



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION - MTHATHA)**

Case no: 2715/2024

In the matter between:

SIMVUMILE MAMBAFULA

Applicant

And

ALFRED NZO DISTRICT MUNICIPALITY

Respondent

JUDGMENT

NKELE AJ:

INTRODUCTION

1. The applicant approached this Court, on an urgent basis, seeking an order to review and set the respondent's decision not to appoint him as per the recommendations of the interviewing panel and to re-advertise the post. He also seeks an order appointing him to the post as per the recommendations of the interviewing panel. Effectively the applicant seeks to review the decision to cancel the recruitment process.

2. On 10 October 2024 the court granted an order interdicting and restraining the respondent from conducting interviews for the post of Director: Corporate Services and from making a permanent appointment to that post, pending the finalisation of the review contemplated in part B of the Notice of Motion.

CHRONOLOGICAL COMMON CAUSE FACTS

3. It is a matter of common cause that on 20 June 2023 the respondent, acting in terms of the applicable Regulations on Appointment of Senior Managers, promulgated in terms of the Local Government Municipal Structures Act, 2000, advertised externally the position of Director: Corporate Services. The advertisement, which is titled “**external advertisement**,” invited all qualified persons to apply for the advertised position and the closing date for the applications was the 21st of July 2023.

4. The shortlisting panel commenced with the process of shortlisting of candidates on the 13th of September 2023, which process culminated into a report on the shortlisting and screening procedure that was submitted to the Council by the Municipal Manager on 28 September 2023.

5. Interviews for the post of Director: Corporate Services were conducted on 12 October 2023 and the interviewing panel recommended that the applicant be appointed to the post as advertised.

6. On the 7th of November 2023 the Mayor of the Respondent, Councillor Mhlembana, wrote a letter to the Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs, Eastern Cape Province, in which he reported some serious irregularities in the interviewing process and in the end recommended that the whole process be nullified and the post of Director: Corporate Services be re-advertised.

7. In a Mayoral Committee meeting that was held on the 30th of November 2023, the applicant was recommended for appointment to the advertised position and Ms A

Ganya was also appointed as the second-best candidate to cater for a situation where the applicant declines or does not accept the offer of employment.

8. On 15 January 2024 the MEC, Cooperative Governance and Traditional Affairs responded to the letter written by the Mayor on 7 November 2023, in which the Mayor highlighted irregularities in the interviews and recommended their nullification. The MEC's response is to the effect that he will ensure that a comprehensive report is compiled and made available to the Mayor. He further states in the letter that, given the gravity of the allegations and the necessity to uphold the highest standards of governance, the post must be re-advertised.

9. A special council meeting held on 23 February 2024 noted the report on the Recruitment of the Director Corporate Services presented by the Executive Mayor and recommended that, whilst the discrepancies in the recruitment process were being investigated, Mr S Quzu be appointed as Acting Director Corporate Services for a period of three months.

10. The applicant received a letter dated 30 April 2024, thanking him for applying for the post of Director: Corporate Services and advising him that the post will be advertised again. The letter also encouraged him to apply for the position. The post was re-advertised on 3 May 2024.

11. The applicant then launched this application on 4 July 2024 on an urgent basis.

ISSUE FOR DETERMINATION

12. The main issue, the quintessence of the matter, that this Court will have to grapple with, and which it has to resolve and decide on, is whether the decision of the Respondent not to appoint the applicant and to re-advertise the post constitutes an administrative action under the Promotion of Administrative Justice Act¹ and, if so, whether it is reviewable.

¹Act no.3 of 2000.

13. Necessarily so, a discussion to resolve the essence of the dispute in this matter entails narrating of the governing legal framework and the analysis of the parties' competing and, often, contradicting contentions. It is imperative to first discuss the pertinent legal principles and then narrate the parties' respective versions, which will be followed by an analysis of both versions and then a conclusion will be made there from. Below I set out to discuss the relevant statutory framework and the applicable case law.

THE REGULATORY CONSTITUTIONAL AND LEGAL FRAMEWORK

14. The right to a just administrative action is a human right expressly entrenched in the Bill of Rights and which is only subject to limitation in terms of section 36 of the Constitution of the Republic of South Africa. The Authors opine that the adjective '*just*' refers to the lawfulness and reasonableness and procedural fairness of the action; that is if an action is lawful, reasonable and procedurally fair it will be just in terms of section 33 of the Constitution. According to the authors section 33 does not operate in a vacuum but is dependent upon the existence or presence of an administrative action.²

15. Section 33 of the Constitution provides that:

- (1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
- (2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
- (3) *National legislation must be enacted to give effect to these rights, and must-*
 - (a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
 - (b) *impose a duty on the state to give effect to the rights in subsections (1) and (2); and*

²Geo Quinot et al *Administrative Justice in South Africa, An Introduction* 2nd ed (2020) at page 75.

(c) *promote an efficient administration*".

16. Section 33 of the Constitution confers wide standing powers to enforce the constitutional right to a lawful administrative action and give an adversely affected party a right to review an administrative action in a Court of law or any other independent and impartial tribunal.³

17. The Promotion of Administrative Justice Act was enacted to give effect to the right to lawful administrative action and it does so by elaborating the right to just administrative action and by providing a remedy to vindicate it.⁴

18. In terms of section 1 of Act 3 of 2000 an '*administrative action*' is defined as "*any decision taken, or any failure to take a decision, by-*

(a) *an organ of state, when –*

(i) *exercising a power in terms of the Constitution or a provincial constitution; or*

(ii) *exercising a public power or performing a public function in terms of any legislation; or*

...which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

...

(cc) *the executive powers or functions of a municipal council;*

...

(hh) *any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or*

(ii) *any decision taken, or failure to take a decision, in terms of section 4(1)".*

19. In the Act a decision is defined as *any decision of an "administrative nature made, proposed to be made, or required to be made, as the case may be, under the empowering provision, including decisions relating to–*

³Ian Currie & Johan De Waal *The Bill of Rights Handbook* 6th ed (2017) at page 646.

⁴ Ibid page 649. See also Preamble to Act 3 of 2000.

- (a) *Making, suspending, revoking or refusing to make an order, award or determination;*
- (b) *Giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
- (c) *Issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
- (d) *Imposing a condition or restriction;*
- (e) *Making a declaration, demand or requirement;*
- (f) *Retaining or refusing to deliver up, an article or*
- (g) *Doing or refusing to do any other act or thing of an administrative nature,*

And a reference to failure to take a decision must be construed accordingly”.

20. *Empowering provision is defined to mean “a law, rule of common law, customary law, an agreement, instrument, or other document in terms of which an administrative action was purportedly taken”.*

21. In terms of the provisions of section 6(1) of the Act [a]ny person may institute proceedings in a court or tribunal for the judicial review of an administrative action and in terms of sub-section 2 a court or tribunal has the power to judicially review an administrative action if—

- (a) The administrator who took it—
 - (i) *was not authorised to do so by the empowering provision;*
 - (ii) *acted under a delegation of power which was not authorised by the empowering provisions; or*
 - (iii) *was biased or reasonably suspected of bias;*
- (b) *a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
- (c) *the action was procedurally unfair;*
- (d) *the action was materially influenced by an error of law;*
- (e) *the action was taken-*
 - (i) *for a reason not authorised by the empowering provision;*

- (ii) *for an ulterior purposes or motive;*
- (iii) *because irrelevant considerations were taken into account or relevant consideration were not considered;*
- (iv) *because of the unauthorised or unwarranted dictates of another person or body;*
- (v) *in bad faith; or*
- (vi) *arbitrarily or capriciously;*
- (f) *the action itself-*
 - (i) *contravenes a law or is not authorised by the empowering provision;*
or
 - (ii) *is not rationally connected to-*
 - (aa) *the purpose for which it was taken;*
 - (bb) *the purpose of the empowering provision;*
 - (cc) *the information before the administrator; or*
 - (dd) *the reason given for it by the administrator;*
 - (g) *the action itself concerned consists of a failure to take a decision;*
 - (h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
 - (i) *the action is otherwise unconstitutional or unlawful.*

22. Section 56(1)(a) of the Local Government: Municipal Systems Act 32 of 2000 provides that a Municipal Council, after consultation with the municipal manager, must appoint-

- (j) *“a manager directly accountable to the municipal manager. In terms of paragraph (b) of sub-section (1) of section 56, a person appointed in terms of paragraph (a)(i) or (ii) must at least have the skills, expertise, competencies and qualifications as prescribed of the Local Government: Municipal Systems Act”.⁵*

⁵ Local Government: Municipal Systems Act 32 of 2000.

23. Subsection 3 is to the effect that if a post referred to in subsection (1)(a) becomes vacant, the Municipal Council must advertise the post nationally to attract a pool of candidates nationwide and select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post. The Municipal Council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements, in terms of subsection 4.

24. If an appointment is made, 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 in terms of section (4A) (a). 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 in terms of subsection (4A) (b).

25. Subsection 6 is to the effect that 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.

26. The competency requirements for Senior Managers are tabulated in regulation 9 of the Regulations on the appointment and conditions of employment of Senior Managers, promulgated in terms section 120, read with section 72, of the Systems Act. The Relevant regulation provides that:

“9(1) A person appointed as senior manager in terms of these regulations must have the competencies as set out in Annexure A.

(2) A person appointed as a senior manager in terms of these regulations must comply with the minimum requirements for higher education qualification, work experience and knowledge as set out in Annexure B.”

27. In *Economic Freedom Fighters v Speaker, National Assembly and Others*⁶, the Constitutional Court confirmed the importance of the rule of law and pointed out also the consequences of abusing state power in the following manner:

“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of state power and resources that was virtually institutionalised during the apartheid era. To achieve this goal we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason public-office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck”.

28. The Constitutional Court in *Minister of Defence & Military Veterans v Motau and Others*⁷ stated that:

“administrative action can be crystallised into seven elements, that there must (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 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.”⁸ (Added emphasis.)

The Apex Court went on to state that in determining what constitute administrative action “(a) a court must make a ‘positive decision in each case whether a particular exercise of public power...is of an administrative character’; (b) a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. A reviewing

⁶ 2016 (5) BCLR 618 (CC), 2016 (3) SA 580 (CC) at para 1. See also *Premier, Gauteng Others v Democratic Alliance Others* 2022 (1) S 16 (CC) at para 67.

⁷ 2014 (5) SA 69 (CC) at para 33.

court must undertake a close analysis of the nature of the power under consideration”.⁹

29. At paragraph 37 the Apex Court defined the conduct of an administrative nature, which is generally known as the conduct of the bureaucracy, in the following terms:

“Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another. By contrast, ‘(a) administrative action is...the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with the direct and immediate consequences for individuals or groups of individuals’. Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example.”¹⁰

30. The Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union & Others*¹¹ held that:

“In s 33 the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may be, as contemplated in *Fedsure*, that some acts of a legislature may constitute ‘administrative action’. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is ‘administrative action’ is not on

⁹ Ibid at para 34.

¹⁰ Ibid at para 37.

¹¹ 2000 (1) SA 1 (CC) paras 141-143.

the arm of the government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of s 33. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be constructed as being administrative action for the purposes of s 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute 'administrative action' as contemplated by s 33, but not all acts by such members will do so.

Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other hand to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitute administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterized as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case-by-case basis".

THE APPLICANT'S CASE

31. The applicant's case is basically a complaint that he was not appointed to the post of a Director: Corporate Services, an external post that was advertised and for which he was interviewed together with other candidates. The nub of his case is that during the selection and interviewing stages all procedures were followed and there were no complaints about irregularities. The recruitment, selection, and interviewing panels were properly constituted and because he was the best qualifying candidate, he was recommended for appointment to the advertised post. The recommendation was sent to the council of the respondent for endorsement.

32. It is the applicant's contention that at all stages of the recruitment, selection and interviewing stages the council was kept abreast of developments and in all the reports about progress in the appointment of the Corporate Services Director, no report of irregularities was made by any of the panels that were intimately involved in the recruitment, selection and interviewing panels. The applicant's case is that it seems odd that the respondent would take a decision not to appoint him on the basis of reports of irregularities reported to it by the Mayor who was not even part of either the recruitment, selection or interviewing panels. In the same vein, the applicant submits, the decision to re-advertise the post on the basis of the allegations of irregularity that adversely affects his rights is also odd and must be reviewed and set aside.

33. The applicant, therefore, seeks an order to review and set aside the respondent's decision not to appoint him to the position of Corporate Services Director and the decision to re-advertise the post. He also seeks for an order appointing him to the position of Director: Corporate Services. The order sought is based on the contention that the decision not to appoint him falls squarely with the definition of administrative action and is susceptible to be reviewed under PAJA.

RESPONDENT'S CASE

34. The respondent's case is to the effect that during the interviews it was discovered that sensitive information about the recruitment process was leaked to

the public in contravention of the policy protocols. It is the respondent's case that those irregularities tainted the entire recruitment process. To substantiate its case the respondent submits that the decision to suspend the recruitment process was based on a rational reasoning to allow the investigation to go to the depth and extent of the identified irregularities. The whole idea behind that exercise, so the respondent submits, was to determine if the alleged irregularities are material.

35. The respondent further contends that in the shortlisting process it was discovered that certain candidates that qualified for the advertised post were not shortlisted, they were excluded, from the interview. According the respondent that rendered the entire shortlisting and recruitment process tainted with irregularities and that made it liable to be reversed. In this regard the respondent contends that the decision to nullify the recruitment process and to re-advertise the post was based on the fact that the investigation revealed material irregularities that cannot be condoned as they rendered the whole process futile.

36. It is the respondent's contention that the applicant is not entitled to the decision to make his appointment final, as per the recommendation of the interviewing panel, as the decision to make an appointment is the sole prerogative of the respondent's council. The respondent further vehemently disputes that the applicant is entitled to be appointed to the advertised position on the basis of a flawed and tainted recruitment process.

37. Lastly, the respondent contends that the decision not to appoint the applicant was taken in an employment context that is in its capacity as the applicant's employer and therefore it had no direct and external effect on any other person other than the applicant. Furthermore, the decision was taken during the respondent's council deliberative process, which does not fall under the definition of administrative action under PAJA and is therefore excluded from being reviewed, as it is the outcome of a deliberative process of a legislative body.

APPLICATION OF LAW TO THE FACTS

38. As already explained above, the Constitutional Court neatly defined an administrative action to be a decision of an administrative nature, taken by an organ of the state or a natural person or juristic person, exercising public power or performing public function, in terms of any legislation or empowering provision, that adversely affects rights, which has a direct, external effect and which does not fall under any of the listed exclusionary grounds.¹²

39. The question for consideration is whether the decision sought to be impugned fits in the definition expounded by the Apex Court and therefore falls to be reviewed under PAJA. In short, the question for consideration is whether the respondent, when it took the decision to sought be challenged, did so exercising public power whether in terms of a legislation or some empowering provision, if so, whether that can be described as administrative in nature.

40. It is trite that the appointment of senior managers accountable to the municipal manager is regulated by section 56 of the Municipal Systems Act. In terms of section 56(1)(a)(ii) a municipal council, after consultation with the municipal manager, must appoint a manager directly accountable to the municipal manager under the circumstances and for a period as prescribed. Section 56(2) provides, in unambiguous terms, that a decision to appoint and any contract concluded between the Municipal Council and that person appointed is null and void if that person does not have the prescribed skills, expertise, competencies or qualifications or the appointment was otherwise made in contravention of the Act, unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1)(b).

41. During argument Mr Maswazi conceded that the post that was advertised, and for which the applicant was recommended for appointment, is a senior managerial one directly accountable to the municipal manager, as described in section 56(1)(a)(i) of the Systems Act. That being the case the respondent's council, in taking a decision whether to appoint a candidate that has availed himself and has been recommended for appointment after an interview, exercised the powers

¹² *Minister of Defence & Military Veterans* (note 7 above) at para 33.

bestowed on it in terms of the provisions of section 56 of the Systems Act, as aforesaid.

42. Logically, and necessarily so, it follows that the respondent's council was expected to follow the relevant legislative or empowering provisions to the letter. Most importantly, when it took the decision that the applicant seeks to challenge in these proceedings, it was exercising public power or performing a public function conferred upon it by section 56 of the Act.

43. There are two contrasting and contradictory propositions about the nature of the decision taken by the respondent not to appoint the applicant to the post to which he was recommended by the interviewing panel. On the one hand, the applicant asserts that it is an administrative action as defined in PAJA. The applicant's reasons for submitting that it is an administrative action are that; firstly, the post was advertised as an external one, meaning that any one from anywhere was invited to apply. Secondly, the irregularities mentioned in the letter written by the mayor to the MEC have not been narrated, either in the Answering Affidavit or in an investigative report. So, it is not known what kind of irregularities are they; thirdly, the complaint by the mayor about the candidates that have been overlooked has not been fully explained in the Answering Affidavit. It is not known who are they and why they were not interviewed or whether their names appear in any of the reports submitted to council, from recruitment to the recommendation stages.

44. Lastly, the applicant argues, very strongly, that the facts of the *Gcaba* and *Chirwa* cases, upon which the respondent relies for dismissal of this application, are distinguishable from the present one in that the posts there related to promotion from a lower rank to a higher and that the applicants did not rely on PAJA, as in the present one. In this regard, the applicant contends, the *Gcaba* and *Chirwa* cases are not authorities that can be relied on in the present factual matrix.

45. Furthermore, the applicant submits that the respondent failed to give the applicant reasons why he was not appointed to the post, as it was duty bound to do so in terms of PAJA, and such failure is a ground for review.

46. On the other hand, the respondent submitted, with much conviction and vigour that, the principle enunciated in *Gcaba v Minister of Safety and Security*¹³ and *Chirwa v Transnet Pension Fund*¹⁴ applies here in that the facts are not distinguishable, as he was an internal employee who sought to be appointed to a higher post. According to the respondent the very same situation pertained in *Gcaba*. In the circumstances, the respondent's line of argument goes on, if the applicant was aggrieved by anything relating to the recruitment, selection and appointment process he should have utilised the internal grievance procedure and pursued his right to fair labour practice following the provisions of the Labour Relations Act.

47. The respondent further resists the order sought on the ground that PAJA specifically excludes decisions taken during deliberative processes by legislative bodies, of which respondent's council is one, from the definition of administrative action and from being reviewed. Therefore, the respondent argues, the decision taken by the respondent's council is immune from being reviewed under PAJA as it is a decision of a legislative body. In other words, the respondent seems to espouse the view that PAJA entirely excludes the functions of the municipal council from the radar of judicial review. In the light of the judgment in the *SARFU* case illustrated above, that view cannot be correct. PAJA simply excludes the executive powers and functions of the municipal council and its legislative functions and not its administrative ones.

48. The applicant, armed with his qualifications, experience and skills, made himself available to the advertised post and was recommended for appointment. That, in my considered view, cannot be synonymous with being raised or propelled to a higher post or rank, particularly because the applicant had to undergo an elaborate process of being selected, interviewed and recommended to the post. In any event, the post was advertised extremely, inviting anyone who qualified to apply for appointment

49. I therefore come to the conclusion that the applicant's appointment to the advertised post would not have amounted to just a mere promotion, on the basis that

¹³ 2010 (1) SA 238 (CC).

¹⁴ 2008 (4) SA 367 (CC).

he was recommended to it by an interviewing panel which considered his expertise, skills and qualifications. The next question is whether the failure to appoint him was a legislative or administrative decision which is liable to be scrutinised under review.

50. It is trite that the question for consideration depends on the manner in which the applicant's cause of action has been formulated in the founding papers. In this matter the applicant has completely disavowed relying on the unfair labour practice regime prescribed in the Labour Relations Act. The applicant solely relies on the fact that the respondent's failure to appoint him and to re-advertise the post contravenes the provisions of PAJA and is therefore reviewable.¹⁵ That means the applicant's case will have to be decided on the facts as pleaded in the papers and not otherwise.

51. My reasoning in this regard is fortified by the judgment of *Mkumatela v Nelson Mandela Bay Metropolitan Municipality* South Eastern Cape Local Division¹⁶ where the court said:

“In my view, the first respondent (a municipality) cannot argue that promoting its employee does not constitute administrative action. It is an organ of State and in promoting employees, it exercises a public power and it performs a public function in doing so. It clearly performs an administrative act when acting in terms of its policies and implementing them.”

52. Indeed, each case is decided on the basis of the facts presented in the papers and in this matter the applicant seeks to review the decision of the respondent not to appoint him as recommended by the interviewing panel and to re-advertise the post. It is a trite principle of our law that the purpose of pleadings is to define issues for the other party and the court. Courts are called upon to adjudicate the dispute that arise from pleadings and nothing else.¹⁷ In *Notyawa v Makana Municipality* it was held that Courts are bound not to decide issues falling outside

¹⁵ *Fredericks v ME for Education and Training, Eastern Cape and Others* 2002 (2) SA 693 (CC).

¹⁶ [2008] JOL 21686 (SE) at para 12.

¹⁷ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA).

pleadings, without determining issues of fairness and prejudice.¹⁸ Similarly, in *National Director of Public Prosecutions v Zuma*¹⁹ the Supreme Court of Appeal held that the judicial function of a Judicial Officer is to confine the judgment to the issues before the Court; by deciding matters that are germane or relevant; by not creating new factual issues; or by making gratuitous findings against persons who are not called upon to defend themselves and by failing to distinguish between allegation, fact and suspicion.

53. It is abundantly clear from the papers filed of record that the applicant seeks to impugn the respondent's decision not to appoint him as per the recommendations of the interviewing panel. He also challenges the decision to re-advertise the post. The basis for doing so are the provisions of PAJA. I am therefore satisfied with the applicant's version in this regard. What the respondent overlooks is that the provisions of section 56 of the Systems Act as well as the regulations, regulate the manner in which a manager directly accountable to the municipal manager is to be appointed. Consequently, I reject the respondent's assertion that the nature of the decision is one taken in its capacity as the employer and has no direct and external effect to any person other than the applicant.

54. What needs to be emphasised, in my view, is that when a municipal council executes the functions that it is mandated to perform in terms of section 56, in particular those that relate to the appointment of a manager directly accountable to the municipal manager, it did not perform the functions as a legislative body. Clearly that cannot be so because its role was to implement what had already been prescribed in the legislation, namely in section 56 of the Systems Act. It is an established principle of our law that both the process by which the decision was made and the decision itself must be rational.²⁰ This was made clear by the Constitutional Court in the *Motau* Judgment when it held that administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example.²¹

¹⁸ 2020 (2) BCLR 136 (CC).

¹⁹ 2009 (2) SA 277 (SCA) at paras 15 and 16.

²⁰ *DA v President of RSA* 2013 (1) SA 248 (CC) at para 67.

²¹ *Motau* (note 7 above) at para 37, also *SARFU* (note 11 above) at para 142.

55. My view in this regard is supported by the conclusion of the Constitutional Court when it stated that “...*administrative action is.... the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals*”.²²

56. The Apex Court in *DA v President of the Republic of South Africa* held that:

“The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred”.²³

57. Furthermore, the Apex Court emphasised that a failure to take into account relevant considerations in the process of making a decision can render it irrational where: (a) the factors ignored are relevant; (b) the failure to consider the material concerned is rationally related to the purpose for which the power was conferred; and (c) ignoring relevant factors of a kind that colours the entire process with irrationality and thus renders the final decision irrational.²⁴

58. In the present matter the information that served before the respondent’s council has not been divulged in the answering affidavit. It is therefore not clear what irregularities the Council relied when it took the decision not to appoint the applicant and to re-advertise the post. It is not known whether there was an investigation following the allegations of irregularities and whether that investigation, if any,

²²*Ibid Motu* para 37, see also *Grey’s Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 (6) SA 313 (SCA) at para 24.

²³*DA* (note 20 above) at para 36.

²⁴ *Ibid* at para 41.

culminated in a report or not. This was pertinently raised to the respondent during argument that it relied on some anonymous information to motivate to the MEC to nullify the outcome of the interview. All that the respondent's counsel could say was that the MEC accepted the report from the Mayor and instructed that the recruitment process be started afresh, hence the re-advertisement of the post. In my view the answer fell far too short from addressing a very important issue, which is, on what factual and legal basis did the Council decide not to appoint the applicant and to re-advertise the post? The only plausible reason why the information regarding irregularities was not divulged in the papers was that it was not there in the first place.

59. In the circumstances, I come to the conclusion that no factual or legal basis, whatsoever, has been disclosed in the papers to justify the respondent's decision not to appoint the applicant and to re-advertise the post. That decision, in my considered view, is of an administrative nature and is liable to be reviewed in terms of the provisions of PAJA.

60. My conclusion that the respondent's decision not to appoint the applicant and to re-advertise the post constitutes an administrative action aligns with the following case law where it was held that a decision of the Municipal Council to appoint a Municipal Manager constitutes an administrative action.

61. In *Mlokothe v Amathole District Municipality and Another*²⁵ the court held that the appointment of a Municipal Manager was an administrative action. In *Tshabalala v Council of the Maluti-A-Phofung Local Municipality and Another*²⁶ stated that:

"By parity of reasoning this should apply to the appointment of the applicant as such appointment ought to take place in terms s56 of the Municipal Systems Act. I cannot see how it can be argued that the recruitment and appointment of the Director in casu can be seen as executive or legislative in nature".

²⁵2009 (6) SA 354 (ECG).

²⁶ (FB) unreported case no. 1537/2022 of 19 September 2022 at para 14.

I am in full agreement with the Learned Judge's reasoning in this regard and it equally applies in the instant matter.

62. In *Notyawa v Makana Municipality and others*²⁷ the court concluded that the decisions sought to be reviewed and set aside (which included the appointment of a Municipal Manager) amounted to administrative action as envisaged in PAJA. That finding was not turned down in the subsequent appeal to the Constitutional Court.²⁸

63. The decision of the respondent's council therefore falls to be set aside because no information relating to the alleged irregularities highlighted by the Mayor in a letter to the MEC has been provided by the respondent in the papers. There was no investigative report presented to the respondent's council before it took the decision not to appoint the applicant and to re-advertise the post. In fact, it is quite apparent from the resolution dated 23 February 2024 that the discrepancies in the recruitment process were being investigated at the time the decision was taken. Therefore, without having verified the veracity of the allegations of irregularities, the council acted on them. The council literally put the cart before the horse in the circumstances.

64. What is also concerning is the chain of events leading to the decision not to appoint the applicant and re-advertised the post. Strange enough is the fact that the Executive Mayor took it upon himself to report the alleged irregularity during the recruitment process in a letter dated 7 November 2023. As to how he got to know of the alleged irregularities has not been divulged in the papers before court. Another serious concern is that, subsequently to the report of irregularities to the MEC by the Executive Mayor, the respondent's Mayoral Committee convened a meeting in which it recommended the applicant for appointment to the post. This raises a very serious question did the Executive Mayor inform his own committee about the alleged irregularities he reported to the MEC? Why would he jump the gun and report to the MEC but omit to inform his committee such that it proceeded to recommend the applicant for appointment to the post? As is apparent from the common cause facts, it was only after the MEC's response to the report of irregularities dated 15 January

²⁷ [2017] 4 All SA 533 (ECG) at para 46.

²⁸ *Notyawa* (note 18 above).

2024, that a special council meeting was convened on 23 February 2024 and a decision not to appoint the applicant and re- advertised the post was taken.

65. There was no investigative report, as the investigation was still underway, the respondent's council relied on the letter written by the Executive Mayor to MEC as well as the response thereto, to take the impugned decision. Quite clearly it relied on the sketchy details and unsubstantiated allegations presented in the letter by the mayor to the MEC. In my considered view the respondent's council had no sufficient information before it when it took the decision complained of and therefore failed to take into account relevant considerations. Instead, it took into account irrelevant considerations and took a decision based on the unwarranted activities of another person, the Executive Mayor, who was not even part of the recruitment process. In the circumstances I come to the conclusion that the decision in question contravenes the provisions of section 56 of the System Act, which regulates the appointment of senior managers, and/or is not authorised by that empowering provision. For that reason, that decision is liable to be reviewed and set aside under PAJA.

66. The next question to consider is whether the facts of this case render it an exceptional one for purposes of section 8(1)(c) of PAJA. Mr Maswazi submitted that in the event of a finding that the decision not to appoint the applicant and re- advertise the post was unlawful, this Court should not substitute its decision for that of the council of the respondent but should remit the matter to the respondent's council for consideration by it. He substantiated his argument in this regard by stating that the facts of this case did not render the matter an "*exceptional case*" for purposes of section 8(1)(c) of PAJA.

67. It is trite that the power provided in section 8(1)(c) to substitute or vary administrative action, or to correct a defect resulting from an administrative action, is extraordinary and is to be exercised sparingly and in exceptional circumstances.²⁹ The court's interventionist remedial powers are justified where exceptional circumstances could be found.³⁰ This remedy is to be exercised sparingly, in

²⁹ Y. Burns and R. Henrico *Administrative Law* 5th ed (2020) at page 658.

³⁰ *Trencon construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) paras 36-9.

exceptional circumstances and when a court is persuaded that a decision to exercise a power should not be left to the designated functionary.³¹

68. From a variety of cases our courts have developed guidelines that have prompted the substitution of the decision rather than remit the matter to the original decision maker. These are the following:

- (a) Where the court is well qualified as the original authority to make the decision;³²
- (b) Where the end result is a foregone conclusion, and it would be a waste of time to remit the decision to the original decision-maker;³³
- (c) Where further delay would cause unjustifiable prejudice to the applicant or another affected person,³⁴

69. The exceptional circumstances of this case persuade me that no useful purpose would be served by remitting the matter to the respondent for decision. The respondent demonstrated a lack of regard for its statutory responsibility and a lamentable abdication of its duties by taking a decision without having all the relevant facts put before it. No doubt, in my view, the respondent demonstrated a lack of insight into its conduct, to contend in the papers that it was proper to do so. It would therefore serve no purpose to remit the matter to it for decision, as the respondent has shown clearly that its intention, is to disregard the applicant for consideration for the post at all costs. In the light of the afore-going, I am of the view that this Court is at least in as good a position to take the decision as the respondent's council and it would be appropriate to do so in the circumstances of this case.

70. In the circumstances the following order will issue:

³¹*Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) at para 28-29.

³² *Ibid* at para 38-39.

³³ *Ibid*, *Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs and Development Planning, Western Cape and Others* 2007 (6) SA 65 (C).

³⁴ *ICS Pension Fund v Sithole and Others NNO* 2010 (3) SA 419 (T) para 97, *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others* 2008 (5) SA 18 (SCA) at para 17, *Geo Quinot et al* (note 2 above) pages 318-319.

(a) The decision of the respondent not to appoint the applicant as per the recommendations of the interviewing panel and to re-advertise the post is hereby reviewed and set aside;

(b) The decision of the respondent is substituted by the following order:

Applicant be and is hereby appointed as the Director: Corporate Services with effect from March 2024 with his salary to commence on the date on which he assumes his duties with the respondent.

(c) The respondent is ordered to pay the costs of this application.

TA NKELE
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: **Z. Badli**
Instructed by: F Nteleleko Attorneys
Mthatha

Counsel for the Respondent: **B. Maswazi**
Instructed by: Jolwana Mgidlana Inc.
Mthatha

Date Heard: **10 April 2025**
Date Delivered: **29 May 2025**