



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: C389/2024

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

THE OFFICE OF THE PUBLIC PROTECTOR

First Respondent

THEMBALETHU JACK

Second Respondent

Case No: C391/2024

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

THE OFFICE OF THE PUBLIC PROTECTOR

First Respondent

CECELIA JAM-JAM

Second Respondent

Case No: C390/2024

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

THE OFFICE OF THE PUBLIC PROTECTOR

First Respondent

LUMKILE RICHARD MZUKWA

Second Respondent

Delivery: 8 December 2025

Heard: 2 September 2025

JUDGMENT

KAHANOVITZ, AJ

Introduction

- [1] Before court are three unopposed applications seeking similar relief and relying on a substantially similar factual background. Although they have not been consolidated into a single application, for purposes of this judgment and for the sake of convenience, I will treat them as if they are a single application, save where it needs to be pointed out that the factual distinctions have any impact on the merits or the relief sought.

- [2] All three applications are brought in terms of section 158 (1)(h) of the Labour Relations Act¹ ("LRA"). In all three cases, the applicant seeks to review its own decision relating to the appointment of an employee.
- [3] "Metrorail" provides commuter rail services. Commuter rail services by and large, provide poor communities with essential public transport.² The questionable appointments investigated by the Office of the Public Protector in compiling the report discussed in what follows thus concerned the qualifications for appointment of persons hired to provide mainly poor people in the Western Cape with essential train services.
- [4] Section 195 of the Constitution provides that in making appointment to the public administration a high standard of professional ethics must be promoted and maintained, and appointments should promote the efficient, economic, and effective use of resources and performance.
- [5] The first application concerns the appointment of Thembaletu Jack as the applicant's Senior Manager: Human Resources on 2 August 2012. ("the Jack application")³
- [6] The second application concerns the appointment of Cecelia Jam-Jam as its transformation manager on 1 April 2014. ("the Jam-Jam application")⁴
- [7] The third application concerns the appointment of Lumkile Richard Mzukwa as Area Manager: Customer Services on 4 September 2013 ("the Mzukwa application.")⁵
- [8] The Office of the Public Protector ("the PP") is the first respondent in all three cases.

¹ Act 66 of 1995, as amended.

² Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at para 8.

³ case number C389/2024

⁴ case number C391/2024

⁵ case number C390/2024.

[9] Report number: 37 of 2021/22 compiled by the PP is entitled "*Report on an Investigation into Allegations of Improper Conduct and Maladministration by Metrorail: Western Cape Relating to the Appointment of Staff*".

[10] I quote at some length from the executive summary (excluding portions not here relevant) as it contains the background to and reasons for the bringing of this application:

'Executive Summary

- (i) This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- (ii) The report communicates the findings of the Public Protector and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into a complaint into allegations of improper conduct and maladministration by Metrorail: Western Cape (Metrorail), a Division of the Passenger Rail Agency of South Africa (PRASA) relating to the appointment of staff.
- (iii) The complaint was lodged anonymously with the Public Protector on 30 January 2013 and in the main related to the alleged abuse of Metrorail fleet vehicles and the irregular appointment of staff by Metrorail. The incidents referred to by the Complainants occurred during the period Mr Mthura Swartz (Mr Swartz) was the Regional Manager of Metrorail.
- (iv) From the information provided by the Complainants and obtained from the initial enquiries made, it was established that some of the allegations were unsubstantiated or without merit. It also transpired that Metrorail had already taken disciplinary and corrective action in respect of several of the incidents complained of.
- (v) It was, therefore, decided to focus the investigation on the following allegations made in the complaints that were lodged and the information obtained, namely:

- (a) ...
 - (b) The alleged improper appointment of Ms Jam-Jam by Metrorail as Transformation Manager on 1 April 2014.
 - (c) The alleged improper appointment of Mr Lumkile Mzukwa (Mr Mzukwa) as Area Manager Customer Services and subsequently as Customer Services Manager in 2013.
 - (d) ...
 - (e) The alleged improper appointment of Mr Themba Jack (Mr Jack) as Senior Manager: Human Resources by PRASA in 2012.
- (vi) In essence, the Complainants alleged that Metrorail and/or PRASA's conduct, as described above, was improper and amounted to maladministration.
- (vii) Based on the analysis of the complaint, the following issues were identified for investigation:
- (a) ...
 - (b) Whether the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.
 - (c) Whether the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.
 - (d) ...

- (e) Whether the appointment of Mr T Jack as the Senior Manager: Human Resources by PRASA in 2012 was not in accordance with the relevant laws and prescripts regulating the selection and recruitment of staff by PRASA and if yes, whether PRASA's conduct was improper and constitutes maladministration.
- (viii) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included the exchange of correspondence with PRASA, Metrorail and the Complainants, the evaluation and consideration of the documents submitted and obtained, and consideration and application of the relevant laws and legal prescripts.
- (ix) The Acting Regional Manager of Metrorail: Western Cape and the Group Chief Executive Officer (GCEO) of PRASA and the persons implicated or that could be affected by the evidence obtained during the investigation were afforded an opportunity to respond thereto, in terms of section 7(9) of the Public Protector Act. The responses received were considered during the investigation
- (x) Having considered the evidence and information obtained during the investigation, the Public Protector makes the following findings:
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- (b) Regarding whether the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.
- (aa) The allegation that the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was not in accordance with the laws and prescripts regulating

the recruitment and selection of staff by Metrorail, is substantiated.

- (bb) Her appointment by Metrorail contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy, as it did not comply with the minimum requirements for the position as determined and advertised by Metrorail.
 - (cc) Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.
- (c) Regarding whether the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.
- (aa) The allegation that the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, is substantiated.
 - (bb) His appointment by Metrorail contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy as Mr Mzukwa did not comply with the minimum requirements for the position, as determined and advertised by Metrorail.
 - (cc) Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the

Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

(e) Regarding whether the appointment of Mr T Jack as the Senior Manager: Human Resources by PRASA in 2012 was not in accordance with the relevant laws and prescripts regulating the selection and recruitment of staff by PRASA and if yes, whether PRASA's conduct was improper and constitutes maladministration.

(aa) The allegation that the appointment of Mr Jack as the Senior Manager: Human Resources in 2012 by PRASA was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by PRASA, is substantiated.

(bb) His appointment contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy as it did not comply with the minimum requirements for the position as determined and advertised by Metrorail and/or PRASA.

(cc) PRASA's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

(xi) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

(a) The GCEO of PRASA to:

(aa) To approach a court to review the appointment of Mr Jack and for a just and equitable order when considering the consequences thereof. In this regard, it should be noted that the Constitutional Court held in In Khumalo and Another v

Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49; that appointments made irregularly are not automatically null and void because the appointed candidate has labour rights. . It was further held in this case that only a court can grant a "just and equitable" order in terms of section 172(1)(b) of the Constitution, when considering the consequences of declaring a decision unlawful.

(bb) Take appropriate action based on the engagement with the National Treasury and PRASA's internal auditors to declare the salary paid to Mr Jack as irregular expenditure. Note is also taken that PRASA has also advised the Public Protector that there is a process underway to deal with the matter including the remedial action as per the National Treasury processes.

(b) The Regional Manager of Metrorail: Western Cape to:

(aa) To approach a court to review the appointments of Ms Jam-Jam and Mr Mzukwa and for a just and equitable order when considering the consequences thereof.

(bb) Take appropriate action based on the engagement with the National Treasury and PRASA's internal auditors to declare the salaries paid to Ms Jam-Jam and Mr Mzukwa as irregular expenditure.⁶ (Own emphasis)

The case made out by the applicant

[11] This application is brought in terms of Section 158(1)(h) of the LRA. The applicant seeks to review its own decisions relating to the appointments of the three named individual respondents referred to in the report of the PP as set out above.

⁶ Portions of the quote not directly relevant to these proceedings have been omitted. The underlining has been added.

[12] The relevant persons, posts and dates are as follows:

12.1 Jack on the 2nd of August 2012, as a Senior Manager: Human Resources.

12.2 Jam-Jam as its Transformation Manager on 1 April 2014.

12.3 Mr Mzukwa as Area Manager Customer Services on 1 April 2013 and subsequently as Customer Services Manager on 4 September 2013.

[13] The court is asked to review and set aside these irregular appointments. The court is furthermore requested to make 'a just and equitable order', considering the consequences of these irregular appointments.

[14] The purpose of bringing these applications is submitted by the applicant to be the duty of organs of state to uphold the rule of law and act in a transparent fashion.

[15] The nucleus of these applications emanates from Paragraph 14 of the Selection and Recruitment Policy (the "Policy"), particularly the part on Shortlisting and Selection, which provides that:

'the number of employees shortlisted must be limited to and restricted to candidates who meet minimum requirements of the position as advertised.'

The appointment of Jack

[16] The Applicant, in appointing Jack, contravened the Policy by acting in a manner which it concedes was irregular, improper and constitutes maladministration for the following reasons:

16.1 The appointment of Jack was unsubstantiated in that there was non-compliance with the minimum requirements for the position as determined and advertised by the applicant;

16.2 The appointment of Jack, the applicant also concedes, constituted improper conduct in terms of section 172(1)(a) of the Constitution.⁷

[17] The non-compliance with this section is said to have been caused by a deviation from the minimum requirements for an applicant to be shortlisted. A relevant bachelor's degree in human resources ("HR") was required. Mr Jack had a degree but not in HR. This notwithstanding it was decided to shortlist him because of his relevant HR experience. According to the applicant he also emerged as the best candidate in the interview process.⁸

[18] After the applicant became aware of the PP's findings and the remedial action to be taken, the applicant took no steps to challenge the report, and in bringing this application, the applicant also confirms that it does not intend to review the first respondent's findings.

[19] In summary, this application is based on uncontested evidence to the effect appointment was irregular and improper as Jack was appointed notwithstanding his failure to meet the minimum requirements for the post because of his lack of a required qualification.

[20] During the investigation stage, the applicant did not dispute the evidence obtained during the investigation and undertook to accept any adverse reasonable remedial action to be taken.

[21] The PP found that the appropriate remedial action to be taken by the first respondent was the following:

21.1 A court was to be approached to review the appointment and for a just and equitable order; and

⁷ A court must declare any conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

⁸ The post in question was a senior post and carried a cost to company package of R1 148 724.

21.2 It should take appropriate action based on engagement with the National Treasury and the applicant's internal auditors on financial consequences or expenditure relating to the second respondent's appointment.

- [22] With regard to the taking of remedial steps, the applicant submits that it is relevant that none of the unsuccessful applicants for these posts challenged the outcome.
- [23] At the time of these appointments, there was no evidence that showed that, at the time the successful applicants applied for these positions, they acted irregularly or unlawfully and or fraudulently. (The submission seems to be that there was no personal culpability on the part of the individual respondents in the process by which they were unlawfully appointed.)
- [24] The members of the panel that made these appointments were no longer in the employ of the applicant by 8 October 2021, when the PP's report was concluded.

Discussion - the legal effect of a decision by the public protector

- [25] The decisions of the PP are binding until set aside, and if not set aside, the appropriate remedial action to be taken must be implemented unless it is challenged by way of a review.
- [26] On the applicant's duty to approach this court to give effect to the decision of the PP, it was pointed out by the applicant that in the matter of *Economic Freedom Fighters v Speaker, National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*⁹, the court held as follows:

'The power to take remedial action is primarily sourced from the supreme law itself. And the powers and functions conferred on the Public Protector by the Act owe their very existence or significance to the Constitution, just as roots do not owe

⁹ 2016 (3) SA 580 (CC) at paras 64 to 66. This is the decision which found that President Jacob Zuma breached the South African Constitution by failing to implement the recommendations in the Public Protector's Nkandla report.

their life to branches, so are the powers provided by national legislation incapable of eviscerating their constitutional forebears into operational obscurity.¹⁰

And

'Our constitutional order hinges also on the rule of law. No decision grounded in the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a license to self-help".'¹¹

- [27] The power of the courts in constitutional matters is derived from Section 172(1)(a) of the Constitution which enjoins a Court to declare invalid any law or conduct inconsistent with the Constitution. When the Labour Court is approached the Section 158(1)(h) of the LRA becomes of application as this provision empowers the Labour Court to review any decision taken or any act performed by the State as an employer, on such grounds as are permissible in law. The facts of this case concern an act of the State as an employer.
- [28] As far as appropriate remedial action is concerned, the applicant's submission was that, aside from setting aside the appointments and possibly calling on the auditor general to do something unspecified, no orders should be made against the individual respondents.
- [29] The applicant's submission is that it would be impermissible for the individual respondents '*to be punished in anyway whatsoever for the irregular appointment*'. In this regard, reliance was placed on the decision of the Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*¹² where the Constitutional Court held - so submitted the applicant - and organ of state was not merely entitled but duty bound to seek redress of an irregularity in a court of law.¹³ At para 62, the Court also said the following:

¹⁰ Ibid at para 64.

¹¹ Ibid at para 74.

¹² (2014) 35 ILJ 613 (CC).

¹³ Paragraph 21 of the applicant's heads of argument quotes this alleged passage from the CC's judgement: "Irregular appointments are potentially unlawful. Appointments made irregularly are not automatically null and void because the appointed candidate has labour rights, only a court can grant a just and equitable order in terms of Section 172(1)(b)

[62] Section 11(2) must be read in the context of the state's obligations under section 195(1)(i) of the Constitution and the right to fair labour practices under section 23 of the Constitution. Section 195(1)(i) stresses the importance of ensuring that appointment processes in the public sector are based on ability, objectivity and fairness. Fairness in employment practices and labour relations requires the state to be even handed and transparent not only to those whom it employs, but so too to those who may wish to apply for employment at a state institution. It would not be fair if the state were to employ persons who do not meet the very requirements that the state itself sets. It is neither fair nor in compliance with the dictates of transparency and accountability for the state to mislead applicants and the public about the criteria it intends to use to fill a post. The formulation and application of requirements for a particular post is a minimum prerequisite for ensuring the objectivity of the appointment process. Persons who do not meet the requirements for a post in the public sector ought not to be appointed.'

Steps taken after the publication of the PP's report

[30] As previously mentioned in the report was signed by the then PP Busisiwe Mkhwebane of 8 October 2021.

[31] Paragraph 8.1.1 of the report required the GCEO of the applicant to submit an implementation plan to the PP within 30 days of the report on the implementation of the remedial action required.

[32] This implementation plan, if it was ever submitted, is not annexed to the applicant's application.

of the Constitution , when considering the consequence of declaring the decision unlawful until a court pronounces on the validity of the act (appointment, the act exists in fact and has legal effect in terms of which legal consequences will continue to exist. The court explicitly viewed functionaries as being not entitled but duty bound to seek redress of an irregularity in a court of law'. The applicant's heads of argument unhelpfully fail to reference the paragraph numbers of paragraphs from judgments directly quoted in their heads. In most of these instances I was able through considerable effort to source, find and footnote the relevant paragraph after reading the whole judgement. I unfortunately cannot find this quoted paragraph in the CC judgment in Khumalo. It may be a quote from someone else's summary of the decision as the legal principles cited are correct.

- [33] The affidavit in the Jack application at paragraph 46 says that this implementation plan is annexure PP 13. Annexure PP 13 is an internal document dealing with the transfer of Jack. Annexure pp14 is an internal report to the CEO by the acting executive human capital management which discusses the remedial action could be taken to comply with a report of the PP. There is accordingly no evidence before this court implementation plan was submitted to the PP.
- [34] The founding affidavit notes that at the time that the applicant investigated the PP's report, Jack had been transferred to a risk pool due to ill health, and he was accordingly no longer rendering services as a Senior Manager Human Resource at a salary of R1 148 724 per annum.
- [35] The applicant submits that it is in the hands of the court to decide whether the appointment of the second respondent should at this stage be declared irregular, improper and unconstitutional.
- [36] On 4 July 2023, the applicant sent a memorandum to all employees in respect of an offer for a voluntary severance package – VSP. The closing date was 21 August 2023. Jack did not apply, allegedly due to his absence from his place of employment. He was, however, still approached by the employer after the closing date to encourage him to apply for a VSP, which he then did on 16 November 2023. (The late applicants (prompted by the employer to apply) for this VSP were obviously told that the closing dates would not be applied in their cases.)
- [37] It will then come as no surprise to discover that Jack's VSP was approved on 20 November 2023 and he was then paid a generous package of R1 140 063 in respect of severance, together with certain other benefits, the termination date of his employment being 30 November 2023.
- [38] The founding affidavit is dated 7 August 2024. It submits that the applicant holds the view that bringing this application is academic and moot, given that the applicant has taken steps to correct the irregular appointment and Jack is no longer in the employ of the applicant.

[39] This initial stance notwithstanding, the applicant, however, met with representatives of the PP on 3 May 2024 to discuss the possible mootness of an application. It noted that measures to correct the irregular appointment had already been taken by the applicant and that the affected employees were no longer in the employ of the applicant.

[40] Its views on mootness were not shared by the PP and the deponent, Naledi Modibeni, Chief Human Capital Officer of the applicant says that representatives of the PP *'insisted that this application should be brought and the court in the absence of any specific order sought on remedial action should decide on steps to be taken on remedial action'*.

[41] The founding affidavits makes much of the contention that the individual respondents are in no way to blame for what has happened. The applicant says that they rendered the services for which they had been hired and were found to be competent and with the prerequisite skills to hold the position on merit. The affidavit does not, however, explain in any convincing way why the appointment criteria were not applied and who was to blame for this¹⁴. Mention is made of an executive who was disciplined, but it is not at all apparent from the findings of that disciplinary hearing what direct relationship that dismissal had to Jacks' appointment.¹⁵

[42] The whole truth does not appear to me to have been revealed in these papers. The deponent repeatedly uses the odd phrase that certain facts will now be mentioned because *'it is therefore necessary to bring the court into confidence by stating ...'*

[43] My general impression is that the culpable parties are being shielded, and the applicant regards the PP's report as much ado about nothing. What is missing from the narrative is an explanation for the motivation for making these unlawful

¹⁴ The interviews are conducted by panels. The interviews are obviously preceded by a shortlisting process.

¹⁵ The annexure is a 34 page finding dealing with 14 charges made against Mthuthuzeli Swart. None of these charges relate to the appointments applicant seeks to have set aside in this case and it is not apparent to me why this document was annexed to the applicant's application.

appointments. The court is told to accept that none of the appointees were in any way to blame for their having been appointed, even if they did not meet the advertised requirements. This is, however, stated as a conclusion, but no evidence is provided to explain the decision to ignore the compulsory advertised criteria. Was it an innocent mistake? Was it nepotism? Was it politically motivated? We simply do not know, and without knowing, it is not possible to conclude that the appointees were truly blameless. At best, it can be said that the applicant has decided to place no evidence before the court, which would permit it to come to any other conclusion.¹⁶ It is also obvious that the papers track the CC's decision in *Khumalo* with a view to driving a court to a conclusion that, although the unlawfulness of the conduct is not contested, no one is to blame. In any case, so runs the argument, applicants for jobs without the entry qualifications can hardly be blamed if they simply try their luck by applying for the position and then end up getting appointed.

Condonation

[44] The deponent says the report was served on the applicant on or about 8 October 2021, but the applicant only appointed its current legal representatives in or around November 2022 to consider and bring an application to the Court.

[45] The affidavit then refers to certain documents that were required to launch this application and were traced with some difficulty. This delayed the bringing of the application. The notice of motion was signed on 30 August 2024, that is, almost three years after the PP's report had been received.

[46] It is submitted by the applicant that the respondents will not suffer any prejudice if condonation is granted, whereas the applicant will suffer irreparable harm 'as they

¹⁶ The procedure or context through which matters of this sort must be brought to court is a cause of concern. A set of facts is brought to the attention of the PP by a whistleblower. A finding is then made unconstitutional conduct on the part of the organ of state which is also directed to approach a court to give full effect to the PP's findings. It is then expected that the organ of state which was found to be breach of the Constitution will change its spots and expeditiously file papers in which they will enthusiastically seek to reveal all to promote transparency, the Constitution and the rule of law instead of protecting the governing incumbents and appointees who would have come to no harm but for actions of a whistleblower.

would have failed to comply with the findings and recommendation of the Public Protector which are statutory and binding'. The court declining to hear the case 'would also entail that the applicant is defiant (sic) of the supremacy of the Constitution particularly the provisions of section 191(5) of the Constitution'.

The PP's non-participation in these proceedings

- [47] The PP did not file papers or present arguments. This was surprising as although no order was sought against her, it was the PP that had required the applicant to bring these proceedings and her views could have assisted this court on whether: (a) proceedings had been launched within a reasonable time; (b) the applicant's conduct was consistent with the remedial action required by the PP; and (c) what form of appropriate relief the PP expected this court to grant.
- [48] This court issued a directive before the hearing stating that, although the matter was not opposed, as it was a matter of public interest, the first respondent was required to file heads of argument and was also directed to appear at the proceedings and present oral argument with reference to authority on what it submitted would constitute just and equitable relief on the facts of these three cases.
- [49] No heads of argument were filed by the PP, but Ms S Langeveldt from the office of the PP was present at the hearing. She explained that she was not a lawyer and that time would be required to obtain legal services. At the completion of oral argument by the applicant, an order was made by agreement that the first respondent would, after obtaining legal advice, file heads of argument on or before 12 September 2025, to which the applicant could reply before 19 September 2025.
- [50] On 5 September 2025 first respondent wrote to the registrar to advise that it could not procure external legal advice by 12 September 2025 and after apologising to the court for failing to act on the court's directive said 'We have requested the Applicant's attorneys to indulge us in this regard, by requesting that we agree to have the timelines revised, in order for the [PP] to participate meaningfully in the

matter'. The first respondent was informed by the registrar that a court order could not be altered in the absence of a formal application. No such application was brought and nor were the heads filed late, together with an application for condonation. This court must accordingly assume that the first respondent, in the end result, decided or was advised not to file written argument.

Explanation for the delay

- [51] The applicant fails by a considerable margin to adequately explain its delay of several years in launching this application. My impression was that the delay was purposeful and had the purpose of shielding the applicant and the unlawfully appointed employees from suffering negatively because of the applicant's unlawful conduct.

Prospects of success / mootness

- [52] *Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs*¹⁷ provides the following summary of the relevant principles on the mootness doctrine :

[12] The general principle is that a matter is moot when a court's judgment will have no practical effect on the parties. This usually occurs where there is no longer an existing or live controversy between the parties. A court should refrain from making rulings on such matters, as the court's decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect; one of the reasons for that rule being that a court's purpose is to adjudicate existing legal disputes and its scarce resources should not be wasted away on abstract questions of law. In *President of the Republic of South Africa v Democratic Alliance*, the Constitutional Court cautioned that "courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in

¹⁷ (104/2022) [2023] ZASCA 35 (31 March 2023).

circumstances where no actual purpose would be served by that decision, now”.

- [13] However, this principle is not an absolute bar against deciding moot matters. An appeal court has a discretion to decide a matter even if it has become academic or moot in circumstances where ‘the interests of justice require that it be decided’. In *Independent Electoral Commission v Langeberg Municipality*, the Constitutional Court held as follows:

“This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.”

- [53] This case is now moot because none of the employees whose appointment might have been affected by the outcome of this case are still in the employ of the applicant. In addition, it is not possible for this court to make a determination of whether or not it would be appropriate for anybody unlawfully appointed, including a director, to repay any salaries which they have received, as no information was furnished to put this court in a position to conclude that making such a decision to this effect would be in the interests of justice.

- [54] In the light of the applicant’s failure to properly explain the reasons for its delay, it is not necessary to consider the prospects of success but, given that it can be argued that applications such as this are brought to promote the public good and not for the benefit of the applicant, the question arises as to whether or not court’s should condone the late filing in order to promote the rule of law and for the public benefit even though there has been no proper explanation for the lengthy delay and the case has become moot.

- [55] The case is, however, and probably by design, moot as the applicant self-evidently took steps to ensure that by the time this case got to court, the affected employees were no longer in their employ, and so the real issue in a case such as this, namely whether the appointments should be nullified (with possible consequential relief), did not arise.
- [56] Making an order in these circumstances would, in my opinion, not be consistent with the objects of the rule of law, as it would, in effect, rubber-stamp noncompliance with the rule of law.
- [57] If the office of the PP wishes to make sure that there has been substantial compliance with its report, then it may find it fruitful to investigate whether there are any named individuals who can be blamed for non-compliance with the appointment criteria or whether they are any named officials or legal representatives who can be blamed for the cynical way the applicant has pretended to give effect to the PP's report.
- [58] Asked to explain what the point is in seeking an order to set aside the appointments at this stage, Adv Malema submitted that it is the report itself that needs to be endorsed by this court. I fail to understand what the point would be in the court doing so. As has already been pointed out, courts do not dispense academic legal advice.¹⁸

Appointment of Cecilia Jam-Jam as transformation manager

- [59] The minimum requirements for this post included a three-year legal or human resources degree or diploma.
- [60] Cecilia Jam-Jam's highest qualification was a Certificate in Office Administration and Computer Training. This notwithstanding she was rated the

¹⁸ I should clarify that although I have found that the application is moot I do not in so finding hold that the PP was required to agree with the applicant was thereby excused from bringing this application to court, as had been required in the PP's report. The applicant could not excuse its own inaction by simply deciding of its own accord - and without approaching a court - that the application had become moot.

best candidate and appointed at an annual salary of R434 623 per annum from 1 April 2014.

[61] Apart from asserting that she was blameless as process the applicant's papers fail to explain why the selection panel did not apply the minimum requirements in her case. They also fail to point out that Themba Jack, also appointed to his post by an unlawful process, was a member of the selection panel which recommended her for appointment. This emerges from a document dated 11 February 2014 which motivated for appointment.

[62] Jam-Jam also did not apply for a VSP but was approached and encouraged to apply after the expiry date. Her employment terminated on 20 November 2023, and she received a package of R415 825,95.

Appointment of Lumkile Mzukwa as area manager: CustomerServices

[63] In the case of this post the shortlisted candidate was required to have a B.Com or equivalent degree and a minimum of four years' experience in a service and logistics environment and five years customer service experience.

[64] Lumkile Mzukwa held a BA degree in social science (and not a degree in commerce) and did not have any of the requisite experience required. On 15 March 2013 he was appointed to this position in salary group 109.

[65] The same rote paragraphs are repeated in the part of the affidavit that deals with his appointment in other words that he was in no way blameworthy in being appointed, and that the payment of his salary was in no way wasteful fruitless expenditure.

[66] Lumkile Mzukwa did not exit via a VSP as he was dismissed for serious misconduct on 11 March 2022. The charges he faced and the reasons for his dismissal do not appear from the papers.

Failure to make out a proper case

- [67] The founding affidavit of the applicant in Jack is inherently contradictory.¹⁹ On the one hand, the deponent, Naledi Modibeni, Chief Human Capital Officer of the applicant, submits that the application is brought to give effect to the rule of law and the South African Constitution.
- [68] On the one hand, it pays mere lip service to the finding of the PP that the unlawful process of the appointments needed to be remedied by these appointments being set aside. The applicant, without satisfactory explanation, took several years to initiate these proceedings and although aware that these appointments are indeed unlawful, compounded its non-compliance by a lengthy delay in launching these proceedings and by then inviting two of the unlawfully appointed employees to accept VSPs in circumstances where it was obvious that, were this to occur, the question of their continued employment would be rendered moot.
- [69] The applicant's conduct in making these appointments in the first place, in the way in which it responded to the PP's report and in the late filing of self-defeating papers in this court, was self-serving, cynical and is to be deprecated.

The ancillary relief sought

- [70] Each notice of motion contains prayers for declarators to the effect that the court should declare the remuneration paid in each case as irregular expenditure; that within six months of this order "*the applicant's internal auditor should liaise with office of the auditor general on the expenditure incurred*" as a result of each flawed appointment. In addition, the court should make orders which it considers "*just and equitable considering the recommendations of the first respondent and all the pleaded facts placed before the court by the applicant.*"
- [71] As I have found that all three cases are moot as regards the main prayer to set aside these appointments, I would also decline the granting of these further

¹⁹ Most of this affidavit is also cut-and-paste into the founding affidavit in the other applications.

prayers. I accordingly leave open the question of whether Labour Court would in either event have jurisdiction to grant relief of this nature. I should add for completeness that in each case it is submitted in the affidavits that although the expenditure incurred was irregular it was not fruitless and wasteful as the appointees were found to be "*competent with the pre-requisite skills to hold the position on merit*".

[72] The application is accordingly dismissed. Costs were not sought.

Order

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



C. Kahanovitz

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv J. Malema

Instructed by: Padi Inc Attorneys