



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: 2025-032401

LEBOHANG ANDREW MOINWE

Applicant

and

JOE MOROLONG LOCAL MUNICIPALITY

First Respondent

B.D MOTLHAPING

(1ST RESPONDENT MUNICIPAL MANAGER)

Second Respondent

**MEC: COOPERATIVE GOVERNANCE,
HUMAN SETTLEMENTS AND TRADITIONAL
AFFAIRS (NORTHERN CAPE)**

Third Respondent

Heard: 23 April 2025

Delivered: 09 May 2025

JUDGMENT

MABASO, AJ

Introduction:

[1] On 17 December 2024, the Municipal Council ("the Council") of the First Respondent adopted a resolution to appoint the Applicant as the First Respondent's ("the Municipality") permanent Director of Technical Services, effective 1 February 2025 ("the first resolution"). However, on 24 February 2025, the Council rescinded this resolution and resolved to re-advertise the position ("the second resolution"), thus nullifying the first resolution. This change was prompted by a letter from the Member of the Executive Council ("the MEC"), which indicated that it did not "concur" with the first resolution. The MEC raised concerns regarding the incumbent's competency, asserting that the Applicant was "not the most competent candidate" and recommending that the Council reconsider its decision and appoint one who, he said, "obtained the highest scores in the core competencies." At this time, the Municipality employed the Applicant as the acting Director of Technical Services.

[2] In response, the Applicant has approached this Court, on semi-urgent, seeking *inter alia* an order declaring the second resolution to be unconstitutional and /or inconsistent with the principle of legality and requesting that it be set aside. All the Respondents oppose this application and have submitted their preliminary objections, including claims regarding the Court's jurisdiction, the Municipality's non-joinder as the resolution taker, and the absence of urgency. These preliminary issues will be addressed before engaging in the case's substantive matters.

Points in limine:

Jurisdiction

[3] The Third Respondent contends that this Court, sitting in Cape Town, should dismiss this application or, alternatively, remove it from the roll, because the Applicant should have instituted these proceedings in Johannesburg, which is a location closer to the Municipality. This contention is based on Rule 3(1) of the Court's Rules, which stipulates that proceedings must be commenced in the nearest venue where the dispute that forms the basis of the case originated. It is crucial to note that the provision upon which the MEC relies addresses "the seat where proceedings must be initiated and court sittings," rather than the jurisdiction of the Court. According to the definitions provided within the same Rules, the term 'Court' is

defined as the Labour Court established under section 151 of the Act, which inter alia confirms that this Court is a Court of equity. This Court has national jurisdiction, not provincial jurisdiction.

[4] This Court concludes that, even though the Applicant did not obtain authorisation from the Judge President of this Court when he instituted this application in Cape Town, which is not condoned, the procedures related to the Court's sittings do not affect the Labour Court's jurisdiction, even if proceedings are initiated at a different seat. Rather, the purpose of the Rules and associated directives is to manage and regulate the handling of cases within this Court. Should a party fail to adhere to these rules, it does not imply that the matter will be dismissed or automatically removed from the roll. Instead, the Court may impose a costs order deemed appropriate, which may include unnecessary expenses incurred by either party that could have been avoided had the matter been instituted within a reasonable proximity to the location of the dispute. This Court would not have hastened to issue a costs order against the Applicant based on this if there were submissions that the MEC incurred unnecessary costs because of the location when this matter was instituted. Therefore, as this is a Court of equity, it concludes that this contention lacks merit and must be dismissed.

Non-joinder

[5] The MEC also contends that the application is flawed because the Applicant did not cite the Council herein; furthermore, he submits that the Council has a vested interest in this matter as their decision are a subject of this litigation.

[6] It is true that it is imperative for a party initiating legal proceedings to include all other parties that possess what is designated as "a direct and substantial interest" in the relief sought. However, this Court's understanding is that it is crucial to recognise the status of such parties within the application under consideration. This indicates that the principle is not absolute but is evaluated on a "case and context basis." In the matter of *Minerals Council South Africa v Minister of Mineral Resources and another* [2020] 4 All SA 150 (GP), the Court stated the relevant principle as follows:

“The question whether the potentially affected interest is a direct and substantial one that constitutes a legal interest, needs to be determined on a case and context-specific basis. Particular regard would have to be paid to the special characteristics of the case as well as to the impact the relief sought by an applicant would have on the non-joined affected parties. It is therefore important to discern the context within which this litigation is conducted.” (Own emphasis)

[7] This Court has carefully considered the arguments presented on this issue and finds no compelling evidence supporting the MEC's position. Instead, the Court is persuaded by the Applicant's submission, which references an excerpt from the case of *Nelson Mandela Bay Municipality and others v Qaba and others* [2022] 3 All SA 239 (ECP). This excerpt effectively articulates the relationship between a Municipality and a Municipal Council regarding Section 151 of the Constitution of the Republic of South Africa, when read in conjunction with Section 2 of the Systems Act¹, as it said:

"What section 2 of the Systems Act does not contemplate is that 'a municipality' is a separate incorporated entity to that of its 'council'. Such a notion would, in any event, be absurd since it is the Council in which executive and legislative power and authority is vested."

And

"Section 2(b) plainly conceives of a municipality as an amalgam of the political structures and administration of which it consists. Neither the Constitution nor the legislation enacted to give effect to its provisions clothes a 'municipal council' with separate legal personality from the 'municipality' of which it is a component. Rather, a municipality acts and performs its functions through the agency of its Council. The Council consists of democratically elected representatives of the community which forms part of the Municipality. In it is vested all of the constitutionally conferred powers and responsibilities of a municipality."

¹ Local Government: Municipality Systems Act 32 of 2000 ("the Systems Act")

[8] In light of the conclusion of this Court, which emphasizes a "case and context basis" approach, this conclusion is supported by section 160 of the Constitution, which stipulates that "A municipal Council makes decisions concerning the exercise of all the powers and the performance of all functions of the Municipality." Additionally, as stated in the answering affidavit submitted on behalf of the Municipality and Second Respondents ("the Municipal Manager"), in paragraph 3 therein, the Municipal Manager confirms that she is authorized to oppose the application on behalf of the Municipality and further asserts that "*as can be gleaned in section 2(a) of [the Systems Act], a Municipality includes its Council.*" This also reinforces the fact that the Council extends its authority to the Municipal Manager.

[9] Consequently, this point is rejected as it lacks merit.

Urgency

[10] During oral submissions, the counsel for the MEC indicated that he was not particularly concerned about urgency; however, the Municipality and the Municipal Manager insisted on it. This Court has thoroughly considered the facts of this case. Moreover, it is crucial to note that this is not an application in which an individual seeks to interdict or obtain a declaratory order concerning an ongoing disciplinary hearing, but rather a matter in which the Applicant raises an important issue regarding the Council's irrational decision, which the MEC, who is not an employer, has influenced.

[11] This Court has taken into consideration the findings in *Apleni v President of the Republic of South Africa* 2018 (1) All SA 728 (GP), particularly regarding the issue of urgency, as that Court acknowledged that allegations concerning the abuse of power by public officials, which may have significant implications for the public, warrant prompt judicial attention.

[12] This Court has also considered what the learned Makhura J said in *Letsholonyane*² as he reinforced the principle of urgent intervention by the Court whereby political heads seem to act irrationally in employment relationships.

[13] *In casu*, the Council has resolved to re-advertise the position. Clearly, there will be interviews afterwards, which might lead to the appointment of a different person to this position. If this matter is not addressed now, what will happen if a year later this Court rules as it is doing in Order 2 below? That would clearly result in wasteful expenditure, considering that the parties have on record that this process involves a service provider who conducted the appointment process following the first resolution.

[14] On this basis, this Court concluded to hear this matter on an urgent basis.

Substantive case:

[15] On 30 September 2024, the Council passed a resolution to appoint the Applicant to an acting position for a duration not exceeding three months, pending the fulfilment of the vacancy. The vacancy was subsequently advertised in accordance with the Municipality's internal protocols. The Applicant applied, alongside other candidates, and was shortlisted for the position, participated in interviews, and underwent competency assessment tests. The selection panel recognized the Applicant as a distinguished candidate and subsequently recommended his appointment. Therefore, on 17 December 2024, in accordance with regulation 17(1) and (2) of the Regulations on Appointment and Conditions of Employment of Senior Managers, as well as sections 56 and 57 of the Systems Act, it was resolved that he be appointed to the vacant position. This is the first resolution.

[16] At this point, it is important to take a moment to refer to and reproduce the excerpts of the contested Regulation, mentioned in the preceding paragraph. Regulation 17 reads thus:

² See *Letsholonyane v Minister of Human Settlements and Another* [2023] ZALCJHB 147; [2023] 8 BLLR 796 (LC); (2023) 44 ILJ 1740 (LC) at paras 29 – 30.

“17 Resolution of municipal Council on appointment of senior managers and reporting

*(1) **Before making a decision on an appointment**, a municipal council must satisfy itself that-*

- (a) the candidate meets the relevant competency requirements for the post, as set out in Annexures A and B to these Regulations;*
- (b) screening of the candidates has been conducted in terms of regulation 14; and*
- (c) the candidate does not appear on the record of staff members dismissed for misconduct as set out in Schedule 2 to these Regulations.*

*(2) **A municipal council must**, subject to subregulation (1), **take a decision on the appointment of a suitable candidate**.*

(3) A municipal council must-

- (a) inform all interviewed candidates, including applicants who were unsuccessful, of the outcome of the interview; and*
- (b) within 14 days of the decision referred to in subregulation (2), **submit a written report to the MEC for local government regarding the appointment process and outcome**.*” (Own emphasis)

[17] The pertinent excerpts from Sections 56 of the Systems Act are articulated 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) ...*
- (b) A person appointed in terms of paragraph (a) (i) or (ii) must at least have the skills, expertise, competencies and qualifications as prescribed.*
- (c) ...*
- (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).

(3) If a post referred to in subsection (1) (a) (i) becomes vacant, the municipal Council must-

(a) advertise the post nationally to attract a pool of candidates nationwide; and

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

(4) The municipal Council must readvertise the post if there is no suitable candidate who complies with the prescribed requirements.

(5) (a) The municipal Council must, within 14 days of the date of appointment, inform the MEC for local government of the appointment process and outcome, as may be prescribed.

(b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister.

(6) If a person is appointed to a post referred to in subsection (1) (a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal Council with this Act, which steps may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the municipal Council.

(7) A municipal council may, in special circumstances and on good cause shown, apply in writing to the Minister to waive any of the requirements listed in subsection (1) (b) if it is unable to attract suitable candidates.”

[18] Back in this matter, the first resolution was subsequently forwarded to the MEC, as outlined in Regulations 17(3)(b), which stipulate the requirement to “*submit a written report*” to the MEC. Following this procedure, the MEC issued a letter to the Council, indicating that he had reviewed the appointment process and the outcome report, noting the number of individuals shortlisted and the overall results. However, he concluded that the appointment was in violation of section 56(1)(b) read with Regulations 8(1)(b) and 9(1) of the Appointment Regulations. Consequently, he proposed the following recommendations.

“ I cannot Concur with the appointment of the first candidate as he is not the most competent candidate. The municipal Council is advised to reconsider the recommendation based on the candidate that obtained the highest scores in the competencies”

[19] Upon receiving the outcome, the Municipality formally expressed its disagreement with the conclusion reached by the MEC. Nevertheless, the Council resolved to rescind its previous resolution and opted to re-advertise the vacancy. The Council articulated that this decision was made in order to mitigate the potential risk of litigation from the Applicant, should they proceed with the appointment of the candidate recommended by the MEC. Additionally, they considered the possibility of facing litigation from the MEC if they chose not to comply with the advice provided. Ultimately, the Council acknowledged that, with respect to the initial resolution, they believed their stance to be correct.

[20] The Applicant asserts that the Council's later approach influenced by the MEC's decision is irrational and inconsistent with the principle of legality,³ as the authority to appoint a manager who reports directly to the Municipal Manager is vested in the Council, albeit within the confines of statutory limitations, specifically referencing section 56(1)(a) of the Systems Act. The Applicant characterises this decision as irrational, providing several reasons to support his claim, arguing *inter alia* that:

20.1 The competency assessment stage should not be considered in isolation from other criteria that could supersede preceding stages, such as shortlisting and the interview process, as it constitutes part of a more comprehensive procedure.

20.2 The Applicant also takes advantage of the version in the Municipality's affidavit, which, *inter alia*, provides that the Council maintains that upon reviewing the MEC's report, they remain adamant that no legal provision in the Systems Act obstructs them from making decisions while fulfilling their functions; thus, their decision was within the law.

³ Hendricks v Overstrand Municipality & Another (2015) 36 ILJ 163 (LAC), para 16 – 33.

20.3 The Applicant asserts that the MEC's reasoning is irrational. The MEC incorrectly believes that his appointment, based on the resolution adopted on 17 December 2024, contravenes the provisions outlined in section 56(1)(b) of the Systems Act.

20.4 Furthermore, the Applicant argues that if the MEC opines that the appointment was a nullity, as described in section 56(2) of the Systems Act, he should have approached a competent court for appropriate recourse, rather than the approach that has been taken. In a way, the Municipality and the Municipal Managers concur with this assertion.

[21] This Court's understanding of the interpretation of Section 56, as stated above, is outlined hereafter.

[22] It is essential to note that Section 4(1)(b) of the Systems Act confers upon the Council the authority to exercise the Municipality's executive and legislative powers without any undue interference. Furthermore, Section 56(1)(a)(i) of the Systems Act affords the Council the powers necessary to appoint a manager who is directly accountable to the Municipal Manager, rather than to an MEC. This provision specifies that such an appointment must occur following consultation with the Municipal Manager. It is important to clarify that this decision is not required to involve the MEC. This subsection specifically provides that "[the Council] ...**must appoint**...". Subsection (1)(b) expressly confirms that the process is independent of the MEC, as it refers to "A person appointed," rather than a person recommended, and subsequently delineates the qualifications required for that individual.

[23] To support the point made in the preceding paragraph, reference is made to subsection (2), which states that "**A decision**" to appoint an individual as previously indicated and "any contract concluded between the municipal council and that person... is null and void if...the person does not possess the prescribed ...competence...". This clause underscores that the authority to appoint such an individual resides solely with the Council. Both subsections 56(1) and (2) elaborate on the necessary consultations, identify the decision-maker, and outline the

consequences of making decisions that do not comply with the stipulations set forth in the Systems Act.

[24] Notably, there is no mention of an MEC within these provisions. It is also clear that subsection 5(a) indicates what should have happened after “the date of the appointment,” as it clearly states that the Council “must” “inform” the MEC of “the appointment process and outcome” thereof.

[25] To demonstrate that the process of informing the MEC is procedural and does not entail directing parties on who to appoint, it is expected that the MEC must also inform the concerned Minister. It is also clear that section 56(6) specifically indicates that “ (6) ***if a person is appointed*** to a post referred to in subsection (1) (a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with ***this Act***, which steps may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the municipal council.”(Own emphasis)

[26] Consequently, it is concluded that the only recourse available to the MEC, in light of the aforementioned considerations, is to refrain from offering recommendations to the Council as he did, instead, seek judicial intervention if the Council has rendered a decision that contravenes both subsections 56(1)(a) and (b) of the Systems Act.

[27] Furthermore, this Court concludes that the MEC incorrectly understood the provisions of section 56 (1)(b) of the System Act, which inter alia refers to “competencies” not in light of the classification provided by the MEC referring to the “most competent” individuals. It articulates the necessity for “at least ... skills, expertise, competencies, and qualifications” to be appointed; this serves as a guiding framework for the Council, which acts as the decision-making body, and the decision lies with that Council. The assertion by the MEC that the appointment fails to satisfy the criteria outlined in the provisions suggests a misunderstanding of the fact that the competency assessment stage is not an isolated process within the appointment

framework; additional factors must be taken into account. So, the decision-maker, which is the Council, will know that, not the MEC.

[28] Moreover, the decision-maker, in accordance with regulation 17 (2), is obligated to "make a decision regarding the appointment of a suitable candidate." Therefore, it would have been more appropriate for the MEC to seek recourse through the judicial system, as stipulated in section 56(6) of the Systems Act, rather than proceeding in the manner that was adopted. Consequently, the MEC acted contrary to section 4(1)(b) of the Systems Act, which disapproves of "improper interference." Considering all that is stated above, the Council was right in that the MEC had no power to give them advice as he did.

[29] Did the Council act irrationally and against the principle of legality by adopting the second resolution? The starting point is to look at the judgment in *Premier, Gauteng and Others v Democratic Alliance and Others* 2022 (1) SA 16 (CC), which says the following about the principle of legality, which is a subject of the Applicant, in the following point,

"...The principle of legality has developed significantly in our jurisprudence since *Fedsure* and the grounds for a legality review have expanded along with it. They now include lack of authority, abuse of power, and jurisdictional facts, which are all subcategories of lawfulness. The rationality of the action in question may also be challenged as a further and separate ground of review."

[30] The LAC in *Hendricks v Overstrand Municipality & Another* (2015) 36 ILJ 163 (LAC) at para 21, said the following:

"But it is probably unnecessary to go that far. There is strictly speaking no need to classify the decision as administrative action in terms of PAJA before a review will be competent under s 158(1)(h). The provision does not say that the Labour Court may review decisions of the state acting as employer on the grounds of review applicable to administrative action under PAJA. The Labour Court may do so on any ground 'permissible in law'. Review under PAJA is only one kind of administrative law review. Other exercises of public power are reviewable on constitutional grounds of legality and rationality. As stated by the SCA in NDPP & others v Freedom under Law, the legality principle

has become well established in our law as an alternative pathway to judicial review of exercises of public power where PAJA finds no application. The principle permits review on grounds of both legality and rationality. (Footnotes omitted)

[31] In this matter, as much as the law is clear that the Council may rescind its decisions,⁴ the Council subsequently rescinded its initial resolution in light of the position articulated by the MEC. It is crucial to analyse the reasons presented by the Council, as referenced in paragraph 19 of this judgment, which centre on concerns regarding potential litigation.

[32] This reasoning indicates an irrationality. The Council possesses both the right and the obligation to govern its operations and proceedings without fear, favour, or prejudice, given that it is an institution established by the Constitution of the Republic.⁵ Should the Council be permitted to render decisions based on such uncertain apprehensions, it would undermine the ability of councillors to fulfil their duties, as they would be apprehensive of unforeseen legal challenges. Moreover, the actions of the Council have been unduly influenced by the MEC's erroneous decision, which subjects the Council to inappropriate interference, contrary to the stipulations of section 4(1)(b) of the Systems Act. This conduct is inconsistent with the principle of legality and is irrational.

[33] It is essential to recognize that the decision to re-advertise the position is in direct contradiction to the applicable regulations. It is widely understood that the Council has identified a suitable candidate in accordance with the requirements set forth in regulation 17. Moreover, regulation 19(1) explicitly delineates the conditions under which a re-advertisement may be warranted. This regulation states: "If no suitable candidate has been identified, [the Council] (a) must inform all shortlisted candidates that their applications were unsuccessful; and (b) may re-advertise the post." Consequently, the decision to re-advertise the position is deemed unlawful, as

⁴ Section 59(3) of the Systems Act.

⁵ Section 4(2)(b) of the System Act provides that the Council "...has the duty to...provide, without favour or prejudice..."

it violates not only this regulation but also other relevant provisions outlined in the Systems Act, as established in section 120 of the same Act.

[34] The Applicant also has raised concerns regarding the procedural steps undertaken to adopt the second resolution, which mandated the re-advertisement of the position. These concerns primarily pertain to the alleged procedural impropriety of the Council, as the Applicant asserts that the second resolution was enacted in violation of Rule 28.5 of the Standing Rules, which delineates specific guidelines pertaining to such actions. This Rule reads thus:

“ When a member introduces a motion which is intended to rescind or amend a resolution passed by the council in the preceding three months or which has the purport as a motion that was not supported within the three preceding months shall not be entertained.”

[35] The assertions stated above are not significantly contested by the Respondents. For example, the joint response from the Municipality and the Municipal Manager consists solely of a denial, lacking any substantive arguments. This standing Rule is explicit, and given the circumstances of this case, it is evident that the Council should not have proceeded in the manner that they did, as the first resolution was adopted on 17 December 2024, and the subsequent resolution was enacted on 24 February 2025. Furthermore, a clear and undisputed argument exists that this conduct is improper. Thus, this Court concludes that the actions taken by the Council constituted a violation of the applicable standing Rule.

[36] The final consideration pertains to the subsequent course of action. The pleadings do not explicitly indicate whether the Council has met the requirements set forth in Regulation 17(3)(a), which mandates that all candidates who have undergone interviews receive notification regarding the outcomes of their interviews, including the Applicant. Therefore, the Council is hereby directed to furnish this notification within the timeframe outlined in the order below.

[37] Costs do not invariably follow the results in this Court, as the provisions of section 162 of the LRA apply; in this particular case, the Court has concluded that the Municipality shall bear the costs incurred by the Applicant. The rationale for this

determination is as follows: Following the receipt of recommendations from the MEC, the Council consulted legal counsel, which unequivocally indicated that the MEC had relied upon incorrect advice, as the case law followed was not applicable in this matter. Upon reviewing the referenced case law, this Court agrees that it is not pertinent to the current matter, a conclusion that the Council has appropriately recognised. Furthermore, motivated by irrational considerations, the Municipality chose to re-advertise the position, contrary to their initial understanding. Subsequently, when the Applicant initiated this application, the Municipality opposed it.

[38] Consequently, the following order is made:

Order:

1. The application was heard as a matter of urgency, and the Applicant's failure to comply with time limits, forms and procedures in the Rules of this Court was accordingly condoned.
2. The decision of the Municipal Council of the First Respondent, taken on 24 February 2025, to re-advertise the Director of Technical Services position is hereby reviewed and set aside.
3. The Municipal Council, acting through the Second Respondent in accordance with section 55(1)(k) of the Systems Act 32 of 2000, is directed to comply with Regulation 17(3)(a) of the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers, within five days.
4. The Second Respondents are directed to implement and execute the decision rendered by the Municipal Council on 17 December 2024, within 10 days, which is the decision that mandates the permanent appointment of the Applicant to the position of Director of Technical Services.
5. The First Respondent is to pay the Applicant's costs.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr W. P. Schötlz

Instructed by: Schötlz Attorneys

For the First and Second Respondents: Adv. N Mathe-Ndlazi

Instructed by: Voyi Inc. Attorneys

For the Third Respondent: Adv. CC Davis

Instructed by: The Office of the State Attorney

LABOUR COURT