



THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Reportable
Case No: PA 15/24

In the matter between:

JAFTA BOOYSEN

Appellant

and

BEAUFORT WEST MUNICIPALITY

First Respondent

HENDRIK TRUMAN PRINCE

Second Respondent

Heard: 21 May 2025

Delivered: 19 August 2025

Coram: Nkutha-Nkontwana JA, Mahalelo AJA and Tokota AJA

Summary: Section 158(1)(h) of the Labour Relations Act – PAJA or legality review – review of a decision not to appoint a job applicant who is not an employee – jurisdiction of the Labour Court – State as an employer – job applicant – the decision not to appoint a qualified candidate was unreasonable, irrational and arbitrary – instatement is a fair and equitable remedy.

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

- [1] This matter pertains to two judgments of the Labour Court delivered by different judges. The appellant (Mr Booysen), an external job applicant, impugned the decision of the first respondent (the Municipality) not to appoint him to the position of Director of Community Services. Mr Booysen's case was premised on the Promotion of Administrative Justice Act¹ (PAJA) and the doctrine of legality. The Municipality opposed the application and raised a jurisdictional point to the effect that an external job applicant cannot avail himself of a claim in terms of section 158(1)(h) of the Labour Relations Act² (LRA).
- [2] The first judgement dealt with the jurisdictional point taken by the Municipality. It was found that the Labour Court was properly clothed with the jurisdiction to determine the matter, and that was the demise of the Municipality's jurisdictional point. The Municipality impugns this order by way of a cross-appeal.
- [3] Subsequently, the second judgment dealt with the merits of the review application and, in turn, dismissed Mr Booysen's claim. Mr Booysen appeals against this order with leave of the Labour Court.

Factual background

- [4] Mr Booysen applied for the vacant position of Director of Community Services (the impugned position), which was advertised on 17 August 2018. It is not in dispute that Mr Booysen was suitably qualified. His career in the Local

¹ Act 3 of 2000.

² Act 66 of 1995, as amended.

Government commenced on 22 January 2001 and includes nine years of experience as a Municipal Manager in the very same Municipality up until December 2016.

- [5] Mr Booyesen was shortlisted and underwent an intensive selection process, which included an interview, an assessment, and a test. The process was conducted by the Council selection panel and external consultants, Roy Steele and Associates. Notably, the second respondent (Mr Prince) was a member of the selection panel in his capacity as a Deputy Executive Mayor and Portfolio Councillor. Mr Prince was a councillor for the African National Congress (ANC), which, together with its coalition partner, the Karoo Democratic Front (KDF), were running the Municipality. Mr Booyesen obtained an aggregate score of 64,80% which placed him at the top of the list of candidates. He was followed by JJ France, who obtained an aggregate score of 62,27%. The consultants prepared the selection report in terms of which no candidate was found suitable for appointment and recommended that the position be re-advertised.
- [6] The selection report was tabled before the Municipal Council on 1 November 2018. Mr Prince, seconded by Mr Constable, a KDF Councillor, proposed that the impugned position be re-advertised and the legality of headhunting be explored. That proposal was adopted as the resolution of the Council. Mr Booyesen was not advised of the resolution of the Council. He became aware of the turn of events for the first time in January 2019 when the position was re-advertised through the media.
- [7] Mr Booyesen applied for the post once more. Yet, on 25 March 2019, through his attorneys of record, Mr Booyesen addressed a letter to the acting Municipal Manager requesting reasons for his non-appointment in the first recruitment process. The Municipal Manager responded on 29 March 2019 by providing the minutes and reports that informed the Municipality's decision of 1 November 2018.

- [8] On 2 April 2019, Mr Booysen received an invitation from the consultants to be tested and interviewed once more following being shortlisted after a preliminary screening process conducted by the Council's selection panel. Mr Prince was also a candidate during the second recruitment process. The selection report was compiled in April 2019. Mr Van der Westhuizen was the highest-ranking candidate, with a 62.93% aggregate score. Mr Booysen ranked second, with a 62.13% aggregate score. Mr France ranked third, with a 58.80 % aggregate score, and Mr Prince ranked fourth, with a 58.00% aggregate score. Mr Van der Westhuizen was recommended for appointment; alternatively, that Mr Booysen to be appointed in the event Mr Van der Westhuizen declined the offer.
- [9] On 24 May 2019, Mr Prince resigned as a Councillor. On 31 May 2019, the Council resolved to appoint Mr Prince to the impugned position, contrary to the recommendation of the selection panel. The explanation provided by the Municipality for appointing Mr Prince is that the Council was unable to agree on a candidate and therefore resorted to voting. The Municipal Manager, Mr. Haarhoff, who was in attendance, distanced himself from the Council's resolution and warned the Council members that they risk being held personally liable for any costs consequent to any legal action challenging it.
- [10] Notwithstanding, the Council sat again on 2 June 2019 and appointed Mr. Prince to act in the impugned position pending the effective date of his appointment, 1 July 2019. The controversial appointment of Mr Prince was not well received. That led to the intervention by the Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape Provincial Government (the Minister), who challenged the legality of the Council's decision to appoint Mr Prince. The Minister threatened to take legal action to have the impugned decision reviewed and set aside, unless corrected by the Municipality. In response, the Municipality resolved to review its decision to appoint Mr Prince and to re-advertise the position.

[11] Notably, the Municipality extended Mr Prince's acting appointment for a further period not exceeding three months. The Minister equally challenged the legality of the decision. To circumvent the scrutiny by the Minister, the Council resolved to do away with the position and to create the position of Senior Manager: Community Services, to which Mr Prince was appointed to act pending a permanent appointment to that position. Nonetheless, it is not in dispute that the position was subsequently reinstated to the organogram and was vacant and funded as at 3 November 2022, when the Labour Court heard argument in respect of the merits. Mr Booysen sought the order in the following terms:

- '1. That the decision of the first respondent on the 1st of November 2018 not to appoint the applicant as the Director of Community Services be reviewed and set aside.
2. That the decision of the first respondent on the 31st of May 2019 to appoint the second respondent as the Director of Community Services of the first respondent be reviewed and set aside.
3. That the decision of the first respondent not to appoint the applicant as Director of Community Services of the first respondent, insofar as may be necessary, be reviewed and set aside.
4. Substituting the decision of this Honourable Court for the decision of the first respondent, with an order that:
 - 4.1 The applicant be and is hereby appointed Director of Community Services of the first respondent with effect from the 1st of July 2019, with full salary and benefits.
 - 4.2 That the first respondent, together with the second respondent, in the event of the second respondent opposing the application, pay the costs of this application, the one paying the other to be absolved.
- 5 Further and/or alternative relief.'

The jurisdiction of the Labour Court

[12] I deal first with the Municipality's cross-appeal, which turns on the correct interpretation of section 158(1)(h). The Municipality contends that the first judgment erroneously found that the Labour Court had jurisdiction to entertain the review application by a job applicant, as the meaning of '*the state as the employer*' in section 158(1)(h) must be understood within the context of the definition of '*employee*' in section 213 of the LRA which means a person who is already employed. Job applicants or prospective employees are accordingly excluded; so the argument further goes. The Municipality further contends that the first judgment negates the established notion supported by the previous decisions of the Labour Court that its jurisdiction is contingent on the existence of the employer/employee relationship.³

[13] In *Pretorius and Another v Transport Pension Fund and Others*⁴ (*Pretorius*), relied on by the Municipality, the Constitutional Court dealt with an unfair labour practice claim in terms of section 23 of the Constitution.⁵ The applicants impugned the High Court's finding, which upheld the respondent's exception on the basis that there was no employer/employee relationship. The following observations by Constitutional Court are pertinent:

[47] That appears to be unnecessarily restrictive. The section refers to 'everyone' having the right and its purpose is to protect persons from unfair labour practices that originated in an employer – employee relationship. Labour law jurisprudence under the Labour Relations Act (LRA) recognises that unfair labour practices under the Act may extend beyond the termination of employment.

[48] Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in s 23(1). Fewer and fewer people are in formal

³ See: *SAAPAWU v Premier (Eastern Cape) & Others* [1997] 9 BLLR 1226 (LC) at 1229A-B; *Mphage and Others v South African Municipal Workers Union* (2013) 34 ILJ 1764 (LC) at para 17.

⁴ 2019 (2) SA 37 (CC) at paras 46 – 55.

⁵ Section 23(1) of the Constitution of the Republic of South Africa provides that '*Everyone has the right to fair labour practices*'.

employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the 'twilight zone' of employment as supposed 'independent contractors' in time-based employment subject to faceless multinational companies who may operate from a web presence. In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of formal employment—but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of s 23 to only those who have contracts of employment.⁶ (Emphasis added)

- [14] *Pretorius* left ample room for the interpretation that expands rather than limits the protection afforded by section 23 to persons who may not be formally employed, contrary to the Municipality's contention. That is so because the purpose of section 23 is to protect 'any person' from unfair labour practice and cannot be furthered in any way by denying job applicants this constitutional right. The following findings in paragraph 17 of the first judgment accord with *Pretorius* and are accordingly unassailable:

'The LRA seeks, amongst other things, to give expression to the constitutional rights to fair labour practices and the freedom of association. Although the definition of unfair labour practices in the LRA is limited to those persons in employment, section 5(2) of the Act protects persons seeking employment against violations of the right to freedom of association. In other words, the LRA recognises that in some circumstances at least, applicants for employment are entitled to statutory protections of their fundamental rights. ... Section 158(1)(h) makes no absence of the pronoun "an" before "employer" is not insignificant. What this indicates is that the sole determinant is that the impugned decision or act must be one performed in the capacity of an employer, not as the employer of the employee seeking the remedy of review. In short, section 158(1)(h) is a self-standing, jurisdiction conferring provision capable of bearing the interpretation for which the applicant contends.'⁷

⁶ Id.

⁷ See: *Booyesen v Beaufort West Municipality and Another* [2021] 9 BLLR 904 (LC) at para 17.

- [15] The Municipality further impugns the first judgment's reliance on this Court's judgment in *Merafong City Local Municipality v SA Municipal Workers Union and Another*⁸ (*Merafong*) that section 158(1)(h) is jurisdiction-conferring. It contends that *Merafong* is incorrect as it conflates matters of jurisdiction and powers of the Labour Court and deviates from the decisions of this Court and the Supreme Court of Appeal (SCA), particularly in *Booyesen v Minister of Safety & Security & others*⁹ (*Booyesen*) and *Motor Industry Staff Association v Macun NO & others*¹⁰ (*Macun*).
- [16] In *Merafong*, this Court was confronted with a section 158(1)(h) review application by a trade union, challenging the respondent municipality's decision to appoint as a Municipal Manager, a candidate who did not meet the statutory requirements for that position. The court opined that, while section 157 manifestly deals with the jurisdiction of the Labour Court, '*a proper reading of s 157 makes it clear that other provisions of the LRA are sources of jurisdiction of the Labour Court*' and, pertinently, section 158 (1)(h).¹¹
- [17] Sections 157(1) and (2) deal with the jurisdiction of the Labour Court and provide:
- '(1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.
 - (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –
 - (a) employment and from labour relations;

⁸ (2016) 37 (ILJ) 1857 (LAC) at paras 31 – 36.

⁹ (2011) 32 ILJ 112 (LAC).

¹⁰ (2016) 37 ILJ 625 (SCA).

¹¹ *Merafong* above fn 8 at para 36.

- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible.'

[18] While section 158(1) deals with the powers of the Labour Court and provides:

'(1) The Labour Court may –

(a) make any appropriate order, including –

- (i) the grant of urgent interim relief;
- (ii) an interdict;
- (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of *this Act*;
- (iv) a declaratory order;
- (v) an award of compensation in any circumstances contemplated in *this Act*;
- (vi) an award of damages in any circumstances contemplated in *this Act*; and
- (vii) an order for costs;

(b) order compliance with any provision of *this Act* or any *employment law*;

(c) make any arbitration award or any settlement agreement an order of the Court;

(d) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

(e) determine a dispute between a registered trade union or registered employers' organisation and any one of the members or applicants for membership thereof, about any alleged non-compliance with –

- (i) the constitution of that trade union or employers' organisation (as the case may be); or
- (ii) section 26(5)(b);

(f) subject to the provisions of *this Act*, condone the late filing of any document with, or the late referral of any *dispute* to, the Court;

(g) subject to section 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law;

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;

(i) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act 85 of 1993); and

(j) deal with all matters necessary or incidental to performing its functions in terms of *this Act* or any other law." (Emphasis added)

[19] Jurisdiction is tritely defined as the power or competence of a Court to hear and determine an issue between parties and is determined based on the pleadings.¹² In *Macun*, the SCA referred with approval to a High Court dictum in *O Thorpe Construction and Others v Minister of Labour and Others*,¹³ which endorsed a notion that section 158(1) is jurisdiction-conferring, albeit in the context of section 158(1)(g) and read with section 157(1). *Macun* was followed in *South African Municipal Workers' Union and others v Mokgatla and Others*¹⁴ (*Mokgatla*), another SCA decision, albeit in the context of section 158(1)(e)(i). *Mokgatla* confirmed that, while section 157(1) and (2) relate, broadly, to the jurisdiction of the Labour Court, section 158(1) lists both specific remedial powers¹⁵ and

¹² See: *Gcaba v Minister for Safety and Security & Others* (2010) 31 ILJ 296 (CC) at paras 75 and 75; *Chirwa v Transnet Ltd and Others* [2008] 2 BLLR 97 (CC) at paras 155 and 169; *Makhanya v University of Zululand* [2009] 8 BLLR 721 (SCA) at paras 34 and 71.

¹³ (2015) 36 ILJ 935 (WCC) at para 32.

¹⁴ [2016] 6 BLLR 560 (SCA).

¹⁵ Section 158(1)(a), (b), (c), (d) and (f).

provides substantive jurisdictional bases¹⁶ of the Labour Court.¹⁷ In both instances, the Labour Court's exclusive jurisdiction was confirmed.

- [20] The Municipality's criticism of *Merafong* is unwarranted. This Court has, in different instances, confirmed the Labour Court's jurisdiction and power to review the decisions and acts of the State as employer contemplated in section 158(1)(h) on any grounds permissible in law, which include the constitutional grounds of legality and rationality and, if they constitute administrative action, on the grounds that are stipulated in PAJA.¹⁸
- [21] It is not in dispute that the Municipality is an organ of the State as defined in section 239 of the Constitution, and its powers and duties are public. This includes the powers to recruit Municipal Managers and Managers reporting to them, which are derived from the Local Government: Municipal Systems Act¹⁹ (Systems Act). They constitute decisions or acts performed by the State in its capacity as employer.²⁰
- [22] It must therefore follow that the construction of section 158(1)(h) proposed by the Municipality is irreconcilable with the purpose of this provision, which is to extend the jurisdiction of the Labour Court to review decisions of the State in its capacity as employer on any grounds permissible in law.²¹ This power is pivotal to the role of the Labour Court as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence.²²
- [23] The Municipality contends, alternatively, that *Merafong* is, in any event, distinguishable, as it is not the authority for the proposition that the Labour Court has jurisdiction over a complaint which does not concern an employee or an

¹⁶ Section 158(1)(e) and (g).

¹⁷ *Macun* above. See also *Mokgatla* supra at paras 11 and 14.

¹⁸ See: *Merafong* above fn 8 at para 38; *Hendricks v Overstrand Municipality* [2014] 12 BLLR 1170 (LAC); *MEC for Finance, KwaZulu-Natal v Dorkin NO* (2008) 29 ILJ 1707 (LAC).

¹⁹ Act No 32 of 2000.

²⁰ *Merafong* above fn 8 at para 38.

²¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) at para 18.

²² *Gcaba* above fn 12 at paras 70 – 72.

employment relationship. This argument is fallacious. In my understanding, *Merafong* does not impede a job applicant, like Mr Booysen, or any interested person, from invoking section 158(1)(h) to review and set aside the Municipality's employment-related decisions or actions vitiated by, *inter alia*, irrationality or illegality. The authorities relied on by the Municipality in this regard are of no assistance to its case as they are patently distinguishable.

- [24] Overall, the interpretation accorded to section 158(1)(h) in the first judgment is unassailable as it conforms with the Constitution.²³

Right to fair labour practice in terms of section 23 of the Constitution.

- [25] Mr Booysen sought to challenge the decision not to appoint on the basis, *inter alia*, that it violated his right to fair labour practices in terms of section 23 of the Constitution. The first judgment confirmed the jurisdiction of the Labour Court in terms of section 157(2), subject to the notion of subsidiarity. However, it did not pronounce on this issue because it took the view that it turned on the merits of the claim rather than the jurisdiction.

- [26] The second judgment did not deal with this issue, nor was it taken up by Mr Booysen in these proceedings. The Municipality contends in its written submissions that it does not avail Mr Booysen to bypass the legislation enacted to give effect to a constitutional right and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.²⁴ Without the benefit of legal argument on behalf of Mr Booysen, I am disinclined to pronounce on this issue.

Review in terms of PAJA

²³ See: *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N.O and Others* 2001 (1) SA 545 (CC) para 22; *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28, *National Commissioner of SA Police Services and Others v Phopho* (2021) 42 ILJ 1666 (LAC) at paras 59 and 60.

²⁴ See: *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) at para 51.

[27] Before the Labour Court, Lallie J proceeded on the premise that she was properly clothed with the jurisdiction to determine the matter in terms of section 158(1)(h) and the ground being PAJA. Mr Booysen makes the following assertions in relation to the grounds of review in paragraph 67 of his founding affidavit:

'I respectfully submit that the municipality's decision not to appoint me on two occasions and to appoint Mr Prince falls to be set aside in terms of PAJA for the following reasons:

- 67.1 Irrelevant considerations were taken into account, or relevant considerations were not considered (Section 6(2)(e) (iii));
- 67.2 The decision was arbitrarily and capriciously taken (Section 6(2)(e)(vi));
- 67.3 The decision was taken in a way not rationally connected to:
 - 67.3.1 the purpose for which it was taken;
 - 67.3.2 the purpose of the empowering provision;
 - 67.3.3 the information before the council of the municipality (Section 6(2) (f) (ii));
- 67.4 The decision was so unreasonable that no reasonable person could have reached the decision taken by the municipality (Section 6(2) (h)); and
- 67.5 The decision was irrationally, and thus, unconstitutionally taken (Section 6(2)(i)).'

[28] The respondents raised various points *in limine*, but the second judgment dealt with only two, which pertain to the impugned decision in terms of the first recruitment process. First, the review was instituted outside the 180 days stipulated by PAJA. Second, the impugned decision regarding the first recruitment process had been overtaken by the events, and the relief would accordingly be unenforceable because Mr Booysen had participated in the

second recruitment process. The first *point in limine* was dismissed on the basis that, when computing the 180 days, the Municipality failed to take into consideration the date when Mr Booyesen received the reasons for his non-appointment. The second *point in limine* was upheld.

- [29] On the merits, the second judgment found that the impugned decision in relation to the second recruitment process was capricious and irrational. However, relief of instatement was refused on the basis that Mr Booyesen failed to show that, but for the impugned second decision, he would have been appointed. The claim was accordingly dismissed.
- [30] Before this Court, Mr Booyesen submits that the second judgment erroneously held that he sought relief in relation to the second recruitment process, and that the first recruitment process had been overtaken by the events. He further submits that the second judgment failed to appreciate that both recruitment processes had been tainted by irrationality and capriciousness, which entitled him to be instated. Mr Booyesen's alternative submission is that he was entitled to be instated in terms of the first recruitment process, in which he had been the highest-ranking candidate in line with the dictum in *Department of Rural Development and Agrarian Reform v General Public Service Sectoral Bargaining Council and Others*.²⁵
- [31] I deal first with the legal points raised by the Municipality. Firstly, the first judgment erroneously accepted that the impugned decisions and conduct of the Municipality constitute 'administrative action' or the exercise of a public power. Secondly, the first judgment erroneously dismissed the Municipality's first point *in limine* pertaining to delay and waiver arguments.

Administrative action in terms of PAJA

- [32] The Municipality contends that, unlike in *Merafong*, the impugned decisions solely affect Mr Booyesen personally and have no impact on other people and the

²⁵ [2020] 4 BLLR 353 (LAC)

citizens generally. Thus, it does not constitute administrative action in terms of PAJA. To buttress this contention, the Municipality referred to the following passage in *Gcaba*²⁶:

‘Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of s 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.’²⁷ (Emphasis added)

[33] A helpful illustration of the relevant principles is well articulated in *Minister of Labour and Another v Public Services Association of SA and Another*²⁸ (*Minister of Labour*), where this Court stated:

[51] What was established in *Gcaba* is a general principle that employment relationship issues do not amount to administrative action within the meaning of PAJA (ie as construed consistently with s 33 of the Constitution). The clear implication being that there could be exceptions to the principle and that certain employment relationship issues (ie actions) may amount to “administrative action” within the meaning of PAJA, properly construed. For example, there might be instances where grievances by State or public sector employees have implications or consequences for other citizens.

[52] Features that serve to distinguish the exception from the general are, *inter alia*, the source and nature of the action, whether the action involves, or is closely related to the formulation of policy, or to the initiation of

²⁶ *Gcaba* supra fn 12.

²⁷ *Ibid* at para 64.

²⁸ (2017) 38 ILJ 1075 (LAC) at paras 51-52.

legislation and/or whether it has to do with the implementation of legislation. In *De Villiers* the Labour Court added the existence of alternative remedies as another factor to be considered, due to the importance attached to that aspect in both the *Chirwa* and the *Gcaba* decisions.’ (Emphasis added)

[34] *Gcaba* patently posits a general principle which is not rigid. As well, the observation in *Public Servants Association of SA on behalf of De Bruyn v Minister of Safety and Security and Another*²⁹ that ‘[t]he supposition that public servants had an extra string to their bow in the form of judicial review of administrative action... evaporated when the Constitutional Court in *Chirwa v Transnet Ltd & others*, held that the dismissal of a public servant was not “an administrative action”...’³⁰ is context-specific and finds no application in the present case.

[35] In *Minister of Defence and Military Veterans v Motau and Others*³¹ (*Motau*), the Constitutional Court aptly expounded the definition of ‘administrative action’, stating:

‘The concept of “administrative action”, as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: 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...’³²

[36] In *Minister of Labour*, this Court found that PAJA was implicated because the Registrar of Labour Relations is a public position and the decision by the Minister to reverse his designation impacted the rights of significant numbers of workers

²⁹ (2012) 33 ILJ 1822 (LAC) at para 26.

³⁰ *Ibid.*

³¹ 2014 (5) SA 69 (CC).

³² *Ibid* at para 33.

and the public.³³ Accordingly, it was found to constitute administrative action as it had a significant impact on the incumbent and beyond.³⁴ As a result, the Minister's decision to revoke Mr Crouse's designation as Registrar was found to be unreasonable, irrational and procedurally unfair in terms of PAJA and the principle of legality.

- [37] In the present case, it is apparent that political machinations in the Council tainted the impugned decisions and had a significant impact on Mr Booysen and beyond. Like in *Merafong*, the appointment of the managers accountable to the Municipal Manager is equally essential; hence, their competence is, similarly, a statutory imperative. It is also apparent from the regulations that only a person with relevant qualifications, experience, competence, and skills is eligible for appointment to ensure that municipalities effectively perform their functions.
- [38] Consequently, the recruitment of managers accountable to the Municipal Manager is subject to oversight by national and provincial ministers, ensuring that qualified candidates are appointed to serve the general citizenry of municipalities. For this reason, the Municipality's contention that the impugned decisions had no implications or consequences for other people or citizens must be rejected.
- [39] Turning to the Municipality's further contention that the second judgment should have refused to exercise its review jurisdiction on the basis that Mr Booysen has alternative remedies in terms of the LRA and unfair discrimination in terms of the Employment Equity Act³⁵ (EEA).
- [40] The availability of alternative remedies does not oust the court's review jurisdiction. This notion was recently affirmed by the Constitutional Court in *SARS and Another v Richards Bay Coal Terminal (Pty) Ltd*³⁶ (*SARS*). The primary issue in that matter was whether section 47(9)(e) of the Customs and Excise Act³⁷ (CEA), which allows a party to challenge a tariff determination made by SARS

³³ *Minister of Labour* supra at para 67 and 68.

³⁴ *Ibid.*

³⁵ Act 55 of 1998, as amended.

³⁶ 2025 (6) BCLR 639 (CC).

³⁷ Act 91 of 1964.

under the CEA (wide appeal), effectively ousted the review jurisdiction of the High Court in terms of PAJA and legality. In a unanimous decision panned by Kollapen J, the Constitutional Court held that it did not and that, absent an express ouster, and given the constitutional significance of the right to just administrative action, both remedies should co-exist.³⁸

- [41] Ultimately, the test is whether the alternative remedy is adequate in all the circumstances to resolve the litigant's grievance. The enquiry should not be limited to available alternatives but must extend to the suitability and appropriateness of judicial review in the circumstances. In that regard, SARS instructs that the interests of justice should inform the court's decision whether to exercise its review jurisdiction and, expertly crafted a list of scenarios that may constitute interests of justice, including an instance where *'the factual and legal circumstances underlying the review grounds [are] so egregious that they warrant, in the interests of justice, the exercise of the court's review jurisdiction...to address and correct the shortcomings in the decision-making process...'*³⁹
- [42] Notwithstanding the context, SARS applies in the present case by parity of reasoning. The exercise of the review jurisdiction by the second judgment is unassailable. It will be apparent from the conclusion I reach later in this judgment that the factual and legal circumstances underlying the grounds of review in the present case are so egregious that they justified, in the interests of justice, the court's intervention to correct the glaring irregularities in the decision-making process and the irrational outcome.
- [43] Therefore, the only conclusion to come to, as I now do, is that the impugned decisions constitute administrative action. Moreover, to the extent that the impugned decisions emanate from the exercise of a public power, the matter also implicates the constitutional doctrine of legality.

Legality review

³⁸ SARS above fn 36 at para 119 - 121.

³⁹ Ibid.

- [44] The gravamen of the doctrine of legality is that the exercise of public power, even if it does not constitute administrative action, must comply with the Constitution.⁴⁰ In *Affordable Medicines Trust and Others v Minister of Health and Others*⁴¹, the Constitutional Court stated the following:

'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.'

- [45] The recruitment of managers reporting to the Municipal Manager is regulated by the Systems Act and the relevant regulations. Section 56 of the Systems Act provides:

'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.

⁴⁰ See: *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA) 28-29; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA) at para 28 – 30.

⁴¹ 2006 (3) SA 247 (CC) at para 49.

- (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) A person appointed in terms of paragraph (a) (ii) may not be appointed to act 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).
- (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 re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.'

[46] The Local Government: Regulations on Appointment and Conditions of Service of Senior Managers⁴² (Regulations) provide, *inter alia*, that the selection of candidates for appointment must be 'competence-based', and ensure the effective performance by municipalities of their functions, and that only persons with relevant qualifications, experience, competence, and skills may be appointed.

Waiver and delay arguments

[47] The Municipality's contention that Mr Booysen waived his right to challenge the first recruitment process is not supported by evidence on record. On the contrary, it is clear *ex facie* the record that Mr Booysen took issue with the first recruitment process. Nothing much turns on the fact that Mr Booysen only sought to be instated with effect from 1 July 2019, date when Mr Prince was appointed; or whether he correctly or incorrectly conceded that there was a delay. The first judgment accordingly erred in upholding the Municipality's point *in limine* to the effect that the first decision was overtaken by events and therefore unenforceable.

[48] The waiver argument is, in any event, incongruous with the established legal principle that reliance on estoppel is impermissible where the exercise of public power is unlawful and, if upheld, would amount to sanctioning illegality.⁴³ Mr Booysen had no right to waive, and the waiver argument must be seen for what it is, just a mere estoppel labelled differently.⁴⁴

⁴² GN 21, GG 37245, 17 January 2014.

⁴³ See: *Municipal Employees Pension Fund and another v Mongwaketse (Centre for Applied Legal Studies as amicus curiae) amicus curiae* 2022 (6) SA 1 (CC) at para 40; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 18.

⁴⁴ *Ibid.*

[49] Equally, there is no substance in the Municipality's delay argument. The fact that Mr Booyesen participated in the second recruiting process did not sanction the first impugned decision. Strangely, the Municipality persists with the contention that Mr Booyesen had always been aware of the first impugned decision without providing proof that it had communicated same. What is undisputed, though, is the fact that the information containing the first impugned decision and reason for not appointing anyone during the first recruitment process was communicated to Mr Booyesen on 29 March 2019, and the review application was filed on 22 July 2019. In this regard, the following observations by the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*⁴⁵ (*Asla*) are instructive:

'In both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken.'⁴⁶

[50] Since the matter also implicates the doctrine of legality, *Asla* further observed:

'The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to s 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.'⁴⁷

[51] The second judgment correctly found that there was no need for condonation within the context of a PAJA review. Even in the context of a legality review, the application was instituted within a reasonable time; alternatively, the delay was not unreasonable.

First impugned decision

⁴⁵ 2019 (4) SA 331 (CC).

⁴⁶ Ibid at para 49.

⁴⁷ Ibid 50.

- [52] Mr Booysen contends that the approach taken in the second judgment was unduly circumscribed and was informed by the erroneous finding that the first recruitment process had been overtaken by events. I agree. The impugn against the outcome of the first recruitment process, whether self-standing or interconnected to the second recruitment process, should not have escaped the second judgment's scrutiny.
- [53] The Municipality asserts in its opposing affidavit that the Council neither deliberated on the selection report nor questioned the recommendation not to appoint any of the candidates. Yet, in its written submissions, it seems to suggest that there exists a record of deliberations by the Council that culminated in the resolution to re-advertise the impugned position. I doubt that such a record exists because, if it did, the Municipality would have discovered it to support its case. What can be gleaned from the information on record, though, is that Mr Prince, an ANC councillor, proposed that the position be re-advertised and was seconded by his political ally, Mr Constable, a KDF Councillor. It is telling that Mr Prince was also a member of the selection panel. Therefore, it is not a sheer coincidence that Mr Prince emerged as a candidate during the second recruitment process.
- [54] The Municipality is grasping at straws in denying that it took a decision that could be challenged because the Council did not deliberate on the contents of the selection report and the suitability for appointment of each candidate. Counsel for Mr Booysen correctly submits that the Council did take a decision which was to sanction the selection report and implement its recommendation to re-advertise the position. That decision was, by necessary implication, also a decision not to appoint Mr Booysen, who was the most eligible candidate for appointment.
- [55] Section 56(4) of the Systems Act enjoins the Council to re-advertise a position if only there is no suitable candidate who complies with the prescribed requirements. The Council failed in its duty as a decision maker to satisfy itself, based on the information that was placed before it, whether indeed there was no

candidate suitable for appointment. The selection panel could only make a recommendation, but the ultimate decision lay with the Council to decide on the suitability of the candidates. That entails consideration of all the information contained in the selection report and taking a decision that is rationally connected to its purpose, which is to appoint a suitable candidate. The approach followed by the Council is at odds with this constitutional imperative.

[56] The Municipality contends that Mr Booysen viewed the two processes as interconnected; hence, it was not an accident or error that he sought to be appointed from the date that Mr Prince was appointed, 1 July 2019. Well, Mr Booysen indeed sought a substitution order effective from 1 July 2019. However, that does not mean that he abandoned the prayer to have the first impugned decision reviewed and set aside. Therefore, the approach adopted by the second judgment cannot be supported as it did not pay fidelity to the constitutional duty to fashion orders that will provide effective relief to those affected by constitutional breaches.⁴⁸

[57] It follows that the first impugned decision stands to be set aside as it is vitiated by arbitrariness, capriciousness and irrationality.

Second impugned decision

[58] The Council's brazen impropriety led to the appointment of Mr Prince, contrary to the selection panel's recommendations. Municipal Manager's stern warning about the threat of legal costs against the Council members, individually, did not dissuade the Council. Even after the Minister assailed the second impugned decision, the Council was obstinate. It appointed Mr Prince to act in the very same position for which he was not suitable, and it went so far as to tamper with the organogram to keep him in its employ.

⁴⁸ See: *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at paras 102 – 105; *Ngomane and Others v Johannesburg (City) and Another* 2020 (1) SA 52 (SCA) at para 22.

[59] It follows, as correctly held by the second judgment, that the second impugned decision was equally vitiated by arbitrariness and capriciousness. However, as mentioned above, the Council had already set it aside at the instance of the Minister.

Relief

[60] What remains is the issue of an appropriate and effective remedy following a finding that sets aside administrative actions. Section 8(1) of PAJA affords courts a wide discretion to grant ‘*any order that is just and equitable*’. At the same time, section 8(1)(c)(ii)(aa) affords a court the discretion to make a substitution in exceptional circumstances. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*,⁴⁹ the Constitutional Court formulated the following exceptional circumstances test:

‘To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.’ (Emphasis added)

[61] Mr Booysen tepidly criticised the second judgment for refusing to substitute the second impugned decision with an order instating him, prudently so. As correctly submitted by counsel for the Municipality, substitution was correctly denied because there was no causal connection between the impugned second decision and Mr Booysen’s non-appointment. The second impugned decision was not a

⁴⁹ 2015 (5) SA 245 (CC) at para 47.

foregone conclusion because Mr Booyesen was the second-best candidate during the second recruitment process. However, the second judgment erred in not considering alternative remedies, such as remitting the matter back to the Council for reconsideration with a clear directive on how that process should be to undertaken, instead of dismissing the matter.

[62] Even so, when it comes to the first recruitment process, nothing impedes the substitution. On the record before this Court, the result is a foregone conclusion. As alluded to above, Mr Booyesen received the highest aggregate score, as he met all the requirements for the position in terms of the prescripts. Mr Booyesen's eligibility for appointment is beyond reproach. It is also not the Municipality's case that there are outstanding internal recruitment procedures that had to be complied with. Conversely, the first recruitment process had been finalised and the selection report tabled before the Council. Moreover, the Municipality demonstrated a bias which led to utter disrespect for the recruitment regulatory framework. Regrettably, there is no demonstration of penitence or undertaking to self-introspect on the part of the Municipality.

[63] Having found that the result is a foregone conclusion, remitting the matter for reconsideration would serve no useful purpose.

Conclusion

[64] For all the reasons above, the appeal must succeed, and the cross-appeal must be dismissed. The first impugned decision must be set aside and be substituted with an order instating Mr Booyesen to the position of Director of Community Services. Mr Booyesen sought to be instated from 1 July 2019, which is, to my mind, a just and equitable relief in the context of the present case.

Costs

[65] There is no reason why the Municipality should not be mulcted with costs Mr Booyesen, an individual litigant, had to incur expenses to vindicate his constitutional right, whose affront was flagrant.

[66] In the result the following order is made:

Order

1. The appeal is upheld with costs.
2. The cross-appeal is dismissed with costs.
3. The order of the Labour Court in the second judgment is set aside and substituted with the following:
 - 3.1. The Municipality's decision of 11 November 2019 not to appoint the applicant, Mr Booysen, as the Director of Community Services is reviewed and set aside.
 - 3.2. Mr Booysen is instated to the position of Director of Community Services of the Municipality effective from 1 July 2019 with full salary and benefits.
 - 3.3. The Municipality shall pay Mr Booysen's costs.

P Nkutha-Nkontwana JA

Mahalelo AJA and Tokota AJA concur.

Appearances

For the appellant: Wheeldon Rushmere & Cole Inc

For the respondents: Marais Muller Hendricks Attorneys

LABOUR APPEAL COURT