



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Case Number: 3180/2022

In the matter between:

THE !KHEIS MUNICIPALITY

Applicant

and

KG MAREKA

Respondent

HEARD ON: 04 March 2024

CORAM: MHLAMBI, ADJP et JORDAAN, AJ

DELIVERED ON: 06 FEBRUARY 2025

INTRODUCTION

[1] The Applicant, The !Kheis Municipality, is seeking to have the decision of Mr. T.F. Leeuw, the Municipal Manager of the Applicant, to appoint the Respondent as Specialist Corporate Services at the Applicant on the 1st of July 2021¹

¹ Paginated Bundle: Page 10 paragraph 25 and Annexures "V2" and "V3"

alternatively during October 2021² and the subsequent fixed term employment contract concluded, reviewed and set aside.

- [2] The Applicant originally launched their application on the basis of seeking a declaratory order to have the decision to appoint the Respondent declared null and void, out of caution as a legality review or as a review in terms of the Promotion of Administrative Justice Act³ of 2000, but at the hearing before this Court the Applicant moved their application exclusively on the basis of a legality review.
- [3] The application is opposed by the Respondent who elected to represent himself after numerous lengthy indulgences to obtain legal representation, yielded no legal representative.

PARTIES

- [4] The Applicant is the !Kheis Municipality, a local municipality established in terms of the Local Government Municipal Structures Act, 117 of 1998, with its principal place of business at 97 Oranje Street, Groblershoop, Northern Cape Province.
- [5] The Respondent is Mr. Koena Goodenough Mareka, formerly appointed Specialist Corporate Support at the Applicant, residing at 645 Ntsaharebone , Clocolan, Free State Province.

BACKGROUND

- [6] On the 01st of July 2021 the then Municipal Manager, Mr. T. Leeuw, appointed the Respondent to the position of Specialist Corporate Support at the Applicant.
- [7] The Applicant contend that this post did not exist on the approved organogram of the Applicant. This the Applicant further contend, means that the Respondent was appointed to a position which was not approved by the Applicant's Council and as a result the appointment was unconstitutional and unlawful.

² Paginated Bundle: Page 10 paragraph 26 of the Founding Affidavit read with pages 25 and 26 and Annexures "V4"

- [8] The Respondent in opposition contend that his appointment was lawful as the Municipal Manager was authorised to make such appointment.

ISSUES

- [9] The preliminary issue to be determined is:
- (a) Whether this Court has the jurisdiction to hear the application before it.
- [10] In respect of the main application, the issues to be determined are:
- (a) The procedural requirement of whether Municipality delayed in bringing the review application;
 - (b) The lawfulness of the Municipality's actions in effecting the appointment of the Respondent.

JURISDICTION

- [11] Jurisdiction means the power vested in a Court by law to adjudicate upon, determine and dispose of a matter and does not extend beyond the boundaries of, or over subjects or subject-matters not associated with, the Court's ordained territory.³
- [12] In this legality review, the decision of Mr. T.F. Leeuw, the Municipal Manager of the Applicant, to appoint the Respondent as Specialist Corporate Services at the Applicant on the 1st of July 2021⁴ and the letter of appointment following upon such decision being signed and issued as the contract of service and, occurred in Groblershoop in the Northern Cape Province. It is thus axiomatic that the administrator, who made the decision to be reviewed, has its principal place of administration in the Northern Cape Province, which is outside the area of jurisdiction of this Court.
- [13] In light of the aforementioned, the question arose whether this Court has jurisdiction to hear this matter.

³ Ewing McDonald & Co Ltd v M&M Products Co [1990] ZASCA 115; 1991 (1) SA 252 (A)

⁴ Paginated Bundle: Page 10 paragraph 25 and Annexures "V2" and "V3"

[14] Section 21 of the Supreme Court Act⁵ provides that:

'A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power:

- (a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;*
- (b) to review the proceedings of all such courts;*
- (c) in its discretion, and at the instance of any interested person, to enquire into determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'*

[15] The jurisdiction of the High Court is not codified and should therefore also be determined in terms of common law. Therefore the common law jurisdictional factors of residence and domicile, the situation of the subject-matter of the action within the jurisdiction, the cause of action which includes the conclusion or performance of a contract, must also be considered.

[16] This being a legality review, is founded upon the rule of law, which is a founding value of our Constitution. The Respondent, whose rights have been affected, is ordinarily resident within this Court's area of jurisdiction having regard to his contract of employment, which is also the address where process was served.

[17] Upon a consideration of these factors, we find that this Court has the jurisdiction to hear this review, as the Respondent whose rights are affected, reside within this Court's area of jurisdiction and no issue arise that makes it inconvenient or justiciably impractical to hear the matter in this Court.

DELAY IN BRINGING THE REVIEW APPLICATION

[18] An organ of state seeking to review its own decision must do so under the principle of legality.⁶

⁵ Supreme Court Act 59 of 1959

⁶ Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) par 45

- [19] A legality review has no fixed period within which it must be launched. The only requirement is that the review must be launched within a reasonable time. The proverbial clock starts to run from the date that the Applicant became aware or ought reasonably to have become aware of the decision or action to be reviewed.⁷
- [20] In a legality review the Court must first assess whether the delay is unreasonable, and if it is found that the delay is unreasonable, then the Court has to determine whether the interest of justice require that the unreasonable delay be overlooked.⁸
- [21] The Applicant contends that the review was launched within a reasonable time after the Applicant became aware of the decision, its implication and its legal consequences, being July 2022. Applicant further submitted that good grounds exist that the appointment be reviewed and set aside as no such post exists and the prospects of success on the merits are strong.
- [22] The Respondent in contrast contends that the Applicant was aware of the decision since July 2021 as the deponent co-signed the temporary contract of employment in July 2020, but refused to sign the permanent contract in July 2021. The Respondent submits that there was an unreasonable delay.
- [23] The Applicant further submitted that the permanent appointment service contract was received on the 26th of October 2021, backdated to the 01st of July 2021, for the deponent to sign. The deponent then pointed out that there was no such post on the then approved municipal structure, that management during 2020 decided not to appoint any new employees due to the bloated staff structure, that the position was not budgeted for, no human resource processes were followed nor was the position declared vacant or advertised.

⁷ Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) par 49

⁸ Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) par 50

- [24] The Applicant explains the delay, stating that it was only advised of the full facts underlying this application and the legal consequences which flow therefrom on the 17th of June 2022⁹, after the deponent was appointed as Acting Municipal Manager in June 2022, and immediately instructed the Applicant's legal team. This application was then issued on the 07th of July 2022.
- [25] It was further submitted that investigations revealed the appointment was not merely effected, but that the appointment was backdated; that the post was not on the staff establishment, but added to the staff establishment after the fact by the Respondent and Mrs Minnies on the instruction of Mr. Leeuw.
- [26] Having regard to the explanation for the delay proffered by the Applicant in the circumstances of the matter. This Court accepts on the basis of submissions that after the appointment of the deponent as Municipal Manager during June 2022, he was informed of the facts and legal consequences underlying the decision and instructed the Applicant's legal team on the 17th of June 2022 and the application was issued on the 07th of July 2022. This Court thus finds the explanation satisfactory and reasonable having regard to the facts and finds that the Applicant did not unreasonably delay in bringing the application.

LEGALITY REVIEW

APPLICANT'S SUBMISSIONS

- [27] The applicant seeks, through judicial review, to have the decision of T.F Leeuw, in his capacity as municipal manager, to appoint the Respondent as Specialist Corporate Services at the Applicant on the 1st of July 2021¹⁰ and the subsequent employment contract concluded, to be set aside.
- [28] The Applicant further submitted that in terms of s 55(1) of the Act, the Municipal Manager as Head of the Administration is subject to policy directives of the Municipality which he violated in appointing the Respondent.¹¹

⁹ 9 Paginated Bundle: Page 13 paragraph 25 of the Founding Affidavit and Annexures "V1"

¹⁰ Paginated Bundle: Page 10 paragraph 25 and Annexures "V2" and "V3"

¹¹ Paginated Bundle: Page 19 dated the 27th of October 2021

- [29] The Applicant further submitted that in terms of section 66 of the Act, read with regulation 1 and regulation 4, the position that the Respondent was appointed to does not exist on the approved staff establishment. The appointment was therefore unconstitutional and unlawful, it was contrary to the management decision during 2020 to not appoint further new staff and the Applicant has no financial means or budget to appoint the Respondent.

RESPONDENT'S SUBMISSIONS

- [30] The Respondent submits that he was lawfully appointed as the Municipal Manager appointed him on the strength of the Special Council Minutes dated the 24th of January 2020, wherein Council directs him to appoint a person.
- [31] The Respondent further submits that the Municipal Manager has the authority and a prescribed right to establish a staff establishment in terms of section 66(1) of the Act. He further submits that his post is on the staff organogram and the Municipal Manager sent it to the Council for noting as per the Municipal Manager's evidence in the Labour Court.
- [32] The Respondent submitted that section 66 (3) was not applicable to his appointment as the amendment was subsequent to his appointment and he was middle management.

ANALYSIS

- [33] The applicant seeks to have the decision of T.F Leeuw, in his capacity as municipal manager, to appoint the Respondent as Specialist Corporate Services at the Applicant on the 1st of July 2021¹² and the subsequent employment contract concluded, to be declared null and void and set aside in terms of section 66(3) and 66(4) of the Local Government: Municipal Systems Act 32 of 2000 (the Act).

¹² Paginated Bundle: Page 10 paragraph 25 and Annexures "V2" and "V3"

- [34] The Local Government: Municipal Systems Amendment Act 7 of 2011 amended section 66 of the Act by the insertion after subsection (2) of the following subsections:

"(3) No person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment of 15 that municipality.

(4) A decision to employ a person in a municipality, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if the appointment was made in contravention of subsection (3).

(5) Any person who takes a decision contemplated in subsection (4), knowing that the decision is in contravention of subsection (3), may be held personally liable for any irregular or fruitless and wasteful expenditure that the municipality may incur as a result of the invalid decision."

This amendment took effect on the 5th of July 2011 following publication in GN 559 and GG 34433.

- [35] The Municipal Workers Union v Minister of Co-Operative Governance and Traditional Affairs and Others confirmed the earlier declaration of constitutional invalidity of the Local Government Municipal Systems Amendment Act 7 of 2011 in the same case made by the Pretoria High Court, but suspended the declaration of invalidity for 24 months from 9th of March 2017 until it was declared unconstitutional on the 09th of March 2019 without being rectified by the Legislature.
- [36] The impugned appointment was during July 2021, alternatively the 26th of October 2021, the appointment was thus not subject to subsections (3) to (5) of section 66 of the Act.
- [37] The legality review on the other hand, was argued on the basis that the position of Specialist Corporate Support did not then or now exist on the approved organogram as contemplated in section 66 of the Act read with regulation 1 and

regulation 4 of the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers.

- [38] The Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers promulgated on the 17th of January 2014 in GN21 GG37245 provides the definition of staff establishment and post in regulation 1 thereof in the following terms:

“ ‘staff establishment’ means the approved posts created for the normal and regular requirements of a municipality”

“ ‘post’ means a post on the approved staff establishment of a municipality which has been budgeted for”

- [39] Regulation 4(6) of the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers promulgated on the 17th of January 2014 in GN21 GG37245 provides:

“The municipal manager must, within 14 days of finalizing the staff establishment, submit the staff establishment, detailed report and recommendations on the staff establishment to the municipal council for approval.”

- [40] The Respondent's own version in submissions is that the Municipal Manager has the authority to establish and approve the staff establishment and the Municipal Manager in the Labour Court stated he sent the staff establishment for their council to note. There is no submission by the Respondent that it was approved by council.

- [41] The Respondent simultaneously also submits that his post was on the staff establishment and that council authorised the Municipal Manager to appoint a person as per the Special Council Meeting on the 24th of January 2020.

- [42] The Applicant replied that the 24th of January 2020 minute clearly gives an instruction to appoint a person by a specific date being March 2020. The Respondent's impugned appointment is for a completely different date July 2021 alternatively October 2021 in circumstances where during 2020 council decided to not appoint any new staff to positions.

- [43] This Court is satisfied that the post to which the Respondent was appointed in July 2021 was not a post defined as a post on an approved staff establishment as per the Respondent's own submissions that the Municipal Manager sent the staff establishment for council's noting. Noting is not approval as is required in terms of the regulations to the Act.
- [44] The Court is further satisfied that the appointment of the Respondent as Specialist Corporate Support Services on the 01st of July 2021 by the Municipal Manager, is contrary to the policy decision of council during 2020 to not appoint any new staff. The letter was sent to the Municipal Manager on his request for the deponent to co-sign the appointment, and the contract of appointment was on the basis of the policy decision taken, not co-signed.¹³
- [45] It is clear that the Municipal Manager appointed the Respondent in total disregard of the legal and regulatory framework despite a written objection to the appointment with a detailed basis why the appointment could not be co-signed.
- [46] The Court therefore finds, for the reasons mentioned herein in terms of the legality review, that the permanent appointment of the Respondent on the 01st of July 2021 to the position of Specialist Corporate Support Services is reviewable and stands to be set aside.

COSTS

- [47] The Applicant in terms of their notice of Motion requested costs of the Application. During submissions in Court, Applicant requested costs on an attorney and client scale due to the manner in which the Respondent delayed the manner with the various requests to appoint legal representation without fully exercising the indulgences granted and non-compliance with the Court's directive in regard to same.

¹³ Paginated Bundle: Page 19

- [48] The award of costs falls within the Courts discretion and the usual practice is for costs to follow the result. The Respondent, though in a manner that might appear as dilatory, has a right to defend the application and the Courts in exercising their discretion, granted the Respondent those indulgences to realise his right to attempt to obtain legal representation. To now want to punish the Respondent with a punitive costs order, would in this Court's view be placing a question mark on the indulgence granted.
- [49] This Court, in exercising its discretion is of the opinion that the appropriate costs to be awarded, is for the Applicant to be awarded costs on a party and party scale including costs of Counsel.
- [50] This Court therefore makes the following order,

ORDER

- [51] 1. The decision of T.F.Leeuw, in his capacity as Municipal Manager of the Applicant, to appoint the Respondent as Specialist Corporate Support Services at the Applicant on the 01st of July 2021, is reviewed and set aside;
2. The employment contract concluded between the Applicant and the Respondent dated the 01st of July 2021, is reviewed and set aside;
3. The Respondent is ordered to pay the Applicant's costs of this action on a party and party scale, including costs of Counsel.


 M.T. JORDAAN
 ACTING JUDGE OF THE HIGH COURT, BLOEMFONTEIN


 J. MHLAMBI ADJP
 ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT, BLOEMFONTEIN

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