



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

Case No.: **15022/2023**

In the matter between:

FINANCIAL AND FISCAL COMMISSION

Applicant

v

SHAFEEQA DAVIDS

First Respondent

CLAIRE HORTON

Second

Respondent

Coram : Salie, J

Date of Hearing : 8 May 2024

Written Judgment delivered : 8 May 2024

Counsel for Applicant : Adv. M Mhambi

Attorneys for Applicant : Office of the State Attorney (c/o Mr T Shabane)

Counsel for Respondents : Adv. A Breitenbach SC (*pro bono*)
Adv. N Ristic

Attorneys for Respondents : Bagraims Attorneys (c/o Ms N Silke)

JUDGMENT DELIVERED *EX TEMPORE* ON 8 MAY 2024

(both heard and delivered on 8 May 2024)

SALIE, J:

1] This matter was argued before me earlier today. This judgment is delivered *ex tempore*, delivered shortly after submissions by counsel for both the applicant and respondents were concluded. The matter had been fully ventilated and the facts are common cause.

2] This is an opposed state self-review application based on the principle of legality.

The applicant, Financial and Fiscal Commission (“FFC”), established in terms of our Constitution, seeks to have the respondent’s respective appointments as senior researchers reviewed (as it is required to do on these facts) and seek furthermore in consequence to set the two appointments aside.

3] The appointments to the level 13 posts to which the respondents were appointed, just under 2 years ago, were made by a Mr. Tseng, the then acting Chief Executive Officer. It is not in dispute that he was delegated to make appointments ending at post level 12 and accordingly he did not have the authority to appoint the respondents in their respective positions. Ms Davids (Davids) and Ms Horton (Horton) consequently accept that the decisions to appoint them were inconsistent with the principle of legality in the Constitution. What remains is for this court to act in terms of section 172 of the Constitution. Given the facts of the matter, it follows that this court ought to declare the appointments as being inconsistent with the Constitution as being irregular and accordingly invalid.

4] However, the court retains a judicial discretion in terms of section 172(1)(b) to decline the setting aside of the appointments. The Court is enjoined to consider a just and equitable remedy in the circumstances, which require a consideration of a number of factors in the exercise of its wide and true discretion, that being, whether to set the appointments aside or to decline to grant the setting aside.

5] The high watermark of the applicant's case is that because Mr Tseng's decisions to appoint Davids and Horton were irregular, the Court cannot countenance unconstitutional action and that the principle of legality could only be vindicated by setting the appointments aside. In so doing, the argument follows for state's counsel, that it would serve as a deterring factor and would be in line with and uphold good governance. I understand further the argument by state counsel to mean that in terms of the principle enunciated by the Constitutional Court in ***State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23 (CC)***, commonly referred to as the '*Gijima principle*', that that once this Court had found an impugned decision inconsistent with the constitution it is obliged to set aside the decision. Differently stated, the argument concludes that a just and equitable remedy would be to order a setting aside, holding as its forefront the applicant's institutional integrity.

6] I had ventilated a number of questions from the bench with counsel for the state. I am of the view respectfully that counsel had conflated the just and equitability consideration with the non-discretion in terms of section 172(a). The two subsections are of course separate and distinct and the latter does not automatically follow from the former. Whilst the former is mandatory in nature, the latter takes the form of judicial discretion.

7] Setting aside is a discretionary remedy if the court considers same to be just and

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

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

9.1] The appointments of both Davids and Horton followed fair and transparent processes in terms of the applicant's selection policy. Their recommendation by the panel set out detailed motivations for the recommendation including their respective qualifications, working experience, employment record, verifications as to their qualifications including positive reviews by the respective referees. Both scored highly in the various tests which had been undertaken in the recruitment process.

9.2] The irregularity with the respondent's appointments was essentially a formal one due to a bona fide mistake by Ms. Tseng and the FFC's Human Resources Department. It is significant to mention that the mistake occasioned at the very end of the process, that being, who should be making the appointment decision.

9.3] The appointments were not due to any ulterior motive or purpose on the part of Mr. Tseng or anyone else involved in the process. State Counsel was very assertive in confirming that under no circumstances is there any averment of corruption or malfeasance in the matrix of this matter and the issue centers on the lack of authority of Mr. Tseng as indicated above. This submission is borne out by the papers and is in accordance with the facts of this matter. Accordingly, everyone involved, and moreover, Davids and Horton reasonably relied on the application's representation that the acting CEO had the requisite authority to approve their appointments.

9.4] Setting aside of the appointments runs a well apprehended risk to important aspects of the FCC namely research and preparation of the recommendations which the Fiscal Commission does in terms of Section 214(2) of the Constitution regarding the divisions of the fiscal revenue collected.

9.5] A most relevant feature is that the respondents stand to suffer very significant prejudice because their current and future income, employment and retirements benefits will be severely and adversely impacted. If their appointments are set aside through no fault of their own, they will be without employment. I find the state counsel's view on this issue highly problematic in that he submitted that the respondents can simply apply for their position again. To this the answer is simply, that there is no guarantee that the positions would be advertised given that a number of government

employment positions are frozen given budgetary constraints, the recruitment and advertisements positions are known to be fraught with delays and tedious processes, there is no guarantee that they would be able to gain positions in the province where they are presently living and their life has been well established, nor any guarantee that they would gain employment in this sector at all. The consequential and inevitable harm and trauma to the respondents and their respective homes and families are endless.

9.6] In my view, the declaration of invalidity in terms of Section 172(1)(a) for the FCC and the caution it heeds to avoid such proceedings in the future is in my view, given all the facts of this matter, a sufficient deterring factor and would serve as a fair safeguard against repetition. Punishing the respondents by rendering them jobless in these circumstances can never be deemed to be just and equitable.

10] For these reasons and having considered all the facts and circumstances of the matter I am satisfied that my judicial discretion as conferred to me in terms of section 172(1)(b) of the Constitution warrant me to decline to set the respondents' appointments aside notwithstanding the irregularity committed in their appointment.

11] As regards costs, I am satisfied that as the respondents have been substantially successful, the only issue for determination having been whether to set aside their appointments or not, the applicants are to pay the respondents' legal costs including the costs of counsel (one junior counsel). Mr Breintenbach SC acted *pro bono* for the

respondents and no costs are sought in respect of his service.

12] In the result, I make the following order:

“(i) In terms of section 172(1)(a) of the Constitution it is declared that the decision by the Acting Chief Executive Officer on 30 May 2022 to appoint the first respondent to the post of Research Specialist in the applicant is inconsistent with the principle of legality in the Constitution and invalid;

(ii) It terms of section 172(1)(a) of the Constitution it is declared that the decision by the Acting Chief Executive Officer on 25 January 2023 to appoint the second respondent to the post of Research Specialist in the applicant is inconsistent with the principle of legality in the Constitution and invalid;

(iii) In terms of section 172(1)(b) of the Constitution, and despite the declarations of invalidity in orders (i) and (ii) above, the appointments of the first and second respondents into their posts are not set aside;

(iv) The costs of this application, including the costs of one junior counsel on Scale A and one attorney on Scale A, shall be paid by the applicant.”

SALIE, J

JUDGE OF THE WESTERN CAPE HIGH COURT