



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO. 331/2023

In the matter between:

DIBIWE NDJIBU

FIRST APPLICANT

MULANGALA TRESOR MUKINAYI

SECOND APPLICANT

ISSU JAMES MANDUANGA

THIRD APPLICANT

TRESOR KANTENGA NSAMBA

FOURTH APPLICANT

and

THE MEMBER OF THE EXECUTIVE

COUNCIL FOR HEALTH,

EASTERN CAPE PROVINCE

FIRST RESPONDENT

THE SUPERINTENDENT GENERAL,

DEPARTMENT OF HEALTH,

EASTERN CAPE PROVINCE

SECOND RESPONDENT

THE CHIEF EXECUTIVE OFFICER,

ISILIMELA DISTRICT HOSPITAL

THIRD RESPONDENT

JUDGMENT

Rugunanan J

[1] The applicants are Congolese nationals and are medical doctors in the employment of the Eastern Cape Department of Health (the department). They are neither citizens nor permanent residents of South Africa. Their dispute with the respondents concerns the tenure of their employment status. The first applicant is the main deponent to the founding affidavit. Each of the remaining applicants have deposed to confirmatory affidavits and support the averments in the founding affidavit and the relief sought.

[2] On 27 June 2023 the applicants approached this Court on urgency. Their approach culminated in an interim order with costs reserved.

[3] Quoted in relevant part the order reads:

‘2 Pending the final determination of the application and counter-application:

2.1 The applicants are to remain in the employ of the Eastern Cape Department of Health on a month-to-month basis commencing on 1 July 2023 on the same terms and conditions as set out in their respective employment contracts with the Eastern Cape Department of Health.’

[4] The order, in addition, made provision for the parties to amend their notices of motion and supplement their affidavits and to file heads of argument in readiness for the matter be heard on 7 September 2023.

History

[5] The applicants are serving at the Isilimela District Hospital in Port St Johns. They each occupy the post of Medical Officer Grade 1. Each of them holds a degree in Batchelor of Medicine and Surgery obtained in the Democratic Republic of Congo.

[6] In accordance with section 24(3)(a) of the Refugees Act¹ the applicants enjoy formal recognition of refugee status in South Africa. The first applicant is recognised as such for the period 25 June 2021 to 25 June 2025. The second applicant is recognised for the period 19 May 2021 to 15 May 2025. The third applicant, for the period 21 June 2021 to 24 June 2025; and the fourth applicant for the period 10 October 2022 to 10 October 2026.

[7] During June 2020 the department entered into contracts of employment with the applicants. The applicants were represented by themselves and the department was represented by Ms Nomvume Ntshanga, the District Manager: OR Tambo (the district manager). The employment contracts are incorporated in letters of appointment that were signed by the district manager and the applicants.

[8] On 11 May 2023 the applicants received letters (termination notices) from the third respondent who purported to give notice of termination of each applicant's contract of employment with effect from 30 June 2023 on the premise that their contracts were for a fixed term of three years. This precipitated the applicants' initial approach to this Court and culminated in the interim order. The order presently regulates their incumbency pending final determination of the relief they seek.

¹ Refugees Act 130 of 1998.

The principal contentions and relief sought

[9] I begin with the approach adopted by the respondents. They resist the relief sought by the applicants by contending that the applicants did not meet the qualification in the Public Service Act, 1994² (the Act) of citizenship or permanent residency in South Africa, and that the district manager did not have the authority to enter into and conclude the employment contracts with the applicants as foreign nationals.

[10] I will henceforth refer to the Public Service Act or the Act interchangeably depending on the context.

[11] The respondents' stance falls into the paradigm of a reactive or defensive challenge, at the heart of which the legality of the contractual appointments is called into question. At the outset therefore the respondents maintain that the employment contracts were unlawful and since they were invalid from inception that which followed by way of the third respondent's purported termination is immaterial.

[12] The case advanced by the applicants, in what will be referred to as the main application, is that they are permanent employees and for that reason the purported termination of their employment is neither sanctioned by law nor by the terms of their contracts. They contend that their case must be viewed in the context of an employment relationship. Interlocked with this argument is that the Act properly interpreted does not invalidate employment contracts concluded by the government with persons who are not South African citizens or permanent residents. They contend that breach of the Act as alleged by the respondents does not constitute grounds for terminating their employment contracts, and that

² Public Service Act, 1994 (Proclamation 103 of 1994).

section 16A of the Act provides adequate disciplinary and reporting mechanisms for non-compliance by a public official.

[13] In summary, the applicants' stance is that contracts concluded in breach of the Act are not to be visited with nullity.

[14] Accordingly, they seek orders: declaring as unlawful the respondents' termination of their employment contracts; that the contracts be declared to remain of full force and effect notwithstanding the effluxion of a three-year period; that the respondents be directed to reinstate them on the same terms and conditions as stipulated in the contracts; and that the human resource and payroll system known as PERSAL (persal) be corrected to reflect them as permanent employees of the department.

[15] In their counter-application the respondents on the other hand seek orders: dismissing the applicants' main relief; declaring that the applicants' respective appointments were in breach of section 10(1)(a) of the Act and were in contravention of the *National Policy on the Utilisation of Foreign Nationals to address Human Resources and Skills Needs in the Public Service*³ (the utilisation policy); setting aside as unlawful the applicants' letters of appointment issued by the district manager; and in the alternative, that that the applicants were employed on a fixed term contract each commencing on 1 July 2020 and terminating on 30 June 2023 by effluxion of time.

The employment contracts

[16] The uniform and material provisions of the applicants' employment contracts are detailed in the letters of appointment.

³ Issued on 1 December 2009 by the Minister for the Public Service and Administration as a directive in terms of section 41 (3) of the Public Service Act, 1994 to elucidate and supplement the Public Service Regulations 2001, Chapter 1, Part VII B1, B4, C and D.

[17] The foreword states:

‘Your employment is of a permanent nature and is in terms of the Public Service Act, 1994.’

[18] What follows are the essential terms which stipulate *inter alia*:

‘Your salary will be R821 205.00 per annum plus applicable allowances and benefits’.

‘You are not eligible for membership to the Government Employees Pension Fund (GEPP)’.

‘You will be subject to the disciplinary procedures and rules applied by this department and as contained in the Public Service Central Bargaining Chamber (PSCBC) Resolution 1 of 2003’.

‘One month’s written notice is required should you wish to resign’.

‘Other than the conditions of service detailed in this document, you will be subject to those policies and procedures laid down by the Department as amended from time to time. A copy of the Department’s policies and procedures may be viewed during office hours on request to your immediate supervisor’.

[19] Provision is made for vacation leave, sick leave, special sick leave, special leave and family responsibility leave. Relevant to vacation leave, this is regulated by the condition reproduced hereunder:

‘Leave is granted at the beginning of the contract period on a pro rata basis at the rate of one twelfth of 22 days for each month of service. The granting of vacation leave is subject to prior approval of your supervisor. Vacation leave must be authorised before you proceed on leave. Unused vacation leave for any year lapses at the end of June the next year...’

[20] It is not pointedly in issue that the contracts incorporate implied or tacit reference to section 17 of the Act which provides for dismissal of an employee of a department on account of incapacity due to ill health or injury; operational requirements; incapacity due to poor work performance; or misconduct.

[21] In summary, the applicants' contracts of employment are subject to the Public Service Act and departmental policies and procedures. I intend, later in this judgment, to deal with the relevant provisions.

[22] The notices of termination in terms of which the third respondent purported to act communicate the following:

‘The purpose of this letter is to confirm termination of your employment contract with the Eastern Cape Department of Health under OR Tambo District (Isilimela Hospital). Regrettably, this means your contract of employment will be terminated. This decision is not a reflection of [y]our performance but is in adherence to paragraph 5, 7 & 14 of the Policy on Recruitment of Foreign Health Professionals...’

Evaluation and applicable legal principles

[23] A useful starting point commences with section 10(1)(a) of the Act. The section precludes the appointment, whether permanently or on probation, of any person to any post on the establishment in a department unless he or she is a South African citizen or permanent resident.

[24] For convenience the text of the section reads:

‘10. Qualifications and appointment

(1) No person shall be appointed permanently, whether on probation or not, to any post on the establishment in a department unless he or she-

(a) is a South African citizen or permanent resident; and

(b) ...’

[25] In her supporting affidavit the district manager states that she was under the impression that the applicants’ appointments were ordinary appointments and that she did not notice that they were foreigners. It is significant that she states that she had no authority to appoint foreign professionals on a permanent basis. While her supporting affidavit does not state that she had no delegated powers to sign the letters of appointment, this is inconsequential – the applicants did not (and do not) meet the qualification either of citizenship or permanent residence.

[26] Ms Rolene Wagner is the main deponent to the respondents’ answering affidavit. She deposes thereto in her capacity as Superintendent-General and Accounting Officer of the department.

[27] Ms Wagner does not dispute what is stated in the foreword to the letters of appointment but goes on to declare the following:

‘At the time of loading the particulars of the [applicants] into the [persal] system, it was detected that the contracts were for a fixed term of employment and were loaded as such.’

[28] Gleaning from what she further explains it appears that the foreword on the first page of the applicants’ letters of appointment was substituted during the loading process. She states:

‘The first page of the letter[s] of appointment [were] altered at the time of loading the particulars in the system to reflect the fixed term nature of appointment as ... “your employment is of a contract nature [and] is in terms of the Public Service Act, 1994.” ’

[29] As for the term of the applicants’ appointment she mentions:

‘[T]he applicants as Congolians had to be appointed on a fixed term that did not exceed three years at a time.

[30] Elsewhere, she proceeds to say:

[The applicants] were advised on 11 May 2023 that their contracts were terminating on 30 June 2023 by way of a reminder ...

[T]he termination on 30 June 2023 will be the result of effluxion of time.’

[31] Ms Wagner’s affidavit, in addition, makes reference to paragraphs 5.2.1 and 5.5.4 (a) of the utilisation policy.

[32] Quoted in full, the identified paragraphs of the utilisation policy read as follows:

‘5.2.1 In terms of section 10(1)(a) of the Public Service Act no person shall be appointed permanently to a post unless she or he is a South African citizen or permanent resident. Foreign nationals who are not in possession of a permanent residence permit may therefore only be employed temporarily in departments.’

‘5.5.4

(a) The employment of foreign nationals must be on a fixed term contract basis, the term of employment must not exceed the term of the relevant work permit and the employment relationship must be on a full-time basis in funded vacant posts.’

[33] Annexed to the utilisation policy is a further document entitled *Employment of Foreign Health Professionals in the South African Health Sector* (the health sector policy). Paragraph 3 thereof which is quoted in relevant part reads:

‘No foreign health professional shall be allowed to initially take up employment in a professional capacity or continue with such employment without a valid work permit or refugee’s permit or treaty permit ...’

[34] Turning for a moment to the notices of termination issued by the third respondent. These incorporate reference to the *Policy on Recruitment of Foreign Health Professionals* (the recruitment policy). The material parts of the policy are reproduced hereunder (all sic):

‘5 Except for Foreign Health Professionals recruited through a government-to-government agreement, a Corporate Permit obtained in terms of section 2 of the Immigration Act or unpaid of volunteer services, the employment of Foreign Health Professionals shall only be allowed after they have been successful in competing for an advertised post and there is record of no South African citizen or permanent resident was available and found suitable to fill the particular post. The National Minister of Health may prescribe how posts would be advertised to ensure consistent practices in the health sector.

...

7. Only fixed term employment contracts shall be issued to Foreign Health Professionals. An employment contract shall not exceed a term of three years from the date of employment and may not be extended unless otherwise determined by a specific government-to-government agreement. A Foreign Health Professional who is not employed under government-to-government agreement, shall not be allowed to enter into a new employment contract during the currency of the initial contract. Should a health employer wish to renew an employment contract during or after the initial contract of three years, the conditions contained in paragraph 5 above shall be applicable.

...

14. At no stage, the recruitment and employment of Foreign Health Professionals shall compromise employment opportunities available to South African citizens and permanent residents. Healthcare employers shall present a recruitment and employment plan containing quotas for the employment of Foreign Health Professionals for consideration by the National Minister of Health and reporting to the National Health

Council. The National Minister of Health may issue further directives to health employers regarding quotas for the employment of Foreign Health Professionals.’

[35] In summary, it is apparent from the Act and the policies referred to hereinabove that: the Act precludes the permanent appointment of persons who are not South African citizens or permanent residents. The policies on the other hand, allow (subject to the conditions stipulated therein) for the recruitment and employment of foreign health professionals for a fixed term not exceeding three years provided that they are in possession of a valid work permit, or refugee’s permit or treaty permit.

[36] The respondents adopt the position that because the contracts were unlawfully concluded for breach of section 10(1)(a) of the Act, it is inconsequential whether or not the district manager was cloaked with the authority to enter into the contracts even though she maintains that she did not have the authority to conclude the contracts with foreigners.

[37] The applicants’ argument against the respondent’s defence of unlawfulness proceeds from the premise that the Act is to be interpreted in the context of an employment relationship. From this perspective they argue that there is no provision in the Act to the effect that a permanent contract of employment shall be void if concluded with someone who is not a South African citizen or permanent resident.

[38] Relying on *dicta* from decided cases⁴, the applicants argue that the capricious effects of the alleged invalidity of their contracts are not consistent with the intention of the legislature to render a prohibited act invalid; hence the purpose of the legislation must be considered taking into account the provision

⁴ *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274, and *Pottie v Kotze* 1954 (3) SA 719 (A) at 727E.

for remedies for breach of the relevant provision. In this regard they place store on *Steenkamp and Others v Edcon Ltd*⁵ where it is stated (footnotes omitted):

‘[182] The approach that the use of the word “shall” in a statutory provision means that anything done contrary to such a provision is a nullity is neither rigid nor conclusive. The same can be said of the use of the word “must”. Many factors must be considered to determine whether a thing done contrary to such a provision is a nullity. There are cases where the performance of an act in breach of a statutory obligation does not necessarily result in the act being invalid and of no force and effect. When the question arises whether something that was done contrary to a statutory provision is invalid and of no force and effect, the proper approach is to ascertain what the purpose of the legislation is in this regard. Sometimes the purpose of the legislation will be to render it a nullity. At other times the purpose will not be to render such a thing a nullity. In each case the legislation will need to be construed properly to establish its purpose.

[183] Some of the factors that should be taken into account in the construction of the statute to establish its purpose are the following: the purpose of the legislation as a whole, the purpose of the relevant section of the Act, the mischief sought to be addressed, whether the statute makes provision for remedies for its breach, or whether, if the act were not held to be null and void, it would mean that the provision may be breached with impunity. Where the statute does make provision for some remedies for the breach of the relevant provision, the court would also have to take into account whether the remedies provided are adequate. Where they are adequate, there seems to be no justification for the conclusion that the purpose of the legislation is to visit an act committed in breach of the provision with nullity. It would be a different case where the remedies provided by the statute are not adequate, particularly if they are substantially inadequate or where such remedies cannot be easily obtained.’

[39] While the correctness of the above *dictum* is not doubted it is with respect inapplicable in the present context. On the facts *Steenkamp* dealt with a dismissal/retrenchment procedure that did not accord with legislative prescripts⁶

⁵ 2016 (3) SA 252 (CC).

⁶ In terms of the Labour Relations Act 66 of 1995.

and is therefore distinguishable from the present context which deals with the conclusion of employment contracts in breach of section 10(1)(a) of the Act.

[40] The applicants' argument based on the supposition that the Act is to be interpreted in the context of an employment relationship where there is a valid contract, is unsustainable. Reliance is sought on *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others*⁷. The case concerned an Argentinian national Mr Lanzetta who was dismissed by Discovery Health when his work permit expired.

[41] At the time of assuming his employment Lanzetta was already in possession of a work permit, and there is no indication on the facts of the matter that whoever represented Discovery Health when the employment contract was entered into with Lanzetta, was not authorised to do so. As the legality conditions were extant at the time of the conclusion of the employment contract the Labour Court considered that a valid contract had come into existence and Lanzetta fell within the definition of 'employee' in the Labour Relations Act.

[42] In the present case the conditions in section 10(1)(a) of the Public Service Act were not present at the time of the conclusion of the employment contracts with the applicants. The *Discovery* case is therefore distinguishable, and it does not assist the applicants to argue that contractual validity must be upheld where there has been non-compliance with the Act.

[43] The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. Gleaning from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution

⁷ [2008] ZALC 24.

and invalid. The legality principle requires that public officials must act within the ambit of the law and that they may not exercise powers that are not conferred upon them by law. That is a consequence of what section 2 of the Constitution stipulates.⁸

[44] The question therefore is: Was the condition of citizenship or permanent residency present at the time when the district manager concluded the contracts with the applicants? If it was, that is the end of the matter. If it was not, the matter may be reviewed and set aside under legality review, reactive or otherwise. An organ of state may, in resisting an unlawful claim and to prevent its continuance, file a counter-claim or counter-application seeking the review and setting aside of the impugned decision or conduct. This is what the respondents have done.

[45] In this case the conclusion of the employment contracts without either of the requisite statutory conditions being present was an exercise of public power. So too when upon conclusion of the contracts the district manager states that she was under the impression that the applicants' appointments were ordinary appointments and that she did not notice that they were foreigners. She thus failed to apply her mind to the requirements of section 10(1)(a) of the Act and the utilisation policy. The principle of legality is thus a vehicle for reviewing the appointments, reactive or otherwise.

[46] Accepting on the material before this Court that there are sufficient indications that the applicants were neither citizens nor permanent residents of South Africa and for that reason the conclusion of their contractual appointments were unlawful, the issue of delay is a vital aspect and must be considered as well.

⁸ Section 2 of the Constitution provides that the Constitution 'is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

[47] Unlike reviews under the Promotion of Administrative Justice Act⁹ which lays down a 180-day bar within which to initiate a review, there is no such period applicable to a legality review. The review must be initiated without undue delay and the time period starts to run from the date the party seeking review became aware or reasonably ought to have become aware of the action taken.¹⁰

[48] It has long been recognised that courts have the inherent power to either overlook the delay or to refuse a review application in the face of an undue delay.¹¹ The test for assessing undue delay in launching a legality review has two components: First, it must be determined whether the delay is unreasonable or undue (this is a factual enquiry upon which a value judgment is made). Where there is no explanation for the delay (as in this instance) the court is inhibited from making this factual enquiry and the delay is undue. Second, if the delay is unreasonable, the question is whether the court's discretion should nevertheless be exercised to overlook the delay and entertain the proceedings.¹²

[49] The counter-application presenting the respondents' reactive challenge was filed on 21 June 2023 (three weeks after the applicants issued their application) and about three years after the contracts were entered into. At worst for the respondents the delay was three years because no indication is given by Ms Wagner as to when the particulars of the applicants were loaded into the system nor by whom and under what circumstances was it discovered (at first opportunity) that the contracts were for a fixed term. This lack of disclosure should not be countenanced for the reason that public functionaries are duty-

⁹ Act 3 of 2000.

¹⁰ *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* [2021] ZASCA 34 generally at paras 34-37 and the authorities referred to.

¹¹ *Altech Radio Holdings (Pty) Ltd & Others v Tshwane City* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 18 and footnotes thereto.

¹² *Khumalo and Another v MEC for Education KwaZulu-Natal* 2014 (5) SA 579 (CC) paras 49-51; *Altech Radio Holdings supra* para 19.

bound to diligently investigate and rectify without delay irregularities brought to their attention.

[50] In *Gijima*¹³ the Constitutional Court considered the rule against delay in bringing review applications with reference to *Tasima*¹⁴ and *Kirland*¹⁵ and found that even in the instance of a reactive challenge due process must be followed by an organ of state as there is no reason to exempt the latter. At paragraph [50] the court confirmed the correctness of the following *dictum* by Cameron J in *Kirland*:

‘[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.’

[51] In that regard it bears mentioning that organs of state have constitutional obligations which must be performed diligently and without delay. The respondents did not launch review proceedings without delay (i.e. at first opportunity). Had that been done it would have been obligatory to have disclosed the reasons for the decision to appoint the applicants, to issue letters of appointment and conclude contracts with them.

[52] In short, all relevant aspects pertaining to the history of the matter would have had to be disclosed and the role players involved (including the persons mentioned in the affidavit by the district manager) would have had to be identified and their involvement explained.

¹³ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) paras 43-50.

¹⁴ *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).

¹⁵ *MEC for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC).

[53] All the facts have not been placed before this Court.

[54] Gauging from Ms Wagner's affidavit (much of which is hearsay) my sense is that the alteration of the first page of the applicants' letters of appointment at the time of loading the system amounts to administrative self-help. The respondents disregarded recourse to the correct legal process¹⁶ and sat idly for several years. This is utterly reprehensible and evokes a sense of indignation.

[55] In the absence of a reasonable and satisfactory explanation, and where it is found that there is no basis for overlooking an unreasonable delay as in the present case, a court is nevertheless compelled to declare the conduct of a public official or organ of state unlawful for the reason that our constitutional democracy enjoins organs of state and public officials to conduct themselves and exercise powers sanctioned by law.¹⁷

[56] That is the rationale of the rule of law.

[57] The nature of the illegality is a crucial factor in determining the relief to be granted when a court is faced with a delayed review. So too in the case of a reactive challenge. Therefore, as part of assessing the delay, this Court may consider the issue of the lawfulness of the employment contracts under the principle of legality.¹⁸

Estoppel

[58] The contention advanced by the applicants is that the respondents induced them to believe that the contracts of employment were valid, and therefore to act to their prejudice by entering into them.

¹⁶ *MEC for Health Eastern Cape and Another v Kirland Investments supra* para 50.

¹⁷ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited supra* para 52.

¹⁸ *Buffalo City Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15 para 58.

[59] Quoting directly from their heads of argument, this is what the respondents weigh-in:

‘There has been no evidence to suggest that the applicants acted to their prejudice as a result of the letters of appointment that were issued to them by the district manager... Buying cars, taking children to school, family rentals, medical expenses, insurance policies, debit and stop orders, support of wife and children, monthly financial obligations – these are all matters that are incidental to anyone. They cannot be used as a basis for estoppel. These are generic undertakings by anyone who has such responsibility. If they were usable for founding estoppel, all employees would be estopped from terminating employment contracts of employees. These are outflows of employment. When an employee is unemployed and therefore struggles to satisfy these needs, that is an unfortunate outflow of unemployment, but they are no grounds for estoppel.’

[60] In addition, the respondents argue that the applicants knew or ought to have known that they were employed on a fixed term basis. Their contracts incorporate reference to the Act including departmental policies and procedures. The applicants are by no means unsophisticated individuals – they were not entitled to shut their eyes as to what is stated in their contracts or to downplay their own culpability in the process as they now do. They ought to have familiarised themselves with the ‘rules of the game’.

[61] Ms Wagner’s affidavit (tacitly) supports this.

[62] Her affidavit includes as annexures a series of printouts entitled ‘enquiry leave credits’. These items indicate the date of the applicants’ engagement as well as their contract termination date which is 30 June 2023.

[63] Maintaining that the printouts were provided to the applicants whenever they made enquiries about their accrued leave credits, the respondents argue that the applicants must have known that they were employed on a fixed term basis.

The applicants pointedly declined to join issue contending rather that any allegation in Ms Wagner's affidavit that is not specifically traversed should be taken to be denied. The provision for vacation leave contained in their contracts requires that the granting of leave is subject to prior approval and authorisation, and that unused vacation leave for any year lapses at the end of June the following year.

[64] It is unthinkable that the applicants would not have made enquiries about unused leave and that they would not have had access to the printouts.

[65] Their denial is untenable and far-fetched and rejected merely on the papers.

[66] Even if I am mistaken in the above conclusion, there is a more insistent reason why estoppel is inoperable. The applicants seek to portray innocence by contending that they were misled into believing that the employment contracts were of a permanent nature.

[67] It is not disputed that their appointments were in terms of the Act.

[68] In that regard, the situation between the immediate parties is this: The applicants did not meet either one of the qualifications stipulated in the Act nor did the district manager have the authority to enter into and conclude the contracts with them as foreigners. For this reason, even if it is assumed that the necessary factual requirements for estoppel to operate were properly raised in their papers, it is doubtful if this is a case in which estoppel can be allowed to operate.

[69] It is settled law that a state of affairs prohibited by law cannot in the public interest be perpetuated by reliance upon the doctrine of estoppel¹⁹.

¹⁹ *Provincial Government of the Eastern Cape v Contractprops* 25 [2001] 4 All SA 273 (A) at 278b.

Conclusion and costs

[70] The letters of appointment issued to the applicants and the employment contracts concluded with them are unlawful. The order below accordingly speaks to the counter-application and the relief sought by the respondents.

[71] Reserved costs were attendant on the court order of 23 June 2023. The order was not taken by agreement and in submission the applicants contended that they were substantially successful in being accorded interim relief. The award of costs proceeds from two basic principles, the first being that the award is in the discretion of the presiding judicial officer, and the second is that the successful party should, as a general rule, be awarded its costs. The applicants were successful in securing the interim relief and must accordingly be awarded their costs.

[72] As for the main application, the applicants were unsuccessful and the general rule must apply against them.

[73] Regarding the counter-application, although successful, this Court's displeasure at the respondents' conduct and lack of transparency is expressed in the costs order below. Their lack of disclosure is a circumstance that necessitates depriving them of a costs order.

[74] In the result the following order issues:

1. The main application by the applicants is dismissed with costs.
2. The applicants are awarded costs in respect of the proceedings on 23 June 2023, such costs to include those of two counsel where so employed.

3. The respondents' counter-application is upheld and it is further ordered that:

- (a) The letters of appointment issued by the district manager on 1 July 2020 were in breach of section 10(1)(a) of the Public Service Act, 1994 (Proclamation 103 of 1994) as well as the National Policy on the Utilisation of Foreign Nationals to address Human Resources and Skills Needs in the Public Service.
- (b) The District Manager acted *ultra vires* her powers in issuing the letters of appointment and same are hereby set aside as unlawful and invalid.
- (c) Each party shall pay their own costs.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: D Cooke and L Ntikinca, Instructed by T L Luzipho
Attorneys c/o Msamo Attorneys King Williams Town

For the Respondents: A Nyondo, Instructed by The State Attorney, East London

Date heard: 07 September 2023

Date delivered: 10 October 2023