

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

Case Number: 12005/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
12 Nov 2013 DATE	 SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATBRIEF X67 JUDGE'S SECRETARY
2013 -11- 12
REGTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

MULDERSDRIFT SUSTAINABLE DEVELOPMENT

APPLICANT

and

MOGALE CITY LOCAL MUNICIPALITY

1ST RESPONDENT

KOKETSO CALVIN SEERANE

2ND RESPONDENT

DAN METLANA MASHIISHO

3RD RESPONDENT

Coram: **HUGHES J**

JUDGMENT

Delivered on: 12 November 2013

Heard on: 22 October 2013

HUGHES J

1. This is an opposed application that I encountered during the opposed motion roll on 22 October 2013.

2. The applicant seeks the order as set out below:

"1. Declaring that the Third Respondent has not been duly appointed as Municipal Manager for the Mogale City Local Municipality in accordance with the provisions of Local Government: Municipal Systems Act, 32 of 2000, as amended, for the period 1 October 2011 to 30 September 2016.

2. Declaring that the appointment of the Third Respondent as Municipal Manager for the Mogale City Local Municipality to be null and void.

3. That the costs of the application be paid by the Respondent or Respondents who oppose this application."

3. From the outset the respondents have raised a challenge as regards the applicant's *locus standi* in their answering affidavit.

This aspect, it is noted, is not challenged in the applicants replying affidavit.

4. Essentially the points raised in respect of the applicants *locus standi* are as follows:

- 4.1 the applicants bring their application before this court as a voluntary association which does not in the circumstances have any juristic or legal capacity;

- 4.2 the members of this voluntary association have not deposed to confirmatory affidavits to substantiate the resolution taken;

- 4.3 the resolution itself which gives authority to the deponent to depose to the founding affidavit is irregular, as the body, organisation or association of persons or members are without legal standing; and

- 4.4 finally, the application is not brought in terms of section 38 of the Constitution of the Republic of South Africa, nor is it brought in the interest of the public, in that the application seeks to benefit the applicant or its members.

5. For the reasons set out above the respondents argue that the applicant has failed to demonstrate the legal capacity in which it acts and its right to launch this application.

6. The facts briefly are that the Municipal Manager, the third respondent, had an initial contract of employment for a period of five years with the Mogale City Municipality, the first respondent. This initial contract came to an end on 30 September 2011. The contract of the third respondent was extended or renewed for a further five years, commencing on 1 October 2011 and ending on 30 September 2016. It is this power exercised by the Executive Mayor, the second respondent, to renew or extend the contract of the third respondent, that is in dispute.
7. On an examination of the founding affidavit the applicant cites itself as follows:

"3.

*The applicant is the **MULDERSDRIFT SUSTAINABLE DEVELOPMENT FORUM**, an unincorporated voluntary association of residents in Muldersdrift of **26 VAN ZUL STREET, STEYNSVLEI, MULDERSDRIFT**. A copy of its constitution is attached hereto as **Annexure "B"**.*

4.

It is respectfully submitted that the Applicant has the necessary:

4.2 *Legal personality in view of its nature, its constitution, its objects and activities as more fully appears form Annexure "B".*

4.3 *Locus standi to bring this application on behalf of its members who are permanent residents of the area of jurisdiction of the Mogale City Local Municipality, and in particular members of the Applicant who permanently reside and/or own immovable property in the Municipal Area"*

8. It is also prudent to set out as did the applicant in the founding affidavit the nature of the application it is pursuing:

"NATURE OF THIS APPLICATION:

9.

This is an application to declare that the Third Respondent has not been duly appointed as Municipal Manager for the Mogale City Local Municipality in accordance with the provisions of Local Government: Municipal Systems Act, 32 of 2000, as amended (the Act) and that it be declared that the appointment of the Third

Respondent as Municipal Manager for the Mogale City Local Municipality to be null and void."

9. The respondent persisted with its argument that the application of the applicant was not brought in terms of section 38 of the Constitution in that the applicant was not acting in the public interest (S38(d)). For easy reference section 38 is quoted below:

"38 Enforcement of Rights

- 1) *Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.*

The persons who may approach a court are:

- a) *anyone acting in their own interest;*
- b) *anyone acting on behalf of another person who cannot act in their own name;*
- c) *anyone acting as a member of, or in the interest of, a group or class of persons;*

d) anyone acting in the public interest; and

e) an association acting in the interest of its members."

10. The respondent submitted that, it was not sufficient if one examined section 38. The qualification being that one needs to allege that a right in the Bill of Rights has been infringed or threatened. In this instance the applicant has failed to demonstrate which right in terms of the Bill of Rights has been infringed or threatened and as such even as a group or class of persons or as a association acting in the interest of its members, the applicant has no right nor legal capacity to bring this application.
11. Counsel for the respondent developed the argument further by pointing out that as individuals the applicant members could advance that their rights in terms of chapter 2 of the Bill of Rights were being infringed or threatened, however as an association or group they cannot claim in these circumstance as each individual member has not provided confirmation in the form of a confirmatory affidavit as to what rights were being infringed or threatened of the Bill of Rights.

12. The applicant on the other hand argued that, the applicant did fall within the parameters of section 38 as it was acting "as a member of or in the interest of, a group or class of persons - (S38(c)) and it was an association acting in the interest of its members - (S38 (e))". However, the applicant set the record straight and advised that this application was not being brought in terms of section 38 but in terms of section 34 of the Constitution which reads as follows:

"34 ACCESS TO COURTS

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

13. From the rounding papers of the applicant it is evident that a declarator is sought, if one looks at the nature of the application as set out in paragraph 9 supra, it is clear that the allegation made is that the third respondent has not been appointed in accordance with the provisions of Local Government: Municipal Systems Act 32 Of 2000 ("the Act").

14. It is trite that section 38 of the Constitution empowers a court to grant a declaration of rights. This power is not explicitly conferred in respect of provisions outside the ambit of the Bill of Rights and the rest of the Constitution does not confer 'rights'. See ***Ex Parte Speaker of National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 (CC)*** at paragraph [40]

"[40] The National Party submitted that this Court should make an order declaring that the Bill is not unconstitutional, and that it does not empower the Minister to compel the provinces to implement the policy set out in clause 3 of the Bill. The Democratic Party asked for a similar order in the event of it being held that the Bill did not empower the Minister to compel the provinces to implement national policy. The only question referred to this Court is whether the Bill is unconstitutional. The provisions of s 7(4)(a) of the Constitution authorising this Court to make declarations of rights applies to infringements of chap 3 and not to the Court's jurisdiction under s 98(2)(d). The Bill is not a law; it creates no rights and cannot be made the subject of a declaration of rights. All that this Court is empowered to do is to resolve the dispute as to the constitutionality of the Bill. In the circumstances the only order that can properly be made is that the provisions of

the National Education Policy Bill submitted to this Court by the Speaker are not inconsistent with the Constitution on any of the grounds advanced on behalf of the petitioners.”

15. A declarator sought in terms of section 38 is a flexible remedy and of particular value to a constitutional democracy as it allows the courts to clarify and declare right on the hand while leaving the decision on how best to realize the rights to the other branches of the state. See **Rail Commuters Action Group v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC)** at Paragraph [106]-[108]. I set out paragraphs [106] and [107] below:

"[106] ... The first form of relief that is sought by the applicants is declaratory. Section 172(1)(a) of the Constitution states that this Court must declare "any law or conduct that is inconsistent with the Constitution"... It does not mean, however, that this Court may not make a declaratory order in circumstances where it has not found conduct to be in conflict with the Constitution. Indeed section 38 of the Constitution makes it clear that the Court may grant a declaration of rights where it would constitute appropriate relief:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

"[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values."

16. I turn to deal with the applicant's reliance on section 34 of the Constitution. The purpose of section 34 is to guarantee the right *"...that the courts and other fora which settle justiciable disputes are independent and impartial."* See **Bernstein v Bester N. O. 1996 (2) SA 751 (CC)** at [105]
17. Bearing the aforesaid in mind the threshold which must be met to access the right (access to courts) is that there must be a dispute capable of resolution by law. Once this is present the three components of section 34 of access, independence and impartiality, and fairness are triggered. See **The Bill of Rights**

Handbook Sixth Edition by **Iain Currie and Johan de Waal** at page 711.

18. As stated above the application of section 34 comes to the fore when there is a dispute that can be resolved by the application of law. From the nature of this application quoted above it is evident to me that the dispute concerned is the decision to appoint the Municipal Manager of the Mogale City Local Municipality. This decision was taken by an organ of the state, the municipality, in terms of the Constitution and or Provincial Constitution. The decision as alleged by the applicant was not in accordance with the Local Government: Municipal Systems Act 32 of 2000, thus the public power or function that was exercised in this instance was in terms of the legislations. This being the case, the action of the Municipality amounts in my view to an administrative action as defined by Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The applicable section reads:

“‘administrative action means’ any decision taken, or any failure to take a decision, by-

(a) An organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

- (ii) *exercising a public power or performing a public function in terms of any legislation; or*

19. In the **Bill of Rights Handbook Sixth Edition** at page 656 the author's set out what constitutes an administrative action under PAJA:

"In summary, an action will qualify as administrative action under the PAJA if it is:

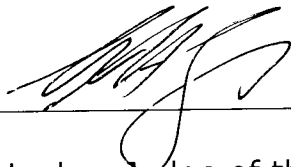
- 1. a decision*
- 2. by an organ of state (or a natural or juristic person)*
- 3. when exercising a public power or performing a public function*
- 4. in terms of any legislation (or in terms of an empowering provision)*
- 5. that adversely affects rights*
- 6. that has direct, external legal effect*

7. and, that is not specifically excluded by the list of exclusions in subparas (aa) to (ii) of the definition of administrative action."

20. Having concluded that the decision in this instance constitutes an administrative decision then it is clear that any dispute of this nature is governed by section 33 of the Constitution which provides for procedurally fair administrative action and thus there is no need or room for the application of section 34. See **Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC)** at paragraph [146] to [147].
21. In the circumstances, as the administrative function (that is the decision having been taken) is complete the recourse now available to the applicant is to approach the courts to review the administrative action and at this review stage, section 34 is then applicable or invoked. See **Koyabe v Minister of Home Affairs 2010 (4) SA 327 (CC)** at paragraph [36].
22. The applicant's reliance on section 34 of the Constitution to seek the declarator clearly amounts to the incorrect process followed in the prevailing circumstances. The correct process would have been the application of section 33 by way of review to the court to eventually invoke section 34 of the Constitution.

COSTS

23. Counsel for the respondent Adv. Mokhari SC, argued that a costs order be made in the circumstances of this case, as the applicant was not the sort of applicant, that a cost order would have a “chilling effect” against a prospective litigant, so it was held in **Biowatch Trust v Registrar, Genetic Recourses 2009 (6) SA 232 (CC)** at paragraph [21]. It was further argued that the applicant had prior to this application brought a review application under case no. 61071/2012 which application deals with the same aspects of the appointment of the third respondent as Municipal Manager. Therefore in my view this is not an instance where an adverse costs order will have the potential of chilling the applicant’s prospects of litigation. In fact a balance needs to be struck between the applicant being able to pursue legitimate claims and the impact on the defendant who successfully defends such claims to recover costs of its defence.
24. In the circumstances the following order is made:
- 24.1 The application is dismissed with costs. These costs to include the employment of senior counsel.



W. Hughes Judge of the High Court

Delivered on: 12 November 2013

Heard on: 22 October 2013

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