

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Appeal Case No: **A295/2024**

Case No. **HC38952/2022**

(1) REPORTABLE: no

(2) OF INTEREST TO OTHER JUDGES: no

(3) REVISED:

DATE 29 SEPTEMBER 2025

SIGNATURE

In the matter between:

SINDISWA SHARMAIN CHWARO

Appellant

(Applicant in the Court *a quo*)

and

**MINISTER OF DEFENCE AND MILITARY
VETERANS N.O**

First Respondent

(First Respondent in the Court
a quo)

**DEPARTMENT OF DEFENCE AND MILITARY
VETERANS**

Second Respondent

(Second Respondent in the
Court *a quo*)

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 22 September 2025.

JUDGMENT

RETIEF J (CONCURRING LESO AJ AND MORE AJ)

INTRODUCTION

[1] This appeal lies against the whole judgment and order, including the costs of Nyathi J delivered on the 15 July 2024 in which he dismissed the applicant's judicial review application with costs [Court *a quo*]. In the Court *a quo* the appellant sought to review the first respondent's [the Minister] decision to terminate her fixed term contract of employment [contract] [review relief] and, that her contract be extant, linked to the first respondent's tenure, claiming that it only be capable of termination for legally valid reasons, with full pay from the 1 October 2022 [remedial relief].

[2] The nub of the appellant's case was that the termination of her contract was unlawful, *inter alia*, on the basis that the respondents hurriedly and unreasonably decided to terminate her contract for failing to provide an NQF7 qualification which is not rationally connected to the purpose for which probation is provided in the Public Service Act [PSA]. The appellant contended that her claim fell within the ambit of section 157(2) of the Labour Relations Act, 66 of 1995, as amended [LRA], as it implicated her right to a lawful administrative and procedurally fair action as against the State, and that Minister as the employer was exercising administrative powers.¹ The appellant brought her review relief based on section 6(2) the Promotion of Access to Justice Act, 3 of 2000 [PAJA].

¹ Section 157(2) of the LRA provides:

- “(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.”

[3] The respondents argued that the Court's jurisdiction was not engaged and that the appellant's relief was based on an unfair dismissal which fell in the exclusive jurisdictional purview of the Labour Court. It raised the jurisdictional point in *limine*.

[4] Admittedly, the Court *a quo*, in a confusing manner, upheld the *in limine* point because the review relief failed. The Court *a quo*, whilst applying the principle set out by the Constitutional Court [CC] in Baloyi v The Public Protector² [Baloyi matter] found that because the review application was devoid of any cogent reasons anchoring it as a review and absent an allegation of a violation of any fundamental right entrenched in Chapter 2 of the Constitution, no case was made out for concurrent jurisdiction of the High Court as envisaged in terms of section 157 of the LRA.

[5] However if regard is had to the CC in the Baloyi matter the Court stated that:

*"[38] It is trite that the same set of facts make give rise to several different causes of action. In some instances, the forum in which a particular cause of action may be pursued prescribed in terms of legislation. In the labour context, where more than one potential cause of action arises as a result of a dismissal dispute, a litigant must choose the cause of action she wishes to pursue and prepare her pleadings accordingly."*³

"[40] The mere potential for an unfair dismissal claim does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court, notwithstanding the fact that other potential causes of action exist."

² (CCT03/20) [2020] ZACC 27.

³ *Supra* footnote [38] and [40].

and then at:

“[42] Finally, it is important not to conflate the question of whether a court has jurisdiction to hear a pleaded cause of action, with the prospects of success of that cause of action. When assessing whether its jurisdiction is engaged, a court might be of the view that a litigant should have pursued a different cause of action, or that she would have had a better chance of success had she done so. However, these views are irrelevant to the court’s competence to hear the matter.”⁴

[6] The Court *a quo* did conflate the question of whether a court has jurisdiction to hear a pleaded cause of action, with the prospects of success of that cause of action and found that although it may have concurrent jurisdiction to deal with the matter if, besides it being an employment contract matter, there was indeed a basis for reviewing the respondents’ decision. Therefore because it found no prospects of success for the review relief, the Court *a quo* found that its jurisdiction was not engaged and dismissed the application by upholding the point *in limine*.

[7] In short, this is an incorrect approach and apply the principle in the Baloyi matter the Court *a quo* did have jurisdiction to deal with a claim as pleaded, and should have dealt with the public law challenge on its merits.

[8] For the sake of clarity, the appellant was entitled to choose her course in the High Court, notwithstanding that the LRA is a purpose built employment framework, inferring that labour processes and forums should take precedence over non-purpose built processes and forums in situations involving employment-related matters. The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices. The Constitutional Court in the matter of

⁴ *Ibid*, [42].

Chirwa v Transnet,⁵ when it warned that judicial review of an administrative decision can only result in an administrative decision being set aside. The line of reasoning that the Constitutional Court reiterated in the Chirwa matter was endorsed by Conradie JA,⁶ the conclusion being:

“If an application for the review of administrative action succeeds, the applicant is usually entitled to no more than a setting aside of the impugned decision and its remittal to the decision-maker to apply his mind afresh. Except where unreasonableness is an issue the reviewing court does not concern itself with the substance of the applicant’s case and only in rare cases substitutes its decision for that of the decision-maker. The guiding principle is that the subject is entitled to a procedurally fair and lawful decision, not to a correct one. Under the LRA, the procedure to have a dismissal overturned or adjusted involves a rehearing with evidence by the parties and the substitution of a correct decision for an incorrect one. The scope for relief consequent upon such an order is extensive. It is quite unlike that afforded by an administrative law review.”⁷

[9] Against this backdrop this Court considers the appellant’s review.

THE REVIEW RELIEF

[10] The appellant wishes to review the Minister’s decision as contained in a termination letter of the 20 July 2022. The reason for the termination of the appellant’s contract is set out in paragraph 2 of the letter and states that “2. *The Department noted that you are not in possession of NQF 7 resulting in your continual extension of appointment being regarded as irregular.*” [impugned decision].

[11] To give context to the termination letter, the Guide for Members of Executive states that: “*Appointments of the post of Chief of Staff (the appellant’s*

⁵ (CCT78/06) [2007] ZACC 23.

⁶ *Supra*, par [44].

⁷ *Administrator, Natal, and Another v Sibiyi and Another* 1992 (4) SA 532 (A) at par 31.

appointed rank – own emphasis), Private and Appointment Secretary; Medial Liaison Officer and Parliamentary Officer, must be made in terms of section 9 of the Public Service Act and Regulation 66 of the Public Service Regulations, 2016 and must be linked to the term of the officer of the Minister”.

[12] Regulation 66(1)(a) and (2) of the Public Service Regulation [PSR] states that:

“(1) An executive authority may only fill vacancies in the office of an executive authority or deputy minister by means of-

(a) an appointment in terms of section 9 of the Act for the term of the office of the incumbent executive authority or deputy minister which will terminate at the end of the first month after the month which the term of the executive authority or deputy minister terminates for any reason.

(2) Subject to the appointment criteria in regulation 67(5)(b) to (d),⁸ an executive authority may fill a post in the office of the executive authority or deputy minister in that executive authority’s portfolio, in terms of subsection (1) without complying with regulation 65(1), (3), (4) (exempt from advertising the post-own emphasis)).”

[13] It is a common cause facts the appellant was not in possession of an NQF level 7 qualification but a NQF level 6 and, that it is a requirement in terms of appointments on salary level 13 and 14. The appellant was appointed on salary level 14. No mention on the papers is made of the fact that the Minister followed the selection criteria for the appellant’s appointment set out in regulation 67(5)(b) to (d). However, from the appointment letter dated the 10 September 2021, the Minister, *inter alia*, appointed the appellant to the position of Chief of Staff, the Minister informed General Mkhize of the Human Resources Management that the

⁸ Regulation 67(5)(b)-(d) concerns the appointment of a selection committee which would make recommendations for the post to the Minister. Criteria for the post must include the employees fulfilment of the inherent requirements of the post.

General may contact the appellant for any other relevant information that the General may need to fulfil the exercise. Further requirements to fulfil the appellants appointment was foreseen.

[14] Two months later, the Chief Director of Human Resources on the 11 November 2021 sought the Minister's approval to deviate from the statutory, regulatory prescripts and the directive on minimum entry requirements into SMS level in order to regularise the applicant's appointment for want of compliance of the inherent requirement for the post as required in terms of regulation 67(5)(b). The request for deviation according to the Department was not supported by the Secretary of Defence and ultimately not granted. The appellant's appointment was irregular.

[15] The Department on the 22 February 2022 informed the Minister that under the circumstances, to rather use the appellant in another vacant post in which she met the requirements. The instruction to the Department from the Minister was to rather extend her probation period for a further 6 (six) months from 1 March 2022 to the 30 September 2022. This was conveyed to the appellant in a letter of the 10 March 2022. The letter of 10 March 2022 was headed: "**APPOINTMENT OF 0[...] MISS SC CHWARO AS A CHIEF OF STAFF ON THE PROBATIONARY PERIOD OF 6 MONTHS SUBJECT TO MPSA APPROVAL IN THE PRIVATE OFFICE OF THE MINISTER OF DEFENCE AND MILITARY VETERANS**". Furthermore, in terms of paragraph 2 thereof the appellant's appointment was in terms of regulation 66 of the PSR as well as the Guide for Members of Executive and the following was stated:

- "a. *Rank: Chief of Staff*
- b. *Salary Level 14*
- c. *Remuneration package: R1 251 183.00 (To be structured within the rules of senior management assistants. Refer to annexure A for the terms and conditions of employment).*
- d. *Date of appointment: 16 March 2022 to 30 September 2022 (on probation period of 6 months subject to submitting the qualification that meet the minimum requirement (NQF7) Linked to the term of Minister*

T.R Modisa. Appointment will terminate a month following the end of term of the Minister.

[16] Page 2 of the 10 March 2022 letter required the appellant to enter an employment contract with her supervisor within 7 (seven) days of the letter, required her to enter into an annual performance agreement with her immediate supervisor within 3 (three) months after assumption of duty and thereafter to comply with the submissions of performance agreement and development systems documentation as communicated in the department.

[17] It is common cause that the appellant received the letter of the 11 March 2022, refused to sign for it and elected not to comply with its further directions. The respondents argued and relied on a prior letter dated the 11 March 2022, the initial letter of appointment dated the 11 October 2021 was delivered regulating the first term of probation period from the 6 September 2021. The appellant denies receiving it.

[18] Now, departing from giving context of the termination letter through the lens of the respondents, the appellant in paragraph 79 of her founding papers contends that the impugned decision was unreasonable because the purpose of probation is not rationally connected to her failure to provide an NQF7 qualification. In other words probation in terms of the PSR serves an entirely different purpose and its imposition regarding her situation in consequence arbitrary. The appellant also contends that the Minister by imposing probation, acted outside the powers of the PSA and the PSR.

[19] The appellant does not take issue that her non-compliance of the requirement of a NQF7 constitutes an irregularity in terms of regulation 66 read with regulation 67 as she confines her review relief to the issue of probation.

[20] A closer look at the how probation is regulated is then required.

PROBATION

[21] According to the PSA, probation, if so required by regulation, is applicable and prescribed for the relevant category of employee⁹. The regulations being the source document to ascertain if probation is required for the appellants rank and based on the circumstances of her appointment.

[22] Prior to the appellant's appointment the appellant served with the Minister, who, at the time, was the Speaker of Assembly. The appellant moved from such appointment together with the Minister, now in the position of Chief of Staff. On the facts it appears the appellant relocated with the Minister at the Minister's invitation.

[23] Regulation 68 deals with probation. The general rule is set out in regulation 68(1) which states that all employees in public service are to serve probation for a period of 12 (twelve) months excluding the number of days for which leave has been taken by him or her during the period of probation or any extension thereof. However there are exceptions. Sub regulation (3) is one of the exceptions and speaks to regulation 45(2) appointments as follows: *"An employee who is continued to be employed in terms of regulation 45(2) is not required to serve probation in the higher graded post, provided that if he or she was on probation immediately before the upgrade, he or she shall remain on probation"*. Reliance on regulation 45(2) was not the case argued for the appellant. If no exception applies, the general application of regulation 68(1) applies.

[24] The appellant on her own version, contents that her new appointment was not an upgrade, yet her post was not advertised. In any event if a position is not advertised, such may have been excused in terms of regulation 66 if the employee meets the criteria of regulation 67(5). The deviation request to the Minister suggests that the appellant did not meet the criteria of regulation 67(5)(b). Furthermore, if the vacancy is filled for a position equal, not higher in relation to the previous position held by the employee, the Minister possesses a discretion to exempt an employee from the general probation period of regulation

⁹ Section 13(1) of the Public Service Act, 1994.

68(1).¹⁰Applying the appellant's own version of her position not being higher, means that the Minister could exempt her from probation but exercised her discretion not to and the regulation 68(1) probation requirement followed.

[25] Be that as it may, notwithstanding whether her position was higher or not, the appellant argues that she is exempt from probation because her term of appointment was linked to the tenure of the Minister and because the Minister may be removed or reassigned at any time by the President, the general application of regulation 68(1) does not apply to her. No authority was provided for this proposition and section 13 of the PSA is clear, probation applies unless otherwise prescribed by the regulations. The regulations are silent on the appellant's proposition, therefore no exemption is prescribed as argued, the appellant's argument misplaced and regulation 68(1) therefore applies to the appellant. The application of probation by the Minister lawful and not arbitrary.

[26] Furthermore the impugned decision was a rational response to the appellants irregular appointment and, probation prescribed.

[27] The appellants review relief must fail as too, the remedial relief she seeks as set out in prayer 2 and 3 of her amended notice of motion. The Court *a quo* was correct when it stated that the appellant's review relief had no prospect of success. The appeal must fail.

COSTS

[28] There is no reason why the costs should not follow the result. No other argument was tendered.

[29] The following order:

1. The appeal is dismissed with costs, Counsel's fees to be taxed on scale B.

¹⁰ Regulation 68(2).

L.A. RETIEF

Judge of the High Court
Gauteng Division

I agree,

LESO AJ

Acting Judge of the High Court
Gauteng Division

I agree,

MORE AJ

Acting Judge of the High Court
Gauteng Division

Appearances:

For the Appellant:

Adv M Phalane

Instructed by attorneys:

Mothle Jooma Sabdia Incorporated

Tel: (012) 362 3137

Email: tipem@mjs-inc.co.za

Ref: Mr TA Mothle/Nadine/Chumeez/TAM5304

For the Respondents:

Adv Janse Van Rensburg

Instructed by attorneys:

The State Attorney

Email: imakubela@justice.gov.za

Ref: Mr Makubela/434/22/Z57

Date of hearing:

24 July 2025

Date of judgment:

29 September 2025