



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

Of interest

CASE NO. 3959/2024

In the matter between:

THEMBELA MATA

Applicant

and

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

First respondent

MAGISTRATES' COMMISSION

Second respondent

**CHAIRPERSON OF
THE MAGISTRATES' COMMISSION,
DEPUTY JUDGE PRESIDENT AUBREY LEDWABA**

Third respondent

**REGIONAL COURT PRESIDENT,
MR SAMSON DUNYWA**

Fourth respondent

JUDGMENT

LAING J

[1] This is an application for the review and setting aside of the first respondent's decision to appoint the applicant as a permanent regional magistrate in Makhanda.¹ The applicant also seeks a declarator that his prior appointment as a regional magistrate in Gqeberha was lawful and enforceable, and that the first respondent be ordered to give effect thereto.

Background

[2] Most of the facts are common cause. The applicant was previously a magistrate at the district court in Middleburg. When the second respondent advertised vacant posts at various regional courts in the Eastern Cape, the applicant applied, resulting in his appointment on 1 March 2015 as an acting regional magistrate in Makhanda. The appointment was for 12 months. It was extended from time to time until 29 October 2019, when the first respondent appointed the applicant as a regional magistrate in Gqeberha.

[3] The applicant remained in Makhanda, pending, as he alleged, the fourth respondent's facilitation of his move to Gqeberha. Nothing happened for three years. A change in the applicant's financial circumstances prompted him to request the fourth respondent, in November 2022, to give effect to his Gqeberha appointment. This resulted in a meeting at which the fourth respondent reminded the applicant that the intention had always been to appoint him as a regional magistrate in Makhanda, nowhere else; he could, however, apply for a transfer to Gqeberha. When the applicant repeated his request, in January 2023, the fourth respondent refused, saying that the appointment in Gqeberha had been a mistake. The applicant made a further request in February 2023 and subsequently approached the first and second respondents. A meeting was held in September 2023 but yielded no outcome. The

¹ The applicant referred to several 'decisions' in his notice of motion. This appeared to confuse the distinction between the decision itself, on the one hand, and how this was purportedly implemented, on the other. Only one decision forms the subject of the application. The first respondent's amendment of the applicant's certificate of appointment, on 2 February 2024, and his issuing of a fresh letter of appointment, on 20 February 2024, were merely intended to give effect to the decision to appoint the applicant as a permanent regional magistrate in Makhanda.

fourth respondent merely reiterated that it remained open to the applicant to apply for a transfer. The applicant never did so.

[4] On 20 February 2024, the first respondent sent a letter to the applicant, stating as follows:

'Dear Mr Mata

CORRECTION OF YOUR APPOINTMENT AS REGIONAL MAGISTRATE: MAKHANDA

I advise that I have received a request from the Chairperson of the Magistrates Commission regarding your incorrect certificate of appointment; your request to take up a post in Gqeberha; and proposals to resolve the matter.

The Commission proposed that the matter be resolved either by my correction of the certificate of appointment or the simultaneous advertisement of the posts at Gqeberha and Makhanda. I have given due consideration to the matter. I have accordingly approved that the posts of Gqeberha and Makhanda be advertised simultaneously and the amendment of your certificate of appointment to reflect that you are appointed at Makhanda since October 2019.

I have informed the Chairperson of the Magistrates Commission and the Regional Court President of my decisions. Kindly find attached your amended certificate of appointment.'

[5] The first respondent enclosed an amended certificate, indicating that the applicant had been appointed as a regional magistrate in Makhanda with effect from 29 October 2019. The applicant rejected this and instituted review proceedings on 13 September 2024.

Issues to be decided

[6] At the outset, the court must determine whether the decision that informs the application is capable of review or whether this is a matter that falls more appropriately within the jurisdiction of the Labour Court. If the court has indeed jurisdiction to deal with the matter, then it must decide whether the decision in question violated the applicant's right to just administrative action, alternatively

infringed the principle of legality. A further aspect to be considered is the relevance or otherwise of any time bar. A brief overview of the relevant principles follows.

Legal framework

[7] As a starting point, section 174 (7) of the Constitution provides for the appointment of magistrates in terms of an Act of Parliament. The most recent legislation to that effect is the Magistrates Act 90 of 1993, where section 10 provides that the first respondent shall, after consultation with the second respondent, appoint magistrates under and subject to the Magistrates' Courts Act 32 of 1944. The older legislation contains similar provisions under section 9 (1). No mention is made of what steps are to be taken in circumstances where an appointment is because of an 'administrative error', as the respondents contended.

[8] The issue of jurisdiction is an important consideration. It was addressed extensively in *Gcaba v Minister for Safety and Security and others*,² within the context of a public sector employment dispute. In that regard, the Constitutional Court held, per Van der Westhuizen J, that:

'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*,³ and not the substantive merits of the case... In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings — including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits — must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA,⁴ one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.'⁵

² 2010 (1) SA 238 (CC).

³ *Chirwa v Transnet Ltd and others* 2008 (4) SA 367 (CC).

⁴ Labour Relations Act 66 of 1995.

⁵ *Gcaba*, para 75.

[9] Uncertainty about the extent to which the Labour Court enjoys exclusive jurisdiction has, nevertheless, persisted. More recently, the Constitutional Court held, in *Baloyi v Public Protector and others*,⁶ that:

‘...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.’⁷

[10] The pleadings must ultimately decide the issue of jurisdiction. If confirmed, then the question of reviewability arises. The extent to which the first respondent’s decision is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) depends, however, on whether it falls within the definition of administrative action. In that regard, section 1 indicates that administrative action means, inter alia, any decision taken by an organ of state, when exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person, and which has a direct, external legal effect.⁸ In the event that the decision did not meet the definition, the principle of legality may be invoked as a further pathway to review.⁹

[11] Regarding the possible influence of a time bar on the applicant’s case, section 7 (1) of PAJA stipulates that review proceedings must be instituted without unreasonable delay and not later than 180 days after the date upon which, inter alia, the applicant was informed of the administrative action. In a legality review, however, the standard approach to delay involves the application of the test employed in

⁶ 2022 (3) SA 321 (CC).

⁷ Para 42.

⁸ The definition excludes, inter alia, a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law. That is not the situation here.

⁹ See, in this regard, the discussion in C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021), at 148–161. See, too, *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), paras 95 and 96.

Khumalo v MEC for Education, Kwazulu-Natal.¹⁰ To that effect, the court must decide whether the delay was unreasonable or undue; if so, then the court must decide whether to overlook it.¹¹

Jurisdiction

[12] The applicant framed his cause of action as a breach of his contract of employment. In the alternative, he contended that the first respondent violated his constitutional right to just administrative action or infringed the principle of legality. The distinctions made by the applicant in argument were, admittedly, not always easy to discern.

[13] The respondents contended, in contrast, that the first respondent had merely amended the applicant's certificate of appointment and issued a fresh letter of appointment to give effect to the original intention i.e. to appoint the applicant to Makhanda, not Gqeberha. This was not a case about administrative action; it was an employment-related issue that affected only the applicant and had no direct, external legal effect. The respondents placed extensive reliance on *Gcaba* to assert that the court lacks jurisdiction. The case involved the appointment of a member of the South African Police Services (SAPS), in September 2003, as station commissioner at its branch in Grahamstown (as it was then). The position was upgraded in February 2006. The member applied for the position, appeared on the short-list, underwent an interview process, but was ultimately unsuccessful. After the relevant bargaining council failed to provide suitable recourse, the member brought an application in the High Court to review the national and provincial commissioners' decision not to appoint him. The High Court dismissed the application, finding that it lacked jurisdiction because it pertained to an employment dispute. When the matter eventually came before the Constitutional Court, it was acknowledged that the earlier

¹⁰ 2014 (5) SA 579 (CC).

¹¹ The approach has undergone further refinement but the principles remain the same. See *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC); *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC).

decisions in *Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others*¹² and *Chirwa v Transnet Ltd and Others*¹³ had resulted in differences of opinion. There was uncertainty in subsequent jurisprudence on the proper interpretation and application of overlapping administrative law and labour law principles, especially within the context of public sector employment.¹⁴ Van der Westhuizen J observed as follows:

‘Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable, and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.’¹⁵

[14] The court held that the failure to promote and appoint the member was, essentially, a labour-related issue. As apparent from the above extract, it found that the impact of the decision was felt mainly by the member himself, with little or no direct consequence for any other citizens.¹⁶ This, said the court, was consistent with the decision in *Chirwa*, without contradicting *Fredericks*.¹⁷ The failure to promote and appoint the member was not administrative action.¹⁸

[15] The findings in *Gcaba* have not escaped academic criticism.¹⁹ Hoexter and Penfold observe that:

‘In the end, the court’s reasoning in *Gcaba* raises more questions about administrative action than it answers, arguably causing just the sort of “complexity and confusion” that the court

¹² 2002 (2) SA 693 (CC).

¹³ 2008 (4) SA 367 (CC).

¹⁴ *Gcaba*, para 3.

¹⁵ Para 64.

¹⁶ Para 66.

¹⁷ Para 67.

¹⁸ Para 68.

¹⁹ For example, see Hoexter and Penfold, n 9 above, at 265–70.

accuses others of having created after *Chirwa*. The role played by the “quintessential labour-related” nature of the conduct is one of those questions, for this description suggests that at some level, and in spite of its statements to the contrary, the court persisted in its compartmentalised view of ss 23 and 33 of the Constitution. The categorical or essentialist idea fostered by such an approach is that something is either a labour matter or an administrative-law matter, but not both; or, in Bill of Rights terms, that if a primary or more specific right is applicable, it somehow ousts or excludes the application of other, more general rights.’²⁰

[16] More recently, the Supreme Court of Appeal sought to distinguish *Gcaba* from other public sector employment disputes. In *Minister of Defence v Xulu*,²¹ the respondent had been a soldier under a two-year contract with the South African National Defence Force (SANDF). The SANDF extended the contract on three occasions before notifying the respondent that it would not renew it any further. Previous offences played a role in the decision. The court, per Wallis JA, held that *Chirwa* and *Gcaba* were distinguishable, with the former entailing the exercise of public power in terms of a contractual right.²² The SANDF’s decision had not been taken under the respondent’s contract but in terms of legislation; it was not a dismissal dispute.²³ Wallis JA went on to say that the Constitutional Court’s finding in *Gcaba* had been that the failure to have appointed the applicant was ‘a quintessential labour issue with little or no consequence for any other citizens.’ Accordingly, the failure to have appointed him was not administrative action.²⁴ The learned judge continued:

‘By contrast the issue in the present case is of importance to the citizenry at large, namely the manner in which people are selected for enrolment in our armed forces and the circumstances in which their contracts may be terminated. It cannot be categorised as the exercise of a contractual power under a contract of employment, because that is not the nature of the contract between a soldier and the SANDF. Irrespective of the precise nature of the contract, the decision not to renew it did not involve an exercise of contractual power, because no such exercise was required in the situation. . . . Unlike *Gcaba*, which was a

²⁰ At 267.

²¹ 2018 (6) SA 460 (SCA).

²² Para 38.

²³ Para 39.

²⁴ Para 40.

dispute over promotion in the context of a contract of employment, falling within the dispute-resolution mechanisms of the LRA, this is a non-contractual dispute over the exercise of a statutory power to extend Mr Xulu's period of enrolment in the SANDF falling outside the LRA.²⁵

[17] The SANDF's exclusion from the operation of the Labour Relations Act 66 of 1995 (LRA) clearly formed part of the *ratio*. The judicial duty to extend protection to public sector employees who did not fall under the umbrella of the same legislative protection as private sector employees, as recognized in *Chirwa*, remained 'clamant'.²⁶ Nevertheless, what seems to have been the primary consideration in *Xulu* was the relevance of the matter to the public at large. The case concerned how military personnel were enlisted and how their services were terminated. The court emphasised that the SANDF's actions did not amount to the exercise of contractual power. They were rooted in the exercise of a public power, based on underlying legislation. Despite the employment context that informed the case, the public nature of the issues that arose therefrom placed it within the reach of the operation of administrative law principles.

[18] Returning to the present matter, the respondents argued that it is chiefly an employment-related issue, placing it outside the court's jurisdiction. They have, nevertheless, failed to plead the terms of any underlying contract or the provisions of the applicant's conditions of service.²⁷ There is nothing in their papers to suggest that the first respondent's decision amounted to the exercise of a contractual right.

[19] More importantly, however, attention must be focused on the nature of the appointment of a magistrate. This occurs within a clearly defined statutory framework. The Constitution provides that judicial authority is vested in the courts,²⁸ with organs of state being required to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility, and effectiveness.²⁹ The first

²⁵ Para 41.

²⁶ Para 42.

²⁷ The conditions of service are stipulated in the Regulations for Judicial Officers in Lower Courts, 1994 (made in terms of GN R361 of 1994, published under GG 15524 on 11 March 1994).

²⁸ Section 165 (1).

²⁹ Section 165 (4).

respondent's appointment of a magistrate can only be done under the authority granted by section 10 of the Magistrates Act 90 of 1993 and subject to the conditions of service referred to in section 11 and set out in the applicable regulations.³⁰ Judicial officers in the lower courts (all courts, for that matter) are required to uphold and protect the Constitution and the human rights entrenched in it; they are, moreover, required to administer justice to all persons alike.³¹ The first respondent's appointment of a magistrate is undoubtedly the exercise of a public power.

[20] Mention must be made of the contention that the amendment of the applicant's appointment was merely a rectification of official records to reflect the respondents' original intention. They pointed out that the applicant had, in any event, served as an acting regional magistrate in Makhanda since 1 March 2015. The reference to Gqeberha in the subsequent letter and certificate of appointment was merely an 'administrative oversight.' The argument is, however, plainly wrong, and the reference cannot be described as a small, technical error. The appointment of the applicant to Gqeberha was clear and unambiguous. He was entitled to have planned his life accordingly and to have continued to rely thereon, despite the intervening hiatus. The subsequent amendment was nothing less than the exercise of a public power. The first respondent purported to appoint the applicant as a regional magistrate in Makhanda, rather than Gqeberha.

[21] It also cannot be argued with reference to *Gcaba* that the amendment of the applicant's appointment had no direct, external legal effect. This is because it would have had an impact on the respective capacities of the lower courts in question. The removal of a magistrate from the staff complement in Gqeberha and the conversion of an appointment from acting to permanent status in Makhanda would have had a bearing, however slight, on the potential ability of the courts to have managed their different caseloads. It would, moreover, have created implications for the remaining respondents' evaluation of the courts' effectiveness regarding the administration of justice and the possible need to address shortcomings by making further appointments. Ultimately, however, it would not be too far-fetched to say that the decision had a direct, external legal effect on the communities falling under the

³⁰ See n 27 above.

³¹ Preamble to Code of Judicial Conduct for Magistrates, Schedule E of the Regulations (n 27 above).

judicial authority of the courts in Gqeberha and Makhanda, respectively, subject as they are to the decisions emanating (or not) therefrom.

[22] The applicant challenged the decision on the basis that it was a breach of his contract of employment. On its own, this would have been sufficient to have persuaded the court to consider whether the Labour Court was not a more appropriate forum. It is, nevertheless, the applicant's alternative course of action, in the form of review proceedings, that creates the necessary platform upon which to establish jurisdiction. The first respondent exercised a public power but not in terms of any contractual right; the decision was not without consequences for the public at large. The court is satisfied that *Gcaba* is distinguishable and that the more inclusive approach adopted in *Xulu* is to be preferred. Considering the circumstances of the matter, the court is persuaded that the Labour Court does not enjoy exclusive jurisdiction and the applicant must be afforded the protection of the relevant administrative law principles.

Just administrative action, legality, and the time bar

[23] For the reasons already discussed, the first respondent's decision amounted to the exercise of a public power that had a direct, external legal effect. Whether this amounted to administrative action in terms of the somewhat convoluted definition provided under section 1 of PAJA must still be determined.

[24] In this regard, the respondents argued that the decision created no prejudice for the applicant. His inaction over a period of three years after having been appointed to Gqeberha demonstrated the acceptance of his original appointment to Makhanda, albeit in an acting capacity. Any prejudice was self-created and purely the result of a change in the applicant's financial circumstances. The argument, however, misses the point. The applicant has a right to procedural fairness, which was adversely affected. This was because of the first respondent's failure to have given, in terms of section 3 (2) (b) of PAJA, adequate notice of the decision and its purpose, a reasonable opportunity for the applicant to have made representations,

and adequate notice of any right of review or internal appeal. By the time that the applicant received the first respondent's letter of 20 February 2024, the correction to his certificate of appointment was a fait accompli; the amendment had been made almost three weeks earlier.³² It is not good enough to contend that the applicant's meetings with the remaining respondents, as well as the fourth respondent's repeated suggestions that he apply for a transfer, met the requirements for procedural fairness. The amendment was made without warning. There is, moreover, no indication on the papers that it was reasonable and justifiable in the circumstances to have departed from the section 3 (2) (b) requirements.³³

[25] The court is satisfied that the first respondent's decision qualifies as administrative action that falls to be reviewed on one or more of the grounds listed under section 6 (2) of PAJA. Whereas there is no evidence on the papers that the decision was taken for an ulterior purpose or motive, in bad faith, arbitrarily or capriciously, or that it was totally unreasonable, as the applicant asserted, it can nevertheless be said that the following grounds are relevant: the first respondent was not authorised in terms of section 10 of the Magistrates Act 90 of 1993 to amend the appointment of the applicant as a regional magistrate in Gqeberha for purposes of correcting an 'administrative oversight';³⁴ the action was procedurally unfair for want of compliance with section 3 (2) (b);³⁵ the applicant's change in financial circumstances were not considered, alternatively the decision was not rationally connected to the information before the first respondent.³⁶

[26] Even if, however, the decision fell outside the ambit of PAJA, then the principle of legality offers a further review pathway to the applicant. In *Khumalo*, the Constitutional Court held, per Skweyiya J, that the principle was applicable to all exercises of public power and not only to administrative action as defined in terms of PAJA. It required such exercises to be, at a minimum, lawful and rational.³⁷ The learned judge observed further that, as bearers of the duty to respect, protect, promote, and fulfil the rights contained in the Bill of Rights, public functionaries must

³² The date stipulated on the amended certificate of appointment is 2 February 2024.

³³ Section 3 (4).

³⁴ Sections 6 (2) (a) (i), 6 (2) (e) (i), and 6 (2) (f) (i).

³⁵ Section 6 (2) (c).

³⁶ Sections 6 (2) (e) (iii) and 6 (2) (f) (ii) (cc) .

³⁷ *Khumalo*, para 28.

seek to redress irregularities in the public administration, be they in the context of employment or otherwise.³⁸ In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute*,³⁹ however, the Constitutional Court, per Cameron J, cautioned that public functionaries may not take the law into their own hands when seeking to override conduct with which they disagreed.⁴⁰ Subsequently, in *Economic Freedom Fighters v Speaker, National Assembly and Others*,⁴¹ Mogoeng CJ stated as follows:

‘ . . . our constitutional order . . . hinges 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 licence to self-help.” Whether the Public Protector’s decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.’⁴²

[27] The learned judge went on to refer with approval to Cameron J’s warning in *Kirland* that self-help invited ‘a vortex of uncertainty, unpredictability and irrationality.’⁴³ At the heart of the matter is the principle expressed by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁴⁴ that until a public functionary’s decision is set aside by a court, in proceedings for judicial review, it exists in fact and has legal consequences that cannot simply be overlooked.⁴⁵

[28] In the present matter, the first respondent’s decision on 29 October 2019 to appoint the applicant as regional magistrate in Gqeberha cannot be overlooked, disregarded, or overridden. The amendment thereof, by way of a correction to the

³⁸ Para 36.

³⁹ 2014 (3) SA 481 (CC).

⁴⁰ Para 102.

⁴¹ 2016 (3) SA 580 (CC).

⁴² Para 74.

⁴³ *Kirland*, para 103.

⁴⁴ 2004 (6) SA 222 (SCA).

⁴⁵ Para 26.

applicant's certificate of appointment, is a classic example of the self-help against which our courts have guarded. It is surprising, considering the circumstances, that the respondents never instituted self-review proceedings during the almost five years that lapsed after the decision was made. Alternatively, they could simply have filed a counterapplication in the immediate proceedings. Overall, the court is satisfied that the first respondent's conduct infringed the principle of legality, opening a route for the review sought by the applicant.

[29] The applicant brought his application on 13 September 2024, some 198 days after he received notification of the first respondent's decision. The respondents contended that the 180-day period prescribed under section 7 (1) of PAJA began far sooner, in November 2022, when the fourth respondent explained to the applicant that his appointment to Gqeberha had been an error. Relying on *Cape Town City v Aurecon SA (Pty) Ltd*,⁴⁶ the respondents argued that the reasons for the administrative action had become known to the applicant by the earlier date; the clock had started to run at that point, not any later.⁴⁷ This confuses, however, the decision that forms the subject of these proceedings. It is not the appointment of the applicant to Gqeberha, on 29 October 2019, that the applicant seeks the court to review and set aside. It is the decision to appoint the applicant to Makhanda, purportedly given effect by way of a correction to the corresponding certificate on 2 February 2024 and the notification of the applicant thereof by letter on 28 February 2024. If anything, then the question must be asked why the respondents did not institute self-review proceedings to undo the error — without unreasonable or undue delay.

[30] Regarding the statutory 180-day period,⁴⁸ the decision of the Supreme Court of Appeal in *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*⁴⁹ indicates that a delay that exceeds the above period is per se unreasonable.⁵⁰ The provisions of section 9 (1) of PAJA allow the period to be extended on application, provided that it is in the interests of justice, as required

⁴⁶ 2017 (4) SA 223 (CC).

⁴⁷ Para 41.

⁴⁸ Section 7 (1) of PAJA.

⁴⁹ [2013] 4 All SA 639 (SCA), also referred to as the *OUTA* case.

⁵⁰ Para 26.

under section 9 (2). The Constitutional Court confirmed the position in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*,⁵¹ where Theron J recognized the differences in assessing delay under PAJA, on the one hand, and the principle of legality, on the other.⁵² The *Khumalo* test informs the latter, based as it is on well-established principles developed under the common law.⁵³ In *Asla*, Theron J held that, within the context of a legality review, the unreasonableness of a delay cannot be examined in a vacuum. For a court to decide whether a delay can be overlooked, it must consider several factors: (a) the potential prejudice to the affected parties as well as the possible consequences of setting aside the impugned decision; (b) the nature of the impugned decision; and (c) the conduct of the applicant. Even if there is no basis upon which to overlook an unreasonable delay, the court may, nevertheless, be constitutionally compelled to declare state conduct unlawful.⁵⁴

[31] The applicant in the present matter was indisputably out of time. The delay was per se unreasonable. In his notice of motion, the applicant sought condonation instead of the extension contemplated in terms of section 9 (2) of PAJA. Nothing turns on the distinction.⁵⁵ The relief sought can be granted if it would be in the interests of justice. The meaning thereof was addressed in *Aurecon*, where the Constitutional Court held, per Mbha AJ, that these included the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success.⁵⁶

[32] Admittedly, the applicant has failed to provide a detailed chronology of the steps taken after 28 February 2024. It is evident that he merely sent a letter to the first respondent on 27 March 2024,⁵⁷ rejecting the decision taken, no more. The

⁵¹ 2019 (4) SA 331 (CC).

⁵² Paras 46 – 48.

⁵³ See *Wolgroeiërs Afslaeers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A); *Setsokeane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n ander* 1986 (2) SA 57 (A); and *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA).

⁵⁴ *Asla*, paras 44 to 72.

⁵⁵ See the discussion in Hoexter and Penfold, n 9 above, at 727.

⁵⁶ *Aurecon*, para 46. The court, in this regard, endorsed the approach taken by the Supreme Court of Appeal in that case.

⁵⁷ The letter is dated 27 March 2023, which is clearly incorrect.

almost complete absence of a reasonable explanation for his delay would usually have proved fatal, notwithstanding the fact that it exceeded the statutory period by only 18 days. Nevertheless, the court is disinclined to non-suit the applicant in the face of what was a most regrettable attempt at self-help on the part of the first respondent, unequivocally violating the applicant's constitutional right to just administrative action. To put it another way, the correction of the applicant's certificate of appointment was, respectfully, a particularly careless infringement of the principle of legality. On that basis alone, it would be in the interests of justice to grant condonation. Similarly, if this were an assessment of the applicant's delay not in terms of PAJA but under the principle of legality, then the court would be of the view that it was constitutionally compelled to declare the first respondent's decision unlawful. No real prejudice can be caused to the remaining respondents if condonation is granted. Such inconvenience as may result can be ameliorated by the nature of the relief eventually to be granted.

Relief and order

[33] The court is satisfied that the decision that informs the application is capable of review. This is not a matter that falls within the exclusive jurisdiction of the Labour Court. The first respondent's decision to amend the applicant's appointment violated his right to just administrative action, alternatively infringed the principle of legality. The applicant's delay in the institution of proceedings is, moreover, capable of condonation for the reasons already provided.

[34] Mention must be made, briefly, of the point taken by the respondents in their answering papers that the applicant had not exhausted the internal remedy available under regulations 31 to 33.⁵⁸ The provisions in question stipulate that if a magistrate is dissatisfied with an official act then he or she may report the complaint or grievance in writing to the head of office or the second respondent, as the case may be. This will trigger an investigation, the outcome of which to be communicated to the magistrate, who may in turn escalate the complaint or grievance to higher levels

⁵⁸ See n 27 above.

of authority if he or she remains dissatisfied. The first respondent has the final say. Considering the history and circumstances of the present matter, it would make no sense to insist that the applicant follows, to the tee, the procedure contained in the relevant regulations. It is abundantly clear that the first respondent's decision to amend the applicant's appointment was informed by the views of the remaining respondents. To all intent and purposes, there was no longer any internal remedy available by the time of the correction of the certificate of appointment.

[35] The applicant's appointment as a regional magistrate in Gqeberha continues to exist in fact and has legal consequences. It cannot be wished away. The correct approach of the first respondent would have been to have sought recourse from the court. Whereas there was no evidence on the papers that the implementation of the original appointment to Gqeberha would give rise to substantial administrative difficulties, it would be just and equitable to allow the respondents an opportunity to make the necessary arrangements at the lower courts in question. The broad nature of the relief envisaged in terms of section 8 (1) of PAJA would seem to permit such an option.

[36] In relation to the orders sought by the applicant, the decision that forms the subject of these proceedings is the first respondent's appointment of the applicant as a permanent regional magistrate in Makhanda. The original appointment of the applicant to Gqeberha must be given effect in accordance with the *Oudekraal* principle,⁵⁹ but without making any finding on the legality thereof. The applicant has, however, not set out a proper basis, either in fact or law, why the court should also review and set aside the advertisement of the post. This may have already been filled, in which event the incumbent is not before court. Regarding the order for the placement of the applicant in Gqeberha, this would amount to a *mandamus*, in relation to which the applicant has not dealt with the requirements in his papers.⁶⁰ Finally, there is no reason why the general rule should not be applied in relation to costs. The applicant is entitled to the recovery thereof. There is, nevertheless, no indication that the third respondent opposed the application or aligned himself with

⁵⁹ See n 44 and 45 above.

⁶⁰ D E van Loggerenberg *Erasmus: Superior Court Practice* RS 25 (2024), at D6–3.

the arguments made by the remaining respondents; the relief must be tailored accordingly.

[37] Consequently, the following order is made:

- (a) The applicant's failure to institute proceedings without unreasonable delay is condoned;
- (b) The first respondent's decision to appoint the applicant as a permanent regional magistrate in Makhanda, by amending the applicant's original certificate of appointment on 2 February 2024, and issuing a fresh letter of appointment on 20 February 2024, is reviewed and set aside;
- (c) The respondents are ordered to give effect to the first respondent's appointment of the applicant, on 29 October 2019, as a regional magistrate in Gqeberha;
- (d) The orders in paragraphs (b) and (c) above are suspended for a period of 30 calendar days to allow the respondents to make the necessary arrangements; and
- (e) The first, second, and fourth respondents are liable, jointly and severally, for the costs of the application, on a party-and-party basis, at scale B.

JGA LAING
JUDGE OF THE HIGH COURT

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