



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable

Appeal Case No: A149/2025

Court *a quo* Case No: 15022/2023

In the matter between:

FINANCIAL AND FISCAL COMMISSION

Appellant

and

SHAFEEQA DAVIDS

First Respondent

CLAIRE MARGARET HORTON

Second Respondent

Neutral citation: Financial and Fiscal Commission v Shafeeqa Davids &
Another (Case no: A149/2025) [2026] ZAWCHC (30 July 2026)

Coram: **JUSTICE FORTUIN ET THULARE ET MAYOSI JJJ**

Heard: 22 July 2026

Delivered electronically: 3 August 2026

Summary: Appeal against an order made, in the exercise of the court a *quo*'s discretion in terms of section 172(1)(b) of the Constitution, refusing to set aside the appointment of the respondents to positions in the appellant, notwithstanding an order, made in terms of section 172(1)(a) of the Constitution, declaring the appellant's appointment of the respondents to those positions to be inconsistent with the principle of legality and invalid – condonation - grounds for appellate court's interference with the lower court's section 172(1)(b) discretion - costs.

ORDER

1. The application for condonation is granted, with the appellant to bear the respondents' costs, including the costs of one junior counsel, on Scale A;
2. The appeal is dismissed with costs, including the costs of one junior counsel, on scale A.

JUDGMENT

Mayosi J:

Introduction

[1] This appeal is with the leave of the Supreme Court of Appeal (SCA), granted on 19 February 2025.

[2] The appeal lies against the orders made by Salie J in paragraphs 12(iii) and (iv) of her judgment that was delivered, *ex tempore*, on 8 May 2024. The orders appealed against appear as follows in paragraphs 3 and 4 of the court order that was subsequently issued on 21 May 2024:

3. That in terms of section 172(1)(b) of the Constitution, and despite the declarations of invalidity in orders (i) and (ii) above, the appointment of the first and second respondents into their posts are not set aside.

4. That the costs of this application, including the costs of one junior counsel on scale A and one attorney on scale A, shall be paid by the applicant.

[3] The appeal emanates from an opposed ‘State self-review’ application that was instituted by the appellant in the court below, relying on the principle of legality in the Constitution; section 195 of the Constitution and section 5(7)(a) of the Public Service Act, 1994.

[4] The appellant is a constitutional institution as envisaged in section 220 of the Constitution. It was established and is governed by the Financial and Fiscal Commission Act, 99 of 1997 (**the Act**), which mandates the appellant to provide advice to Parliament, provincial legislatures, organised local government and other organs of state. The appellant’s primary functions include advising on: (a) the equitable division of nationally collected revenue across the national, provincial and local spheres of government; (b) allocations for provinces and local government out of the National Revenue Fund; and (c) other financial and fiscal matters as required by the Constitution and national legislation.

[5] In the court below the appellant sought to have the respondents’ appointments to senior positions on its staff establishment declared irregular and unlawful, and to have their appointments set aside.

- [6] The respondents accepted in the court a *quo*, as they do in this appeal, that their appointments were irregular because the person who appointed them did not have the delegated authority to do so and, accordingly, that the court a *quo* had to declare their appointments to be inconsistent with the principle of legality in the Constitution and invalid, in terms of section 172(1)(a) of the Constitution, which the court a *quo* duly did. To be clear, the remainder of the process that culminated in the appointment of the respondents, i.e., the recruitment and selections processes, were not impugned. Rather, it was the formal step that occurred at the end of the process – the question of who had the authority to sign off on the appointments - that formed the basis of the challenge before the court a *quo*.
- [7] However, the respondents submitted in the court a *quo* that, in the exercise of the wide discretion conferred upon it by section 172(1)(b) of the Constitution, it should decline to set aside their appointments, which is what the court a *quo* decided. It is this decision - not to set aside the appointments - that forms the subject matter of this appeal.
- [8] The appellant furthermore seeks condonation for the late filing of its notice of appeal, which was filed 67 days late. The respondents have mounted a vigorous opposition to the granting of condonation.
- [9] A final issue for determination in this appeal concerns the costs order made by the court a *quo*, which ordered that the appellants pay the respondents' costs of suit.
- [10] It is apposite to deal upfront with the condonation sought.

Condonation

- [11] The appellant, which has been represented from the inception of these proceedings by the State Attorney in Cape Town, seeks condonation for the late filing of its notice of appeal to this Court.
- [12] Uniform Rule 27(3) gives this Court a wide discretion to, on good cause shown, condone any non-compliance with the Rules. In order not to hamper or abridge the exercise of this discretion, the courts have consistently refrained from attempting an exhaustive definition of what constitutes good or sufficient cause for the exercise of this discretion.
- [13] In **Grootboom v National Prosecuting Authority**¹ the Constitutional Court² held that the standard for considering an application for condonation is the ‘interests of justice’. In this regard the following was stated:³

However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate,⁴ it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

- [14] The cause of the delay in the late filing of the notice of appeal is explained in the affidavit of the Assistant State Attorney tasked to deal with the file, namely Mr David Mashigo. He explains that the lateness of the filing is attributable to the following events:

¹ 2014 (2) SA 68 (CC)

² With reference to *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC); and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC)

³ At paragraph 22

⁴ *Brummer supra*; and *Van Wyk supra*

[a] The matter was previously handled in the office of the State Attorney by attorney Mr Trevor Shabane who resigned from the office of the State Attorney on 30 November 2024. It was Mr Shabane, assisted by his secretary Ms Olwetu Matu, that had filed the special leave to the SCA after the appellant's application for leave to appeal was dismissed by the court below.

[b] After the departure of Mr Shabane the file was allocated to Ms Tanya Lombard who also resigned from the State Attorney in May 2025. Before her departure, Ms Lombard was on sick leave for extended periods causing her to be remiss in following up with the correspondent attorneys in Bloemfontein as to the progress of the appellant's appeal.

[c] After Mr Mashigo joined the office of the State Attorney in April 2025, he had to familiarise himself with the new environment whilst at the same time perusing the old files that had been left behind by Mr Shabane and others; and at the same time Mr Mashigo was being allocated new files. This exercise took him about two months as he had to peruse more than 400 files and also deal with the new instructions.

[d] Before her departure Ms Lombard had instructed her secretary, on 23 April 2025, to enquire about the status of the appeal filed with the SCA. There was no response from Ms Cronje of the correspondent attorneys in Bloemfontein.

[e] The file was transferred to Mr Mashigo on 26 May 2025. On 27 May 2025, he caused a follow up email to be sent to Ms

Cronje regarding the status of the appeal, to which no response was received from Ms Cronje.

[f] On 4 July 2025 Mr Mashigo requested his secretary Ms Kayla Worship to directly call Ms Cronje as a follow up to the previous emails sent. It was only on that day, through the information that he received from Ms Worship, that Mr Mashigo learned that an email containing the SCA Order granting leave to appeal to this Court had been sent, on 24 March 2025, to both Mr Shabane and his former secretary Ms Matu.

[g] Ms Worship approached Ms Matu who then forwarded to her on the same day a trail of emails received from Ms Cronje. The email trail showed that the Registrar of the SCA had emailed a copy of the SCA Order to Ms Cronje on 28 February 2025; and on 24 March 2025 Ms Cronje had emailed the Order to Mr Shabane and his secretary Ms Matu.

[h] On the same day – 4 July 2025 - Mr Mashigo addressed correspondence to the appellant requesting instructions to proceed with the appeal and to brief counsel in the matter.

[i] Upon receiving instructions from the appellant, Mr Mashigo instructed counsel to prepare the necessary papers for this appeal, which papers were completed on 8 July 2025.

[15] Rule 49(2) of the Uniform Rules provides that if leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within 20 days after the date upon which leave was granted, or within such longer period as may upon good cause shown be permitted. The SCA Order having been received by the correspondent attorneys on

28 February 2025, the notice of appeal to this Court ought to have been delivered on 31 March 2025. For the reasons explained by Mr Mashigo, it was filed on 9 July 2025 – 67 court days late.

- [16] The respondents' opposition to the condonation application is based on three grounds: (a) the degree of delay is said to be severe; (b) the appellant's explanation does not cover the full period of the delay; and (c) there are poor prospects of success in the appeal.
- [17] Whilst the extent of the delay is indeed substantial, much of it from 28 February 2025 until the allocation of the file to Mr Mashigo on 26 May 2025 is not attributable to him, but to his erstwhile colleagues who were then dealing with the matter. It was the attempts made by Mr Mashigo after the allocation of the file to him that ultimately led to the discovery that, unbeknownst to him, the SCA order had in fact been received over four months earlier in February 2025.
- [18] The period of six weeks that lapsed from the allocation of the file to Mr Mashigo to the filing of the notice of appeal is indeed far from ideal. However, it seems to me to be more indicative of the systemic inefficiencies in the office of the State Attorney than wilful default on the part of Mr Mashigo in prosecuting the appeal.
- [19] In **Ferris v FirstRand Bank Ltd**⁵ the Constitutional Court held that lateness is not the only consideration in determining whether an application for condonation may be granted. It held that the test for condonation is whether it is in the interests of justice to grant it and, in this regard, that an applicant's prospects of success and the importance of the issue to be determined are relevant factors.

⁵ 2014 (3) SA 39 (CC) at paragraph 10

[20] As will become apparent from this Court's judgment on the merits of this appeal, the respondents' objection to the condonation application based on the poor prospects of the appeal is well-founded. In my view, however, the appeal raises issues of public importance. The public importance of the matter derives from the fact that the appellant is a public institution seized with the performance of constitutional functions of some significance, and the subject matter of the appeal is a matter of public importance. Whilst the appellant's explanation may fall short of what is required in a condonation application, the flaws in the explanation together with the poor prospects in the appeal are outweighed by the public importance of the case. I would therefore grant the condonation application, in the interests of justice.

[21] Given the extent of the delay and the appellant's prospects in the appeal, the respondents' opposition to the application for condonation was reasonable and indeed warranted, and for these reasons it is only fair and just that they not be required to bear the costs of opposing an application that was, after all, necessitated by the appellant's own lax conduct in prosecuting its own appeal.

Relevant factual background

[22] In or about March 2022 the appellant advertised two positions of research specialist, for which the first and second respondents applied. At the time the respondents were senior officials in the employ of the WC Provincial Government in its Provincial Treasury.

[23] Whilst they were awaiting the outcome of their applications, and unbeknownst to the respondents, on 11 May 2022 the appellant amended its system of internal delegations of authority including the *locus* of authority to make appointments to posts above salary Level 12. The

amended system of internal delegations vested the authority to make appointments to posts pitched at Level 12 and above in the Chairperson of the appellant, Dr Patience Nombeko Mbava.

- [24] On 5 April 2022, the appellant's selection panel shortlisted ten candidates, who included the respondents, for interviews. After the elimination of two candidates from this group, the remaining eight candidates were interviewed, after which the appellant's Human Resources Officer made a written recommendation to Mr Cheng Tseng, the Acting Chief Executive Officer at the time, that the first respondent and a Mr Thando Ngozo be appointed on permanent contracts into the positions of research specialists, at salary Level 13. Mr Tseng had previously been employed at the WC Provincial Treasury.
- [25] Mr Tseng accepted and signed the recommendation, and on 13 June 2022 he signed the first respondent's employment contract, warranting by his signature that he was duly authorised thereto. The first respondent commenced working as a research specialist at the appellant on 1 July 2022.
- [26] During November 2022, the appellant advertised a further position of research specialist and the second respondent applied again. After being interviewed by a selection committee the Human Resources Officer addressed a written recommendation to Mr Tseng that the second respondent be appointed to the position. Upon accepting the recommendation, Mr Tseng signed the second respondent's employment contract and she commenced working for the appellant in the position of research specialist on 1 March 2023.
- [27] On 17 March 2023, the appellant became aware of an anonymous letter dated 3 March 2023 sent by '*Concerned Staff Members*' of the appellant

to the President of the Republic. One of the allegations in this letter was that Mr Tseng was guilty of favouritism in appointing to the appellant two of his '*friends from the Western Cape Provincial Treasury.*'

- [28] On 20 June 2023 the respondents were called to separate meetings with the Chairperson and were informed of the irregularity regarding their appointments, and were asked to make a submission as to how the appellant could remedy the irregularity.
- [29] They decided not to resign from their positions. They were of the view that it would be unjust and inequitable for them to have to give up their positions with the appellant on account of what was essentially a formal irregularity that had nothing to do with them, caused by a *bona fide* mistake by Mr Tseng and the appellant's Human Resources Department.
- [30] There was no dispute on the papers that the remainder of the process which culminated in the appointment of the respondents was regular; that they were adjudged by the appellant to be the best applicants for the vacant positions and that they were more than suitably qualified for appointment. Furthermore, it is accepted by the parties that Mr Tseng made a genuine error regarding his authority (which he lacked), and no ulterior motive or bias was imputed to him in the appointments, or anyone else who was involved in the recruitment process.
- [31] The appellant approached the court a *quo* in August 2023, seeking the review and setting aside of the then Acting CEO's decision to appoint the respondents, on the sole ground that he had no authority to do so because that authority resorted with the Chairperson. The notice of motion furthermore invited the court a *quo* to grant any equitable remedy in terms of section 172(1)(b) of the Constitution.

[32] In their answering affidavit in the court a *quo*, the respondents highlighted ten factors relevant to the court a *quo*'s exercise of its discretion in terms of section 172(1)(b). These included the following:

[a] The fact that their appointments followed recruitment and selection processes that were competitive, fair, transparent and in accordance with the appellant's relevant policies. The appellant did not dispute this in reply.

[b] The irregularity with their appointments was essentially a formal one due to a *bona fide* mistake by Mr Tseng and the appellant's Human Resources Department at the very end of the process, as to who should make the appointment decision. Strikingly in relation to this aspect, there was no affidavit by the delegated decision-maker, namely the appellant's Chairperson Dr Mbava, to the effect that had the Human Resources Department's recommendations been submitted to her for decision, she would not have appointed the respondents to the vacant posts. Surely if this were the case, the appellant would doubtless have said so in its papers before the court a *quo*. Nor is there any other indication in the papers that Dr Mbava would not have approved the appointments. The appellant did not address this at all in reply; the issue having been pointedly raised by the respondents. In the circumstances therefore, the assumption that, had the recommendations been submitted to Dr Mbava she, too, would have appointed the respondents to their positions is not an unreasonable one to arrive at.

[c] The respondents were not to blame for the procedural irregularities in the process – to the contrary, they reasonably relied on the appellant's representation that Mr Tseng, as the acting CEO, had the requisite authority to approve their appointments. The appellant did not take issue with this in reply.

[d] Both respondents were well-established in their posts in the appellant. Setting aside their appointments could impair the functioning of the important aspects of the appellant, for which they were responsible, namely, research and the preparation of the appellant's recommendations in terms of section 214(2) of the Constitution regarding the divisions (or shares) of the public revenue collected nationally with local government and the provinces. The appellant did not dispute this in reply.

[e] Should their appointments be set aside, the respondents would suffer very significant prejudice because their current and future income, employment and retirement benefits would be severely adversely impacted. The appellant disputed that the respondents' chances of re-employment or their pension benefits would be negatively impacted if their appointments were set aside.

[33] The court *a quo* accepted the respondent's submissions which, as I have stated (save for [e]), were not seriously disputed by the appellant. As to the submission in [e] above, i.e., the prejudice to the respondents if their appointments were set aside, the court *a quo* was not convinced by the appellant's rejection of the submission, holding that the respondents stand to suffer very significant prejudice because their current and future income, employment and retirement benefits will be severely adversely impacted in the event of their appointments being set aside.

[34] The court *a quo*'s further consideration and weighing up of the factors raised by the parties, in the exercise of its discretion in terms of section 172(1)(b), is evident from the following passage of the judgment of Salie J:

7. Setting aside is a discretionary remedy if the court considers same to be just and equitable in the circumstances of the case. I have therefore considered an appropriate balance of the interests of all those who might be affected by the order including to what extent the requirement of deterrence and good governance would be achieved. I had during argument requested both counsel to address me on these issues specifically and indeed the opportunity was utilized to argue same in respect of the parties' respective interests.

8. I mention a few factors which have made an indelible impression on me which are distinct features in this matter and which I believe weigh heavily in the course of determining if setting aside would be appropriate or not in my discretion.

[35] Salie J then proceeded to consider and weigh the factors placed before her, which encompassed the prejudice to both the respondents and the appellant that could eventuate from a setting aside order. She concluded that she was satisfied that the judicial discretion conferred by section 172(1)(b) of the Constitution warranted her to decline setting aside the respondents' appointments notwithstanding the irregularity committed in their appointments.

[36] The nub of what is in dispute in this appeal is whether or not it can be said, from the court a *quo*'s decision, that it misconceived the nature of its powers and did not do what was just and equitable in exercising its discretion.

[37] Before addressing the nub, I should mention that the second respondent is no longer employed by the appellant. She returned to the WC Provincial Treasury, where she has been employed since January 2025. The respondents contend that now that the second respondent is no longer working at the appellant the substantive relief sought by the appellant in this appeal is moot as it will have no practical effect in relation to her. Whilst it is correct that the relief sought in this appeal will have no practical result in relation to the second respondent, this does not render

the appeal moot, justifying its dismissal. The first respondent remains employed at the appellant and an order setting aside her employment is sought in this appeal. In the circumstances, the appeal and the issues it raises remain very much alive. This court's judgment will have a practical effect on the first respondent; as well as the appellant for that matter.

The applicable legal principles

[38] The starting point for a discussion of the exercise of the discretion in section 172(1)(b) of the Constitution is section 172(1) itself, which stipulates the following, in relevant part:

- (1) When deciding a constitutional matter within its power, a court –
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[39] The compulsory nature of section 172(1)(a) and the discretionary nature of section 172(1)(b) are vividly illustrated by the Constitutional Court's dealing with the issue of the remedy in **State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd**⁶ (**Gijima**), indeed in the very part of the judgment in which the Constitutional Court articulated what is now known as the Gijima principle,⁷ as well as from the orders that the CC consequently made declaring SITA's decision to appoint Gijima as a service provider constitutionally invalid;⁸ whilst refusing to

⁶ 2018 (2) SA 23 (CC)

⁷ Paragraphs 52 to 54

⁸ Order at paragraph 3(a)

divest Gijima of any contractual rights that accrued to it consequent to the invalid award.⁹

[40] Gijima forms part of a long line of judgments establishing and applying the principles of our modern constitutional law that, first, setting aside is a discretionary remedy, additional to a declaration of invalidity which is a mandatory remedy; and, second, when exercising the discretion conferred by section 172(1)(b) of the Constitution, courts must consider and appropriately balance the interests of all those who might be affected by the order.¹⁰

[41] In dealing with section 172(1)(b), the Constitutional Court in **Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC**¹¹ held that: *‘The operative word ‘any’ is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. This Court has laid down certain principles in charting the path on the exercise of discretion to determine a just and equitable remedy.’*¹²

[42] Like the discretion to make an award as to costs, the discretion conferred on the court *a quo* by section 172(1)(b) of the Constitution is a wide and true discretion as was held by the Constitutional Court in **Trencon**,¹³ dealing with the comparable wide decision-making powers available to courts under section 8(1) of the Promotion of Administrative Justice Act 3 of 2000.

⁹ Order at paragraph 3(b)

¹⁰ The relevant judgments to which I allude are many. They include, but are not limited, *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 570 (CC) para 53; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) paras 104-105 and para 3 of the CC’s order; *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) paras 209 - 211

¹¹ 2018 (10) BCLR 1179 (CC))

¹² Paragraph 68

¹³ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC), in paragraphs 82 to 92

[43] Relatively recently the CC summarised the state of our law as follows in **Ekapa Minerals (Pty) Ltd and Another v Sol Plaatje Local Municipality and Others**¹⁴:

[55] In review proceedings under the principle of legality and in considering the application of section 172(1)(b) of the Constitution, it is settled law that a court has broad and a flexible discretion to craft an order that prioritises substance over form, thereby allowing the court to pinpoint the genuine underlying conflict between the parties and mandate actions that resolve the dispute in accordance with constitutional principles, due regard being had to the specific circumstances of the case. The court must balance the interests of all parties, avoiding a narrow focus on the interests of one side alone.

...

[60] ...this Court has remarked that: “*improper* performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief” (own emphasis). It has also distinguished between a declaration of invalidity and a setting aside order as was the case in *Khumalo*, where this Court held that “[w]hile a court must declare conduct that it finds to be unconstitutional invalid, it need not set the conduct aside”. A declaration of invalidity would then engage a court’s remedial powers to grant a “just and equitable” order under section 172(1)(b) of the Constitution.

[61] Thus, when a court declares a decision of the state invalid and unlawful, the default position is that the impugned decision is void *ab initio* (from the start), for example, the declaration of invalidity has retrospective effect – “an administrative decision declared to have been invalid is to be retrospectively regarded as if it had never been made.” However, the court has wide powers to exercise a discretion to ameliorate the consequences of such an order. It follows that a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy: for example, notwithstanding the invalidity, the

¹⁴ 2025 (6) SA (6) SA 1 (CC)

impugned decision might not be set aside, and hence the declaration of invalidity would have no retrospective effect.

[44] This exposition is relevant to the issues raised in this appeal.

[45] The true discretion that was enjoyed by the court *a quo* in determining a just and equitable remedy in terms of section 172(1)(b) of the Constitution was not disputed during argument. This accords with Ekapa:

[57] The Supreme Court of Appeal confirmed in *Central Energy Fund*,¹⁵ that the discretion exercised in terms of section 172(1)(b) of the Constitution is a true discretion, to be exercised on a case-by-case basis. Therefore, it may only be interfered with on appeal, if the court of appeal is satisfied that the discretion was not exercised judicially, or was influenced by wrong principles or based on a misdirection of fact. It follows that the enquiry here should be whether the High Court misdirected itself on the facts and the law.

[46] As this passage makes clear, when a lower court exercises a discretion in the true sense, as is the case in this matter, an appellate court may not interfere unless it is satisfied that:

[a] the lower court was influenced by wrong principles or a misdirection on the facts; or

[b] the discretion was not exercised judicially; or

[c] the lower court reached a decision that could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

¹⁵ *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* [2022] ZASCA 54; 2022 (5) SA 56 (SCA) at para 43.

[47] These are the issues that arise for determination in this appeal.

The appellant's grounds of appeal

[48] The appellant's grounds of appeal are difficult to decipher from its notice of appeal and the heads of argument. However, when regard is had to the contents of the founding affidavit that was made on its behalf in support in of its successful petition to the SCA, together with its heads of argument the appeal grounds gleaned therefrom can be grouped under the headings: vindication of the Constitution and deterrence.

Vindication of the Constitution and deterrence

[49] Under this ground the appellant asserts, correctly in my view, that an appropriate and effective remedy is one that upholds, enhances and vindicates the values underlying, and the rights entrenched in, the Constitution.

[50] Where I part ways with the appellant is when it makes the following contentions:

[a] The court a *quo*'s refusal to set aside the respondents' appointments was contrary to the rule of law and cannot by any means be regarded as a vindication of the rule of law.

[b] The court a *quo*'s refusal to set aside the appointments is against the legal principle that court orders must be effective, and courts should guard against issuing academic orders or orders which have no material effect to the parties.

- [51] These submissions are legally unsustainable.
- [52] Mr Tseng's decisions to appoint the respondents to their positions in the appellant were reviewed by the court *a quo* and it issued declarations, as it was obliged to do by section 179(1)(a) of the Constitution, that the decisions were inconsistent with the principle of legality in the Constitution and invalid. This declaration of invalidity was the first vindication of the rule of law by the court *a quo*.
- [53] In fact, the appellant itself had instituted the self-review proceedings in order to vindicate the principle of legality in the Constitution, more specifically to uphold and protect the rule of law by seeking redress for the Acting CEO's unlawful exercise of the power to appoint the respondents to Level 13 posts.
- [54] The appellant's having had to go to the trouble and incur the expense of bringing the application was a sufficient deterrent against the appellant repeating the irregularity in the future and a sufficient guarantee of the appellant improving this aspect of its human resources management going forward.
- [55] The court *a quo*'s setting aside of the respondents' appointment would, in essence, have the effect of punishing them with a severe sanction akin to dismissal for a formal mistake committed by the appellant's most senior executive when making their appointments, through no fault of their own. The following rhetorical question must be asked when assessing the effectiveness of the setting aside contended as a deterrent in the circumstances of this case: How would what amounts to punishing innocent employees who had no idea of an indoor-management irregularity committed by their employer, deter future violations by their

employer? The question needs only be asked in order for the injustice and inequity attendant upon setting aside respondents' appointments for the appellant's error, in the circumstances of this case.

[56] I turn now to the appellant's contention that the court a *quo*'s failure to set aside the respondents' appointments renders its order of invalidity academic and of no effect. This contention cannot be sustained for the reasons I set out below.

[57] The court a *quo*'s substantive orders are not academic. They have significant and material effects on the appellant and the first respondent, as well as the second respondent until she resigned from the appellant with effect from January 2025.

[58] Mr Tseng's decisions to appoint the respondents to their positions in the appellant were reviewed by the court below and it issued declarations in terms of section 172(1)(a) of the Constitution, as it was obliged to do, that the decisions were inconsistent with the principle of legality in the Constitution and invalid.

[59] For the reasons set out in its Judgment and despite the declarations of invalidity, the court a *quo*, acting in terms of section 172(1)(b) of the Constitution exercised its discretion against setting aside the respondents' appointments into their posts.

[60] For as long as these orders are not set aside by this Court or a higher court of appeal, they entail, firstly, binding public declarations that Mr Tseng's decisions to appoint the respondents are unconstitutional and unlawful and secondly, a binding public determination that their appointments nevertheless be set aside.

[61] When the court a *quo*'s judgment is read as a whole, it is clear that it decided not to set aside the respondents' appointments despite their unlawfulness and unconstitutionality, because in the court a *quo*'s opinion, that is what justice and equity require in the circumstances of their case. The court a *quo* stated in paragraph 9.6 of its judgment that '*[p]unishing the respondents by rendering them jobless in these circumstances can never be deemed to be just and equitable.*' This is similar to the principle that the Labour Court applied in **MEC for Health, Eastern Cape v Mafoko**,¹⁶ where the view was expressed that where an employee has been appointed in good faith and is not responsible for any irregularity in the appointment process, it would be inequitable and unfair to set aside the appointment with retrospective effect as if he or she had never been employed; and that the employer's remedy, if any, lies in following a fair procedure to terminate the employment relationship, not in declaring the contract void *ab initio*.¹⁷

[62] The upshot was that the respondents, who are in a sense the innocent victims of the appellant's error in this matter, remained employed by the appellant (in the second respondent's case until January 2025), an outcome which certainly had a significant material effect on their lives and livelihoods. The court a *quo*'s orders of invalidity and refusal to set the appointments aside can therefore hardly be said to have no material effect on the parties.

[63] The manner in which the court a *quo* exercised its discretion is in harmony with two cases in which the courts exercised their section 172(1)(b) discretion by declining to set aside appointments in the public sector which were irregular because of missteps by the appointing authorities similar to that made by the appellant in this matter.

¹⁶ ZALCJ 44; (2014) 35 ILJ 2012 (LC)

¹⁷ Paragraph 25

[a] In **Ramapepe**,¹⁸ the court held that, though unlawful, it does ‘*not automatically follow that the decisions are to be set aside.*’ The factors that the court considered in reaching its decision were a three-year delay in bringing the application; the respondent was close to retirement age; he was not to blame for the irregularity in his appointment; he was suitably qualified; he was performing well in his position; and the potential prejudice if the appointment was set aside.

[b] In **Van Reenen**,¹⁹ the court declined to set aside the appointments because there was no ulterior motive or purpose on the affected employees’ part or on the part of anyone else involved in the recruitment process; the reasons for the invalidity of the decision to appoint the respondents were not ascribable to them; the respondents were well-established in their posts; and the respondents were senior public servants and setting aside their appointments could impact on their remuneration and other employment benefits.

[64] In my view, the decision of the court *a quo* refusing to set aside the respondents’ appointments notwithstanding the invalidity of the decisions appointing them, was not influenced by any wrong principles. The discretion was exercised judicially after the court had properly directed itself to all the relevant facts and legal principles. There are no reasons justifying this Court’s interference with the decision of the court *a quo*.

Costs

¹⁸ MEC for Gauteng Department of Infrastructure Development v Ramapepe (J1943/2019) [2022] ZALCJHB 98 (12 May 2022); paragraphs 122 - 126

¹⁹ Minister of Social Development, Western Cape Provincial Government and Another v Van Reenen and Another (C634/2022) [2023] ZALCCT 53 (22 August 2023), at paragraph 67

[65] In the appellant's notice of appeal, it seeks the following orders in relation to costs:

[a] *'that the appeal be upheld with costs'*; and

[b] the court a quo's order is substituted with an order that *'the first and second respondents are to pay the costs of this application on scale B.'*

[66] The appellant is appealing against the court a *quo*'s costs order for the following reasons as set out in its founding affidavit in support of its petition to the SCA:

'In paragraph (iv) of the Order, the Court awarded cost (sic) against the applicant. The issue of cost (sic) is settled law that it is the discretion of the Court to award cost (sic). However, such a discretion cannot be exercised arbitrarily and there are limited grounds to interfere with a cost (sic) order. These grounds may include that the lower court did not act judicially in exercising its discretion or based its exercise of discretion on wrong principles of law or a misdirection on material facts.'

[67] This paragraph fails to make out a case as to why this Court should interfere with the court a *quo*'s exercise of its discretion that the appellant pay the respondents' costs of suit.

[68] The court a *quo* correctly pointed out in paragraph 11 of its judgment that the only substantive issue for determination by it was whether or not to set aside the respondents' appointments; and on that issue the respondents were substantially successful.

[69] It was and remains common cause that the appellant was responsible for the irregularity in the respondents' appointments. In line with the general

principles applicable to proceedings for judicial review, if the order is granted (as happened here with the declarations of invalidity), the organ of state concerned (here, the appellant) should bear the costs and any private parties (which the respondents are in the context of this application) should not be mulcted in costs.²⁰

Conclusion

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

[a] The application for condonation is granted, with the appellant to bear the respondents' costs, including the costs of one junior counsel, on Scale A;

[b] The appeal is dismissed with costs, including the costs of one junior counsel, on scale A.

N T MAYOSI
JUDGE OF THE HIGH COURT

I agree.

D THULARE
JUDGE OF THE HIGH COURT

²⁰ Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC) paragraphs 21 – 28 and 56, the principles in which apply to applications for judicial review of administrative action (Harrielal v University of Kwa-Zulu Natal 2018 (1) BCLR 12 (CC)).

I agree and it is so ordered.

C FORTUIN
JUDGE OF THE HIGH COURT

Appearances:

For applicant: Adv WR Mokhare SC
Instructed by: State Attorney, Cape Town

For respondents: Adv A M Breitenbach SC
Adv N Ristic
Instructed by: Bagraims Attorneys