there has been no unreasonable delay. If there is no indication in the papers that there may have been such a delay the position may well be that it is then up to the respondent to raise the point in its answering affidavit. This does not arise in this case and we need not decide that point.

[39] It was submitted on behalf of the appellant that, although it was accepted that the making of the regulation constituted administrative action, and that the provisions of PAJA apply to it, the time - bar in s 7(1) does not apply to it. Counsel pointed out that reasons are not normally available for the promulgation of regulations and submitted that the wording of s 7(1) is not appropriate to a review of the making of a regulation under PAJA.

[40] I do not consider that such an interpretation of s 7 can be justified. On the plain wording of s 7(1) the time-bar applies to ‘any proceedings for judicial review’. It must be read with s 5, which deals with reasons for administrative action. Section 5(1) provides that an affected person who has not been given reasons for the administrative action may, within 90 days after the date on which that person became aware of the action, or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action. Subsection (2) provides that the administrator concerned must furnish adequate reasons within 90 days after receiving the request. Subsection (3) provides that if the administrator fails to furnish such reasons it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason. Subsection (4) provides that the administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

[41] It follows that reasons for an administrative action will not always be furnished. There is no obligation to furnish reasons where they have not been requested, save in those cases specified in a list published by the Minister in terms of s 5(6)(*a*), in respect of which the administrator concerned must automatically furnish reasons without a request therefor. And, as I have pointed out, an administrator may decline to furnish reasons if it is reasonable and justifiable to do so. Moreover, the request for and the

furnishing of reasons are appropriate when a decision is made that affects a particular person. It is not as a rule appropriate to ask for reasons for the promulgation of regulations.

[42] If it is accepted that PAJA applies to a review of the making of a particular regulation, which is the position in the case before us, then I see no reason why the provisions of s 7(1) do not apply to such a review.

[43] I turn to consider when the period of 180 days commenced to run. In *Opposition to Urban Tolling Alliance* Brand JA said the following (para 27):

'In its terms s 7(1) envisages asking when "the person concerned" was informed, or became aware, or might reasonably be expected to have become aware, of the administrative action. This admits of an answer where the act affects and is challenged by an individual, but does not readily admit of an answer where it affects the public at large. In that situation it would be anomalous – if not absurd – if an administrative act were to be reviewable at the instance of one member of the public, and not at the instance of another, depending upon the peculiar knowledge of each. It seems to me that in those circumstances a court must take a broad view of when the public at large might reasonably be expected to have had knowledge of the action, not dictated by the knowledge, or lack of it, of the particular member or members of the public who have chosen to challenge the act.'

[44] I do not think that the public at large, as referred to by Brand JA, was necessarily intended to be a reference to the general public. In this case it seems to me to refer to those members of the public who are involved with the pension fund industry, such as

administrators, board members, principal officers, some employers, curators and liquidators. Evidence of actual knowledge is not required. What is required is a broad view of when the public at large might reasonably have been expected to have become aware of the action. In *New Clicks* Chaskalson CJ referred, in a slightly different context, to the fact that the impugned regulations adversely affected the rights of pharmacists and persons in the pharmaceutical industry.

[45] Van der Linde J approached the matter on the basis that an applicant for review should place evidence before the court of the date on which he acquired actual knowledge of the administrative action and the reasons for it. He also held that if the administrator wants to rely on an earlier date, namely one by which the applicant might reasonably have been expected to have become aware of the action and the reasons, then the administrator should place the relevant evidence before the court. He pointed out that the application for review was brought on 27 March 2015, well outside the 180 day period after the date of the administrative action, which was 22 April 2003.

[46] The learned judge then referred to the respondent's argument, with reference to facts that were common cause on the papers, that at best for the appellant the latest date by which he might reasonably have been expected to have become aware of the action and the reasons for it, was 11 May 2012. That was the date on which the Registrar approved the Fund's surplus apportionment scheme. The learned judge said that had it been necessary to determine what he referred to as the 'deemed knowledge date', he would have held that 11 May 2012 was the date by which the appellant might

reasonably have been expected to have become aware of the action and the reasons for it.

[47] The learned judge then concluded, as I understand the judgment, that in those circumstances the appellant had not shown that the proceedings were instituted in compliance with s 7(1) and that the court a quo had no power to entertain the review application.

[48] The approach adopted by the learned judge was not in accordance with the statement in *Opposition to Urban Tolling Alliance* to which I have referred. The making of the regulation did not affect the appellant as an individual. It affected the public at large, in the context to which I have referred. It was therefore not appropriate to consider when the appellant personally became aware of the administrative action or when he might reasonably have been expected to have become aware of it. As Brand JA pointed out, it would be anomalous if an administrative act were to be reviewable at the instance of one member of the public, and not at the instance of another, depending upon the peculiar knowledge of each. The court a quo should therefore have taken a broad view of when the public at large might reasonably have been expected to have become aware of the action.

[49] Counsel for the appellant pointed out that when Brand JA referred in *Opposition to Urban Tolling Alliance* to 'a broad view of when the public at large might reasonably be expected to have had knowledge of the action', he omitted the words 'and the

reasons', which appear in s 7(1)(*b*). He submitted that this was an oversight and that the 180 day period could not start to run until a date by which the public at large might reasonably be expected to have had knowledge of the action and the reasons for it.

[50] As I pointed out earlier, however, reasons for administrative action are not always furnished. In the present case reasons were not requested and none were furnished. The 180 day period therefore commenced to run, when, taking a broad view, the public at large might reasonably have been expected to have become aware of the action.

[51] Counsel for the appellant submitted that such date could not be determined on the papers as none of the parties had dealt with it. In those circumstances, he submitted, it was not appropriate for the court a quo to deal with the s 7 point.

[52] It seems to me that, in the circumstances of the case, the manifest delay between the promulgation of the regulation and the institution of the review proceedings, which was some 12 years, and the challenge in the respondent's heads of argument to the court's power to entertain the matter, required of the appellant to satisfy the court that the proceedings were instituted within the period of 180 days referred to in s 7. It made no attempt to do so, nor did it apply for an extension of the period in terms of s 9.

[53] The regulation in question was promulgated on 22 April 2003. The application for it to be reviewed was brought nearly 12 years later. In the absence of any evidence to the contrary I think it can safely be accepted that this was well outside a period of 180 days after the date on which the public at large (as described in para 44 above) might reasonably have been expected to have become aware of the regulation. I come to this conclusion on the facts set out in the founding papers in the court a quo, and not on the basis of a failure to discharge an onus.

[54] The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

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**JA Ploos van Amstel**

**Acting Judge of Appeal**

APPEARANCES:

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| For Appellants: | C D A Loxton SC (with him A Milovanovic) |
| Instructed by: | Mostert Attorneys, Woodmead |
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| For Respondents: | N H Maenetje SC (with him S Khumalo) |
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