



CONSTITUTIONAL COURT OF SOUTH AFRICA

Nkosinathi Lawrence Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal

CCT 10/13

**Date of hearing: 8 August 2013
Date of judgment: 18 December 2013**

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down a judgment upholding an appeal concerning a challenge by the Member of the Executive Council for Education: KwaZulu-Natal (MEC) to two promotion decisions made by the Department of Education, KwaZulu-Natal.

In 2004, the Department advertised a vacancy for which Mr Khumalo, an employee in the Department, applied and was eventually promoted to. Mr Ritchie also applied but was not shortlisted. Being under the impression that Mr Khumalo was not qualified to be promoted, Mr Ritchie referred a dispute with the Department for arbitration but before proceedings commenced, the Department concluded a settlement agreement granting him a protected promotion. The agreement was made an arbitration award.

About 20 months after becoming aware of allegations of irregularity in the two promotions, the MEC launched an application in the Labour Court seeking that it declare the promotions unlawful and set them aside. The Labour Court granted the application. Mr Khumalo and Mr Ritchie appealed unsuccessfully to the Labour Appeal Court. Mr Khumalo and Mr Ritchie sought leave to appeal against the Labour Court and Labour Appeal Court's decisions in the Constitutional Court.

In a majority judgment written by Skweyiya J (with which Moseneke DCJ, Cameron J, Froneman J, Madlanga J, Mhlantla AJ, Nkabinde J and Van der Westhuizen concurred), the Constitutional Court upheld the appeal. The Court held that the MEC's application was one for

the review of the legality of the promotions in terms of the Public Service Act and not for the review of “administrative action” in terms of the Promotion of Administrative Justice Act (PAJA). The Court held that a responsible state functionary like the MEC is obliged to investigate and to seek to rectify irregularities and unlawful conduct within her institution. However, the MEC had delayed unreasonably in bringing her application. Her delay, in the context of the facts of the dispute, constrained the ability of the Court to determine the lawfulness of Mr Khumalo’s promotion. In addition, given that the delay was unexplained and unreasonable, the Court held that the Labour Court should not have overlooked it. The delay was of a nature that non-suited the MEC in relation to her claim against Mr Khumalo’s promotion.

Regarding Mr Ritchie’s protected promotion, the Court held that the MEC was not entitled to bypass the provisions of the Labour Relations Act that regulate the review of arbitration awards by framing her challenge against the anterior decision of the Department to enter into the settlement agreement. Her challenge ought to have been made against the arbitration award, which application would have fallen out of the time limits set by the LRA. In the result, the Court set aside the decisions of the Labour Court and Labour Appeal Court and permitted the promotions to stand.

In a minority judgment (in which Jafta J concurred), Zondo J agreed with Skweyiya J’s outcome, but did not agree that the matter should be dealt with on the basis that the MEC brought the application in terms of the LRA or the principle of legality. Zondo J held that the MEC brought the application in terms of PAJA on the basis that the promotions were administrative action. Since PAJA contains an express requirement that a review application be brought within 180 days, Zondo J would have dismissed the application on the basis that the MEC had not made an application for condonation of the late lodgment of the application and had given no explanation for her delay.