



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

Reportable/Not reportable

Case Number: 2840/2023

In the matter between:

MAJOE THULO

Applicant

and

NALA LOCAL MUNICIPALITY

Respondent

Coram: Reinders, J

Heard: 12 September 2024

Delivered: This judgment was handed down in open court on 12 March 2025 and distributed to the parties via electronic mail communication

Summary: Resolution taken by Municipal Council in respect of termination of an appointment of an Acting Manager – Review – Non-compliance with the provisions of the Promotion of Administrative of Justice Act 3 of 2000 - Local Government: Municipal Systems Management Act 32 of 2000

ORDER

1. The main application is dismissed with costs, such costs to be taxed on scale B.
 2. There shall be no cost order in relation to the conditional counter-application.
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JUDGMENT

Reinders, J

[1] Mr Thulo Majoe (the applicant) is an employee of Nala Local Municipality (the respondent – NLM/the municipality). On 27 May 2021 the applicant was appointed in an acting capacity as the Director Community Services (the DCS) with NLM, but subsequently on 7 October 2022 his appointment was terminated (the termination letter) in terms of a resolution taken by the Council of NLM on 5 October 2022 (the resolution).

[2] The applicant moves for the following relief:

“1. That the resolution taken on 5 October 2022 in terms of item 14.10 of the agenda of the council meeting terminating the applicant's acting appointment as Director Community Services is unlawful, invalid and set aside;

2. That the termination of the applicants acting appointment as Director Community Services is unlawful, invalid and set aside;

3. That the removal of the applicant as acting Director Community Service is unlawful and invalid and set aside;

4. That the respondent is ordered and directed to pay the applicant acting allowance in accordance with his letter of appointment to such appointment;

5. To the extent that the position is not filled, the respondent is ordered and directed to restore the *status quo ante*;

6. Ordering and directing the second respondent to pay the costs of this application

[3] The municipality not only opposes the relief claimed by the applicant, but filed a conditional counter-application which reads as follow:

"KINDLY TAKE NOTICE that:

- only in the event of the Honourable Court does not dismiss the main application under case number **2840/2023** based on any one of the *in limine* points raised by **Nala Local Municipality**, and
- in the event of the Honourable Court holding that Nala Local Municipality's reactive challenge to the main application is insufficient,

the **Nala Local Municipality**, Respondent in the main application (hereinafter referred to as "*the Respondent*") intends making application to this Honourable Court for the following orders:

1. That the failure of the Respondent (Nala Local Municipality) to bring this application within a reasonable time be condoned;
2. That the decision to appoint **Thulo Majoe** (Applicant in the main application) as Acting Director Community Services, of the Nala Local Municipality, taken by the Council of the Municipality on **25 May 2021**, be declared unlawful and void *ab initio*;
3. That the appointment of **Thulo Majoe** as Acting Director Community Services in terms of annexure "**TMO1**" to the founding affidavit in the main application, pursuant to the Resolution of the Council taken on **25 May 2021**, be declared unlawful and set aside;

Alternatively to prayers 2 and 3:

That, to the extent that the appointment of **Thulo Majoe** as Acting Director Community Services of Nala Local Municipality in terms of the Council Resolution of **25 May 2021** and/or annexure "**TMO1**" purported to appoint him as Acting Director Community Services for longer than three (3) months and beyond **26 August 2021**, such "*appointment*" be declared to be:

- only lawful until and including **26 August 2021**,
- unlawful from 27 August 2021 and set aside from the said date.

4. **That Thulo Majoe** (the Applicant in the main application) pay the costs of this application in the event that it be opposed by him;
5. Such further and or alternative relief as the Honourable Court deems appropriate, or a just remedy as contemplated by Section 172 of the Constitution, 1996; ...

[4] As a point of departure, the respondent raised three points *in limine*, the upshot whereof entailed:

(a) Non-compliance with the provisions of the Promotion of Administrative Justice Act¹ (PAJA) in that s7 thereof requires any proceedings for judicial review to be instituted without unreasonable delay and no later than 180 days after the date of the decision², and if PAJA does not find applicability the procedure is by way of a common law review (in terms of Uniform Rule 53) to be brought within a reasonable time. It is not disputed that the applicant issued this application on 7 June 2023 with no explanation for issuing same eight months after he received the termination letter.

(b) Non-joinder in respect of the Member of the Executive Council for Local Government (the MEC) and "the incumbent acting in the position as DCS".

(c) *Lis pendens* in that the applicant on 15 May 2023 referred an unfair labour practise dispute to the South African Local Government Bargaining Counsel, requiring the "employer be ordered to promote me to the capacity of Director Community Services. Alternatively, the Employer be ordered to grant me protected promotion in the said capacity."

[5] The point raised regarding *lis pendens* essentially became moot when the application was heard, as counsel for the applicant conveyed from the bar that the applicant had been unsuccessful in his application before the Bargaining Counsel. I was in any event not impressed by this special plea as the applicant in that application

¹ Act 3 of 2000.

² Section 7(1) of PAJA provides:

'Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a)....

(b)....on which the person concerned was informed of the administrative action....

moved for relief elevating him to the said permanent position whereas herein, he seeks nullification of a decision to terminate an acting appointment.

[6] The appointment of managers in the municipal sphere of local government is regulated by legislation enacted for such a purpose. The Local Government: Municipal Systems Management Act of 32 of 2000 (the Systems Act) made provision therefore in S56 of the Systems Act:

56 Appointment of managers directly accountable to municipal managers

- (a) A municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager.
- (b) A person appointed as a manager in terms of paragraph (a), must have the relevant skills and expertise to perform the duties associated with the post in question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.

[7] On 5 July 2011 the Local Government: Municipal Systems Management Amendment Act of 7 of 2011 (the Amendment Act) was promulgated. It amended the Systems Act, with s56 to read as follows:

“56 Appointment of managers directly accountable to municipal managers

- (1) (a) A municipal council, after consultation with the municipal manager, must appoint-
 - (i) a manager directly accountable to the municipal manager; or
 - (ii) an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.
- (c) A person appointed in terms of paragraph (a) (i)(ii) may not be appointed for a period that exceeds three months: provided that a municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months.
- (2) A decision to appoint a person referred to in subsection (1) (a) (i) or (ii), and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-

- (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
- (b) the appointment was otherwise made in contravention of this Act, unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1) (b)."

[8] In *South African Municipal Workers Union v Minister of Co-operative Governance and Traditional Affairs*³, the Amendment Act, including the provisions of s56 regarding the appointment of managers and acting managers, was declared to be unconstitutional. The said declaration was however suspended for a period of 24 months effective from 9 March 2017, and consequently would have expired on 9 March 2019. Only on 1 November 2022 did the Local Government: Municipal Systems Act 3 of 2022 come into operation.

[9] The applicant in his founding affidavit states the purpose of the application "to seek an order setting aside the termination of my appointment as Acting Director Community Services and the payment of my acting allowance which I was entitled to in terms of the appointment, among others..." He explains that he was transferred on 1 May 2021 as Manager Local Economic Development and Tourism in the employ of the municipality, a position which he still holds as at date of deposing to his affidavit on 30 May 2023. On 27 May 2021 he received an appointment letter from the then Acting Municipal Manager (Annexure "TM 01") which reads:

"RE: APPOINTMENT IN ACTING CAPACITY AS DIRECTOR COMMUNITY SERVICES

At the meeting of the Municipal Council of Nala Local Municipality held on the 25th May 2021, Council resolved as per item 11.3 that you are appointed with immediate effect as Acting Director Community Services. (Approved Organisational Structure depicts all sections falling under community services department).

In my meeting with you on the 27th May 2021 we agreed that your acting allowance will be based on the difference between your current annual salary

³ [2017] ZACC 7; 2017 (5) BCLR 641 (CC)

and the midpoint salary stated at **R1 022 226 per annum** as per the Government Notice No 43122 dated 20th March 2020.

Your acting period will end on the day preceding one appointment of the Director Community Services or on earlier date agreed upon between parties."

[10] Whilst still acting in this position, he received a letter from the Municipal Manager (Annexure "TM 02") reading as follows:

"RE: DISCONTINUATION OF YOUR ACTING CAPACITY: COUNCIL RESOLUTION ITEM 14.10 DATED 05 OCTOBER 2022.

You are kindly informed that as per Council resolution on item 14.10 dated 05/10/2022, the Council resolved that your acting capacity as Acting Director Community Services be discontinued with immediate effect."

[11] Item 14.10 on the agenda of the Council meeting of 5 October 2022 (Annexure "TM 03") reads:

"14.10 Recruitment and Appointment of Director Community Services

(NB: Section 95(1) stipulates that a councilor may, with due regard to the provisions of rules 87 to 93, when an item in the agenda is put to order or at any time during the debate on an item, propose that the matter be dealt with in closed session.)

The Municipal Manager will present on the recruitment and appointment of the Director Community Services in a closed session during council meeting."

[12] According to the applicant none of the conditions attached to his appointment had materialized and accordingly the letter of appointment "should still be in force." The termination letter "flies in the face of the appointment letter" and the termination of his acting appointment is unlawful. Moreover, the applicant states that the resolution leading to his termination in terms of the termination letter, was not on the agenda of the council meeting, as alluded to in paragraph [12] above. Accordingly, the consideration of his removal was unlawful as it was done in contravention of NLM's Standard Rules and Orders dictating that only matters included in the agenda may be

dealt with.⁴ The applicant states that the termination of the acting appointment “affected my pocket as I was receiving an acting allowance which was stopped when the acting appointment was revoked and/or terminated without cause.” According to the applicant the additional monthly payment that he had received for his acting position, amounted to R 45 692.58. He accordingly claims for payment of an amount to be so calculated from the date of termination of his acting position up until, at the time of him deposing to the affidavit, 30 May 2023.

[13] On 7 October 2022 the applicant had thus been acting in the position for a period of almost 15 months.

[14] The deponent to the answering affidavit is the current municipal manager of NLM who was appointed as such on 1 July 2022. Reliance is placed on the provisions of s 56 of the Systems Act, more specifically in terms of the peremptory period of not exceeding three months in respect of an acting appointment. Accordingly, the respondent relies thereon that the MEC had to be joined to this application. Moreover, the respondent holds the view that the appointment of the applicant in an acting position was null and void ab initio as the appointment is “open ended” and not for a fixed period of three months, or an extension as envisaged by s 56 (1)(c), which could only have been granted by the MEC. The amount of remuneration as stated in the appointment letter is not disputed, however the respondent disputes that the applicant is entitled to any remuneration for the reasons stated herein above.

[15] The applicant in reply stressed that the prescripts of s 56 of the Systems Act, was not applicable at the time of his appointment, having been declared unconstitutional, and accordingly there was no necessity for a time limit of three months for his acting appointment, nor for the intervention of the MEC. Accordingly, so the submission went, he is entitled to payment as prayed for as there has been no incumbent in the acting position and the cancellation/termination of his appointment was unlawful.

⁴ Rule 45(1) [subject to subsection (2) that a councillor may at any time during a meeting propose that discussion be allowed of any matter not included in the agenda and must give reasons therefore).

[16] As stated the applicant in his notice of motion seeks relief that the resolution taken at a council meeting be declared unlawful, invalid and set aside. It is thus the applicant's case that such a decision and/or resolution had in fact been taken on 5 October 2022. The respondent *in limine* submits that the applicant had to move for the said relief in terms of PAJA or common law review in terms of Uniform Rule 53. The crisp issue is thus whether the impugned decision by the municipal council constitutes an administrative action. It is trite that such a decision or resolution stands until it is set aside by a competent court of law irrespective of whether it was taken unlawful or not.⁵ Should I find that the relevant resolution taken by the municipal council constitutes an administrative action, then s7 of PAJA would find applicability.

[17] In *Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs and Mthonjaneni Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs*⁶ (*Nkandla Local Municipality* [2020]) the principles to determine whether a decision constitutes an administrative action was reaffirmed by Molemela JA (as she then was) [with whom Poyo-Dlwati AJA concurred]:

“[34] In *Minister of Defence and Military Veterans v Motau and Others (Motau)*⁷ the Constitutional Court provides a helpful guidance on whether a decision or conduct constitutes ‘administrative action.’ It distilled the definition of ‘administrative action’ into seven components: There must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.

[35] As stated before, the crux of the case brought by the MEC is that the Municipal Managers (Mr Jili and Mr Sibiya) should not have been employed in the first place

⁵ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).

⁶ *Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs and Mthonjaneni Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs* (Case no 485/2019) [2020] ZASCA 153 (26 November 2020).

⁷ *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 33.

because they are not qualified as required by the legislative instruments that apply. The question is whether, juxtaposed with the criteria set out in Motau, the impugned decisions of the two municipalities (i.e. the appointment of Mr Jili and Mr Sibiya, respectively) constituted administrative action to which PAJA applied. It is to that exercise that I now turn my attention.

[36] That a municipality's decision to appoint a Municipal Manager is quintessentially of an administrative character warrants no debate, in my view. A municipality is an 'organ of state' as defined in s 239 of the Constitution and its powers are of a public nature. The power related to the appointment of a Municipal Manager is derived from the Systems Act and constitutes a decision or conduct by the State. Given the crucial role of Municipal Managers as delineated in s 55 of the Systems Act, it is indisputable that an irregularity in the appointment of Municipal Managers can adversely affect the rights of members of the public or ratepayers to whom the Municipality owes the duty to lawfully execute its duties and thus had an external effect. Lastly, the decision to appoint Municipal Managers does not fall within the limited exclusions under the definition of 'administrative action' in PAJA.

[37] It is evident from the above that the impugned decisions meet the elements of the definition of 'administrative action' enunciated in PAJA and expounded in Motau and would thus meet the threshold for a review grounded on PAJA...."

[18] Recently in *Penxa v Central Karoo District and Others*⁸ Thulare J dealt with an urgent application to review and set aside a decision taken by the municipality to appoint a specific candidate as the municipal manager. The court referred to *Nkandla Local Municipality* [2020] to determine the nature of the decision taken by the council, to wit whether it constituted an administrative action as envisaged under PAJA. The court concluded that the appointment of a Municipal Manager is of an administrative character.

[19] In the matter of *Mlokoti v Amathole District Municipality and Another*⁹ Pickering J dealt with the review and setting aside of a municipality's resolution to appoint the second respondent candidate as Municipal Manager. Having considered whether such decision amounted to an administrative act he concluded as follows: "In my view

⁸ *Penxa v Central Karoo District and Others* (4913/24) [2024] ZAWCHC 151 (5 June 2024)

⁹ *Mlokoti v Amathole District Municipality and Another* 2009 (6) 354 (E).

therefore the decision to appoint the second respondent was clearly an administrative act which is susceptible to review.”¹⁰ Having had the advantage of the full record of the council meeting, he granted the relief claimed by the applicant for the review and setting aside of the decision to appoint the second respondent instead of the applicant to the position of Municipal Manager.

[20] Although the case law referred to relates to municipalities' appointment of Municipal Managers I am of the view that it likewise finds applicability to a municipality's decision to appoint Managers. Managers to be appointed likewise should comply with certain competency prescripts and such appointments likewise falls under the supervision of the MEC. In applying the principles set out in *Nkandla Local Municipality [2020]* above, the resolution which the applicant requires me to set aside in my view falls squarely within the ambit of the test for an administrative action. I say so because a municipality is an 'organ of state' as defined in s 239 of the Constitution and its powers are of a public nature. The power related to the appointment of a Manager (or acting Manager) is derived from the Systems Act and constitutes a decision or conduct by the State. An irregularity in the appointment (or the termination thereof) of either a Manager or acting Manager as envisaged in s 56 of the Systems Act, can adversely affect the rights of members of the public or ratepayers to whom the Municipality owes the duty to lawfully execute its duties and thus had an external effect. Finally, the decision to appoint Managers (either in a permanent or acting position) does not fall within the limited exclusions under the definition of 'administrative action' in PAJA.

[21] In my view I cannot declare a resolution unlawful, invalid or set it aside without reviewing it. Such a review must comply with the prescripts of PAJA. It is not the applicant's case that it is reviewing the aforementioned decision in terms of either PAJA and/or Rule 53 of the Uniform Rules of Court. Even if I condone the form used and consider it to be a review, there is a further insurmountable obstacle that the applicant did not address in its papers. S 7(1) of PAJA prescribes that “any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date...(b)...on which the

¹⁰ At 377 I.

person concerned was informed of the administrative action..." In casu eight months has lapsed since the applicant received his termination letter, and the eventual institution of these proceedings. The applicant is silent on an explanation of whatsoever nature for the late institution or even why such a lapse of time is reasonable under the circumstances, and the court is not requested to condone such. One would have expected an aggrieved applicant to seek relief, on an urgent basis as in most of the case law referred to, to have the impugned decision of the council to terminate his acting appointment reviewed, set aside and declared unlawful and invalid. This the applicant did not do, and absent any evidence placed before me in the founding affidavit to consider whether the time lapse of eight months is reasonable, I cannot do so, and in any event find it not to be *in casu*.

[22] In *Nguele v King Sabata Dalindyebo Municipality and Others*¹¹ the court declined to condone the late filing of the applicant's application for a review in terms of PAJA and held:

"It would again be impermissible of the court to come to the assistance of the Applicant who had not brought an application for judicial review of administrative action within the timeframes as prescribed in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000. Consequently, the invalid resolution has for all instances and purposes is to be regarded as valid together with all the consequences flowing from it..."

[23] The Supreme Court of Appeal in *Nkandla Local Municipality* [2020] stated the rule against delay in instituting review applications as follows:

"The requirement to institute review proceedings without undue delay is intended to achieve both certainty and finality. In *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) it was held that the rationale for the rule against delay in instituting reviews was to curb the potential prejudice that would ensue if the lawfulness of the decision remained uncertain. It was also observed that protracted delays could give rise to calamitous consequences not just for those who rely upon the decision, but also for the efficient functioning of the decision makings."¹²

¹¹ *Nguele v King Sabata Dalindyebo Municipality and Others* [2011] 8 BLLR 817 (ECM) at para [34]

¹² At para [39] thereof. See also: *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 44.

[24] According to evidence tendered in affidavit by the respondent the position had been filled in the meantime by another acting person. In terms of the common law, it was held that finality should be arrived at within a reasonable time in relation to administrative decisions failure whereof it could be contrary to the administration of justice and public interest to allow such decisions to be set aside after an unreasonably long period.¹³

[25] Recently this court in *Melato v Masilonyane Local Municipality*¹⁴ adjudicated on relief sought by the applicant for a declarator that the applicant's acting appointment as Director Corporate Services is lawful, and subsequent payment for a period of three months. The applicant had been appointed to act in the said position previously and was remunerated for that period. It was not in dispute that the applicant had duly and diligently performed his duties during this period. Van Zyl J found that the High Court had jurisdiction to hear the matter in terms of the Basic Conditions of Employment Act¹⁵ and the common law, and granted the orders as prayed for by the applicant. However, in *Melato* the applicant annexed to his papers not only the agenda of the council meeting, but also the minutes recording what had been discussed in respect of the applicant's acting appointment and remuneration.¹⁶ The court was thus in a position to determine that "...in terms of the resolutions by the municipal council, after consultation with the Municipal Manager, during the council meeting of 22 December 2020, (the council) approved payment of the acting allowance for the first acting appointment to the applicant and also approved the second acting appointment for the months December 2020 until 28 February 2021." Consequently, the court granted the relief claimed by the applicant.

[26] In view of my finding in paragraphs [20] and [21] that the applicant failed to comply with the prescripts of PAJA, the application cannot succeed which makes it unnecessary to decide any of the further disputes between the parties. The main application cannot succeed. The conditional counter-application does not need to be adjudicated upon, save that in respect thereof I do not intend to make any cost order.

¹³ *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41 E-F.

¹⁴ *Melato v Masilonyane Local Municipality* (2458/2023) [2024] ZAFSHC 215 (12 July 2024).

¹⁵ Act 75 of 1997.

¹⁶ In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 4486 (SCA) at [37] Navsa JA held "Without the record a court cannot perform its constitutionally entrenched review function..."

The applicant should pay the costs of the main application. In considering Uniform Rule 67A, I am satisfied that an appropriate scale for costs to be taxed should be on scale B.

[27] I therefore make the following orders;

1. The main application is dismissed with costs, such costs to be taxed on scale B.
2. There shall be no cost order in relation to the conditional counter-application.


C REINDERS, J

Appearances:

On behalf of the Applicant

Instructed by:

Adv Z Feni

Qhali Attorneys

Johannesburg

c/o Makubalo Attorneys

BLOEMFONTEIN

On behalf of the Respondent

Instructed by:

Adv Mc Louw

Maritz-Willemse Attorneys

c/o Hill Mc Hardy Attorneys

BLOEMFONTEIN