



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

Of interest

CASE NO. CA 20/2024

In the matter between:

DIBWE NJIBU

First appellant

MULANGALA TRESOR MUKINAYI

Second appellant

ISSU JAMES MANDUANGA

Third appellant

TRESOR KANTENGA NSAMBA

Fourth appellant

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH, EASTERN CAPE PROVINCE**

First respondent

**SUPERINTENDENT-GENERAL FOR THE
DEPARTMENT OF HEALTH,
EASTERN CAPE PROVINCE**

Second respondent

**CHIEF EXECUTIVE OFFICER: ISILIMELA
DISTRICT HOSPITAL**

Third respondent

JUDGMENT

LAING J

[1] This is an appeal pertaining to the employment contracts concluded by the appellants and the Department of Health, Eastern Cape. The appellants are medical practitioners from the Democratic Republic of Congo ('DRC'), appointed to serve as medical officers at the Isilimela District Hospital, situated at Port St Johns, along the Transkei coastline. The court *a quo* dismissed their urgent application for, *inter alia*, a declarator to the effect that their contracts were of a permanent nature, and the review and setting aside of the decision to terminate the contracts in question.

The appellants' case

[2] In their founding affidavit, the appellants aver that they each concluded an employment contract on or about 1 July 2020. The material terms thereof were that, *inter alia*, they would be paid monthly salaries, they would be entitled to leave, and they could terminate the contract on one month's written notice. The Department, in turn, could only terminate the contract for reasons related to incapacity, operational requirements, or misconduct. The contracts would, moreover, be subject to the provisions of the Public Service Act 103 of 1994 ('the PSA') and the regulations thereto, the relevant collective agreements, and the Department's policies. Save for the first appellant, the remaining appellants are all members of the Government Employees Pension Fund; deductions are made from their salaries in that regard.

[3] On 11 May 2023, the third respondent delivered termination letters to each of the appellants. The contents thereof are pertinent and are repeated below:

'SUBJECT: EMPLOYMENT CONTRACT TERMINATION LETTER- YOURSELF...

Dear Dr...

The purpose of this letter is to confirm termination of your employment contract with the Eastern Cape Department of Health under OR Tambo District (Isilimela Hospital). Regrettably, this means your contract of employment will be terminated. This decision is not a reflection of our performance but is in adherence to Paragraph 5, 7 & 14 of the Policy on Recruitment of Foreign Health Professionals, which reads as follows:

- “5. Except for Foreign Health Professionals recruited through a government-to-government agreement, a Corporate Permit obtained in terms of section 2 of the Immigration Act or unpaid or volunteer services, the employment of Foreign Health Professionals shall only be allowed after they have been successful in competing for an advertised post and there is record of no South African citizen or Permanent Resident was available and found suitable to fill the particular post. The National Minister of Health may prescribe how posts would be advertised to ensure consistent practices in the health sector.”
- “7. Only fixed term employment contracts shall be issued to Foreign Health Professionals. An employment contract shall not exceed a term of three years from the date of employment and may not be extended unless otherwise determined by a specific government-to-government agreement. A Foreign Health Professional who is not employed under government-to-government agreement, shall not be allowed to enter into a new employment contract during the currency of the initial contract. Should a health employer wish to renew an employment contract during or after the initial contract of three years, the conditions contained in paragraph 5 above shall be applicable.”
- “14. At no stage, the recruitment and employment of Foreign Health Professionals shall compromise employment opportunities available to South African citizens and permanent residents. Health care employers shall present a recruitment and employment plan containing quotas for the employment of Foreign Health Professionals for consideration by the National Minister of Health and reporting to the National Health Council. The National Minister of Health may issue further directives to health employers regarding quotas for the employment of Foreign Health Professionals.”

Based on the above directive, your 3-year contract of employment will end on the 30th June 2023 and has already been effected as such on the PERSAL system. Isilimela

Hospital management acknowledges and thanks you for valuable contribution during your employment with us.

Yours in Health Services

...¹

[4] The appellants regarded the termination letters as unlawful and their attorneys demanded the retraction thereof. This met with no response.

[5] In the urgent application that followed, the appellants asserted that only the first respondent, not the third respondent, had the necessary authority to terminate the contracts. They also asserted that this could only be done based on one of the limited grounds stipulated therein. Regarding their personal circumstances, the appellants referred to the fact that they were all sole breadwinners, with minor children and extended families to support. Their financial obligations included school fees and transportation costs, rental, motor vehicle instalments, insurance premiums, food, and household expenses in general. As foreign health professionals, the appellants were unlikely to obtain alternative employment, especially considering the provisions of the relevant policy and the Department's budgetary constraints. They sought to enforce the terms of the contracts, arguing that damages claims would not suffice.

Respondents' case

[6] The respondents opposed the application and brought a counter-application. The relief claimed was somewhat confusing and contradictory, but the respondents effectively sought the review and setting aside of the decision to appoint the appellants

¹ Sic.

on 1 July 2020, alternatively a declarator that the appellants were employed in terms of fixed term contracts that terminated on 30 June 2023.

[7] In the founding affidavit to the counter-application, the second respondent averred that the first page of the contracts was altered to reflect their fixed term nature. It was recorded in this way administratively. The appellants, moreover, were always aware of their fixed term nature because they were described as contract workers in such leave or salary enquiry forms as were requested by and issued to the appellants from time to time. The termination letters, contended the second respondent, were merely reminders; the appellants' contracts terminated on 30 June 2023 by effluxion of time.

[8] The second respondent went on to argue that the original appointment of the appellants, by the District Manager: OR Tambo, was done in contravention of the Policy on the Utilisation of Foreign Nationals to Address Human Resource and Skills Needs in the Public Service ('the PSA policy').² Furthermore, the Policy on the Employment of Foreign Health Professionals in the South African Health Sector ('the health recruitment policy') provided that the Head of a Provincial Department of Health was responsible for the employment of foreign health professionals and could not delegate his or her duties in this regard.³ The district manager had no power to appoint the appellants.

[9] Addressing the averments made in the appellants' founding affidavit, the second respondent denied that the appellants were the holders of permanent residence permits. They had refugee status.

In reply

² The policy was ostensibly issued by the Minister for Public Service and Administration as a directive in terms of section 41(3) of the PSA to supplement the Public Service Regulations, 2001 (since repealed) with effect from 1 December 2009.

³ The policy appears to have been issued by the Minister of Health on the recommendation of the National Health Council, with effect from 8 February 2010.

[10] The appellants, in their replying papers, took issue with the respondents' delay in launching the counter-application. They pointed out that this was done almost three years after their knowledge of the permanent nature of the contracts. The respondents had placed no facts before the court upon which it could condone such a delay. Substantial prejudice would be caused to the appellants if the contracts were set aside.

[11] Furthermore, the appellants contended that the policies in question allowed the public sector to address human resources needs in relation to critical skills and occupations by employing foreign nationals. The policies did not expressly prohibit a foreign national from accepting a permanent employment contract and did not invalidate any agreement to that effect. They also permitted the renewal of a fixed term employment contract. There were no South Africans who had applied for the positions when the appellants were appointed. The appellants have, in any event, no intention of returning to the DRC.

Further developments

[12] On 27 June 2023, the matter came before Tokota J, who ordered the respondents to retain the appellants in the employment of the Department on a month-to-month basis, pending the final determination of the matter. The respondents subsequently amended their counter-application to the effect that they sought, *inter alia*: a declarator that the letters of appointment issued by the district manager on 1 July 2020 were in breach of section 10 of the PSA as well as the PSA policy, and that the district manager had acted outside her powers; alternatively, that the appellants had been employed on a fixed term basis, and that the termination of their contracts on 30 June 2023 had come about by effluxion of time.

Findings of the court *a quo*

[13] In his judgment, Rugunanan J referred to section 10 of the PSA, pointing out that it precludes the permanent appointment of a person to any post in a government department unless he or she is a South African citizen or a permanent resident. Both the PSA policy and the health recruitment policy are consistent with the legislation in question but permit the employment of foreign health professionals for a fixed term of no more than three years, subject to the conditions stipulated.

[14] The learned judge distinguished, from the present matter, the decisions relied upon by the appellants. The doctrine of legality was a means by which the Constitution regulated the exercise of public power; public officials were required to act within the ambit of the law and could not exercise powers not conferred upon them. Rugunanan J stated that the single question to be answered was whether the condition of South African citizenship or permanent residency status had been satisfied. The learned judge held that it had not. The district manager had failed, moreover, to apply her mind to the provisions of section 10 of the PSA, and the PSA policy, when concluding the contracts with the appellants.

[15] Turning to the counter-application, Rugunanan J found that the respondents' delay in instituting a legality review was unreasonable. There was also no satisfactory explanation for the delay. Nevertheless, a court could find itself compelled to declare, as unlawful, the conduct of a public official because the Constitution enjoined the exercise of only such power as was sanctioned by law. Consequently, in assessing the respondents' delay, the court could consider the lawfulness of the contracts in terms of the doctrine of legality.

[16] The court *a quo* held, in the end, that the contracts concluded with the appellants were unlawful. It dismissed the main application with costs; it upheld the counter-application, declaring that the letters of appointment issued by the district manager on 1 July 2020 were in breach of section 10 of the PSA as well as the PSA policy, and that the district manager had acted outside her powers.

Application for leave to appeal

[17] The appellants contended that the court *a quo* had erred in distinguishing the decisions relied upon. They also said that, considering the relevant constitutional principles, the court had failed to construe properly the provisions of the PSA. The court should have found that the contracts were valid. The appellants argued, furthermore, that the court had erred in not finding that the termination thereof was unlawful; this had not been done in accordance with the terms of the contracts or the PSA itself.

[18] Regarding the counter-application, the appellants contended that the court *a quo* had not followed the principles of the applicable case law. It had failed to consider the importance of the constitutional rights advanced, the nature of the decision to be reviewed, the prospects of success, the question of prejudice, and the allegations of irregularity and impropriety made against the respondents. The appellants also argued that the court had erred in not applying section 172(1)(b) of the Constitution by failing to grant a just and equitable remedy. The appellants should retain their employment.

[19] Rugunanan J stated that the crux of his judgment was the finding that an employment contract concluded between an unauthorised public official and a person who did not meet the requirements of section 10 of the PSA had no permanence and should be treated as a nullity. The appellants had failed to satisfy the condition of South African citizenship or permanent residency status. Nevertheless, the learned judge granted leave based on the arguments made by the appellants, recognising at the same time the importance of the matter; in his opinion, an appeal would have a reasonable prospect of success. It was Rugunanan J's view that the appeal turned on the interpretation of the PSA within the context of its purpose, as well as the remedies contained therein.

Issues to be decided

[20] The grounds of the appellant's appeal provide the general framework within which the present matter must be evaluated. From the papers filed, and from the arguments advanced at the appeal hearing, the issues are capable of being confined to the following: (a) whether the employment contracts can be treated as lawful; (b) if not, then whether the counter-application must succeed, notwithstanding the delay incurred; and (c) where the decision to appoint the appellants is declared invalid, what just and equitable relief should follow.

[21] The main principles are mentioned below. To the extent that each issue, as set out above, attracts its own set of specific principles, these will be discussed separately.

Legal framework

[22] The starting point for an examination of the relevant principles is the PSA itself. In the preamble thereto, the purpose of the legislation is, *inter alia*, to provide for the regulation of the conditions of employment and terms of office for members of the public service. Section 10 provides as follows:

'10. Qualifications for appointment.—(1) No person shall be appointed permanently, whether on probation or not, to any post on the establishment in a department unless he or she—

- (a) is a South African citizen or permanent resident; and
- (b) is a fit and proper person.

(2) ...'

[23] The legislation is silent in relation to the purpose of distinguishing between South African or permanent residents, on the one hand, and foreign nationals, on the other. If the PSA is considered within the context of the Constitution, then the provisions of section 195 are pertinent to some extent since they set out the basic values and principles governing public administration. To that effect sub-section (i) provides that:

‘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.’

[24] Who qualifies as ‘the South African people’ is not apparent, but sub-section (i) does not reserve employment in the public administration exclusively for citizens; an inclusive approach would, moreover, be consistent with the constitutional values of human dignity, equality, and freedom.⁴ Returning to the PSA, section 10 does not prevent the employment of a person who is neither a citizen nor a permanent resident; it merely prohibits his or her permanent appointment.

[25] The PSA policy that features in the present matter was issued by the minister as a directive. Paragraph 2 explains that the purpose of the policy was:

‘To provide mandates and processes according to which departments can address their human resource and skills need in respect of critical occupations and critical skills by utilising foreign nationals on an employment, secondment or exchange basis.’

[26] The policy set out the applicable principles, emphasising in paragraph 5.1 that the employment of South African citizens and permanent residents must receive preference; the use of foreign nationals was a ‘last resort’. The provisions of paragraph 5.2.1 made it abundantly clear that:

⁴ Section 7(1) of the Bill of Rights, contained in chapter 2 of the Constitution.

'In terms of section 10(1)(a) of the Public Service Act, 1994 no person shall be appointed permanently to a post unless she or he is a South African citizen or permanent resident. Foreign nationals who are not in possession of a permanent residence permit may therefore only be employed temporarily in departments.'

[27] Furthermore, the policy stipulated under paragraph 5.5.4 that:

'(a) The employment of foreign nationals must be on a fixed term contract basis, the term of employment must not exceed the term of the relevant work permit and the employment relationship must be on a full-time basis in funded vacant posts.'

[28] The remaining policy relied upon by the respondents was the health recruitment policy. To that effect, its aim was described as the promotion of high standards of practice in the recruitment and employment of health professionals who were neither South African citizens nor permanent residents. The relevant principles are those mentioned in the third respondent's termination letters, which are broadly consistent with the principles listed in the PSA policy, and which comply, ultimately, with the prohibition contained in section 10 of the PSA.

[29] At this point, it is helpful to emphasise the relevance of the principle of legality. This is a key aspect of the rule of law and its bearing upon the present matter was recognized in the court *a quo*. Hoexter comments as follows:

'The first principle of administrative law (and of the rule of law) is that the exercise of power must be authorised by law.'⁵

[30] The principle was given impetus during the early constitutional era in the decision of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional*

⁵ Hoexter and Penfold, *Administrative Law in South Africa* (Juta, 3ed, 2021), at 357.

Metropolitan Council and Others.⁶ In what has been described as one of the most frequently cited *dicta* in South African public law,⁷ the Constitutional Court stated that:

‘It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.’⁸

[31] The principle continues to run like a golden thread through our administrative law jurisprudence. This can be seen in recent decisions such as *Merifon (Pty) Limited v Greater Letaba Municipality and Another*,⁹ where the Constitutional Court reiterated that:

‘An important foundation of our constitutional democracy is the doctrine of legality, a subset of the rule of law. This Court, as well as the Supreme Court of Appeal, has stressed in a number of decisions that the exercise of public power must strictly comply with ordained prescripts, and that failure to observe this contravenes the doctrine of legality.’¹⁰

[32] The principle is an important part of the legal framework within which the present matter must be assessed. As already mentioned, the remaining principles pertain to the areas delineated in the paragraphs that follow. It is logical to use the respondents’ counter-application as a departure point; as counsel for the appellants contended, the

⁶ 1999 (1) SA 374 (CC).

⁷ Hoexter and Penfold, *ibid*.

⁸ *Fedsure*, at paragraph [58].

⁹ 2023 JDR 2444 (CC).

¹⁰ At paragraph [1]. Mlambo AJ, writing for the court, referred to, *inter alia*, *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC); and *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC).

fate of the appeal turns on whether the respondents have demonstrated that the contracts are unlawful.

Lawfulness of the employment contracts

[33] The respondents rely on section 10(1) of the PSA. For their part, the appellants argue that the legislation in question does not indicate that a contract concluded with anyone who is neither a South African citizen nor a permanent resident is rendered null and void. They refer to several authorities in that regard.

[34] In *Standard Bank v Estate Van Rhyn*,¹¹ the erstwhile Appellate Division dealt with an executor's failure to have complied with section 116(1) of the Administration of Estates Act, 2013 in terms of which a cheque drawn on an estate account was required to stipulate the reason for payment and the name of the payee. Penalties were imposed for non-compliance. Solomon JA held that, as a general proposition, the effect of a statutory prohibition was to render an act null and void, but this was not a hard and fast rule. If it could be shown that the intention of the legislature was not to render an act invalid, then it would be incorrect to hold otherwise. The learned judge stated that:

'As Voet (1.3.16) puts it- "but that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it." Then after giving some instances in illustration of this principle, he proceeds: "The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law." These remarks are peculiarly applicable to the present case, and I find it difficult to conceive that the Legislature had any intention in enacting the directions in section 116(1) other than that of punishing the executor who did not comply with them.'¹²

¹¹ 1925 AD 266, at 274.

¹² At 274-5.

[35] The subject of inconveniences and impropriety resulting from the treatment of non-compliant contracts as null and void was subsequently addressed in *Pottie v Kotze*.¹³ In that matter, the Appellate Division considered the question of whether the sale and delivery of a tractor was null and void where the seller had not previously obtained a certificate of roadworthiness in terms of section 13 *bis* of the Transvaal Motor Vehicle Ordinance, 17 of 1931. An infringement thereof would attract a criminal sanction. Fagan JA held that:

‘a further compulsory penalty of invalidity would- as the cases referred to above show- have capricious effects the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned and it would upset transactions which, if the safeguard of an examination for roadworthiness can be enforced... the Legislature could have had no reason to view with disfavour.’¹⁴

[36] The stance taken by the Appellate Division was consistently followed in later cases. This is exemplified in *Metro Western Cape (Pty) Ltd v Ross*,¹⁵ where Boshoff JA emphasised the importance of discerning legislative intent.¹⁶ In the post-1994 decision of *Steenkamp and Others v Edcon Ltd*,¹⁷ the Constitutional Court endorsed the approach adopted by the earlier authorities. The matter concerned section 189A(2)(a) of the Labour Relations Act 66 of 1995 (‘LRA’), which stipulated that, for dismissals based on operational requirements by employers with more than 50 employees, notice of termination of employment ‘must’ be given ‘in accordance with the provisions of this section’. The case involved the provisions of section 189A(8), which precluded an employer from giving dismissal notice during a period of 30 days after giving a section 189(3) notice. The respondent gave notice prematurely. The appellants applied

¹³ 1954 (3) SA 719 (A).

¹⁴ At 727.

¹⁵ 1986 (3) SA 181 (A).

¹⁶ At 188F-G.

¹⁷ 2016 (3) SA 251 (CC).

unsuccessfully for a declarator to the effect that their dismissals were invalid and of no force or effect. On appeal to the Constitutional Court, Zondo J held as follows:

‘The approach that the use of the word “shall” in a statutory provision means that anything done contrary to such a provision is a nullity is neither rigid nor conclusive. The same can be said of the use of the word “must”. Many factors must be considered to determine whether a thing done contrary to such a provision is a nullity. There are cases where the performance of an act in breach of a statutory obligation does not necessarily result in the act being invalid and of no force and effect. When the question arises whether something that was done contrary to a statutory provision is invalid and of no force and effect, the proper approach is to ascertain what the purpose of the legislation is in this regard. Sometimes the purpose of the legislation will be to render it a nullity. At other times the purpose will not be to render such a thing a nullity. In each case the legislation will need to be construed properly to establish its purpose.’¹⁸

[37] The learned judge referred to several authorities in support of such an approach, saying further that:

‘Some of the factors that should be taken into account in the construction of the statute to establish its purpose are the following: the purpose of the legislation as a whole, the purpose of the relevant section of the Act, the mischief sought to be addressed, whether the statute makes provision for remedies for its breach, or whether, if the act were not held to be null and void, it would mean that the provision may be breached with impunity. Where the statute does make provision for some remedies for the breach of the relevant provision, the court would also have to take into account whether the remedies provided are adequate. Where they are adequate, there seems to be no justification for the conclusion that the purpose of the legislation is to visit an act committed in breach of the provision with nullity. It would be a different case where the remedies provided by the statute are not adequate, particularly if they are substantially inadequate or where such remedies cannot be easily obtained.’¹⁹

¹⁸ At paragraph [182].

¹⁹ At paragraph [183].

[38] The appellants argued that the court *a quo* erred in distinguishing the facts in *Steenkamp* from those in the present matter. The principles derived from the decision in question remain of general application. I am inclined to agree.

[39] If the above principles are applied here, then the PSA must be considered more closely. From the preamble, as already noted, the purpose of the legislation is to provide for, *inter alia*, the regulation of the conditions of employment and terms of office for members of the public service. The provisions of section 10 stipulate the qualifications required for permanent appointment to a departmental post. Non-compliance with the PSA is addressed under section 16A, which requires appropriate disciplinary steps to be taken against the officials in question and for the matter to be reported to the relevant government structures, public office-bearers, or senior officials, as the case might be. Non-compliance does not result in criminal charges or contractual nullity. It cannot be said, without equivocation, that the intention of the PSA is, to use the language of *Steenkamp*, to visit the appointment of a person who is neither a South African citizen nor a permanent resident with nullity.

[40] The appellants also argued that the PSA must be interpreted within the context of an employment relationship. In that regard, they drew attention to the decision of the Labour Court in *Discovery Health Ltd v Commission for Conciliation, Mediation, and Arbitration and Others*,²⁰ where the appellant contended that the first respondent (the CCMA) had no jurisdiction to arbitrate an employee's unfair dismissal claim because the definition in section 213 of the Labour Relations Act 66 of 1995 ('LRA') regarded an 'employee' as a person who was party to a valid employment contract. The third respondent (an Argentinian national) had previously been employed by the appellant but could not claim the protection afforded by the LRA, so the contention went, because his contract with the appellant was tainted by illegality for want of a valid work permit. Van Niekerk AJ observed that the Immigration Act 13 of 2002 did not stipulate that an employment contract concluded without the necessary permit was void or that a person committed an offence by accepting work from or performing work for another in such

²⁰ (2008) 29 ILJ 1480 (LC).

circumstances.²¹ It was also clear, said the learned judge, that the legislation did not intend to limit the right to fair labour practices or to accomplish more than to penalise persons who employed others on unauthorised terms.²² Inequitable consequences could flow where the legislation was construed to mean that employment contracts concluded with foreign nationals without valid permits were rendered void.²³ Van Niekerk AJ held that:

‘...by criminalizing only the conduct of an employer who employs a foreign national without a valid permit and by failing to proscribe explicitly a contract of employment concluded in these circumstances, the legislature did not intend to render invalid the underlying contract. For this reason, the contract concluded between Discovery Health and [the employee]... was valid, and remained so until its termination...’²⁴

[41] The decision in *Discovery Health* was cited with approval in *Sithole v Metal and Engineering Industries Bargaining Council and Others*,²⁵ to which the appellants also referred. In that matter, Nkutha-Nkontwana J stated that a breach of the Immigration Act 13 of 2002 was never intended to shield employers from the consequences of terminating an employment contract. The learned judge held that a foreign national can vindicate his or her right to fair labour practices by availing themselves of the ‘comprehensive machinery of the LRA’, despite having been employed illegally.²⁶

[42] As attractive as the appellants’ arguments might appear, there are, nevertheless, key differences between the case law mentioned and the present matter. In *Estate Van Rhyn, Pottie, and Metro Western Cape*, the court dealt with commercial transactions that did not comply with the applicable legislation. That is not the situation here. In *Steenkamp, Discovery Health, and Sithole*, the court dealt with the termination of employment contracts where there had been a breach of a statutory obligation. The

²¹ At paragraph [24].

²² At paragraph [30].

²³ At paragraph [31].

²⁴ At paragraph [33].

²⁵ (2018) 39 ILJ 472 (LC).

²⁶ At paragraph [13].

distinction to be drawn, however, is that the employers in question were not organs of state.

[43] Whereas there may be debate about where the frontier of administrative law lies in relation to employment relationships, and commensurately where the domain of labour law begins,²⁷ there seems to be little dispute that a decision by an organ of state to conclude a contract in such a context can indeed be regarded as administrative action. For example, in *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others*,²⁸ the Supreme Court of Appeal had no difficulty in regarding as such the Head of Department's appointment of the principal and deputy-principal at the Point High School in Mossel Bay, purportedly in terms of section 6(3) of the Employment of Educators Act 76 of 1998.²⁹ In the present matter, the appellants accepted that their appointment by the district manager constituted administrative action; no contention was made that the respondents were precluded from bringing a self-review application.³⁰

[44] This, in turn, appears to invite the question of how the principles expressed in authorities such as *Steenkamp* and *Discovery Health* relate, in the present matter, to the principle of legality. Mindful of the centrality of the principle to South Africa's constitutional order, I am of the view that the approach taken in the context of the authorities mentioned by the appellants should not be permitted to undermine the basic tenet that an organ of state is constrained by the principle that it may exercise no power and perform no function beyond that conferred upon it by law. If an organ of state's power to appoint foreign health professionals was derived from and circumscribed by section 10(1) of the PSA, as is the case here, then any act beyond the empowering

²⁷ In the same breath, there is debate about the extent to which the two fields of law overlap. See the discussion in Hoexter and Penfold (n 5), at 262-70.

²⁸ 2008 (5) SA 18 (SCA).

²⁹ At paragraph [10].

³⁰ Indeed, counsel for the appellants confirmed during argument that the matter pertained to a legality review but urged the court to consider the surrounding circumstances.

provisions in question, such as the decision to conclude permanent employment contracts, gives rise to an illegality. This cannot be ignored or wished away.³¹

[45] In *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC*,³² the Supreme Court of Appeal, per Leach AJA, held that:

‘This court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty-bound to approach a court to set aside its own irregular administrative act.’³³

[46] Similarly, in *Merafong City v AngloGold Ashanti Ltd*,³⁴ the Constitutional Court, per Cameron J, stated as follows:

‘This court has affirmed as a fundamental principle that the state “should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help”. What is more, in *Khumalo*³⁵ this court held that state functionaries are enjoined to uphold and protect the rule of law by *inter alia* seeking the redress of their departments’ unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty “to insist that the state, in all its dealings, operate within the confines of the law and, in so doing, remain accountable to those on whose behalf it exercises power”. Public functionaries “must, when faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it”. Not to do so may spawn confusion and conflict, to the detriment of the administration and the public.’³⁶

³¹ The point was, with respect, correctly made by Rugunanan J in the court *a quo*. See *Ndjibu and Others v Member of the Executive Council for Health, Eastern Cape Province and Others* (331/2023) [2023] ZAECBHC 33 (10 October 2023), at paragraphs [43] to [45].

³² 2010 (1) SA 356 (SCA).

³³ At paragraph [23]. The court referred to its earlier decisions in, *inter alia*, *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA), at paragraph [10], and *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA), at paragraph [36].

³⁴ 2017 (2) SA 211 (CC).

³⁵ *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC).

³⁶ *Merafong*, at paragraph [61]. Footnotes omitted.

[47] In the circumstances, I find that the conclusion of the contracts was unlawful. It cannot be said that they should not be rendered null and void. Whether there is, however, a basis upon which the respondents can successfully apply for the review and setting aside of the decision to appoint the appellants depends on whether they can overcome the hurdle presented by the delay incurred. It is to this issue that attention must now be focused.

Delay in the institution of self-review proceedings

[48] It was common cause in the present matter that an official or officials in the employment of the Department altered the appellants' contracts unilaterally to reflect a fixed term, rather than permanent duration. The details of who was responsible for such alteration and precisely when this was done are entirely unclear. The court *a quo* rightly criticised such conduct, describing it as 'administrative self-help'.³⁷ It was also common cause that, at worst for the respondents, a period of three years had lapsed since the decision to conclude the contracts and the date upon which they instituted self-review proceedings.

[49] The importance of launching any application to that effect as expeditiously as possible was emphasised in *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal*.³⁸ The Constitutional Court held, per Skweyiya J, that:

'...Section 237 of the Constitution provides:

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

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

³⁷ *Ndjibu* (n 31), at paragraph [54].

³⁸ 2014 (3) BCLR 333 (CC).

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

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

...In *Gqwetha*³⁹ the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.⁴⁰

[50] The two-stage approach, described above, has subsequently become known as the *Khumalo* test, despite its origin. It forms the basis for the assessment of any undue delay regarding a self-review application such as that in the present matter.

[51] The provisions of PAJA would ordinarily govern the procedure to be adopted, but the Constitutional Court held, in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*,⁴¹ somewhat controversially,⁴² that an organ of state was constrained to rely on the legality principle, instead of PAJA, when seeking the review and setting aside of its own decision. This meant that the 180-day period stipulated under section 7(1) of PAJA did not apply. The applicant was required merely to institute proceedings within a reasonable time.

³⁹ *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA).

⁴⁰ *Khumalo*, at paragraphs [46] to [49].

⁴¹ 2018 (2) SA 23 (CC).

⁴² See the discussion in Hoexter and Penfold (n 5), at 152-6, and 692-5.

[52] The legal position was clarified in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*.⁴³ The Constitutional Court, per Theron J, confirmed the *Khumalo* test when assessing undue delay in relation to a self-review application, stating that:

'Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay to entertain the application.'⁴⁴

[53] The court went on to amplify the principles that must be applied when carrying out such an assessment. The first is that there are differences between a review brought in terms of PAJA and a review brought based on legality.⁴⁵ The second is that the reasonableness of the delay must be examined with reference to the explanation offered for the delay; where there is no explanation, the delay will necessarily be unreasonable. The third is that the reasonableness of the delay cannot be examined in a vacuum and the court must decide whether the delay ought nevertheless to be overlooked. In doing so, the court must consider several factors: (a) the potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision; (b) the nature of the impugned decision; and (c) the conduct of the applicant. The fourth principle is that, despite there being no basis upon which to overlook an unreasonable delay, the court may nevertheless be constitutionally compelled to declare state conduct unlawful.⁴⁶

⁴³ 2019 (6) BCLR 661 (CC). The subject of self-review was addressed extensively in earlier decisions of the Constitutional Court, e.g. *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC), *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC), and *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC). A distinction emerged, however, between PAJA and legality reviews. *ASLA* assisted in clarifying the position to a considerable extent.

⁴⁴ At paragraph [48].

⁴⁵ As already mentioned, the first of the differences is that PAJA contains a 180-day bar; there is no fixed period under a legality review. The second difference is that delay in terms of PAJA requires an application for condonation; there is no corresponding requirement under a legality review.

⁴⁶ See the discussion in *Asla*, paragraphs [44] to [72].

[54] In the present matter, it cannot be disputed that, at the very least, the first time that the Department fully appreciated that permanent employment contracts had been concluded was when they were unilaterally altered to reflect a fixed term. When this occurred remains a mystery. It was for the respondents to have demonstrated why self-review proceedings were instituted some three years after the conclusion of the contracts. At best for the respondents, they explained that the district manager was unaware of the appellants' foreign national status at the time of their appointment. They also explained that an internal investigation had been commenced to ascertain the circumstances of the matter. The findings of the investigation, whether preliminary or final in nature, are completely unknown. That is not good enough.

[55] The potential prejudice to the appellants is obvious. The secure future that the contracts provided for the appellants and their dependents will cease to exist if the district manager's decision is set aside. The hospital in question will, on the available evidence, lose four competent members of its staff. The community, situated in a rural area and far from urban health facilities, will lose the services of four dedicated health professionals. The decision, moreover, was taken by a senior official on behalf of a state employer in relation to services to be rendered by individuals, whose inherent disadvantage in the employer-employee power relationship was exacerbated by their refugee status. They have done nothing wrong. In contrast, the conduct of the respondents has been, if not quite 'utterly reprehensible', as the court *a quo* termed it,⁴⁷ then certainly very far from acceptable.

[56] Consequently, I do not hesitate in finding that the respondents' delay in instituting the present proceedings was undue. There is, moreover, no reason why it should be overlooked.

[57] However, that is not the end of the matter. In terms of the *Gijima* principle, a court is enjoined, under section 172(1)(a) of the Constitution, to declare invalid any law or

⁴⁷ *Njibu* (n 31), at paragraph [54].

conduct that it finds to be inconsistent with the Constitution.⁴⁸ The harshness of the principle was ameliorated to some extent in *Asla*, where the court held as follows:

‘The *Gijima* principle should thus be interpreted narrowly and restrictively so that the valuable rationale behind the rules on delay are not undermined. At the same time, this is not a matter in which the *Gijima* principle can be ignored and thus impliedly overruled. So the injunction it creates- to declare invalid that which is indisputably and clearly inconsistent with the Constitution- must be followed where applicable.’⁴⁹

[58] In the present matter, the Department’s conclusion of permanent employment contracts with the appellants amounted to blatant non-compliance with section 10(1) of the PSA. If the provisions had been worded differently, in more permissive terms,⁵⁰ then there might have been a basis upon which to avoid the application of the *Gijima* principle. Where, however, the decision was taken in direct contravention of a clear prohibition, then it was indisputably and clearly inconsistent with the constitutional principle of legality. It falls to be declared invalid.

Just and equitable relief

[59] Having declared that the district manager’s decision was invalid, the issue that arises is whether to set it aside, as sought by the respondents. In terms of section 172(1)(b) of the Constitution, a court that decides a constitutional matter, within its power, may make any order that is just and equitable. In *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*,⁵¹ the Constitutional Court, per Madlanga J, held, with reference to section 172(1)(b), that:

⁴⁸ *Gijima* (n 41), at paragraph [52].

⁴⁹ *Asla* (n 43), at paragraph [71].

⁵⁰ For example: ‘A person may be appointed permanently... provided that he or she is... a South African citizen or a permanent resident...’

⁵¹ 2018 (2) SACR 442 (CC).

‘The operative word “any” is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section- justice and equity.’⁵²

[60] Whether the court must set aside the district manager’s decision is an issue that falls to be determined with consideration for the broad discretionary power available. The basic principles of justice and equity comprise the essential guardrails that protect the decision-making process. In that regard, however, a proper appreciation of context is necessary, involving a recognition of the centrality of the principle of legality as an aspect of the rule of law. This remains a core principle of South Africa’s constitutional order.

[61] In *Waenhuiskrans Arniston Ratepayers Association and Another v Verreweide Eiendomsontwikkeling (Edms) Bpk and Others*,⁵³ De Swardt AJ held that it would be ‘in the interests of justice for a court to be slow to exercising its discretion in any way that undermines the principle of legality.’⁵⁴ A year later, in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*,⁵⁵ the Constitutional Court, per Froneman J, emphasised the fundamental importance of the principle of legality in relation to a court’s exercise of its discretion to make any order that is just and equitable under section 8 of PAJA. I am of the view that the same recognition must be accorded to the principle of legality in the present matter.

[62] The appellants drew attention to several authorities where the court refused to set aside unlawful conduct. These included *MEC for Gauteng Department of Infrastructure Development v Rampepe*⁵⁶ and *Minister of Social Development, Western Cape Provincial Government and Another v Van Reenen and Another*,⁵⁷ where the facts

⁵² At paragraph [68].

⁵³ 2011 (3) SA 434 (WCC).

⁵⁴ At paragraph [73].

⁵⁵ 2011 (4) SA 113 (CC).

⁵⁶ (J1943/2019) [2022] ZALCJHB 98 (12 May 2022).

⁵⁷ (C634/2022) [2023] ZALCCT 53 (22 August 2023).

were clearly tilted in favour of the employees when measured against the factors of justice and equity. Furthermore, the appellants urged us to have regard to the factors listed in *Financial and Fiscal Commission v Davids and Another*,⁵⁸ which persuaded the court to decline to set aside the appointment of the employees in question.

[63] In the present matter, there is no evidence to suggest that the appointment of the appellants was anything but fair and transparent. There is also nothing to impugn the conduct of the appellants or to indicate that they were in any way unqualified or unsuited for the posts in question. They have provided satisfactory services to the Department, the hospital, and the community. The setting aside of the district manager's decision will have an adverse impact upon them, as well as their dependents, more so because of their refugee status. In contrast, the conduct of the Department's officials in unilaterally altering the contracts was plainly wrong and wholly inexcusable.

[64] The difficulty that faces the appellants, however, is that a refusal to set aside the decision will perpetuate, indefinitely, the illegality in question. Mindful of the centrality of the legality principle, as already discussed, this is a serious obstacle to the relief that the appellants seek. The situation is complicated further by the fact that the Department's conclusion of permanent employment contracts flew in the face of both the PSA policy and the health recruitment policy. Neither has been challenged for want of constitutionality or otherwise. To permit the contracts to stand will thwart the policy objectives involved and potentially undermine the purposes of related policies regarding the implementation of section 10(1) of the PSA in relation to the appointment of individuals to the public service in other occupational sectors. This is territory into which the court is loath to venture.

[65] There are, in the exercise of the court's broad discretion, ways in which to mitigate against at least some of the negative consequences of setting aside the decision. Such an outcome is achievable by adhering to the basic principles of justice and equity. For example, the declaration of invalidity can be suspended to allow the

⁵⁸ (15022/2023) [2024] ZAWCHC 127 (8 May 2024).

appellants an opportunity to re-arrange their personal circumstances to the extent that this might be feasible; rights that have accrued to the appellants in terms of the impugned contracts can be protected and preserved. This aspect seems not to have been considered sufficiently by the court *a quo* but remains the only area in which it can possibly be said that the court *a quo* was incorrect. I cannot find fault with the remainder of its findings.

Conclusion

[66] The appellants abandoned their arguments in relation to estoppel. Nothing more needs to be said. Similarly, it would be pointless to consider the respondents' arguments regarding the termination of the contracts by effluxion of time.

[67] Turning to the question of costs, the conduct of the respondents cannot escape criticism. It would be neither just nor equitable, despite the outcome of the appeal, to make an award in that regard.

[68] In the circumstances, I propose the following order:

- (a) The appeal is dismissed, save for:
 - (i) the insertion of the following sub-paragraphs in paragraph 3 of the order of the court *a quo*:
 - (aa) '(c) the declarations made in sub-paragraphs (a) and (b), above, are suspended until 31 December 2025;' and;
 - (bb) '(d) the appellants shall retain the right to all salary payments and other benefits that have accrued because of the

issuing of the letters of appointment, provided that this shall fall away upon the date indicated in sub-paragraph (c), above’;

(ii) the consequential renumbering of existing sub-paragraph (c) to (e).

(b) Each party is ordered to pay its own costs in relation to the appeal.

JGA LAING

JUDGE OF THE HIGH COURT

I agree.

AS ZONO

ACTING JUDGE OF THE HIGH COURT

I agree.

KL WATT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: Adv Cooke with Adv Ntikinca

Instructed by: T L Luzipo Attorneys
26 Corner of Victoria and Madeira Street
1st Floor, Steve Motors Building
MTHATHA
Email: tluzipoattorneys@telkomsa.net
c/o Msamo Attorneys
No. 18 Alexandra Road
KING WILLIAMS TOWN
(Ref: Siya)

For the respondent: Adv Nyondo
Instructed by: The Office of the State Attorney
17 Fleet Street
Old Spoorinet Building
EAST LONDON
Email: BTongo@justice.gov.za
(Ref: Ms B Tongo ref 301/23-P11)

Date heard: 16 September 2025.

Date delivered: 21 January 2025.