

SOUTH AFRICA / JUDGMENT

MEC for Gauteng Department of Infrastructure Development v Ramapepe (J1943/2019) [2022] ZALCJHB 98 (12 May 2022)

[2022] ZALCJHB 98

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J1943/2019

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J 1943/2019

In

the matter between:

MEC
FOR GAUTENG DEPARTMENT
OF
INFRASTRUCTURE
DEVELOPMENT
Applicant
and
SIMON
RAMAPEPE
Respondent

Heard:

21 April 2022

Delivered:

12 May 2022

(In

view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 12 May 2022.)

JUDGMENT

PRINSLOO, J

Background**facts**

[1] The Respondent is an employee of the Gauteng Department of Infrastructure Development (Department). On 25 March 2016, the Applicant advertised the post of Deputy Director: Professional Secretariat Services, with the closing date for applications on 11 April 2016. In terms of the published advertisement, the requirements for the said post were:

1.1 a three year recognised Bachelor of Commerce degree/National Diploma in supply chain management / logistics/ cost and management accounting/ financial management/ business management/ strategic source/ purchasing management or a relevant qualification;

1.2 five years' experience in the SCM Professional Secretariat Services, of which three years must be at management level;

1.3 a valid driver's license; and

1.4 proficiency in Microsoft Office.

[2] A total of 68 applications were received and six candidates were shortlisted, based on the requirements set out in the advertisement. The selection panel added the following selection criteria when the candidates were interviewed:

2.1 that preference would be given to internal candidates with relevant qualifications;

2.2 that preference be given to assistant directors; and

2.3 that candidates around Gauteng would be given preference.

[3] The interviews were held on 29 April 2016 and the panel scored the five interviewed candidates as follows:

3.1 Mr Monyela:

785

3.2 Mr Rampepe:

635

3.3 Ms Mnisi:

635

3.4 Mr Mmathume: 480

3.5 Ms Letlapa:

380.

[4] The selection panel initially recommended Mr Monyela, who was awarded the highest score, for appointment to the post of Deputy Director: Professional Secretariat Services. Mr Monyela, at the time, was

appointed as an Assistant Director at the Gauteng Department of Education and it is evident from the recommendation that he demonstrated a vast understanding and knowledge of issues the interviewing panel had canvassed with him. The Respondent and Ms Mnisi both scored 635.

[5] The Deputy Director General: Corporate Services (DDG), Ms Mutlaneng, was not happy with the recommendation of the selection panel and she persuaded that panel to change the recommendation and to instead

recommend the Respondent for appointment to the post of Deputy Director: Professional Secretariat Services, as he was an internal

candidate. The DDG had been delegated to approve the appointment of employees at salary levels 9 -12, but the delegation is subject to conditions and limitations. The ultimate approval must be in consultation with the Head of Department (HOD).

[6] On 19 September 2016, Mr Owen Gaveni, the Department's personnel practitioner, prepared a submission, requesting approval for the Respondent's appointment as Deputy Director: Professional Secretariat Services in the Directorate: Supply Chain Management. It is evident from the prepared submission that Mr Monyela was not recommended for the post and that the Respondent was instead recommended based ultimately on the fact that he was an internal candidate.

[7] The DDG subsequently on 19 September 2016 approved the recommendation, with effect from 1 October 2016 and added that the Respondent "be transferred with immediate effect to the position of DD: Policy and Legislation due to his qualifications as we have the need there."

[8] On 19 September 2016, the Respondent was made an "[o]ffer of appointment to the post of Deputy Director: Professional Secretariat Services in the Directorate: Supply Chain Management and transfer to the post of Deputy Director: Policy and Legislation in the Directorate: Policy and Legislation". The Respondent accepted the offer on 1 October 2016. The acceptance of the offer reflects that the Respondent accepted the offer of employment for the post of Deputy Director: Policy and Legislation. The Respondent occupies the position of Deputy Director: Policy and Legislation since 1 October 2016.

The applicable legislative framework

[9] The legislative framework within which recruitment, selection and the filling of posts within the public service takes place is relevant for the purposes of this application, and will provide context to it.

[10] The recruitment, selection and filling of posts in the public service is governed by the Public Service Act[1] (PSA) as well as the Public Service Regulations (PSR).

The Public Service Act

[11] Chapter IV of the PSA, which provides for appointments and filling of posts in the public service, is relevant in casu.

[12] Section 9 of the PSA deals with appointments in the public service and provides as follows:

‘An executive authority may appoint any person in his or her department in accordance with this Act and in such manner and on such conditions as may be prescribed.’

[13] Section 11 of the PSA provides as follows:

‘Appointments and filling of posts. – (1) In the making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.

(2) In the making of any appointment in terms of section 9 in the public service –

- (a) all persons who applied and qualify for the appointment concerned shall be considered; and
- (b) the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act 55 of 1998), the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender

and disability.’

[14] Section 14 of the PSA deals with the transfer of employees within the public service and provides as follows:

‘(1) Subject to subsections (2), (3) and (4), any employee of a department may be transferred –

- (a) within the department, by its executive authority;
- (b) to another department by the executive authorities of the two relevant departments.

(2) Such transfer shall be made in such manner and on such conditions as may be prescribed.

(3) An employee may be transferred under subsection (1) only if –

- (a) the employee requests the transfer or consents to the transfer; or
- (b) in the absence of such request or consent, after due consideration of any representations by the employee, the transfer is in the public interest.

- (4) Before employees may be transferred in terms of subsection (3) (b) as a result of a determination regarding an allocation, abolition or transfer of a function, contemplated in section 3 (4) (b) or
- (c) or 3A (b), consultation shall take place in the applicable bargaining council established in terms of the Labour Relations Act for the public service as a whole or for a particular sector in the public service.
- (5) (a) The transfer of an employee in terms of subsection (1) who is on probation shall remain subject to probation as prescribed.
- (b) Any regulation so prescribed shall take due regard of the respective functions before and after the transfer to avoid detriment to the employee concerned.
- (6) An employee who has been transferred to a post with –
 - (a) a lower salary than his or her salary before the transfer shall not upon such transfer suffer any reduction in salary, except if he or she requested the transfer or he or she consented to the reduction; or
 - (b) a higher salary than his or her salary before the transfer shall not by reason only of that transfer be entitled to the higher salary.’

[15] Section 42A of the PSA provides for delegation and the relevant part is section 42A(5) which reads:

- ‘(5) The head of a department or any other functionary may –
- (a) delegate to any employee of the department any power –
 - (i) conferred on that head by this Act; or
 - (ii) delegated to that head in terms of subsection (4); or
 - (b) authorise that employee to perform any duty –
 - (i) imposed on that head by this Act; or
 - (ii) that that head is authorised to perform in terms of subsection (4).’

The Public Service Regulations

[16] The PSR 2001[2], applied at the time of the Respondent’s shortlisting and interview and the relevant part of the Regulations is to be found in Chapter 1, Part VII, which provides for appointment, promotion and termination of services. Applicable to the facts before this Court, are items C and D of the said Regulations, which provide as follows:

‘C. RECRUITMENT

C.1 Determination of requirements for employment

C.1.1 An executing authority shall determine composite requirements for employment in any post on the basis of the inherent requirements of the job.

C.1.2 An executing authority shall –

- (a) record the inherent requirements of a job;
- (b) ensure that the requirements for employment do not discriminate against persons historically disadvantaged; and
- (c) comply with any statutory requirement for the appointment of employees.

C.2 Advertising

C.2.1 An executing authority shall ensure that vacant posts in the department are so advertised as to reach, as efficiently and effectively as possible, the entire pool of potential applicants, especially persons historically disadvantaged.

C.2.2 An advertisement for a post shall specify the inherent requirements of the job, the job title and core functions.

C.2.3 Any vacant post in the SMS shall be advertised nationwide.

C.2.4 An executing authority shall advertise any other vacant post within the department as a minimum, but may also advertise such post –

- (a) elsewhere in the public service; or
- (b) outside the public service either nationwide or locally.

C.2.5 An executing authority may fill a vacant post without complying with regulations VII C.2.3 and C.2.4 if –

- (a) the department can fill the post from the ranks of supernumerary staff of equal grading;
- (b) the department can absorb into the post an employee who was appointed under an affirmative action programme, if she or he meets the requirements of the post;
- (c) the department plans to fill the post as part of a programme of laterally rotating or transferring employees to enhance organisational effectiveness and skills; or
- (d) the post is filled in terms of section 3B of the Act.

C.2.6 An executing authority may utilise an appropriate agency to identify candidates for posts, as long as the advertising and selection procedures comply with regulations VII C and D.

C.2.7 The Minister may issue directives regarding the manner in which vacancies must be advertised within the public service.

D. SELECTION

D.1 An executing authority shall appoint a selection committee to make recommendations on appointments to posts. The selection committee shall consist of at least three members who are employees of a grading equal to or higher than the grading of the post to be filled or suitable persons from outside the public service or in which both such an employee or employees and such a person or persons are represented. However –

- (a) the chairperson of the selection committee, who shall be an employee, shall be of a grading higher than the post to be filled; and
- (b) in the event that the manager of the component within which the vacant post is located, is graded lower than the vacant post, such a manager may be a member of the selection committee.

D.2 A selection committee constituted for the appointment of –

- (a) a head of national department shall include at least three Ministers and a national head of department;

...

- (c) a head of a provincial department, shall include at least three members of the Executive Council of the relevant province...

D.3 A selection committee shall, where possible, include adequate representation of historically disadvantaged persons.

D.4 Employees of a grading which is lower than the grading of the post to be filled may provide secretarial or advisory services during the selection process, but shall not form part of the selection committee.

D.5 The selection committee shall make a recommendation on the suitability of a candidate after considering only –

- (a) information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;
- (b) the training, skills, competence and knowledge necessary to meet the inherent requirements of the post;
- (c) the needs of the department for developing human resources;
- (d) the representativeness of the component where the post is located; and
- (e) the department's affirmative action programme.

D.6 A selection committee shall record the reasons for its decision with reference to the criteria mentioned in regulation VII D.5.

D.7 When an executing authority does not approve a recommendation of a selection committee, she or he shall record the reasons for her or his decision in writing.

D.8 Before making a decision on an appointment or the filling of a post, an executing authority shall –

- (a) satisfy herself or himself that the candidate qualifies in all respects for the post and that her or his claims in her or his application for the post have been verified; and
- (b) record in writing that verification.’

[17] On 1 August 2016, the new PSR[3] became effective. It provides for employment matters in Chapter 4, part 4 and the relevant part, relating to selection, provides that an executive authority shall appoint a selection committee to make a recommendation on the appointment to a post. The selection committee shall consist of at least three members who are employees of a grade equal to or higher than the grade of the post to be filled or suitable persons from outside the public service. It provides specifically in regulation 67 that:

‘(5) The selection committee shall make a recommendation on the suitability of a candidate after considering only –

(a) information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;

(b) the inherent requirements of the post;

(c) the department’s employment equity plan as contemplated in regulation 27; and

(d) in respect of candidates applying for posts from salary level 9 and above –

(i) the level of understanding of the relevant departmental mandates;

(ii) the ability to identify problems and find innovative solutions; and

(iii) the ability to work in a team.

(6) A selection committee shall record the reasons for its recommendation with reference to the criteria mentioned in subregulation (5).

(7) If the selection committee is unable to recommend a suitable person for appointment from those who applied in terms of subregulation (5), the executive authority may, after that selection process has been completed, approve the head-hunting of one or more persons with the requisite competencies and subject such person or persons to the same selection process as those who applied.

(8) If an executive authority does not approve a recommendation of a selection committee, he or she shall record the reasons for his or her decision in writing.

- (9) Before making a decision on an appointment or the filling of a post, an executive authority shall –
- (a) satisfy herself or himself that the candidate qualifies in all respects for the post and that his or her claims in his or her application for the post have been verified as directed by the Minister; and
- (b) record that verification in writing.’

The Departmental recruitment policy

- [18] At the time of the Respondent’s appointment, the Department had a recruitment policy in place, which was approved on 30 November
2011. The said policy provided for recruitment and the relevant provisions stated that applicants should be shortlisted against the selection criteria and that shortlisting was the process to select the candidate whose skills most closely matched the requirements for the job.
- [19] In respect of selection criteria, the policy provides that the selection panel must use selection criteria to evaluate the candidate’s competencies and that such criteria should include qualifications, experience and skills required to perform the job and should not be discriminatory. The selection decision should be based on the assessment of the interviewed candidates.

The relief sought in casu

- [20] This application concerns the lawfulness of two decisions taken by the DDG on or about 19 September 2016, relating to the appointment and transfer of the Respondent. The Applicant approached this Court in terms of the provisions of section 158(1)(h) of the Labour Relations Act[4] (LRA), which empowers this Court to review any decision taken or act performed by the State in its capacity as an employer, on such grounds as are permissible in law. The review application is founded on the grounds cognisable under the principle of legality, which is applicable to all exercises of public power and which requires the exercise of public power to be, at a minimum, lawful and rational.

- [21] The Applicant seeks the following relief:

21.1 declaring that the decision taken by the DDG on or about 19 September 2016 to appoint the Respondent to the post of Deputy Director: Professional Secretariat Services, was not lawful, reasonable or fair and accordingly invalid;

21.2 declaring that the decision taken by the DDG on or about 19 September 2016 to transfer the Respondent to the post of Deputy Director: Policy and Legislation, was not lawful, reasonable or fair and accordingly invalid;

21.3 reviewing and setting aside the decision taken by the DDG on or about 19 September 2016 to appoint the Respondent to the post of Deputy Director: Professional Secretariat Services, was not lawful, reasonable or fair and accordingly invalid;

21.4 reviewing and setting aside the decision taken by the DDG on or about 19 September 2016 to transfer the Respondent to the post of Deputy Director: Policy and Legislation, was not lawful, reasonable or fair and accordingly invalid;

21.5 directing the Respondent to pay back to the Department the difference between the salary level of Assistant Director, and what he had earned at a salary scale of Deputy Director.

[22] The Applicant's case is that the Respondent's appointment to the post of Deputy Director: Professional Secretariat Services and his subsequent transfer to the post of Deputy Director: Policy and Legislation, are both unlawful and irrational because of the failure to comply with the prescripts of the PSA and the PSR (2001 and 2016). The Respondent occupies the position of Deputy Director: Policy and Legislation since 1 October 2016, without that post having been

advertised and being filled through the recruitment and selection process prescribed under the PSR.

The MEC's duty to rectify the unlawfulness

[23] The Applicant submitted that public functionaries, as arms of the State, are vested with the responsibility, in terms of section 7(2) of the Constitution[5], to "respect, protect, promote and fulfil the rights in the Bill of Rights".

[24] The Applicant referred to *Khumalo v Member of the Executive Council for Education: Kwazulu-Natal*[6] (*Khumalo*), where the Constitutional Court dealt with the duties of public functionaries, in support of her application and contention that she is duty-bound to approach this Court. The Constitutional Court held that the rule of law is a founding value of our constitutional

democracy and that it is the duty of the Courts to insist that the State, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. It was held that "[t]he supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values

underlying the Bill of Rights"[7]. The Court specifically referred to section 23(1) of the Constitution which provides that everyone has the right to fair labour practices.

[25] In Khumalo, reference was made to section 195 of the Constitution which compelled the MEC, in the public interest, to avoid and eliminate illegalities in public administration and the fact that the MEC was not only entitled, but also duty-bound to set aside irregular administrative acts. It was held that[8]:

[35] Section 195 provides for a number of important values to guide

decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a). Read in the light of the founding value of the rule of law in section 1(c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.

[36] Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil the rights in the Bill of Rights." As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.

[37] In the context of public-sector employment, this is fortified by section 5(7)(a) of the PSA which provides:

"A functionary shall correct any action or omission purportedly made in terms of this Act by that functionary, if the action or omission was based on error of fact or law or fraud and it is in the public interest to correct the action or omission."

Section 5(7)(a) undoubtedly includes the possibility of a functionary seeking recourse in the courts.

[38] The MEC's actions in seeking to rectify the irregularities that were brought to her attention must be viewed in this light – as a bold effort to fulfil her constitutional and statutory obligations to ensure lawfulness, accountability and transparency in her Department. I now turn to the impugned decisions.'

[26] The Applicant explained that she approached this Court as she is duty-bound to do so to correct irregularities, as part of her constitutional obligation to ensure lawfulness, accountability and transparency in the Department.

This application

[27] The Applicant effectively seeks to challenge two decisions: the decision to appoint the Respondent as Deputy Director: Professional Secretariat Services and the decision to transfer him to the post of Deputy Director: Policy and Legislation, which decisions were taken on 19 September 2016. This application was only filed on 21 October 2019.

Condonation

[28] The Respondent raised the issue of condonation as a point in limine.

[29] The Respondent submitted that, as this application is brought in terms of the provisions of section 158(1)(h) of the LRA, it has to be brought within a reasonable period. The decisions that are subject to review were taken in September 2016 and the review application was filed more than three years thereafter, which can never be said to be a reasonable period.

[30] The Respondent addressed all the requirements that have to be satisfied in an application for condonation. He submitted that the Applicant failed to show cause as the delay is significant, the explanation unreasonable and unacceptable, he will be severely prejudiced if condonation were to be granted and that the granting of condonation would not be in the interest of justice.

[31] The Applicant on the other hand submitted that all she was required to do was to give a full and satisfactory explanation to account for the delay in launching this application and that she had done.

[32] What is the time for filing a section 158(1)(h) application? This question was considered by the Courts and the Labour Appeal Court (LAC) decided the question as follows below.

[33] In *G4S Secure Solutions (SA) (Pty) Ltd v Gunqubele NO and others*,^[9] the LAC rejected the approach taken by the Court in *Weder v Member of the Executive Council for the Department of Health, Western Cape*,^[10] where it was held that although an application should be brought within a reasonable time, an applicant should apply for condonation

if the application was made after six weeks. The LAC held that:

‘It is not permissible for a court to fix a certain time which it regards as a reasonable time; nor is it permissible to insist that an application for condonation should be made after a specific time. An application for condonation must be made when the delay is unreasonable and must be made at the earliest opportunity. The correct approach is that outlined by Brand JA in *Associated Institutions Pension Fund and others v Van Zyl and others*, followed by this Court in *Collet v Commission for Conciliation, Mediation and Arbitration and others* namely:

“[46] ...It is a longstanding rule 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 had been guilty of unreasonable delay in initiating the proceeding ...

[47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the *Wolgroeiens* case and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n ander* 1986

(2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

(a) Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned?

[48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosane* at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see *Setsokosane* at 86E–F).'

[34] In *Member of the Executive Council for Economic Development, Environment and Tourism v Mogahlane*, [11] the LAC confirmed that as there is no prescribed time limit for launching a review application in terms of section 158(1)(h) of the LRA, such review application should be initiated within a reasonable time. The LAC held that:

'Although there is no prescribed time limit for launching a review under section 158(1)(h) of the LRA, this type of review application should be initiated within a reasonable time. A period of six weeks has been regarded by our courts to be "within a reasonable time." In a legality review, the review application must be initiated without undue delay. Courts have the power, as part of their inherent jurisdiction, to regulate their proceedings, to refuse a review application where there has been an unwarranted or undue delay in initiating proceedings, or to overlook the delay in appropriate circumstances. There is, however, no requirement for a party who has unduly delayed the initiation of its review application under section 158(1)(h) of the LRA, to bring a formal condonation application. The Labour Court, therefore, erred in holding that where the application is more than six weeks late, a formal application for condonation must be brought. However, this does not mean that the defaulting party is not required to provide the Court with an explanation for the undue delay in initiating the review application under section 158(1)(h) of the LRA, and persuade it to exercise its discretion in favour of overlooking the delay and entertaining the review application.'

[35] The Constitutional Court in *Khumalo*, [12] held that:

'There is no prescribed time limit for launching a review under section 158(1)(h) of the LRA. The Labour Court Rules further prescribe no time limits for bringing review applications. Under other provisions of the LRA, the time limits in which litigants or complainants are required to bring their disputes are strictly circumscribed. The importance of resolving labour disputes in

good time is thus central to the LRA framework. It is generally understood that proceedings under section 158(1)(h) must be launched within a reasonable time. In some instances, in the context of the LRA, the courts have held a reasonable time to be about six weeks.'

[36] The Constitutional Court in *Khumalo*, when called to determine whether a party must apply for condonation, held that as there is no prescribed time limit for launching a review under section 158(1)(h) of the LRA and because there are no express, legislated time periods in which the MEC was required to bring her application, there was no requirement that a formal application for condonation had to be filed.

[37] The Constitutional Court[13] confirmed that an assessment of a plea of undue delay involves examining:

'(1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.'

[38] There was no need for the Applicant to file an application for condonation, but she has to show that the application was brought within a reasonable time. In considering the question of whether the application was filed within a reasonable period, the sequence of events and the Applicant's explanation have to be considered.

[39] The question is, after considering the reasons for the delay, whether the Applicant persuaded this Court to exercise its discretion in favour of overlooking the delay.

[40] The Applicant explained that she was appointed as MEC for the Department on 29 May 2019 and she became aware of the controversy surrounding the Respondent's appointment on 4 June 2019, upon receipt of a letter from the Public Service Commission (PSC). The purpose of the said letter was to inform the MEC regarding irregularities identified during the term of her predecessor, MEC Mamabolo and the HOD, Mr Netshiswinzhe and to request a clear indication as to the intended course of action in complying with the direction and recommendations submitted by the PSC.

[41] The letter provided a history of the matter; the nature of the dispute or grievance lodged by Mr Abrahams relating to the irregularities in the filling of the post of Deputy Director: Policy and Legislation without the post being advertised; the PSC's investigation of the said grievance; and the findings and recommendations made by the PSC. The Applicant was requested to indicate, by no later than 14 June 2019, whether she intended to proceed with an application for the judicial review of the PSC report or whether the PSC's recommendations would be implemented. It is pertinent to set out the context within which this letter was sent to the Applicant.

[42] The grievance lodged by Mr Abrahams related to the fact that he was acting in the post of Deputy Director: Policy and Legislation since 2007, without being paid an acting allowance. The post was advertised in 2012, and Mr Abrahams was recommended as the second best candidate. The successful candidate did not take up the position and the post was not filled. Mr Abrahams continued to act in the position and made numerous attempts to address the issue with the Department,

but to no avail. He was surprised when the position was filled in 2016 and he subsequently lodged a grievance. The grievance was not attended to and he finally escalated the matter to the PSC. The issue was that the post of Deputy Director: Policy and Legislation was filled without being advertised and it denied Mr Abrahams the right to fairly compete and to be considered for the post, which affected his career progress adversely.

[43] The PSC investigated the grievance and found that there were serious recruitment irregularities which could not be ignored. A provisional report was issued to the former MEC of the Department on 1 October 2018, with a request to provide inputs. The PSC regarded the provisional report necessary, due to the magnitude of irregularities identified and to provide the former MEC with an opportunity to respond to the allegations before a final report was issued.

[44] No feedback was received from the former MEC and the PSC issued a final report for implementation on 22 November 2018. In the final report, the PSC identified nine irregularities in the appointment of the Respondent to the post of Deputy Director: Professional Secretariat Services and two in respect of his transfer. The PSC found that the filling of the post of Deputy Director: Professional Secretariat Services was irregular and that the filling of the post of Deputy Director: Policy and Legislation by means of the Respondent's transfer was irregular and that the requirements of a fair and equitable recruitment process were flouted.

[45] The PSC directed the former MEC, in terms of the provisions of section 5(8)(a) of the PSA, read with section 196(4)(d) of the Constitution, to approach the Labour Court to set aside the irregular promotion of the Respondent in the post of Deputy Director: Professional Secretariat Services and his subsequent transfer to the post of Deputy Director: Policy and Legislation.

[46] Section 5(8) of the PSA provides as follows in respect of the PSC:

‘(8) (a) The Commission may investigate compliance with this Act and may issue directions contemplated in section 196 (4) (d) of the Constitution in order to ensure compliance with this Act and in order to provide advice to promote sound public administration.

(b) If the Commission issues a direction contemplated in paragraph (a), the relevant executive authority or head of department, as the case may be, shall implement the direction as soon as possible after receipt of the written communication conveying the direction but, in any event, within 60 days after the date of such receipt.’

- [47] On 21 January 2019, the PSC addressed a letter to the former MEC, reiterating that a direction was issued in terms of section 5(8)(a) of the PSA to correct the Respondent's irregular appointment and to remind the MEC that the prescribed 60 day period would lapse on 26 January 2019. The letter was issued as a final reminder that the PSC's direction had to be implemented by 26 January 2019.
- [48] The PSC did not receive any response from the former MEC and on 29 January 2019 the non-compliance with the PSA was reported to the Minister of Public Service and Administration, for action in accordance with section 16A(4) of the PSA.
- [49] In a letter dated 12 February 2019, the former MEC informed the Minister of Public Service and Administration of his "full commitment to comply with the directive from the Public Service (sic), which we will do before end of February 2019".
- [50] The former MEC made a subsequent U-turn and on 28 February 2019, he addressed a letter to the PSC, indicating that he was not in agreement with the PSC's report and he requested that certain aspects be clarified in a meeting. The PSC responded to him on 5 March 2019, indicating that the PSC was functus officio in relation to the matter and that a meeting to discuss the final report would serve no purpose. The former MEC was advised that his only legitimate remedies were to either implement the PSC recommendations or to approach the Labour Court to set the PSC's report aside.
- [51] The MEC responded in a letter, dated 19 April 2019 that he intended to approach the Labour Court to review the PSC's report. The former MEC requested a legal opinion regarding the possible review of the PSC's report in March 2019.
- [52] The letter received by the Applicant in June 2019, was sent to the Applicant after no review application was received from the previous MEC. The PSC requested the Applicant to indicate by 14 June 2019, whether she intended to proceed with an application for the judicial review of the PSC's report or whether the direction and recommendation of the PSC would be implemented. The Applicant made enquiries as to the status of the matter and the legal opinion that had already been requested was received on 13 June 2019. The Department was advised to approach the Labour Court to review and set aside the impugned decisions.
- [53] After considering the legal opinion, the Applicant responded to the PSC and gave an undertaking to comply with the directions and recommendations of the PSC. On 6 August 2019, the Department instructed the State Attorney to assist with the launching of this application.

[54] In the meantime, a meeting was scheduled in August 2019 between the Applicant and the PSC regarding the implementation of the PSC report. The meeting was cancelled and eventually held on 3 September 2019. After the meeting and on 10 September 2019, the Applicant instructed that this application should proceed. Counsel was consulted on 16 September 2019 to attend to the preparation of this application, which was eventually filed on 21 October 2019.

Analysis

[55] The Constitutional Court in *Khumalo*[14] held that:

‘Nevertheless, it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution.’

[56] I already alluded to the fact that an assessment of the delay involves examining firstly whether the delay is unreasonable and if so, whether the Court’s discretion should be exercised to overlook the delay and nevertheless entertain the application.

Reasonableness of the delay

[57] The first leg of the enquiry is a factual enquiry upon which a value judgment is made in the light of “all the relevant circumstances” and the explanation offered.

[58] It is common cause that the review application was filed three years after the Respondent’s appointment and transfer. However, the real trigger for this application was the report submitted by the PSC in November 2018, which required of the Department’s MEC to rectify the unlawfulness, as set out in the report, relating to the Respondent’s appointment and transfer. The PSC report was submitted two years after the Respondent already occupied the position of Deputy Director: Policy and Legislation.

[59] The previous MEC was provided with the report and the direction of the PSC in November 2018; he was reminded to implement same by end of January 2019 and he undertook to do so by end of February 2019; he subsequently changed his mind on this and did nothing about it until a new MEC was appointed in May 2019. This matter came to the new MEC’s attention in June 2019 and on 14 June 2019 she undertook to comply with the PSC’s direction and recommendations, yet this application was only filed in October 2019, another four months later.

[60] The question is: was the application brought within a reasonable period?

[61] In my view, it was not. The former MEC was provided with the final PSC report in November 2018, when it became necessary to either bring this application or to bring an application to review and set aside the PSC report. No steps were taken between November 2018 and May

2019, notwithstanding a reminder to that effect and an undertaking from the MEC to do so. A period of six months passed by without any steps to address this matter. When a new MEC was appointed, an undertaking was given in June 2019 that the PSC report would be implemented, yet another four months passed before this application was filed.

[62] The Department's MEC had an obligation to ensure expeditious and diligent compliance with constitutional duties. To ignore the report from the PSC to the extent that no steps were taken between November 2018 and May 2019 is not compliant with the MEC's constitutional duties and shows a lack of diligence. The dilatory conduct of the previous MEC is lamentable and unfortunately not something this Court can ignore or disregard. To delay the institution of these proceedings for a further period of four months, after the new MEC undertook to implement the PSC's report, also does not display an expeditious compliance with constitutional duties. In short: the institution of these proceedings were not done within a reasonable time, especially considering the context within which labour disputes are to be dealt with.

[63] That is however not the end of the enquiry.

Should the delay be overlooked?

[64] The second leg of the enquiry is whether this Court should nevertheless overlook the unreasonable delay. In *Khumalo*,^[15] it was confirmed that the delay cannot be evaluated in a vacuum but must be assessed with reference to a number of other factors.

[65] In *Khumalo*, the Constitutional Court did not overlook the delay. However, the facts on that score are different from the case before this Court in the sense that the MEC in *Khumalo* did not in any way explain the delay to the Court at all. The Constitutional Court found that in the absence of any explanation, the delay is unreasonable. Furthermore, the Court found that there was insufficient information provided to determine whether or not a decision was made in accordance with the provisions of the PSA and that the delay constrained the Court's ability to determine the lawfulness of the decision accurately. That is not the case in *casu*.

[66] One of the factors to be considered is the potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision.

[67] In *casu*, the Respondent submitted that at the time of deposing to the opposing affidavit (August 2020), he was 62 years old and close to retirement. The position of Deputy Director he currently occupies, significantly increased his income to assist him in his retirement. He had applied for the position of Deputy Director: Professional Secretariat Services in 2016 as he saw it as an opportunity to promote his career. He accepted the position of Deputy Director: Policy and Legislation and he has been performing his duties in that capacity since October 2016. The decision to appoint him to the said position was not the result of the Respondent's

fraud or misconduct.

[68] The Respondent submitted that he will be severely prejudiced should his appointment be set aside, as he is close to retirement and he will left in financial dire straits.

[69] The Applicant submitted that the Respondent is not entitled to the post he currently occupies and accordingly he cannot complain of any prejudice when the Applicant is fulfilling her constitutional obligation to correct the irregularities in his appointment process. To the extent that the Court may find that the delay in bringing this application is potentially prejudicial to the Respondent when regard is had to the possible consequences of setting aside the impugned decisions, this Court has powers to regulate any possible unjust consequences by granting an appropriate order, as contemplated in section 172(1)(b) of the Constitution.

[70] In Khumalo,[16] the issue of prejudice was considered and it was held that:

‘In considering the consequences of a possible finding in this matter, it was stressed by counsel for the MEC that her application distinguished between the declaratory relief she sought (to declare the decisions unlawful, unreasonable and unfair) and the consequential relief (to set aside the respective promotion and protected promotion). It is significant in this context that if the full relief is granted in the MEC’s favour, Mr Khumalo will lose his position. Mr Khumalo has gone on with his life, continued in his employment, presumably adapted his expenses accordingly, and invested nine years of his career in this path. At no stage has the MEC sought so much as to imply that Mr Khumalo performs inadequately in his post.’

[71] In casu, the same considerations are before this Court. The Respondent occupies a Deputy Director position since October 2016 and he had invested more than five years of his career in this position, he adapted his life and planned for his retirement on the basis that

he will retire from this position. The Respondent bears no responsibility for being appointed in the said position after he applied for a position he was qualified to apply for and to be considered for appointment. The potential prejudice to be suffered by the Respondent should all the relief sought by the Applicant be granted, is obvious.

[72] However, in Khumalo the Constitutional Court held that the consequences and potential prejudice ought not be the reason to non-suit an applicant in the face of the delay, considering the Court’s power to grant a just and equitable remedy[17].

[73] Prejudice to the Respondent is a factor to consider and in casu his prejudice is real and obvious.

[74] In Khumalo[18], the Court accepted that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia by seeking the redress of their departments’ unlawful decisions. It was held that:

[45] ...Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.

[46] Section 237 of the Constitution provides:

"All constitutional obligations must be performed diligently and without delay."

Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.

[47] This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.'

[75] In considering the aspect of prejudice, I cannot ignore the Applicant's constitutional obligations and the prejudice the Department and its administration may suffer if alleged unlawful decisions cannot be challenged in a court of law because there was some delay in approaching the Court. The prejudice the Respondent may suffer, if this application is to succeed, can be ameliorated by a remedy that is fair to him, considering all the circumstances.

[76] The Court in *Khumalo*, [19] held that an additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. It was held that:

'In my view, this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.'

[77] This Court has to consider the merits of the challenge made against the impugned decisions.

The Respondent's appointment to the post of Deputy Director: Professional Secretariat Services

[78] In respect of the Respondent's appointment as Deputy Director: Professional Secretariat Services, the Applicant raised a number of issues. I intend to deal in detail only with the most material challenges raised.

[79] Section 11 of the PSA provides that in the appointment of candidates and filling of positions, due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.

[80] PSR Chapter 1 Part VII, D.5, [20] states that the selection panel was to make a recommendation on the suitability of a candidate after considering only:

‘(a) information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;

(b) the training, skills, competence and knowledge necessary to meet the inherent requirements of the post;

(c) the needs of the department for developing human resources;

(d) the representativeness of the component where the post is located; and

(e) the department’s affirmative action programme.’

[81] The Department’s recruitment and selection policy provides that the selection panel must use selection criteria to evaluate the candidate’s competencies and to include qualifications, experience and skills required to perform the job and should not be discriminatory.

[82] In Khumalo[21], the Court held that:

‘[63] However, the fairness of the decision will typically be weighted

heavily on the process and justification of the decision-makers. This would be in line with the interpretation offered by the MEC of section 11(3) to require justifications to be given for departing from the requirements.

[64] Section 11(3) allowed for the approval by an executing authority of a promotion to promote the basic values and principles in section 195(1) of the Constitution. The values in section 195(1) may, therefore, call for the approval of a person whose appointment would, for example, promote a more efficient, economic and effective use of resources; maximise the human-resource potential in the institution; or provide for greater representativeness. The rationality of an approval of this nature would largely depend on the reasons of the executing authority.’

[83] It is evident that the reasons provided as to why the Respondent, who did not obtain the highest score in the interview, was appointed, is a relevant consideration.

[84] The Applicant’s main issue is the fact that additional selection criteria had been added, namely that preference would be given to internal candidates, to candidates occupying the position of Assistant Director and candidates who reside around Gauteng. This notwithstanding the fact that the post of Deputy Director: Professional Secretariat Services was advertised externally and nationally. The preference that was given to internal candidates and candidates from Gauteng, is contrary to the PSR, as referred to supra, in that preference based on geographical area and being an internal candidate, is discriminatory, more so where these requirements were not mentioned in the advertisement. Evaluation of the candidates should have been based on training, skills, competence and knowledge and considerations about where a candidate resided or worked, were irrelevant for purposes of the selection process.

[85] The Applicant also raised a number of issues in respect of the improper constitution of the shortlisting and interviewing panel, which composition was contrary to the Department's 'Delegation of Authority' as well as other irregularities regarding the Respondent's appointment that were not in compliance with the said delegations.

[86] It is common cause that five candidates who were shortlisted, were interviewed for the post of Deputy Director: Professional Secretariat Services and except for the Respondent, all the other candidates were external candidates. Mr Monyela had scored the highest points (785), followed by the Respondent and Ms Mnisi (both having scored 635). The

additional selection criteria favoured the Respondent as there were no other internal candidates to compete against, which gave him an unfair advantage. The recommendation for the appointment of the Respondent to the post of Deputy Director: Professional Secretariat Services was based on factors that had no relevance to the selection process and the acceptable and applicable criteria.

[87] The Applicant's case is that decision to appoint the Respondent to the post of Deputy Director: Professional Secretariat Services, was unfair and irrational and the process followed was not fair and equitable, as required by the provisions of the PSA and the PSR. This is so when regard is had to the scores obtained by the candidates in the interviews and the fact that the only reason why the Respondent was eventually selected and appointed, was because he was an internal

candidate, a criterion that was unfair, irrational and which resulted in a decision that disregarded the applicable prescripts of the PSA and the PSR. This renders the decision unlawful.

The Respondent's transfer to the post of Deputy Director: Policy and Legislation

[88] Section 14 of the PSA provides for the transfer of employees within the public service. The Applicant challenged the lawfulness of the Respondent's transfer to the post of Deputy Director: Policy and Legislation.

[89] The Applicant raised an issue in respect of the non-compliance with the provisions of the PSR. Regulation 57(6) of the PSR provides that an appointment shall take effect on the date of an employee's assumption of duty. If an employee assumes duty on the first working day of the month and this day is not the first day of the month, the first day of the month is deemed to be his or her assumption of duty.

[90] In casu and despite his appointment as Deputy Director: Professional Secretariat Services, the Respondent never assumed duty in the said post. Instead, he assumed duty in the post of Deputy Director: Policy and Legislation. The appointment process in respect of the post of Deputy Director: Professional Secretariat Services was thus not concluded and therefore the Respondent's transfer to the post of Deputy Director: Policy and Legislation was unlawful as he did not occupy a post at deputy director level and could not have been transferred to a post at that level.

- [91] In short: the Respondent could not be transferred from a post which he never assumed to a deputy director post at salary level 11.
- [92] In considering the impugned decisions, I am of the view that the non-compliance with the legal prescripts and the deviation from what was required, as set out in the Applicant's papers, is of such a nature that this Court should overlook the delay in instituting these proceedings.

Analysis

and conclusion

- [93] Section 158 (1)(h) of the LRA grants this Court the power to review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.
- [94] In casu the Applicant, as a state functionary, is seeking to establish the unlawfulness of her own Department's actions. The Courts have accepted that the MEC was not only entitled, but also duty-bound to set aside irregular or unlawful administrative acts through the appropriate avenues and within the boundaries of the law and the interests of justice. This duty is founded in the provisions of the Constitution[22].
- [95] In *Hendricks v Overstrand Municipality and another*[23] (Overstrand), The LAC considered the interpretation of section 158(1)(h) of the LRA and held that:

'In sum therefore, the Labour Court has the power under section 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on i) the grounds listed in PAJA, provided the decision constitutes administrative action; ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or iii) in accordance with the requirements of the constitutional principle of legality, such being grounds "permissible in law".'

- [96] In *Khumalo*,[24] the Court held that:

'To me, the true nature of the application is one for judicial review under the principle of legality, sought in terms of section 158(1)(h). The principle of legality is applicable to all exercises of public power and not only to "administrative action" as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational...'

- [97] In casu, the Applicant approached this Court on the principle of legality. There is no fixed list of requirements of the principle of legality

but it has been held to include inter alia rationality. The exercise of public power must be rational and the principle of legality has been expanded by treating procedural fairness as a requirement of rationality – the process by which the decision is made and the decision itself must be rational.[25]

- [98] Rationality was defined by Hoexter[26] as follows:

‘[t]his means in essence that a decision must be supported by the evidence and information before the administrator as well as the reasons given for it. It must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken.’

[99] The Applicant’s case is that the Respondent’s appointment to the post of Deputy Director: Professional Secretariat Services is irrational and cannot survive rationality scrutiny, considering the absence of a proper relationship between the action of the functionary and the facts and information available to her and on which she purported to base the decision.

[100] In my view, there is merit in the Applicant’s submissions. The purpose of the recruitment and selection process prescribed under the PSA and PSR is to ensure equality and fairness in the filling of posts in the public service. It is for these reasons that the PSA prescribes that the evaluation of candidates should be based on inter alia training, skills, competence, knowledge and the need to redress the imbalances of the past. The PSR provides that the selection committee shall make a recommendation on the suitability of a candidate after considering only, inter alia, information based on valid methods, criteria or instructions for selection that are free from any bias or discrimination and the training, skills, competence and knowledge necessary to meet the inherent requirements of the post.

[101] In Khumalo, it was held that it is neither fair nor in compliance with the dictates of transparency and accountability for the State to mislead applicants and the public about the criteria it intends to use to fill a post. The formulation and application of requirements for a particular post is a minimum prerequisite for ensuring the objectivity of the appointment process.[27]

[102] Notwithstanding the aforesaid prescripts, aimed at ensuring equality and fairness in the selection process, the selection panel added three criteria, after the shortlisting of candidates, namely to give preference to internal candidates, to assistant directors and candidates from around Gauteng. The additional selection criteria gave preference to candidates based on where they resided, what position they occupied and where they work. These criteria was not rationally connected to the purpose sought to be achieved by the selection process, namely to ensure equality, fairness and efficiency in the filling of posts in the public service. The aforesaid criteria was not related to the selection process and had nothing to do to select the most suitable candidate based on training, skills or competence.

[103] It is evident that the Respondent was not the highest scoring candidate, he was not recommended as the best or most suitable candidate based on his training, skills or competence, but he was recommended and appointed as Deputy Director: Professional Secretariat Services based on factors and criteria that had no relevance to the selection process. The Respondent was the only internal candidate, a factor which favoured him and gave him an unfair advantage, more so in circumstances where he was not the highest scoring candidate. Furthermore, the post was advertised nationally, with no indication that preference would be given to internal candidates or candidates residing in Gauteng. The

use of the said selection criteria was contrary to the provisions of the PSA and the PSR.

[104] The appointment of the Respondent to the position of Deputy Director: Professional Secretariat Services was irrational, unreasonable and unlawful.

[105] The Applicant's case is further that the Respondent's transfer to the post of Deputy Director: Policy and Legislation is unlawful. This is so because there was no compliance with section 14 of the PSA and because the Respondent never assumed duty in the post of Deputy Director: Professional Secretariat Services and therefore he could not be transferred from a post which he never assumed to a post at salary level 11.

[106] There is merit in the Applicant's submissions.

[107] In my view, the transfer of the Respondent to the post of Deputy Director: Policy and Legislation poses another problem. That is that the Respondent occupies a post of deputy director, without the post having been advertised and filled through the recruitment and selection process prescribed by the PSA, the PSR and the Departmental recruitment policy, which prescribes that positions on salary level 9 and above, are to be advertised internally and nationally.

[108] Section 11(2)(a) of the PSA provides that:

'In the making of any appointment in terms of section 9 in the public service –

(a) all persons who applied and qualify for the appointment concerned shall be considered...

[109] The post of Deputy Director: Policy and Legislation was not advertised and the Respondent never applied for the position.

[110] The provisions of section 11 of the PSA were commented on in Khumalo[28] as follows:

'[61] The MEC's interpretation of section 11 of the PSA is compelling. Section 11(2) does not state explicitly that only those who meet the requirements may be appointed. However, section 11(2) (a) does create an entitlement for those who apply and qualify for a position to be considered.

The purpose of section 11(2) is to ensure

that applicants are considered on their merits and on the basis of equality and objectivity. It follows, as a corollary to these express terms, that those who do not apply or do not qualify are not entitled to be considered.

[62] Section 11(2) must be read in the context of the state's obligations under section 195(1)(i) of the Constitution and the right to fair labour practices under section 23 of the Constitution.

Section 195(1)(i) stresses the importance of ensuring that appointment processes in the public sector are based on ability, objectivity and fairness. Fairness in employment practices and labour relations requires the state to be even-handed and transparent not only to those whom it employs, but so too to those who may wish to apply for employment at a state institution. It would not be fair if the state were to employ persons who do not meet the very requirements that the state itself sets. It is neither fair nor in

compliance with the dictates of transparency and accountability for the state to mislead applicants and the public about the criteria it intends to use to fill a post. The formulation and application of requirements for a particular post is a minimum prerequisite for ensuring the objectivity of the appointment process. Persons who do not meet the requirements for a post in the public sector ought not to be appointed. ‘

[111] It is significant that the Constitutional Court emphasised that:

111.1. fairness in employment practices requires the State to be even-handed, accountable and transparent in the recruitment process by not misleading applicant and the public about the criteria it intends to fill a post;

111.2 section 11(2)(a) of the PSA creates an entitlement for those who apply and qualify for a position, to be considered; and

111.3. the purpose of section 11(2) is to ensure that applicant are considered on merits and on the basis of equality and objectivity.

[112] The Respondent’s transfer to the post of Deputy Director: Policy and Legislation was unlawful.

Relief

[113] The last issue to be decided is the relief.

[114] There is no evidence before this Court that the Respondent contributed to the irregularities relating to his appointment and transfer, there is no allegation of fraud or corruption and no evidence that the Respondent’s performance in the post of Deputy Director: Policy and Legislation was not satisfactory.

[115] In *Khumalo and another v MEC for Education, KwaZulu-Natal*, [29] the LAC confirmed that a review court has a discretion to set aside a decision. The mere fact that a decision is based on ignorance,

mistake or fraud does not mean that it has to be set aside, as in appropriate circumstances a Court will decline, in the exercise of its discretion, to set aside an invalid administrative action in order to avoid or minimise injustice when legality and certainty

collide. It was held that:

[46] Mr Blomkamp criticised the manner in which the Court a quo considered the question whether or not the appellants' promotions had to be set aside. He submitted that the court a quo did not appear to have appreciated that it had a discretion and that it was entitled to refuse the setting aside of the impugned decisions notwithstanding substantive grounds being present for doing so. He argued that the fact that there was a delay in bringing the application for the setting aside of the impugned decisions was the factor which the Court a quo ought to have taken into account in the exercise of its discretion to refuse the setting aside... He emphasized that the problem with the approach of the court a quo is that it fixated on what it saw as the illegality of this administrative action and gave no proper consideration to the interests of finality, pragmatism and practicality.

[47] I agree with Mr Blomkamp's submission that the court a quo was wrong; firstly, in approaching the matter on the basis that it did not have a discretion to refuse the setting aside of the impugned decisions. It appeared to have adopted the view that once it was found that the impugned decisions are unlawful they have to be set aside. Secondly, the court a quo does not appear to have given a proper consideration to the legal effect of the MEC's delay in bringing the review application on the impugned decisions.'

[116] The LAC considered that there was a delay in bringing the review application and that the employees have planned their careers and arranged their affairs on the basis of an assumption that they were properly promoted, that they are entitled to certainty and that if their appointments were to be set aside, it would have huge implications for them in terms of their career paths in the sense that because of their promotions they may have decided not to consider other career options available within the field of their study and may find it difficult to regain the lost job opportunities.

[117] The Constitutional Court in Khumalo[30] held that:

'Under the Constitution, however, the requirement to consider the consequences of declaring the decision unlawful is mediated by a court's remedial powers to grant a "just and equitable" order in terms of section 172(1)(b) of the Constitution. A court has greater powers under the Constitution to regulate any possible unjust consequences by granting an appropriate order. While a court must declare conduct that it finds to be unconstitutional invalid, it need not set the conduct aside. The delay was indeed a factor taken into account by the Labour Appeal Court when deciding whether or not to set aside the applicants' promotions once they had been found unlawful.'

[118] It is evident that this Court has a discretion whether or not to set the unlawful conduct aside, considering the facts and circumstances of the case.

- [119] Notwithstanding the fact that the Applicant sought an order to set aside the appointment and the transfer of the Respondent and for him to pay back to the Department the difference between the salary level of Assistant Director, and what he had earned at a salary scale of Deputy Director, the Applicant was alive to the prejudice this would cause to the Respondent.
- [120] The Applicant proposed that this Court should mediate the consequences of declaring the Respondent's appointment and transfer invalid, by fashioning an order which is just and equitable in the circumstances.
- [121] The question is: what would be just and equitable?
- [122] I accept that the Applicant has a constitutional duty to correct unlawful decisions and irregularities in her Department and that the appointment and the transfer of the Respondent did not comply with the applicable legislative prescripts. As such they have to be declared unlawful. It does however not automatically follow that the decisions are to be set aside.
- [123] In deciding whether or not to set aside the impugned decisions, I considered the fact that this application was filed three years after the Respondent had been appointed and transferred to a position of deputy director and was enrolled for hearing a further two and a half years later. The Respondent occupies a deputy director position since October 2016 and he had invested many years of his career in this position, he had adapted his life and planned for his retirement on the basis that he will retire from this position. The Respondent is close to retirement age and he was in no way responsible for being appointed in the said position after he applied for a position he was qualified to apply for and to be considered for appointment. There was no case made out that he was not performing in the position or that he was disciplined for any reason, whilst occupying this position. The potential prejudice to be suffered by the Respondent should all the relief sought by the Applicant be granted, is obvious.
- [124] The Applicant proposed that this Court should declare the Respondent's appointment and transfer invalid and unlawful, but should limit the retrospective effect, by giving the order prospective effect only, alternatively to declare his appointment and transfer invalid and unlawful, but retain the Respondent in the position of Deputy Director: Policy and Legislation.
- [125] I am inclined to grant the latter relief, considering all the facts and circumstances of this case. The practical effect of this is that the impugned decisions are to be declared unlawful, but that this Court exercises its discretion not to set them aside.

[126] Let this be clear: this judgment is no precedent for the principle that unlawful appointments or transfer within the public service will never be set aside. This case is decided on its own merits and had the PSC or the Applicant taken sooner steps to correct the unlawful decisions, the outcome of this case might have been different.

[127] Insofar as costs are concerned, this Court has a broad discretion. In my view this is a case where the interest of justice and fairness will be best served by making no order as to costs.

[128] In the premises I make the following order:

Order

1.The decision taken by the DDG on or about 19 September 2016 to appoint the Respondent to the post of Deputy Director: Professional Secretariat Services, is declared to be unlawful, unreasonable and unfair.

2.The decision taken by the DDG on or about 19 September 2016 to transfer the Respondent to the post of Deputy Director: Policy and Legislation, is declared to be unlawful.

3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

On behalf of the Applicant:

Advocate M Rantho

Instructed by:

State Attorney, Johannesburg

On behalf of the Respondent:

Advocate J H Groenewald

Instructed by:

BDK Attorneys

[1] Proclamation 103 of 1994, as amended.

[2] Public Service Regulations, 2001, Government Notice No. R 1 of 5 January 2001.

[3] Public Service Regulations 2016, published in the Government Gazette of 29 July 2016, No 40167.

[4] Act No. 66 of 1995, as amended.

[5] Constitution of the Republic of South Africa, 1996.

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- [6] 2014
- (5) SA-579 (CC).
- [7] Ibid at para 29.
- [8] Ibid at paras 35 – 38.
- [9] (2018) 39 ILJ 131 (LAC) at para 11.
- [10] (2013) 34 ILJ 1315 (LC).
- [11] [2019] 40 ILJ 315 (LAC) at para 16.
- [12] Khumalo supra at para 42.
- [13] Ibid at para 49.
- [14] Khumalo supra at para 44.
- [15] Ibid at para 52.
- [16] Ibid at para 54.
- [17] Ibid at para 56.
- [18] Ibid at paras 45 – 47.
- [19] Ibid at para 57.
- [20] PSR, 2001.
- [21] Ibid at paras 63 – 64.
- [22] Sections 7(2), 195 (1)(a), (f) and (g).
- [23] (2015) 36 ILJ 163 (LAC) at para 29.
- [24] Khumalo supra at para 28.
- [25] Democratic Alliance v President of the Republic of South Africa and others 2013
- (1) SA 248 (CC) at para 34.
- [26] C. Hoexter 'Administrative Law in South Africa', 2nd ed, Juta, 2012, at p 340.
- [27] Khumalo supra at para 62.
- [28] Ibid at paras 61 and 62.
- [29] (2013) 34 ILJ 296 (LAC).
- [30] Khumalo supra at para 53.

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