



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

Case Number: 1931/2023

In the matter between:

MELVIN MOODLEY

Applicant

and

THE PUBLIC SERVICE COMMISSION

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
WESTERN CAPE DEPARTMENT OF HEALTH**

Second Respondent

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION

Third Respondent

ANITA PARBHOO

Fourth Respondent

Heard: 7, 8 and 31 May 2024

Judgment: 3 June 2024

JUDGMENT

Handed down by email to the parties on 3 June 2024

- 1 Two issues of some considerable public importance arise in this matter (in respect of which there is no direct authority of which the four counsel who appeared at the hearing of the matter and I are aware and could find):
 - 1.1 Whether the findings and recommendations of the Public Service Commission (the first respondent) are binding on the executive authority to whom they are directed.
 - 1.2 Whether the requirement of certain years of “**experience at a senior managerial level**” for entry into Levels 14 to 16 of what is known as the Senior Management Service of the Public Service (defined in the next paragraph) means, for applicants who are employees in the Public Service, the requisite years of experience at any of Levels 13 to 16 of the Public Service, or whether those years of experience at a senior managerial level can be obtained elsewhere.
- 2 The Public Service (“the Public Service”) is defined as follows in section 8(1) of the Public Service Act 103 of 1994 (“the PSA”):

“The public service shall consist of persons who are employed –

 - (a) in posts on the establishment of departments; and
 - (b) additional to the establishment of departments.
- 3 “department” is defined in in section 1 of the PSA to mean:

“a national department, a national government component, the Office of a Premier, a provincial department or a provincial government component;”
- 4 The Senior Management Service of the Public Service (“**the SMS**”) was established in respect of senior managers at Levels 13 to 16 of the Public

Service. In other words, members of the SMS were those employed at Levels 13 to 16 of the Public Service.

- 5 On 3 March 2017, and in terms of section 3(2) of the PSA, the Minister for Public Service and Administration (**“the Minister”**) issued the amended *“Directive on Compulsory Capacity Development, Mandatory Training Days and Minimum Entry Requirements for SMS”* with effect from 1 April 2017 (**“the Directive”**). In paragraph 10.2 thereof it is recorded:

“The table below reflects minimum years of experience as an entry requirement into the SMS:

<i>SMS Level</i>	<i>Relevant experience (wef 1 April 2015)</i>
Entry (level 13)	5 years of experience at a middle/senior managerial level
Level 14	5 years of experience at a senior managerial level
Level 15	8-10 years of experience at a senior managerial level
Level 16	8-10 years of experience at a senior managerial level (at least 3 years of which must be with any organ of State as defined in the Constitution Act 108 of 1996)”

- 6 Key to this matter is what is meant in the Directive by **“experience at a senior managerial level”**.

- 7 Paragraph 16 of the Directive provides as follows:

“Request for deviation in respect to any part of this Directive may only be considered by the Minister for Public Service and Administration provided that such a request, citing the reasons therein, is in writing and signed by the relevant Executive Authority.”

- 8 The post of Chief Executive Officer (CEO) of the Red Cross War Memorial Childrens’ Hospital in Cape Town (**“the Post”**) was advertised on 23 June 2021 (**“the Advertisement”**). The Post is a level 14 post, i.e. part of the SMS.

Numerous persons applied. Two of them were the applicant, Dr Melvin Moodley (**“Dr Moodley”**), and the fourth respondent, Dr Anita Parbhoo (**“Dr Parbhoo”**). Dr Moodley occupied a Level 14 post, i.e. a post in the SMS. Dr Parbhoo occupied a Level 12 post, i.e. a post which is not in the SMS. Level 12 is the highest level of the middle management of the Public Service, one below the level at which the SMS starts.

- 9 The Advertisement listed various requirements. The one material to this application is *“at least 5 year[s] of experience at a senior managerial level”*. The requirements in the Advertisement read as follows (underling added by me):

“An undergraduate qualification (NQF 7) in Health/Social Science or related field as recognized by SAQA with at least 5 year of experience at a senior managerial level. Pre-entry Certificate for the Senior Management Services (Candidates not in possession of this entry requirement can still apply but are requested to register for the course and complete as such as no appointment can be made in the absence thereof. The course is available at the National School of Governance (NSG) under the name Certificate for entry into SMS ...

Experience:

Applicants should have a proven, extensive track record in all major aspects of health facility, health service and resources management. Proven extensive management experience of health services.

....

Competencies (knowledge/skills):

Proven skills and abilities in the financial and human resources management of a health service. General strategic management, project management and capacity to draft and assess operational policies. Good interpersonal skills and self-awareness. Computer literacy (MS Word, Excel, PowerPoint, internet and email). Ability to communicate in at least two of the three official languages of the Western Cape. Knowledge and understanding of Health Systems. Knowledge of financial and people management. Proven experience in the provision and management of health services. Proven leadership capabilities.

....

NOTICE TO ALL

Candidates may be subjected to a competency test ... As directed by the Department of Public Service and Administration, applicants must note that further checks will be conducted once they are shortlisted and that their appointment is

subject to positive outcomes on these checks, which include security clearance, qualification verification, criminal records and previous employment.”

- 10 The only contentious requirement in the Advertisement for the purposes of this application, is that of *“at least 5 year[s] of experience at a senior managerial level”*..
- 11 The genesis thereof is the requirement in paragraph 10.2 of the Directive quoted above that applicants for Level 14 SMS posts must have at least **“5 years of experience at a senior managerial level”**.
- 12 Both Dr Moodley and Dr Parbhoo were shortlisted and interviewed. Dr Parbhoo was appointed to the Post by the second respondent, the Member of The Executive Council, Western Cape Department of Health (**“the MEC”**).
- 13 Dr Moodley lodged a grievance: the essence of the grievance for the purposes of this application was that Dr Parbhoo did not have **“5 years of experience at a senior managerial level”** as required by the Directive. Dr Moodley’s case confirmed and emphasised in oral argument is that **“5 years of experience at a senior managerial level”** means:
 - 13.1 For any applicants from the public sector, five years of experience at Levels 13 to 16 in the Public Service.¹
 - 13.2 For applicants from the private sector, five years of experience at an equivalent level.

¹ Mrs Moodley, who appeared for applicant, deliberately used the wording *“Levels 13 to 16 in the Public Service”* as opposed to *“in the SMS”* in articulating applicant’s case in oral argument. In my view this is a distinction without a difference.

- 14 On 11 November 2021, the MEC rejected the grievance in writing to Dr Moodley. On 15 December 2021, the MEC further explained in writing to Dr Moodley the rejection of the grievance inter alia as follows:

“The CEO post in question is graded at a level 14 and requires 5 years of experience at a senior managerial level. It does not dictate that this experience should be as part of the SMS in Public Service ... It is thus fair to assume that when considering what senior managerial experience is, that a selection panel would consider the complexity and functions performed and whether it would be regarded as above that of managerial experience so to make it senior managerial experience.”

- 15 The grievance was escalated to the Public Service Commission (“**the PSC**”). The legal framework under which the PSC operates and grievances are made and investigated is considered below.

- 16 The PSC communicated in a letter to the MEC dated 24 June 2022 (“**the PSC Letter**”) that:

“The claim that Dr Parbhoo has no senior managerial experience is found to be without merit and this part of the grievance is unsubstantiated.

The shortlisting of Dr Parbhoo for the Chief Executive Officer (level 14) post is not in accordance with the explicit provisions of the [Directive]. This part of the grievance is found to be substantiated. The deviation clause was not utilized by the department and renders the appointment irregular.”

- 17 The PSC produced a report dated 6 June 2022 on the investigation of Dr Moodley’s grievance (“**the PSC Report**”). In essence the PSC Report is a much more detailed exposition of what is contained in the PSC Letter, with the same conclusions, as well as containing material as to other aspects.

- 18 On 12 August 2022, the MEC communicated to the PSC that she disagreed that the shortlisting and appointment of Dr Parbhoo was irregular. On that same date she advised Dr Moodley of this and further communicated that she disagrees with Dr Moodley's contention that the appointment of Dr Parbhoo was unlawful and stands to be set aside. She stated further that "... the shortlisting, and eventual appointment of Dr Parbhoo as CEO of Red Cross War Memorial Children's Hospital were not irregular, and I will, for the reasons set out in the enclosed correspondence, not be approaching a Court to have same set aside." This correspondence from the MEC to the PSC was in fact not attached and Dr Moodley only had sight of it later, but it was the PSC Report referred to above.
- 19 The PSC subsequently aligned itself with the position adopted by the MEC. In a counter-application, it sought the setting aside of the PSC Report, findings and recommendations (prayer 1) and the Directive (prayers 4 and 5). Prayers 2 and 3 concerned declarations as to Dr Parbhoo qualifying for the requirements of the Post and that her appointment was valid. During the course of oral argument, Mr Tshetlo, who appeared for the PSC together with Ms Mashiane, informed me that the relief in prayers 2 to 5 of the counter-application was abandoned by the PSC, prayers 2 and 3 not being necessary and the PSC being in agreement with applicant's view on prayers 4 and 5. Mr Tshetlo further informed me in oral argument that, although not stated as such in the Notice of Counter-Application, prayer 1 of the counter-application is in fact conditional on the PSC Report, findings and recommendations being found to be binding.
- 20 Dr Moodley seeks various relief, including that the shortlisting and appointment of Dr Parbhoo for and to the Post be set aside on review in terms of the

Promotion of Administrative Justice Act 3 of 2000 (**'PAJA'**) or the principle of legality. One of his main contentions is that the requirement in paragraph 10.2 of the Directive that Level 14 SMS posts require **"5 years of experience at a senior managerial level"** means five years at Levels 13 to 16 of the Public Service for applicants from the public sector.

- 21 The third respondent did not participate in the matter and Dr Parbhoo delivered a Notice of Intention to Abide.
- 22 Core to this matter are the following two issues:
 - 22.1 What is meant by *"senior managerial level"*, this being the key phrase in the requirement in paragraph 10.2 of the Directive that Level 14 SMS posts require **"5 years of experience at a senior managerial level"**.
 - 22.2 Whether the findings and recommendations of the PSC are binding (in this instance, on the MEC.
- 23 The other main points are the question of jurisdiction and whether the decision of the MEC was administrative action. Both the first and second respondent raised a lack of jurisdiction of this Court to hear this matter. First respondent abandoned this point. Second respondent persisted with it as well as the administrative action point.
- 24 There were some other issues which were raised by the parties which were abandoned during oral argument. For example, prayer 1.2 of the application in

convention, prayers 2 to 5 of the counter-application and Dr Moodley's challenge to the authority of the PSC to bring the counter-application.

- 25 The following is not in issue: the Advertisement for the Post, the recruitment and selection process, the Directive as it currently reads and whether or not Dr Parbhoo fulfils the requirements of **"5 years of experience at a senior managerial level"** if applicant's argument fails.
- 26 In the above respects, Dr Moodley, the PSC and the MEC produced a record of over 1100 pages, more than 540 of which are the actual affidavits themselves, excluding annexures.

The relief sought

- 27 Dr Moodley seeks the following relief in terms of his (fourth amended) notice of motion:

"1. In accordance with the provisions of uniform Rule 53 and the principle of legality and/or the Promotion of Administrative Justice Act 3 of 2000, reviewing and setting aside of:

- 1.1 the first respondent's (the PSC) decision that the fourth respondent does have experience at a senior managerial level;
- 1.2 the second respondent's (the MEC) decision to not abide by the findings of the PSC that the appointment of the fourth respondent was irregular; and
- 1.3 the decision to shortlist and appoint the fourth respondent into the post of Chief Executive Officer: Red Cross War Memorial Children's Hospital (the Red Cross Post)

on the basis that the aforementioned decisions (in paragraphs 1.1 to 1.3) are arbitrary, irrational and unlawful.

2. Declaring that:
 - 2.1. the failure by the PSC to take remedial action having found that the fourth respondent's appointment into the Red Cross Post was irregular, is unlawful and contrary to its Constitutional mandate.
 - 2.2. in terms of section 196(4)(a) to (f)(iii), read with section 195(1)(a) to (i) of the Constitution, the PSC is obligated to set aside irregularities or take remedial action to rectify irregularities or take remedial action to rectify irregularities it finds in the public service in the scope of discharging its obligations and duties as set out in the Constitution read with the Public Service Act, 1994 and the Public Service Commission Act, 46 of 1997.
 - 2.3. the MEC is bound by the PSC's finding that the fourth respondent's appointment into the Red Cross Post was irregular until such time as a court of law pronounces otherwise.
3. Directing the second respondent to, within 30 days from the date of this order, appoint the applicant into the post of Chief Executive Officer: Red Cross War Memorial Children's Hospital and that such appointment shall run retrospectively as from 1 July 2021.
4. In the alternative to paragraph 3 above, directing the second respondent to, within 30 days from the date of this order:
 - 4.1. inform the applicant of her decision as to the acceptance or rejection of the selection panel's recommendation to alternatively to the fourth respondent, appoint him into the post of Chief Executive Officer: Red Cross War Memorial Children's Hospital; and
 - 4.2. in the event of her rejecting the selection panel's aforesaid recommendation, to, simultaneously, inform the applicant of her reasons for rejecting the recommendation.
5. Directing that in terms of prayer 4 above, in the event of the second respondent appointing the applicant, the applicant's appointment shall run retrospectively as of 1 July 2021.
6. Directing the PSC to pay the costs of this application on an attorney and client scale, including the cost of counsel.
7. In the alternative to paragraph 4 above, directing the PSC and the MEC to pay the costs of this application on an attorney and client scale, including the cost

of two counsel where so employed, jointly and severally, the one paying the other to be absolved; and

8. Granting such further and alternative relief as the Court deems fit.”

28 As mentioned, during oral argument applicant abandoned the relief sought in prayer 1.2 of the Amended Notice of Motion.

29 In my view, the above relief depends on the determination of these main issues: (1) jurisdiction; (2) whether administrative action as defined in PAJA is involved; (3) whether the PSC’s findings and recommendations are binding and (4) the meaning of *experience at a senior managerial level* in the Directive.

30 Dr Moodley does not seek to impugn the entire recruitment and shortlisting process, but rather the result thereof, insofar as Dr Parbhoo was shortlisted and appointed to the Post, and seeks his own retrospective appointment in her stead, which would effectively be a substitution by the Court.

31 The MEC and PSC oppose the relief sought by Dr Moodley. The PSC also brought a counter-application, under the principle of legality and under PAJA, for the following relief:

- “1. The PSC’s investigative report, findings and recommendation dated 6 June 2022, are hereby set aside.
2. It is declared that Dr Parbhoo qualified for the requirements of the advertisement for Chief Executive Officer at Red Cross War Memorial Children’s Hospital, Rondebosch (Reference Number RXH4-2021).
3. It is declared that Dr Parbhoo’s permanent appointment as Chief Executive Officer at Red Cross War Memorial Children’s Hospital is lawful and valid.

4. The Department of Public Service and Administration's ("DPSA") Amended Directive on Compulsory Capacity Development, Mandatory Training Days and Minimum Entry Requirements for Members of the Senior Management Service dated 6 March 2017 ("the Directive") is hereby reviewed and declared unlawful.
5. The declaration of unlawfulness in paragraph 4 above be suspended for a period of 12 months pending remittal of the Directive to the DPSA for reconsideration.
6. No order as to costs, save in the event of opposition of the PSC's counterapplication."

32 As mentioned, in oral argument the relief in prayers 2 to 5 of the counter-application was abandoned by the PSC and the relief in prayer 1 thereof was clarified by the PSC to be conditional on the PSC Report, findings and recommendations being binding.

PAJA and the principle of legality

33 The MEC argued that the decision of the MEC sought to be impugned in this matter is not administrative action as defined in section 1 of PAJA. The definition of '**administrative action**' in PAJA is as follows:

" '**administrative action**' means 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,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include ..." [The exclusions are not quoted because I do not consider them to be relevant].

- 34 It appears to me that four basic requirements emerge from this definition for conduct to be administrative action, namely (1) a decision (or a failure to take a decision) by an organ of state; (2) exercising a constitutional power or a public power; (3) which adversely affects the rights of any person and (4) which has a direct, external legal effect.
- 35 There is no dispute that factor (1) above is satisfied. In my view, the decision of the MEC to appoint Dr Parbhoo and her decision in respect of the grievance arising therefrom does constitute the exercise of a public power (Chirwa v Transnet Limited and Others 2008 (4) SA 367 (CC) at paragraph 138), which means that factor (2) above would be satisfied. Further, were it to be reviewable as contended for by Dr Moodley (notably on the question of material error of law), it would affect the fundamental right of Dr Moodley to administrative justice, thereby satisfying requirement (3) above (whether the case is good or not is irrelevant to this enquiry).
- 36 The main aspect of contention seemed to distil in argument as to whether factor (4) above was satisfied (a direct, external legal effect). Mr De Villiers-Jansen, who appeared for the MEC, submitted that, because what was involved was a decision in a labour context, then that decision could not be administrative action for the purposes of PAJA. I am of the view that the absolute terms in which this submission is made is not supported by the authority. What the Constitutional Court held (in Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC) at paragraphs 64 to 66) was that it is 'generally'

the case that employment and labour relationship issues do not amount to administrative action within the meaning of PAJA because they do not have direct implications or consequences for other persons (underlining added):

[64] Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action ...

[66] In *Chirwa* Ngcobo J found that the decision to dismiss Ms Chirwa did not amount to administrative action. He held that whether an employer is regarded as “public” or “private” cannot determine whether its conduct is administrative action or an unfair labour practice. Similarly, the failure to promote and appoint Mr Gcaba appears to be a quintessential labour-related issue, based on the right to fair labour practices, almost as clearly as an unfair dismissal. Its impact is felt mainly by Mr Gcaba and has little or no direct consequence for any other citizens.

37 As mentioned and dealt with elsewhere herein, the main legal issues on the merits in this matter are, in my view, of public importance and therefore they have a direct, external legal effect (*Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) at para 64), relating as it does at its core, to the interpretation of the Directive in regard to entry into the SMS and whether or not the findings and recommendations of the PSC are binding on executive authorities.

38 The result is that factor (4) above is, in my view, also satisfied and administrative action is involved in this matter.

39 If I am wrong in this respect, the question arises whether the action/conduct of the MEC and the PSC, being the exercise of public power, is in any event subject to the principle of legality which allows for judicial review where that action/conduct, even if not administrative action in terms of PAJA, was materially influenced by an error of law. As held in Premier of the Western Cape and Others v Overberg District Municipality and Others 2011 (4) SA 441 (SCA) (underling added by me):

“[37] The long and the short of all this is the finding that, because of the error in its interpretation of s 139(4), the cabinet failed to consider less drastic means, other than to dissolve the council, to meet the desired end of an approved budget. Counsel for the appellants conceded that the impugned decision cannot survive this finding. I believe the concession was rightly made. It is true that the decision constituted executive action, as opposed to administrative action. In consequence it is not judicially reviewable under the provisions of the Promotion of Administrative Justice Act (PAJA). Yet, this does not shield the decision from a challenge on the basis of illegality.”

[38] This is so because it has by now become settled law that the constitutional principle of legality governs the exercise of all public power, rather than the narrower realm of administrative action as defined in PAJA. And in *President of the Republic of South Africa v South African Rugby Football Union* the Constitutional Court pertinently held that the principle of legality requires the holder of executive power not to misconstrue that power. As I see it, it follows that in the circumstances the impugned decision of the cabinet offended the principle of legality, because it directly resulted from the cabinet misconstruing its powers under s 139(4) of the Constitution. Stated slightly differently: by deciding to dissolve the council without considering a more appropriate remedy, the cabinet, in my view, offended the provisions of s 41(1) of the Constitution which requires all spheres of Government to respect the constitutional status, powers and functions of Government in other spheres and ‘not [to] assume any power or function except those conferred on them in terms of the Constitution’. It follows that in my view the High Court was right in setting the impugned decision aside on the basis of illegality.”

40 In my view, therefore, the MEC’s decisions are subject to review, in accordance with the principle of legality (and under PAJA).

Jurisdiction

- 41 In its heads of argument, the PSC recorded that it did not persist with the point *in limine* in regard to jurisdiction. This was confirmed in oral argument by its counsel, Mr Tshetlo.
- 42 The MEC, represented by Mr De Villiers-Jansen, persisted in averring an absence of the jurisdiction of this Court.
- 43 The fact that the consideration and determination of the validity of decisions in a labour context may be reserved to the Labour Court (whether in respect of review or otherwise) does not mean that any particular decision is not reviewable by this court. The real question is whether this court is deprived of jurisdiction to consider and determine the review at issue in this matter by operation of section 157 of the Labour Relations Act 66 of 1995 (“**the LRA**”).
- 44 Section 157 of the LRA provides as follows:
- “157. Jurisdiction of Labour Court
- (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
 - (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –
 - (a) employment and from labour relations;
 - (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
 - (c) the application of any law for the administration of which the Minister is responsible.”

- 45 In Chirwa (in the judgment per Skweyiya J, concurred in by a majority of the Court), it was held as follows:

[54] The authorities that have attempted to grapple with this provision have come to conflicting interpretations. Keeping in mind the aim of the LRA to be a one-stop shop dispute resolution structure in the employment sphere, it is not difficult to see that the concurrent jurisdiction provided for in section 157(2) of the LRA is meant to extend the jurisdiction of the Labour Court to employment matters that implicate constitutional rights. However, this cannot be seen as derogating from the jurisdiction of the High Court in constitutional matters, assigned to it by section 169 of the Constitution, unless it can be shown that a particular matter falls into the exclusive jurisdiction of the Labour Court.

- 46 It was found in Chirwa (in the judgment of Ngcobo J, also concurred in by a majority of the Court) that the High Court retains jurisdiction where a party relies directly on the provisions of the Bill of Rights (I have underlined the portion of the extract below in which this is held):

[123] While section 157(2) remains on the statute book, it must be construed in the light of the primary objectives of the LRA. The first is to establish a comprehensive framework of law governing the labour and employment relations between employers and employees in all sectors. The other is the objective to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA. In my view the only way to reconcile the provisions of section 157(2) and harmonise them with those of section 157(1) and the primary objects of the LRA, is to give section 157(2) a narrow meaning. The application of section 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights ...

[124] Where, as here, an employee alleges non-compliance with provisions of the LRA, the employee must seek the remedy in the LRA. The employee cannot, as the applicant seeks to do, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case “for practical considerations”. What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because

the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.

47 In Gcaba it was held as follows:

“[72] Therefore, s 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by s 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA, and which are covered by s157(2)(a), (b) and (c).

[73] Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies.”

48 The right to administrative justice is a right enshrined in section 33 of the Bill of Rights of the Constitution:

33. Just administrative action

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

49 Applicant relies on this right to administrative justice as well as the right to equality before the law and the equal protection and benefit of the law provided for in section 9(1) of the Constitution. His case concerns in the main the allegations that the appointment of Dr Parbhoo is irregular, including that a material error of law was made insofar as the Directive is concerned. The merits of that case are explored below. For jurisdictional purposes, all that is

required is that the case is presented on the basis of these constitutional rights. Whether the case has merit or not is irrelevant to this enquiry as to jurisdiction: In Makhanya v University of Zululand 2010 (1) SA 62 (SCA) at paragraph 71 (approved in Baloyi v Public Protector 2022 (3) SA 321 (CC) at paragraph 40) it was held that when a party bringing a claim "... says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point."

50 I am therefore of the view that this Court has jurisdiction to hear this matter.

51 A further basis for this conclusion is to be found in Steenkamp and Others v Edcon Ltd 2016 (3) SA 251 (CC), a case in which the issue of unlawfulness as opposed to fairness in the context of dismissals, was considered. The Constitutional Court recognised (at paragraphs 112 to 116) that the LRA provided for remedies in respect of an unfair dismissal but not for an unlawful dismissal.

52 Applicant does not rely on the provisions of the LRA and contends that the impugned decision was unlawful.

53 I am therefore of the view that this Court has jurisdiction to hear this matter.

Interpretation

54 Owing to the important part it plays in this matter, despite it having become settled, the law on interpretation will be considered. In Natal Joint Municipal

Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), the SCA held as follows (footnotes omitted):²

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document”.

55 Accordingly, while the words used are the starting point, they are not the end point. As Wallis JA explained: “Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the

² Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) (Endumeni) at paras 18 to 19ff. See also Zeeman v De Wet en Andere NNO 2012 (6) SA 1 (SCA) at para 14; North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA 1 (SCA) at paras 24 and 25, where the court perhaps takes a more subjective approach: ‘The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded.’; Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) at paras 10–12, where the court quotes para 18 of Endumeni with approval and holds at para 12: ‘Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is “essentially one unitary exercise”.’

broad context of their use, is an unhelpful exercise.”³ Or, as held in Novartis v Maphil 2016 (1) SA 518 (SCA) para 28: “Words without context mean nothing.”⁴ Words must be read in the light of context including the textual context, the broader legal context, and the factual context. They must, as far as possible, be read consistently with the document’s purpose.

56 One of the principles to be gleaned from Endumeni is that where two possible interpretations arise, preference lies with the interpretation that is more commercially sensible (or “business-like”). A business-like interpretation that is inconsistent with the actual wording of the document must be jettisoned.⁵

57 Further, the Constitutional Court (in Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) at para 28) held that the fundamental tenet of statutory interpretation is that the words in the statute must be given their ordinary grammatical meaning, unless doing so would lead to an absurdity.⁶

58 Endumeni is expressed in terms of wide ambit: “Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract ...”. It refers specifically to contracts and statutory instruments. Its principles have also been held to apply to wills.⁷ In my view,

³ Endumeni at para 25.

⁴ See also Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC) para 53 (“Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.”)

⁵ GPC Developments CC and others v Uys and another [2017] 4 All SA 14 (WCC) at para 36

⁶ Diener NO v Minister of Justice and Correctional Services and Others 2019 (2) BCLR 214 (CC) at para 37 and the authorities referred to in footnote 20

⁷ BOE Trust Ltd 2013 (3) SA 236 (SCA) para 30

while the Directive and Rules referred to below are none of these, I see no reason in principle why this generally accepted approach to interpretation should not be applied to it (and the other documents relevant to this matter) and further am of the view that it is encompassed in the wide ambit in which the principles in Endumeni were stated.

Whether the conclusions in the PSC Letter and PSC Report are binding

- 59 This is the first of what I consider to be the two material issues on the merits of the matter.
- 60 The word “*conclusions*” is used advertently in the above heading, in order to avoid any perception of an inclination one way or the other insofar as the terminology in the legislation, regulations and other governmental documents referred to below.
- 61 The question presently under consideration is what the effect is of the findings and recommendations of the PSC in the PSC Letter and PSC Report. This is material because if, as contended by applicants, those conclusions are binding on the MEC, she could not have legally departed from them and the fact that she did do so would then be unlawful and susceptible to being set aside on review.

62 Mrs Moodley, who appeared for Dr Moodley, relied heavily on the following dictum from *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) at paragraph 41:

“The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.”

63 Core to that dictum for the purposes of this matter is that the ruling or decision must be binding (hence my underlining of that word in the above *dictum*).

64 To answer this question for the purposes of this matter requires an analysis of the applicable legislation, regulations and governmental documents. This will be done by starting at the highest level and working down.

(1) **The Constitution of the Republic of South Africa, 1996 (“the Constitution”)**

65 The point of departure is the Constitution. The PSC was established in terms of section 196 of the Constitution. The purpose of the Commission is to promote the constitutionally enshrined democratic principles and values of the Public Service by investigating, researching, monitoring, evaluating, communicating and reporting on public administration.

66 Section 195 of the Constitution sets out the basic values and principles which govern public administration, which include the following:

- “(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.
 - (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.”

67 Section 196(4) of the Constitution is the empowering provision in respect of the PSC. It provides as follows (I have underlined the parts of the extract which I consider to be most pertinent):

- “(4) The powers and functions of the Commission are-
- (a) to promote the values and principles set out in section 195, throughout the public service;
 - (b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;
 - (c) to propose measures to ensure effective and efficient performance within the public service;
 - (d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;
 - (e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with;
 - (f) either of its own accord or on receipt of any complaint-
 - (i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

- (ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;
- (iii) to monitor and investigate adherence to applicable procedures in the public service; and
- (iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and
- (g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.

68 There is no direct authority which counsel the parties and I have found as to whether anything done in terms of section s196(4)(f)(ii) is binding. However, instructive and persuasive guidance is to be found in Certification of the Amended Text of the Constitution of the Republic of South Africa 1997 (1) BCLR 1 (CC). The essence thereof is that the Constitutional Court compared the provisions in respect of the PSC in the Interim Constitution with those in the amended text of the Final Constitution and observed that, insofar as the provision relevant to this matter is concerned, the former established power of the PSC with binding effect while the latter did not (I have underlined the part of the extract which I consider to be most pertinent):

[184] Under the IC the powers of the national PSC are governed by IC 210(1) which provides that:

“The Commission shall be competent -

- (a) to make recommendations, give directions and conduct enquiries with regard to -
 - (i) the organisation and administration of departments and the public service;
 - (ii) the conditions of service of members of the public service and matters related thereto;
 - (iii) personnel practices in the public service, appointments, promotions, transfers, discharge and other career incidents of members of the public service and matters in connection with the employment of personnel;
 - (iv) the promotion of efficiency and effectiveness in departments and the public service; and
 - (v) a code of conduct applicable to members of the public service ...;

IC 210(3) makes it clear that directions or recommendations given by the PSC have to be implemented by those to whom they are directed unless treasury approval is not obtained for any resultant expenditure or the President rejects the direction or recommendation. The PSC therefore enjoys considerable powers over the public service. It can control the size of any establishment within the public service, determine conditions of service and job descriptions, and give directions concerning appointments, transfers and dismissals.

...

[188] The role of the single PSC under the AT is therefore far less significant than it is under the IC. Under the IC the directions and recommendations of the PSC are effectively peremptory. Under the AT its powers, while important, are largely concerned with investigation and reporting. The hands-on control of the public service has been removed from the PSC and given, effectively, to the national and provincial executives. The exercise of those powers by each executive is now subject to monitoring by the single PSC. In relation to provincial government AT 197(4) makes it clear that it is the provincial governments that are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administration, all within a framework of uniform norms and standards applying to the public service.

- 69 Similar persuasion and considerations appear from *Premier, Western Cape v President of the RSA* 1999 3 SA 657 (CC) at para 24 (I have underlined part of the extract which I consider to be most pertinent):

“[24] The 1996 Constitution certified by this Court changed these provisions. It requires that there be a single Public Service Commission for the Republic, consisting of fourteen commissioners, five of whom have to be recommended by the National Assembly. The remaining nine are to be appointed on the basis that one commissioner for each province will be nominated by the Premier of that province. The powers of the Public Service Commission are different to the powers of the commissions which existed under the interim Constitution. The new Public Service Commission has less control over the public service than its predecessors. It is empowered to conduct investigations, make reports and generally to promote those values and principles of the public service identified in the Constitution. It has to report to the National Assembly and also to provincial legislatures in respect of its activities in a province. It is entitled to investigate complaints and to monitor the performance of the public service, but it is only empowered to give directions aimed at:

“... ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195 [of the Constitution].”

The Constitution does not say how such directions are to be implemented, but as that issue does not arise in the present proceedings, there is no need to deal with it.”

70 I have underlined section 196(4)(d) and section 196(f)(ii) above because of their material relevance to this matter. I believe that the wording and import of those provisions is not a matter of difficulty, especially in the context of, and because of, their contrasting terminology, and with the guidance of the two Constitutional Court Judgments quoted above:

70.1 As identified in Premier, Western Cape, section 196(4)(d) provides for “directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195.”

70.2 Two features are immediately apparent: (1) *directions* are involved; and (2) at a general level.

70.3 In my view, these directions could be argued to be binding (mindful of the fact that that is not an issue to be decided, but I mention it for the purposes of contrast with the applicable provision, section 196(4)(f)(ii) dealt with below).

70.4 Section 196(4)(f)(ii), on the other hand, contains very different wording, providing for the PSC “to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies.” Two features are immediately apparent from this provision, in contrast to that contained in section 196(4)(d) : (1) *recommendations* are involved; and (2) in respect of specific grievances of specific persons.

71 Had the word *binding* preceded the word *recommendation*, it could have made it binding. But it does not so precede. That does not preclude the provision from being interpreted to be read to include it, on the principles of interpretation considered above, but it is, in my view, a factor counting against such an interpretation.

72 There are, however, in my view, numerous considerations militating against such an interpretation:

72.1 The absence of the word *binding* in section 196(4)(f)(ii).

72.2 The contrast with the wording in section 196(4)(b), namely *directions*.

72.3 Standard dictionary definitions such as that in the Concise Oxford English Dictionary 2011 which defines recommendation as 'put forward with approval as being suitable for a purpose', 'advise as a course of action' and 'advise to do something'.

72.4 In other words, 'recommend' does not normally connote something binding, but rather a suggestion, advice or guidance. For example, a recommended retail price.

72.5 The analogous situation of the Public Protector whom the Constitution does clothe with the power to take and enforce binding remedial action (*South African Broadcasting Corporation SOC Ltd v Democratic Alliance* 2016 (2) SA 522 (SCA) at paragraphs 45 to 52). Section 182 of the

Constitution provides as follows (I have underlined parts of the extract which I consider to be of material relevance to this matter):

- (1) The Public Protector has the power, as regulated by national legislation –
 - (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
 - (b) to report on that conduct; and
 - (c) to take appropriate remedial action.
- (2) The Public Protector has the additional powers and functions prescribed by national legislation.

72.6 The provisions of the PSA referred to below.

73 In my view, therefore, section 196(4)(f)(ii), does not empower the PSC to make binding decisions in respect of grievances such as those of Dr Moodley.

74 Dr Moodley made much of *Khumalo v MEC for Education, Kwazulu-Natal 2014 5 SA 579 (CC)* in which the following was held at paragraphs 35 and 36 (the emphasis is that of his counsel):

“[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, s 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 s 195(1)(f) and (g) and the requirement of a high standard of professional ethics in s 195(1)(a). Read in the light of the founding value of the rule of law in s 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 s 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.”

- 75 In my view, this does not take the matter any further because the conclusions I come to on the merits of this matter mean that there was not anything unlawful for the PSC or the MEC to take action to set aside.
- 76 I am of the view that the PSC Report dated 6 June 2022 and the PSC Letter to the MEC dated 24 June 2022 to the effect that the appointment of Dr Parbhoo was irregular, is not binding.
- 77 That in turn means that the decision of the MEC not to follow the PSC Letter and the PSC Report is not unlawful for that reason.
- 78 My views expressed above are reinforced by a consideration of the various other aspects below.

(2) The Public Service Act 103 of 1994

- 79 The provisions of the PSA appear to me to be faithful to the above provisions of the Constitution and do not disturb my views expressed above. On the contrary, I believe that they reinforce them.
- 80 The mandate of the Act is to *inter alia* provide for the organisation and administration of the public service of South Africa, the regulation of the

conditions of employment, terms of office, discipline, retirement and discharge of members of the public service, and matters connected therewith.

- 81 Section 3 of the PSA sets out the functions of the Minister of Public Service and Administration (“**the Minister**”) as follows:

“Functions of Minister and executive authorities

- (1) The Minister is responsible for establishing norms and standards relating to-
 - (a) the functions of the public service;
 - (b) the organisational structures and establishments of departments and other organisational and governance arrangements in the public service;
 - (c) the conditions of service and other employment practices for employees;
 - (d) labour relations in the public service;
 - (e) health and wellness of employees;
 - (f) information management in the public service;
 - (g) electronic government;
 - (h) integrity, ethics, conduct and anti-corruption in the public service; and
 - (i) transformation, reform, innovation and any other matter to improve the effectiveness and efficiency of the public service and its service delivery to the public.
- (2) The Minister shall give effect to subsection (1) by making regulations, determinations and directives, and by performing any other acts provided for in this Act.”

- 82 Section 5(8) of the PSA provides (I have underlined the parts of the extract which I consider to be most pertinent):

- “(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.”

- 83 The words **shall implement** indicate an obligation on executive authorities to implement directions relevant to them contemplated in section 196(4)(d) (i.e.

they are peremptory – whether this is *intra vires* the Constitution is not an issue in this matter). Executive authorities are defined in section 1 of the PSA to include an applicable Member of Executive Council, such as the MEC in the instant matter. This is further reinforced by the fact that section 5(8), while referring to directions to provide *advice*, nonetheless provides that the direction shall be implemented.

84 The foregoing is, as with the Constitution, to be contrasted with the provisions of the PSA relating to grievances which provide for recommendations and no obligation to implement them in the case of grievances. The relevant provisions are in section 35 (I have underlined the word *recommend* in section 35(2)):

- “(1) For the purposes of asserting the right to have a grievance concerning an official act or omission investigated and considered by the Commission—
 - (a) an employee may lodge that grievance with the relevant executive authority under the prescribed circumstances, on the prescribed conditions and in the prescribed manner; and
 - (b) if that grievance is not resolved to the satisfaction of the employee, that executive authority shall submit the grievance to the Commission in the prescribed manner and within the prescribed period.
- (2) After the Commission has investigated and considered any such grievance, the Commission may recommend that the relevant executive authority acts in terms of a particular provision or particular provisions of this Act or any other law if, having regard to the circumstances of the case, the Commission considers it appropriate to make such a recommendation.”

85 Accordingly, as I mentioned above, the provisions of the PSA appear to me to be faithful to the above provisions of the Constitution and do not disturb my views expressed above. On the contrary, I believe that they reinforce them.

(3) The PSA Regulations

86 I have mentioned section 3(2) above which empowers the Minister to make regulations. Similarly, section 41 of the PSA provides as follows:

- “(1) Subject to the Labour Relations Act and any collective agreement, the Minister may make regulations regarding-
- (a) any matter required or permitted by this Act to be prescribed; (b) any matter referred to in section 3(1), including, but not limited to-
 - (i) the allocation, transfer and abolition of functions in terms of section 3(4) and the staff performing such functions;
 - (ii) employment additional to the establishment and restrictions on the employment of persons, other than permanently or for fixed periods or specific tasks, in the public service as a whole;
 - (iii) the appointment of unpaid voluntary workers who are not employees and their functions;
 - (iv) the co-ordination of work in a department or between two or more departments;
 - (v) a code of conduct for employees;
 - (vi) the disclosure of financial interests by all employees or particular categories of employees and the monitoring of such interests; and
 - (vii) the position of employees not absorbed into a post upon its re-grading;
 - (c) the reporting on and assessment of compliance with this Act and the review for appropriateness and effectiveness of any regulations, determinations and directives made under this Act;
 - (d) the designation or establishment of one or more authorities vested with the power to authorise a deviation from any regulation under justifiable circumstances, including the power to authorise such deviation with retrospective effect for purposes of ensuring equality; and
 - (e) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.
- (2) Different regulations may be made to suit the varying requirements of particular departments or divisions of departments, of particular categories of employees or of particular kinds of employment in the public service.
- (3) The Minister may issue directives which are not inconsistent with this Act to elucidate or supplement any regulation.”

87 Section 86 of the PSA regulations provides as follows:

“The Minister may issue directives on the desired managerial and leadership competencies of members of the SMS and the selection processes for the filling of SMS posts.”

88 The provisions of the PSA regulations do not undermine the position set out above. Nor could they do so as that would conflict with the Constitution and national legislation.

(4) The Grievance Rules

89 Section G of the Rules for dealing with grievances of employees provides as follows:

- “1. Once the Commission has received all the information from the executing authority, it must within 30 days consider such grievance and inform the executing authority of its recommendation and the reasons for its decision in writing.
2. On receipt of the Commission’s recommendation, the executing authority must, within five days, inform the employee and the Commission of his or her decision in writing.”

90 Rules 15 of the PSC Rules on Referral and Investigation of Grievances of Employees in Public Service provides as follows:

- “(1) The Commission must after investigating a grievance, communicate the outcome thereof in writing to the executive authority.
- (2) Communication of the outcome must be through a letter containing the following:
 - ...
 - (c) the findings of the Commission and reasons therefor, which must include the applicable law and prescripts; and
 - (d) recommendations, where this is applicable.
- (3) The executive authority to whom a recommendation has been made must, within 10 days of receipt of the Commission’s letter, provide the Commission

with comment indicating whether or not the executive authority is going to implement recommendations made by the Commission .

91 Rule 19(1) of the same Rules provides as follows:

“The Commission must issue its findings and make recommendations in respect of a grievance investigation to the executive authority, who must within 10 days of receipt of the findings and recommendations notify the Commission whether or not the executive authority is going to implement the recommendations made by the Commission.”

92 Mrs Moodley contends that there is a distinction between findings and recommendations in Rule 15 and also in Rule 19(1) above. She further contends that this means that findings are binding on the executive authority concerned (in the instant case, the MEC).

93 In my view, this is incorrect because it is not provided as such anywhere and, more importantly, would be in conflict with the scope of the empowering provisions of the Constitution and of the PSA dealt with above.

94 In the premise, I am of the view that the effect of the conclusion of the PSC in the PSC Letter and PSC Report that the appointment of Dr Parbhoo is irregular is not binding on the MEC.

95 The consequence of this is that the application in convention does not succeed on this point and the relief sought in prayer 1 of the counter-application falls away.

The meaning of “5 years of experience at a senior managerial level”

- 96 In my view this is the second key aspect on the merits of this matter.
- 97 Mrs Moodley emphasised in oral argument that the applicant's case does not extend to a consideration of whether or not Dr Parbhoo's experience satisfied the requirement of 5 years of experience at a senior managerial level if the meaning of that phrase is as contended for by the PSC and the MEC, dealt with below.
- 98 Mrs Moodley contended that all senior managers in the Public Service are in the SMS. While this may be so, it does not mean that experience at the level of a senior manager cannot be obtained elsewhere, both in respect of employees of the Public Service and those employed elsewhere – that depends on what the core phrase in this matter means. In this respect, the PSC pointed out that the Public Service Middle Management Competency Framework records material overlap between the services and competencies of the middle management and the SMS forming part of the Public Service. The competencies are generic in nature and apply to all occupations on salary levels 11 and 12, which contain management/supervisory type tasks. Although a large number of the occupations on levels 11 and 12 comprise positions of "technical specialist", they also have supervisory and management tasks inherent to their job content and may possess experience at a senior managerial level (not gained in the SMS) that may render them eligible for entry into the SMS at a level higher than Level 13, provided they can demonstrate the requisite minimum years of experience and qualifications.

99 Mrs Moodley contended that the wording of the Directive was changed from being a member of the SMS to **“5 years of experience at a senior managerial level”** only in order to cater for applicants from the private sector, and not from the public sector (the Public Service, as defined (quoted above), is a narrower concept). Further to this, she contended that these words, for the purpose of Public Service employees, mean only experience at Levels 13 to 16 of the Public Service (I see that as being the same as the SMS, but Mrs Moodley emphasised in oral argument that she preferred that wording). In other words, applicants from the Public Sector had to have that experience for the purposes of applications for posts at Level 14 and above, and therefore there is no distinction between that experience and **“experience at a senior managerial level”**. On the other hand, in respect of applicants from the private sector, Mrs Moodley submitted that the words **“experience at a senior managerial level”** mean experience at an equivalent senior managerial level outside of the Public Service.

100 Owing to its core importance, I asked Mrs Moodley to state in oral argument applicant’s case as to what **“5 years of experience at a senior managerial level”** means. She answered as follows:

100.1 For any applicants from the public sector [she expressly stated that this was not limited to the Public Service], five years of experience at Levels 13 to 16 in the Public Service [she explained that she deliberately used these words instead of ‘the SMS’, but I see this as a distinction without a difference].

100.2 For applicants from the private sector, five years of experience at an equivalent level.

101 The sole purpose, Mrs Moodley submitted, of the use of the words “experience at a senior managerial level” instead of experience in the SMS as previously had been the case, was to allow for applicants from the private sector to apply. I consider this to be a faulty premise at odds with the overall context, which is dealt with below.

102 It is necessary to interpret the words “experience at a senior managerial level” in the Directive and, in doing so, to consider the context in which they were produced. As will be attempted to be demonstrated below, I consider that context to be of significant importance.

103 The Directive was issued by the Minister in accordance with section 3(2) of the PSA, which provides as follows:

“The Minister shall give effect to subsection (1) by making regulations, determinations and directives, and by performing any other acts provided for in this Act.”

104 Similarly, section 41(3) of the PSA provides as follows:

“The Minister may issue directives which are not inconsistent with this Act to elucidate or supplement any regulation.”

105 The Minister accordingly had the power to issue the Directive.

106 Being a Level 14 post, paragraph 10.2 of the Directive requires “**5 years of experience at a senior managerial level**”. The relevant part of paragraph 10.2 reads as follows (I have underlined in bold the wording directly relevant to this matter. The other bolded extracts are in bold in the Directive itself):

“The table below reflects minimum years of experience as an entry requirement into the SMS:

<i>SMS Level</i>	<i>Relevant experience (wef 1 April 2015)</i>
Entry (level 13)	5 years of experience at a middle/senior managerial level
<u>Level 14</u>	<u>5 years of experience at a senior managerial level</u>
Level 15	8-10 years of experience at a senior managerial level
Level 16	8-10 years of experience at a senior managerial level (at least 3 years of which must be with any organ of State as defined in the Constitution Act 108 of 1996)”

107 The question is whether “**5 years of experience at a senior managerial level**” means, for the purposes of applicants who are employees in the public sector, five years’ experience at Levels 13 to 16 of the Public Service, as contended for by the applicant, or whether it could include equivalent experience elsewhere (in the Public Service, private sector or elsewhere, such as organs of state not forming part of the Public Service). In the former event, the appointment would be irregular because it is common cause that Dr Parbhoo did not have five years’ experience at Levels 13 to 16 of the Public Service. In the latter event it would not be irregular on this basis. As mentioned above, Mrs Moodley emphasised that her contention is that “**5 years of experience at a senior managerial level**” means:

107.1 For any applicants from the public sector, five years of experience at Levels 13 to 16 in the Public Service.

107.2 For applicants from the private sector, five years of experience at an equivalent level.

108 The criterion in the above sub-paragraph does not apply to middle managers in the Public Service who are not from the private sector and who are excluded per se from applying for posts at Levels 14 to 16.

109 The law on interpretation of documents dealt with above is equally and most pertinently applicable to this section. Various factors in regard to the interpretation of “experience at a senior managerial level” in the Directive will be considered below. The actual relevant wording of the Directive will be considered first and thereafter various contextual aspects, with neither predominating, as required by the authority.

(1) The wording per se

110 The effect of what applicant is contending is that “5 years of experience at a senior managerial level” means “5 years at Levels 13 to 16 of the Public Service for public sector employees, and 5 years of experience at an equivalent managerial level for private sector applicants”. What immediately springs to mind is the fact that this is not what was provided for in the Directive, when it could easily have so provided, if that was what was intended. Rather, in my view, applicant’s interpretation requires one to extract and divine from the words used in the Directive extended and differential meanings for different classes of persons. This is, in my view, a factor which, while not a bar to applicant’s interpretation, does tell against it.

(2) Applicants not in the Public Service or private sector

- 111 As mentioned, applicant argued that the purpose of the change in the Directive of the requirement from being a member of the SMS to *being experience at a senior managerial level* was to widen the opportunity to persons from the private sector to apply and not to widen it for applicants from the public sector.
- 112 A problem that arises with this and the meaning of the phrase in issue contended for by applicant (mentioned a number of times above), is the position of applicants who are neither members of the Public Service nor the private sector, in other words applicants who are public sector employees not forming part of the Public Service (such as employees of organs of state – see the definition thereof set out below – not forming part of the Public Service, the definition of which is set out above). The question is where they fit in on applicant's interpretation. On my understanding thereof, they do not fit in at all because they cannot qualify as they are not members of the Public Service or in the private sector.
- 113 This means that there could be a perfectly qualified applicant from the public sector who is not a member of the Public Service, as defined – more qualified than any of the private sector applicants in a particular instance – who is disqualified for that reason alone. That appears to me to be a somewhat arbitrary treatment of that category of persons, especially in comparison with private sector applicants.

(3) **“Organ of state” and “Public Service”**

114 The Directive refers to **“organ of state”** as defined in the Constitution. It is defined therein to mean:

- “(a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution –
 - (i) exercising a power or performing a function 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, but does not include a court or a judicial officer;”

115 The definition of the **“Public Service”** has been quoted above. It is to be appreciated that the defined concept of an **“organ of state”** overlaps in part with what is provided for in the defined concept of the **“Public Service”**. However, the concept of an **“organ of state”**, in particular in (b) of the definition, goes beyond that which is provided for in the concept of the **“Public Service”**.

116 It therefore appears to me to be incongruous to interpret **“5 years of experience at a senior managerial level”** to mean five years at Levels 13 to 16 of the Public Service for applicants who are public sector employees and experience at an equivalent managerial level outside of the Public Service in respect of applicants from the private sector, as submitted by Mrs Moodley. I do not see anything which prevents experience at an equivalent managerial level in an organ of state from satisfying the criterion. Further, the wording in paragraph 10.2 of the Directive in respect of applications for Level 16 posts (“8-10 years of experience at a senior managerial level **(at least 3 years of which must be with any organ of State ...)**”) contemplates that three years of experience must be with **“any organ of State”**

which, in my view, means that the remaining five to seven years can be from somewhere else and is not limited to Levels 13 to 16 of the Public Service.

117 This, too, in my view is against the interpretation contended for by the applicant.

(4) The introduction of the Directive and its amendment

118 The Directive was originally introduced on 1 April 2015. It was amended on 1 April 2016 and further amended on 3 March 2017 into its current form. In the covering letter from the Director-General of the Department of Public Service and Administration (“**the DPSA**”) dated 6 March 2017 to all heads of national and provincial departments in regard to the latest version of the Directive, it was recorded, *inter alia*, as follows (underlining added by me):

“2. Following the initial implementation of the Directive, challenges with regard to the recruitment of Heads of Department that specifically required that five (5) of the 8-10 minimum years of experience required for entry into a post of a HOD or DG must be as a member of the SMS in the Public Service. This was amended with effect from 1 April 2016 to reflect that experience must be as a senior manager within any organ of state. However, there were still challenges with regards to the area concerning minimum entry requirements for Heads of Department. In response to such and noting the impact of required amendments, the following amendment was enacted ensuring Cabinet concurrence on 7 December 2016.

2.1 The number of years of experience for a Head of Department will now reflect, 8-10 at a senior managerial level of which at least three (3) years’ experience must be within any organ of State as defined in the Constitution, Act 108 of 1996, in order to widen the opportunity to attract individuals at that level.”

119 While the above explanation is targeted at Head of Department posts, it pertains to the same terminology – experience at a senior managerial level – which

applies across the board from Level 13 to Level 16, including to Level 14 which is in issue in this matter. What can therefore be derived from the explanation in relation to the general context, genesis and purpose of these words is instructive to the general context, genesis and purpose of the words experience at a senior managerial level, and therefore to the consideration and determination of this matter.

120 The PSC explained that for the purposes of entry into the SMS, the Directive has been amended twice and with each amendment the requirements for entry have become less restrictive in order to promote a broader pool of candidates and accommodate private sector candidates as well as candidates from the public sector for recruitment purposes (in this latter respect, this includes the objective of arresting the exodus of talent from the public sector). Put another way, this was to widen the opportunity for persons to apply for positions in the SMS. The context behind this is considered further below. To this end, the language in the Directive shifted from requiring SMS experience to experience at a senior managerial level.

121 Mrs Moodley argued that the purpose of the change of the requirement in the Directive from being a member of the SMS to being experience at a senior managerial level was only to widen the opportunity for persons from the private sector to apply and not to widen it for applicants from the public sector to include applicants from middle management, other than for Level 13.

122 The explanation in the covering letter from the Director-General in respect of the Directive, quoted above indicates, to me, that the wording experience at a senior managerial level means something other than as a member of the SMS (or at Levels 13 to 16) of the Public Service. Further in this regard:

122.1 The initial wording of the Directive “specifically required that five (5) of the 8-10 minimum years of experience required for entry into a post of a HOD or DG must be as a member of the SMS in the Public Service.”

122.2 In the first amendment of the Directive in April 2016, this was changed “to reflect that experience must be as a senior manager within any organ of state.”

122.3 This process contemplated and recognised a difference between the specific requirement of experience “as a member of the SMS in the Public Service” and experience “as a senior manager within any organ of state”, the new terminology being to widen the pool of potential applicants.

122.4 That connotes that they mean something different, which they do, the latter being wider, i.e. the pool for possible public sector applicants had been widened by the first amendment of the Directive. Applicant’s interpretation of the current wording of the Directive would, however, have the surprising result that this widening was reversed to again exclude members of organs of state which are not members of the SMS (or those not at Levels 13 to 16 of the Public Service).

122.5 It further connotes that experience in the SMS (or at Levels 13 to 16 of the Public Service) was already then not a requirement and that experience in any organ of state would suffice.

122.6 This is further reinforced by the further amendment of the Directive into its current form in March 2017 in which the requirement was changed to: “The number of years of experience for a Head of Department will now reflect, 8-10 at a senior managerial level of which at least three (3) years’ experience must be within any organ of State ...”

122.7 Why I am of the view that this further reinforces the position is that while “at least three (3) years’ experience must be within any organ of State”, the balance is expressed in the more general phrase of 8 to 10 years’ “experience at a senior managerial level.” Were this more general phrase to mean Levels 13 to 16 of the Public Service, it would constitute a reversal of the process undertaken which was “in order to widen the opportunity to attract individuals at that level.”

123 The PSC and the MEC explained the context of the Directive and its current wording in this respect as being to attract as wide a pool of applicants for posts, including from the private sector (as contended by Mrs Moodley), and to arrest the exodus of talent from the public sector (as not contended by Mrs Moodley). For example:

123.1 The Director: Employment Management of the DPSA (Ms Renel Singh Dastaghir – “**Ms Dastaghir**”) explained as follows:

“Senior managerial experience is not linked to remuneration but linked to relevant complexity of the role/s having [been] performed by a person who has applied in line with the requirements of the advert and determination of suitability is done on that basis. Remember recruitment is not confined to internal public service but anyone can submit an application from the public in favour of a post, hence the Directive reflects the experience requirement as 5 years senior managerial and not 5 years SMS.”

And elsewhere:

“The Directive does not stipulate anyway that middle management or senior management experience must be based on salary level as that would mean that only public servants can apply. It is based on job complexity and the work undertaken as provided for in the CV. As policy drafters we cannot draft policy which is limited to persons only in the Public Service as recruitment is an open process where persons can apply for public service posts from any sector.”

123.2 Another example is the establishment of the Occupational Specific Dispensation (“**the OSD**”) in respect of the Public Service in 2009, explained by the PSC as follows: When the OSD was introduced, the SMS fell away in certain categories. In the medical category this included principal specialists, chief specialists and Chief Operating Officer (COO) positions, amongst others, which were positions previously graded at Levels 13 and 14 which, on becoming part of the OSD, were delinked from the SMS and loaded on PERSAL (the public sector’s human resource management system) at Level 12 at a maximum, but which can be remunerated as high as Level 16. The OSD resulted in there being medical professionals who had experience at SMS Level 13 and above who were then classified at Level 12 but earning salaries as high as Level 16. This did not diminish the managerial experience gained. Relevant in this respect is that which is set out above in regard to the Public Service Middle Management Competency Framework which records material overlap between the services and competencies of the middle management and the SMS forming part of the Public Service, including in relation to management/supervisory type tasks which are inherent in jobs resulting

in experience at a senior managerial level (not in the SMS) that may render them eligible for entry into the SMS at a level higher than Level 13, provided they can demonstrate the requisite minimum years of experience and qualifications.

123.3 The existence of this body of state employees under the OSD was a matter of fact at the time of the original issue of the Directive and its amendments. It would therefore be an existing contextual factor relevant to its interpretation. The Public Service Regulations effective from 1 August 2016, specifically provided for the Minister to determine an occupational specific dispensation for a specific occupational category or categories that includes a unique salary scale, centrally determined job grades and job descriptions and career progression opportunities based on competencies, experience and performance.

123.4 The PSC further explained that five years' experience at a senior managerial level as opposed to five years in the SMS precisely gave effect to section 8.2(4) of the SMS handbook which requires all candidates to be measured against the same objective criteria and against the same selection criteria by ensuring that all candidates from within and outside the Public Service could be measured against the same objective selection criteria. The SMS Handbook, the PSC's Toolkit on Recruitment and Selection and the Recruitment and Selection Policy of the Western Cape Government do not state that the experience required must be in the SMS.

- 123.5 The object of the amendments to the Directive was deliberate, namely to widen the field of applicants. For this reason, experience at a senior managerial level, if interpreted to mean solely experience in the SMS (or Levels 13 to 16 of the Public Service) for applicants who are public sector employees, would not further that deliberate intent.
- 123.6 The purpose of the Directive was not only to attract applicants from outside of the Public Service, but also to assist in addressing the exodus from the Public Service of skilled individuals and to attract skilled individuals to the Public Service from other sectors. Self-evidently, a requirement that applicants must have experience in the SMS itself (or Levels 13 to 16 of the Public Service) undermines these two purposes, save insofar as Level 13 is concerned in part which allows for experience at a *middle managerial level* as well as at a *senior managerial level*.
- 123.7 A further problem with Dr Moodley's interpretation is that if *experience at a senior managerial level* is to mean experience at Levels 13 to 16 of the Public Service, then why should *experience at a middle managerial level* not mean experience in the Middle Management of the Public Service (which is officially recognised and in respect of which there is a detailed Middle Management Competency Framework – “**the MMCF**”). To me this is a problematic inconsistency which arises from Dr Moodley's approach.
- 123.8 The covering letter, quoted in part above, to the Directive when it was distributed to all heads of national and provincial departments, made it

clear that the purpose was to move away from experience as a member of the SMS being a requirement.

124 In my view, this demonstrates that membership of the SMS as a requirement was departed from even prior to the Directive (i.e. in its previous forms) and that it is a concept distinct and different from both “*experience at a senior managerial level*” and “*experience as a senior manager within any organ of state*” as contemplated in the Directive in its current form.

125 This indicates to me that, taking into account the purpose of attracting talent external to the Public Service and the purpose of not losing talent within the Public Service (and the SMS), what is a more rigid criterion of minimum years of service at Levels 13 to 16 of the Public Service for different levels, was not a requirement.

126 Applicants argued that the approach of the PSC (and the MEC) creates two types of senior managers in the public sector: (1) those that are members of the SMS; and (2) those who are level 12 and lower, but are subjectively chosen using subjective criteria regardless of their job level. Applicant argues that the effect of interpreting the term “*experience at a senior managerial level*” in the manner contemplated by the PSC and the MEC is that two types of senior managers would be created in the public sector, rendering the SMS nugatory and threatening the rights of the existing or known senior managers. I disagree: On the interpretation of the PSC and the MEC, all applicants are to be judged against their actual experience and not years in the SMS. That entering Levels

14 to 16 of the SMS does not require experience in the SMS (or at Levels 13 to 16 of the Public Service) has no effect on the SMS remaining in place. The SMS is not, in my view, rendered nugatory.

127 Applicant, in attempting to interpret the meaning of *senior managerial level*, relies on previous recruitment and selection processes at the Metro TB Hospital and Tygerberg Hospital as examples of the consistent manner in which the term was interpreted (being, according to him, as interpreted by him). In my view, this approach to interpretation is inappropriate. For example, applicant would have to satisfy the court that the same comparator is being used, which he has not. For instance, in the case of the Metro TB Hospital, whilst the panel decried the stringent nature of the Directive, which meant that a good candidate would not qualify with the minimum requirements, the clear outcome in that case was that the candidate did not meet the number of years of experience on any interpretation, only being able to demonstrate two out of the five years of middle/senior managerial level experience required. Further, and more importantly from the perspective of the rules of interpretation, in an interpretive exercise, it is the context that leads to the wording adopted, and not the context of how it is applied (which may be incorrect), that is far more relevant. Therefore, one can accept that the Directive may have been misinterpreted and misapplied by various stakeholders over the years. The interpretive exercise remains the exclusive remit of the courts.

128 In my view, the context, including the genesis and purpose of the current wording of the Directive under consideration, constitutes weighty material against the interpretation contended for by Dr Moodley.

(5) **Further aspects in regard to the wording in paragraph 10.2 of the Directive**

129 The wording of clause 10.2 is also, in my view, instructive on a material level.

130 The introductory line to the table containing the required levels of experience:

130.1 This reads: “The table below reflects minimum years of experience as an entry requirement into the SMS:”

130.2 Were **experience at a senior managerial level** to mean only Levels 13 to 16 of the Public Service, then it would exclude private sector applicants for the purpose of Levels 14 to 16, which is the opposite of the purpose of the Directive. That is why Mrs Moodley was constrained to argue that non-SMS experience was acceptable, but only for private sector applicants, and to rely on different content to be given to the same words for different categories of persons.

131 Further, were **experience at a senior managerial level** to mean only at Levels 13 to 16 of the Public Service for the purpose of applicants from the public sector, the question then arises as to what **experience at a middle managerial level** for the purposes of entry into Level 13 means. If it means experience in the Public Service only, then it completely excludes private sector applicants without such experience which runs contrary to the purpose of the Directive. We know that

not to be the case, even on Dr Moodley's case. Bearing in mind that the only difference from the wording experience at a senior managerial level is to replace senior with middle, then if experience at a senior managerial level means only experience at Levels 13 to 16 of the Public Service for applicants from the public sector, I think that it would be a strain to suggest that experience at a middle managerial level means experience outside of the Public Service for applicants from the private sector. Indeed, I think that this militates in favour of an interpretation that the wording refers to experience at a particular level without limiting it to any place for the purposes of any particular category of applicant.

132 Were the words experience at a senior managerial level to mean only experience at Levels 13 to 16 of the Public Service for the purposes of applicants from the Public Service, then it is difficult to understand why the Directive did not simply provide as such.

133 The fact that for Level 16 it is provided that three years must be with any organ of State, in contradistinction to the balance being able to be experience at a senior managerial level, would result in the effect that, were experience at a senior managerial level to mean experience at Levels 13 to 16 of the Public Service, all 8 to 10 years experience would have to be with an organ of State (the Public Service being in respect of organs of State) as opposed to the only three years stated to be expressly required.

134 The table under paragraph 10.2 of the Directive demonstrates that, to qualify for entry into the SMS at Level 13, a candidate must either have 5 years' experience at middle managerial or senior managerial level. Implicit in this requirement, is the understanding that it is possible to already have experience at a senior managerial level, prior to entry into the SMS.

(6) Conclusion on this aspect

135 In my view, experience at a senior managerial level does not mean, for the purposes of applicants from the public sector, experience at Levels 13 to 16 of the Public Service, and something else for certain other applicants. In my view it means experience as a senior managerial level for all applicants. As a result, my conclusion is the MEC did not err in this regard and the shortlisting and appointment of Dr Parbhoo for and to the Post is not irregular on this basis.

Conclusion on Main application

136 For the foregoing reasons, it is my view that the relief sought in the main application ought not to be granted.

137 As to costs, I agree with the following submissions made by Mrs Moodley:

137.1 That this matter engages the Biowatch⁸ principle in which the Constitutional Court held that "[O]rdinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear

⁸ Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC) at para 22

its own costs.” This relates to litigation against the government in which litigants seek to assert a constitutional right (*Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) at para 138).

137.2 Linked to this is that this matter raises two aspects of general public importance, as articulated above (*Biowatch* at paragraph 123). Mr De Villiers-Jansen contended that the effect of the decision in this matter (or that of appeal court) would be limited to Dr Moodley and Dr Parbhoo. I disagree. The question as to the binding nature of the findings and recommendation of the PSC is of wide import, as is that in relation to the interpretation of the Directive.

137.3 While the rule is not inflexible and may be departed from in certain instances, for example, frivolity of the litigation or other conduct on the private litigant’s part, that deserves censure,⁹ in my view this is not the kind of case that warrants such censure, despite the applicant’s language and accusations having been somewhat intemperate at times. While not eliminating that factor, it is noted that the fact that a litigant pursues litigation with vigour is not a relevant consideration (*Affordable Medicines* at para 139).

138 In the premise, I am of the view that it would be appropriate for there to be no order as to costs in respect of the main application.

The counter-application

⁹ *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) at para 138, *Biowatch* para 24.

139 As mentioned above, prayers 2 to 5 of the counter-application were abandoned in oral argument by the PSC.

140 Mr Tshetlo further informed me in oral argument that, although not stated as such in the Notice of Counter-Application, prayer 1 of the counter-application is conditional on the PSC Report being binding. He explained that this was because prayer 1 is only required in the event that the Court finds that the PSC Report is binding because then, in order to consider the question of irregularity, it would have to be set aside.

141 For the reasons set out above, I have come to the conclusion that the PSC Report is not binding. Prayer 1 of the counter-application therefore falls away.

142 The counter-application therefore does not require further consideration, save in respect of costs.

Costs of the counter-application

143 The competing costs orders in respect of the counter-application, in my view, are whether first respondent should pay applicant's costs or whether they are to pay their own costs.

144 Insofar as prayers 1 to 3 of the counter-application are concerned:

- 144.1 As dealt with above, prayer 1 was conditional and fell away because of first respondent's success on the merits in the main application. I consider this to be a largely neutral factor.
- 144.2 In respect of all of prayers 1 to 3, there was a material overlap between the counter-application and the issues determined in the main application. Those issues have been decided against applicant in the main application. They were issues which would not have required much, if any, independent consideration for the purposes of the counter-application. My view expressed above is that the Biowatch principle/rule should apply despite applicant having been unsuccessful in the main application, and that there be no order as to costs in the main application. I am of the view that these are factors which are in favour of the parties paying their own costs in respect of the counter application.
- 144.3 Finally, Mr Tshetlo, in communicating the PSC's abandonment of prayers 2 and 3 of the counter application, said that this was because they were unnecessary (with which I agree). I am of the view that this is a factor which is in favour of the applicant being awarded his costs in respect of the counter application.
- 145 The balance of the main relevant aspects in the counter-application fall into three categories:
- 145.1 Applicant disputed the authority of (1) the PSC's deponent to have deposed to the affidavits to the main application as well as (2) to

institute the counter-application on behalf of the PSC. These aspects were a not insignificant aspect of the papers and written argument. During oral argument, however, they were abandoned by applicant. I am of the view that this is a factor which is in favour of the parties paying their own costs in respect of the counter application.

145.2 The second category is that some major issues in the counter-application would, in my view, have been decided against applicant. The main items in this respect are whether the counter-application would have failed due to it having been brought out of time and whether first respondent failed in complying with a statutory and constitutional obligation to consult prior to bringing the application (I will deal with these aspects briefly below). For this reason, I am of the view that this is a factor which is in favour of the parties paying their own costs in respect of the counter-application.

145.3 The third category relates to prayers 4 and 5 of the counter-application. I am of the view that that relief would not have been granted had it not been abandoned (I will deal with this aspect briefly below) and therefore this is a factor which is in favour of the applicant being awarded his costs in respect of the counter-application.

146 The three aspects which I said in the above paragraph would be dealt with further will now be briefly considered.

(1) The timing of the counter application

147 Applicant alleges that the counter-application, being a review, whether in terms of PAJA or the principle of legality, is out of time. This involves the exercise of a broader discretion in the context of a legality review (Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) at paragraph 50).

148 In oral argument, applicant's main complaint distilled to the assertion that the PSC explained the period of delay from February 2022 to September 2022 but did not explain the previous period from June 2021. I disagree: The PSC stated that it was not until it engaged its current legal representatives with a view to defending the main application, that the PSC became aware that a material error of law informed the PSC Report. The counter-application was launched within 180 days thereof. I am therefore of the view that the delay has been reasonably explained.

149 For this reason, I am of the view that this is a factor which is not in favour of first respondent paying the costs of the counter-application.

(2) Why the relief in prayers 4 and 5 would have been refused

150 This relief concerned the setting aside of the Directive and consequent relief flowing therefrom.

151 The Directive and the issue thereof have already been dealt with in detail. The Directive was issued in terms of section 3(2) of the PSA provides as follows:

“The Minister shall give effect to subsection (1) by making regulations, determinations and directives, and by performing any other acts provided for in this Act.”

152 Section 5(2) of the PSA provides as follows:

“A determination or directive, or any withdrawal or amendment thereof, made or issued by the Minister in terms of this Act shall take effect on the date of the written communication conveying the making of the determination, the issuing of the directive or the withdrawal or amendment thereof, unless expressly stated otherwise in that communication, determination or directive.”

153 The basis for the PSC’s case for the relief in prayers 4 and 5 of the counter-application is that members of the SMS can only move up one level thereof at a time which results in unfair differentiation between them and public servants who are not members of the SMS as they can enter the SMS at a higher level. The pertinent allegations in this regard in the founding papers in the counter-application are as follows:

- “256 More specifically, to the extent that such applicants seek to apply for a position in the SMS, their only limitation to entry at any level, is the candidates’ own ability to demonstrate the requisite years of experience at a senior management level.
- 257 On the other hand, the progression and movement of public servants who are existing members of the SMS is constrained by the Directive, to the extent that it prohibits such candidates from skipping a promotional level (i.e. a level 13 member of SMS cannot apply for a level 15 position, without first progressing to a level 14 position, despite possessing the required number of years of experience for such higher position).
- 258 This lacuna in the provisions of the Directive therefore results in the unfair differentiation between members of the SMS and public servants who are not SMS members.”

154 This argument therefore stands or falls on there being a provision in the Directive to the effect that members of the SMS can only progress one level at a time in the SMS.

155 I have considered the Directive and have not been able to find a provision to the aforesaid effect. The only candidates dealing with progression in the SMS which I could identify are:

“10.5: Existing SMS members

10.5.1 Existing SMS members will be required to comply with all minimum requirements to progress to higher levels within the SMS.”

And the part of clause 10.2 which reads as follows:

“An SMS member must demonstrate that she/he has validated his/her competencies at their current performer level before progressing to a higher level of SMS.”

156 I agree with Mrs Moodley that the Directive, including both of the above two provisions thereof, do not have the effect contended for by the PSC (the PSC, in oral argument, agreed with this). On the contrary, in my view, the use of the indefinite article in the extract from clause 10.2 and the words “*progress to higher levels*” in clause 10.5.1 suggest the opposite.

157 Another consideration is that the Minister has the power to amend the Directive – we have seen that this has already been done twice, and is referred to in section 5(2) of the PSA quoted above. No explanation has been given for why this was not done or attempted to be done in respect of the aspect under consideration.

158 For these reasons I am of the view that the relief sought in prayers 4 and 5 would have been declined had it not been abandoned by the PSC and, therefore, this is a factor which is in favour of the applicant being awarded his costs in respect of the counter-application.

(3) The allegation of a failure to consult

159 Applicant argued that, in terms of section 41 of the Constitution, the relief sought in prayers 4 and 5 of the counter-application should be dismissed.

Section 41 provides as follows:

41. Principles of co-operative government and intergovernmental relations
 - (1) All spheres of government and all organs of state within each sphere must –
 - (a) preserve the peace, national unity and the indivisibility of the Republic;
 - (b) secure the well-being of the people of the Republic;
 - (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
 - (d) be loyal to the Constitution, the Republic and its people;
 - (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
 - (f) not assume any power or function except those conferred on them in terms of the Constitution;
 - (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
 - (h) co-operate with one another in mutual trust and good faith by –
 - (i) fostering friendly relations;
 - (ii) assisting and supporting one another;
 - (iii) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.
 - (2) An Act of Parliament must –
 - (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
 - (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
 - (3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.
 - (4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.”

160 Applicant contends that there is no evidence that the PSC even consulted with the DPSA and its Minister in regard to the Directive and the PSC's problems with it. It is to be remembered that it is the Minister who issued the Directive and it was the Director-General who distributed it under the auspices of the DPSA. I disagree with the contention in the first sentence of this paragraph: there was correspondence dealing with and discussing the substance of the core aspect of this matter (*experience at a senior managerial level*) involving the DPSA and the PSC on the issue.

161 In any event, the point taken by applicant would in my view have failed on another even more fundamental level: both Mr Tshetlo and Mr De Villiers-Jansen pointed out that section 40(2) of the Constitution refers to government in the national, provincial and local spheres which are said to be interdependent and interrelated. The PSC, however, is an institution created in terms of Chapter 10 of the Constitution. It does not form part of government as defined for these purposes. Section 41(2) of the Constitution envisages an Act of Parliament to inter alia facilitate intergovernmental disputes. This is the Intergovernmental Relations Framework Act 13 of 2015 ("IRFA"). Section 2(1) thereof provides that the statute applies to national, provincial and local government. On the other hand, section 2(2) provides that the statute does not apply to constitutionally independent institutions. Section 2(3) provides that an organ of state may only participate in an intergovernmental structure if specifically referred to in Chapter 2 of IRFA or if invited to participate. Neither of these apply in the instant matter.

162 I therefore think that applicant's reliance on section 41 of the Constitution is not well-founded and that this is a factor in favour of the parties paying their own costs in respect of the counter-application.

Conclusion on the costs of the counter-application

163 While there were some issues of substance unique to the counter-application, on balance, taking into account all of the above factors, I believe that it would be appropriate were there to be no order as to the costs in the counter-application.

Order

164 The following order is made:

1. The application in convention brought by the applicant is dismissed.
2. There shall be no order as to costs in respect of the application in convention.
3. In respect of the relief sought in the counter-application, it is recorded as follows:
 - 3.1. Prayer 1 falls away flowing from the dismissal of the application in convention.
 - 3.2. Prayers 2 to 5 were abandoned by first respondent.
4. There shall be no order as to costs in respect of the counter-application.

A Kantor

Acting Judge of the High Court

For the applicant

Adv J Moodley

Instructed by

J Naidoo Attorneys

J Naidoo

For the respondent

Adv R Tshetlo

Adv S Mashiane

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