



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1537/2022

In the matter between:

SIPHO MBUYISELO TSHABALALA

APPLICANT

and

**COUNCIL OF THE MALUTI –A- PHOFUNG
LOCAL MUNICIPALITY**

FIRST RESPONDENT

**MALUTI- A- PHOFUNG
LOCAL MUNICIPALITY**

SECOND RESPONDENT

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 2 JUNE 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 19 SEPTEMBER 2022. The date and time for hand-down is deemed to be 19 SEPTEMBER 2022 at 9H00.

- [1] The applicant seeks an order that pending the finalisation of his review application instituted in this Court under case number 260/2022, the Second Respondent (the Municipality) be interdicted from permanently appointing any person, other than himself into the position of Director: Local Economic Development of the Municipality.
- [2] On 20 September 2020 the Municipality caused an advertisement to be published inviting suitably qualified individuals to apply for the position of the Director aforementioned. The incumbent for this position would account directly to the Municipal Manager as the appointment had to be done in terms of the Local Government: Municipal Systems Act, 32 of 2000.
- [3] The applicant applied for the position as advertised. The First Respondent (the Council) established a selection panel, to be chaired by the Municipal Manager, to conduct the selection process and make recommendations for the appointment of successful candidates to the Council for the said position. He, together with two other candidates were shortlisted and subsequently interviewed by the selection panel. The three candidates were required to undergo a compulsory competency test as envisaged in Regulation 16(1) of the Local Government: Regulations on the Appointment and Conditions of Employment of Senior Managers (the Regulations). The applicant duly underwent the said competency test.

- [4] Following the interview and competency test, the Executive Mayor of the Municipality submitted a report to the Municipality in which the following recommendations were made:
- i. The Council take a decision on the appointment of the applicant as a suitable candidate for the position of the Director for a period of five years;
 - ii. The Council notify the MEC for Local Government of the appointment; and
 - iii. Lastly, the Municipal Manager enters into an employment contract with the applicant subject to the current upper limits.
- [5] By 24 January 2022 the Municipality had made no appointment to the position advertised and had not furnished the applicant with the reasons for his appointment or non-appointment following the recommendation. The applicant then launched the review application seeking the following relief:
- a) Reviewing, in terms of sections 6(2)(g) and 6(3) of the Promotion of Administrative Justice Act, 3 of 2000(PAJA), the Council's failure to appoint the applicant as the Director: Local Economic Development in the Maluti-a- Phofung Local Municipality;
 - b) Directing the Council in terms of section 18(2) (a) of PAJA, to take a decision on his appointment as Director: Local Economic Development in the Maluti a Phofung Local Municipality.

[6] While the review application was pending, the Municipality re-advertised the position. This prompted this application.

[7] The purpose of an interim interdict is to preserve or restore the status quo pending the final determination of the rights of the parties. In *National Gambling Board v Premier, Kwazulu Natal and Others*¹ the Constitutional Court said the following:

“ [49] An interim interdict is by definition ‘ a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve the final determination of these rights and does not affect their final determination.’ The dispute in an application for an interim interdict is therefore not the same as that in the main application, to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements the status quo should be preserved or restored pending the decision of the main dispute. At common law , a court’s discretion to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo.”

[8] The requirements for the granting of an interim interdict are settled. In *Erikson Motors (Welkom) Ltd v Protea Motors Warrenton and Another*² the court said the following:

“ The grant of an interim- interdict pending an action is an extraordinary remedy within the discretion of the court. Where the right which it is sought to protect is not clear, the court’s approach in the matter of an interim interdict was lucidly laid

¹ 2002(2) SA 715 (CC) at 730-731.

² 1973(3) SA 685(A) at 69 at 691.

down by Innes J.A., in *Setlogelo v Setlogel*, 1914 AD 221 at page 227. In general, the requisites are:

- a) a right which; though prima facie established, is open to some doubt;
- b) a well-grounded apprehension of irreparable injury;
- c) the absence of ordinary remedy.

In exercising its discretions, the court weighs inter alia, the prejudice to the applicant, if the interdict is withheld against the prejudice to the respondent, if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the greater the need for the other factors to favour him. The court considers the affidavits as a whole and the interrelation of the foregoing considerations, according to the facts and probabilities; See *Olympic Passenger Service (Pty) Ltd v Ramlagan*; 1957 (2) SA 382 (D) of 383 D-G, viewed in that light, the reference to a right which, though prima facie established, is open to some doubt is apt, flexible and practical, and needs no further elaborations."

- [9] Four questions arise for determination in this application. First, the non-joinder of the Speaker of the Municipality. Secondly, whether the applicant has a remedy under PAJA. Thirdly, whether the non-compliance with the regulations in the recruitment process vitiates the entire process of the appointment. Fourth, whether the applicant has reasonable prospects of success in the review application.

[10] The executive and legislative authority of a municipality is vested in its Municipal Council.³ The Constitution and the Municipal Structures Act, 117 of 1998 require every Municipal Council to elect a Chairperson, to be called a Speaker. The functions of a Speaker are set out in section 37 of the Municipal Structures Act. While I take note of the functions of a Speaker it is necessary to look at the nature of a 'municipality'. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea⁴ I will not deal with its nature exhaustively except to refer to Section 2 of the Municipal Systems Act, which provides that a municipality is an organ of state within the local sphere of government.

[11] Section 2(d) of the Municipal Systems Act specifically provides that a municipality has a separate legal personality which excludes liability on the part of its community for actions of the municipality. The Systems Acts thus clothes the municipality with the authority to sue or be sued in its names. There is in my view no need to join the Speaker as a party in order to sue the municipality. Although the applicant has cited both the Council and the Municipality itself, for reasons which are not clear, I am satisfied that the municipality is properly before court and the issue of non-joinder does not arise.

[12] The respondents contend that the applicant's remedy does not lie with review in terms of PAJA. This contention is

³ Section 151 of the Constitution.

⁴ *Judicial Services Commission v Cape Bar Council* 2013(1) SA (SCA) at para 9.

premised on the view held by the respondents that the functions of a Municipal Council are excluded from the definition of ‘*administrative action*’ in PAJA. The respondents contend further that failure to appoint the applicant is a quintessential labour related issue and accordingly, so the argument goes, on the strength of *Gcaba v Minister of Safety and Security*⁵, does not amount to administrative action within the meaning of PAJA.

[13] The Court in *President of the Republic of South Africa & Others v South African Rugby Union & Others*⁶(hereinafter referred so as SARFU) held as follows:

“[141] In s33 the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute ‘administrative action’. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

[142] As we have seen, one of the constitutional responsibilities of the President and cabinet members in the national sphere (and premiers of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute ‘administrative

⁵ [2009] ZACC 26.

⁶ 2000(1) SA 1 paras 141-143.

action' within the meaning of s33. Cabinet members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of s33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute 'administrative action' as contemplated ins33, but not all acts by such members will do so.

[143] Determining whether an action should be characterised as the implementation of legislation, or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on one hand to policy matters, which are not administrative, and on the other hand to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitute administrative action for the purposes of s33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterized as administrative action for the purposes of s33. These will need to be drawn carefully in the light of the provisions of the Constitution and the general constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."

[14] PAJA simply excludes the executive powers and functions of the Municipal Council and its legislative functions. This means therefore that non-executive functions of the Municipal Council are subject to PAJA. The question is not who took the decision but whether the task itself is

administrative or not as held in SARFU. The respondents seem to espouse the view that PAJA excludes the functions of the Municipal Council in toto. In this way the view cannot be correct as illustrated by SARFU above. In *Mlokothe v Amathole District Municipality and Another*⁷ the court concluded that the appointment of a Municipal Manager was an 'administrative action'. By parity of reasoning this should apply to the appointment of the applicant as such appointment ought to take place in terms s56 of the Municipal Systems Act. I cannot see how it can be argued that the recruitment and appointment of the Director in casu can be seen as executive or legislative in nature.

- [15] Reliance on *Gcaba* (supra) is misplaced. In *Gcaba* the applicant was a station commissioner who had applied for a higher position when the police station was upgraded. He was short listed and went for an interview. He was not appointed. The applicant in that case was an employee who was aggrieved by non-appointment. Section 213 of the Labour Relations Act, 66 of 1995 provides that an employee is anyone, other than an independent contractor, who works for another person or who assists in conducting the business of an employer. The Court in *Mlokothe* (supra) held that in the case of an external candidate for employment (who like the applicant in this case, is not an employee of an entity), the LRA does not find application, as such, a person is not an employee as defined in section 213. *Gcaba* is thus distinguishable on the basis of whether the applicant can be

⁷ 2009(6) SA 354(ECD).

characterised as an employee or not. In *Gcaba* the applicant was an employee whereas in this case he is not. It thus cannot be said, as contended by the respondents that this matter is quintessentially a labour matter.

- [16] The two remaining issues will be dealt with together. The applicant contends that he has good prospects of success on the merits while the respondents contend that such prospects are non-existent in view of the alleged irregularities in the recruitment process.
- [17] It is common cause that the applicant emerged as the highest scoring candidate in the interview as well as the competency test. The applicant has a prima facie right as he seeks to assert his right to a fair administrative action. He does not seek a final interdict and thus only has to establish a right though open to some doubt.
- [18] I decline to deal with the contention that the recruitment process was vitiated by the alleged irregularities for the simple reason that the court which will be seized with the review application will be better placed to adjudicate the said issue. In my view, it appears that the respondents had condoned some acts, by way of an illustration, the Municipal Manager, as chairperson of the selection panel proceeded with the interview well being aware that the timelines for the interview process had not been complied with. In his answering affidavit he proffers no explanation why this was

done. He was obliged to furnish the Council with the report after interviews. He is silent on why this was not done. He does not play open cards with the court as the Municipal Manager of the respondents.

[19] The fact that the respondents re-advertised the position lends credence to the apprehension of the applicant that if it is filled, he will suffer irreparable harm. I am satisfied that the applicant has no other remedy and the balance of convenience favour the granting of the order. I accordingly make the following order:

ORDER

1. That pending the finalization of an application for review under this Court's case number 260/2022 the respondents are interdicted from permanently appointing and/or employing any person, other than the Applicant, into the post of Director: Local Economic Development of the Maluti-a- Phofung Municipality;
2. That the Second Respondent pay the costs of this application.



P. E. MOLITSOANE, J

On behalf of the applicant:
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