

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE No: HCAA4/2024

Court a quo CASE No: 9061/2022

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO

M.G PHATUDI JP

SIGNATURE

DATE

22/11/2024

In the matter between:

THE MEC FOR DEPARTMENT COOPERATIVE
GOVERNANCE, HUMAN SETTLEMENT AND
TRADITIONAL AFFAIRS, LIMPOPO PROVINCE

1ST APPELLANT

MOGALAKWENA LOCAL MUNICIPALITY

2ND APPELLANT

THE COUNCIL OF MOGALAKWENA LOCAL
MUNICIPALITY

3RD APPELLANT

MAYOR: MOGALAKWENA LOCAL MUNICIPALITY

4TH APPELLANT

CLLR N S TAUETSOALA

and

LESETJA SAMUEL SEKGOTA

RESPONDENT

Delivered : 22 November 2024. This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down of the judgment is deemed to be 22 November 2024 at 10h00.

Coram : M. G. Phatudi JP *et al.* Naude – Odendaal J, Diamond AJ.

JUDGMENT

M.G. PHATUDI JP:

INTRODUCTION:

- [1] This is an appeal against the judgment and/or order of the court *a quo* (Muller J sitting as court of first instance) handed down in this court on 12 September 2022.

The appeal is with leave of the Supreme Court of Appeal ('SCA') dated 19 January 2024 to the Full Court of this Division

- [2] The appeal arises from two substantially similar urgent applications brought in the court *a quo* which were consolidated and heard together. The Appeal is opposed by the First Respondent, **Mr. Lesetja Samuel Sekgota**, (Sekgota) who persists in opposing the appeal.

THE FACTS:

- [3] The appeal in essence conflates two consolidated urgent applications which Muller J ordered on 30 August 2022 that they be heard together. The one application was brought by Sekgota on 19 August 2022 under case No: 9061/2022, (Sekgota application) while the other application was brought by **Molahlegi Ephraim Mokoma** (Mokoma) and several community members of Mogalakwena Local Municipality, the Fourth Applicants in the court *a quo* under case No: 8944/2022 (Mokoma application).

- [4] In his application, Mokoma sought relief substantially similar to that sought by Sekgota in respect of prayers 2, 3, 9, and 10 of the notice of motion.¹ His application was, however, dismissed by Muller J.
- [5] In essence the relief sought by Sekgota, the present Respondent, was, *inter alia*, that it be declared that the selection panel consisting of the Mayor, the Ninth and Tenth Respondents *a quo*, is unlawful and invalid and, therefore, to set aside all processes undertaken by the Selection Panel (SP) in the exercise of the filling of the vacant post of a Municipal Manager('MM').
- [6] He also sought an order setting aside Resolution II (c) ostensibly, according to him, appointing the Selection Panel on 25 January 2022, and declaring the council meeting held on 08 August 2022, unlawful and invalid, and invariably, any resolution passed thereat seeking to fill the post of the 'MM' to suffer the same fate.

The said applications were opposed by the Appellants. The seventh Respondent *a quo* (Mr. Maluleke) abides the courts' decision.

FACTUAL CHRONOLOGY OF EVENTS:

- [7] On 25 January 2022, the Third Appellant, the council of Mogalakwena Municipality (the council) took a resolution to fill the vacant post of a Municipal Manager ('MM') in line with the provisions of the Local

¹ Vol 4, paras 1 to 5, Record.

Government: Regulations on Appointment and Conditions of Employment of Senior Managers.² ('the Regulations')

- [8] Furthermore, on 25 January 2022, council resolved to designate the Mayor, and a councillor designated by it and at least one person who is not a councillor or a staff member of the municipality concerned, and who has expertise or experience in the area of the advertised post.
- [9] The aforementioned requirements are laid down in Regulation 12 of the said regulations. I shall deal with each of the requirements shortly in the course of this judgment.

THE SUBMISSIONS:

- [10] Counsel for the Respondent, Mr. Mosomane of Mosomane Incorporated (Mr. Mosomane) contended that while he has had no issue with appointment of the Mayor as the chairperson of the Selection Panel (SP) in fulfillment of Regulation 12, he, however, expressed disquiet for the alleged failure by the municipal council on 25 January 2022, to have appointed two other members of the SP in contravention of Regulation 12. He contended further that though the Ninth and Tenth Respondent *a quo* qualified for appointment under the said regulation, the municipal council failed to have the *duo* appointed. Failure, therefore, by council to have properly appointed the other SP members was, in consequence, unlawful and invalid.

² Government Notice №: 21 dated 17/01/2014, promulgated as Regulations under the Local Governments: Municipal Systems Act 32 of 2000.

[15] Counsel for the First Appellant (MEC for COGHSTA, Limpopo) Mr. Williams SC, submitted, among other things, that unlike in Sekgota's application that save for the Mayor who serves *ex officio*, council did not 'designate' the two other members, the appointment of the SP was lawful. Regulation 12 (3) only requires that the municipal council, the Fourth Appellant, designate another Councillor. (Regulation 12(3)(b)).

What is required, according to him, was for council members to 'designate' one of the councilors to serve on the SP.

[16] He submitted further that, unlike what the Respondent contended, in essence, that the entire SP was not appointed by council, conversely, it was incumbent upon the council merely to appoint a co – council member to serve on the SP.

[17] Relying on the confirmatory affidavits of Messrs. Boshomane and Mogotie, which were not refuted by the Respondent, Mr. Williams SC contended that the interviews and selection process had been lawfully taken, including the appointment of the SP. It would have been inconceivable that the appointment of the SP could have been effected otherwise than by council members who constituted the Municipal council. This fact is confirmed by two councilors, albeit, in Mokoma's application *a quo*, which was also before Muller J.

[18] Deferring to the minutes of the SP which³ formed part of the record or minutes of the municipal council, Mr. Williams SC, contended that there was full compliance with Regulation 12 (3) and, therefore, the appointment of the MM was beyond reproach.

To illustrate his submission, he pointed that ironically, the SP in fact did not recommend Mr. M. M. Maluleka be appointed, but instead recommended on the basis of gender balance, one Mrs. M.R. Rampedi on her “basic” competency assessment, whereas Mr. Maluleka had been assessed as “competent”. The assessment, so the submission went, was not on the identity of an individual, but on merit and competence.

[19] The foregoing observation stems from the Respondent’s annexure ‘LSS’⁴ attached to his founding affidavit to the application *a quo*⁴.

[20] It was further contended on behalf of the First appellant that the said minutes of the SP were circulated to the councillors’ meeting which ultimately appointed Maluleka as the MM from 2 other candidates recommended for appointment.

[21] The council meeting held on 08 August 2022 which is common cause, was properly constituted, so Mr. Williams SC submitted, and was therefore lawful. There, it was resolved that Mr. Maluleka be appointed. A formal letter as per council resolution, was issued to him dated 11 August 2022.⁵

³ Minutes of 11/03/2022, vol.1 pp 72 – 73, are minutes of the SP meeting for vacant post of the MM.

⁴ PP 51 – 56, Vol.1, Record. This annexure reflects the Minutes of the Special Exco Meeting on 29/07/2022.

⁵ Annexure ‘MM’¹, P454, Record.

- [22] He in addition, contended that Regulation 12 (3) does not contemplate any resolution having to be adopted by the Municipal council upon designating their co – council members to serve on the SP, or that the same be specifically recorded or reduced to writing.
- [23] Furthermore, it was submitted that the court *a quo*'s finding that the municipal council failed to 'designate' Ms. M.S. Teffo as a co – council member of the SP 'by resolution' or "to appoint a third panelist" and that therefore, all other processes of shortlisting, screening, interviews and appointment of the MM, are unlawful, was clearly erroneous.
- [24] This is simply because the said regulation does not require a formal resolution for the designation of the council member to serve on the SP. Regulation 12 (3) is silent on this aspect.
- [25] Mr. Williams also made the submission that what regulation 12(3) envisages is that there should be ample evidence in totality, available as to the entire process that was followed, to draw an inference, on the balance of probabilities, that the Municipal Council did designate the particular SP. His submission is that, if all the facts before the court are assessed, there can be no conclusion other than that the council made the designation of the SP, therefore, substantially complying with the requirements of Regulation 12(3).
- [26] According to the submission he made, the law – maker has drifted away from the word "appointment" and had instead chosen to use the word "designated" (Reg.12 (3)(b)) and that formality had been complied with.

[27] Counsel for the Third to Seventh Appellants, Mr. Shakoane SC, highlighted the fact that the Mokoma application (not material to the present application) sought relief materially similar to that sought by the present Respondent in its prayers 2, 3, 9 and 10 of the notice of motion. Despite opposing each application, *a quo*, the Appellants also brought the striking-out application of certain material in the respective founding affidavits. There was also a counter application in the *Mokoma* application which, according to Shakoane SC, was correctly granted by Muller J in the said striking out application. He dismissed the latter's application, and in the same breath, granted the Appellant's counter-application.

[28] He submitted that the court *a quo* in a bizarre manner, dismissed the Appellants striking out application by the Respondent (Sekgota) in prayers 2, 3, 9 and 10 of his notice of motion. Mr. Shakoane SC, took the view that the court *a quo*'s approach was blatantly contradictory.

[29] One of the grounds of appeal was that the court *a quo* erred by not striking from the urgent roll the Respondent's urgent application for failure to comply with the provisions of S.35 of the General Law Amendment Act, 1995⁶ This part of the ground of appeal lacks merit. None of the relief sought by the Respondent in its application prayed for interim relief, alternatively, a *rule*

⁶ Act 62 of 1995, the so called 72 hours' notice applicable to legal proceeding against the state departments or an organ of state.

nisi for proper invocation of the statutory exception found in S. 35 of the Act. This point was, moreover, not even argued before us on appeal.

[30] It was also submitted by Mr. Shakoane SC that the court below misdirected itself in fact and in law in setting aside the council resolution passed on 08 August 2022, and ordering a re-advertisement of the disputed vacant post of the MM.

[31] The attack against such order was the discrepancy of the court *a quo*'s prior pronouncement in paragraph 4 of its order, that the council meeting held on 08 August was lawful, and the decision of the municipality and its municipal council pursuant to Resolution 11 (c) of 25 January 2022, in which all selection processes and the SP's recommendation of 25 January 2022, culminating on the 08 August 2022 meeting, is not invalidated and remain extant.

[32] According to his submission, the court below erred in declaring the composition of the SP of 25 January 2022 unlawful and invalid, resultantly upsetting the entire process of appointing the MM.

[33] Furthermore, the nub of contention Mr. Shakoane SC made was the error by the court below in having ignored the corroborative evidence contained in the confirmatory affidavit (CA) of Councillors Boshomane and Mogotle filed in support of both Sekgota and Mokoma's founding affidavit ('FA')

- [34] It is in the two 'FA' that both deponents thereto corroborated and confirmed that the said resolution was "duly and lawfully" passed and additionally, all processes were lawfully followed when filling the MM's post.
- [35] Furthermore, the additional evidence in the confirmatory affidavit of Councillor Mogale had in fact corroborated the 'CA' of Boshomane referred to above. According to Mr. Shakoane SC, the similarity in content regarding the 'CA' of Boshomane and Mogotle, had in fact induced the court *a quo* to grant consolidation of Sekgota and Mokoma applications.
- [36] Mr. Shakoane SC's contention again was that the finding and order of the court *a quo* that the SP was unlawfully appointed was because it overlooked the corroborative evidence of the said deponents of the "CA", and blatantly provided no reasons as to its exclusion. This was erroneous, he said.

IN THIS COURT:

- [37] The issues that calls for determination in this court are three- pronged, and are:
- (1) Whether or not the SP was properly designated/appointed by the municipal council in order to embark upon the selection processes for the filling of the post of MM, and
 - (2) Whether or not the Council Resolution of 08 August 2022, to effect the appointment of the MM was lawful and validly taken; and

(3) Whether or not the council meeting held on 08 August 2024 was properly constituted for the purpose of appointing a MM.

[38] The aforementioned questions are, by and large, dependent on the history and factual chronology of the events summarized in paragraph [7], above, as well as the Appellants' further evidence. This court ruled in its ex tempore judgment on 20 September 2024, for the introduction of the contents of annexure "A" and "B" to the application in terms of the provisions of S.19 (b) of the Superior Courts Acts of 2013(SuCA).⁷

I shall revert to examine the evidential value of these crucial annexures when I evaluate the merits of the present appeal.

[39] The starting point should be what the Second and Third Appellants were required to adhere to in terms of Regulation 12 of the regulations on Appointment and Conditions of Employment of Senior Managers.⁸ The regulation outlines the procedure a municipal council is obligated to follow when appointing the S.P. It provides as follows:

Regulation 12(1):

"A municipal council must appoint a selection panel to make recommendations for the appointment of candidates to the relevant senior manager posts".

(2) "In deciding to appoint a selection panel, the following considerations must inform the decision:

⁷ Act 10 of 2013. S 19 (b) grants the high court exercising appeal jurisdiction, judicial discretion and power in addition, provided in any other law, to receive "further evidence". (as opposed to "new evidence")

⁸ Ibid, para, 2, above

- (a) *The nature of the post;*
- (b) *The gender balance of the panel; and*
- (c) *The skills, expertise, experience and availability of persons to be involved.*

(3) *The selection panel for the appointment of a municipal manager must consist of at least three and not more than five members, constituted as follows:*

- (a) *The mayor, who will be the chairperson, or his or her delegate;*
- (b) *A councillor designated by the municipal council and*
- (c) *At least one other person, who is not a councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post."*

[40] Against these requirements, I consider it apposite to examine whether the municipality appellants had complied with the relevant regulation in regards to filling the vacant post of MM.

COMMON CAUSE FACTS:

[41] It is common cause, or not disputed that on 25 January 2022, in its meeting, the Third Appellant, the council of Mogalakwena Local Municipality, (the Municipality) took a decision passed as Resolution 11 (c), for the appointment of a SP. This was done pursuant to the said. Regulation 12 (3) and in line with S.67 of the Municipal Systems Act 2000⁹.

[42] It is further common cause that on 25 January 2022, the persons forming the SP were 'designated' by the Municipal Council to interview and shortlist

⁹ Local Government: Municipal Systems Act 32 of 2000, as amended

candidates for the vacant post of MM. The minutes of the shortlisting committee of candidates, was attached to the respondent's papers as annexure 'LSS5', evincing the members of the SP. This was done on 11 March 2022¹⁰.

[43] According to the respondent he, however, disputed the fact that the resolution designating the SP did not specify names of its members, except for the mayor.

[44] The alleged failure by the council meeting to specifically name the designated SP members is, in my view, not fatal to their designation as contented by the respondent. All that is required by regulation 12 (1) is merely for a Municipal Council to 'appoint a selected panel; so as to make a recommendation for the appointment of suitable candidates to vacant senior manager posts, *in casu*, a MM. In the instant case, there is no contestation on the Municipal Council's compliance with regulation 12 (2) regulating a selection process.

[45] In compliance with regulation 12(3), the SP constituted for the appointment of a MM, comprised of the following persons:

- (a) The mayor, who will be the chairperson;
- (b) A councillor designated by the municipal council, and

¹⁰ PP.72-73. (shortlisting) and PP 74-75 interview held on 25.04.2022, and PP 76-77 (Finalization meeting) on 10.06.2022, respectively.

(c) At least one other person, who is not a councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post.

[46] This then brings us to the question whether or not, the Municipal appellants complied with the spirit of regulation 12(3).

[47] A closer reading of the minutes of a Special Council meeting of the Third Appellant (the municipal council) held on 25 January 2022¹¹, shows it was resolved that:

“

37.1

37.2

37.3 *The following people be designated to constitute a selection panel for shortlisting and interview of the position of a municipal manager:*

(1) The Mayor who will be the Chairperson.

(i) A councillor designated by the municipal council; and

(ii) At least one other person who is not a councillor or a staff member of the municipality and who has expertise or experience in the area of the advertised post.”

EVALUATION:

[48] The content of the relevant item of council resolution under consideration, reveals, in my view, compliance with the essential requirements of regulation 12(3) of the enabling resolution. In fact, nowhere in regulation 12(3) is the

¹¹ P57 and P 61, para 1, Item 21, Vol I, Record.

requirement of names of SP members be specifically mentioned. Failure or omission of mention of specific names in that special council meeting, whose assembly is, in any event, not an issue, is not fatal to the outcome, nor should render their composition a nullity.

- [49] Subsequent thereto, and on 11 March 2022, the shortlisting meeting convened by members of the appointed SP, was held chaired by the mayor, councillor Taueatsoala. Present also was Mr. D.J Moshwana (Second Appellant) and Ms. Mr. S Tefu (portfolio chairperson, corporate support services).
- [50] I interpose to mention that the Second Appellant (Mr. Moshwana) is not a councillor of any municipality. He is attached to Limpopo Provincial Government's COGHSTA department as an employee.
- [51] The interview process and scores, are captured in the SP minutes dated 25 April 2022.
- [52] On 10 June 2022, the SP held the finalization meeting where scores were allocated to the 3 candidates, namely, Ms., Mr. Rampedi, Mr. M.C Moshwana, who both were assessed as "basic", while Mr. M.M Maluleka's assessment was found to be "competent" based.
- [53] The contention made on behalf of the respondent that the members of the SP were not appointed by the Municipal Council is wrong. As already shown above, the minutes of the Special Council meeting of 25 January 2022, attests the contrary.

- [54] Pursuant to the recommendations of the SP, a Special Council meeting was convened on 29 July 2022, but could not proceed and was, therefore, adjourned to 08 August 2022.
- [55] On 08 August 2022, the day to which the Special Council meeting was adjourned, the Speaker of council issued a short SMS notice purporting to postpone *in absentia*, a duly convened Special Council meeting. This was done 15 minutes before the time scheduled for the meeting.
- [56] The manner in which the Speaker purported to 'postpone' a properly convened Special Council meeting of 08 August 2022, is mind boggling as he initially convened it in accordance with clause 4 of the Municipality's Standing Rules and Orders¹². The Speaker had however, failed to attend the said meeting, in which event, the MM (or acting MM) must convene the meeting.
- [57] In order to alleviate the situation, the mayor invited the Sixth Appellant (acting MM) to preside over the election of an Acting Speaker in order for the Municipal Council to continue with its business. The purpose of that meeting was to appoint a MM. The said meeting where the appointment of the MM was made, was presided over by the Acting Speaker, who the meeting of council had elected to do so for purposes of appointment of a MM.

¹² Annexure 'LSS', PP78-99, VOL.1, Record. The standing rules and orders of Mogalakwena Local Municipality are promulgated in Provincial Gazette no 305 dated 30.09.2009

[58] The contention by the respondent that the mayor does not have power to convene a council meeting, is simply a half- truth. Absent the Speaker at the meeting of 08 August 2022, there was no impediment to the Acting Speaker to preside over the said Special Council meeting, and to proceed to business to be transacted for that purpose.

Furthermore, the absence of the Speaker, as a councillor, from that meeting, was not as envisaged in clause 14 of the Standing Rules and Orders referred to, in that the latter did not 6 hours before the commencement of the meeting, lodge with the Acting MM, a written application for leave of absence from the whole of the meeting or part thereof.

[59] The court *a quo* found that Municipal council only selected the mayor "*for the appointment (sic) into the panel*". The court again found that as far as other two panelists are concerned, the Municipal council resolved to designate a councillor, and the third SP member "*is to be designated*". The court *a quo* further concluded that "*council failed to either designate the councilor by resolution or to designate or appoint the third panelist*". This finding is erroneous.

[60] Either way one looks at it, the learned Judge erred in his findings. This is simply because regulation 12(3), only envisage a situation that in constituting a SP, council is not required to appoint members specifically attaching names to the capacity of the individuals who are appointed as members of the SP. What council is obliged to do is merely to appoint a

selection panel, which in turn would make recommendations for the appointment of candidates to vacant senior post, *in casu*, a MM.

[61] Looking closely at the minutes of the council meeting of 25 January 2022, council clearly 'designated' members of the SP as contemplated in regulation 12(3). They are the mayor, a councilor designated by the municipal council, and one other person who is not a councilor or staff member of the municipality with the requisite expertise or experience relevant to the said post.

[62] Although no individual names were attached to their official designation as SP members, it follows logically that the mayor is Mr. Taueatsoala, and a councilor designated by the council is Mr. Ms. Teffo, and a non - councilor being Mr. D.J Moshwana attached to Limpopo's COGSTA department. These names appear in all council minutes of the Second Appellant, pertaining to all their selection processes leading to final appointment of a MM.

[63] The court *a quo*, flowing from the erroneous finding aforementioned, concluded that the shortlisting exercise did not comply with regulation 12(3), which invariably meant that the screening, shortlisting and interviews processes, were in consequence all tainted with illegality. This conclusion is also flawed.

[64] Apart from not only providing reasons for his finding on the shortlisting process, the court *a quo* seems to have simply ignored the contents of the

minutes of the SP held on 11 March 2022, when shortlisting for MM's post was conducted¹³.

[65] Furthermore, on a reading of the minutes of the meeting of the SP held on 25 January 2022, the capturing of the panelist members was identified by the council as required by the Regulation 12(3) and in doing so, there is no trace of evidence of anyone of them not being "delegated" in their capacities by the Municipal Council as the court of *a quo* found.

The Regulation in question makes no provision of the names of the SP members to be individually specified. The conclusion reached in this regard is, therefore, wrong. In addition to that, Regulation 12(3) requires no resolution by the Council specifically naming the members of the SP, save for their appointment. Nothing more, nothing less.

[66] The reasoning of the court *a quo* stating that Mr Maluleke's recommendation by the SP for appointment as the MM is unlawful, is therefore, clearly erroneous.

[67] The totality of the evidence points to an inference, on a balance of probabilities, that the Council made the appointment as stipulated by Regulation 12(3), and that there was, consequently, substantial compliance with prescripts of the regulation.

¹³ OP cit, pp 72 – 73, Record

[68] The court *a quo* proceeded from the premise that the selection process recommending the MM was valid. However, for some reason, it found after analyzing the effect of the Speaker purporting to 'postpone' a properly convened Council meeting, with reference to the applicable provisions of the council's Standing Rules and Orders, (SRO) correctly found, in my view that such meeting was lawfully convened, regard being had to the provisions of Rule 23(1), 23(2), 23(3), 41(1) and 39 of the SRO, the latter Rule 39 demanding of the council's business to continue. In the instant case, the council meeting of 08 August 2022, was convened in terms of Rule 41 as a continuation of the 29 July 2022 meeting.

[69] The court *a quo*'s conclusion that the said meeting was validly convened as a continuation of the 29 July 2022, which the Speaker purported to 'postpone' on 08 August 2022 can, therefore, not be faulted. The Speaker's conduct in this regard lacked authority and was of no force or effect.

[70] Furthermore, the court *a quo* had occasion to consider whether or not annexure 'LLS 1' 'LLS 3' and 'LLS 4' to the respondents papers before it, should be admissible in evidence. Relying on the authority of *S v Mkwasu*¹⁴, the court correctly held, in my view, that the interests of justice required that the evidence sought, to be adduced, by way of the said annexures, be admitted. By parity of reasoning in the *Nkwasu's case*, a similar approach

¹⁴ 2016 (1) SACR 53 (SCA), para [50]

should find application even in civil litigation. I mention for the sake of completeness that the annexures referred to herein are, the transcripts of the council's Special Meeting held on 08 August 2022. Here, the Municipal Council having elected an Acting Speaker, proceeded to appoint Mr Maluleka as the MM. Their contents are in the public domain and remain public documents (except if not a product of when council went into committee stage i.e. *in camera*), of which the public has the right of access to their contents.

[71] Having said that, the court *a quo* was correct in finding that the continuation of the Special Council meeting on 08 August 2022, was lawfully convened as such, with the result that it should have found Maluleka's appointment as a MM, legitimate.

[72] For some inexplicable reasons, however, and going against the foregoing observation, the learned Judge, however, found the appointment by the same Municipal Council of the MM (Maluleka) to be invalid and liable to be set aside, as it was said to be an off-shoot of a faulty selection process by the SP not being properly appointed.

[73] The latter conclusion is a misdirection by the court *a quo*. That conclusion invariably led to the respondent's application partially successful in respect of prayer 2, 3, 9 and 10 of the notice of motion.

[74] Ironically, while the court below found that the SP was not properly appointed, the learned Judge had not granted prayer 4, declaring paragraph

11(c) of the resolutions of 25 January 2022 (selection of SP) to be unlawful and invalid. Similarly, prayers 5,6,7 and 8 were not granted.

[75] It is the partial success of some contradictory orders that precipitated the present appeal.

APPLICATION TO INTRODUCE FURTHER EVIDENCE:

[76] Prior to the hearing of the present appeal on the merits, the Third to Seventh Appellants brought a notice of application in terms of Rule 6(11) read with S.19(b) of the SUCA, 2013, to introduce further evidence. The respondent unsuccessfully opposed the said application. Reasons for dismissing opposition to it appear in the judgment handed down *ex tempore* on 20 September 2024 with costs. I shall for considerations of brevity, not repeat the facts and reasoning advanced here, as the same were mechanically recorded.

[77] It suffices to mention that the said appellants sought leave to adduce further evidence of the contents of annexure "A" and "B" to the supporting affidavit relative to the appeal at hand. The substance of the said application was not to introduce any "new evidence", but "further evidence" to the present pending appeal on the merits. The provisions of S.19(b) of SUCA 2013, bestows the court exercising appellate jurisdiction, a judicial discretion to receive "further evidence".

- [78] The purpose therefore was to assist this court to determine if the appointment of a MM, among others, at a meeting of 08 August 2022, was lawful. Similarly, whether the court *a quo*'s interpretation of Regulation 12(3) which informed the procedure and formulae of the appointment of the council's SP panel, was sound.
- [79] As already shown, a litigant is entitled in terms of the provisions of Rule 6(11) of the rules, to bring interlocutory and other applications incidental to pending proceedings on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge. The nature of the interlocutory application in the present instance is the one incidental to the appeal now before us which, at the time of lodgment of the application was still pending. It is brought in terms of S19(b) of the SUCA, 2013, which permits introduction of "further evidence".
- [80] The court in **PROPHET V National Director of Public Prosecution 2007(6) SA 169 (CC) of 185, para [33]**, stated that there are two routes for admission of late evidence on appeal in that court. The first is in terms of Rule 31(Concourt) which permits parties to adduce relevant material that is common cause or otherwise incontrovertible, or is of an official, scientific, technical or statistical nature and capable of easy verification. The second is in terms of S22 of the repealed Supreme Court Act, 1959 (now replaced) with S19(b) of the SUCA 2013).

[81] The applicable approach following the *Prophet's* case above, is that late evidence may only be done in 'exceptional circumstances', where the evidence sought to be submitted is 'weighty, material, and to be believed', and 'there is a reasonable explanation' for the late filing of the evidence. See also, **Rail Commuters Action Group and Others v Transnet Ltd t/a METRORAIL and Others 2005(2) SA 359 (cc)**.

[82] It was upon a careful consideration of the foregoing compelling principle eloquently laid down by the apex court, that this court, persuaded by the weighty material and reasonableness of the explanation proffered for the delayed filing of the evidence, as well as the judicial discretion conferred on this court exercising appeal authority, that further evidence sought to be adduced, was inevitably permitted.

[83] According to the Third to Seventh Appellants, post the noting of the appeal, they individually discovered two letters issued by the mayor of the Second Appellant which are materially relevant to the process that relates to the composition of the SP and what Regulation 12(3) prescribes. A submission was made that their contents was somewhat connected to the "CA" made by Cllr. Boshomane and Mogotle. With their inclusion as part of the evidence on appeal, which clearly, were not before Muller J, would show that the relevant factual findings in the *court a quo* were wrong.

[84] The relevant annexures brought as further evidence appear as 'ALE 1' and 'ALE 2', respectively, to the S.19(b) application¹⁵. The documents introduce evidential material that confirms the appointment of Mr Moshwana and Ms. Teffo by the Municipal Council to be part of the SP to conduct shortlisting, interviews and screening of shortlisted candidates for the position of a MM. The date of the said letters is 25 January 2022, a day after the sitting of the council meeting.

DISCUSSION:

[85] Having made the preceding observation and evaluation, it follows that the contents of the annexures introduced as further evidence sought to illustrate their relevance as to how the SP was constituted by the Municipal Council as envisaged in Regulation 12 (1) ;(2) and (3) thereof. This part of the evidence, needless to mention, was not before the court *a quo* when the two urgent applications were jointly heard.

[86] The view I take of the matter, therefore, is that had the court *a quo*'s attention been drawn to the undisclosed evidential matter at that time, the conclusion would have been somewhat different. This is particularly so in that the two annexures 'A' and 'B' of the S. 19(b) application read with Rule 6(11) of the rules, explicitly state that the appointment by the council of the 2 (two) additional SP members were in accordance with Council Resolution adopted

¹⁵ PP 81 – 82, supplementary Vol. Part A, Record.

on 25 January 2022. These annexures are emphatic in informing the two panelists that they will receive an invitation from the municipality (third appellant) to participate in the Recruitment process.

[87] This process was subsequently done on 11 March 2022, with interviews and ratings concluded on 25 April 2022. Those rated “basic” on interview, were deemed ‘unsuitable’ for the role of Senior Manager, and that caution should be applied when promoting such persons. Only Maluleka of the two shortlisted/interviewed candidates was considered “competent” for the vacant post of MM. The remaining two were rated “basic”, thus “unsuitable”. This process was completed by the SP in their finalization meeting of the Recruitment process on 10 June 2022.¹⁶

[88] The argument raised on behalf of the Respondent that the other 2 SP members where not appointed by the Municipal council erroneously assume the Mayor had appointed Moshwana and Teffo as additional panelists probably because of Annexures ‘A’ and ‘B’ letters introduced by way of further evidence were signed by the Mayor. This assumption is skewed. The Mayor did so not as a councillor, but as Chairperson of the SP appointed by the council.

[89] The misconception mentioned above, inevitably led the court *a quo* astray in its interpretation and application of Regulation 12 in practical terms. It took

¹⁶ Minutes on finalization of the Recruitment Process, vol 1, p 76 -77.

a more technical understanding of the concept 'designated' within the purview of the said regulation. What compounded its misconstruction of the word '*designated*' was when the court below imported the unnecessary requirement of a resolution of the municipal council for establishment of a SP, in particular, by pronouncing individually its members by name.

LEGAL PRINCIPLES:

[90] The above observation is guided by legal literature on the correct approach when interpreting words in a statute, contract, regulation or any legal instrument. For instance, in *Novartis V MAPHIL*¹⁷, the court in deciding the contractual dispute before it on appeal, also paid attention to how courts should interpret written contracts. It had this to say:

"[24] The argument of Novartis, as I understand it, is that interpretation is an entirely objective process. In deciding what a contract means, a court must have regard to the words used and construe them objectively. Novartis cites in this regard passages from KPMG Chartered Accountants (SA) V Securifi Ltd and another: 2009(4) SA 399(SCA) para:39, Natal Joint Municipality Found v Endumeni Municipality [2012] ZA SCA 13; 2012 (4) SA 593 (SCA) para:18."

[91] From the foregoing passage, it is crystal that if a document was intended to provide a complete record of a jural act, extrinsic evidence may not contradict, supplement, or modify its true meaning. This principle flows from the fact that interpretation is a matter of law and not fact, and therefore, it

¹⁷ 2016 (1) SA 518 (SCA) para: [24]

remains a matter within a court's power and, not for witnesses, nor as often said at common law, not a jury question.

- [92] Properly interpreted, the applicable or acceptable way of interpreting a written document was aptly espoused in *Endumeni* case, above¹⁸, paraphrased *inter alia* as follows:

"[18] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the content provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax...."

- [93] There is considerable force behind the above principle. The language used in Annexure 'A' and 'B' to S.19(b) application, gives context to what the council sought to do in appointing the SP to bring to fruition the selection, interview and finalization processes towards appointment of a MM.

- [94] In doing so and in general terms, the Second and Third Appellant (municipality and council) had a statutory if not a constitutional obligation to fulfil its mandate to govern on its own accord the local government affairs for which it is empowered to exercise by virtue of its executive authority conferred by S151(2) of the Constitution.¹⁹

¹⁸ Ibid. para: [18]

¹⁹ Act 108 of 1996, as amended

[95] Furthermore, the authority to appoint a MM is conferred upon it by the provisions of S54A of the Local Government: Municipal System Amendment Act, 2022²⁰. The said provision calls upon a Municipal Council to:

"I The Municipal Council must appoint – (a) A Municipal Manager as head of the administration of the Municipal Council" (underlining own emphasis)

[96] A brief comment on some misgivings revealed in the judgment of the court *a quo*, would hopefully throw light on the issues on appeal. They are, among others, the following:

96.1. It is common cause that it heard two consolidated applications, and delivered judgment on 13 September 2022. In the Makoma application, (not before us on appeal) it granted relief sought by the appellants in prayers 4 and 7 of the counter-application. It in the same vein, granted the appellant's striking-out application in certain aspects of the Founding Affidavit of Makoma, and went on to ultimately dismiss the latter's application.

96.2. The effect of para: 4 and 7 of the appellant's counter-application claim granted meant that *"the meeting of 08 August 2022, was never postponed or adjourned and had lawfully taken place."*

96.3. The "CA" of Cllr. Boshomane attesting to the Founding Affidavit of each Applicants *a quo*, confirmed the lawfulness of the entire

²⁰ Act 2 of 2022

selection process, on the meeting of 08 August 2022 alluded to in para: 4 of the court *a quo*'s judgment.

96.4. Despite the consolidated applications and similarity of their respective relief sought and accounting for Boshomanes 'CA' and the lawfulness of the meeting of 08 August 2022, the court *a quo* went on to dismiss the striking-out application in relation to the respondent's application, and worst still, went against its findings about the latter council meeting it found to be lawful, but to our dismay, declared all the selection processes which preceded a "lawful" meeting, (08.08.2022) unlawful and individual, crucially, setting aside the resolutions of the 08 August 2022 Council Meeting, ordering a re-advertisement of the vacant post of the Mayor.

[97] These glaring contradictions in the judgement of the court *a quo*, were not countervailed by the Respondent's attorney, Mr Mosomane as he, has without plausible explanation, failed to file further heads of argument on behalf of the Respondent as directed by this court on 20 September 2024.

[98] In light of all the reasons aforementioned, the following order would issues:

(a) The appeal is upheld.

(b) The judgement and order of the court *a quo* handed down on 13 September 2022, is set aside and replaced with the following order:

1) "The application is dismissed with costs".

(c) The respondent is ordered to pay the costs of appeal on scale 'C', such costs to include the costs of two counsel where so employed.



M. G. PHATUDI JP
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

I concur,



M. NAUDE – ODENDAAL J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I concur,



G.J. DIAMOND AJ
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

REPRESENTATION:

For the 1 ST Appellant	:	Adv J.O Williams SC
On brief	:	Popela Maake Attorneys Polokwane
For the 3 RD to 7 TH Appellants	:	Adv G Shakoane SC
On brief	:	Popela Maake Attorneys Polokwane
For the Respondent	:	Mr. S.T. Mosomane
On brief	:	Mosomane Incorporated Midrand
Date heard	:	11 October 2024
Judgment Delivered	:	22 November 2024