Republic of South Africa

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT DURBAN)

Reportable

Case Number: DA 3/2011

In the matter between:

N L KHUMALO First Appellant

K RITCHIE Second Appellant

versus

THE MEC FOR EDUCATION: KWA-ZULU NATAL Respondent

Judgment delivered: 29 August 2012

HEADNOTE: **Review – Delay in instituting proceedings for review and its effect on invalid appointments – Court having a discretion to decide whether or not to set aside invalid act – Factors to be taken into account in the exercise of discretion – tension between legality and certainty – Application of the proportionality test.**

CORAM: JAPPIE, JA et NDLOVU, JA et ZONDI, AJA

JUDGMENT

ZONDI, AJA:

Introduction

[1] This is an appeal against the judgment and order delivered by the Labour Court (Pillay, J) on 6 July 2010, in which the Court *a quo* declared unlawful, unreasonable and accordingly invalid the promotion of the first appellant to the post

of the Chief Personnel Officer at the eThekwini Service Centre of the Department of Education Kwa-Zulu Natal ("the department") and the decision to agree to grant the second appellant protected promotion in respect of the post of Chief Personnel Officer at the eThekwini Service Centre (impugned decisions). The Court *a quo* set aside the impugned decisions and further directed the first respondent to take necessary steps to fill the posts.

[2] In addition thereto the Court *a quo* granted certain structural remedies.

The facts

[3] The issues presented in this appeal fall to be determined in the context of the following factual background.

[4] It is common cause that the first appellant (Khumalo), the respondent's employee, was promoted to the position of Chief Personnel Officer in April 2004. The second appellant (Ritchie), also the respondent's employee, had also applied for the same post as that to which Khumalo was promoted. Ritchie was not shortlisted. He lodged a grievance before and after the start of the interviews against his non-shortlisting. When his grievance failed he referred the dispute to the General Public Servants Sectoral Bargaining Council contending that he should have been shortlisted and appointed because he met the requirements for the post.

[5] After an attempt to conciliate the dispute between Ritchie and the department had failed, the matter was referred to arbitration. The department defended the matter. The MEC alleges that at the time the documentation relating to Khumalo's

interview and appointment had gone missing and by reason thereof the department could not formulate its defence. It then opted to settle the dispute by offering Ritchie a protected promotion to the post the filling of which he was challenging. Ritchie accepted the offer and on 11 July 2005 a settlement agreement was concluded to that effect, which agreement was made an award. The effect of Ritchie's settlement was that Khumalo was allowed to retain the post to which he was promoted.

[6] The MEC was not aware that the promotions of Khumalo and Ritchie were fraught with certain irregularities until it was brought to her attention in a complaint lodged with her on 6 October 2005 by the National Union of Public Service and Allied Workers ("NUPSAW or the Union"), acting on behalf of 11 of its members. The gist of the complaint was as follows. Firstly, one official (Khumalo) who was appointed to the post of Chief Personnel Officer did not meet all the minimum requirements for the post in that he did not have 2 or more years' supervisory experience at "*Salary Level 6 or 7*". He was on level 5. Secondly, another official (Ritchie) who raised a grievance in respect of the matter and who was not short-listed for the post, was granted protected promotion with effect from July 2005.

[7] The Union together with the complainants met the MEC and following the meeting a resolution was taken to the effect that a task team consisting of the departmental officials and representatives of the Union would be established to look into the complaints and thereafter submit a report to the MEC. This was done.

[8] The task team, in the report which it presented to the MEC on 26 January 2006, concluded that in the absence of supporting documentation it had been difficult for it to understand why Khumalo was promoted when he did not meet all the

minimum requirements of the post concerned and why Ritchie had been promoted in the absence of a prior shortlisting. It therefore found, on the information presented to it, that Khumalo could not be appointed as he did not meet the requirements of Chief Personnel Officer and the decision to appoint him rendered "*the process unfair, especially to potential applicants to whom the advertised experience requirements proved to be a barrier and therefore did not bother to apply*" and that as Ritchie had not been shortlisted the conclusion of the settlement agreement forming the basis of his promotion had been irregular.

[9] The MEC accepted the task team's findings that Khumalo ought not to have been promoted to the post in question as he did not possess the requisite experience. She also found the conclusion of the settlement agreement granting Ritchie protected promotion problematic as in her view the person who concluded the agreement on behalf of the department had no authority to do so. On the basis of the task team's findings the MEC approached the court *a quo* on 17 October 2008 seeking *inter alia* the setting aside of Khumalo and Ritchie's promotions on the ground that they were unlawful to the extent that they did not meet the requirements of just administrative action as set out in section 33 of the Constitution.

Proceedings in the Court *a quo*

[10] Khumalo opposed the MEC's application on various grounds and also raised preliminary objections. He contended, firstly, that the MEC was not entitled to approach the court to set aside her own administrative decisions and actions. He argued that the MEC, as the person with ultimate responsibility in the department, should herself have done so. Secondly, that she was not entitled to

seek relief in the form of a declarator in the absence of any existing dispute between her and either of the appellants. Khumalo contended that the grievants who lodged a complaint with the MEC about their non-appointment should, if they felt aggrieved by his appointment, have pursued the matter through the dispute resolution mechanism provided for by the Labour Relations Act which would have involved referring the matter to the General Public Servants Sectoral Bargaining Council (the Bargaining Council).

[11] Khumalo further averred that in so far as Ritchie's appointment was concerned, the matter had become *res judicata* as the dispute between the MEC and Ritchie was finalised in terms of the settlement agreement dated 11 July 2005, which was made an award of the Bargaining Council.

[12] Khumalo also contended that the MEC should be non-suited in this matter because of unreasonable delay in bringing the proceedings. He alleged that the MEC's right to bring the application for the setting aside of this appointment had become prescribed. To substantiate his allegation he pointed out that he was appointed in April 2004, and the review proceedings were only brought on 17 October 2008 over four years later. The MEC could not provide any explanation for the delay. Therefore, her right to institute the review proceedings for the setting aside of his appointment had become prescribed.

[13] With regard to the merits of the application Khumalo denied that he had not met the requirements for the advertised post. He alleged that the advertised requirements were:

"A senior certificate/ grade 12 plus extensive relevant, coupled with two or

more years of supervisory experience at levels 6 or 7 within human resources."

He contended that he met these requirements.

[14] He pointed out that his CV, which was part of the material before the selection panel, indicated that he had grade 12 qualification and extensive relevant experience within human resources. He alleged that although at the time of the interview he was on level 5 he had, however, been performing the functions which related to level 6 and 7 posts.

[15] In support of his claim that he was properly promoted, Khumalo referred to the evidence of Dr Hlatshwayo before the task team. Dr Hlatshwayo was on a selection panel which interviewed and shortlisted Khumalo when he applied for the position the propriety of which is now disputed. Dr Hlatshwayo told the task team that in terms of scores Khumalo was the second best candidate and was selected after a lady who scored the highest points became unavailable for the post.

[16] Ritchie also opposed the review application and in doing so he mainly associated himself with the allegations made by Khumalo. In particular, he denied that his appointment was irregular. He contended that the department's representatives who settled the dispute with him in terms of the settlement agreement had authority to do so.

[17] It was also contended by the appellants that the MEC was not entitled to seek the relief that she did. They rejected the MEC's contention that she could not herself set aside the impugned decisions on the ground that she was *functus officio* in

relation thereto.

[18] The court *a quo* dismissed the appellants' defences and granted an order, *inter alia*, declaring that the promotion of Khumalo to the post of the Chief Personnel Officer and the decision to agree to grant Ritchie protected promotion "*was not lawful, reasonable or fair and was accordingly invalid*". It set aside the promotion of Khumalo and the grant to Ritchie of protected promotion and directed the MEC to re-advertise the post in question. The appellants' appeal is against these findings and orders of the Court *a quo*.

The Appeal

[19] It was submitted on behalf of the appellants that the Court *a quo* erred in the decision it made. It was argued that the application ought to have been dismissed due to the MEC's inordinate delay in bringing it and further that the Court *a quo* should have found that any cause of action which the MEC had, had become prescribed. A person in the MEC's position, it was argued, is not entitled to approach the Court to rubber stamp the employer's wish that an appointment should be set aside. If others were aggrieved by the promotions, the appellants further argued, they should have challenged them before the appropriate tribunal. The MEC should have herself set aside the appointments if she considered them invalid and for this proposition reliance was placed on **SADTU and Others v Head of Northern Province Department of Education** [2001] (7) BLLR 829 [LC]; **Duda v MEC for Gauteng Department of Education and Others** [2001] (9) BLLR 1051 [LC]; **North West Department of Education v Neswiswi and Others** [2004] (8) BLLR 792 [LC].

[20] The appellants' reliance on these cases is, in my view, misplaced and they do not provide support for the contention which they seek to advance. In **Sadtu** *supra* the individual applicants were appointed as principals at five different schools. The Department of Education subsequently withdrew their letters of appointment. The applicants declared a dispute, which was referred to arbitration. The arbitration found that the withdrawal of the applicants' letters of appointment was unfair and ordered the department to reinstate the applicants. The department's application for review of the award was dismissed. The propriety of the department's decision to withdraw the applicants' letters of appointment was not considered by the Court as the department accepted the arbitrator's decision that its decision to withdraw the applicants from their posts was unfair (at para 4). Similarly in **Neswiswi**, *supra* the propriety of the Northwest Department of Education's decision to withdraw the individual teachers' permanent status was not considered. The department's application, in which it sought the setting aside of the award in favour of the teachers, was dismissed due to its lateness.

[21] Finally, the appellants also rejected the suggestion by the MEC that the person who had concluded the settlement agreement with second appellant was not authorised to do so. They argued that once the matter was settled by the agreement the dispute was resolved and the matter became *res judicata.* They submitted that there was no basis to challenge the settlement agreement and resultant award. In any event, so they argued, the procedure to follow would be to review the award.

[22] On the other hand Mr **Soni SC**, who appeared for the MEC, submitted that in the absence of a reasonable explanation from the decision makers, Khumalo's promotion was not lawful because he did not fulfil one of the requirements as

advertised. He argued that the agreement to grant Ritchie protected promotion was only made because the Department did not have evidence to gainsay the allegation that Khumalo's promotion was irregular. The protected promotion was unlawful, invalid and irregular. He submitted that Ritchie was not entitled to protected promotion because he was not shortlisted. It was for Khumalo to place evidence before the Court *a quo* that his appointment had complied with section 33 of the Constitution.

[23] In response to the appellants' claim that the MEC's right to bring the review had become prescribed and thus could not be enforced, Mr **Soni** argued that the Prescription Act does not apply. He submitted that the Prescription Act applies only to debts. This is not a debt as contemplated by the Prescription Act. He rejected the suggestion by the appellants that the aggrieved members of NUPSAW should have approached the tribunals provided for in the Labour Relations Act. He argued that the MEC was *functus officio* and could not set aside the appointments herself. She had to approach the Court for the setting aside of the appointments. He further argued that *res judicata* does not apply to the settlement agreement with Ritchie because it was in conflict with the Constitution. He submitted that the prejudice which the appellants will suffer if their promotions are set aside affords no basis for denying the MEC the relief she seeks. He argued that the question of prejudice must be determined by using the proportionality test. He further argued that the fact that the appellants may be innocent provides no basis for the contention that their appointments may not be set aside.

[24] Mr **Soni** submitted that the fact that the MEC's delay in bringing a review application has caused the appellants prejudice is not necessarily a bar to the grant

of substantive relief. He argued that what is required is the application of the proportionality test which will involve the weighing up of the prejudice to the department and the public interest if the appellants' promotions were to be allowed to stand against the prejudice to the appellant if their promotions were to be set aside. He submitted that the principle of legality and the public interest would require that the appellants' promotions be set aside.

[25] In argument before us Mr **Seggie SC,** who appeared with Mr **Blomkamp** for the appellants, confined his attack on the judgment of the Court *a quo* mainly to two grounds. First, he submitted that the factual issues do not support the judgment and, secondly, that the delay by the MEC in bringing the application for the setting aside of the impugned decisions is fatal to the MEC's case.

[26] He pointed out that if the Court agreed with him on the first point and found that the Court *a quo's* findings were factually incorrect then there is no need to consider the second point.

[27] The thrust of Mr **Seggie's** argument is that the Court *a quo's* finding that the appointments of Khumalo and Ritchie were invalid and unlawful was based on issues which were factually incorrect. His argument was that had the court *a quo* properly analysed the evidence before it, it would have found that the appointments of Khumalo and Ritchie were impeccable.

[28] In an attempt to convince us to find that the Court *a quo's* findings were based on incorrect facts Mr **Seggie** analysed the judgment and the evidence underpinning it. He submitted that it was factually incorrect to state, as the Court *a quo* did, that

"*Khumalo was promoted to the position... without meeting the minimum requirements"*. He argued that what the Court *a quo* stated as a fact was in fact what it was required to decide.

[29] He attacked the correctness of the Court *a quo*'s finding that "*although Khumalo had acted in a supervisory position, he did so when he held a level 5 post, not a level 6 or 7 post*". Mr **Seggie** submitted that the advertisement is open to the interpretation that one is eligible provided that one has acted at the level required, even though one's substantive rank may be lower than that. He argued that there was no reason to exclude for consideration a candidate who has the relevant experience. In this regard he referred to Mlangeni's evidence which confirmed that Khumalo had a supervisory experience at level 6 or 7 post. Mlangeni's evidence was that Khumalo "*was appointed as a senior personal officer, no matter of the level, whether he was level 5 or 6... he would have qualified...*".

[30] As regards Ritchie, Mr **Seggie** submitted that the Court *a quo* erred in finding that Ritchie had misled the MEC by not disclosing that he had not been shortlisted. He argued that this finding was not borne out by the evidence. He argued that Mr Zulu who represented the department at the arbitration hearing was under no illusions as to the nature of Ritchie's complaint. His complaint was about his non-shortlisting.

[31] I have given anxious and serious consideration to the individual points of criticism raised against the Court *a quo's* treatment of the factual evidence and its cumulative effect on the judgment. While I agree that the judgment of the Court *a quo* is replete with incorrect factual statements which to a certain extent formed the

basis of some of its findings, I am, however, not of the view that its findings which resulted from incorrect factual statements related to the main issue which was before it for consideration, namely whether the appellants' appointments were validly made and, if not, whether for that reason they had to be set aside.

[32] The question whether or not the appointments of the appellants were validly made should be answered by reference to what the post for which they applied required and whether the appellants met those requirements.

[33] The post for which the appellants applied is Chief Personnel Officer at the Department's eThekwini's Regional Office. The requirements for the post were that the candidate had to "*possess a senior certificate/ Grade 12 plus extensive relevant experience, coupled with 2 or more years of supervisory experience at level 6 or 7 within human resources*". The Newspaper in which the post was advertised also sets out what the core functions and recommendations for the post were.

[34] Mr **Seggie** submitted that the advertisement is open to the interpretation that one is eligible provided that one has acted at the level required, even though one's substantive rank may be lower than that and on the basis of this construction, Khumalo, so he argued, met the requirements. He argued that Khumalo was the best in terms of scores and had supervisory experience.

[35] Khumalo alleged in his answering affidavit that he had a senior certificate and extensive relevant experience within human resources. He further alleged that he also had more than 2 years of supervisory experience at levels 6 or 7, within human resources. He, however, pointed out that although he was on salary level 5 at the

time that he had that supervisory experience, he was performing the functions that pertained to level 6 and 7 posts.

[36] I reject Mr **Seggie's** contention that the advertisement is open to the interpretation which he contended for. In my view the language used in the advertisement is clear and unambiguous and that, being so, effect must be given to it. A candidate must have a senior certificate and two years' supervisory experience and which is at level 6 or 7. Khumalo did not have supervisory experience at level 6 or 7. He had it at level 5 and therefore did not meet the post requirements.

[37] As regards Ritchie's appointment, it is common cause that he was not shortlisted for the post. He filed a grievance regarding his non-shortlisting. He obtained promotion through a settlement agreement he concluded with the department to resolve the dispute he had referred to the Bargaining Council for arbitration. The case which the department was called upon to meet was the fairness of Ritchie's non-shortlisting. In other words, the issue was whether Ritchie's non-shortlisting was fair. If it was fair then the department's failure to shortlist him could not have constituted an unfair labour practice. On the other hand, if the department was of the view that Ritchie should have been shortlisted or if it did not have evidence to support its case it should have shortlisted him. It was not open to the department to grant relief which he never sought. The department's decision to grant him protected promotion in circumstances where there was no evidence to support it was unlawful and undermined the spirit of transparency and accountability which is the cornerstone of the rule of law.

[38] In support of the contention that he should have been shortlisted Ritchie told

the task team that he was the most senior person. He was already on salary level 7 and also acted as Chief Personnel Officer, salary level 8. The task team rejected Ritchie's evidence that he had acted as a Chief Personnel Officer. It found that he acted on another equivalent post. The finding of the task team was not challenged.

[39] The task team found both appointments to have been irregular. In my view this finding by the task team was justified in light of the fact that neither Khumalo nor Ritchie had met the requirements for the post for which they applied. In the circumstances the Court *a quo's* finding that these appointments were unlawful was correct.

[40] The next question is whether the Court *a quo* was correct in setting aside Khumalo and Ritchie's appointments.

[41] There is no doubt that the MEC was not only entitled but also duty-bound to approach a Court to set aside her own irregular administrative act (**Municipality Manager: Qaukeni Local Municipality and Another v FV General Trading CC** 2010 (1) SA 356 (SCA) at para [23] and authorities cited therein). This is so because it is a fundamental principle of the rule of law that the exercise of public power is only legitimate where lawful.

[42] But the fact that an administrative act is unlawful does not necessarily follow that it had to be set aside. In reviewing and considering whether to set aside an administrative action, Courts are imbued with a discretion and may in the exercise thereof refuse to order the setting aside of an administrative action, notwithstanding substantive grounds being present for doing so (**Oudekraal Estates (Pty) Ltd v City**

of Cape Town and Others 2010 (1) SA 333 (SCA) at para 33) (*Oudekraal* 2). Sections 172 (1) (b) of the Constitution and 8 of PAJA are statutory provisions providing the source of the Courts' discretion. In terms of section 172 (1) (b) of the Constitution a Court, when deciding a constitutional matter within its powers, may make any order that is just and equitable, including an order suspending the declaration of invalidity for any period. Similarly, under section 8 (1) of PAJA the Court in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable (**Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others** 2011 (4) SA 113 (CC) at para 82; **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) (**Oudekraal 1**); **Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others** 2008 (2) SA 638 (SCA) at para 28).

[43] The Court made it clear in *Sapela* supra that in deciding whether or not to exercise its discretion against the grant of the substantive relief it will have regard to the failure by the aggrieved party to institute review proceedings within a reasonable time and whether there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. It will also be guided by considerations of pragmatism and practicality. The Constitutional Court in *Bengwenyama Minerals (Pty) Ltd* supra at para 84 pointed out, however, that when making the choice of a just and equitable remedy in terms of PAJA it would be important to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would ensure that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding and would not precede the finding of invalidity.

[44] In setting out the approach to be followed in determining a just and equitable remedy following upon a declaration of unlawful administrative action the Court held at para 85:

> *"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 interest involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case".*

[45] The question is whether the Court *a quo's* decision to set aside the appellant's promotions was correct notwithstanding its finding that the MEC had delayed inordinately and without reasonable explanation in lodging the application for the setting aside of the appellants' promotions and having regard to the fact that the appellants have planned their careers on the basis of an assumption that their appointments were valid.

[46] Mr **Blomkamp** criticised the manner in which the Court *a quo* considered the question whether or not the appellants' promotions had to be set aside. He submitted that the Court *a quo* did not appear to have appreciated that it had a discretion and that it was entitled to refuse the setting aside of the impugned decisions notwithstanding substantive grounds being present for doing so. He argued that the fact that there was a delay in bringing the application for the setting aside of the impugned decisions was the factor which the Court *a quo* ought to have taken into account in the exercise of its discretion to refuse the setting aside. He emphasised that the problem with the approach of the Court *a quo* is that it fixated

on what it saw as the illegality of this administrative action and gave no proper consideration to the interests of finality, pragmatism and practicality.

[47] I agree with Mr **Blomkamp's** submission that the Court *a quo* was wrong; firstly, in approaching the matter on the basis that it did not have a discretion to refuse the setting aside of the impugned decisions. It appeared to have adopted the view that once it was found that the impugned decisions are unlawful they have to be set aside. Secondly, the Court *a quo* does not appear to have given a proper consideration to the legal effect of the MEC's delay in bringing the review application on the impugned decisions.

[48] In para 13 of the judgment the Court *a quo* says:

"*Admittedly, the MEC has delayed inordinately in lodging this application for which she has no explanation. However, applying a proportionality test, the benefit to the department and the public interest must be weighed against he prejudice to Khumalo and Ritchie. Conversely, the harm that will ensue if the decision is allowed to stand must be weighed against the benefit to Khumalo and Ritchie. Furthermore, if State is guilty of "unconscionable conduct" prescription should not apply.*"

[49] The Court *a quo* went on to say at para 30 of the judgment:

"*This application should have been brought years ago. The MEC was alerted to the need- for condonation. But she made no such application. Even if she did apply for condonation, she would not have advanced any explanation for the delay, because she has none.*"

[50] Then in para 35 of the judgment the Court *a quo* says:

"*Decisions based on ignorance, mistake or fraud should be reversed in the public interest...*"

[51] This approach by the Court *a quo* is clearly wrong and contrary to the line of cases in which the Courts have reiterated that in reviewing and considering whether it will be just and equitable to set aside an administrative decision, they have a discretion. (**Bengwenyama and Oudekraal 1** supra).

[52] The mere fact that the impugned decision is based on ignorance, mistake or fraud does not necessarily mean that it has to be set aside. In appropriate circumstances a Court will decline, in the exercise of its discretion, to set aside an invalid administrative action in order to avoid or minimise injustice when legality and certainty collide. (**Oudekraal 1** *supra* at 246D).

[53] While it may be true that the review is aimed at setting aside an invalid act on the basis that it fails to satisfy the principle of legality, sometimes practical considerations would require finality, rendering it less desirable to set aside an invalid act. That would be a case where an invalid administrative act has over a period of time remained unchallenged and third parties have arranged their affairs in accordance therewith and its setting aside may cause them injustice. (**Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd** 2009 (4) SA 628 (SCA) at para 9).

[54] Mr **Blomkamp** argued that in the present case there was a pressing need for the exercise of discretion by the Court *a quo* to avoid or minimise injustice which

would occur to the appellants if the appointments are set aside. He pointed out that because of an apparent conflict between legality and certainty in the present case there are two considerations to which the Court *a quo* should have given sufficient attention. The first related to the MEC's failure to bring a review within a reasonable time which, he submitted, may have caused prejudice to the appellants. The second is the public interest element in the finality of administrative decisions.

[55] He argued that if Khumalo's appointment is set aside the department would have to go through the selection process again, which, he submitted, was unnecessary having regard to the fact that there is no suggestion that Khumalo is not doing his work properly. Secondly, he submitted that the public has an interest in the MEC's department delivering services efficiently and effectively and that setting aside of Khumalo's appointment will cause disruption in the department resulting in the failure of service delivery.

[56] I have already found the appellants' promotions to have been unlawful and invalid. The post for which Khumalo applied required a candidate to have a senior certificate and two years' supervisory experience at level 6 or 7. Khumalo did not have a supervisory experience at level 6 or 7. He had it at level 5 and therefore he should not have been appointed. In relation to Ritchie's protected promotion, there is no doubt that Ritchie did not deserve it in light of the fact that he was not shortlisted. Their appointments were unlawful and irregular and therefore reviewable. They were inconsistent with the Constitution.

[57] Ordinarily, where there has been a reviewable irregularity in the exercise of public powers an aggrieved party would be entitled to apply to Court to have it set

aside and the principle of legality would require that it be set aside. It is correct that there has been an inexplicable delay in bringing the review in the present case. The appellants have planned their careers and arranged their affairs on the basis of an assumption that they were properly promoted. They are entitled to certainty. If their appointments were to be set aside it would have huge implications for them in terms of their career paths in the sense that because of their promotions they may have decided not to consider other career options available within the field of their study and may find it difficult to regain the lost job opportunities. On the other hand there are those candidates who applied for the post and who are of the view that they had all what it takes for the job. They are entitled to expect to be treated with respect and fairly when it comes to the selection process. The aggrieved candidates have been prejudiced in the sense that the selection committee did not give sufficient attention to their credentials when it considered their applications with the result that they were left out for consideration when they should not have been.

[58] There is no doubt in my mind that a decision either to allow the impugned decisions to stand or to have them set aside will invariably cause the respective parties prejudice. Granted, the setting aside of the appellants' promotion will affect their status and is likely to be perceived by them as demotion. This is so because of the potential reputational damage attendant on a setting aside of one's appointment. Their prejudice may entail financial and reputational aspects of their lives. No doubt it is the realisation of this potential prejudice to the appellants and the need to minimise its effects which prompted the Court *a quo* to order the department not to reduce the appellants' salaries as a result of the setting aside of the appellants' promotions.

[59] It is clear that the extent of potential prejudice to the appellant is capable of being minimised in one way or the other whereas in relation to the aggrieved candidates there is no way in which its impact can be lessened. Their prejudice, as long as the impugned decisions are allowed to stand, will continue to exist and is likely to be irreversible. In these circumstances, although I recognise the fact that it is highly desirable, in order to achieve predictability, that certainty should be maintained, I would, however, incline to the view which will promote the principle of legality and set aside the appellants' promotions in the hope that justice would be done to all of those who feel they were unfairly treated during the selection process. I have decided on this approach in order to promote the spirit of transparency and accountability which, in my view, was undermined when the appointments of the appellants were made. The integrity of the selection process was allowed to be compromised in order to accommodate the interests of the two individual appellants at the expense of the aggrieved candidates which in my view was clearly wrong. The fact that the agreement in terms of which Ritchie was granted protected promotion was made an award of the Bargaining Council does not preclude the setting aside of his promotion as the award was based on the agreement which was unlawfully concluded.

[60] Before I proceed to the next issue I think it is necessary and apposite to comment on some of the comments made by the Court *a quo* regarding the MEC. Firstly, it is not correct, as the Court *a quo* found in para 68 of its judgment, that there is evidence indicating that the MEC also violated "*every principle of legality and every tenet of ethical, accountable and transparent public administration, ... in the promotion of Khumalo and Ritchie*". There is no evidence suggesting that at the time when Khumalo and Ritchie were promoted the MEC was aware that their promotions

were irregular. The evidence on record indicates, however, that as soon as the MEC became aware of allegations of irregularities in the promotion of Khumalo and Ritchie she took the necessary steps to have the allegations investigated. When she received a report suggesting evidence of irregularities in the promotion of Khumalo and Ritchie she approached the Court *a quo* for an appropriate relief.

[61] Secondly, the Court ***a quo's*** rejection of the MEC's explanation for the delay in bringing the review and its finding at para 78 of its judgment that "*her explanation is an excuse for managerial indecisiveness and sloppiness; at worst, ... another cover for official misconduct*" is for the reasons already given not justified.

[62] With regard to costs the Court *a quo* deprived the MEC of costs on the basis of her delay in bringing the review. In relation to the appellants the Court *a quo* deprived them of costs because of their "*dishonourable conduct*".

[63] Mr **Blomkamp** urged this Court to set aside the Court ***a quo's*** costs order and award costs in favour of the appellants on the ground that there is no evidence suggesting that the appellants had done anything wrong and which would have been a basis for depriving them of their costs.

[64] I agree with Mr **Blomkamp.** There is no evidence suggesting that the appellants were guilty of dishonourable conduct. Had they been successful in the Court *a quo* they would have been entitled to costs since there would have been no legal basis for depriving them of their costs.

[65] When it comes to the question of costs the general rule is that costs follow the

event. In other words, a successful litigant is entitled to his costs. But the Court has a discretion to deprive a successful litigant of his costs in certain circumstances. In the present case though the MEC was a successful litigant and ordinarily should have been awarded costs, the Court *a quo* in the exercise of its discretion deprived her of her costs because of her delay in bringing the review. There is no suggestion that in doing so the Court *a quo* improperly exercised its discretion and in the circumstances there is no basis for this Court to interfere with the Court *a quo's* costs order.

Order

[66] In the result the appeal against the judgment of the Court *a quo* is dismissed with costs.

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ZONDI AJA

I agree

_____

NDLOVU JA

I agree .

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JAPPIE JA

APPEARANCES

For the appellants : Adv. RJ Seggie SC & Adv. PJ Blomkamp

Instructed by : Llewellyn Cain Attorneys

For the respondent : Adv. V Soni SC

Instructed by: The State Attorney

Date of Hearing : 24 November 2011

Date of Judgment: 29 August 2012