IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Not reportable

Case no:**C305/2023**

In the matter between:

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY Applicant

And

RUHAN VAN DER MERWE Respondent

Date of Judgment: 19 August 2025

JUDGMENT

CASSELLS AJ

Introduction

[1] The Applicant seeks an order reviewing and setting aside the appointment of the

Respondent from the post of Practitioner: Human Development and Transformation on the basis that the Respondent's appointment was procedurally flawed and irregular.[1] The application is opposed.

[2] The Applicant has also applied for the condonation of the late filing of its replying affidavit, which is twenty nine days late. The Respondent did not oppose the condonation application. As the application is unopposed and there is no identifiable prejudice to the Respondent, the late filing of the replying affidavit is condoned.

Background facts

[3] The Respondent was employed in the position of budget controller.

[4] The Applicant advertised the post of Practitioner: Human Development and Transformation, with a closing date of 20 August 2021.

[5] The advertisement recorded the minimum requirements for the post, including a Degree / National Diploma (NQF level 6 or 7) qualification (psychology / public administration / social work related / B Nursing / HRD / HR). Applicants for the post were required to limit their applications to form Z83 and their curriculum vitae to four pages maximum, with one attachment per application.

[6] The Respondent applied for the position and recorded that he had completed his National Diploma.

[7] Two candidates, including the Respondent, were ultimately nominated by the interviewing panel for final appointment. On the day of his interview, the Respondent brought a letter from the institution where he had studied, Northlink College, which recorded that:

[7.1] His application for Diploma in Human Resource Management was submitted to the Department of Higher Education;

[7.2] He had met the requirements of a National Diploma in Human Resource Management;

[7.3] The diploma is issued by the Department of Higher Education and it takes three to six months to get feedback from the Department of Higher Education.

[8] Although the letter from Northlink College was on a letterhead, it contained no date, signature or stamp from the institution.

[9] The Respondent's lack of a diploma was referred to the Applicant's head office for guidance and it was advised that the Respondent should provide an affidavit confirming that he had completed his studies and was awaiting his diploma, and that his academic record should be provided to indicate that his qualification had been completed.

[10] The guidance was partially followed in that the Respondent provided an affidavit, but not his academic record. It is disputed whether the Respondent was advised to provide his academic record.

[11] On 10 January 2022 the Respondent's appointment was approved and he was appointed on 01 February 2022.

[12] NEHAWU subsequently lodged a complaint regarding the Respondent's appointment and an independent investigator was appointed to conduct an investigation into the recruitment process and to make a recommendation regarding any action to be taken. The investigator's report was received by the Applicant in June 2022.

[13] The relevant findings of the investigator were that:

[13.1] The Respondent had utilised an old Z83 form in his application. The new Z83 form had been circulated on 11 December 2020 and was effective from 01 January 2021;

[13.2] Four of the shortlisted applicants had used the old Z83 form;

[13.3] The advertisement had not specified that the applicants should use the amended version of the form, although it had been attached to the email that posted the advertisement;

[13.4] The HCM Department was at fault for not clearly stating which form should be used, and therefore the applicants should not be penalised;

[13.5] On the closing date of the advertisement, the Respondent did not have his actual qualification. However, he had completed his diploma and was waiting for it to be conferred, and the Respondent had not misrepresented facts in his application.

[14] The investigator recommended that the Respondent's appointment to the post should be rescinded and that the recruitment process should begin afresh.

[15] On 20 December 2022 the Applicant addressed a letter to the Respondent which recorded *inter alia* that:

"*Your appointment to the post of Practitioner: Human Capital Development and Training* (sic) *was found to be irregular in terms of SASSA staffing policy. It was found that the process leading to your appointment was not fair and when applying for the post you did not have a qualification as per the advert up until*

your appointment…

In light of the above you are invited to agree and/or consent in writing to the setting aside of your appointment as Practitioner: Human Capital Development and Training (sic)*… Furthermore, you return to your prior post of Clerk: Human Capital Management…*

Should you refuse, fail and/or neglect to agree to the setting aside of your appointment, the Agency will have no alternative to make an application to the Labour Court in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 to review the administrative act of the Agency. Which the Agency will seek a cost order against the respondents...". (sic)

[16] The Respondent was not willing to consent to the Applicant's request. In his response to the Applicant on 09 January 2023 he recorded that:

[16.1] Before applying for the position, he had consulted with Human Capital Provisioning and Maintenance and explained that he had completed his studies in December 2020 but had not yet received his diploma. He had been advised by the Department of Higher Education and Training that the delay in issuing the diploma was as a result of a backlog caused by the Covid-19 pandemic;

[16.2] He was invited for and attended an interview and was issued with an offer letter for the position;

[16.3] He had not withheld information from the Applicant and did not misrepresent himself during the recruitment process;

[16.4] He had completed his studies prior to applying for the post and could not be held accountable for administrative errors made by the Respondent;

[16.5] He had been in the position for ten months and had made financial commitments which could not be reversed and was not in a position to accept a demotion;

[16.6] He was more than willing to work with the Applicant to find alternative solutions.

[17] On 17 January 2023 the Applicant advised the Respondent that it would lodge a review application at the Labour Court.

[18] The Applicant's present application was delivered on 15 June 2023. Its main ground of review is that the process and decisions made to appoint the Respondent were not conducted in accordance its recruitment policy, terms of reference and the relevant regulatory framework, which renders the Respondent's appointment irregular, and that the decision to appoint the Respondent should be set aside.

Preliminary issues

[19] The Applicant's application is brought in terms of section 158(1)(h) of the Labour Relations Act[2] ("the LRA") in terms whereof the Labour Court "*may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law*". It further relies on the provisions of the Public Services Commission Guidelines in support of its application.

[20] In its heads of argument, the Respondent raised in argument for the first time that the Public Service Act[3] ("the PSA") and its regulations are not applicable to employees employed by the Respondent and that the meaning of the word "State" in section 158(1)(h) of the LRA does not include the Applicant.

[21] Ordinarily, parties are required to plead their grounds of review and for opposing the matter, and the role of the reviewing court is limited to deciding the issues that are raised therein. However, the court is obliged to deal with a point of law raised *mero motu* or by counsel for the parties where it is apparent from the papers, otherwise the court's decision may be premised on an incorrect application of the law and the principle of legality would be infringed. [4] Furthermore, a jurisdictional point may be raised at any time during the proceedings.[5]

[22] During argument, the Applicant did not object to the points raised by the Respondent in its heads of argument and the issues were fully ventilated.

Whether the PSA and its regulations are applicable to the Applicant

[23] The Applicant is a juristic entity established in terms of section 2 of the South African Social Security Agency Act[6] ("the SASSA Act"). It is an agency of and one of the reporting entities to the Department of Social Development.

[24] The Respondent contends that the PSA and its regulations are not applicable to the Applicant as it is not listed in any of its schedules and that the Applicant has its own Act.

[25] Section 2(1) of the PSA sets out the application of that Act. It states that "*(e)xcept in so far as this section provides otherwise and except where it is inconsistent with the context or clearly inappropriate, the provisions of this Act shall apply to or in respect of employees whether they are employed within or outside the Republic, and in respect of persons who were employed in the public service or who are to be employed in the public service*".

[26] The definition of "employee" as recorded in the PSA means a person contemplated in section 8, but excludes a person appointed in terms of section 12A.

[27] The definition of "public service" as contained in the PSA means "*the public service contemplated in section 8*". Section 8 states that:

> "*(1) 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."*

[28] In terms of the PSA, "department" means a national department, a national government component, the Office of the Premier, a provincial department or a provincial government component.

[29] Section 7 (2) of the PSA addresses the departments referred to above:

> "*(2) For the purposes of the administration of the public service there shall be-*
> *(a) national departments and Offices of the Premier mentioned in column 1 of Schedule 1;*
> *(b) provincial departments mentioned in column 1 of Schedule 2;*
> *(c) national government components mentioned in column 1 of Part A of Schedule 3; and*
> *(d) provincial government components mentioned in column 1 of Part B of Schedule 3.*"

[30] The Respondent is correct in contending that the Applicant is not listed in any of those schedules.

[31] In terms of section 7(4) of the SASSA Act, a "*person employed by the Agency becomes a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees Pension Law, 1996 (Proclamation 21 of 1996), and is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service*". (emphasis added).

The definition of "public service" as contained in section 1 of the SASSA Act is the public service contemplated in section 8 of the PSA.

[32] Section 7(4) of the SASSA Act is an indication that employees employed by the Applicant are not employed in the public service.

[33] The fact that the Applicant's employees are not employed in the public service was confirmed by the Labour Appeal Court in *National Education, Health and Allied Workers Union v Minister for the Public Service and Administration and others*[7] which pertained to an urgent application to interdict a strike, where the Court stated that:

"*There can be no doubt that the strike notice given by NEHAWU in this matter was intentionally broad and recklessly so. It gave notice of the strike "across all departments and provinces (including SASSA, SIU and SANBI)" and "in all workplaces in the public service, including those of SASSA, SIU and SANBI". NEHAWU issued this notice with the knowledge that hundreds of thousands of its members were employed in essential services and that it was impermissible in terms of section 65(1)(d)(i) for them to strike, as it was for the Union's members at SASSA, SIU and SANBI since these entities did not fall within the public service as defined.*" [8] (emphasis added)

[34] Furthermore, in *Gordhan v Office of the Public Protector*[9] this court stated, with reference to the South African Revenue Services, that:

"*[2] SARS is established in terms of section 2 of the South African Revenue Service Act ("the SARS Act"), as an organ of state within the public administration, but as an institution outside the public service. The Minister of Finance is the member of Cabinet who is responsible for SARS. The Minister appoints the Commissioner as the Chief Executive Officer of SARS and in turn, the Commissioner is accountable to the Minister on all matters relating to SARS.*

[3] Although employees of SARS do not fall under the Public Service Act, ("the Public Service Act") and are in that regard not public servants, their pension is, however, regulated in terms of the Public Service Act read with the Government Employees' Pension Law, ("GEP Law"). Section 19 of the SARS Act provides that a person appointed by SARS as an employee becomes a member of the Government Employees' Pension Fund ("GEPF") mentioned in section 2 of the GEP Law and is entitled to pension and retirement benefits as if that person were in the service in a post classified in the division of the public service mentioned in section 8 (1) (a) of the Public Service Act."

[35] The statement by this court in the *Ghordhan* case is analogous to the present matter.

[36] Specifically in respect of the Public Service Commission Guide ("the Guide") relied upon by the Applicant in support of its present application, the Applicant records in its founding affidavit *inter alia* that:

[36.1] The Guide states that an appointment can be considered to be irregular after an investigation has been conducted and a finding of an irregular appointment has been made;

[36.2] The Guide states that there should be a finding of non-compliance with the regulatory framework applicable to appointment of staff as prescribed in the PSA, regulations, any regulations and departmental policy;

[36.3] The Guide records that the prescribed remedies in correcting an irregular appointment is to make application to this Court to declare the appointment null and void, which should be made without delay and that the affected employee should be informed of the steps taken by the department.

[37] The Guide was published by the Public Service Commission, which was established by section 196(1) of the Constitution. The Public Service Commission Act[10] provides for the regulation of the Public Service Commission and matters connected therewith and its provisions apply in respect of the administration in the national and provincial spheres of government.[11]

[38] The Applicant does not fall within the ambit of the national and provincial spheres of government. Accordingly, the PSA and its regulations are not applicable to the Applicant, neither are the Guidelines and any reliance thereon by the Applicant is misplaced.

Whether "State" in section 158(1)(h) of the LRA includes the Respondent

[39] In support of its contention that the Respondent does not fall within the definition of "State" in section 158(1)(h) of the LRA, the Respondent relies upon the judgments of *South African Broadcasting Corporation (Soc) Ltd v Keevy and Others*[12] and *Department of Defence v Thamaga NO and another.*[13]

[40] In *South African Broadcasting Corporation (Soc) Ltd v Keevy and Others*[14] this Court stated that it was clear that the SABC was established as a company by incorporation within the contemplation of the Companies Act and was not the "State", which finding was based on section 7 of the Broadcasting Act[15] ("the Broadcasting Act") and which records that "o*n the transfer date the Minister must apply for the establishment by incorporation of the Corporation to a limited liability company with a share capital as contemplated in the Companies Act*" and that "*(t)he application for incorporation must be accompanied by the memorandum and articles of association as contemplated in the Companies Act signed by the Minister on behalf of the state*".[16] This Court therefore took the view that the SABC was a separate and distinct legal entity from the State and that section 158(1)(h) did not have the likes of the SABC in mind when it empowered the

Court to review decisions or acts performed by the State in its capacity as an employer.[17] This Court further stated, with reference to *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others*,[18] that a private company becomes an organ of state only when it performs a public function.

[41] However, these cases are distinguishable from the present matter. The SASSA Act does not contain the same or similar provisions to the Broadcasting Act. Section 2 of the SASSA Act merely states that the Applicant is established as a juristic person subject to the Public Finance Management Act.[19]

[42] In *SARS v CCMA & others*[20] this Court found that "*SARS is an organ of State exercising public power and performing public functions. As the chairperson of the disciplinary enquiry acts in place of SARS, her decision is reviewable as a decision of SARS as employer under section 158(1)(h).*"[21] Similarly, in *Overstrand Municipality v Magerman NO and another*[22] the court found that section 158(1)(h) of the LRA applied to the municipality as it was an organ of state.

[43] This Court has therefore accepted that the word "State" in section 158(1)(h) of the LRA refers to or includes an organ of state.

[44] Section 239 of the Constitution defines an organ of state as

> "*(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 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.*" (emphasis added)

[45] In *Allpay Consolidated Investment Holdings (Pty) Ltd And Others v Chief Executive Officer, South African Social Security Agency and Others*[23] the Constitutional Court concluded that the Applicant in this matter is an organ of state established in terms of the SASSA Act.[24]

[46] Accordingly, the Respondent's challenge that the word "State" does not include the Applicant must fail.

The legal principles applicable to the review application

[47] The Applicant has not relied on the Promotion of Administrative Justice Act[25] to establish its grounds of review and no regard will be had to that statute. Rather, it relies on section 158(1)(h) of the LRA, being a legality review.[26]

[48] In *Hendricks v Overstrand Municipality & another*[27] the Labour Appeal Court stated that "*(l)egality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law*".[28]

[49] In *Khumalo & another v Member of the Executive Council for Education: KwaZuluNatal*[29] the court stated that "*(t)he principle of legality is applicable to all exercises of public power and not only to "administrative action" as defined in PAJA. It requires that all exercises of public power are, at a minimum, lawful and rational*".

[50] In addressing the reviews founded on the principle of legality, this Court stated in *Mohlomi v Ventersdorp/Tlokwe Municipality & another*[30] that:

"*In summary therefore, where a litigating party seeks to challenge a decision in*

the context of the public service employment environment, on the basis of a review application under s 158(1)(h) of the LRA, founded on the constitutional principle of legality, the party seeking to review such a decision must show that the decision failed to meet the following essential requirements:

29.1 the decision was rationally connected to the purpose for which the power was given to it, thus meaning that the decision would not be considered to be arbitrary;

29.2 the decision accounted for all the relevant facts informing the decision, to the extent that the decision made can be said to be rational;

29.3 the process giving rise to the decision was lawful and fair; and

29.4 the decision itself was lawful, meaning that it is not a decision that falls outside the scope of the power afforded to the functionary.

Thus, should any applicant for review succeed in showing that any one of these requirements has not been satisfied, then the decision taken would be reviewable in terms of s 158(1)(h) of the LRA, based on the principle of legality."

The Respondent's appointment

[51] The Applicant argues that the Respondent's appointment was procedurally flawed and irregular on the basis that the Z83 form used by him was non-compliant and that the Respondent did not have his actual qualification, although he had completed his diploma and was waiting for it to be conferred.

[52] As it pertains to the Z83 form, it is common cause or otherwise not disputed that the advertisement did not specifically state that the new Z83 form had to be utilised and that the other shortlisted candidates had also used the old version of the document. In respect of this issue, the investigator found that it was the Applicant's HCM Department who was at fault for not clearly stating which form should be utilised and that the applicants should not be penalised.

[53] Notwithstanding that fact, the Applicant argues that the Respondent was a

recipient of the HCM policies and had a duty to know which form should have been used and that the Applicant's application, as well as any other applications on the old form, should have been excluded from the process. In response, the Respondent contends *inter alia* that the old Z83 form was still in operation and being utilised. This contention was not addressed or disputed by the Applicant in its replying affidavit.

[54] In circumstances where the old Z83 form was still being used and the advertisement did not prescribe that the new form was to be utilised by applicants, failing which they would be excluded from the process, the argument by the Applicant cannot be sustained.

[55] In respect of the qualification issue, it was common cause the Respondent had met the requirements for the diploma and was merely awaiting for it to be conferred. It is further not disputed that the Respondent did not misrepresent the factual situation to the Applicant.

[56] Although the Applicant contends that the Respondent was to provide an affidavit and his academic record, the Respondent contends that he was only requested to provide an affidavit confirming that he had completed his qualification, which he provided. That contention was not addressed by the Applicant in its replying affidavit. The Appellate Division (as it then was) in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[31] sets out the principles applicable to the evaluation of factual disputes arising from evidence presented by affidavit, namely that the relief sought should only be granted if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order. In the present matter, the Respondent's version must be accepted, more so as the Applicant has not provided a version in response to the Respondent's contention.

[57] In this instance, the Respondent had completed his qualification but was awaiting

his diploma. The Applicant was aware thereof and it was advised that he should merely provide an affidavit and his academic record. The Applicant was willing to accept the Respondent's appointment on that basis. It therefore accepted that, despite the Respondent not having received his diploma, he met the minimum requirements for the position and that this is not a situation where the Applicant was unqualified for the post.

[58] Accordingly, the basis upon which the Applicant applies to have the Respondent's appointment set aside cannot be said to be said to constitute a defect of such magnitude that it could serve to vitiate the entire appointment process. It does not satisfy the requirements for a review based on the principle of legality.

The Applicant's delay in lodging the review application

[59] The Respondent contends that the Applicant unreasonably delayed in lodging the application as it waited for almost a year after receipt of the investigation report before lodging the application whilst the Respondent performed his duties associated with his position and that in the absence of a reasonable explanation and a condonation application, the application must be refused.

[60] The Applicant contends that there was no unnecessary delay in launching its application as the investigator's report was received in June 2022, after which internal consultations took place regarding the way forward and how best to approach the matter, including disciplinary procedures against those who had been involved in the process. The investigator's recommendations were approved in December 2022, after which engagements took place with the Respondent which were unsuccessful. The matter was handed to the Office of the State Attorney on 07 March 2023 and was allocated to the State Attorney on the following day. The first phase of the selection process for counsel commenced on 30 March 2023 and approval for the allocation of the matter to the Applicant's counsel was made on 14 April 2023. Due to various public holidays and diary

clashes, a consultation was held with the Applicant's appointed counsel on 03 May 2023.

[61] In *Khumalo & another v Member of the Executive Council for Education: KwaZuluNatal*[32] the Constitutional Court considered *inter alia* whether this Court had erred in not properly evaluating the legal effect of a delay by the MEC in instituting review proceedings in terms of section 158(1)(h) of the LRA when it considered setting aside the promotions of two employees. In that matter, the MEC took approximately twenty months to bring the application and did not seek to explain the delay. The Constitutional Court stated that:

"*There is no prescribed time limit for launching a review under section 158(1)(h) of the LRA. The Labour Court Rules further prescribe no time limits for bringing review applications. Under other provisions of the LRA, the time limits in which litigants or complainants are required to bring their disputes are strictly circumscribed. The importance of resolving labour disputes in good time is thus central to the LRA framework. It is generally understood that proceedings under section 158(1)(h) must be launched within a reasonable time. In some instances, in the context of the LRA, the courts have held a reasonable time to be about six weeks.*"[33]

[62] And

"*…it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express, legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought.*

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

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.

…

In Gqwetha 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.

…

…the majority in Gqwetha held that the delay cannot be evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the

impugned decision. In the context of public-sector employment, the value of security for employees and in mitigating the arguably inherent inequality of the workplace must be kept in mind.

…It is significant in this context that if the full relief is granted in the MEC's favour, Mr Khumalo will lose his position. Mr Khumalo has gone on with his life, continued in his employment, presumably adapted his expenses accordingly, and invested nine years of his career in this path. At no stage has the MEC sought so much as to imply that Mr Khumalo performs inadequately in his post.

Furthermore, the MEC states candidly that the facts do not disclose any wrongdoing by Mr Khumalo. Even if Mr Khumalo's promotion is found to have been unlawful, on the facts he bears no responsibility for it but for having the boldness to apply for a position for which he possibly did not qualify. The burden on the public administration and cost to the public purse to recommence the appointment process would be further prejudice to consider."[34]

[63] In *MEC for Economic Development, Environment & Tourism, Limpopo Province v Mogahlane*[35] the Labour Appeal Court stated where a party has unduly delayed in the initiation of its review application under section 158(1)(h) of the LRA, it is required to provide the court with an explanation for the delay and to persuade the court to exercise is discretion in favour of overlooking the delay and entertaining the review.[36] In that matter, the undue delay amounted to six months, which the court found to be excessive. It further found the explanation tendered by the applicant to be unreasonable and that there was no point in overlooking an undue delay if there were no prospects of success on the merits.[37]

[64] The Applicant was required to launch its application within a reasonable time and without undue delay. In this instance, the Applicant received the investigator's report in June 2022 and only delivered its review application on 15 June 2023. The delay is therefore approximately twelve months, which is excessive. The

explanation provided by the Applicant does not properly address the delay. It is not explained why it took six months to decide the way forward and the best approach to the matter or how and why the disciplinary procedures that had been invoked against those involved in the process had impacted the decision making process as it pertained to addressing the matter with the Applicant.

[65] Furthermore, although the Applicant advised the Respondent on 17 January 2023 that it would be launching the present application, the matter was only handed to the State Attorney on 07 March 2023, with no explanation for the intervening period. The same applies for the period subsequent to the consultation held with the Applicant's appointed counsel on 03 May 2023. There is no explanation for the period between 03 May 2023 and the date upon which the application was ultimately delivered, being 15 June 2023.

[66] The consequence of the delays is that, for the period of inaction and the litigation process, the Respondent remained in the appointed position.

[67] In evaluating the potential prejudice to the Respondent if the decision to appoint him is set aside, by the date of the hearing of the matter, more than two years had passed with the Respondent performing his duties in the appointed role. Should the Applicant be granted the relief it seeks, it will effectively result in a demotion of the Respondent in circumstances where he has, similarly to the *Khumalo* matter, moved on with his life adapted his expenses accordingly. Furthermore, there is no evidence of any wrongdoing by the Applicant, he bears no responsibility for the situation that has arisen, and there is no indication that he has not properly performed his duties. Such a finding will also prejudice the Applicant in respect of commencing the recruitment process afresh. The Applicant has furthermore not identified any prejudice that it may suffer should the Respondent remain in his appointed position.

[68] The nature of the application and the merits do not favour overlooking the undue

delay. The delay and the explanation tendered was unreasonable and large portions thereof were not properly explained or simply remained unexplained. The delay cannot be ignored or overlooked. It should therefore non-suit the Applicant in respect of its application for the review and setting aside of the Respondent's appointment.

[69] In any event, even if the Applicant was not non-suited by the delay, the Applicant has failed to make out a case for the relief sought.

Costs

[70] Section 162 of the LRA records that this Honourable Court may make an order for the payment of costs according to the requirements of the law and fairness.

[71] The Constitutional Court has further held that the ordinary rule that costs follow the result does not apply in labour matters.[38]

[72] There are no reasons to depart from the normal approach of each party paying their own costs in this case.

[73] The following order is made:

Order

1. The application is dismissed.
2. There is no order as to costs.

G Cassells

Acting Judge of the Labour Court of South Africa

For the Applicant:	Adv E Fitz-Patrick
Instructed by:	State Attorney
For the Respondent:	Adv T du Preez
Instructed by:	Timothy and Timothy Attorneys

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[1] The notice of motion refers to Practitioner: Human Development and Training, and not Transformation. The founding affidavit, at paragraph 4, also refers to "Training" and not "Transformation".
[2] 1995 as amended
[3] 1994 as amended
[4] Commercial Workers Union of SA v Tao Ying Metal Industries & others 2009 (2) SA 204 (CC) at para [67] and [68]
[5] Rowmoor Investment (Pty) Ltd v Wilson & others (2008) 29 ILJ 2275 (LC) at para [21]
[6] 2004 as amended
[7] [2023] JOL 58073 (LAC)
[8] At para [42]
[9] *2021 JDR 0054 (GP)*
[10] 1997 as amended
[11] Section 2
[12] (J1652/19) [2020] ZALCJHB 31; [2020] 6 BLLR 607
[13] [2022] 8 BLLR 723 (LC)
[14] *Supra*
[15] 1999 as amended
[16] At paras [40]-[41]
[17] At para [43]
[18] [2015] 36 ILJ 1423 (CC)
[19] 1999 as amended
[20] [2010] 3 BLLR 332 (LC)
[21] At para [36]
[22] [2014] 2 BLLR 195 (LC)
[23] 2014 (4) SA 179 (CC)
[24] At para [52]. See also City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd & others (2015) 36 ILJ 1423 (CC) at paras [22] and [23] and RAiN Chartered Accountants Incorporated v South African Social Security Agency [2021] JOL 51205 (CC) at para [3]
[25] 2000 as amended
[26] South African Broadcasting Corporation (Soc) Ltd v Keevy and Others *supra* at para [23]
[27] (2015) 36 ILJ 163 (LAC)
[28]
[29] (2014) 35 ILJ 613 (CC)
[30] (2018) 39 ILJ 1096 (LC) at para [29]
[31] 1984 (3) SA 623 (A) at p634E – 635C
[32] (2014) 35 ILJ 613 (CC)
[33] At para [42]
[34] At paras [44] to [55]
[35] (2019) 40 ILJ 315 (LAC)
[36] At para [15]
[37] At para [18]
[38] Zungu v Premier of the Province of KwaZulu-Natal & others (2018) 39 ILJ 523 (CC); Long v SA Breweries (Pty) Ltd & others (2019) 40 ILJ 965 (CC)