

**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN**

**Case number: 2613/23**

In the matter between:

**BREEDE VALLEY ONHAFHANKLIK**

Applicant

and

**SPEAKER OF THE BREEDE VALLEY MUNICIPALITY**

First Respondent

**EXECUTIVE MAYOR OF THE BREEDE VALLEY  
MUNICIPALITY**

Second Respondent

**MUNICIPAL MANAGER OF THE BREEDE VALLEY  
MUNICIPALITY**

Third Respondent

**BREEDE VALLEY MUNICIPALITY**

Fourth Respondent

**Coram:** Acting Justice A Montzinger

**Heard:** 01 August 2024

**Delivered electronically:** 01 November 2024

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**JUDGEMENT**

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**Montzinger AJ**

**Summary introduction**

1. The applicant, Breede Valley Onafhanklik ("BVO"), a political party, seeks to review and set aside the decision of the Breede Valley Municipal Council (the

“Council”), to unilaterally appoint BVO’s members, to serve on the Council’s s 80<sup>1</sup> committees.

2. Section 80 of the Structures Act provides for the establishment of committees, composed of councillors, to assist the executive mayor or executive committee of the Council in carrying out their executive functions. In this case the s 80 committees were established to assist the Council’s executive committee.

3. This matter requires me to determine whether the Council’s decision to appoint the members of BVO, who are all elected councillors, to serve on the s 80 committees is administrative or executive action. Depending on the nature of the decision it must then be subjected to scrutiny either in terms of the provisions of PAJA<sup>2</sup> or the principle of legality.

### **Chronology of events**

4. On 1 December 2021, the Council unanimously adopted resolution C114/2021, establishing various s 80 committees, each with designated chairpersons. The committees were aligned with the Breede Valley Municipality’s (the “Municipality”) directorates, covering finance, engineering, public, strategic, and community services. The resolution required each political party, represented on the Council, to nominate one councillor to serve on the various committees by 10 December 2021. BVO did not adhere to the deadline and did not nominate any of its members to serve on the s 80 committees.

5. On 22 March 2022, three months after the December 2021 deadline has passed, BVO sent a letter to the executive mayor questioning the necessity and powers of the s 80 committees. In the letter, BVO enquired whether the committees would be granted delegated executive powers. BVO’s request for certainty was motivated by two reasons. Firstly, BVO’s members had other employment in addition to their roles as councillors of the Municipality; and secondly, they wanted assurance

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<sup>1</sup> Local Government: Municipal Structures Act 117 of 1998 (the “Structures Act”)

<sup>2</sup> Promotion of Administrative Justice Act, 00 of 2000 (“PAJA”)

that their participation would be meaningful, rather than taking part in discussions that often proved irrelevant to actual decisions. The executive mayor responded the following day, confirming that the delegation of powers and duties to s 80 committees is discretionary, and that no powers had been delegated to the committees, and that there was no intention to do so in the future.

6. In the meantime, the s 80 committees were established. BVO's members did not participate, since February 2022, in the committees as confirmed in a letter to BVO dated 21 July 2022 by the Speaker of the Council. As a result, this letter informed BVO that under sections 3 and 4 of Schedule 7 to the Structures Act and the Municipality's Standing Rules of Order, BVO's members were obliged to attend the committee meetings. The letter further warned BVO and its members of potential sanctions for non-attendance, including that they could be removed from office if they were absent for three or more consecutive meetings. On 3 August 2022, the Speaker sent another letter, this time referring to the Code of Conduct for councillors, requesting BVO to participate and to nominate councillors to serve on the s 80 committees. BVO did not oblige.

7. A council meeting was scheduled for 23 August 2022. The agenda included item 9.3, with reference to resolution C114/2021 passed in December 2021. Item 9.3 recommended that the Council nominate and appoint the BVO councillors to serve on the various s 80 committees. A day before the intended council meeting, on 22 August 2022, BVO sent a letter to the Municipal Manager and the Speaker, stating that resolution C114/2021 did not authorise the Municipality to nominate councillors on behalf of BVO and requested a removal of item 9.3 from the agenda. Furthermore, BVO expressed the view that even if the Municipality had such authority, the obligation to nominate had lapsed on 10 December 2021.

8. Despite BVO's contestation, item 9.3 was tabled at the Council meeting on 23 August 2022. Resolution C100/2022 was unanimously adopted and provided that the Municipal Council nominate and appoint the BVO councillors to the various s 80 committees, which it did. The adoption of resolution C100/2022 and the appointment of BVO's members to the various committees were communicated to BVO in a letter

dated 30 August 2022. Pursuant thereto, one of BVO's members were invited to attend the s 80 committee meeting for financial services. However, on 10 October 2022 BVO rather sent a letter to the Speaker and executive mayor, confirming that its member would not attend, and that BVO intended to challenge the nomination and appointment of its councillors to the s 80 committees.

9. Fearing that its members might be expelled from the Council for failing to attend the s 80 committee meetings, BVO, as the political party and not its individual members, almost four months after its October 2022 letter, launched a review application on 14 February 2023. The basis of the review application was that the decision it sought to challenge constitute an administrative action, and as such, should be reviewed under various provisions of PAJA. Alternatively, BVO contended that the decision was arbitrary and irrational, thereby warranting a review under the principle of legality. As a remedy, BVO sought only to have the decision set aside.

10. The Municipality opposed the application on the grounds that the decision was not administrative but rather executive action. The Municipality further argued that the Council's power to appoint councillors to s 80 committees is derived from statute and justified the unilateral appointment of councillors to these committees, even if against their will, on the basis that councillors are obliged to participate in the work of the Council for the benefit of the entire citizenry.

11. In evaluating the different contentions, I will first consider whether there was an unreasonable delay in BVO launching its application. Next, I will contextualise the establishment of s 80 committees within the relevant legislative framework and where they fit into the function of a municipal council. I will then determine whether the decision in question constitutes administrative or executive action, to be able to determine which standard of review to apply. Based on my findings, I will consider the appropriate remedy, if any, and finally address the issue of costs.

### **Was there an unreasonable delay**

12. Subsection 7(1) of PAJA mandates that a review application must be instituted without unreasonable delay and not later than 180 days. BVO's review application was filed on day 175. Nearly six months elapsed between the Council's decision in August 2022 and BVO's launching of the review application in February 2023. Another 18 months elapsed before the matter was argued before me.

13. Nonetheless, despite my reservations about whether the application was launched within a reasonable time, the delay issue was not raised in the Municipality's answering papers. While I may raise the issue of delay *mero motu*, judgements, like *Camps Bay Ratepayers*<sup>3</sup>, advises caution in doing so where the respondent has not raised it. In due consideration for judicial economy, it would not serve any purpose to pronounce on the delay issue any further.

#### **Legislative framework - section 80 committees**

14. Section 80 committees, although established in terms of the Structures Act, find their foundation in ss 160(1)(c) of the Constitution that deals with the "Internal procedures" of the council of a municipality. It empowers a municipal council to elect an 'executive committee' and 'other committees', subject to national legislation.

15. In terms of s 42 of the Structures Act only certain type of municipalities may establish executive committees. One of the functions of an executive committee of a municipal council is to receive reports from the committees of the council referred to in s 80 of the Structures Act.

16. A municipal council's power to establish committees is provided for in sections 79 and 80 of the Structure Act, which is located in part 5 of chapter 4, that addresses "*Other Committees of Municipal Councils*".

17. Subsection 79(1) of the Structures Act provides as follows:

*'(1) A municipal council may—*

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<sup>3</sup> *Camps Bay Rate Payers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para 53 referring to *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) at 141H and *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 11992E-1194A

(a) *establish one or more committees necessary for the effective and efficient performance of any of its functions or the exercise of any of its powers;*

(b) *appoint the members of such a committee from among its members; and*

(c) *dissolve a committee at any time.*

(d)

18. While ss 80(1) of the Structures Act provides for the following:

**80. Committees to assist executive committee or executive mayor.—**

*(1) If a municipal council has an executive committee or executive mayor, it may appoint in terms of section 79, committees of councillors to assist the executive committee or executive mayor.*

19. When subsections 79(1) and 80(1) are read together, they grant a municipal council the power to establish committees to ensure the efficient and effective performance of its functions. Subsection 79(1) provides the general power for the council to create committees from among its councillors, while ss 80(1) provides for the power that the council may establish particular committees to assist the executive committee or the executive mayor.

20. Up to this point, there is no dispute that the Breede Valley Municipality is a type of municipality that may establish an executive committee for its Council. That being the case, there is also no dispute that the Council in this instance could establish s 80 committees. Where the parties depart is on the appointment of councillors to serve on s 80 committees. BVO asserts that neither ss 79(1) nor ss 80(1) of the Structures Act grants a municipal council the authority to unilaterally appoint councillors to the committees. On the other hand, the Municipality's position is that the power to appoint councillors to the committees expressly flows from these sections. I will henceforth return to this issue. First, it is necessary to determine what is the nature of the action of appointing councillors to s 80 committees.

**Is the decision administrative or executive action**

21. The action under scrutiny is the Council's decision on 23 August 2022 to appoint the members of BVO to the s 80 committees. BVO has attacked the decision in terms of either PAJA or the principle of legality, while the Municipality categorised the decision as purely executive action. If the Municipality's contention is correct the decision is not open to what the Constitutional Court, in *Motau*<sup>4</sup> described as 'a higher level of scrutiny in terms of PAJA<sup>5</sup>, but rather being *'subject to the less exacting constraints imposed by the principle of legality'*.

22. It is well recognised that drawing the distinction between an administrative or executive action *'is often not easily made'*. The determination needs to be made *'on a case-by-case basis; there is no ready-made panacea or solve-all formula'*<sup>6</sup>. However, although the distinction is hard to make or to recognise the distinction must be drawn as I am not at liberty to choose between the two bases for review<sup>7</sup>, even if the decision or action is reviewable under both PAJA and the principle of legality. As the court found in *Minister of Home Affairs v Public Protector*<sup>8</sup>, an applicant for judicial review does not have a choice as to the 'pathway' to review: if the impugned action is administrative action, as defined in PAJA, the application must be made in terms of s 6; if the impugned action is some other species of public power, the principle of legality will be the basis of the review<sup>9</sup>.

23. In evaluating whether a decision constitutes an administrative action the approach followed in *Grey's Marine*<sup>10</sup> have found widespread acceptance in our jurisprudence. According to *Grey's Marine*:

*"...Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of*

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<sup>4</sup> *Minister of Defence and Military Veterans v Motau and Others* (2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC ("*Motau*"))

<sup>5</sup> Par 27

<sup>6</sup> *Motau* par 36

<sup>7</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), 2006 (8) BCLR 872, Chasklason CJ paras [95], [96] and Ngcobo J paras [426]-[428]

<sup>8</sup> *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) – par 27

<sup>9</sup> *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC); [2005] ZACC 14 - paras 95-97

<sup>10</sup> *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 21. ("*Grey's Marine*")

*policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.” [footnotes omitted]*

24. I may be oversimplifying it, but in short, following *Grey’s Marine*, what will assist me is to determine whether the administrative action is in general about implementing a policy rather than creating one, and whether it involves practical routine decisions that directly affect people’s rights or obligations.

25. BVO’s founding and supplementary affidavits contained no allegations why the decision it seeks to review is administrative action. The allegation is simply made that the decision is reviewable in terms of PAJA. It was simply argued that firstly, the role and functions of s 80 committees is not closely related to policy formulation. Secondly, that a decision appointing councillors to committees in terms of the Structures Act does no more than give effect to the legislative framework as opposed to giving effect to policy. Thirdly, the proposition was advanced that the court should not focus on the source of the function but rather the nature and that since the decision to establish s 80 committees involve a discretion it points towards being a policy implementation issue and is therefore administrative in nature. Lastly, it was argued that the appointment of councillors to s 80 committees is more in the nature of the discharge of low-level bureaucratic power in the daily functions of a municipality, and for that reason, on a legal policy basis it would be appropriate to subject the exercise of that power to the more rigorous, administrative-law review standard provided for in PAJA.

26. The Municipality in its answering affidavit provided a substantial basis why it contended the decision was executive action. It provided an explanation of the roles of s 80 committees and why the decision to appoint BVO’s members to the committee constitutes executive action. It was argued on behalf of the Municipality that the decision by the Council to appoint councillors to s 80 committees does not qualify as administrative action for three main reasons. First, the decision does not involve ‘the conduct of the bureaucracy’ in routine state functions but rather pertains to the structural organisation of the Council, deriving from its powers under ss 160(1)(c) of the Constitution. Second, the s 80 committees serve as extensions of

the Council's policy-forming role, offering the executive committee advice for informed governance. Third, the power to appoint councillors to these committees is closely tied to the Council's broad, policy-formulating functions that makes it executive in nature. BVO's replying affidavit failed to engage with the allegations by the Municipality and dismissed it as legal argument.

27. Before evaluating the different arguments, I will address the contention on behalf of BVO, that while the decision to establish s 80 committees may be executive action, the decision to appoint councillors to serve on the committees is rather administrative action. The argument is not persuasive for the reason that the creation of the committees and the appointment of councillors to serve on them are joined at the hip. It must be that if the decision to establish s 80 committees is executive action, then the appointment of councillors to serve on the committees attracts the same classification. The creation of the committee involves the appointment of councillors to serve on them. There can be no committee without the councillors. There is no basis for a piecemeal approach in attempting to differentiate between a series of decisions that has to do with the same issue.

28. Returning to whether the decision is administrative or executive action. I am not persuaded that the decision which BVO seeks to review is administrative action. On the facts of this matter, there are a myriad of reasons why this is so. I identify only a few.

29. The source and nature of the power to constitute s 80 committees and appoint councillors to serve on them has an executive character to it. As mentioned earlier, the power to create committees is expressly provided for in the Constitution.<sup>11</sup> In addition, the power to appoint s 80 committees forms part of chapter 4 of the Structures Act, which sets out the executive functions of a Municipal Mayor and Council.

30. The Structures Act further envisaged the establishment of the committees to assist the executive committee in executing its tasks. The decision to appoint

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<sup>11</sup> ss 160(1)(c)

councillors to these committees does not stem from administrative or policy implementation obligations. Instead, it represents an exercise of a limited discretion and strategic allocation of resources within the Council to align with its broader executive functions rather than the daily operational duties associated with administrative action. To be clear, the discretion the Council has relates to the decision whether to create the committees in the first place. The discretion is not in the nature that lends itself to administrative action as there is no obligation that the Council have to establish s 80 committees. A council can serve an entire term without establishing the committees. This points towards a discretionary power that is circumscribed and afforded to the executive to exercise when needed. However, there is not discretion on the obligation to appoint councillors to serve on the committees.

31. Further, as the court found in *Masondo*<sup>12</sup>, although in relation to an executive committee, actions associated with the internal functioning of council structures, such as committee appointments, fall within the executive scope of authority. Applying the reasoning in *Masondo*, the appointment of a councillor to serve on s 80 committees impacts only the internal structure of the Council, rather than directly affecting the public's rights in a way that would activate the protections of PAJA.

32. Also, I agree with the Municipality contentions, that having regard to how the power to create s 80 committees is set in the legislative scheme of the Structures Act, these committees serve as adjuncts to the policy-formulating function of the municipal council. They rather seem to be aimed at assisting the executive committee in obtaining information, advice, and recommendations, which would then play an integral part to potential policy formulation and strategic decision-making. This is consistent if one has regard to it that the key duties of the executive committee are stated in ss 44(2)(a) – (d) and ss 44(3)(a) – (h) of the Structures Act, and includes assisting the Council to ensure efficient governance, service delivery, and community development.

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<sup>12</sup> *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC) (“*Masondo*”)

33. Furthermore, the action to create the committees and to appoint councillors to them had no direct external legal effect as it only had an effect on the councillors of BVO. It only required them to serve on and attend the s 80 committee meetings. In fact, the primary basis for BVO's application was because its members complained that they had other engagements in addition to being councillors and that they found the workings of the committees a waste of time. There was no suggestion on the papers that the decision had an external effect nor is there any indication that it would have. There was some suggestion during argument, that appointing BVO's members to the committees affects its constituency, but this claim is far fetch. BVO's members are not being excluded from the work of the Council, but rather included. It is inconceivable that BVO's constituency will find it offensive that its representatives are being asked to participate in the work of the Council.

34. Having regard to the nature of the action, its purpose and objective I am also not persuaded that the decision ought to be subjected to a higher threshold of scrutiny under PAJA, rather than the principle of legality. The creation and appointment of a councillor to serve on the s 80 committees is discretionary and further away from the effective discharge by a municipality of its day-to-day administrative functions. Neither BVO, or the Council has presented a case that the Municipality or the Council is defunct because of the ineffectiveness of the committees or as a result of the members of BVO's failure to participate or not. In fact, BVO in its replying affidavit spend considerable focus on making out a case how the Municipality can function without the creation of s 80 committees and also how its members can still contribute to the work of the Council without having to take part in the work of s 80 committees.

35. I am therefore not persuaded that the decision to appoint BVO's members to serve on the s 80 committees falls within the definition of administrative action in terms of PAJA. The action must therefore be scrutinised under the principle of legality.

**Does the decision contravene the principle of legality**

36. In support of its case that the Council's decision does not survive the legality standard of review, BVO's case in the supplementary affidavit is premised on two pillars. Firstly, that the decision is *ultra vires*, since resolution C114/2021 did not authorise the Council to unilaterally nominate and appoint councillors who had not been nominated by their political party. Secondly, that the decision to appoint BVO's councillors to s 80 committees against their will was not rationally connected to the purpose of the power in terms of resolution C114/2021 or any enabling legislation, as there is no requirement in s 80 that the committees must include members of all the different political parties. Furthermore, by BVO's members not being on these committees the business of the Council would not be affected.

#### The legal principles: a legality review

37. The doctrine of legality is one of the constitutional controls through which the Constitution regulates the exercise of public power<sup>13</sup>. In assessing the legality of executive action, there are generally two major considerations. The first consideration is whether the functionary that performed the action did so within the powers conferred on it<sup>14</sup> (*intra vires*) or beyond those powers (*ultra vires*). Secondly, an objective assessment whether the exercise of a power is rationally related to the purpose for which the power was given<sup>15</sup>, and is not arbitrary<sup>16</sup>. Related to rationality is a further consideration which is, whether the process followed to arrive at the decision was rational.<sup>17</sup>

38. On the issue of procedural irrationality the position is as confirmed in *Law Society*<sup>18</sup>. Procedural fairness is not a requirement that has to be assessed under

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<sup>13</sup> *ABSA Bank Ltd and related matters v Public Protector and others* [2018] 2 All SA 1 (GP) par 52

<sup>14</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 58 and *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at paras 49, 75 and 77.

<sup>15</sup> Motau par 69

<sup>16</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at n 32 at par 85.

<sup>17</sup> *Masetlha v President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007) ("*Masetlha*")

<sup>18</sup> *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) ("*Law Society*")

legality, as per the finding in *Masetlh*. However, depending on the circumstances of the case Mogoeng J in *Law Society* endorsed the approach followed in *Albutt*<sup>19</sup> and *Simelane*<sup>20</sup> that what is important is rather procedural irrationality, which is a requirement under legality. The position is therefore that procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered. While procedural irrationality is about testing whether or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power<sup>21</sup>.

### The *Ultra Vires* attack

39. This basis for review is not couched as an attack that s 80 does not empower the Council to appoint members from among itself to serve on the committees. According to BVO the decision is *ultra vires*, since resolution C114/2021 did not authorise the Council to unilaterally nominate and appoint councillors who had not been nominated by their political party. This ground of attack draws the two resolutions into focus.

40. Resolution C114/2021 recorded that in terms of ss 160(8) of the Constitution, members of a municipal Council are entitled to participate in its proceedings and those of its committees in a manner that, *inter alia*: - allows parties and interests reflected within the Council to be fairly represented; and is consistent with democracy. The resolution recommended the creation and establishment of certain s 80 committees and the appointment of certain councillors as chairpersons to the committees. On the appointment of councillors to the committees it was resolved that the executive mayor appoint the chairpersons and that:

*“...each party nominate one Councillor to serve on the above Committees and submit their names on or before 10 December 2021 at the Speakers’ office.”*

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<sup>19</sup> *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) (“*Albutt*”);

<sup>20</sup> *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) (“*Simelane*”) at paras 34-5.

<sup>21</sup> *Law Society* supra paras 61 - 65

41. I understand BVO's argument to be that having regard to resolution C114/2021 the power to 'nominate' councillors to serve on the s 80 committees was reserved for the political parties. As a result the Council could not pass the later Resolution C100/2022, in August 2022, to 'nominate' and 'appoint' councillors to serve on the s 80 committees.

42. I am not convinced of the *ultra vires* argument based on resolution C114/2021 for at least the following reasons. Firstly, s 80 clearly affords the Council the power to 'appoint' its councillors to serve on the committees and there is nothing in the wording of resolution C114/2021 to suggest that it restricted the power of the Council to continue to do so. Secondly, there is no indication in resolution C114/2021 that suggest that if the political parties do not nominate their members, that the Council is barred from making appointments in terms of s 80 of the Structures Act.

43. Thirdly, as BVO has pointed out, the power afforded to the political parties to nominate their members had lapsed on 10 December 2021. So even if there was merit in relying thereon that resolution C114/2021 restrained the Council's power, that restraint has lapsed by December 2021 and was no longer effective by August 2022, when resolution C100/2022 was passed.

44. Lastly, the nomination of councillors to serve on s 80 committees is not a precondition for 'appointment' in terms of s 80 of the Structures Act. BVO found value in this attack since Council actually provided the political parties the opportunity to recommend which members would serve on which committees. On my reading of sections 79 and 80 the Council could simply have appointed council members from amongst themselves, without a nomination process. The fact that the council incorporated a nomination process did not dilute the power it had in terms of s 80 to simply appoint its members to the committees.

45. I therefore find that the decision cannot be reviewed on the basis that it was *ultra vires* the resolutions on which BVO relied.

### The Rationality of the decision

46. BVO submits that it was highly irrational for the Council to appoint BVO councillors against their will and without party nomination. Furthermore, it was submitted on behalf of BVO that there is no requirement in s 80 that the committees must include members of all the different political parties and that the business of council would be affected, if it does not have representation by all the different political parties. Procedurally, BVO also contend that the procedure was irrational since resolution C114/2021 called for nominations and the Council ignored its own resolution and appointed Councillors against their will.

47. There are various difficulties with BVO's attack on the basis of rationality.

48. As the court has said in *Allbutt*<sup>22</sup> I should be mindful not to interfere with the means the Council selected to appoint councillors to its s 80 committees simply because I, for that matter BVO, do not agree with it or because there are other more appropriate means that could have achieved the same objective. I must determine whether the Council's chosen means are rationally connected to the intended objective.

49. What were the chosen means, and what was the intended objective? The means selected can easily be disposed of, as this is, what BVO termed the 'unilateral' appointment of its councillors. Coupled with that is the fact that there was a resolution passed rather asking the political parties to nominate, which the Council later ignored. I have already found that resolution C114/2021 on BVO's version has lapsed by August 2022. However, for purposes of this ground of attack I will approach the matter from the position that there was a resolution making provision for nomination and notwithstanding the resolution the Council still appointed BVO's members to the s 80 committees. The means was therefore: the unilateral appointment of councillors despite a resolution that afforded the political party the right to nominate which councillors it wanted to serve on the s 80 committees or not.

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<sup>22</sup> Par 51

50. The Municipality has provided a comprehensive explanation of why appointing BVO councillors to the s 80 committees was rational. As an active participant in the Council BVO did not dispute the rationale for creating s 80 committees and the roles and responsibilities of a council member. To determine if the means were justified, I must consider the purpose of s 80 committees alongside the roles and responsibilities of municipal councillors. In my view the following factors constitute the objective the Council wanted to achieve by appointing the members of BVO in the manner that it did:

50.1 Section 80 committees are established to assist the executive committee or executive mayor by providing information, advice, and support essential for informed decision-making and to ensure efficient and accountable governance.

50.2 The Constitution and Structures Act empowers a municipal council to appoint councillors to s 80 committees, even in the absence of nomination by their political party. Certainly this is to ensure that all political interests within the council are represented. Subsection 160(8) of the Constitution emphasises the principle of fair representation and requires that minority parties participate meaningfully in council processes. This inclusivity is fundamental to the democratic operation of the council and supports the Council's broader mandate of fostering participatory governance.

50.3 BVO's councillors, like all councillors, are obligated under s 53 of the Municipality's Roles and Responsibilities Manual to engage actively in council business. Their duties transcend party interests and include serving the community, which necessitates their participation in committee work.

51. Consequently, for the reasons stated in the previous paragraphs, the Council's decision aligns with and upholds the legislative framework designed to facilitate inclusive and effective municipal governance. Therefore, the means of unilateral appointment were justified and rational when considered against the unqualified power to appoint as contained in s 80 of the Structure Act.

52. Given the legislative and constitutional imperatives, the unilateral appointment of councillors to s 80 committees can be rationally justified. It ensures the proper functioning of the committees, aligns with the democratic principles of fair representation, and enforces the responsibilities that councillors have to participate in municipal governance. Allowing councillors to opt out of committee work would undermine the governance structure established by the Structures Act and subvert a council's obligation to participate in delivering efficient and inclusive municipal services.

53. With regard to procedural fairness or irrationality. I am of the view that this matter did not warrant the BVO councillors being heard before they are appointed. Section 80 does not provide for such an opportunity. Furthermore, they are councillors and ss 80(1) read with ss 79(1) allows for councillors to be appointed, and part and parcel of being a councillor is to take part in the work of council. It is therefore not clear on what basis the BVO councillors could insist on a right to be heard before they are appointed.

54. Also, as I have found, the Council's decision to unilaterally appoint BVO members to the s 80 committees must be viewed within the specific legal and contextual framework governing municipal governance and the unique role of councillors. The decision to unilaterally appoint did not make the observance of procedural fairness irrelevant. Rather, the distinguishing factor here is the special legal duty that councillors have, rooted in their roles as elected representatives responsible for serving the entire community and contributing to the effective functioning of the Council. Councillors are fundamentally obligated to participate in council and committee activities, a duty stemming from their role that demands active engagement beyond party affiliation.

55. All of the reasons mentioned are in support of my finding that the decision to unilaterally appoint BVO councillors to the s 80 committees does not amount to procedural irrationality because the chosen means are rationally connected to achieving the intended objective. The decision therefore does not offend the principle of legality and is not liable to be set aside.

## **Conclusion**

56. I therefore find that the decision which BVO sought to review is executive action and reviewable in terms of the legality standard. Applying that standard it survives scrutiny as the decision to appoint BVO councillors to the s 80 Committees was rational and the means in doing so justified the objective.

57. In respect of costs, I see no reason why it should not follow the result.

58. The application is therefore dismissed with costs, with costs of counsel on scale B as from 12 April 2024.

**A MONTZINGER**

**Acting Judge of the High Court**

### **Appearances:**

|                        |                             |
|------------------------|-----------------------------|
| Applicants' counsel:   | Adv DC Joubert SC           |
| Applicant's attorney:  | Chris Fick & Associates     |
| Respondents' counsel:  | Adv T Sarkas                |
| Respondents' Attorney: | Fairbridges Wertheim Becker |