



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

REPORTABLE

Case No: 353/2022

In the matter between:

SOMA INITIATIVE PTY LTD

APPLICANT

and

**THE PREMIER, EASTERN CAPE PROVINCIAL
GOVERNMENT**

FIRST RESPONDENT

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH, EASTERN CAPE**

SECOND REPENDENT

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
EDUCATION, EASTERN CAPE**

THIRD RESPONDENT

**THE MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION OF THE REPUBLIC OF
SOUTH AFRICA**

FOURTH REPENDENT

ALEXANDER FORBES HEALTH (PTY) LTD

FIFTH RESPONDENT

PROACTIVE HEALTH SOLUTIONS (PTY) LTD SIXTH RESPONDENT

THANDILE HEALTH RISK MANAGEMENT (PTY) LTD SEVENTH RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL FOR
CO-OPERATIVE GOVERNANCE AND TRADITIONAL
AFFAIRS, EASTERN CAPE** EIGHTH RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL FOR
COMMUNITY SAFETY, EASTERN CAPE** NINETH RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL FOR
ECONOMIC DEVELOPMENT, ENVIRONMENTAL
AFFAIRS AND TOURISM, EASTERN CAPE** TENTH REpondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
HUMAN SETTLEMENT, EASTERN CAPE** ELEVENTH RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL FOR
PUBLIC WORKS AND INFRASTRUCTURE,
EASTERN CAPE** TWELFTH RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL FOR
RURAL DEVELOPMENT AND AGRARIAN REFORM,
EASTERN CAPE** THIRTEENTH RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL FOR
SOCIAL DEVELOPMENT, EASTERN CAPE** FOURTEENTH RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL FOR
SPORT, RECREATION, ARTS AND CULTURE,
EASTERN CAPE** FIFTEENTH RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL FOR
TRANSPORT, EASTERN CAPE**

SIXTEENTH RESPONDENT

**PROVINCIAL TREASURY DEPARTMENT FOR THE
EASTERN CAPE**

SEVENTEENTH RESPONDENT

JUDGMENT

Noncembu J

Introduction

[1] This court, on 27 July 2023, made an order in terms of section 172(1)(a) of the Constitution, declaring unlawful and invalid and setting aside the decision of the first to third respondents and eighth to seventeenth respondents (the Provincial State respondents) appointing the fifth respondent (Alexandra Forbes) as the Health Risk Manager for the Eastern Cape Provincial Administration. The said order, though not taken by consent, was on an unopposed basis.

[2] The declaration of invalidity was suspended pending the finalisation of a process to determine just and equitable relief in terms of section 172(1)(b) of the Constitution. As part of the order, a process was set out in terms of which the relevant parties were to engage and attempt to agree on what would constitute just and equitable relief pursuant to the declaration of invalidity. In the event of the parties failing to agree on what constituted just and equitable relief, the matter would be set down for a hearing relating to that aspect.

[3] Directions and timeframes pertaining to the filing of supplementary affidavits in the regard were also set out in the order. Costs occasioned by the

postponement and hearing of the matter on 27 July 2023 were stood over for later determination.

[4] As things turned out, the parties were not able to agree on what constituted just and equitable relief and have, as contemplated in the order, delivered supplementary affidavits dealing with that issue¹. The matter was set down for hearing before me on 16 November 2023 on the limited issue of just and equitable relief in terms of section 172(1)(b) of the Constitution flowing from the declaration of invalidity. The ancillary question of costs, both in relation to the proceedings leading up to the order (and the declaration of invalidity) and thereafter, also remains for determination.

[5] To put the matter in its contextual setting, it is necessary to give a historical background leading up to the order of invalidity.

Background

[6] The applicant lodged an application which was set out in two parts. In part A, which was brought on an urgent basis,² it sought interim relief which effectively was to interdict and prevent the Provincial State Respondents from implementing, or further implementing the appointment of the fifth respondent (Alexander Forbes) as the Health Risk Manager (HRM) in respect of the Eastern Cape Provincial Government pending final determination of the relief sought in part B.

¹ Just and equitable relief.

² Set down on 1 March 2022.

[7] In part B, the applicant sought relief on the following terms:

- (a) That the decision taken by the first respondent (the Premier) to appoint Alexander Forbes (fifth respondent) as the HRM for the period 1 January 2022 to 31 December 2024, be declared unlawful, invalid, and set aside;
- (b) That the applicant be appointed as the HRM for the Eastern Cape Provincial Government for the aforesaid period alternatively that the decision in respect of the appointment of an HRM for the Eastern Cape Provincial Government be remitted back to the Premier for final determination for the period 1 January 2022 for a period of 36 months thereafter; and
- (c) That the first alternatively fourth respondent further alternatively first and fourth respondents, jointly and severally, be ordered to pay the costs of the application.

[8] The genesis to the matter is fully traversed in the judgment of my brother Laing J, who dealt with Part A of the application. For purposes of this portion of the application and to set forth the reasons for the order which were not fully set out when the order was made, a brief synopsis relating to the background history of the matter is apposite.

[9] Following an investigation by the DPSA (fourth respondent), certain weaknesses in the management of sick leave and ill-health retirement for state employees were identified in a report which estimated that same exposed the state to liability in the amount of R20 Billion. Further evident in the report was that state employees abused sick leave and ill-health retirement benefits. It was found that the high incidence of incapacity leave and ill-health retirement was the result of *inter alia*, the absence of a uniform and clear policy on the management of incapacity leave and ill-health retirement.

[10] Inconsistencies in the management of incapacity leave and ill-health retirement, where a holistic approach applied universally in government needed to be adopted, were identified. It became apparent that the high cost of sick leave and ill-health retirement necessitated the adoption of a uniform policy.

[11] Processes that followed culminated in the adoption of a policy known as the Policy and Procedure on Incapacity Leave and Ill-health Retirement (PILIR) by Cabinet in or about 2006. The objectives of PILIR were to ensure that structures and systems would be established to allow suitable interventions and the management of incapacity leave to accommodate temporary or permanently incapacitated employees and to address the consequences of such incapacity.

[12] For such purposes, and in terms of the policy, Health Risk Managers (HRM's) are appointed to assess employees' applications for temporary or permanent incapacity leave and ill-health retirement, and to make recommendations to the state employer in that regard. Health Risk Managers are independent entities, comprising a range of multi-disciplinary experts but with specialisations in occupational medicine. They assess individual applications and provide recommendations to a Head of Department in either the provincial or national sphere of government. This entails an analysis of the details submitted by an applicant as well as the information provided by the applicant's medical practitioners.

[13] Originally the DPSA appointed an HRM for each implementation area, being a province or a national department. In 2009, there was a move from a centralised to a decentralised model, with the effect that a panel would be appointed from which a provincial or national department could select and appoint its own accredited HRM. The DPSA is responsible for the procurement

process to appoint the accredited panel of HRM's, which is done through the Supply Chain Management Policy of the DPSA. The procurement process is done through a Request for Proposals process (RFP).

[14] The initial RFP process was issued for the 2012-2013 tender process, for a 36-month appointment to provide services to the various provincial and national departments comprising the 11 implementation areas³. Following upon a successful tender process, five entities, including the applicant, were appointed to an accredited panel of Health Risk Managers.

[15] Subsequent to the appointment of the panel, successful bidders were invited to make presentations to various provincial and national departments, in accordance with a prescribed format and in relation to pre-determined issues identified by the DPSA. Delegates from the various provincial and national departments then voted for the Health Risk Manager of their choice.

[16] For the 2012-2013 tender, four out of the five successful bidders who were appointed to the panel went on to receive a fair distribution of work from the various implementation areas.⁴ The Applicant received about 355,000 'PILIR lives' while the others received about 302,000, 260,000 and 160,000 'PILIR lives' respectively.⁵ The Applicant alleges that the distribution amongst the four Health Risk Managers ensured that each would remain commercially viable but points out that there were inherent difficulties with the tender process overall. Ultimately, the appointments were extended on several occasions until 2021.

³ These entailed all provincial and national departments, excluding the South African Police Service.

⁴ The Applicant notes that only Metropolitan Health Risk Management (Pty) Ltd received no work. It can advance no reason for why this was so.

⁵ The allocation was presumably done with reference to the number of employees or 'PILIR lives' (as the Applicant terms it) for each implementation area. Evident from this allocation is that the applicant received the largest number of employees/PIRIL lives, and consequently the largest portion of the payment since the negotiated pricing was per employee allocated.

[17] During December 2021 the DPSA issued another RFP for a 36-month appointment of Health Risk Managers to the panel, commencing 1 January 2022. In that regard, the DPSA divided the public service into 13 implementation areas, comprising the nine provincial governments and four national department clusters. A selection interview would be held for the various implementation areas, which would consider, *inter alia*, the Health Risk Manager's capacity and the implementation areas with regard to which it had previously been appointed. The DPSA would provide technical assistance during the preparations for and conducting of the interviews but would not participate in the decision-making process itself.

[18] As with the earlier tender, a successful bidder would be required to enter into a contract with the DPSA for appointment to the panel, after which service level agreements would be concluded with the individual provincial or national departments in question. Bidders were invited to match or improve the price stipulated in the RFP, which was subject to later negotiation.

[19] Following the procurement process set out above, four HRM's, including the Applicant and the fifth respondent (Alexander Forbes) were appointed to the panel of accredited HRM's and entered into contracts with the DPSA that contained the same material terms as that for the 2012-2013 tender. The applicant takes no issue with this part of the process.

[20] The DPSA arranged for selection interviews to be conducted with the various provincial departments and national department clusters. The interview for the Eastern Cape departments was scheduled for 22 December 2021. Prior to the interview, the DPSA distributed an interview questionnaire, indicating the

topics to be addressed during the presentation to be conducted by each successful bidder. The interview proceeded and the representatives for the various provincial departments voted to appoint the Fifth Respondent ('Alexander Forbes') as Health Risk Manager for the Eastern Cape.

[21] It is with this part of the process that the applicant joined issue. It alleged that there were a number of problems with the interview process. More specifically, there was no formal structure for the adjudication of presentations and how voting would be done. There were no set criteria to determine how an entity would be appointed to an individual department.

[22] To further compound the situation, the Department of Health and the Department of Education were not represented during the voting. This was problematic inasmuch as these two departments, combined, employed 86.69% of the total workforce in the Eastern Cape Provincial Government and accounted for 84.62% of the incapacity leave cases and 87.28% of the ill health retirement cases for the period, 2016-2021. Moreover, the departments paid a combined total of 86.47% of the monthly or annual fees payable to the Health Risk Manager.⁶

[23] Describing the interview process that was followed, Laing J summed it up as follows: 'Each Health Risk Manager was required to convey, within less than an hour, the advantages and benefits of the services to be provided. This was to be assessed by representatives of the various departments who were not involved in the DPSA's evaluation and adjudication of the original bids. The only material available to the above officials was what the Health Risk Manager communicated verbally or by means of slides or a video presentation. Moreover, the officials had no means by which to verify the submissions made during the

⁶ As extracted from the judgment of Laing J in Part A of the application.

virtual meeting. To put it bluntly, the departments selected the Health Risk Manager to deal with the health risk issues pertaining to the workforce for the Eastern Cape Provincial Government over a period of 36 months, entirely on the basis of a 30- minute sales pitch.’

[24] I couldn’t agree more with his summation of the interview process. The process clearly smacked of the arbitrary manner in which the selection was made and the overall absence of objective criteria used in reaching the decision. The available minutes also demonstrated the apparent lack of transparency and fairness requirements for appointment in terms of section 172(1)(a) of the Constitution.

[25] Given the above reasons, it therefore behoved me to find that the appointment of the fifth respondent was unlawful, invalid and to accordingly set it aside. It therefore came as no surprise that the provincial state respondents did not oppose the order.

[26] I now turn to the solitary issue for determination before this court.

Just and equitable relief

[27] In its proposition of what would constitute just and equitable relief, the applicant seeks an order wherein it replaces the fifth respondent as the HRM for the Eastern Cape Provincial Government; alternatively, an order distributing the allocation of the PILIR lives in the province between itself and the fifth respondent, or further alternatively; a remission of the matter for the process of appointing an HRM from the panel of HRM’s to be started afresh, on strict timelines and directions/instructions.

[28] The grundnorm in this regard stems from section 172(1)(b) of the Constitution read with section 8 of the Promotion of Administrative Justice Act⁷ (PAJA). Section 172(1)(b) of the Constitution reads as follows:

“172 (1) When deciding a constitutional matter within its power, a court –

(a) ...

(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.”

[29] Section 8 of PAJA provides –

“(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant an order which is just and equitable, including orders –

...

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

...”

[30] Invariably, what becomes evident from the above provisions, is that a substitution can only be done in exceptional circumstances. This is also in line

⁷ Act 3 of 2000.

with the common law position.⁸ Whilst the applicant proposes a substitution as a just and equitable remedy, nothing in its papers suggests exceptional circumstances warranting such a remedy.

[31] The following common cause factors are germane in this regard: The DPSA is the custodian of PILIR which regulates sick leave and absenteeism in state departments and provides support to the other national departments and provinces. HRM's are appointed to a national panel in terms of a bid process for a period of three years to run concurrently with the state employees' sick leave policies. The 13 implementation areas established by the DPSA then select an HRM for their respective departments.

[32] The applicant and three other HRM's (Alexander Forbes, Proactive Health Solutions and Thandile Health Risk Management) were appointed onto the national panel of HRM's for the period 1 January 2022 until 31 December 2024 after following the aforementioned bid process. The said procurement process was constitutionally compliant. As such the applicant takes no issue therewith.

[33] The order of invalidity pertained only to the narrow issue of the interview process in terms of which the fifth respondent was selected; which lacked the characters of transparency and fairness for want of an objective criteria, and from which two departments which carry the majority of employees and PILIR lives in the province, did not participate during the voting process⁹. The issue of cost effectiveness did not arise as pricing was negotiated and a uniform price was agreed upon with all the HRM's on the panel.

⁸ Which has since been codified in section 8 of PAJA.

⁹ Such voting process having been the one which led to the fifth respondent being appointed as the HRM for the Eastern Cape Province.

[34] It also cannot be gainsaid that no fault can be placed at the doorstep of the fifth respondent for what transpired at the interview on 22 December 2021 and the outcome thereof. Similarly, there can be no argument that this was a wanton disregard of the constitutional imperatives of transparency and fairness on the part of the DPSA and the state provincial state respondents. Nor has it been suggested that there was explicit bias or incompetence exhibited in the manner in which the entire process was conducted. The Request for Proposals (RFP) makes reference to the process which would be followed, in particular the selection of the HRM by the implementation areas. At the most, the finding of invalidity was premised on the said process falling short of the requisite standard in terms of section 172(1)(a) of the Constitution; nothing more and nothing less.

[35] A just and equitable relief is one that properly balances the various interests which may be affected by it.¹⁰ When balancing the various interests, the process must, at the least, be guided by the objective which comprises of four factors¹¹:

- (a). it should effectively redress any harm caused by the violation of the right;
- (b). it should strive to deter future violations of the right;
- (c). it should be capable of being complied with; and
- (d). it should be fair to everyone who may be affected by it.

[36] Invariably, the nature of the right infringed and the nature of the infringement are significant factors for consideration in the determination of just and equitable relief. I have dealt with the nature of the right infringed and the

¹⁰ *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at para (45).

¹¹ *Ibid.*

nature of the infringement in the preceding paragraphs. What remains for consideration is what would constitute just and equitable relief on the circumstances of the present case.

[37] In *Steenkamp NO v Provincial Tender Board, Eastern Cape*¹² the Constitutional Court held as follows:

“... In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to preempt or correct or reverse an improper administrative function. In some instances, the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.”

[38] With the above principles setting the roadmap in the exercise of my discretion, I now consider the applicant’s proposals with regards to what would be just and equitable relief on the facts and circumstances of this matter.

Substitution of the respondent’s (Provincial State Respondents and the DPSA) decision with that of the Court

¹² *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 29; 2007 (3) BCLR 300 (CC)

[39] In this regard, the applicant proposes that it be appointed as the HRM for the Eastern Cape for the remainder of the contract term. Alternatively, it proposes that the distribution of work be split between itself and the fifth respondent.¹³ This proposal however, is untenable on three very distinct levels. In the first instance, the order proposed, in both instances, only serves to perpetuate the very illegality complained of, which led to the appointment of the fifth respondent being set aside.

[40] All it does is to arbitrarily replace the unlawfully selected HRM (fifth respondent) with the aggrieved party (the applicant), or allocate to the applicant a portion of the implementation areas, on no basis whatsoever, to the exclusion of and thus ignoring the rights of the other members of the panel (sixth and seventh respondents). Such a situation erodes the very principle of legality and the rule of law and can never be sustained. It is not a question of a court being entitled to exercise a discretion having regard to issues of fairness and prejudice. Rather, the question is one of legality.¹⁴

[41] Secondly, there is no suggestion nor any evidence on the applicant's papers that but for the flawed interview process, its selection as the HRM for the Eastern Cape Administration is a *fait accompli*.¹⁵ In *Trencon*¹⁶ it was held that substitution is an extraordinary remedy employable where two significant factors are applicable –

(a) where a court is in as good a position as the administrator to make a decision; and

(b) where the decision of the administrator is a forgone conclusion.

¹³ That it be allocated the Departments of Education and Health, which would mean that it carries about 50% of the PILIR lives in the province, whilst the fifth respondent carries the rest. This, the applicant contends, would result in a fair distribution of work.

¹⁴ *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) at [14]; also referred to in *Metropol Consulting (PTY) LTD v City of JHB Metropolitan Municipality and Another* [2020] ZAGPJHC 392

¹⁵ *Trencon Construction v Industrial Development Corporation* 2015 (5) SA 245 CC (*Trencon*).

¹⁶ *Ibid.*

[42] It is not in dispute that the decision in question is polycentric in nature, as such it cannot be argued, nor is it the applicant's case that this court is in as good a position as the administrator to make the decision, or in this case, the selection of the HRM. Even on the applicant's papers it is acknowledged that a possibility that the fifth respondent or any of the HRM's on the panel, could be appointed if the process were to be restarted. That in itself lends support to the proposition that the appointment of the applicant as HRM for the Eastern Cape is not a foregone conclusion.

[43] Lastly, and perhaps most pertinently in this regard, as is explicitly stated in section 8(1)(c)(ii) (aa) of PAJA, substitution as a remedy can only be utilised in exceptional cases. Stripped to its bare facts, the matter in *casu* cannot be said to be one falling under the category of exceptional cases. I expound more on this below when I deal with the other propositions on just and equitable remedy.

Remission of the matter for the selection process to be re-run.

[44] Initially, the provincial state respondents and the DPSA were almost *ad idem* with the applicant that this would be an effective remedy on the facts of the matter, with the only points of departure being the timeframe within which the process had to be completed, and the inclusion of the objective criteria in the order of the court. However, when the matter was argued in November 2023, they had made an about turn, for reasons that are dealt with below.

[45] Key in the submissions made by all the parties is the date on which the contract in question ends, which is the 31 December 2024. The appointment of HRM's follows the three-year leave cycle nationally, which cycle ends on 31 December 2024. The argument by the provincial state respondents is that when they were agreeable to a re-run of the selection process there was still more than

a year left in the contract, and with the time which passed up until the hearing of the matter, such period has now been reduced substantially.

[46] According to them, supported by the DPSA, given the polycentric nature of the process, they would need at least 4 months to finalise the selection process. This entails that the 13 provincial departments plus the DPSA would need to first meet in order to agree on the objective criteria to be used before an invitation is sent to the HRM's in the panel. Although contending that the objective criteria proposed by the applicant is reasonable, and would certainly receive consideration, the emphasis is that it is not permissible for the applicant to dictate how the process should be conducted. I can find no foul with this argument.

[47] Further emphasis in this regard is placed on the fact that given the polycentric nature of the decision in question, it is not one which this court could be best suited to make.¹⁷ Previously it took the various departments five weeks just to synchronise their diaries, as such, it is averred that the six weeks period proposed by the applicant for the completion of the process is impractical and unreasonable.

[48] Given the time-frame that is proposed by the state respondents (four months), it would mean that there is only about six months left of the contract by the time the new HRM is appointed. This, the argument goes, is problematic for the province as the largest amounts PILIR applications are received this time since it is the last year of the leave cycle.

[49] The DPSA, with which the fifth respondent and belatedly the state respondents form common cause; propose that in the interest of good

¹⁷ *Trencon*, n 13 *supra*.

governance and the employees of the Eastern Cape Provincial Government and their dependants, the order of invalidity be suspended until 31 December 2024, in order to permit the fifth respondent to continue to render its services until the end of its contract.

[50] They contend that a re-run at this late stage would not only be disruptive to a discharge by the state of its constitutional responsibilities, but also opens the potential increase in abuse of sick leave. The contention thus, is that from a point of practicality and pragmatism, a further suspension of the order of invalidity until the end of the contract term would be just and equitable on the facts of the matter.

[51] According to the fifth respondent, by the time the process is re-run, almost 90% of the contract duration would have lapsed by the effluxion of time. It therefore avers that this factor, *inter alia*, self-evidently, renders a re-run impractical and wasteful. This view enjoys the full support of the state respondents and the DPSA which contend, *inter alia*, -

- (a) that accepting that the fifth respondent is not the chosen HRM, it would mean that a new service provider will provide services for a period of between 6 to 9 months;
- (b) that taking into account that a greater part of the contract will have lapsed by the time the (potential) new HRM takes over, that it is not in the interest of government employees, their dependants and families being employed by the Provincial Governments of the Eastern Cape;
- (c) with the DPSA being the custodian of PILIR, it means that it would not be in the interest of the persons for whom the policy was devised, state employees, their dependants and families;

(d) if the fifth respondent is replaced as an HRM, it would have to continue to process and finalise all applications received by it and the new HRM would only deal with new applications; the contention thus is

(e) that such may create the opportunity for chaos and cataclysmic consequences which should be avoided.

[52] The fifth respondent contends further, that the applicant does not approach this court solely in the interests of administrative justice, but rather, to pursue its own commercial interests. On this score it argues that the applicant has elected to review and set aside the decision only where it was unsuccessful in the tender, opportunistically leaving its successes in an allegedly flawed process.

[53] A similar argument has been advanced by the state respondents and the DPSA. According to the DPSA, much as the application professes to be concerned with constitutional values and imperatives, when reduced to its bare bones, it becomes evident that it is a self-serving application. The DPSA contends that the application is more about the applicant's dissatisfaction with the fact that it did not get a substantial portion of the "pie".

[54] Support for the above contention is premised on the fact that the applicant, for the past nine years, had more than a third of the government employees under its control as an HRM, received via the same flawed process. However, when it became clear that its proverbial slice of the pie was reduced to less than 10%, and attempts to persuade the DPSA to influence its selection by the North West Government as its HRM failed, it brought the current application.

[55] Further lending support to the above argument, is the fact that the applicant only brought the constitutionality challenge in those cases where it was unsuccessful, leaving aside the two where it was successful, though also flowing from the same flawed process.

[56] I find myself constrained to accept that there is a case to be made for the above argument, especially in light of the primary relief that the applicant persists with, even in the absence of any evidence to support same on the papers. However, it would be injudicious of me not to acknowledge that, notwithstanding its self-portrayal as an innocent tenderer, the fifth respondent is in no different position than that of the applicant. Both are commercial enterprises with a vested commercial interest; seeking to benefit from a commercial venture, hence the imperative to oppose the application. This I point out on the score that none of the parties can be said to have been at fault for the flawed process that was conducted.

[57] It is a trite principle that a constitutional remedy must be effective because ‘without effective remedies for breach, the values and the rights entrenched in the Constitution cannot be properly upheld or enhanced.’¹⁸ In that exercise however (determining an effective remedy), one must bear in mind that the primary purpose of constitutional remedies is to vindicate the Constitution and deter future infringements.¹⁹

[58] It flows from the above that a court has a discretion, closely tied to the facts of the particular matter, as to what would constitute just and equitable

¹⁸ Ackerman J, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

¹⁹ Kriegler J, *Fose supra*, para [96]; *Tswelopele Non-Profit Organisation v City of Tshwane metropolitan Municipality* 2007 (6) SA 511 (SCA).

relief in a particular matter. In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources*²⁰ (Pty) Ltd, the Constitutional Court formulated this as follows:

“... I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.”²¹

[59] In support of the proposition that the suspension of the order of invalidity be further extended until the end of the contract, reference was made to various cases where a similar approach was followed.

[60] In the *locus classicus* case of *Allpay*²² the Constitutional Court, after having declared administrative action unlawful and invalid in a prior hearing, fashioned a just and equitable remedy where it suspended the declaration of invalidity pending a process in which a new tender process was to be initiated and completed. When SASSA failed to comply with the terms of the suspension a civil society organisation, Black Sash Trust, approached the Constitutional Court for further relief. The court, *inter alia*, extended the contract which it had already declared invalid for a further period.²³

²⁰ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources* 2011 (4) SA 113 (CC), para 85.

²¹ Footnotes omitted.

²² *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others* (No. 2) 2014 (4) SA 179 (CC) .

²³ *Black Sash Trust v Minister of Social Development & Others (Freedom Under Law Intervening)* 2017 (3) SA 335 (CC).

[61] *In Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*²⁴ the court declared a contract invalid but did not set it aside because it had reached practical completion.

[62] Similar considerations applied in *Van Reenen*²⁵ where the court, after having declared invalid a decision which was marred by ‘formal but material, procedural irregularities’, did not set aside the decision. Considerations which swayed the court in *Van Reenen* are much similar to those applicable in the present matter in that:

- (a) there were no ulterior motives in the appointments of the respondents;
- (b) the reasons for the invalidity of the decisions to appoint the respondents were not ascribed to them – but rather because of incorrect composition of the selection committee; and
- (c) the respondents were appointed, respectively, two and three years prior to the declaration of invalidity. The court found that ‘setting aside their appointments may lead to uncertainty and even impair the function of aspects of the Department for which they are responsible’.

[63] Much as I note the enthusiasm of the applicant in so far as the compressed timelines which it proposes a re-run of the process could be completed (6 weeks), I do not consider this as practical. Given the polycentric nature of the process and the decision involved, the likelihood that a rushed process could lead to similar consequences where the ultimate decision is facing a

²⁴ 2019 (4) SA 331 (CC). See also *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) where the court was swayed by considerations of finality, pragmatism and practicality, not to set aside an unlawful award of a tender; see also *Millenium Waste Management v Chairman, Tender Board: Limpopo Province* 2008 (2) Sa 481 (SCA).

²⁵ *Minister of Social Development, Western Cape Provincial Government and Another v Van Reenen and Another* (C634/2022) [2023] ZALCCT 53 (22 August 2023).

constitutional challenge is very real, and should be avoided. More so given the time lapse already in the contract.

[64] The DPSA as custodians of PILIR, and the provincial departments being the ones who deal with these matters on a regular basis, have the necessary knowledge, experience and expertise in these processes. Furthermore, given that I could find no bias, improper motive or gross incompetence on their part in the invalid process undertaken, I have no reason not to defer to their expertise in so far as the requisite time for the completion of a new process. The same applies in respect of the objective criteria for selection.

[65] I also take into account the risk that would put the state employees as beneficiaries of PILIR in the Eastern Cape Province if a new HRM were to be appointed at this late stage of the contract. This, taken together with the considerations referred to above as well as the relevant authorities referred to, leads me to the ineluctable conclusion that a just and equitable remedy, from a point of practicality and pragmatism, would be the further suspension of the order of invalidity (together with the setting aside of the impugned decision) until 31 December 2024.

[66] What now remains for consideration is the question of costs.

Costs

[67] In my view the applicant was substantially successful in the application in the sense that the constitutionality challenge it had mounted was upheld. Whilst it did not receive the order it sought in the form of just and equitable remedy, this was due mainly to the effluxion of time which can in no way be ascribed to

it. It lodged the application shortly after the appointment of the fifth respondent and could have no control in the delay in the court processes. There is therefore no reason why it should not be entitled to its costs. I am however not persuaded that the matter was such as to warrant the employment of three counsel. I take note of the complexity of the matter and the number of counsel employed in respect of the various respondents. However, given the nature of the constitutionality challenge raised, as well as the inherent facts and circumstances of this matter, I am of the firm view that two counsel would have sufficed.

[68] I am also not persuaded by the fifth respondent's argument that it should not be ordered to pay costs as it was obliged to defend itself in the matter, or that the state respondent's should be ordered to pay its costs. As stated elsewhere in this judgment, no fault was placed on the fifth respondent for the flawed process that was undertaken. The fifth respondent thus, elected to participate in the litigation in order to protect its commercial interests, as it was entitled to do so. Such, however, goes hand in glove with the risk that one might have to bear the costs should they not be successful.

Order

[68] In the premises therefore, I make the following order:

(a) The suspension of invalidity as set out in paragraph 2 of the order of this Court of 27 July 2023 is extended until 31 December 2024.

(b) The first to the fifth respondents and the eighth to the seventeenth respondents are to pay the applicant's costs, including costs occasioned by the postponement and hearing of the matter on 27 July 2023, plus costs of **two**

counsel where so employed; jointly and severally, the one paying the others to be absolved.

V P NONCEMBU
JUDGE OF THE HIGH COURT
APPEARANCES

-

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P B J Farlam SC

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J Babamia SC

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Makhanda

Date of hearing:

16 November 2023

Date judgment delivered:

20 March 2024