



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

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 6308/2022

In the matter between:

PULE MAHAPANE
TEBOHO MOCHECHEPA
THABISO EMMANUEL NAI
TSHEPO NOVEMBER
SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant

and

MOHOKARE LOCAL MUNICIPALITY
SPEAKER OF THE COUNCIL OF MOHOKARE
LOCAL MUNICIPALITY: MR R J THULO
MAYOR OF MOHOKARE LOCAL MUNICIPALITY:
MR ZINGESI MGAWULI
MOLATELO JOHANNES KANWENDO
PHAKAMISA DYONASE
MEC FOR THE FREE STATE DEPARTMENT OF
CO-OPERATIVE GOVERNANCE AND TRADITIONAL
AFFAIRS

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

CORAM: HEFER AJ

[1] Applicants launched an application under case number 6308/2022, *inter alia* for

reviewing and setting aside the First Respondent's decision to appoint the Fourth Respondent to the position of the Municipal Manager and declaring such appointment unlawful and/or irregular and/or *ab initio* void and/or setting aside such appointment.

[2] Subsequent to such application being launched, First to Fourth Respondents filed a notice in terms of Rule 30(1) together with Rule 30A to the effect that the Notice of Motion in the matter is deemed to be an irregular step in that:

"1. The Applicant applies, amongst others, for the review and setting aside of the First Respondent's decision to appoint the Fourth Respondent to the position of Municipal Manager.

2. If the impugned action is an administrative action, as defined in the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), the application must be made in terms of Section 6 of the PAJA.

3. The impugned action that forms the subject matter of the Applicants' review is an administrative action.

4. The application is not made in terms of Section 6 of the PAJA."

[3] After the Applicants have failed to remove the abovementioned cause of complaint within the stipulated time, the First to Fourth Respondents (herein later referred to as "**Respondents**"), launched the present application in terms of which an order is sought in terms of which the Notice of Motion, alternatively the application itself, be set aside, alternatively struck through.

[4] The Fifth Applicant, being the South African Municipal Workers Union, opposes the Rule 30 application.

Application of Rule 30:

[5] In **SA Metropolitan Levensversekeringsmaatskappy Bpk v Louw N.O.**¹, Fleming J stated the object of Rule 30(1) as follows:

"I have no doubt that rule 30(1) was intended at the procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed."

[6] "In terms of rules 18(12), 22(5) and 24(5) the pleadings referred to in these subrules are, on non-compliance with the provisions of the rule concerned, deemed to be an irregular step and the opposite party 'shall be entitled to act in accordance with rule 30'.²

¹ 1981 (4) SA 329 (O) at 333G - H

² Erasmus, Superior Court Practice, 2nd Edition, Vol. 2, p. D1-351.

[7] In **Singh v Vorkel**³, it was held that Rule 30 applies only to irregularities of form and not to matters of substance.

[8] In **SA Metropolitan Lewensversekeringsmaatskappij Bpk v Louw NO supra**, it was also held that "proof of prejudice is a prerequisite to success in an application in terms of rule 30(1)".⁴

[9] Mr *Du Preez*, appearing on behalf of the Fifth Applicant, argued that there is no requirement in law that a party is obliged to plead the legislation on which it relies.

[10] Mr *Snellenburg SC*, appearing on behalf of First to Fifth Respondents, in this regard referred me to the matter of **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs**⁵ where O'Regan J said as follows:

"Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. ... However, it must be emphasized that it is desirable (own emphasis) for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action."⁶

³ 1947 (3) SA 400 (C) at 406
⁴ At p. 333G – 334G.
⁵ 2004 (4) SA 490 (CC)
⁶ p. 507, par. [27]

[11] Of importance is that in the **Bato Star**-matter, the Constitutional Court further held that it was clear that PAJA was of application to the matter and that the matter could not be decided without reference to PAJA. To that extent, according to the Constitutional Court, neither the High Court nor the SCA considered the claims made by the Applicant in the context of PAJA, and in that regard both Courts therefore erred. The Constitutional Court further took into consideration "although the applicant did not directly rely on the provisions of PAJA in its Notice of Motion or founding affidavit, it has in its further written argument identified the provisions of PAJA upon which it now relies".⁷ On that basis the Constitutional Court proceeded to adjudicate the matter.

[12] Of importance is that the Constitutional Court used in particular the word "*desirable*" which is indicative thereof as correctly pointed out by Mr Du Preez that a party is not obligated in this regard.

[13] In further support of his argument, Mr Snellenburg SC referred me to a matter of the Bophuthatswana Supreme Court in **Deputy Minister of Tribal Authorities and Another v Kekana**⁸. This matter however cannot be used as authority for the submission that a "defect going to the root of a claim can be attacked under Rule 30" whereas these words were merely used *obiter* by Van der Merwe J where he stated as follows:

⁷ Par. [26]
⁸ 1983 (3) SA 492 (BSC)

"I can think of no reason and principle why a defect going to the root of the claim, cannot be attached under this rule".⁹

It is important to note that with regards to **Singh v Vorkel** the Learned Judge stated that the latter is no authority to the contrary. According to Van der Merwe J the Court in the **Singh**-matter specifically refrained from deciding the point and expressed the *obiter* opinion that the then Cape Rule applied only to irregularities of form and not to matters of substance. As stated, Van Heerden J's remark also amounts to no more than an *obiter* opinion.

[14] More importantly, Van der Merwe J further held as follows:

"In any event in the present proceedings applicants attack the form and not the root of the respondent's cause. Applicants claim that this cause should be in the form of motion proceedings under rule 53 and not in the form of a combined summons. To that extent applicants' claim that the combined summons is an irregular or improper proceeding in respondent's cause I am of the opinion that the applicants' submissions are correct and that they adopted the correct procedure by approaching the court in terms of rule 30."¹⁰

⁹ p. 496.
¹⁰ p. 496B – C.

[15] In **Secretary for the Interior v Scholtz**¹¹, the High Court also followed the same route in setting aside as an irregular proceeding, a summons by reason of the fact that the complaint by the Respondent was in the nature of a review and the proper procedure accordingly was by way of Notice of Motion in terms of Rule 53.

[16] Mr *Snellenburg* SC referred me to numerous authorities in support of his submission that the present review as launched by the Applicants, needs to be dealt with as a review in terms of PAJA and not a legality review as it presently stands. Mr *Du Preez* on the other hand, maintains that the decision which the Applicants seek to review does not constitute administrative action as defined by PAJA. Although Mr *Snellenburg* SC appears to be correct in his submissions in this regard, in view of my finding herein, I do not deem it necessary to make a finding in this regard.

[17] In **Mbutima and Another v Walter Sisulu University and Others**¹² in discussion the distinction between a legality review and a review in terms of PAJA, Toni AJ said as follows:

"While the above two types review appear to be conjoined twins in that they are both the cornerstone of our hallowed and time-honoured principle of the rule of law, they are in substance not."¹³ (own emphasis)

¹¹ 1970 (2) SA 633 (CPD)
¹² 2020 (4) SA 602 (ECN)
¹³ p. 612, par. [36]

[18] Both the legality review as well as a review in terms of PAJA are however in its form "*conjoined twins*". Therefore, the present attack by the First to Fourth Respondents, is in respect of the substance and not the form and can therefore not be upheld in terms of Rule 30, whereas both the Notice of Motion as well as the application itself do not constitute an irregular step.

[19] Mr *Du Preez* asked that in the event of the Rule 30 application being dismissed, a punitive cost order should be granted against the Respondents. I do, however, not consider there to be any basis for a cost order to be granted against the Respondents on a punitive basis.

ORDER:

Therefore, I make the following order:

1. The application in terms of Rule 30(1) is dismissed.
2. First to Fifth Respondents are to pay the costs of the Rule 30(1) application, jointly and severally, payment by the one to absolve the other.



J J F HEFER, AJ

Appearances on behalf of the Fifth Applicant: Adv T du Preez

Instructed by: Kramer Weihmann Incorporated
Bloemfontein

On behalf of the First to Fifth Respondents: Adv N Snellenburg SC

Instructed by: Peyper Attorneys

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