



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **16706/2022P**

In the matter between:

ISIMANGALISO WETLAND PARK AUTHORITY

APPLICANT

and

SIZO SIBIYA

FIRST RESPONDENT

JABULANI PHUMASILWE NGUBANE

SECOND RESPONDENT

CAIPHUS ERNEST KHUMALO

THIRD RESPONDENT

SIMANGALISO QHAMUKILE MNTAMBO

FOURTH RESPONDENT

Coram: Mossop J

Heard: 22 January 2024

Delivered: 30 January 2024

ORDER

The following order is granted:

The application is dismissed with costs.

JUDGMENT

MOSSOP J:

[1] The Isimangaliso Wetland Park in Zululand is one of this country's most beautiful natural parks, rich in its biodiversity and unique in the ecosystems that it supports. It is, indeed, deserving of its name, for *isimangaliso* means 'a miracle' in isiZulu.¹

[2] The applicant is an organ of State established to manage and control this natural jewel, which is a World Heritage site. The four respondents are employees of the applicant. Each of the respondents were initially employed by the applicant on a fixed term contract.² At some stage during 2018, and the applicant cannot be more specific than to state the year, a decision was apparently taken by the applicant's Board of Directors (the Board) that the fixed term contracts of members of the applicant's Executive Staff Component (ESC)³ should be converted to contracts of permanent employment. The applicant has described this decision as 'the impugned decision' in its founding affidavit and I shall do likewise. As a consequence, the first respondent's fixed term contract of employment was converted to a contract of permanent employment on 20 March 2018. Thereafter, the fixed term contracts of employment of the second, third and fourth respondents were converted to contracts of permanent employment on 1 August 2019, 1 July 2019 and 15 February 2021 respectively.

[3] The applicant now believes that the impugned decision was invalid. In its notice of motion, it consequently seeks a declaratory order to this effect. It also seeks an order that the permanent appointments of the four respondents be reviewed and set aside. It finally seeks the suspension of the declaration of invalidity of the impugned decision for a period of six months from the date of any order

¹ Google Translate: <https://translate.google.com/?sl=auto&tl=en&text=isimangaliso&op=translate>.

² The first respondent's contract was for a period of five years.

³ In the definitions section of the World Heritage Convention Act 49 of 1999, the term 'Executive Staff Component' is defined by giving it 'the meaning given to it in Chapter III' of the Act. It appears, in essence, that it is a reference to the management cohort of the applicant.

granted by this court. The notice of motion states that the purpose of this suspension is to enable the applicant to take 'corrective action'. It was not entirely clear what this is intended to mean and it is not explained in the founding affidavit. I asked Mr Cele, who appears for the applicant, what was intended by this. From the bar, he indicated that the applicant intended to conduct performance reviews of the four respondents to decide whether or not they should be awarded fixed term contracts of employment after their permanent employment is set aside by the court.⁴ Mr Cele confirmed that the four respondents would remain employed by the applicant throughout the six-month period of suspension. I am not confident that this will be case, as I shall explain later in this judgment.

[4] It should be mentioned at this juncture that only the first respondent has delivered a notice of intention to oppose and only he has delivered an answering affidavit.

[5] Because it is an organ of State, the applicant may not rely on the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in seeking to review the impugned decision.⁵ It has recognised this and has brought its review application premised upon the principle of legality.

[6] In seeking the relief that it claims, the applicant submits that the impugned decision and the subsequent conversion of the various employment contracts of the respondents contravenes the provisions of the World Heritage Convention Act 49 of 1999 (the Act) and the Regulations.⁶ The applicant contends, further, that the Regulations, when read with the Act, clearly specify that appointments to the ESC of

⁴ The permanent employment contract relating to the first respondent appears to be comprised of his fixed term contract of employment to which is attached a letter containing further terms. That letter contains the following clause:

'Your employment will be performance based. The Authority will set the performance targets in line with your key performance indicators and set the basis of measurement and evaluation. Performance appraisals will be conducted and any non-performance in the agreed key performance indicator targets, (sic) will result in disciplinary measures being taken against you which may result in termination of your employment.'

The permanent contracts of employment for the other respondents contain similar clauses. Why six months should now be required for the purpose indicated by Mr Cele, when the first respondent has been employed permanently for nearly six years, is not apparent, nor is it attractive.

⁵ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC).

⁶ Regulations in connection with the Greater St Lucia Wetland Park, GN R1193, GG 21779, 24 November 2000 ('the Regulations').

the applicant are to be made on a contract basis or for a period to be determined by the Chief Executive Officer (CEO) of the applicant and that any appointment contrary to these prescripts is invalid. It is also contended that both the Board of the applicant and the CEO lack the power to convert fixed term contracts of members of the ESC to permanent or indefinite employment appointments.

[7] As with most things in life, litigation such as the present must have a beginning and an end. There are, however, no prescribed time periods within which a legality review must be commenced, unlike a review brought in terms of PAJA.⁷ All that is required in a legality review is that it must be initiated without undue delay. The touchstone remains reasonableness when considering whether there has been an unacceptable delay in commencing such proceedings.⁸ This is a point that has been taken by the first respondent in his answering affidavit: he contends that the applicant has delayed for four years and has then brought its review application without any explanation for that delay. This point is not taken as a point in limine but it would perhaps be prudent to consider it first.

[8] I commence by considering the test to be applied when assessing whether there has been an undue delay. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*,⁹ Theron J affirmed that the test to be applied is the two step test initially postulated in *Gqwetha v Transkei Development Corporation Ltd and others*,¹⁰ and reaffirmed in *Khumalo and another v MEC for Education, KwaZulu-Natal*,¹¹ namely that: 'Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question

⁷ A period of 180-days is set by s 7(1) of PAJA, which may be extended under s 9 of that Act.

⁸ *Altech Radio Holdings (Pty) Limited and others v Tshwane City* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) ('Altech') para 18.

⁹ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (4) SA 331 (CC) ('Asla (CC)').

¹⁰ *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA); [2006] 3 All SA 245 (SCA).

¹¹ *Khumalo and another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) ('Khumalo').

becomes whether the court's discretion should nevertheless be exercised to overlook the delay to entertain the application.¹²

Any explanation offered for a delay must cover the whole period of the delay.¹³

[9] In *Altech*,¹⁴ Ponnar JA reaffirmed that:

'It is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to either overlook the delay or refuse a review application in the face of an undue delay.'

[10] The requirement that legality reviews be brought without delay was further explained in *Merafong City v AngloGold Ashanti Limited*,¹⁵ where Cameron J stated that:

'The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'

[11] On how the reasonableness of a delay is to be assessed, Plasket JA in *Valor IT v Premier, North West Province and others*¹⁶ indicated that:

'Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a "factual, multi-factor and context-sensitive" enquiry in which a range of factors — the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits — are all considered and weighed before a discretion is exercised one way or the other.'

(Footnotes omitted.)

¹² *Asla (CC)* para 48

¹³ *Ibid* para 52.

¹⁴ *Altech* para 18.

¹⁵ *Merafong City v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) para 73.

¹⁶ *Valor IT v Premier, North West Province and others* [2020] ZASCA 62; 2021 (1) SA 42 (SCA); [2020] 3 All SA 397 (SCA) para 30.

[12] While the court has a discretion to refuse a review because of an unacceptable delay, if the decision about which complaint is made is patently unlawful, this may in turn dictate that the delay be overlooked and that the review be granted. The requirement to bring review proceedings without undue delay is to ensure that there is finality in those proceedings. The Constitutional Court has held that there is a 'strong public interest in both certainty and finality'.¹⁷

[13] Significantly, in *Khumalo*, Skweyiya J acknowledged that excessive delays may cause prejudice to the court that is tasked with hearing such review application when he observed that:

'... it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.'¹⁸

[14] The very difficulty anticipated by Skweyiya J manifests itself in this matter. The decision that permitted the conversion of the fixed term contracts of employment of the respondents was allegedly taken by the Board in 2018. The applicant is unable to state the date of the Board meeting at which the decision was taken. If minutes were kept of such a meeting, they have been lost. It is, however, remarkable in this age of digital documentation that there is no other recordal of when the meeting was held, such as copies of emails advising Board members of the date of the meeting or copies of the agenda for the meeting circulated to Board members.

[15] If the Board meeting was, indeed, held in 2018, it is likely that the impugned decision must have been taken in the first three months of that

¹⁷ *Khumalo* para 47.

¹⁸ *Ibid* para 48.

year as the fixed term employment contract of the first respondent was converted to a permanent employment contract on 20 March 2018. That conversion could only have occurred if the impugned decision had already been taken. This application was issued on 30 November 2022 and was served on the first respondent a week later. The delay is therefore a period in excess of the four years, as mentioned by the first respondent in his answering affidavit: it is, in fact, in excess of 4 years and eight months.

[16] The deponent to the applicant's founding affidavit is the applicant's present Chief Executive Officer, Mr Sibusiso Bukhosini (Mr Bukhosini). Mr Bukhosini does not disclose in the founding affidavit when he assumed that position, but it is apparent from allegations contained in the answering affidavit, which have not been specifically denied by Mr Bukhosini, that he was not so employed in 2018. None of the Board members have deposed to affidavits, other than Professor Antonia Nzama (Professor Nzama), who was a Board member at the time of the impugned decision having been taken and who is presently the chairperson of the Board. However, when the application papers were issued and served, Professor Nzama's affidavit was referred to but was not attached. It has subsequently been delivered together with the applicant's replying affidavit but at the time that the first respondent was required to produce his answering affidavit, he did not have it and he rightly took the point that virtually everything deposed to by Mr Bukhosini was, as a consequence, hearsay. It is difficult to disagree with that. I note in passing that Professor Nzama's affidavit only makes mention of her having read the founding affidavit of Mr Bukhosini and does not mention her having read his replying affidavit, with both her affidavit and the replying affidavit being commissioned on the same day, 19 July 2023.

[17] Is there any explanation for the delay to be found in the founding affidavit or is the first respondent correct in his assertion that no explanation has been provided? The founding affidavit, in which an explanation for the apparent delay should be found, is a lengthy document comprising some 32 pages. It is replete with lengthy extracts

from legislation said to be applicable to the issues in dispute (which legislation is also attached as an annexure to the founding affidavit) but it blithely skips over the delay in bringing the review, as if the author of the founding affidavit did not appreciate that the issue needed to be comprehensively addressed in that document. So brief, and so terse, is the applicant's explanation for the delay that it can profitably be quoted in full:

'7.19 Subsequently (sic) to the current Board term commencing in March 2020, it was suggested to the Board that the 2018 Board decision may not be enforceable due to the failure to comply with the WHCA and the Regulations in converting contract appointments to permanent appointments as well as making new appointments on a permanent basis.

7.20 As a result thereof, on or about the year 2021, I approached and requested the Board committee on HR, Social and Ethics to seek legal advice on how the applicant can rescind the 2018 Board decision in order to have the Executives (sic) Manager appointments to be in accordance with the Regulations.

7.21 Soon thereafter, a legal opinion was sought from our attorneys of record and the services of counsel were enlisted to provide legal opinion on possible ways to rescind the impugned board decision. The opinion was only received in March 2022 which recommended that the applicant should approach the above Honourable court to review the impugned decision and to set it aside, hence the matter is before this Honourable Court.'

[18] These are the only allegations in the founding affidavit that could be interpreted as constituting an explanation for what appears, on the face of it, to be an inordinate delay in seeking the review of the impugned decision. The vagueness of the explanation is troubling: who held the view on the impugned decision, when that view was formed and when precisely it was conveyed to the Board is not explicitly stated by the applicant.

[19] It is trite that an applicant must make out its case in its founding affidavit and may not do so in its replying affidavit, but this is precisely what the applicant has done,¹⁹ for greater detail of the delay is, to an

¹⁹ *Commissioner for the South African Revenue Services v Moloto and others* [2022] ZAGPPHC 832; [2023] 1 All SA 607 (GP) para 51.

extent, provided in the replying affidavit. I mention these additional facts while being acutely aware of the principle stated in the preceding sentence and being further mindful of fact that because the new information is contained in the replying affidavit, the first respondent has not had the opportunity of commenting upon it. In the replying affidavit, Mr Bhukosini now states that he first became aware 'sometime during the year 2021' that there may be a difficulty with the impugned decision. He also repeats that he consequently asked 'the Board Committee on HR, Social and Ethics' to obtain legal advice and further repeats that the legal advice was only received during March 2022. The Board then took a decision on 28 April 2022 to review the impugned decision. In early May 2022, attorneys were instructed. On 24 June 2022 the counsel instructed by the attorneys called for further information, which was sent to him on 27 June 2022. Counsel then took an acting appointment at the Durban Magistrates' Court and was so engaged until August 2022. On 23 September 2022, a query was sent to counsel inquiring how the preparation of the application papers was progressing. As a consequence, a draft founding affidavit was forwarded by counsel to the applicant's attorneys on 27 September 2022. Mr Bhukosini explains that he was then 'engaged in other matters' and could not review the founding affidavit. He eventually did so, made some amendments to it and forwarded it to the applicant's attorneys on or about 6 November 2022. The application was then launched on 30 November 2022. All of this should have appeared in the founding affidavit, but did not. Mr Bukhosini concludes thus:

'I contend that a reasonable explanation has been provided and that it was not an undue delay as the Applicant had acted expeditiously once it became aware of the unlawfulness and invalidity of the impugned 2018 Board decision. I hereby request that under the principal of legality, the delay be overlooked.'

[20] I regret that I cannot agree with this conclusion. What has been provided is not a full explanation for the entire period of the delay nor is it a reasonable and satisfactory explanation. In both the founding and the replying affidavits, the explanation ignores the first three years of the

period after the taking of the impugned decision. The initial explanation in the founding affidavit, such as it is, is characterised by unacceptable vagueness. Mr Cele submitted in argument that more information was acquired by the applicant after the answering affidavit had been received and that information was accordingly placed in the replying affidavit. It is difficult to understand how that could be so. By the time the application was launched, all the events later reported on in the replying affidavit had already occurred and must have been known to the applicant when that the founding affidavit was brought into existence.

[21] The expanded version of the explanation for the delay contained in the replying affidavit also contradicts the initial version contained in the founding affidavit. Mr Bukhosini does not explicitly state in the founding affidavit that he is the person who came to the conclusion on the unlawfulness of the impugned decision and then advised the Board accordingly, but the impression is that it was he who did so. I sought clarity from Mr Cele on this point and he confirmed that it was indeed Mr Bukhosini who had advised the Board. That being the case, Mr Bukhosini has offered two different explanations for when he came to that view: in the founding affidavit he stated that he became aware of the alleged unlawfulness of the impugned decision subsequent to the current Board's term of office commencing in March 2020, whilst in the replying affidavit he states that he came to this conclusion in 2021.

[22] Applying the test in *Khumalo*, the first step must be answered in the affirmative, namely that there has been an excessive and unreasonable delay in the bringing of this review and in my view, the first respondent is correct in his assertion that the applicant has advanced no reasons in its founding affidavit for the delay.

[23] I turn now to consider whether the delay should be overlooked, being the second step in the *Khumalo* test. In doing so, I bear in mind the

dicta of Meyer JA in *Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality and another*,²⁰ where he stated the following:

‘Whether a delay should be overlooked does not and should not entail a determination of the merits of the review or collateral challenge. The merits of the challenge are to be weighed on the following basis: If the delay is to be overlooked, is there a challenge that warrants the attention of the court? In other words, whether there is a serious question to be decided. To decide the merits assumes the very jurisdiction that is yet to be determined. And more, it inevitably skews the weighing of factors that *Khumalo* requires.’

[24] The proper starting point is to consider the nature of the impugned decision. It is essentially a decision by the Board about the form that the respondents’ employment with it should take. The applicant submits that permanent employment is not possible by virtue of the wording of the Act and the Regulations. In rebuffing this, the first respondent has relied heavily on the provisions of s 13(1)(o) of the Act which reads as follows:

‘13. (1) In the case where an Authority controls one or more World Heritage Sites, the Minister may, by notice in the *Gazette*, give some or all of the following powers to an Authority over one or more specified World Heritage Sites, namely to -

...

(o) employ persons or entities on a permanent or temporary basis...’

[25] This, so the first respondent contends, is the end of the matter as it is therefore within the remit of the applicant to make permanent appointments, as it has done in respect of the respondents. The applicant, however, argues that no evidence has been put up that demonstrates that the Minister has granted the applicant that power. The power is, according to the wording of s 13(1)(o), to be conferred by notice in the *Government Gazette* and no such *Government Gazette* has been placed before the court, so the applicant argues. That argument is, however, open to doubt. Before the court are the Regulations, which have been published in the

²⁰ *Golden Core Trade and Invest (Pty) Ltd v Merafong City Local Municipality and another* [2023] ZASCA 126; [2023] 4 All SA 589 (SCA) para 51.

Government Gazette.²¹ Regulation 11 is of direct relevance. Regulation 11(2) reads as follows:

‘(2) Persons shall be appointed to the Executive Staff Component by the Board upon the recommendation of the Chief Executive Officer in accordance with the Act on a contract basis or otherwise for such period as the Chief Executive Officer may determine, including, without limitation, on a temporary basis or pursuant to an agency or secondment arrangement.’ (Emphasis added.)

[26] The meaning of the phrase ‘on a contract basis’ must mean a fixed term contract as for it to simply mean that everyone must be appointed on the strength of a contract is to state the obvious. The phrase ‘or otherwise’ means:

‘... not the thing just referred to or is the opposite of that thing referred to.’²²

The opposite of a fixed term contract can only be a contract with no fixed term, in other words, a permanent contract of employment. That this must be so may be gleaned from the provisions of regulation 11(6) and the annexure referred to therein, which states:

‘The provisions of and the directives, rules and policies made under the Public Service Act, 1994 (Proclamation 103 of 1994) shall not apply to the Executive Staff Component, but the conditions of employment and remuneration of the members shall be as set out in Annexure 2 as amended by regulation from time to time by the Minister with the concurrence of the Minister of Finance.’

Annexure 2 states, in part, as follows:

‘Subject to Section 27 of the Constitution and other applicable law, the service conditions of employees of the Authority shall be regulated by written contract and such contractual measures may deal, without limitation, with the following:

- 1.1. Probation periods not exceeding 6 months.
- 1.2. Medical examinations, reference checks and other applicable background information.
- 1.3. Whether the appointment is permanent or temporary...’

[27] The power to permanently employ has thus been granted by the Minister and has been published in the *Government Gazette*. It matters not that a specific notice that only deals with this aspect has not been

²¹ GN R1193, GG 21779, 24 November 2000.

²² Collins On-line Dictionary: <https://www.collinsdictionary.com/dictionary/english/or-otherwise-and-otherwise>.

issued and that the permission is granted in the Regulations. On the merits of the application, it appears to me that this is not a matter where, if the delay in bringing the review is overlooked, a serious challenge that warrants the attention of the court is thereby raised.

[28] There are other disquieting aspects about the applicant's case. The realisation was reached by the Board that the conversion of the fixed term contracts may be invalid sometime after March 2020. Notwithstanding this apparent realisation, the fourth respondent's fixed term contract was converted to full time employment on 15 February 2021. It appears that the applicant blew hot and cold: it believed that the impugned decision would not pass legal muster, yet it continued to act in accordance with it. This is gravely prejudicial conduct towards the fourth respondent. Why was this done in the light of that apparent realisation? There is no explanation tendered by the applicant for this in any of its affidavits.

[29] Mr Saks, who appears for the first respondent, drew attention to the provisions of section 15(3) of the Act, which provides as follows:

'The Minister may review decisions, actions and policies of the Board.'

There was, thus, a mechanism that the applicant could have invoked to have its decision critically evaluated by the Minister. It made no attempt to do so.

[30] Moreover, it appears to me that Mr Bhukosini overlooks something significant in his submissions: the impugned decision was the applicant's own decision and was taken for reasons of which it must have been aware. The reason why the impugned decision was taken was thus always within its own knowledge. It did not require the legal opinion of another to galvanize itself into acting. A similar argument was advanced in *Asla Construction (Pty) Limited v Buffalo City Metropolitan Municipality and another*.²³ In referring to this matter, I am mindful of the fact that it dealt with a review brought in

²³ *Asla Construction (Pty) Limited v Buffalo City Metropolitan Municipality* [2017] ZASCA 23; [2017] 2 All SA 677 (SCA); 2017 (6) SA 360 (SCA) para 7 ('*Asla (SCA)*').

terms of PAJA, but I can see no reason why the logic of the judgment should not also apply to legality reviews.²⁴ In that matter, Swain JA stated as follows:

'The contention of the respondent that the time period only commenced running once it became aware of the unlawful administrative action is untenable. The issue of whether knowledge of the reviewable irregularities in the decision sought to be reviewed was required before this period commenced running, was decided by this court in *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) ([2015] ZASCA 209) para 16, in the following terms:

"The decision challenged by the City and the reasons therefor were its own and were always within its knowledge. Section 7(1) unambiguously refers to the date on which the reasons for administrative action became known or ought reasonably to have become known to the party seeking its judicial review. The plain wording of these provisions simply does not support the meaning ascribed to them by the court a quo, ie that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity. That interpretation would automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to the respondent (the appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions."²⁵

[31] The delay has, without question, occasioned prejudice to the respondents and it offends the principle of finality. The first respondent, being the first of the respondents to have his employment terms altered, can only have believed the issue of his employment was finalised given the length of time before these proceedings were brought. If the application is to be granted, his employment, which must be regarded by him as being entirely secure, is placed at serious risk. I mentioned earlier that I had reservations about whether the respondents would remain in

²⁴ See the obiter dictum by Theron J in *Asla* (CC) fn 39.

²⁵ *Asla* (SCA) para 7. The decision in *Asla* (SCA) was approved by the Constitutional Court in *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC) paras 40-44.

the employ of the applicant if the relief claimed in the notice of motion is granted. The notice of motion seeks a declaration that the impugned decision taken by the Board was invalid and is to be set aside but that the declaration is, however, to be suspended for six months. However, in subparagraphs 1.2 to 1.5 of the notice of motion, the applicant seeks to review and set aside each of the contracts of permanent employment of the four respondents. Those orders are not to be suspended: it is only the declaration of invalidity of the impugned decision that is to be suspended. The first respondent will thus be rendered unemployed as his fixed term contract has long since ended through the effluxion of time. The potential prejudice is therefore tangible.

[32] The applicant conceived of the plan to convert the employment contracts of the respondents and carried that plan out. It knew why that plan was implemented but has thereafter reposed in a catatonic like state. It now suggests that its lengthy period of inactivity should be disregarded on the flimsiest of explanations and that it should be allowed to act in a fashion that could cause substantial prejudice to the respondents. Notwithstanding that the applicant has dwelt on the matter for several years, it has never once discussed its misgivings about the validity of what occurred with the first respondent. He makes that point repeatedly in his answering affidavit. As his employer, the first respondent was entitled to believe that the applicant would behave in a fair manner towards him²⁶ and after satisfying itself that it had complied with its own internal prescripts.²⁷ The same applies to the other respondents. It seems to me that the applicant has not done so. In my view, the matter does not appear to involve a serious breach of any constitutional duty. I am fortified in this view by the fact that the applicant has not been able to clearly establish the illegality of the impugned decision and does not have reasonable prospects of success on the merits of the review.

²⁶ *Khumalo* para 62.


²⁷ *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC) paras 152-155; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA) para 12.

[33] Ponnau JA stated in *Altech*²⁸ that:

‘The objective of state self-review should be to promote open, responsive and accountable government. The conduct of the City renders the delay so unreasonable that it cannot be condoned without turning a blind eye to its duty to act in a manner that promotes reliance, accountability and rationality, and that is not legally and constitutionally unconscionable. Here the delay is stark and the egregious conduct on the part of the City even starker. The City has a “higher duty to respect the law”. It is not “an indigent and bewildered litigant, adrift in a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline”.’ (Footnotes omitted.)

[34] These words apply with equal measure to the applicant. In the circumstances, I accordingly grant the following order:

The application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'Mossop J', is written over a horizontal line.

MOSSOP J

²⁸ *Altech* para 71.

APPEARANCES

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Date of argument: : 22 January 2024

Date of judgment : 30 January 2024

