CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/13
[2013] ZACC 49

In the matter between:

NKOSINATHI LAWRENCE KHUMALO — First Applicant

KRISH RITCHIE — Second Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION: KWAZULU-NATAL — Respondent

Heard on : 8 August 2013

Decided on : 18 December 2013

JUDGMENT

SKWEYIYA J (Moseneke DCJ, Cameron J, Froneman J, Madlanga J, Mhlantla AJ, Nkabinde J and Van der Westhuizen J concurring):

Introduction

[1] This application concerns a challenge by the Member of the Executive Council for Education, KwaZulu-Natal (MEC), the respondent in this Court, to the lawfulness

of her own department's employment decisions. The matter raises the enforcement of the rule of law in the context of a significant delay by the MEC in bringing her challenge to court.

Background

[2] The first applicant, Mr Nkosinathi Lawrence Khumalo, and the second applicant, Mr Krish Ritchie, are employees of the Department of Education, KwaZulu-Natal (Department). In March 2004, an advertisement for the post of Chief Personnel Officer (Human Resources: Provisioning) was published in the *Sunday Tribune* newspaper. The advertisement specified the following as requirements:

> "Senior Certificate / Grade 12 plus extensive relevant experience, coupled with 2 or more years of supervisory experience at level 6 or 7 within human resources."

[3] Mr Khumalo, who was employed at salary level five at the time, applied for the post and was shortlisted. Mr Ritchie, who was at salary level seven, similarly applied for the post but he was not shortlisted. Mr Khumalo was subsequently interviewed and promoted to the post, with effect from April 2004. Upon Mr Khumalo's promotion, Mr Ritchie lodged a grievance with the Department complaining that he had not been shortlisted for the post. When the grievance could not be resolved, he referred the dispute to the General Public Service Sectoral Bargaining Council (Bargaining Council)[1] where it was set down for arbitration.

[1] In terms of section 4.4 of the Constitution of the General Public Service Sectoral Bargaining Council, Resolution 2 of 2003 (Bargaining Council Constitution), one of the aims of the Bargaining Council is to provide mechanisms for the prevention and effective, expeditious resolution of disputes.

[4] The day before the arbitration, Mr Zulu, from the Directorate for Employee Relations at the Department's Head Office, was given a mandate by the acting Chief Director to settle the dispute. This was in the light of Mr Zulu's inability to get answers from Human Resources on the promotion or to trace any relevant documentation. On 11 July 2005, the Department and Mr Ritchie concluded a settlement agreement in terms of which Mr Ritchie was granted a "protected promotion".[2] The agreement stated:

> "We the parties hereby agree as follows:
> Protected Promotion for Mr K Ritchie to post of Chief Personnel Officer level 8 effective 11 July 2005 and starting scale being the second notch of level 8. This is in full and final settlement of the dispute."

The settlement agreement was made into an award of the Bargaining Council.

[5] Some months later, on 6 October 2005, the National Union of Public Servants and Allied Workers (NUPSAW), on behalf of 11 other employees who had applied for the same post, addressed a letter to the Superintendent-General complaining about irregularities in the advertising and appointment process in the Department. Mr Khumalo's promotion was cited as an example. The complainants demanded an investigation into Mr Khumalo's promotion and Mr Ritchie's protected promotion and, depending on the outcome, that they too be granted protected promotions.

[2] In this context, a protected promotion permits the beneficiary the advantages of a promotion (for example an increase in salary or a change in title). In *KwaDukuza Municipality v SA Local Government Bargaining Council and Others* [2008] ZALC 93; (2009) 30 ILJ 356 (LC) at paras 10-1, the Labour Court described a protected promotion (or "protective promotion") as a form of compensation that would be inappropriate where there is no evidence that the employee would have been promoted or was qualified to be promoted.

[6] The MEC, following a meeting held with NUPSAW, set up a task team comprising four Department officials and three NUPSAW members (Task Team) to investigate the complaint. The Task Team conducted interviews and sought to collect documentary evidence. The record reflects that the interview process commenced in October 2006, a year after the complaint letter was submitted. The Task Team eventually submitted a Report on the Investigations into NUPSAW Grievances (Report) to the MEC in January 2007.

[7] The Report noted that the documentation relating to the appointment process could not be traced and that those involved in the selection process presented with an "almost total collapse" of memory. It stated that there was "no uniformity on the advertised requirements of positions in the eThekwini Region as well as the Department as a whole."

[8] The Task Team found that Mr Khumalo did not meet the minimum requirements relating to supervisory experience stated in the advertisement. It found that, in the absence of any information to the contrary, he ought not to have been shortlisted and interviewed and that the process was "unfair". Three separate irregularities in the appointment process were identified: the expansion of the shortlist at the intervention of the Regional General Manager; the refusal to shortlist a particular candidate because he had not provided a matric certificate but only a statement of his results; and the waiver of the right to be interviewed by one of the shortlisted candidates because the interview proceedings were running late.

[9] Regarding Mr Ritchie's protected promotion, the Report noted that Mr Zulu had been put in a difficult situation in the arbitration proceedings because of the absence of documentation or witnesses. It nevertheless concluded that continuing with the arbitration would have been a better route. The settlement agreement was not "prudent" in the circumstances.

[10] In October 2008, some 20 months after the MEC received the Task Team Report, she launched an application in the Labour Court seeking to challenge Mr Khumalo's promotion and Mr Ritchie's protected promotion. No explanation has been given for her delay in launching the application.

Labour Court

[11] The MEC approached the Labour Court, seeking an order, inter alia:

> "1. Declaring that the promotion of [Mr Khumalo] to the post . . . was not lawful, reasonable or fair and is accordingly invalid.
> 2. Declaring that the decision to agree to grant to [Mr Ritchie] protective promotion . . . was not lawful, reasonable or fair and was accordingly invalid.
> 3. Setting aside the promotion of [Mr Khumalo] . . . .
> 4. Setting aside the grant to [Mr Ritchie] of protective promotion".

[12] In her founding affidavit in that Court, the MEC motivated her need to approach the Court in terms of section 9 of the Public Service Act[3] (PSA), which

[3] Proclamation 103 of 1994. Section 9 provides: "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."

empowers her to appoint and promote persons in the Department. She noted that her oath of office[4] requires her to ensure the supremacy of the rule of law. She contended that the demands for just administrative action in terms of section 33 of the Constitution and the Promotion of Administrative Justice Act[5] (PAJA) required her to act on the purported irregularities and, in so doing, to encourage a culture of accountability, openness and transparency in the exercise of public power. Following her view that she was *functus officio*, the MEC argued that the Labour Court was an appropriate authority to assist her in protecting the integrity of the Department.

[13] Mr Khumalo and Mr Ritchie argued that the MEC had delayed unreasonably in bringing her application. They denied that the MEC was *functus officio*. For these reasons, they argued that she was not entitled to approach a court for relief. On the merits, they contended that Mr Khumalo indeed met the requirements of the post. Regarding Mr Ritchie, they argued that the settlement agreement rendered the dispute a matter already decided (*res judicata*). Mr Khumalo and Mr Ritchie argued further that the impugned decisions did not amount to administrative action under PAJA and that the promotions should be allowed to stand.

[14] NUPSAW was cited as the third respondent in the Labour Court but took no part in those proceedings, nor in subsequent proceedings.

[4] In terms of Item 5 of Schedule 2 to the Constitution.

[5] 3 of 2000.

[15] The Labour Court[6] granted the MEC the relief she sought and declared the promotion of Mr Khumalo and the protected promotion of Mr Ritchie unlawful, unreasonable and unfair and set the promotions aside. However, it ordered that no deductions were to be made from their salaries in respect of payments made at a higher salary scale. The MEC was instructed to re-advertise the post and to investigate which Department officials had committed misconduct in the process.

Labour Appeal Court

[16] Mr Khumalo and Mr Ritchie appealed the decision to the Labour Appeal Court. The Court held that Mr Khumalo did not meet the requirements stated in the "clear and unambiguous" language of the advertisement.[7] It found that the grant of a protected promotion to Mr Ritchie amounted to relief that he had never sought because his complaint related to the fact that he was not shortlisted. The decision was thus unlawful.

[17] The Labour Appeal Court held further that while the MEC was duty-bound to approach a court to set aside her Department's unlawful administrative acts, the Labour Court had erred in holding that, once a finding of unlawfulness was made, it had no choice but to set aside the unlawful decisions. It held further that the Labour Court had erred in not properly evaluating the legal effect of the MEC's delay when it considered setting aside the promotions.

[6] *MEC Department of Education KwaZulu-Natal v Khumalo and Another* [2010] ZALC 79; 2011 (1) BCLR 94 (LC) (Labour Court judgment).

[7] *Khumalo and Another v MEC for Education: KwaZulu-Natal* [2012] ZALAC 26; (2013) 34 ILJ 296 (LAC) (Labour Appeal Court judgment) at para 36.

[18] The Labour Appeal Court considered various factors in weighing the potential prejudice in setting aside the promotions. It found that it was possible to minimise the potential prejudice to Mr Khumalo and Mr Ritchie if the promotions were set aside. For the other candidates who had applied for the post, however, the prejudice caused to them would likely be irreversible as long as the promotions were allowed to stand. The Labour Appeal Court found that the integrity of the selection process had been compromised and it set aside the promotions. The appeal against the judgment of the Labour Court was dismissed.

[19] Mr Khumalo and Mr Ritchie petitioned the Supreme Court of Appeal for special leave to appeal, which petition was dismissed.

Issues

[20] In this Court, Mr Khumalo and Mr Ritchie seek leave to appeal against the decision of the Labour Appeal Court. They ask for the orders of the Labour Appeal Court and the Labour Court to be set aside.

[21] The issues for determination are:

(a) Should leave to appeal be granted?

(b) What is the legal nature of the MEC's challenge to the impugned decisions?

(c) Is there a duty on a state functionary in the MEC's position to rectify unlawfulness committed under his or her authority?

(d) Should the Court review Mr Khumalo's promotion notwithstanding the MEC's delay in bringing the application? If so, was Mr Khumalo's promotion lawful?

(e) Should the Court review Mr Ritchie's protected promotion notwithstanding the MEC's delay in bringing the application? If so, was Mr Ritchie's protected promotion lawful?

(f) If the promotions are unlawful, what is the appropriate remedy?

Leave to appeal

[22] The matter raises an important constitutional issue relating to the state's obligation to comply with the requirements of the rule of law under section 1(c) of the Constitution[8] in the context of public-sector employment. Considering that the state is the country's largest employer, it is in the interests of justice that the matter be considered by this Court. In addition, the applicants have prospects of success. Accordingly, leave to appeal should be granted.

The nature of the challenge

[23] While it appears from its reasoning that the Labour Court approached the MEC's application as a legality review, the framing of the legal challenge in the Labour Appeal Court is more difficult to discern. Portions of the judgment appear to

[8] See below n 16 for the full text of section 1 of the Constitution.

proceed from the premise that the decisions amount to "administrative action" but there is no reasoning to illustrate the Court's apparent conclusion on this point.

[24] Before the Labour Court, counsel for the MEC submitted that the application was made in terms of section 158(1)(h) of the Labour Relations Act[9] (LRA) to review the administrative acts of the decision-making officials. Section 158(1)(h) provides that the "Labour Court may review any decision taken or any act performed by the state in its capacity as employer, on such grounds as are permissible in law".

[25] In supplementary written submissions following the hearing in this Court, the MEC argued that the application brought before the Labour Court was not for a review but for declaratory orders that the Court was empowered to grant in terms of section 158(1)(a)(iv) of the LRA. The section provides that the "Labour Court may make any appropriate order, including a declaratory order".[10] The MEC argued further that the provisions of section 11 of the PSA, as they read at the time the impugned decisions were made, were "of direct relevance to the legality" of Mr Khumalo's promotion.

[26] At the time of the applicants' promotions, section 11 provided as follows:

[9] 66 of 1995.

[10] The MEC's attempt to frame the application, in the supplementary submissions, as an application for declaratory orders in terms of section 158(1)(a), outside of a review, is misplaced. Section 158(1)(a) merely empowers the Labour Court to grant the remedy that she sought and does not establish the legal basis of her claim.

"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 or the filling of any post in the public service—

(a) all persons who qualify for the appointment, transfer or promotion concerned shall be considered; and

(b) the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress 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.

(3) Notwithstanding the provisions of subsection (2), the relevant executing authority may, subject to the prescribed conditions, approve the appointment, transfer or promotion of persons to promote the basic values and principles referred to in section 195(1) of the Constitution."

[27] The MEC submits that section 11(2)(a) of the PSA means that only persons who qualify for a promotion may be considered, unless section 11(3) applies.[11] She makes reference in her heads of argument to the right to just administrative action under section 33 of the Constitution and PAJA. Admittedly, the grounds of the review are ambiguously framed. Counsel for the MEC acknowledged in the hearing that the relief sought was deliberately framed in terms of the LRA in an effort to avoid the time frames set by PAJA. Notwithstanding the ambiguity, in my view, these references to administrative action and PAJA are not meant to found the legal basis of her challenge but to motivate her standing to correct the impugned decisions. In any event, any direct reliance by her on section 33 of the Constitution or PAJA, to

[11] Section 11(3) was repealed by the Public Service Amendment Act 30 of 2007.

establish the grounds of review, would be misplaced in the light of this Court's jurisprudence and the particular facts of this matter.

[28] 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).[12] The principle of legality is applicable to all exercises of public power and not only to "administrative action" as defined in PAJA.[13] It requires that all exercises of public power are, at a minimum, lawful[14] and rational.[15] Mr Khumalo's promotion is argued to be unlawful because of an alleged failure to comply with section 11 of the PSA. With respect to Mr Ritchie, the review appears to be framed more broadly on the grounds that he did not qualify for a protected promotion and that the decision to enter into the settlement agreement was irrational.

The duty of a state functionary to rectify unlawfulness

[29] The rule of law is a founding value of our constitutional democracy.[16] It is the duty of the courts to insist that the state, in all its dealings, operates within the

[12] Section 158(1)(h) is a generic provision that establishes the Labour Court's jurisdiction to decide on review applications. The section cannot and does not, however, establish the grounds of the review.

[13] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 58-9.

[14] Id at para 56.

[15] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 84-6.

[16] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.

confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. The 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.

[30] Historically, public-sector employment and private employment were regulated by distinct legal regimes in South Africa. Since the adoption of the LRA, public-sector employment has largely been synchronised with the legal regulation of employment in the private sector.[17] Section 23(1) of the Constitution further provides that "[e]veryone has the right to fair labour practices." There is thus no longer a general distinction in principle between the protections afforded to private and public-sector employees.

[31] In *Chirwa*, this Court held:

> "The LRA does not differentiate between the state and its organs as an employer, and any other employer. Thus, it must be concluded that the state and other employers should be treated in similar fashion."[18]

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[17] Section 209 of the LRA provides: "This Act binds the State."

[18] *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 66.

Nevertheless, as acknowledged by Ngcobo J in *Chirwa* (citing the rationale of the drafters of the LRA):

> "The political dimension of the state as employer, more particularly the fact that its revenue is sourced from taxation and that it is accountable to the Legislature, gives rise to unique and distinctive characteristics of state employment. For example, the state can invoke legislation to achieve its purposes as employer and its levels of staffing, remuneration and other matters are often the product of political and not commercial considerations. This uniqueness does not, however, justify a separate legal framework."[19]

[32] In this matter, the constitutional and legislative framework must inform an approach which does not undermine the hard-won protections afforded to public-sector employees whilst understanding the uniqueness of public-sector employment. Of importance is the demand that decisions are made and executed lawfully, fairly and expeditiously. We are confronted with the rather unusual situation of a state functionary seeking to establish the unlawfulness of its own institution's actions. The MEC's standing to bring the challenge is established in a number of previous decisions of the Supreme Court of Appeal.[20] It is nevertheless of relevance here to outline and particularise this principle.

[19] Id at para 101.

[20] The Supreme Court of Appeal in *Pepcor Retirement Fund and Another v Financial Services Board and Another* [2003] ZASCA 56; 2003 (6) SA 38 (SCA) at para 10 emphasized that public functionaries "may not only be entitled but also bound to raise the matter in a court of law". In *Ntshangase v MEC for Finance, KwaZulu-Natal and Another* [2009] ZASCA 123; 2010 (3) SA 201 (SCA), the MEC for Finance, KwaZulu-Natal sought to review a decision made by the chairperson of a disciplinary committee in the course of sanctioning an employee for misconduct. The Supreme Court of Appeal held that the MEC in that matter was bound to raise the irregular decision in court as a public functionary exercising a power in the interests of the public in terms of legislation. See also *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA) (*Qaukeni*) at para 23.

[33] The Labour Court held that section 195 of the Constitution compelled the MEC, in the public interest, to avoid and eliminate illegalities in public administration. It held that the principle in this Court's decision in *Njongi*[21] (that it is always open to a government official to admit, without qualification, that an administrative decision was wrongly taken) must apply to unlawful acts committed deliberately, negligently or even in good faith.[22] The Labour Appeal Court agreed that the "MEC was not only entitled but also duty-bound to approach a court to set aside her irregular administrative act".[23]

[34] Section 195 of the Constitution provides in relevant part:

> "Basic values and principles governing public administration
>
> (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-oriented.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
>
> (f) Public administration must be accountable.
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

[21] *Njongi v MEC, Department of Welfare, Eastern Cape* [2008] ZACC 4; 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC) at para 56.

[22] Labour Court judgment above n 6 at para 38.

[23] Labour Appeal Court judgment above n 7 at para 41. The Court cited *Qaukeni* above n 20 as authority for the proposition.

> (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
>
> (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
>
> . . .
>
> (4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service."

[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.

Mr Khumalo

Delay

[39] Despite trying to do the right thing, the MEC delayed reprehensibly in bringing her application to the Labour Court. The MEC appointed the Task Team with relative

haste after hearing of the complaints from NUPSAW. However, after receiving the Task Team's Report, it took the MEC about 20 months to bring the application, at which point Mr Khumalo had occupied the post for over four years. The MEC has not sought in any way to explain her delay.

[40] The applicants take issue with the delay. They argue that it is unreasonable and ought to non-suit the MEC. The Labour Court nevertheless exercised its discretion to overlook the delay. The Labour Appeal Court did not interfere with the Labour Court's discretion and this Court can interfere with it only if it finds the discretion was not judicially exercised.

[41] In considering the delay, the Labour Court held:

> "This application should have been brought years ago. The MEC was alerted to the need for condonation. But she made no such application. Even if she did apply for condonation, she would not have advanced any explanation for the delay, because she has none.
>
> However, it will be short-sighted for the Court to dismiss this application on the procedural technicality that it lacks an application for condonation or that the cause of action has prescribed because that will compound the injustice. Furthermore, the balance of convenience favours the adjudication of the substantive merits of the dispute in the public interest and in the interests of promoting ethical, accountable and transparent public administration. The prejudice to the Department and the public interest far outweighs any prejudice to the [Mr Khumalo and Mr Ritchie]. Any prejudice to [Mr Khumalo and Mr Ritchie] as a result of the delay will be accommodated in the remedy."[24] (Footnotes omitted.)

[24] Labour Court judgment above n 6 at paras 30-1.

[42] 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.[25] 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.[26]

[43] Previously, section 39 of the PSA stipulated a 12-month prescription period in which a claimant could bring an action against the state for any act or omission made in terms of the Act.[27] The time limit was subsequently repealed by section 2(1) of the

[25] For example, section 191(1)(b)(i) of the LRA requires an employee to refer an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council for conciliation within 30 days of the employer making the decision to dismiss. Section 191(1)(b)(ii) prescribes that an unfair labour practice dispute must be referred for conciliation within 90 days from the date it occurred or from which the employee became aware of the act. Sections 191(4) and (5) give the CCMA or a bargaining council only 30 days to resolve the dispute failing which it may be referred to arbitration or adjudication.

[26] See, for example, *Weltevrede Kwekery (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2006) 27 ILJ 182 (LC) at paras 5-6 and *SACCAWU obo Manzana and Others v Pick 'n Pay, Kimberley and Others* [2003] 10 BLLR 1065 (LC) at paras 14-5.

[27] The now-repealed section 39 of the PSA provided:

> "Limitation of Actions
>
> (1) No legal proceedings shall be instituted against the State or any body or person in respect of any alleged act in terms of this Act, or any alleged omission to do anything which in terms of this Act should have been done, unless the legal proceedings are instituted before the expiry of a period of 12 calendar months after the date upon which the claimant had knowledge, or after the date on which the claimant might reasonably have been expected to have knowledge, of the alleged act or omission, whichever is the earlier date.
>
> (2) No such legal proceedings shall be commenced before the expiry of at least one calendar month after a written notification in which particulars as to the alleged act or omission are given, of intention to bring those proceedings has been served on the defendant.

Institution of Legal Proceedings Against Certain Organs of State Act[28] (Repealing Act). At all relevant times, the PSA thus prescribed no time limits for reviews of conduct in terms of the Act.

[44] But what do we make of the Legislature's decision to remove these time limits? Does this mean that litigants are not constrained by any requirement to act timeously? In my view, the Legislature's decision to remove the 12-month prescription period opens the actions of public functionaries in terms of the PSA to ongoing scrutiny and transparency. Bearing in mind the purpose of the Repealing Act,[29] the repeal of section 39 allows that an applicant cannot automatically be non-suited on the basis of a delay. 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[30] to regulate their own proceedings) to refuse a review application in the

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(3) Subsections (1) and (2) shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions of those sections where the interests of justice so require."

[28] 40 of 2002.

[29] The long title of the Repealing Act indicates that its purpose is to harmonise the differing periods of prescription of debts for which organs of state might be liable and other matters connected therewith. The Preamble notes that the Act is promulgated bearing in mind that: South Africa has moved from a parliamentary sovereign state to a democratic constitutional sovereign state; the Bill of Rights is the cornerstone of our constitutional democracy; section 34 of the Constitution provides for the right to have any dispute that can be resolved by the application of law determined in a fair public hearing; and that this right may be limited only in terms of section 36 of the Constitution.

[30] The inherent power of the Constitutional Court, the Supreme Court of Appeal and the High Courts to "protect and regulate their own processes, and to develop the common law, taking into account the interests of justice" is preserved under section 173 of the Constitution. In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at paras 36-7, this Court held:

> "The power recognised in section 173 is a key tool for courts to ensure their own independence and impartiality. . . . A primary purpose for the exercise of that power must be to ensure that proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that courts in exercising this power *must take into account* the interests of justice.

face of an undue delay in initiating proceedings[31] or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express, legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought.

[45] In the previous section it was explained 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. 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."

> When courts exercise the power to regulate their own process it is inevitable that that power will affect rights entrenched in Chapter 2 of the Constitution. A court must regulate the way proceedings are conducted and this will inevitably affect both the right to a fair trial (section 35 of the Constitution) and the right to have disputes resolved by courts (section 34). Courts are bound by the provisions of the Bill of Rights and therefore bear a duty to respect those rights. In exercising the power, therefore, they must take care to ensure that those rights are not unjustifiably attenuated." (Footnotes omitted; emphasis in original.)

[31] *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] ZASCA 78; 2005 (2) SA 302 (SCA) (*Van Zyl*) at para 46.

Section 237 acknowledges the significance of timeous compliance with constitutional prescripts.[32] 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.[33] 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.

[48] In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.

[49] In *Gqwetha*[34] the majority of the Supreme Court of Appeal held 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

[32] In the context of employment, this Court held in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) (*Sidumo*) at para 98 that the "powers of the Labour Court are directed at remedying a wrong and, in the spirit of the LRA, at providing finality speedily."

[33] *Van Zyl* above n 31 at 46.

[34] *Gqwetha v Transkei Development Corporation Ltd and Others* [2005] ZASCA 51; 2006 (2) SA 603 (SCA).

light of "all the relevant circumstances");[35] and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.[36]

[50] In terms of the first leg of the enquiry, any explanation offered for the delay is considered.[37] We know in the present matter that the MEC has made no attempt to explain why she was idle for so long. Considering the typically short time frames for challenges to decisions in the context of labour law, the MEC's delay of about 20 months, if taken from the time of the receipt of the Task Team Report, is significant in itself. Furthermore, in the absence of any explanation, the delay is unreasonable.

[51] The fact that the MEC has elected not to account for the delay, despite having had the opportunity to do so at multiple stages in the litigation, can only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons. Had the matter been brought by a private litigant, this aspect of the test might weigh less heavily. However, given that the MEC is responsible for the decision, that she is obliged to act expeditiously in fulfilling her constitutional obligations,[38] and that she should have within her control the relevant resources to establish the unlawfulness of the decision she impugns, the unreasonableness of the unexplained delay is serious.

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[35] Id at para 24.

[36] Id at para 31.

[37] Id at para 24 citing *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 57 (A).

[38] See above at [46].

[52] But should we nevertheless overlook the unreasonable delay? On this leg of the test, the majority in *Gqwetha* held that the delay cannot be evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties[39] and having regard to the possible consequences of setting aside the impugned decision.[40] In the context of public-sector employment, the value of security for employees[41] and in mitigating the arguably inherent inequality of the workplace[42] must be kept in mind.

[53] 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.[43] 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

[39] *Gqwetha* above n 34 at para 33.

[40] Id at para 34.

[41] Benjamin "Labour Law Beyond Employment" (2012) *Acta Juridica* 21 at 21.

[42] In *Sidumo* above n 32, this Court referred to the "famous dictum" of Kahn-Freund that "the main objective of Labour Law [is to] counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."

[43] Section 172 provides for the powers of courts in constitutional matters. Section 172(1) provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

whether or not to set aside the applicants' promotions once they had been found unlawful.

[54] 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.

[55] Furthermore, the MEC states candidly that the facts do not disclose any wrongdoing by Mr Khumalo. Even if Mr Khumalo's promotion is found to have been unlawful, on the facts he bears no responsibility for it but for having the boldness to apply for a position for which he possibly did not qualify. The burden on the public administration and cost to the public purse to recommence the appointment process would be further prejudice to consider.

[56] Considering the courts' power to grant a just and equitable remedy the impact of a finding of invalidity may be ameliorated by fashioning a remedy that is fair to Mr Khumalo. In considering the factors above, particularly the lack of a complaint against Mr Khumalo's performance, a just and equitable remedy would in all

likeliness result in him keeping his job, if his promotion were found to be unlawful. Therefore, on this leg of the test, the consequences and potential prejudice do not in this case, and ought not in general, to favour the Court non-suiting an applicant in the face of the delay. The application of this aspect of the test set in *Gqwetha* must be contextualised in the courts' discretion to grant a just and equitable remedy.

[57] An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision.[44] In my view, this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.

Mr Khumalo's promotion

[58] The MEC argues that the advertisement of the post to which Mr Khumalo was appointed specified two requirements in relation to supervisory experience which an applicant had to meet: (1) two years' supervisory experience; *and* (2) being at level six or seven.

[59] Mr Khumalo argues that the advertisement is ambiguous at best and can be interpreted in a way that he meets the requirements. He contends that, while he was at salary level five at the time when he applied, he did have two or more years' supervisory experience performing the functions that pertained to level six and seven posts. He at no point avers that he had in fact *acted* in a level six or seven post

[44] *Gqwetha* above n 34 at para 33.

previously, although he notes that it is not uncommon in the public service for persons to act in posts. In setting out his experience prior to his application for the promotion, Mr Khumalo mentions his duties in conducting in-house training, evaluating the progress of trainees and writing reports. He notes further that he supervised newly-appointed staff and sat on interview panels. The MEC has not contested the factual accuracy of these averments.

[60] Nevertheless, even if we accept Mr Khumalo's interpretation of the advertisement, he has not gone far enough to show that he met the post's requirements. Nowhere has he indicated that the supervisory roles he puts forward are those performed by a person at level six or seven. Nor has he indicated that, collectively, his supervisory experience was equivalent to two years. Therefore, even on his own interpretation, the evidence he puts forward does not prove he met the requirements.

[61] The MEC's interpretation of section 11 of the PSA[45] 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.

[45] See above at [26] for the full text of section 11.

[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.

[63] But is the public sector permitted no flexibility in its appointment process? If the ideal applicant happens not to meet one of the formal criteria, is a state employer barred from considering that applicant? The reading of the corollary into section 11 of the PSA, in the context of section 195 of the Constitution, implies that it would generally not be fair or in terms of an objective process for public-sector employers to consider applicants who fall outside of the formal criteria. 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)[46] 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[47] 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;[48] maximise the human-resource potential in the institution;[49] or provide for greater representativeness.[50] The rationality of an approval of this nature would largely depend on the reasons of the executing authority.

[65] It is possible that Mr Khumalo had particular skills or experience that caused the short-listing and selection committees to view him as the candidate best-suited to meet the inherent requirements of the post[51] for the particular station of the eThekwini

[46] Id.

[47] Notwithstanding the provisions of section 11(2).

[48] Section 195(1)(b) of the Constitution.

[49] Id section 195(1)(h).

[50] Id section 195(1)(i).

[51] Counsel for the applicants raised the Public Service Regulations 2001, *Government Gazette* 21951 GN R1, 5 January 2001, as illustrating that Mr Khumalo's promotion was appropriate in meeting the "inherent requirements" of the job. Part VII C.1 provides:

> "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."

region. Mr Khumalo cannot be expected to know those reasons – he can only speculate on the basis of why *he* thinks he was a worthy appointee. Indeed it is the MEC, as the applicant before the Labour Court, who needs to satisfy the Court of the promotion's unlawfulness. Absent the full documentary record of the appointment process, there is insufficient information to determine whether or not an approval in terms of section 11(3) was made.

[66] The inability to access the reasons of the decision-makers (in documentary form or through their memories of the process) is largely occasioned by the delay in bringing the matter on review and in the delay that occurred in the conduct of the Task Team's investigation. By the time that the interviews occurred, almost three years had passed since the appointment process and, without access to the minutes of the proceedings, it is not surprising that the interviewees failed to recall Mr Khumalo's application in much detail. The delay in this instance constrains the ability of the Court to determine the lawfulness of the decision accurately. We simply do not know the basis of the decision to appoint Mr Khumalo – we only know that he was the highest-scoring candidate.

[67] Thus it appears as if Mr Khumalo did not meet the requirements of the post and that his promotion, in consequence, was unfair. However, we are left with no means accurately to verify whether the absence of reasons to motivate the departure from the requirements reflects that there truly were no reasons or if those reasons are merely not discoverable at this late stage. A full picture of the promotion's legality is thus not

reliably ascertainable on the evidence before the Court, nine years after the fact. While the MEC might not be responsible for the entire period of the delay that affects the Court's assessment of the decision's lawfulness, objectively the passage of the extended period of time since the decision was made stands in the way of this Court making a clear determination of the promotion's unlawfulness. This is a consideration rather peculiar to these facts and the particular basis of the challenge.

[68] The nature of the application and the strength of the merits do not favour overlooking the delay. The delay was unreasonable and unexplained, and although we might ameliorate the consequences of a possible finding of unlawfulness in remedy, the nature of the claim does not warrant condoning the delay.

[69] The Labour Court erred in overlooking the delay. While the Court was correct to be cautious in permitting the delay to non-suit the MEC, its simple reference to promoting public accountability and the balance of convenience, as the basis on which to condone, is an inadequate consideration of the depth of difficulties faced by a court when confronted with a review in the labour context, following the passage of an extensive and unexplained delay of this nature. While the Court accurately acknowledged its ability to ameliorate prejudice to Mr Khumalo in the remedy, it did not adequately consider the fact that the MEC gave no explanation for the delay or the extent to which the delay constrained an accurate review. In the result, the Court misdirected itself in overlooking the delay and the grounds for this Court's

interference with its exercise of discretion are established. The delay should non-suit the MEC in relation to her application for the review of Mr Khumalo's appointment.

Mr Ritchie

[70] In challenging Mr Ritchie's protected promotion, the MEC sought to set aside the initial decision to enter into the settlement agreement. She did not seek to impugn the arbitral award, which gave authoritative effect to that agreement. Section 145(1) of the LRA, which is applicable to the proceedings of the Bargaining Council,[52] provides for the review of arbitration awards:

> "Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
>
> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or
>
> (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence."

[71] In oral argument, counsel for the MEC conceded candidly that the review was framed in relation to the decision to grant the settlement agreement (as opposed to reviewing the arbitration award) because his client was well aware that she had by far

[52] Section 5 of the Bargaining Council Constitution provides that its powers and functions are provided for in section 28 of the LRA. Section 28(1)(d) includes under a bargaining council's powers to "perform the dispute resolution functions referred to in section 51". Section 51(8) of the LRA provides: "Unless otherwise agreed to in a collective agreement, sections 142A and 143 to 146 apply to any arbitration conducted under the auspices of a bargaining council." Section 145(1) therefore applies to arbitration awards made by the Bargaining Council.

exceeded the time limits in terms of the LRA in which an arbitration award must be challenged.

[72] As section 145(1)(a) makes clear, the MEC was obliged to bring a challenge against the arbitration award within six weeks of her being served the award. In *Gcaba*, this Court stressed that if "litigants are at liberty to relegate the finely tuned dispute resolution structures created by the LRA, a dual system of law could fester".[53] It is contrary to the very purpose of the inclusion of public-sector employees under labour protections[54] and the very function of arbitration in the context of the LRA[55] for the MEC to be able to fall back on legality to review the anterior decision in order to avoid the consequence of the time limits imposed by the LRA. In so doing, the MEC undermines the protection that the formalisation of settlement agreements, through making them into arbitration awards, affords to parties through the LRA. Arbitration awards are an important tool in the structure of the LRA to provide for the speedy and inexpensive resolution of disputes. The circumscription of the right to review an arbitral award is central to the function that arbitration serves in the scheme of the LRA.

[53] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 56.

[54] In terms of section 209 of the LRA.

[55] Section 1(d)(iv) of the LRA provides that the purpose of the Act includes the object to "promote the effective resolution of labour disputes." Section 143(1) of the Act provides that "an arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court". Section 4.4(iii) of the Bargaining Council Constitution notes that one of the objectives of the Bargaining Council is "to provide mechanisms for the prevention and effective and expeditious resolution of disputes between the employer and employees".

[73] Had the MEC wished to challenge the protected promotion, she ought to have brought it in time in terms of section 145(1)(a). In keeping with her duty to uphold the rule of law, the MEC is not permitted to circumvent the express provisions of the LRA: compliance with the time limit set in section 145(1)(a) *is* a requirement of legality. The correct approach for her would have been to seek a review of the arbitration award, for which application she would had to have sought condonation for her delay in filing. Accordingly, her challenge to the decision to grant Mr Ritchie a protected promotion ought not to have been considered.

Order

[74] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Appeal Court and Labour Court are set aside.
4. The order of the Labour Court is replaced with the following:

   "The application is dismissed."
5. The respondent is ordered to pay the costs of the applicants including the costs of two counsel.

ZONDO J (Jafta J concurring):

[75] I have had the opportunity of reading the judgment prepared by my Colleague, Skweyiya J (main judgment). I agree that the applicants should be granted leave to appeal against the decision of the Labour Appeal Court, that their appeal should be upheld, that the decisions of both the Labour Appeal Court and Labour Court should be set aside and that the order of the Labour Court should be replaced with an order dismissing the MEC's application. However, I am unable to agree with the reasons and approach adopted in the main judgment in deciding the matter. I would also award the applicants costs in the Labour Court, Labour Appeal Court and in this Court.

[76] The main judgment has set out the relevant factual background. Accordingly, it is not necessary for me to do the same. The parties are agreed that this Court has jurisdiction because the case raises constitutional issues. The matter raises important issues. These include the legal standing of the MEC to bring an application such as the one she brought in the Labour Court, the reviewability of decisions made by officials within her department regarding the promotion and the grant of protective promotion, whether the MEC brought her application in the Labour Court in terms of the Promotion of Administrative Justice Act[56] (PAJA) and whether the Labour Court should have entertained her application in the absence of an application for condonation and in the absence of an explanation for the delay.

[56] 3 of 2000.

[77] The main judgment deals with the matter on the basis that the MEC brought the application in the Labour Court in terms of section 158(1)(h) of the Labour Relations Act[57] (LRA) and not in terms of the PAJA. Section 158(1)(h) of the LRA does not contain any express time-limit requirement for bringing a review application whereas section 7(1) of the PAJA contains an express requirement that a review application be brought without an unreasonable delay and not later than 180 days after the person became aware of the decision sought to be reviewed and the reasons for that decision. I am unable to agree with the main judgment in this regard. The MEC brought the application in the Labour Court in terms of the PAJA and on the basis that Mr Khumalo's promotion and the grant of protective promotion to Mr Ritchie were both administrative action. She did not bring that application in terms of the LRA. Support for this view is to be found in both her notice of motion and in her founding affidavit in the Labour Court.

[78] In her notice of motion the MEC couched the relief she sought in the following terms:

> "1. Declaring that the promotion of [Mr Khumalo] to the post of Chief Personnel Officer at the eThekwini Service Centre of the Department of Education: KwaZulu-Natal (the Department) was *not lawful, reasonable or fair and is accordingly invalid*.
>
> 2. Declaring that the decision to agree to grant to [Mr Ritchie] protective promotion in respect of the post of Chief Personnel Officer at the eThekwini

[57] 66 of 1995. Section 158(1)(h) of the LRA reads as follows: "The Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

Service Centre of the Department was *not lawful, reasonable or fair and was accordingly invalid*.

3. Setting aside the promotion of [Mr Khumalo] of the post of Chief Personnel Officer at the eThekwini Service Centre of the Department.
4. Setting aside the grant to [Mr Ritchie] of protective promotion in respect of the post of Chief Personnel Officer at the eThekwini Service Centre of the Department." (Emphasis added.)

[79] Section 33(1) of the Constitution provides that "[e]veryone has the right to administrative action that is *lawful, reasonable and procedurally fair*."[58] Section 33(3) provides for the enactment of legislation to give effect to the rights provided for in section 33. That legislation is the PAJA. Its aim is "[t]o give effect to the right to administrative action that is *lawful, reasonable and procedurally fair* and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto."[59] Section 1 of the PAJA defines "administrative action" as—

"any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—
   (i) exercising a power in terms of the Constitution or a provincial constitution; or
   (ii) *exercising a public power or performing a public function in terms of any legislation*; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision". (Emphasis added.)

[58] Emphasis added.

[59] See the long title of the PAJA. Emphasis added.

[80] The fact that the declaratory orders sought by the MEC were predicated upon the decisions to promote Mr Khumalo and to grant Mr Ritchie protective promotion being "*not lawful, reasonable or fair*" reveals that the MEC brought the application on the basis that the promotion and the grant constituted administrative action. A review of administrative action is governed by the PAJA. I can understand if the MEC was advised that Mr Khumalo's promotion and the grant of protective promotion to Mr Ritchie constituted administrative action because an administrative action is defined in section 1 of the PAJA to include—

> "any decision taken . . . by—
>
> (a) an organ of state, when—
>
> . . .
>
> (ii) *exercising a public power or performing a public function in terms of any legislation*; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect". (Emphasis added.)

Promotions in the public service are governed by the Public Service Act[60] (PSA). The grant of protective promotion to Mr Ritchie was in terms of the PSA read with the LRA.[61]

[81] The MEC disclosed the basis upon which she sought to have Mr Khumalo's promotion and Mr Ritchie's protective promotion declared invalid and set aside in

[60] 103 of 1994.

[61] The reference to the LRA in this regard is based on the fact that the settlement agreement granting Mr Ritchie protective promotion was made an arbitration award in terms of the LRA.

paragraphs 41 and 42 of her founding affidavit. The basis upon which she sought to have the decisions set aside revealed that she intended the application to be dealt with under the PAJA. In those two paragraphs she said:

> "41. The circumstances in which [Mr Ritchie] was granted protected promotion render its grant invalid. *The decision* to enter an agreement that granted him protected promotion *was not lawful, reasonable or fair*.
>
> 42. In the result, the promotion of [Mr Khumalo] and the grant of protected promotion to [Mr Ritchie] *do not meet the requirement of just administrative action, as set out in section 33 of the Constitution. In addition, the [PAJA] was enacted to promote good governance and create a culture of accountability*, openness and transparency in the exercise of public power or the performance of a public function. Were I simply to do nothing in the face of what is set out in the Task Team's Report, I would be retarding and discouraging that culture." (Emphasis added.)

[82] The MEC also stated that the official of the Department who entered into a settlement agreement with Mr Ritchie did not have the power to do so and he acted contrary to the principles of the Constitution. This is not inconsistent with bringing the application under the PAJA. This is so because one of the grounds of review of an administrative action under the PAJA is that the person or functionary who took the administrative action did not have the power to make that decision.[62]

[83] Later, in her replying affidavit, the MEC also asserted:

[62] See section 6(2)(a)(i) of the PAJA.

> "In addition, because the power to make such appointments is granted to me by statute, I am under a duty to ensure that such powers are *exercised as required by the Constitution, and in particular section 33 thereof*." (Emphasis added.)

She also had the following to say about the decisions she sought to have set aside:

> "The decision makers were acting on my behalf. I would expect that when called upon to justify their decisions they would *furnish explanations and reasons that would satisfy the test for just administrative action that is set out in section 33 of the Constitution. If in the face of allegations that this test has not been met the decision makers cannot do so, the most reasonable inference is the decision does not constitute administrative action. If that is so, it ought to be set aside.*" (Emphasis added.)

[84] Lastly, on the above aspect, the MEC says that Mr Khumalo's appointment should be examined against the background that it was made in terms of the PSA and "[a]t that level, it *constitutes administrative action*."[63] She adds:

> "In order to be valid, it had to *be lawful, reasonable and in terms of a fair procedure*. The allegation has been made that it was not. It is for *[Mr Khumalo] to show that his promotion complied with section 33 of the Constitution*." (Emphasis added.)

[85] The MEC's challenge was based solely on the decision to promote Mr Khumalo and the decision to grant protective promotion to Mr Ritchie being administrative action. She expressly states in paragraph 42 of her affidavit:

> "In the result, the promotion of [Mr Khumalo] and the grant of protective promotion to [Mr Ritchie] do not meet the requirement of just administrative action, as set out in section 33 of the Constitution."

[63] Emphasis added.

[86] I am unable to agree with the main judgment in so far as it suggests that this statement by the MEC does not disclose that she brought the application under the PAJA but was explaining why she had to do something about the complaints. It is the statement that comes after this one in paragraph 42 that provides that explanation. The statement I have quoted above shows that she brought the application under the PAJA.

[87] The MEC did not bring the application under section 158(1)(h) of the LRA. The only place in which the MEC mentioned the LRA in her founding affidavit is where she referred to the fact that NUPSAW is a trade union registered under the LRA. She did not refer to section 158(1)(h) of the LRA nor did she refer to any ground of review in the context of the LRA. The main judgment relies on the MEC's written submissions for its conclusion that the MEC based her case on the principle of legality and that her application in the Labour Court was brought in terms of the LRA. It is trite that in motion proceedings an applicant must make his or her case in the founding affidavit. A litigant who has not made his or her case in the founding affidavit cannot escape the consequences of that omission by making it in his or her heads of argument.

[88] In his answering affidavit Mr Khumalo submitted that, in bringing her application, the MEC was circumventing provisions of the LRA and the Labour Court

should not countenance that. After referring to this criticism in her replying affidavit the MEC said:

> "I submit that there is no merit in [Mr Khumalo's and Mr Ritchie's] contentions. This is because of, inter alia, the following matters. First, the appointment of [Mr Khumalo] was not made in terms of the [LRA]: It was made in terms of the [PSA]. *Second, the [LRA] does not deal with the type of relief I seek in this application*. Third, the fact that the NUPSAW complainants *have a remedy to claim some relief in respect of the unfairness allegedly visited upon them does not deprive me of my right or entitlement to ensure that administrative action taken in violation of the Constitution is properly set aside by a forum that has the authority to do so legitimately*." (Emphasis added.)

[89] The statement by the MEC in this extract that the LRA does not deal with the type of relief she was seeking in the application is the clearest disavowal by the MEC of any reliance on the LRA. Therefore, it is not open to the main judgment to deal with the matter on the basis that the application was brought in terms of the LRA.

[90] The MEC must stand or fall on the pleaded cause of action. As illustrated above, it is evident that she deliberately chose to institute a claim founded in administrative justice. Her disavowal of reliance on the LRA precludes any court from adjudicating a claim based on the LRA, even if the facts pleaded were capable of sustaining such a claim. In *Gcaba*[64] this Court rejected the notion that, if pleaded facts sustain a claim not relied on by an applicant, a court may adjudicate such claim. The Court said:

[64] *Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

> "While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court."[65]

[91] In his written submissions as well as his supplementary written submissions counsel for the MEC submitted that the MEC also relied on the principle of legality to support her application to have the two decisions set aside. He referred to four paragraphs in the MEC's founding affidavit in the Labour Court as support for this submission. The word "legality" does not appear anywhere in the MEC's founding affidavit which is where the Court must look to determine what her case was that she brought in the Labour Court. Out of the four paragraphs relied upon by counsel for the MEC, three of them have nothing to do with legality outside of the PAJA.[66] In one of the paragraphs there is mention of the rule of law. However, the rule of law is mentioned not as a ground upon which the MEC sought to have the two decisions set aside, but as a ground to show that she had locus standi to take the unusual step of an MEC bringing an application to court to have decisions taken by officials of her own Department on her behalf set aside. The MEC also does not anywhere in her founding affidavit mention the words "rational" or "irrational" or "rationality". It was never part of her case that the two decisions were irrational and should be set aside.

[92] Once it is accepted that the entire application brought by the MEC in the Labour Court was based on the proposition that the decision to promote Mr Khumalo

[65] Id at para 75.

[66] See fn 3 of the MEC's supplementary written submissions.

and the decision to grant Mr Ritchie protective promotion were administrative action, it follows that the procedure for bringing that application to Court was governed by the PAJA. Section 7(1)[67] of the PAJA required that application to be brought without any unreasonable delay and not later than 180 days after the MEC had become aware of the decisions she sought to have reviewed and the reasons for those decisions.

[93] The Task Team which the MEC had appointed to investigate the complaints about Mr Khumalo's promotion and the grant of Mr Ritchie's protective promotion submitted its report to her on or about 26 January 2007. Whether one calculates the period of delay from that date or from when she received the complaint from NUPSAW, which was earlier, will not affect the outcome in this case. However, I am prepared to assume in her favour that the period should be calculated from 26 January 2007 when she received the report of the Task Team. She was obliged to lodge her application within a reasonable time and at any rate not later than 180 days from then, which is six months. The 180 days expired around 25 June 2007. She had not lodged the review application by then. She only lodged it in or around October 2008. That is more than a year and two months after the expiry of the 180 days or more than 20 months after she had become aware of the report of the Task Team.

[67] Section 7(1) of the PAJA reads:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

[94] The MEC did not bring any application for condonation nor did she provide any explanation for such an inordinate delay in bringing the application. She was obliged to have done so. It is true that, in the light of the decision of this Court in *Gcaba*,[68] the MEC's contention that the decision to promote Mr Khumalo and the decision to grant Mr Ritchie protective promotion constituted administrative action is not sustainable as those decisions do not constitute administrative action. The MEC's contention constituted the entire basis of her application in the Labour Court. However, the fact that the MEC's contention in this regard was wrong, as the main judgment correctly holds, does not mean that her application was not subject to the time-limit requirement prescribed by section 7(1) of the PAJA. The question whether or not those decisions constituted administrative action would be considered and decided on the merits after she had satisfied the Court either that she had not delayed unduly in bringing the application or that there was good cause to condone her delay. The question whether she brought her application timeously is decided before that inquiry and on the assumption that the decisions constitute administrative action as she contended. However, it is important to emphasise that the MEC's claim was not competent in law.

[95] As the MEC did not make an application for the condonation of her delay in bringing the application and did not offer any explanation for the delay, the Labour Court should have dismissed her application on this ground alone. The Labour

[68] *Gcaba* above n 64 at para 75.

Appeal Court should also have upheld the applicants' appeal on this ground alone. For the above reasons I would uphold the appeal, set aside the decisions of both the Labour Court and Labour Appeal Court and replace the decision of the Labour Court with an order dismissing the application. I would also award the applicants costs in the Labour Court, Labour Appeal Court and in this Court.

For the Applicants:	Advocate P Blomkamp and Advocate A Christison instructed by Llewellyn Cain Attorneys.
For the Respondent:	Advocate V Soni SC and Advocate M Makoti instructed by the State Attorney.