THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

CASE NO: PR242/17

In the matter between:

ROGER CLIVE WILLIAM WALSH

Applicant

and

THE SUPERINTENDENT GENERAL: EASTERN CAPE

DEPARTMENT OF HEALTH **First Respondent**

THE MEC FOR HEALTH,

EASTERN CAPE PROVINCE **Second Respondent**

THE MINISTER OF HEALTH **Third Respondent**

Heard: 19 November 2018

Judgment delivered: 19 February 2019

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application for declaratory relief and judicial review, brought in terms of s 158 (1) (h), read with s 6 of the Promotion of Administrative Justice Act, 3 of 2000, and the constitutional principles of legality and rationality. Specifically, the applicant seeks to review and set aside the decision by the first respondent, taken on 20 July 2017, to transfer him from his position as CEO of the Fort England Hospital (the hospital) in Grahamstown to the position of director: forensic services, at the department's head office in Bhisho, some 140 km away. The non-consensual decision to transfer the applicant was taken in terms of s 14 (3) (b) of the Public Service Act (PSA).

[2] The applicant contends that the decision to transfer him was unlawful because the first respondent acted *ultra vires* the PSA, and that the decision to transfer him was taken without prior meaningful consultation. The applicant further contends that his transfer was a response to an unlawful demand by trade unions at the hospital calling for his removal from office, that it was not based on information that served before the first respondent and finally, that no substantively sufficient reason has been proffered as to why his transfer was in the public interest, a jurisdictional prerequisite in terms of the applicable legislation.

[3] The first and second respondents oppose the application on the grounds that the decision was both lawful and effected in accordance with a lawful process.

Factual background

[4] The material facts are not in dispute, and the chronology of material events can be drawn from the founding affidavit. The hospital is a state psychiatric hospital that provides mental health care services to the Eastern Cape and the rest of South Africa. The hospital houses some 300 patients with mental disorders, some of whom are extremely disturbed and require constant supervision. The hospital is further entrusted with statutory responsibilities to manage the country's most difficult and dangerous state patients in its national maximum-security unit.

[5] On 15 October 2012, the applicant was appointed by the first respondent's predecessor as the acting chief executive officer of the hospital. At the time of his appointment, the applicant avers that he encountered what can only be described as an endemic crisis. The situation was one of administrative chaos, rampant absenteeism, financial interactions between staff members and patients, and the like. The applicant says that the quality of clinical care being rendered at the hospital was a cause of great concern to him, to the extent that he considered that urgent leadership and intervention were required to address the situation.

[6] On 9 February 2013, the applicant assumed a permanent appointment as CEO of the hospital. Following his appointment, he implemented a comprehensive review of various policies regulating the administration and management of the hospital, in order to bring about a greater level of uniformity and predictability. The changes that were implemented were met with resistance by a few employees, notably certain shop stewards and representatives of the unions representing employees at the hospital. The applicant avers that this manifested itself in an attitude of general defiance of management authority. The unions that had at the time been granted organisational rights of the hospital were the National Education Health and Allied Workers Union (NEHAWU), the National Union of Public Service and Allied Workers Union (NUPSAW), the Democratic Nursing Association of South Africa (DENOSA) the Health and Other Services

Personnel Trade Union of South Africa (HOSPERSA) and the Public Servants Association (PSA).

[7] A little short of three months after the applicant's permanent appointment, during the week of 27 May 2013, members of NEHAWU, led by their local chairperson, a Mr. Mashalala, embarked on an unprotected strike at the hospital. Although the strike was not violent, it had a negative impact on service delivery. On 29 May 2013, the applicant addressed a letter to the NEHAWU's regional secretary and pleaded with him that union members reconsider their action and return to work. The applicant did not receive a response to this letter. However, the unprotected strike later abated, and those employees participating in the strike returned to work.

[8] On 23 January 2014, a number of nurses employed at the hospital held a general meeting where they took the view that the task of taking blood samples was not part of their job description. They resolved to cease performing this task, with immediate effect.

[9] On 13 March 2014, about 50 nurses, all members of DENOSA, embarked on an unprotected strike. During this strike, nurses abandoned their workstations and left patients unattended. On 26 March 2014, Dr. Nogela, the director of specialised services in the department, called an urgent management meeting at the hospital. At the meeting, certain staff and union representatives raised grievances concerning the applicant's management of the hospital; senior staff of the hospital expressed support for the applicant's management and leadership.

[10] On 11 November 2015, the majority of shop stewards at the hospital walked out of a monthly meeting of the hospital's institutional transformation unit, declaring that they refused to meet with or recognise the applicant as CEO. The minutes of the meeting record that the reasons for that decision were that '*Dr. Walsh is a dictator and issues are not dealt with properly. The union will submit a report to the regional office for a request to remove Dr. Walsh as they have no confidence in the CEO*'. On the same day, the applicant and the chairperson of the committee sent a letter to all the labour unions inviting organised labor to submit

any and all concerns affecting the workforce, and to direct them to the hospital management for consideration.

[11] On 19 November 2015, the applicant received a statement from ten nursing, clinical and administration managers responding to a recent petition by the unions at the hospital in which they had called for the applicant's removal or resignation. The statement recorded the managers' expression of confidence in the applicant's leadership and recorded that the disgruntlement expressed in the petition was uninformed, inflammatory and without any factual basis.

[12] On 21 January 2016, the hospital's labour relations officer advised the applicant that he had become aware that a decision had been made at a mass meeting that staff would embark on a picket, to commence on Monday, 25 January 2016. On 22 January 2016, the applicant authorised the issuing of a circular advising the unions, shop stewards and union members at the hospital that the proposed picketing was unlawful. The unions were invited to engage with the hospital's management to address any issues in order to ensure sound working relations.

[13] On 25 January 2016, staff at the hospital commenced with a picket which continued every day thereafter, initially on a peaceful basis. By 8 February 2016 the picket had become ill-disciplined, resulting in damage to property and threatening behaviour. On 9 February 2016, the applicant's path was blocked by two employees, Mashalala (the NEHAWU shop steward previously mentioned) and a Mr Mvula, a NUPSAW shop steward. At that stage, Mvula was on a final written warning for assaulting his supervisor, and had recently been accused of intimidating two female staff members and displaying aggressive behavior toward them. The applicant managed to get into his office but Mvula pushed the door open and in doing so, the applicant injured his arm. The door was repeatedly banged on and when the situation had quietened down, the applicant opened his office door to find the furniture in the corridor door moved about and dirt thrown on the floor.

[14] The applicant sought assistance from the labour relations division at head office and in particular, sought to have Mvula placed on precautionary suspension

pending the outcome of an investigation into his intimidating and aggressive behavior, his disregard for management instructions and his continued efforts to incite employees to break the department's rules and regulations. The applicant also requested assistance to put a stop to the unauthorised picketing and the continued risk to proper and optimal patient care.

[15] On 9 February 2016, the applicant sent a letter to a Mr. Hilpert, the labour relations officer, in which he recorded Mvula's unlawful conduct and stated that the unlawful behavior of the mob led by Mvula could not be tolerated as both he and other staff members were feeling nervous and concerned for their safety.

[16] On the same day, the applicant sent a memorandum to the shop stewards and union members advising them that the picket was unlawful and that any further unlawful conduct would result in disciplinary action, as well as possible criminal charges. The applicant also laid a charge of assault against Mvula.

[17] On 9 February 2016, a Dr. Nagdee, the head: clinical department addressed an email to the applicant expressing his extreme concern about the safety of staff and what he described as the indifference of the department, which had barely acknowledged the letter from the senior managers dated 19 November 2015.

[18] In view of the escalating unlawful conduct of union members at the hospital, the applicant received instructions from the department to proceed with obtaining an urgent interdict from this court. On 11 February 2016, a notice was sent to employees recording that their unlawful gatherings, picketing and criminal behaviour was severely affecting the operations at the hospital and employees were advised that should these activities continue, the department would seek an urgent interdict.

[19] There was no compliance with this notice and on the following day, an urgent application was filed in this court by the second respondent (the MEC) seeking an order, amongst other things, interdicting the union shop stewards from embarking on unlawful industrial action, interdicting them from threatening, intimidating or harassing employees and interdicting them from approaching the

hospital premises within a 100 m radius, except for the purpose of tendering their services. The applicant deposed to the founding affidavit on behalf of the second respondent. On 12 February 2016, this court granted the order.

[20] On 17 February 2016, the applicant had a meeting of the hospital management to discuss the unprotected strike action and its repercussions. It was resolved at the meeting that disciplinary action should be taken against persons who participated in the strike.

[21] On 24 February 2016, the first respondent sent a delegation to a joint meeting held between the unions and the hospital's management. During this meeting, the unions made a number of demands, including a demand for the immediate removal of the applicant from the hospital, on the grounds that he was not suitable to be the CEO. Other demands included the immediate withdrawal of the interdict, on the basis that it amounted to intimidation of the unions.

[22] After the meeting, NEHAWU, NUPSAW AND DENOSA submitted lists of allegations against the applicant of the hospital's management. The applicant responded to all of the accusations made against him by the shop stewards at the meeting on 24 February 2016, recorded that the allegations against him were without any factual basis and that the intention of the unions was not to improve patient care but to retain unlawful privileges gained under the previous management and regain control of the hospital. The applicant pleaded for decisive action from the department for the sake of the patients and the institution and reiterated that the hospital's management remain willing to listen, correct and consultant implement necessary changes as best it could with the limited resources at its disposal. The applicant's statement included a detailed refutation of every allegation made against him in the hospital's management.

[23] During March 2016, the first respondent appointed Adv. Amelia da Silva, a member of the Bar, to conduct an independent investigation into the hospital's leadership and systems, and the validity of the unions' complaints. The applicant submitted an affidavit to Adv. Da Silva. During the course of the investigation, the labour relations officer at the hospital received an unsigned letter on a DENOSA

letterhead recording, amongst other things, that '*we therefore [sic] going to display our dissatisfaction by forcefully removing Dr. Welsh, Mrs. Holder, Mr. Fry and the rest of the plant management team*'.

[24] On 15 July 2016, Adv. da Silva provided an executive summary of her report. The executive summary states, amongst other things, that the labour force at the hospital should be encouraged to lodge any grievances and complaints through the appropriate channels. In her opinion, the management of the hospital had enforced the various policies and applicable legislation in a strict and consistent manner, that the strict enforcement of policies and legislation by the hospital's management had caused a gradual breakdown in the relationship between management and the workforce, and that serious conflict had arisen between the management and members of the labour arising from a lack of effective communication and consultation when enforcing various policies. In view of this lack of trust, Adv. da Silva recommended the engagement of independent human resources professionals and conflict management experts to resolve the impasse.

[25] The unions refused to accept the executive summary and demanded the full report. The complete report was released on 15 July 2017. It deals in detail with the various complaints and allegations against the applicant and records, amongst other things, that no fault could be found with his management style and that the lack of communication between the management and the workforce at the hospital appeared to have originated from a time when the workforce ceased attending ITU meetings in November 2015. The report concluded further that the labour force had a right to be consulted and that there was no merit in the accusation that management had failed to consult with them in respect of any relevant issues. Ultimately, the report concluded that the lack of knowledge on the part of the labour unions on matters that they have a right to be consulted on was the major source of conflict. The report recommended that workshops be held to inform the workforce on these matters.

[26] The department's head office afforded the unions five days, from 15 July 2016, to comment on the report. What followed was not any constructive engagement of the terms of the report, rather than a repeat of the violence unlawful action by union officials and certain employees at the hospital.

[27] On 15 July 2016, at a feedback meeting on the Da Silva report, it came to the applicant's attention that the NEHAWU representative allegedly stated that he must '*leave the hospital in a bakkie they will make the hospital ungovernable'* and '*set the administration building alight*'. These threats were made in the presence of Dr. Maduna, a senior departmental official who was present at and chairing the meeting.

[28] On 18 July 2016, a group of about 15 employees under the direction of the shop stewards into the wards, offices and support units in the hospital armed with sticks and implements. They proceeded to intimidate staff to leave their workstations. Staff were threatened and told that their houses would be bent down if they did not participate in the strike. Approximately 50 employees gathered on a central sports field while the number hid away, or went on sick leave. The group of 50 employees marched to the main administration building. As a consequence of this unlawful action, some of the wards were left unattended without nurses. The remaining nursing staff just tribute it is best possible across the hospital, and junior doctors and psychologists assisted with duties. Access to the kitchen had to be obtained with the assistance of the South African Police Service and hospital psychiatrists had to prepare patient's food in the kitchen.

[29] During the course of the strike, the keys to hospital delivery vehicles were removed and access to the kitchen was blocked. This made it difficult to feed patients, leaving them hungry and potentially distraught. The provision of medication to patients was substantially delayed.

[30] The applicant wrote a letter to the first respondent on the same day recording what it happened and apprising him of the dire situation at the hospital. He advised that without proper supervision and urgent intervention by the

department to restrain the unlawful conduct of the unions, there was a real danger of violence, escapes, and re-lapsing of psychosis among the patients going unnoticed.

[31] The applicant avers that he was initially supported by the second respondent and traveled again to Port Elizabeth to seek an urgent court interdict. While consulting with the state attorney in Port Elizabeth on 18 July 2016, the applicant was told that the second respondent no longer supported obtaining the interdict against the conduct of the unions and the applicant was directed to return to Grahamstown.

[32] On the same evening, the applicant was visited at his home by Dr. Matiwane. The applicant was advised that what is going on at the hospital was 'political' and that he was being requested by the department to 'step away' from the hospital until the next meeting with unions to discuss the Da Silva report, or perhaps even longer. Dr. Matiwane indicated that given what was going on at the hospital, the applicant was going to be redeployed to Bhisho and could work from there.

[33] On 19 July 2016, 11 clinical and divisional managers of the hospital wrote directly to Dr. Nogela, Dr Matiwane and the first and second respondents. In that letter, the managers record that the Da Silva report had unambiguously exonerated the management of the hospital for failures of leadership and despite this, on 18 and 19 July 2016, union representatives and employees had engaged in an unprotected strike. The letter further recorded that the strike had resulted in widespread intimidation and the forcible removal of staff from wards and essential support services, and the cancellation of most clinical services. The letter further recorded that the strike action was placing a drastic strain on clinical services, health, hygiene, inflectional control and the safety of patients and staff alike, and that the situation was unsustainable and required urgent and decisive intervention.

[34] On the same day, the applicant received a letter from the first respondent stating that he was to stay away from the hospital and report to Bhisho for duty, '*to allow the situation to return to normal*'. The letter concluded by stating that the request

did not constitute a finding of guilt of any violation of any work requirement, nor was it in any way a form of disciplinary action.

[35] On 19 July 2016, the applicant responded to the first respondent's request and placed on the record that he would not agree to the proposed redeployment to Bhisho, on the basis at there was no valid reason for the redeployment and that no legal procedures had been followed. He stated that it would be 'grossly unreasonable' to expect any employee to report for work in a city 140 km away from where he or she lived and worked.

[36] On 25 July 2016 the applicant received a formal instruction not to report to work until 5 August 2016, and to take all further instructions from Dr Matiwane. The decision to request the applicant to move out of the hospital temporarily was recorded as having been motivated by the best interests of patients and taken as an urgent measure to ensure the safety of the applicant as the unrest in the hospital had clearly been directed at him, and to ensure that services at the hospital were not hindered and disrupted. At this point, the applicant elected to take annual leave.

[37] On 25 July 2016, the clinical managers at the hospital directed a further letter to the department's head office regarding the ongoing disturbances at the hospital and complaining about the applicant's redeployment or suspension.

[38] While the applicant was an annual leave, on 12 August 2016, members of the department met with union representatives. At the meeting, the department's head office team agreed to conduct a second internal investigation, made up of a multidisciplinary team on the basis that further investigations were required into issues that were initially raised by the unions but never probed in-depth by the Da Silva investigation.

[39] Between 11 August 2016 and the applicant's return to work on 27 August 2016, a group of four human resource practitioners from the department's head office were appointed to investigate the allegations against the applicant, with the same

terms of reference as the Da Silva investigation. The team interviewed staff over a two-week period and also interviewed the hospital management.

[40] On the evening before the applicant was scheduled to return to work, he was called to an urgent meeting in Bhisho. At the meeting, the applicant was informed about the second departmental investigation and instructed to return to Bhisho on 30 August 2016 to be interviewed by the investigation team. The applicant was also instructed to remain away from the hospital until the report was tabled in the first week of September 2016

[41] On 5 September 2016, the applicant returned to work. By 8 am, the administration block had been invaded by 12 to 15 employees playing whistles, carrying sticks and who then proceeded to kick doors down and discharge fire hydrants. These employees proceeded to the wards and units with a pulled staff from their workstations. The kitchen was blockaded, which meant that no lunch could be made for patients. The applicant called head office for support in order to obtain and the court interdict. The South African Police Services were present but did not intervene to arrest those responsible for the unlawful conduct – they maintained they were there to observe. Dr Nogela requested the applicant to leave the premises which he refused to do in the absence of a written instruction. The first respondent issued such an instruction to the effect that the applicant was to immediately vacate the hospital until the second departmental investigation report was tabled.

[42] On 21 September 2016, the applicant wrote to the second respondent requesting her to intervene in order to ensure that he was able to return to work without delay and that the recommendations of the Da Silva report be implemented.

[43] On 30 September 2016 the applicant sent an email to departmental officials recording the ongoing infringement of his rights by the lack of action against the unions and the instruction given to him to remain off the premises at the hospital.

[44] On 14 October 2016, a delegation from the department's head office, led by Dr Maduna, returned to the hospital to give feedback to the management and

unions on the findings of the departmental internal investigation. At the end of the meeting, the applicant was instructed by Maduna to leave the hospital premises until further notice and not to sign any documents. The applicant had at that stage been provided with a copy of the internal investigation report. That report stated amongst other things, that the investigation team could find no evidence of harassment, inconsistency and non-application of the leave policy, there was no evidence to substantiate the allegation that the implementation of our belief was not applied to members of management, and that allegations of poor management and negligence toward patients could not be verified. It was recommended that for the applicants and safety sake that '*the Department should consider an appropriate Leadership Development intervention and implementing an improvement plan or consider is [sic] transferring the CEO to another facility'*.

[45] Around 14 October 2016 the applicant was appointed to the provincial skills development committee. He attended a committee meeting in East London on or about 20 October 2017. The NEHAWU representative present at the meeting, a Mr Zibi, refused to allow the meeting to continue until the applicant and insisted that the applicant had been suspended by the department. This incorrect assertion was supported by the department's director: labor relations, Mr Myeki, who was also at the meeting. The applicant left the meeting after being asked to do so by the chair, Mr Ntsoane.

[46] Around 20 October 2016, the applicant was contacted by an HR specialist seconded to the department from the office of the premier. The applicant attended a meeting in East London on 26 October 2016 with Sishuba and Simon Kaye, the chief financial officer of the department. During the meeting, the applicant was advised that he was a good and competent manager, an asset to the hospital and that the department did not wish to lose his strategic contribution to the province and the provincial health care system. However, the executive management team was concerned for the applicant safety, that of the patients and its impact on service delivery. The applicant was asked to consider moving

to a suitable position in Port Elizabeth. The record of the meeting records the following:

> ‘ If the CEO was determined to return to Fort England he would be allowed to do so and supported, but with the understanding that the department is unable to guarantee his safety as there is a stand-off and the union indicated that they do not want to the CEO back at Fort England. The CEO was also asked to guarantee that services will not be disrupted and that if such disruption occurs for more than three working days, the CEO would have to be reassigned elsewhere within the department.
>
> The CEO was informed that the SG cannot tolerate the disruption of services or the constant calling of police to the hospital which furthers the instability at Fort England.

[47] The applicant informed Sishuba and Kaye that his wish was to stay in Grahamstown at Fort England, and that he had a plan of action which required labour relations training and teambuilding to ensure his successful return to the hospital. The meeting concluded with an agreement that the applicant would provide a copy of the plan, which would be shared with the executive management team.

[48] On 2 November 2016 the applicant submitted his plan, which required the department and the first respondent to place the provincial secretaries of the three unions concerned on terms to the effect that the strike action that had previously taken place was unlawful, and that they were required to commit to refrain from unlawful conduct on the applicant’s return to the hospital. In the absence of such commitment and if there was a clear risk of unlawful conduct, the department could proceed to institute legal proceedings against the unions concerned, as it had successfully done before. Further, the plan provided for a training program with management and shop stewards and a range of measures aimed at addressing the poor relationship between management and certain unions and their members.

[49] On 9 November 2016, the applicant attended a second consultation meeting with Sishuba and Kaye. Sishuba advised the applicant that to the executive management team and considered his plan and that they had agreed to offer him two options. The first was for him to transfer or relocate to the position of CEO of Elizabeth Donkin hospital in Port Elizabeth. The second was for him to relocate or transfer to the post of health economist based in Bhisho. The applicant was advised that a return to Fort England was not an option that either the executive management team or the department was willing to support.

[50] On 5 December 2016, the clinical managers at the hospital sent a letter to the national Department of Health appealing for their assistance to resolve the crisis at the hospital. The letter records that the hospital was in a state of limbo with basic administrative and managerial functions and processes halting entirely as a result of the lack of an on-site CEO, lack of head office leadership and intervention and ongoing uncertainty. The clinical managers made an urgent appeal to the national department to assist the hospital and its management in resolving the crisis

[51] On 19 December 2016, the applicant received a letter from the first respondent stating that he could not support his return to the hospital. The letter records, amongst other things, the following:

> The department has received reports and considered the recommendation of these reports. Amongst the recommendations they were clear-cut cases where no wrongdoing was found, and in these cases, no action will be taken. Similarly there were instances of alleged misconduct which on face value warrant further investigations and due processes will be followed. Rest assured that the Department will take appropriate steps in the public interest to ensure that Fort England is a stable, functioning institution that provides quality health services to the people of the Eastern Cape.
>
> <u>CEO return plan</u>
>
> The Department has considered your proposed plan to return back to Fort England. In principle, the Department is not averse to the proposals you are

> making, including aspects of the plan such as adherence to the Labour Relations Act (as amended); Basic Conditions of Employment Act; relevant collective agreements in regulating sound employer – employee relations; and enhancing employment relations and good governance of the institution. Further, an intervention for a healing process is required, and will be pursued.
>
> It is my view therefore that, implementing the totality of your return plan does not guarantee that the department would not suffer damage to personal property, injury to staff, disruption of services etc, all of which are not in the public interest

[52] In the course of February 2017, the applicant was again contacted by Sishuba who requested a response to the first respondent's letters sent in December 2016. Subsequently, a meeting was arranged on 28 February 2017 between the applicant, his legal representative and Sishuba and Kaye. In a response sent to Sishuba on for March 2017, the applicant recorded that he was not willing to 'go quietly and abdicate his responsibilities to the patients, the management team and employees of the hospital. He declined the offer is made to him to transfer or relocate from Grahamstown and recorded his dismay that the first respondent appeared to be capitulating to unlawful demands to remove him as the CEO. He called on the first respondent to reinstate him in his position, implement a contingency plan to deal with the unlawful industrial action and if necessary, appoint a team of mediators to deal with the situation.

[53] The applicant did not receive a response to his correspondence but on 29 March 2017, he was instructed to attend a meeting with Maduna and Matiwane. The applicant was handed a letter from the first respondent informing him that he had been overpaid for over four years, that he was to repay some R2 million, and that his salary would be cut by about 40% from 1 March 2017.

[54] On 20 July 2017 the applicant received a letter from the first respondent in which he was given notice of the department's intention to transfer him to the vacant post of director: forensic services, Bhisho. The letter reads as follows:

> 1. Previous correspondence/interactions between yourself, Ms N Sishuba and Mr S Kaye, have reference. As you are aware, all these were endeavors aimed at

briefing you about various investigations relating to allegations by unions/certain staff members against yourself; as well as management recommendations about the way-forward, etc.,

2. During December 2016/January 2017, the above processes also sought to respond to your letter on the general findings and conclusions by Top Management, including the recommendation that you relocate from Fort England Hospital (FEH) for reasons of both your personal safety and public interest.

3. After careful review of this matter, it is the Department's considered view that you must permanently transfer from the position of FEH's CEO to the vacant post of Director: Forensic Services, Head Office, Bhisho.

4. From the Department's point of view, every effort was made to resolve this matter as amicably as possible, and minimise prejudice to both yourself and health services. Top in the list of priorities for the Department has always been your personal safety, well-being of the patients at the hospital and public interest.

5. Lastly, please contact both Acting DDG: HR & Corporate Services and Chief Director: Hospital Services to make necessary arrangements for your transfer, including the date of effect.

[55] On 25 August 2017, the department addressed a letter to the applicant advising that following the decision to transfer him, he was to report to the office of the chief director: hospital services in Bhisho on 1 September 2017, failing which corrective measures would be taken to normalise the situation.

Grounds for review

[56] The applicant submits that the decision to transfer him from his position as CEO of Fort England hospital was taken by the first respondent, in his capacity as head of the department, that the department is the applicant's employer and an organ of state as defined in s 239 (b) of the Constitution. The application is brought in terms of s 158 (1) (h) of the LRA, which provides that this court may

review any decision taken or any act performed by the state in its capacity as employer, on such grounds that are permissible in law.

[57] The applicant's grounds for review straddle s 6 of PAJA and the constitutional principle of legality. In respect of the applicant's contention that the decision to transfer him was taken in a manner that was procedurally unfair, the applicant relies on s 6 (2) (b) (c) and (d) of PAJA.

[58] The respondents accept that decisions by organs of state are susceptible to review by this court in terms of s 158 (1) (h), but deny that the decision to transfer the applicant is unlawful or irrational, or that it was procedurally unfair.

[59] Specifically, the first respondent avers that the decision to transfer the applicant was taken in the interests of the department, the public service and the interests of the public. According to him, he specifically took into account the Da Silva report, the second investigation report, the interruption of health services at the hospital, the applicant's personal safety, and the safety of all employees and the hospital property.

[60] The applicant contends that the Da Silva report had exonerated him of the allegations and accusations made by the unions. No fault was found with the applicant's management style. Further, the second investigation report affords no basis to justify the applicant's transfer. That report mentioned the option of a transfer but recommended an alternative option, being a leadership development intervention.

[61] In so far as the safety of patients, employees and the hospital property are concerned, the applicant submits that what the first respondent failed to appreciate is that the interruption of health care services, assaults and threats to staff and damage to property were all unlawful acts perpetrated by union officials and employees at the hospital. In particular, the applicant contends that the first respondent failed to consider the terms of the order granted by this court on 12 February 2016.

[62] The respondents contend that the decision to transfer the applicant was made on the basis of all of the available information and that in particular, the decision was properly made in the public interest because the applicant was transferred for the applicant's personal safety, that of the hospital's staff and property and to ensure the uninterrupted delivery of services at the hospital..

Applicable legal principles

[63] The legal framework applicable to transfers within the public service as set out in s 14 of the PSA. The section provides as follows:

> 14. Transfers within the public service
>
> (1) Subject to subsections (2), (3) and (4), any employee of a department may be transferred-
>
> (a) within the department by its executive authority;
>
> (b) to another department by the executive authorities of the two relevant departments;
>
> (2) Such transfer shall be made in a manner and on such conditions as may be prescribed.
>
> (3) An employee may be transferred under subsection (1) only if –
>
> (a) the employee requests the transfer or consents to the transfer;
>
> (b) in the absence of such request or consent, after due consideration of any representations by the employee, the transfer is in the public interest.

[64] Section 14 (2) (a) deals with the authority to transfer. The notion of 'public interest' introduced by s 14(3) (b) is not defined. In *South African Police Union v South African Police Service & others* [2004] 5 BLLR 567 (LC). The court held that if a transfer is '*in the interests of the department concerned*' and is not influenced by any '*arbitrary attitude or actuated by bias or malice or by an ulterior or improper motive on the part of the transferring authority, it did not lie with the court to interfere*.'

[65] In *Nxele v Chief Deputy Commisisoner, Corporate Services, Department of Correctional Services & others* (2008) 29 *ILJ* 2708 (LAC), the LAC (per Zondo JP, as he then was), considered an appeal in which the validity of the transfer of a departmental official from the Western Cape to Gauteng. The court observed that s 14 (1) required the employer to establish that the public interest requires the transfer of an employee, given that the section was obviously designed to protect employees from transfers at the whim of a senior official in a government department (see paragraph 45 of the judgment). Further, the court observed that what is required by the interests of the department concerned would 'usually fall' within the ambit of what public interest requires, this is not always the case. There will be cases 'albeit probably few', where the public interest would require that an employee not to be transferred where the interests of the department would require a transfer. The court said the following, at paragraph 46:

> …The public interest will have a much broader scope of focus than what the departmental interest requires. Furthermore, the employer will not discharge the onus by its *ipse dixit* that the public interest requires a particular employee's transfer but will be required to take the Court into its confidence and substantiate that statement.

[66] To the extent that the applicant relies on PAJA, it is not entirely clear whether an applicant seeking to review a decision taken by the state is reviewable under s 158 (1) (h) on one of the grounds admitted under PAJA, if only because most employment-related decisions taken by public sector employers will inevitably not constitute administrative action. (See the comment by Davis JA in *MEC Department of Health Western Cape v Weder* (2014) 35 *ILJ* 2131 (LAC).) Few if any grievances raised by an employee of the state are likely to have direct implications or consequences for other citizens. However, there is at least one decision by this court where the court was prepared to view an employment-related decision as administrative action (and therefore susceptible to a PAJA review). In *De Villiers v Head of Department: Education Western Cape Province* (2010) 31 *ILJ* 1377 (LC), the court held that a decision taken in terms of s 14 (2) of the Employment of Educators Act could be classified as administrative action,

since it constituted the exercise of a statutory power, and further because the remedy of a referral to the CCMA or a bargaining council was not available to the aggrieved employee. In the present instance, what is at issue is the exercise of a statutory power, in circumstances where there is no remedy available to the applicant, if only because the definition of an unfair labour practice in the LRA does not extend to a transfer. This position was upheld and applied by the Labour Appeal Court in *Weder* (*supra*). For these reasons, I accept that the applicant in the present instance is entitled to rely on a ground for review established by PAJA.

[67] The primary ground for review on which the applicant relies is the principle of legality. That principle extends beyond administrative action and requires first, that a functionary act within lawfully conferred powers. (See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC)). Further, the exercise of public power should not be arbitrary or irrational. In *Pharmaceutical Manufacturers Association of SA & another: in re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC), the Constitutional Court said the following regarding the core element of legality:

> It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement.

[68] The concept of rationality was further developed to require the executive or a public functionary to exercise power for the specific purposes for which it was granted, and for no other purpose, or for an ulterior motive. The public functionary must also have taken into account all relevant material. If there is a failure to take into account relevant material, and that failure has an impact on the rationality of the entire process, then the final decision may be rendered

irrational (see *Democratic Alliance v President of the Republic of SA & others* 2013 (1) SA 248 (CC), at para 39), where Yacoob ADCJ said the following:

> If in the circumstances of a case, there is a failure to take into account relevant to material that failure would constitute part of the *means* to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invented by the irrationality of the process as a whole.

[69] It should be recalled that a review on grounds of rationality does not subject the correctness of the decision under review to scrutiny. The court is not concerned with the correctness of the decision if it passes muster as rational.

[70] Finally, the principle of legality establishes a requirement to provide reasons for the impugned decision. In *Judicial Service Commission & another v Cape Bar Council & another* 2013 (1) SA 170 (SCA), Brand JA said at para 44:

> As to rationality, I think it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision but you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defense by the decision maker: "Trust me, I have good reasons, but I am not prepared to provide them"? Exemption from giving reasons will be for almost invariably result in immunity from an irrationality challenge.

Analysis

Authority

[71] I deal first with the issue of authority and specifically, the applicant's contention that the first respondent was not empowered to transfer him. The power to appoint employees in the public service and to transfer them is a power that in terms of the PSA, resides in the 'executive authority'. In terms of s 42A (7), the executive authority may delegate, in writing, powers that are conferred on him or her.

[72] The letter of transfer was signed personally by the first respondent, on the official letterhead of his office. In his founding affidavit, the applicant contends that in

terms of s 14(1) (b) of the PSA, the decision to transfer him could only be taken by the 'executive authority' of the department. 'Executive authority' is defined in the PSA to mean, in relation to a provincial department, '*the member of the Executive Council responsible for such portfolio*'; in this instance, the second respondent. The applicant submits that to the extent that the first respondent purported to take the decision to transfer him, his decision was *ultra vires* and invalid, and that it stands to be set aside on this basis.

[73] In the answering affidavit, the respondents annex a register of delegation of powers attached to a letter dated 25 April 2017 addressed by the MEC to the head of the Department of Health, extending authority certain human resources management issues to the latter in respect of SMS members on salary levels 13 and 14. Item 12 of that delegation concerns transfers in terms of s 14 (1) of the PSA, and provides that the executive authority (the second respondent), approves the transfer of level 15 employees (excluding heads of department), and that the head of department (the first respondent) approves the transfer of employees engaged in levels 1 to 14. On this basis, the respondents contend that the power to transfer in terms of s 14 was validly delegated.

[74] In response, the applicant contends that he was engaged at level 15, and that in terms of the register, the first respondent thus enjoyed no delegated authority to effect the transfer.

[75] The memorandum to the then acting Superintendent General regarding the applicant's appointment records that the applicant was to be paid a salary on the SMS salary scale of L15 notch 2. A memorandum prepared at the time of the applicant's appointment concerned the rectification of the applicant's proposed package from what was referred to as an OSD package to an SMS package, and the means by which his previous salary could be matched. This was achieved by paying the applicant a package at level 15 but with the following qualification:

> RECOMMENDATIONS
>
> It is recommended that the appointment of Dr. Walsh is finalized as follows:

(a) Dr. Walsh's salary packages moves from the current OSD to the equivalent SMS salary scale

(b) A letter of appointment is issued confirming the above and appointing Dr Walsh on the equivalent package at job at level 14 at the second notch, which is equal to his current salary, which is R 1,092,768.

[76] It is apparent from the relevant documentation that while the applicant's salary may be reflected as one that would ordinarily attach to a member engaged at salary level 15, his substantive appointment is at level 14. It follows that in terms of the authority delegated to him, the first respondent was authorised in terms of s 14 (1) of the PSA to transfer the applicant.

Procedural grounds for review

[77] The applicant contends that the decision to transfer him was taken in a manner that was procedurally unfair, and in the absence of meaningful consultation. In particular, he contends that the meeting with Kaye and Sishuba on 26 October 2016, he was not informed that the first or second respondents were contemplating a formal transfer in terms of s 14 (1) (b) of the PSA.

[78] Procedural fairness, as Skweyiya J noted in *Joseph and others v City of Johannesburg and others* 2010 (4) SA 55 (CC), quoting Hoexter's *Administrative Law*, is concerned with giving people an opportunity to participate in the decisions that will affect them and to influence the outcome of those decisions. Participation not only acknowledges the respect for the dignity and worth of the participants but is likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy (at para 41).

[79] It is not disputed that the applicant was consulted before the first respondent decided to transfer him. The first consultation meeting was held on 26 October 2016, when the applicant was told that the first respondent was considering his transfer. The purpose of the meeting was specifically to advise him that a transfer was under consideration, and to invite his input. After the meeting, the applicant produced a plan of action to return to the hospital. That plan was considered, and

a second meeting convened with the applicant on 9 November 2016, when he was informed that his submissions had been considered and that a decision had been made to offer the options of a transfer or relocation either to the Elizabeth Donkin hospital, or to Bhisho as health economist. On 19 December 2016, the applicant was advised by the first respondent that he (the first respondent) could not support the applicant's return to the hospital. Finally, Kaye and Sishuba met with the applicant and his legal representatives on 28 February 2017 to discuss transfer options. Again, submissions were taken from the applicant and this was followed up by written submissions received from him on 4 March 2017. In the submissions, the applicant stated that he would not 'go quietly' and he requested the first respondent to support his return to the hospital. It is clear from these engagements, which took place over a protracted period, that the applicant was offered alternative employment by the first respondent, that these offers were rejected and a decision taken not to accept the applicant's return to the hospital. Again, the merits of that decision are not in issue – what matters is whether the applicant was afforded a meaningful opportunity to make representations, to participate in and influence the transfer decision before it was finally made. In my view, the evidence (on the applicant's own version) discloses that he was.

Substantive ground: Was the transfer effected in the public interest?

[80] As I have indicated, the applicant's primary contention is that the decision to transfer him was taken in pursuance of an unlawful demand, and in capitulation of the demand by the unions that the applicant be removed from the hospital. In particular, the applicant contends that the demand for his removal was in effect a demand for his summary dismissal, without the right to be heard, and in the context of a threat by the unions to make the hospital ungovernable should the demand not be met. The applicant contends that it was further unlawful for the unions and their representatives to make threats against his personal safety, to threaten the safety of patients and to threaten to damage property by burning down the hospital's administration building. Further, in a constitutional state, it is not permissible to permit persons to take the law into their own hands and

threaten violence unless their demands are met. This being so, the transfer decision was taken for reasons that are not authorised by the enabling statute (in this case, the PSA).

[81] There was some debate during argument as to the lawfulness or otherwise of the union's demand that the applicant be removed from his post. The applicant contends that the repeated demands by unions for his removal as CEO of the hospital, without there being any suggestion that he should be subjected to any form of due process prior to being removed, is an unlawful demand.

[82] The evidence discloses at least six occasions on which the unions demanded the removal of the applicant. The first was on 11 November 2015 when during a meeting with union representatives the applicant was called a dictator and the intention to remove him was recorded. Subsequently, a petition was circulated calling for the applicant's removal. At the meeting with union representatives held on 24 February 2016, the applicant's removal was again demanded on the grounds that he was 'not suitable to be CEO of this hospital'. In particular, a Mr Soxujwa from NEHAWU stated that the unions 'want Dr Walsh out.' In their submissions to the department on 26 March 2016, demands from NEHAWU, NUPSAW and DENOSA all called for the applicant's immediate removal as CEO. These demands escalated into threats of violence if the demand was not met. Correspondence form DENOSA was sent to the department's labour relations manager on 6 July 2016 stating that employees would be proceeding to 'forcibly remove' the applicant and the hospital's management team. On 15 July 2016 a NEHAWU representative stated in a meeting that the applicant must leave or they would make the hospital ungovernable and set the administration building alight.

[83] In *TSI Holdings (Pty) Ltd and others v National Union of Metalworkers of SA and others* (2006) 27 *ILJ* 1483 (LAC), the LAC held that '*the purpose of a refusal to work cannot be conduct that would constitute a violation of the right not to be dismissed unfairly provided not to be dismissed unfairly provided for in s 185 read with s 188 of the Act*'. In 2014 (3) SA 544 (CC) to submit that *National*

Union of Public Service & Allied Workers Union obo Mani v National Lotteries Board 2014 (3) SA 544 (CC) the majority of the court held that a demand that a CEO be relieved of his duties failing which employees would stop working was not necessarily unlawful; what mattered was whether the dismissal would be unfair or not. (On the facts, the majority held that there was no justification for the suggestion that the employees had demanded that the CEO be dismissed without a fair hearing.)

[84] In the present instance, none of the demands for the applicant's removal from office remotely suggest that he should be afforded the benefit of fair process prior to his removal. On the contrary, what the unions demanded was the applicant's forcible removal. Further, the unions and their members in fact resorted to violence to further this end, to the extent that this court was required to intervene. In the circumstances, the unions' demand that the applicant be removed from his position as CEO of the hospital without due process was thus unlawful.

[85] However, the lawfulness of the unions' demands is by no means conclusive. The present matter, of course, does not directly concern the conduct of the unions – it is the conduct of the respondents that has been placed in issue. It is necessary for the applicant to establish, as a matter of fact, that he was transferred on account of the unions' conduct. The applicant seeks to draw the necessary nexus between the unions' conduct and the applicant's transfer by submitting that the transfer was inextricably linked to the union's unlawful demand. Indeed, the applicant asserts that the transfer decision was nothing more than a capitulation to an unlawful demand.

[86] When the second violent strike action commenced in July 2016, the applicant was advised by Matiwane that he was being advised to 'stay away' from the hospital. The first respondent's letter on 19 July 2016 refers to the unprotected strike action and records the decision to require the applicant to move for eth hospital 'with immediate effect for the next three weeks to allow the situation to return to normal.' Similarly, the first respondent's letter dated 25 July 2016, which formally instructed the applicant not to report to the hospital with immediate

effect, was motivated by reasons that included the 'unrest in the institution is clearly directed at you. The minutes of the meeting on 26 October 2016 record that the applicant was asked to '*guarantee that services would not be disrupted and if such disruption occurs, the CEO will have to be reassigned elsewhere within the department* (own emphasis)'. The correspondence and meetings with the applicant clearly demonstrate the close link between the decision to transfer the applicant and the unions' demands that the applicant be removed as CEO.

[87] The facts disclose a relentless campaign to oust the applicant, a campaign that commenced almost as soon as the applicant assumed office. The applicant was hounded out of his position on account of the unlawful conduct of union officials and members. He has been subjected to a campaign of vilification, harassment, intimidation and assault.

[88] To the extent that the respondents have sought to hold the applicant accountable for the state of affairs at the hospital, this is rich coming from those who carry the ultimate responsibility for the management of the institution. What the two investigations into the management of the hospital revealed is that the applicant managed by the book. This was not a management style to which the unions had been accustomed, and the applicant proved to be threat to power that they previously wielded. The applicant cannot be blamed for any failure to show leadership and allowing employee relations to degenerate. He expected and was entitled to the support of the department. The evidence discloses that he received very little support, if any.

[89] However, it does not follow that because the behaviour of the unions and their officials was unlawful and that this behavior constituted a material element of the decision to transfer the applicant, the applicant's transfer is necessarily invalid. The nature of the rationality threshold empowers this court intervene if and only if the exercise of public power is arbitrary and inconsistent with the purpose for which the power was given. The exercise of the authority for transfer under s 14 of the PSA is the jurisdictional requirement of the existence of the 'public interest', and it this against this criterion that the rationality of the decision to

transfer the applicant must necessarily be assessed. As Zondo JP observed in *Nxele*, the public interest and that of an affected employee to not always coincide. The inquiry is necessarily broad, and must take into account all relevant facts and circumstances, and what inevitably will be a series of competing interests.

[90] In the *Nxele* judgment, the LAC said the following:

> [36] … The requirement that an employee or officer may be transferred "when the public interest so requires" is of the utmost importance because it qualifies or limits the power to transfer so that it cannot be exercised at the whim of some or other official or functionary when the public interest does not require it…

and

> [45] … Accordingly an employer in the public sector who decides to transfer an employee must show that the public interest requires the transfer of such employee. This is obviously aimed at protecting employees from transfers that may be decided upon at the whim of a senior official of a government department. The employer in a public service bears the onus to show that and employee's transfer is required by the public interest – and not by the individual interest of that senior official.
>
> [46] Although what is required by the interests of the government department which employs a particular employee would usually fall within the ambit of what the public interest requires, this will not always be the case. There will be cases- albeit probably a few – whether the public interest would require that the employee should not be transferred while the interests of the Department require that he be transferred. The two must not be conflated and the focus should always be on what the public interest requires. The public interest will have a much broader scope of focus than what the departmental interest requires…

[91] The first respondent avers that the decision to transfer the applicant was not arrived at easily, and that an objective assessment of all of the available material was made in arriving at the decision. This included the Da Silva report, the second investigation report, the persistent interruption of services at the hospital,

the applicant's affidavits, his personal safety the safety of employees at the hospital and the hospital property. This is not disputed by the applicant, nor is it disputed that these are relevant considerations that ought properly to be taken into account in determining the public interest.

[92] In short, the decision to transfer the applicant was motivated by a basket of factors that extended beyond the applicant's self-interest to the interests of a broad range of persons encompassing the hospital's staff and its patients, and the hospital's proprietary interests. This is not irrational. To approach the matter as the applicant would have the first respondent do would be to elevate the lawfulness or otherwise of a demand made by trade unions and their members to the sole and decisive consideration in determining whether or not the applicant's transfer is in the public interest. Put another way, the applicant's parochial interests cannot outweigh what is in the interests of the broader public good.

[93] For these reasons, the decision to transfer the applicant does not fall outside of the bounds of rationality. The transfer decision was not arbitrary or irrational, it was not actuated by bias or malice or some other ulterior motive on the part of the transferring authority. I should emphasise too that the correctness of the decision is not in issue. Although different decision-makers might have responded to the situation at the hospital differently, the decision ultimately taken to transfer the applicant was not disproportional in relation to his interests, and acknowledged the interests of the hospital's patients, members of staff and its proprietary interests. The application accordingly stands to be dismissed.

[94] Finally, it would be remiss of me not to add a few observations regarding the situation at the Fort England Hospital during the applicant's tenure as CEO. One of the fundamental purposes underlying the LRA is to advance labour peace. The Act is structured so as to provide for the peaceful resolution of disputes through the institutions of conciliation, arbitration and collective bargaining. The achievement of this purpose is not possible when those intended to benefit from the process go rogue and seek to pursue their interests and ends through unlawful means. This is particularly so when the statutory processes established

to provide for rational discussion and the resolution of differences through peaceful means are ignored in favour of an immediate resort to threats, intimidation and violence. The papers in the present matter disclose that the trade unions operating the public health care sector in the Eastern Province displayed little or no regard for the statutory purpose to which I have referred, and instead sought to advance their interests and those of their members through what can only be described as brutal acts of thuggery. I appreciate that the unions concerned are not directly parties to these proceedings, but it is not disputed in these and in prior proceedings in this court that officials and members of NEHAWU, DENOSA and NUPSAW and the PSA have engaged in acts of serious misconduct which wholly undermine the statutory purpose to which I have referred. In particular, Mr Mashalala and Mr Mvula, shop stewards of NEHAWU and NUPSAW respectively, appear to have engaged in acts of misconduct that on face of it warrant summary dismissal.

[95] The response from the department is equally concerning. Employment policy at the hospital at the relevant time appears to have been dictated by the unions. Instead of reigning in the unlawful behaviour of the unions and union officials and holding them to account for their actions (for example, by supporting the applicant in his endeavours to introduce some semblance of orderly management to the hospital), the first and second respondents, and the provincial department of health, ultimately engaged in what can only be described as appeasement and acquiescence and ultimately, craven capitulation to the unlawful demands by the unions to have the applicant removed from his post.

[96] In these circumstances, when an employer allows itself to be held hostage to a concerted campaign of violence and intimidation conducted by power-hungry union officials, the basis for any semblance of a system of industrial relations is compromised. In the resultant anarchy, for those citizens who are reliant on the services provided by the department of health, life will literally and inevitably run the risk of being reduced to the Hobbesian description of life without state

structures and controls –'solitary, poor, nasty, brutish and short.' So it was for the hospital's patients, to whom the constitutional right of access to health care is owed, and who have suffered as a consequence of the conduct of the unions and their officials and members.

Costs

[97] The court has a broad discretion in terms of s 162 to make an order for costs according to the requirements of the law and fairness. In *Zungu v Premier of KwaZulu Natal and others*, the constitutional court affirmed the rule that in labor disputes, the rule that costs or to follow the result does not ordinarily apply, but that this court's order to seek to strike a fair balance between unduly discouraging parties from approaching the court to have the disputes determined on the one hand, and on the other allied parties to refer matters to the school that taught never to have been referred. While it might generally speaking be fair to indemnify a successful litigant for the expense incurred by having to initiate or defend litigation, this court conventionally does not make costs orders against individuals who in good faith, pursue legitimately felt grievances against their employers. This case falls into this category. In my view, the interests of the law and fairness are best served by there being no order as to costs.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. S Magardie, with him Adv. S Sephton, instructed by Neville Bornman & Botha

For the first and second respondents: Adv. T Ngcukaitobi, with him Adv. Madokwe, instructed by the state attorney.