



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: J 1021/12

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS

UNION

First Applicant

VUYISILE PATRICK NQABA

Second Applicant

and

MERAFONG CITY LOCAL MUNICIPALITY

First Respondent

NHLANHLA MABASO

Second Respondent

MEC: LOCAL GOVERNMENT: GAUTENG

Third Respondent

Heard: 29 January 2013

Delivered: 2 May 2013

Summary: The municipal council's decision to appointment a municipal manager in breach of the Municipal Systems Act is null and void susceptible to review.

JUDGMENT

LALLIE J

[1] On 30 April 2012 this court granted an order on an urgent basis the salient parts of which are the following:

“Pending the review of the First Respondent’s decision to appoint the Second Respondent as Municipal Manager;

- (i) The First Respondent is interdicted from appointing the Second Respondent as Municipal Manager;
- (ii) The Second Respondent is interdicted from assuming the position of Municipal Manager of the First Respondent;
- (iii) The First Respondent is interdicted from giving effect to its decision to appoint the Second Respondent as Municipal Manager of the First Respondent.”

[2] The review application was set down for 29 January 2013. Mr De Swart (De Swart) who represented the first respondent applied for the postponement of the hearing of the application on the basis that he was not ready to proceed as he received his mandate to represent on the afternoon of 28 January 2013. For reasons already given, the application for postponement was refused and De Swart withdrew.

[3] The applicants seek an order reviewing the decision of the First Respondent to appoint the Second Respondent (Mabaso) as its Municipal Manager and to have him declared unsuitable for the appointment as he does not meet the requirements prescribed in section 54 A(4) of the Municipal System Act 32 of 2000 (the System Act). They further seek to have the conduct of the First Respondent of appointing Mabaso declared invalid, irrational and unconstitutional. The Applicants seek to have the appointment of the Second Respondent set aside alternatively, to have the First Respondent directed to reconsider

Mabaso's appointment with due regard to the reports of the Auditor General in relation to the Sisonke Municipality for the period ending 30 June 2011. I am indebted to Adv Ngcukaitobi for his heads of argument, a generous part of which I have used in this judgment.

- [4] The basis of this review application is that the First Respondent appointed the Mabaso in breach of Section 54 A(4) (b) of the System which provides as follows :

‘If the post of municipal manager becomes vacant the municipal council must-

(a) Select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post. ‘

- [5] The Applicants submit that the second respondent council's decision to appoint Mabaso is ultra vires on two grounds each of which is sufficient to lead to the grant of their application. The first is that the appointment is in conflict with both the Constitution and the System Act. The other is that the decision is irrational. The Applicants sought to rely, inter alia, on section 151(2)(1) of the Constitution which provides amongst the objects of local government, the provision of accountable government for local communities, the provision of services and the promotion of social and economic development. Reliance is also placed on Section 153 of the Constitution which provides for the developmental duties of municipalities which include structuring and managing its administration and budgeting processes to give priority to the basic needs of the community and to promote the social and economic development of the community.

- [6] The Applicants submitted that the System Act which was passed to give effect to the local government sphere of government of which municipalities play a provotal role in section 54 A 4 (b) requires the municipal councils to appoint a suitable person who complies with the prescribed requirement. An appointment made in contravention of the System Act is declared null and void by section 54 A (3) (b) of the System Act.

- [7] The Applicants' attack on Mabaso's appointment is based on both the substantive and procedural flaws in his appointment.
- [8] The Applicant's submissions that Mabaso is not suitable to hold the position he was appointed to is based on Section 54 A(4) of the System Act which requires the municipal council to appoint a suitable person to the position of municipal manager. The applicants submitted that although 'suitable person' is not defined in the System Act, for a person to be suitable to be appointed to the position of municipal manager, that person needs to demonstrate before he or she is appointed, the ability to do the job, integrity and that he or she is appropriately qualified. The applicants expressed the view that Mabaso lacks all the three attributes and therefore unsuitable to be appointed as municipal manager.
- [9] On the procedure followed in Mabaso's appointment the Applicants submitted that the the second respondent's council (municipal council) was required to act rationally in the process of considering the appointment. The Second Respondent's failure to consider the Auditor General's findings on Sisonke from which it can be inferred that Mabaso lacked the ability to manage a municipality smaller than the second respondent, rendered the process and therefore the outcome of the appointment irrational and arbitrary. They further reflect the municipality's failure to apply its mind when making the appointment.

Substantive flaws of the appointment

- [10] The municipal council was enjoined by section 54(4)(b) of the Systems Act to appoint a suitable person to the position Mabaso was appointed to. The manner in which the municipality should have exercised the power is expressed as followed in *Kimberly Junior School and Another v Education Department Northern Cape*.¹.

'In administrative-law parlance the head of department's power to appoint under s 6(3)(f) is therefore dependent on the jurisdictional fact of a recommendation by the governing body. As was pointed out by the

¹ [2010] (1) SA 217 (SCA) at para.12.

Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (supra)* para 168 n 132, the judgment of Corbett in *South African Defence and Aid Fund and Other v Minister of Justice 1967 (1) SA 31 (C)*² remains the leading authority on jurisdictional facts in our law. In that judgment Corbett J (at 34 in fine-35C) identified two categories of jurisdictional facts that can be encountered in empowering legislation. The first category, described as 'objective jurisdictional facts', includes the type of fact or state of affairs that must exist in an objective sense before the power can validly be exercised. Here the objective existence of the fact or state of affairs is justiciable in a court of law. If the court find that objectively the fact or state of affairs did not exist, it will declare invalid the purported exercise of power.'

[11] The above approach was approved by the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa, Minister for Justice and Constitutional Development, National Director of Prosecution, Menzi Simelane*³. Mabaso's suitability to be appointed by the municipality should have existed, in an objective sense, before his appointment. In order to determine whether Mabaso was a suitable person it is important⁴ to be considered that municipalities are creatures of the Constitution. Section 151(1) of the Constitution provides that the local sphere of government consists of municipalities, which must be established for the whole territory of the Republic. One of the objects of local government provided for in section 152 of the Constitution is the provision of democratic and accountable government for local communities.

[12] The values and principles governing public administration which apply to municipalities set out in section 195 of the Constitution include:

- (a) A high standard of professional ethics must be promoted and maintained.

² [1967] (1) SA 31 (C).

³ Case CCT 122/11 [2012] ZA CC 24.

- (b) Efficient, economic and effective use of resources must be promoted.”

[13] Section 54 A (1) of the System Act empowers the municipal council to appoint a municipal manager as head of administration of the municipal council. Section 54 A (2) requires a person appointed as municipal manager to, at least, have the skills expertise, competencies and qualification as prescribed. Section 54(4)(b) requires the municipal council to select a suitable person who complies with the prescribed requirement for appointment to the post.

[14] Some of the responsibilities of a municipal manager are stated as follows in section 55 of the Systems Act :

‘55 (2)

- (a) All income and expenditure of the municipality;
- (b) All assets and the discharge of all liabilities of the municipality;
and
- (c) And proper and diligent compliance with the Municipal Finance Management Act.’

[15] It will be noted that the applicants’ argument that suitable person is not defined in the System Act is addressed in section 54 A (2) which provides for minimum requirements for appointment as a municipal manager. When these requirements are considered with the responsibilities of a municipal manager provided for in section 55 (2) of the System Act the meaning of the suitable person as envisaged in section 54 A (4) (b) becomes clear. The golden thread that runs through the qualities which a person to be appointed as municipal manager is required to possess is adequate knowledge and the ability to perform the statutory duties of a municipal manager.

[16] The Applicants submitted that Mabaso lacks the required ability in that prior to his appointment as the First Respondent’s municipal manager he was the municipal manager of Sisonke District Municipality (Sisonke) a

category C Municipality. Sisonke has 204 employees and an annual budget of about R546 million and his salary was R934 459,00. The Second Respondent is a local municipality with about 1500 employees, an annual budget of about R1.2 billion. Its municipal manager earns R1611 986,00. The fundamental difference between the two municipalities is that Sisonke co-ordinates district municipalities which fall within its area of jurisdiction but the Second Respondent deals directly with all the constitutional rights and obligations of the local government.

- [17] The Applicants sought to rely on the contents of the Auditor's General's reports of the 2009-2010 and 2010-2011 financial years on Sisonke in proving that Mabaso was not suitable to be appointed as the municipal manager of the Second Respondent. I have noted that although Mabaso was responsible for Sisonke by virtue of being the municipal manager, some of the irregularities in the reports which the Applicants sought to rely on could not be imputed to Mabaso. I will therefore consider those parts of the reports which have a direct bearing on whether at the time of his appointment, Mabaso was a suitable person with at least skills expertise, competencies and the prescribed qualifications to be the Second Respondent's municipal manager.
- [18] It is not my intention to burden this judgment with all the portions of the Auditor General's report on Sisonke which reflect the financial position as at 30 June 2010 and 30 June 2011. I will select only a few findings which will support my conclusion on the first respondent's omission to take them into account when taking its decision.
- [19] The contents of the auditor general's reports are self-explanatory. They reflect that for both financial years Mabaso failed to perform his duties in terms of section 55(2) of the Systems Act. As the Accounting Officer he neglected particularly his responsibilities for the expenditure of Sisonke. He neglected his responsibility for the assets (including money) and liabilities of Sisonke. The reports further reflect that he did not properly and diligently comply with the MFMA. It must be noted that section 55(2)(c) of the Systems Act requires strict compliance with the MFMA, any compliance less than proper and diligent is not good enough.

- [20] In the 2009-2010 financial year Sisonke had unauthorised expenditure in the amount of R9, 172 million, wasteful expenditure amounting to R1.594 million and R1.500 million for non-establishment of shared internal auditor services and R5, 725 million irregular expenditure incurred as a result of not following proper tender processes. In the 2010-2011 financial year the unauthorised expenditure was reduced to R65,1 million which was incurred as a result of exceeding the limits of the amounts provided for the votes in the approved budget.
- [21] The 2009 -2010 auditor general's report reflects that fruitless and wasteful expenditure was made in vain and could have been avoided had section 1 of the MFMA been complied with. This reflects Mabaso did not ensure compliance with the procurement policy which cost the municipality substantial amount. A number of contraventions of the MFMA is reflected in both Auditor General's reports. They include Mabaso's failure to exercise adequate oversight responsibility over compliance with MFMA. The internal audit unit function which was dysfunctional also falls within the purview of the MFMA. In both Auditor General's reports the performance of the internal audit unit is attacked. This means that the problem was recurring. In the 2009-2010 auditor general's report it is noted that Mabaso committed Sisonke to long term debt before meeting the requirements in section 46 (3) of the MFMA.
- [22] When the contents of the Auditor General's reports are considered against the constitutional right and duties of municipalities, the values, the minimum requirements for appointment as a municipal manager and his or her responsibilities and accountabilities stated in the Systems Act, the only reasonable inference that can be drawn is that Mabaso was not a suitable person to be appointed as municipal manager at the time of his appointment by the Second Respondent. The manner in which the first respondent should have exercised its power to appoint a municipal manager is clearly stated in section 54 A (1) (a) and (2) of the System Act. The applicant argued that Mabaso had an obligation to disclose the Auditor General's finding on Sisonke and provide the First Respondent with their copies as a demonstration of his integrity. They find his

attitude that the findings were in the public domain unacceptable. I do not agree with the applicants' own submissions I am not convinced that Mabaso misled the First Respondent about his performance at Sisonke. The first Respondent's failure to perform its statutory obligation of ensuring that he was a suitable person cannot be laid at his door.

- [23] The law is clear, in determining a particular provision in a statute the legislative intent needs to be determined. The golden rule requires adherence to the "plain meaning of the words" used in a statute unless this would lead to an absurdity or to a result contrary to the intention of the legislature. The plain language used in section 54A(3) declares an appointment of a municipal manager who does not have the skills, expertise, competencies and prescribed qualifications and in contravention of the Systems Act null and void. The applicants have proved that Mabaso was not a suitable person at the time of his appointment and that the municipal council appointed him contrary to the provisions of the Systems Act by not establishing his suitability before appointing him. The municipal council's omission denied Mabaso an opportunity to comment on the Auditor General's reports and possibly provide reasonable explanation which could prove that he was a suitable person to be appointed. The consequences of the omission on Mabaso do not cure the breach of the Systems Act. He retains his right to compete for the position in future. For these reasons Mabaso's appointment was in breach of the Systems Act and null and void.

Irrationality and Procedure

- [24] Another ground the applicants sought to rely on in this review application is that the First Respondent acted irrationally and in excess of its power by appointing Mabaso. Their argument is based on the First Respondent's reliance on marks allocated to Mabaso during his job interview to the exclusion of the Auditor General's reports. They argued that Mabaso's suitability is a jurisdictional fact for his appointment which should have existed before the decision to appoint him was taken. Absent its existence, the purported exercise of power may be declared

invalid. In this regard they relied on *SA Defence and AID Fund v Minister of Justice (Supra)*

- [25] Arguing that the First Respondent's failure to consider the Auditor General's reports before exercising its power to appoint rendered Mabaso's appointment reviewable, the Applicants sought to rely on *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*⁵ and *Democratic Alliance v The President of RSA and others* Lastly the Applicants sought to rely on *Democratic Alliance v The President of RSA and others (supra)*.

- [26] It is the Applicants' argument that the First Respondent failed to follow a rational process by not satisfying itself with an oral interview that Mabaso was a suitable person especially against the background of the first respondent's knowledge of the findings of the Auditor General. The applicants denied that enquiry into the Auditor General's findings would have prejudiced candidates for the position.

- [27] I agree with the applicants that the First Respondent's decision had to be based on the requirements laid down in legislation in order to serve the purpose for which a municipal manager as the administration head of the municipal council is employed for. The omission to ensure that Mabaso was a suitable person as envisaged in the System Act is fatal. The Auditor General's findings which the First Respondent was aware of, as illustrated earlier in this judgment show that Mabaso does not fulfil the requirements of a suitable person as envisaged in the System Act. A decision taken by the First Respondent with the knowledge of the Auditor's General's finding is undoubtedly irrational. The First Respondent therefore did not act rationally in the process of appointing Mabaso as it disregarded material, reliable and available information which would have placed it in a position to take a decision in terms of the statutory requirements. The First Respondent failure to apply its mind by

⁵ [1988] (3) SA 132 (A) at 152 C-D

ignoring relevant and material information rendered the process it followed in appointing Mabaso unreasonable and resulted in irrational decision. The unreasonableness rendered its decision reviewable.

Standing

[28] The applicants argued that they had the necessary *locus standi* to bring this application as the Systems Act does not reserve, for the Third Respondent only, the right to challenge the validity of a municipal manager's appointment. The applicants argued that they had the necessary *locus standi*, as well as the First Respondent. The source of the Second Respondent's being section 200 of the LRA. The applicant further relied on *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council* ⁶. A purposive interpretation of section 200 of the LRA allows the first respondent, as a trade union which has a substantial number of members employed by the first respondent to bring this application. A proper reading of the LRA reveals that the role of the trade union is wide. By way of example, section 77 of the LRA grants trade union's the right to protest action to promote or defend socio economic interest. It is in the same spirit that they should be allowed to approach this court to stop the government as an employer from acting illegally.

Jurisdiction

[29] The concise answer to the question whether this court' has jurisdiction to determine this review application is that Section 158 (1) (h) provides that this court may review any decision taken by the state in its capacity as employer. This dispute concerns the review of the first respondent's decision to employ Mabaso as its municipal manager. It therefore falls within the ambit of section 158 (1) (h) of the LRA.

[30] For these reasons this application must succeed. In the circumstances, the following order is made:

⁶ [1999] (1) SA 374 (CC) (1998 (12) BCLR 1458 (CC)) at paras. 55 and 56.

- 30.1 The First Respondent's decision appointing the Second Respondent as its Municipal Manager is null and void.
- 30.2 The First Respondent's decision appointing the Second Respondent as its Municipal Manager is reviewed and set aside.
- 30.3 At the time of his appointment, the Second Respondent was not suitable to be appointed as the Municipal Manager of the First Respondent.
- 30.4 The First Respondent pays the Applicants' costs.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Advocate Ngcukaitobi

Instructed by Cheadle Thompson and
Haysom Inc

LABOUR COURT