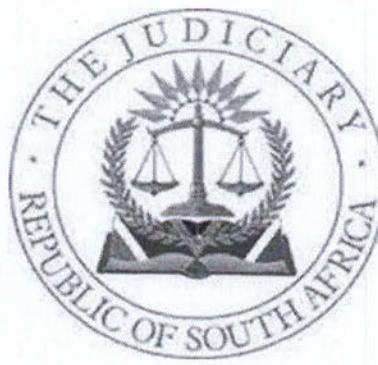




**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 3675/2023

In the matter between:

BOITSHOKO PERCIVAL DIKOKO

Applicant

and

TSWELOPELE MUNICIPALITY

1st Respondent

THE ACTING MUNICIPAL MANAGER

2nd Respondent

LEBOHANG SHADRACK MALOKASE

3rd Respondent

HEARD ON: 05 October 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 08 JANUARY 2024

- [1] On 31 July 2022, the first respondent's position of Director of Technical Services was advertised but, due to legislative amendments, was re-advertised on 29 January 2023. The applicant was one of ten persons who applied for the position and one of four candidates who made it to the shortlist. On 31 May 2023, the first respondent accepted the recommendation of the Selection Committee and appointed the third respondent, as the successful candidate, to the position of

Director of Technical Services with effect from 1 June 2023. All the unsuccessful candidates were informed of the outcome of the interviews.

- [2] The applicant, aggrieved by the outcome of the interviews, seeks an order as follows:

"(a) Ordering the First Respondent to disclose and make available to the Applicant the documentation listed in annexure " B" hereto;

(b) Setting aside the appointment of the Third Respondent as Technical Service Director of the First Respondent;

(c) Cost of the application on a punitive scale;

(d) Further and alternative relief."

- [3] The documents sought by the applicant are the following:

- 3.1. Copy of the approved 2022/2023 organizational structure/organogram;
- 3.2. List of the applicants;
- 3.3. A section 14(2) screening process report;
- 3.4. Municipal council resolution approving the selection panel and the shortlisted candidates;
- 3.5. Competency assessment results;
- 3.6. Minutes of the shortlisting meeting;
- 3.7. Minutes of the interviews, including the scoring of each candidate;
- 3.8. Recommendations of the selection panel as submitted to the municipal council;
- 3.9. Municipal council resolution approving the appointment;
- 3.10. recommendations of the executive mayor or the executive committee to the municipal council;

- 3.11. Curriculum vitae, application form together with declarations, as well as proof of qualifications of the successful candidate;
- 3.12. Any and all other documents relied upon by the successful candidate.
- [4] The applicant maintained that he was entitled to the documentation and needed the information in terms of the provisions of section 11 of the Promotion of Access to Information Act, 20 of 2000 (PAIA).¹ He needed to place this evidence before the court.² However, on being alerted to the fact that the provisions of PAIA did not allow any reliance on its provisions for accessing records in pursuit of litigation after the commencement of proceedings, the applicant stated in his replying affidavit that the question whether he acted in breach of section 7 of PAIA had become moot as the respondents had attached the requested documents to their answering affidavits, save for the third respondent's competency report and the panellists' individual scoresheets.³
- [5] As brief background, the applicant served as the first respondent's Director of Technical Services for a period of ten years before his contract came to an end. The third respondent served at the time under him as a junior officer and technician with a level T14/1 job description.⁴ The latter, according to the former, was neither qualified to be shortlisted for the interviews nor appointed to the position.⁵ The level required for middle management was level T16.⁶ The applicant contended that the third respondent's appointment was irregular and unlawful as he was not qualified for the position in which he was appointed.⁷ The applicant stated that he was convinced and had reason to believe that the appointment of the third respondent was done improperly/unlawfully and that the scoring was manipulated to favour him. He, the applicant, was advised that there was clear evidence of corruption if proven and the act of falsely representing to

¹ Paras 16 and 18 of the FA.

² Para 20 of the FA.

³ Para 2.3.

⁴ Para 9 of the FA

⁵ Para 10 of the FA.

⁶ Para 10 of the FA

⁷ Para 17 of the FA.

the mayor and the executive council that the third respondent scored the highest marks, may constitute a criminal offence of fraud.⁸

- [6] The respondent's main submissions are that the applicant's reliance on the provisions of PAIA is bad in law; that he failed to disclose a cause of action for the setting aside of the third respondent's appointment and his assertion that the third respondent misled the selection panel, is a dispute incapable of being resolved in motion proceedings. In his heads of argument, the applicant only sought an order ⁹setting aside the third respondent's appointment in terms of paragraph (b) of the notice of motion with costs on an attorney and own client scale. He contended that the third respondent failed to deal with the allegations in the founding affidavit that he did not qualify for the position advertised and that such allegations were met with a bare denial.
- [7] The respondents countered the argument that the applicant's breach of section 7 of PAIA had become moot by describing the applicant's act as cynical and untenable as the applicant still continued to assert that the competence report and the panellists' score sheets were still outstanding despite his failure to amend the notice of motion. They contended that section 7 of PAIA prohibited reliance on the statute for the purpose of requesting documents in the pursuit of criminal or civil proceedings. Furthermore, the applicant's concession that he attempted to place reliance on the provisions of the PAIA could not be sustained in law. The relief sought to compel the production of the documents must fail, it was contended.
- [8] It was contended furthermore that the applicant, despite filing a sparse founding affidavit in which it was indicated that upon receipt of the requested documents, evidence would be placed before the court to establish the third respondent's alleged unlawful appointment, the founding affidavit was never supplemented even though the requested documents were provided. The founding affidavit, as it stands, did not provide evidence upon which the court could grant final relief.

⁸ Para 20 of the FA.

⁹ 1989 (4) SA 1055 (O) at 1059.

- [9] The applicant no longer seeks the relief contained in prayer one of the notice of motion as he regards this point moot now that the documents he had requested had been provided. The only relief he seeks is the one contained in the second prayer together with costs. The applicant appears not to be interested any longer in presenting the evidence that he obtained from the documents provided by the respondents before the court. Can he now seek the setting aside of the third respondent's appointment without presenting evidence to the court or can he merely rely on the advice by third parties that fraud was committed? Surely not.
- [10] On a perusal of the founding affidavit, it is clear to me that the sole purpose of the application was to access information to be able to proceed with legal steps against the respondents; hence the applicant's attempted employment of the PAIA. This step was, however, not proceeded with even though the applicant was provided with information. Rule 6 of the Uniform Rules of Court provides that every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. A litigant must make out its case in its founding affidavit.¹⁰ It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.¹¹
- [11] It is settled law that the purpose of pleadings is to define the issues for the parties and the court. In application proceedings, the affidavits do not only constitute evidence, but they also fulfil the purpose of pleadings. They must set out the cause of action in unequivocal terms to enable the respondent to know what case to meet. This is the reason why an applicant is never permitted to change colours and plead a new cause of action in a replying affidavit.¹² The applicant has failed dismally to set out facts to justify the relief sought, namely, the setting aside of the third respondent's appointment.

¹⁰ My Vote Counts NPC v Speaker of the National Assembly and others 2016 (1) SA 132 (CC).

¹¹ Minister of Safety and Security v Slabbert [2010] 2 All SA 474 (SCA).

¹² Molusi v Voges NO 2015 3 ALL SA 131 (SCA).

- [12] The respondent correctly pointed out that the applicant failed to disclose what cause of action he relied upon. He neither relied on PAIA nor the provisions of the Promotion of Just Administrative Act (PAJA)¹³ as he failed to identify a review ground under section 6 of the latter Act. The applicant sought the granting of a final relief but his papers fell deplorably short of disclosing a cause of action.¹⁴ Relying on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,¹⁵ it was contended that the applicant had to identify both the facts upon which they based their cause of action and the legal basis of their cause of action.
- [13] In protesting that he had disclosed a cause of action,¹⁶ the applicant maintained, in his replying affidavit, that the third respondent did not have work-related experience in middle management or project management as required by the advertisement. The third respondent's appointment process was flawed and based on a false CV.¹⁷ He attached a confirmatory affidavit by the third respondent's former office manager, Alphonso van der Merwe, who stated that the third respondent had never been a project manager on any of the former employer's assignments that he was engaged in. His qualifications and experience were not sufficient to fulfil the role at that time.¹⁸
- [14] The respondents filed an application for the late delivery of a supplementary affidavit to respond to what they regarded as new matters which had been advanced for the first time in the replying affidavit. These referred to Mr Van der Merwe's confirmatory affidavit, the allegations of misrepresentations and false contents of the third respondent's CV and, having previously occupied a Tier Level T14/1, that the third respondent could never have obtained middle management experience in such a position.¹⁹ The respondents were of the view that, had the applicant particularised his case in that manner in the founding affidavit, it would have fully been addressed in the answering affidavit. The

¹³ Act 3 of 2000.

¹⁴ Paras 35-37 of the AA.

¹⁵ 2004 (4) SA 490 (CC).

¹⁶ Para 2.4 of the RA.

¹⁷ Para 9 of the RA.

¹⁸ Para 4 of annexure "PPD 4".

¹⁹ Para 10 of the Supplementary affidavit.

applicant never took umbrage at the notice of motion and supplementary affidavit except in open court where it was opposed and, in oral argument, the court was requested to dismiss it.

- [15] In the supplementary affidavit, the third respondent denied having been previously employed by the first respondent at a Tier Level 14/1. The categorisation of employees into tier levels applied only to permanent employees. He joined the first respondent in 2018 on a fixed term contract and not as a permanent employee.²⁰ The decision to convert this position to permanent status was only taken by the first respondent on 29 June 2023 after his permanent appointment on 1 June 2023.²¹ In 2018, on his appointment as PMU Technician, the first respondent had conceded that he had the requisite minimum of five years' experience in project management in a managerial position.²² Besides, project management experience at a managerial level was already a requirement when he was employed in 2018. His appointment in 2018, unlike an appointment to a similar position presently, had not been categorised under a tier level.²³ The applicant was misguided when he asserted that he was previously employed at T14/1.
- [16] The third respondent disputed Mr Van der Merwe's statements and took umbrage at the applicant's litigation style of employing ambush tactics.²⁴ According to the third respondent, the applicant appeared not to understand the requirements of the employment advertisement. The advertisement, it was alleged, made it clear that what was sought was work-related experience as a project manager and not the professional accreditation of a project manager.²⁵ During his tenure at Aurecon, the applicant was seconded to various companies such as Assmang (Pty) Limited, Bloemspuit Airforce Base Complex and Hoopstad Waste Treatment Plant to provide project management services.²⁶

²⁰ Paras 13 and 14 of the Supplementary affidavit.

²¹ Para 16 of the Supplementary affidavit.

²² Para 17 of the Supplementary Affidavit.

²³ Para 19 of the Supplementary affidavit.

²⁴ Para 22 of the Supplementary Affidavit.

²⁵ Para 24 of the Supplementary Affidavit.

²⁶ Paras 28-30 of the Supplementary Affidavit.

He is uncertain of Mr Van der Merwe's motivations as to deny such facts, but such conduct seeks to be deprecated.²⁷

[17] In his opposition in the oral argument, the applicant contended that there was no new evidence in the replying affidavit. The respondents failed to deal with paragraph 10 of his founding affidavit in their answering affidavit and his CV, despite demand, was only attached to the answering affidavit. The applicant's complaint relating to paragraphs 10 and 11 of the founding affidavit, was dealt with following the manner they were structured in the papers. I am not impressed with the manner the applicant approached the condonation application and how the additional evidence was presented in the replying affidavit. He never filed papers in opposition of the condonation application nor stated that he stood to suffer any prejudice were this application to be granted. It is crystal clear that the supplementary affidavit was necessary to enable the respondents to cure the prejudice that these matters were advanced for the first time in reply. Consequently, I grant the condonation application and admit the supplementary affidavit.

[18] In my view, the application is without merit and falls to be dismissed.

[19] In the result, the following order is made:

Order:

1. The respondents' condonation application is granted with costs.
2. The main application is dismissed with costs.



MHLAMBI, J

²⁷ Para 31 of the Supplementary Affidavit.

On behalf of the Applicant: Adv. J Lubbe SC

Instructed by: Finger Attorneys
4 Captain Proctor Street
Westdene
Bloemfontein

On behalf of the respondent: Adv. AE Ayayee

Instructed by: Rampai Attorneys
48 General Hertzog Street
Dan Pienaar
Bloemfontein