



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Nos: 831/2020
15509/20
15507/20

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE: 28 September 2022

Peter Lazarus
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SIGNATURE

In the matters between:

MALEBO KWENA ELSIE MAEMA

Applicant (Case No.: 831/2020)

RICHARD SIBUSISO SKHOSANA

Applicant (Case No.: 15507/20)

RAOAGA ITUMELENG LETHOKO

Applicant (Case No.: 15509/20)

and

**MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION**

First Respondent

**DEPARTMENT OF INTERNATIONAL RELATIONS
AND COOPERATION**

Second Respondent

**DIRECTOR-GENERAL, DEPARTMENT OF
INTERNATIONAL RELATIONS AND COOPERATION**

Third Respondent

JUDGMENT

LAZARUS AJ

1. This judgment relates to three separate review applications brought by three applicants all of whom were employed by the Second Respondent (the Department of International Relations and Cooperation ("**the Department**") at South African embassies in different countries.
2. In each matter, the applicants seek the review and setting aside of a decision of the Third Respondent ("**the Director-General**") to review and rescind an earlier decision made by the Director-General to approve the extension of each applicants' term of duty at their respective embassy.
3. The facts in all three matters are similar as are the arguments and the main issues to be determined. Furthermore, in each of the matters the applicants and the respondents are represented by the same attorneys. I accordingly deem it practical to hand down one judgment in respect of all three matters.
4. The facts in all three cases are largely common cause and may briefly be summarised as follows:
 - 4.1. In 2015, the three applicants, all employees of the Department, were transferred to the South African embassies in Vietnam, India and Algeria respectively.

4.2. The transfers took place in terms of transfer letters signed by the Director-General and each applicant during November 2015. The transfer letters set out the terms and conditions applicable to the transfers which included, *inter alia* –

4.2.1. that the duration of the transfers was to be four years, commencing on 9 December 2015 and terminating on 15 December 2019;

4.2.2. that in terms of current policy it is the Department's intention that the term of duty will be for a period of four years provided that the Department retains the right to adjust this period, should it be necessary;

4.2.3. that at the end of the term of duty, the applicants would be given at least 3 months' notice as confirmation of their transfer back to Head Office in South Africa; and

4.2.4. that the transfer is based on the understanding that the conditions contained in the transfer letter cannot be guaranteed for the full durations of the applicants' term of duty.

- 4.3. On 15 August 2019, each of the applicants received written notification from the Director-General that they would be transferred back to Head Office with effect from 15 December 2019.
- 4.4. In November 2019, the heads of the respective embassies made written submissions to the Director-General requesting approval for the extension of each of the applicants' term of duty to 30 June 2020. The submissions motivated the need for the extensions on the basis that the applicants were required for the effecting on-going operation of the respective embassies.
- 4.5. On 3 December 2019, the Director-General approved the aforesaid requests for the extension of the terms of duty for each of the applicants by signing the aforesaid submissions. The extensions were, however, only approved until 31 March 2020 in accordance with the recommendation of the Chief Director: Human Resources of the Department.
- 4.6. On 6 December 2019, at a meeting of the Special Director-General's Forum, at which the applicants were not present, it was resolved that the approvals for the extension of the term of duty for each of the applicants (among others) were to be recalled and resubmitted to the Director-General for reconsideration and review on a case-by-case basis. This was because the extensions were contrary to a policy previously adopted by the Director-General's

Forum that extensions should only be granted in exceptional circumstances as they created tensions, were highly subjective and affected the rotation system. It was noted, however, that there may be legal implications for the revision of approvals that had already been communicated.

- 4.7. Pursuant to the resolution adopted at the meeting, the Deputy Director: Human Resources Placement within the Department, made a written submission to the Director-General requesting the Director-General to review the prior approvals that had been granted to the applicants (among others) for the extension of their terms of duty. The request did not mention the policy considerations raised at the Special Director-General's Forum but was rather motivated on financial grounds.
- 4.8. On 11 December 2019, the Director-General approved the aforesaid request for the recall of the approvals that were granted to the applicants (among others) on 3 December 2019.
- 4.9. On 12 December 2019, the applicants were informed that the approval for the extension of their term of duty had been reviewed by the Director-General and that it had been withdrawn. The applicants were accordingly advised that they were to return to Head Office on 15 December 2019 as per their transfer letters and the notice of 15 August 2019 referred to above. Due to the late

notice given, two of the applicants' terms of duty were nevertheless extended to 31 December 2019.

4.10. The applicants allege (and the respondents do not seriously deny) that they became aware of the Director-General's decision of 3 December 2019 prior to the meeting of the Special Director-General's Forum on 6 December 2019. In particular, and on or about 5 December 2019, the Deputy Director: Human Resources Placement's submission duly signed by the Director-General, was forwarded to two of the applicants by email from other officials within the Department and the other applicant was advised telephonically by a Departmental official.

4.11. At the date of the hearing of this application, all three applicants had returned to Head Office in South Africa and had resumed employment with the Department.

5. At the centre of the dispute between the parties is the legal characterisation of the nature of the Director-General's decisions.

6. According to the applicants, when the Director-General made his decision to extend the applicants term of duty on 3 December 2019, he was exercising a public function and was precluded from revoking his decision because he had become *functus officio*. The applicants accordingly characterise the Director-General's decision as "administrative action" (as

contemplated in the Promotion of Administrative Justice Act, 2000 (“**PAJA**”)) and thus call for the review and setting aside of the decision in terms of the PAJA, alternatively, on the basis of legality.

7. The respondents disagree and argue that the Director-General’s decision was made in his capacity as an employer and in terms of the transfer letters signed by the parties in November 2015. Since no new agreements extending the applicants’ term of duty was concluded, the respondents argue that the Director-General was entitled to revoke his decision of 3 December 2019 and hold the applicants to the terms of their transfer letters. The respondents argue, therefore, that the Director-General’s decision did not constitute “administrative action” and accordingly the matter must be resolved on the basis of the contract between the parties.
8. Determining whether a decision of an official constitutes the exercise of a public power or the performance of a public function is a “*notoriously difficult exercise*”.¹
9. In *Chirwa*,² which concerned the dismissal of a public service employee by the chief executive officer of a wholly state-owned public company, the Constitutional Court, per Skweyiya J, held that the appellant’s claim fell under the exclusive jurisdiction of the Labour Court for to hold otherwise would give public sector employees an unfair advantage over those in the

¹ *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC), para [186].

² *Ibid.*

private sector who lack the protection of administrative law and it would encourage undesirable forum shopping and the development of a dual system of law.³

10. While endorsing the order granted by Skweyiya, Ngcobo J, in the same matter, found that although the dismissal did entail the exercise of public power, it did not qualify as administrative action as it was contractual in nature, did not involve the implementation of any legislation and did not constitute “administration” but was concerned more with labour and employment.⁴
11. Ngcobo J’s reasoning in *Chirwa* was largely followed by the Constitutional Court in the subsequent matter of *Gcaba*⁵, in which the appellant challenged a decision not to appoint or promote him to an upgraded position in the South African Police Service. Categorising the decision as a “*quintessential labour-related issue*” that had few or no direct consequences for the citizens apart from the appellant himself, the Constitutional Court found that the dismissal did not amount to administrative action.⁶
12. In the present matter, the Director-General’s decisions to extend the applicants’ terms of duty and then to revoke the extensions are similarly quintessentially labour-related. As in *Chirwa*, the applicants terms of duty

³ *Chirwa* para [65]. See also Hoexter and Penfold, *Administrative law in South Africa*, 3rd Ed, p263.

⁴ *Chirwa* para [142] and Hoexter, *supra*, p263.

⁵ *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC).

⁶ *Gcaba* para’s [66] and [68].

were contractual in nature and the Director-Generals decisions did not involve the implementation of any legislation. Furthermore, as in *Gcaba*, the Director-Generals decisions had few or no direct consequences for the general public apart from the applicants themselves.

13. That being so, the question that arises is whether the terms of the transfer letters were ever amended to provide for the extension of the applicants' terms of duty.

14. The answer to this question is no. Even if the Director-General's decision of 3 December 2019 to extend the applicants terms of duty was a final, unconditional decision (which is debatable because at least one of the approval letter's signed by the Director-General required further consultation with the department's human resources division to finalise the extension), no agreement was ever concluded between the Director-General and the applicants which amended the terms of the original transfer letter or constituted a new agreement.

15. In the result, there is no basis upon which the Director-Generals decision of 11 December 2019 to review and revoke his earlier decision of 3 December 2019 should be set aside.

16. **I accordingly make the following order:**

16.1. The applications are dismissed.

- 16.2. The applicants in each of the three matters are ordered to pay the costs of their respective applications.

Peter Lazarus

LAZARUS AJ

**ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION
PRETORIA**

For the Applicants: Adv Y Van Coertzen
Instructed by Lesiba Mason Attorneys

For the Respondents: Adv M V Magagane
Instructed by State Attorney

Date of hearing: 22 October 2021
Date of Judgment: 28 September 2022