IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: EAST LONDON CIRCUIT COURT)

Case no: EL1983/2022

In the matter between:

AKHONA NELISA TINTA	Applicant
and	
AMATHOLE DISTRICT MUNICIPALITY	First Respondent
THE EXECUTIVE MAYOR, AMATHOLE DISTRICT MUNICIPALITY	Second Respondent
THE SPEAKER OF COUNCIL, AMATHOLE DISTRICT MUNICPALITY	Third Respondent
ACTING CHIEF EXECUTIVE OFFICER, AMATHOLE ECONOMIC DEVELOPMENT AGENCY	Fourth Respondent
AMATHOLE ECONOMIC DEVELOPMENT AGENCY	Fifth Respondent

JUDGMENT

Appels AJ

Introduction

[1] The applicant was appointed as Chief Executive Officer ("CEO") of the fifth respondent on 19 September 2022. The fifth respondent, is the Amathole Economic Development Agency, also known as Aspire ("Aspire"), a municipal entity established by the first respondent ("the municipality") in terms of the Local Government Municipal Systems Act, 32 of 2000 ("the Systems Act"). It is also a statutory owned company, as envisaged in the Companies Act, 71 of 2008 ("the Companies Act"). The municipality is its sole shareholder.

[2] On 1 November 2022, pursuant to the conclusion of a contract of employment, the applicant assumed her duties as CEO. However, the following day, 2 November 2022, the second respondent ("the executive mayor") attended her workplace and proceeded to introduce the fourth respondent as CEO. The mayor did so notwithstanding that the applicant's contract of employment remained valid and in force and had not yet expired.

[3] The executive mayor's conduct in this regard followed a municipal council resolution taken by the municipality on 13 October 2022, in terms of which it removed the Board that appointed the applicant and appointed the fourth respondent as the acting CEO of Aspire.

[4] On 15 November 2022, the applicant approached this court in the main application and sought and obtained, *inter alia*, interdictory relief against the respondents. The court issued a rule *nisi,* calling on the respondents to show cause why an order in accordance with paragraph 2.1, declaring unlawful and setting aside the resolution of the municipal council of 13 October 2022, in which it appointed the fourth respondent as acting CEO, should not be made final.

[5] The court also granted interim interdictory relief in terms of which: a) the fourth respondent was interdicted from in any manner passing himself off as the acting CEO of Aspire; b) the municipality was restrained and interdicted from

unlawfully and without following due process appointing any person to act as the acting CEO of Aspire whilst the applicant's employment contract was still valid; and c) the respondents were interdicted from in any manner interfering, tampering or obstructing the applicant from executing her duties as CEO.

[6] The municipality initially opposed the main application, seeking to launch a collateral challenge against the validity of the applicant's appointment as CEO. However, this collateral challenge was abandoned in favour of a counter-application. In filing the counter-application, the municipality and the executive mayor conceded that the applicant was entitled to confirmation of paragraph 2.1 of the rule *nisi*. However, they sought an order that the decision by Aspire to appoint the applicant as its CEO and the conclusion of the fixed-term employment contract between Aspire and the applicant on 19 September 2022, be declared invalid in terms of section 172(1)(a) of the Constitution, 1996 and set aside.

[7] It is important to note at this juncture that even though the impugned decision is a decision by Aspire, the municipality and the executive mayor did not seek costs against Aspire but against the applicant personally.

[8] Since the municipality conceded that the applicant is entitled to confirmation of paragraph 2.1 of the rule *nisi*, only the issue of costs in the main application and the relief sought in the counter-application required determination.

The Facts

[9] On 24 May 2022, the Board of Aspire had a meeting during which they *inter alia* approved the composition of a five-member shortlisting and interview panel ("the selection panel") in respect of the recruitment of the CEO. The selection panel so approved, comprised of the Board chairperson, Professor Adendorff, the chairperson of the Board's finance committee, Dr N Williams, the chairperson of the Board's projects committee, Mr L Mbokotho, the chairperson of the Board's social and ethics committee, Mr S Khanyile. The shareholder representative of the municipality was elected as the fifth member.

[10] Regarding the shareholder representative, it should be noted that Section 93D of the Systems Act, provides that the council of a parent municipality must designate a councillor or an official of the parent municipality, or both, as the representative or representatives of the parent municipality to represent the parent municipality as a non-participating observer at meetings of the Board of directors of the municipal entity concerned. The shareholder representative should also attend shareholder meetings and exercise the parent municipality's rights and responsibilities as a shareholder, together with such other councillors or officials that the council may designate as representatives. The shareholder representative was therefore elected to be on the selection panel in order to comply with Section 93D. Mr Xhanti Mngxaso ("Mr Mngxaso") was at all relevant times the councillor who has been designated as the shareholder representative.

[11] It appears from minutes of the Board meeting of 24 May 2022 that the applicant was present at the meeting as an "invitee" in her capacity as Acting CEO. The municipality and the executive mayor relied on the minutes of the meeting which records the applicant's presence at this meeting, as evidence that she had access to and insight into material information relating to the recruitment process for the position of CEO which was not available to the other applicants. The applicant, however, alleges that she was excused from the meeting by the chairperson when the recruitment of the CEO position was discussed.

[12] A further meeting of the Board was held on 11 August 2022, in which meeting the applicant was also present as acting CEO. It is evident from the minutes of that meeting that the process plan and the advertisement for the recruitment of the CEO were noted. The municipality and the executive mayor also point to the presence of the applicant at this meeting as evidence that the process was manifestly unfair. I will return to this issue later in the judgment.

[13] On 11 August 2022 there was a change in the political leadership of the municipal council of the municipality and a new executive mayor, speaker and chief were appointed. Shortly after this, on 22 August 2022, the executive mayor sought an urgent meeting with the Board on 23 August 2022 and was advised that because

two members of the Board were abroad, the meeting could not take place and that it would be scheduled upon their return.

[14] The advertisement for the vacant position of CEO was published in the edition of the Mail & Guardian of 12 to 18 August 2022. The advertisement informed potential applicants that the job profile, qualifications and competencies could be found on the Aspire website. It should be noted that the qualifications and competencies which an applicant for CEO of a municipal entity must meet are regulated by statute. It is apparent from the advertisement that it did not include the statutory requirements relating to minimum competency levels for accounting officers in respect of financial and supply chain management competency areas or the core managerial and occupational competencies.

[15] In this regard, section 119(1) of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA") requires that the accounting officer, that is the chief executive officer, of a municipal entity, must meet the prescribed competency levels.[1] These competency levels are set out in Regulation 3 of the Local Government: Municipal Regulations on Competency Levels, 2007, promulgated under the MFMA ("the competency regulations").

[16] Furthermore, regulation 3 provides for 18 unit standards in relation to financial and supply chain management standards which an accounting officer of a municipal entity must achieve in order to qualify for appointment. The applicant applied for the position of CEO notwithstanding the fact that she did not meet the minimum competency requirements in accordance with regulation 3. She was nonetheless shortlisted and interviewed for the position of CEO.

[17] In this regard, it is important to note that the applicant had not achieved five of the specified unit standards for financial and supply chain management standards. In this regard, she did not meet unit standard 11658, relating to strategic leadership and management, unit standard 116342 and 116362 (relating to strategic financial

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[1] Section 119(1) provides that: "*The accounting officer and all other officials of a municipality or municipal entity involved in the implementation of the supply chain management policy of the municipality or municipal entity* <u>*must meet the prescribed competency levels*</u>." [my emphasis]

management), unit standard 116341 (relating to financial and performance reporting) and unit standard 116348 (relating to stakeholder relations).

[18] Despite the Board being unable to meet with the executive mayor on 23 August 2022, it nevertheless proceeded, without making itself available for the requested meeting with the executive mayor, to conduct the virtual shortlisting of candidates for the CEO position, followed by virtual interviews of the shortlisted candidates on 31 August 2022 and 6 September 2022 respectively.

[19] Despite the fact that the selection panel that was approved by the Board of Aspire comprised of a five-member panel, it is evident from the report of the chairperson of the panel, that only three members of the selection panel, namely, Professor Adendorff, Dr Williams and Mr Khanyile participated in the aforementioned virtual interviewing process. Notably, Mr Mbokotho and the shareholder representative, Mr Mngxaso were absent.

[20] Following the interview process, the applicant was recommended for appointment as CEO in the report compiled by the chairperson. It does not appear from the report that a competency assessment was conducted to ensure that the applicant possessed the prescribed core competencies.

[21] The report compiled by the chairperson also contains a recommendation on the salary at which the applicant should be appointed. The recommendation on the salary was based on a benchmarking report focussing on development agencies with similar attributes in the Eastern Cape.

[22] The municipality and the executive mayor allege that the municipality had not in respect of the applicant determined the upper limits of the salary and other benefits of the CEO as it was required to do in terms of the applicable prescripts. In this regard, they point out that the municipality had last made such a determination in December 2018, but that determination was based on incorrect categorisation of the municipality as a category 7 municipality. It is alleged that the municipality has obtained a court order declaring its categorisation as a category 7 municipality to be unlawful and altering that categorisation to a category 6 municipality. The also allege

that the benchmarking report on which the recommendation on the applicant's salary was based had not been shared with them.

[23] Furthermore, Mr Xhanti Mngxasa, the councillor who is the person designated by the municipality to represent it at meetings of the Board of Aspire in terms of section 93D of the Systems Act, was not notified that he was required to attend either the shortlisting meeting or the interviews, or indeed that he was appointed as a member of the selection panel. Therefore, notwithstanding that the Board approved the selection panel which makes provision for the shareholder representative to be a member of the selection panel, the shareholder representative was not informed that he is a member of the selection panel, nor was he given notice of meetings of the selection panel.

[24] The applicant, in her answering affidavit, admitted that Mr Mngxasa is the shareholder representative that was appointed to be present at Board meetings of Aspire and that he was not present at the Board meeting of 19 September 2022. She also admitted that only three of the selection panel members approved by the Board conducted the interview and shortlisting processes and made the recommendation to the Board.

[25] On 19 September 2022, notwithstanding the absence of Mr Mngxaso, the shareholder representative and Mr Mbokotho from the shortlisting interview and selection processes, the Board considered the report of the three members of the selection panel and appointed the applicant as CEO, even though the selection panel was not constituted in accordance with its approval, dated 24 May 2022. The applicant was appointed on the salary as contained in the recommendation by the chairperson. The municipality alleges that the appointment was made without affording the municipality an opportunity to determine the upper limits of the applicant's salary. The salary at which she was appointed is the equivalent of the maximum upper limit for managers directly accountable to the municipal manager of a category 6 municipality.

[26] The shareholder representative, Mr Mngxaso was also not present at the Board meeting of 19 September 2022 when the Board resolved to appoint the

applicant as CEO. The shareholder representative's absence was solely due to the fact that Aspire failed to notify him of the meeting or to take any steps to secure his attendance at the meeting.

[27] It was only after the meeting of 19 September 2022 that it came to Mr Mngxaso's attention that a CEO has been appointed by the Board. This is evident from a Whatsapp text message sent by Mr Mngxaso to the chairperson, in which he stated it had come to his attention that a new CEO has been appointed by the Board and in which he requested confirmation that such appointment had indeed taken place.

[28] It was also only on 20 September 2022, following the appointment of the CEO that arrangements were made for a meeting between the Board and the executive mayor. The municipality alleges that the Board deliberately appointed the applicant in haste in order to avoid scrutiny and oversight by the municipality. The meeting eventually took place on 3 October 2022. In the meeting it was resolved that a report by the chairperson on the recruitment of the CEO be submitted within 48 hours. The report, together of the employment contract of the applicant was sent to the executive mayor on 5 October 2022.

[29] On 13 October 2022, the council of the municipality resolved to dissolve the Board of Aspire as the relationship between the parties had broken down. It was also resolved that, the fourth respondent should be appointed as Acting CEO.

[30] On 1 November 2022, the applicant duly assumed her duties as CEO. However, on 2 November 2022, the executive mayor attended her workplace and proceeded to introduce the fourth respondent as CEO. This was done, despite the fact that the applicant's contract of employment remained valid and in force and had not yet expired.

[31] Accordingly, the applicant approached this court on 15 November 2022 on an urgent basis in the main application and obtained interim interdictory relief against the municipality and the executive mayor.

[32] On 27 March 2023, the applicant's employment was terminated by Aspire. Subsequently, the applicant approached the High Court under case number 713/2023 to challenge the termination of her employment. The matter was struck from the roll for lack of urgency. Thereafter, the applicant launched proceedings in the Labour Court, seeking her retrospective reinstatement. The matter is still pending in the Labour Court.

Analysis

Mootness

[33] On the day of the hearing of the matter, the applicant's counsel argued that the issues in the matter are moot, in that: a) the municipal manager and mayor conceded that the applicant is entitled to the confirmation of the rule *nisi*; and b) on 27 March 2023, the applicant's fixed term of employment was unilaterally terminated by Aspire.

[34] Accordingly, it was argued on behalf of the applicant that the main point of contention, i.e. the validity of the applicant's appointment, had become moot. Mr Rorke SC however argued that the matter is not moot in that the applicant still seeks her reinstatement in the Labour Court. Accordingly, he contended, the legality of her appointment remains a live controversy. The applicant's counsel in turn, from the bar, stated that the applicant only seeks compensation for the unlawful termination of her contract and no longer seeks reinstatement.

[35] A matter is moot when a court's decision will have no practical effect because the underlying dispute ceased to exist or events have overtaken the dispute.[2] A court is empowered to refuse to hear a matter if the judgment would have no practical effect. It should generally refrain from determining abstract, and academic or hypothetical questions and should only resolve live disputes with concrete

[2] *Minister of Tourism v Afriforum* NPC [2023] ZACC 5 at para 23.

consequences.[3] Mootness is however not an absolute bar, only a discretionary principle.[4]

[36] Where there are still practical legal consequences flowing from the determination or the outcome may affect rights, applications and or remedies in other proceedings or a declaration will bring certainty or clarity to the legal position of other parties, the matter is not moot.

[37] The applicant has challenged the termination of her employment in separate proceedings. Whether she seeks reinstatement or compensation, the legality of her appointment is still a live dispute. In this regard it should be noted that a finding that her appointment was unlawful directly affects the legal consequences flowing from the termination of her appointment, in particular whether she is entitled to reinstatement or compensation.

[38] Furthermore, it is in the public interest, grounded in the principle of legality, that clarity is obtained on whether the Board acted lawfully in appointing the applicant. The appointment of a CEO of a municipal entity is an exercise of public power with implications for governance, accountability and compliance with statutory prescripts. A determination on legality serves an important function beyond the personal position of the applicant.

[39] Given these considerations, the dispute is not academic. A decision on the validity of the appointment will have practical legal consequences. Accordingly, notwithstanding the termination of her employment on 27 March 2023, the issues raised in the counter-application are not moot.

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[3] *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 at para 15.

[4] *President of the Republic of South Africa v Democratic Alliance and Others* (664/17) [2018] ZASCA 79 (31 May 2018) at para 12.

The Legality of the Applicant's Appointment as CEO

[40] For its argument on why the appointment of the applicant is unlawful, the municipality relies on a breach of the principal of legality, alternatively the breach of the provisions of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

[41] It is important to note at the outset that this is not a self-review. Therefore, the impugned decision could, in principle, be reviewed either under PAJA or under the principle of legality. The principle of legality applies to all exercises of public power, whether or not they constitute an administrative action as defined in PAJA. It requires that all public power be exercised lawfully and in compliance with mandatory statutory prescripts. I am therefore empowered to dispose of the counter-application on the basis of legality alone.

[42] The legality of the appointment of the applicant is challenged on various grounds. These are that: a) the decision to appoint the applicant was not taken in consultation with the executive mayor of the municipality; b) the shortlisting and interview panel was not properly constituted; c) the municipality has not determined the upper limits of the applicant's remuneration and the Board's determination thereof was also irrational; d) collusion and favouritism; e) the meeting of the previous Board of Aspire on 19 September 2022 was not properly constituted; and f) the previous Board of Aspire failed to ensure that the applicant met the prescribed competency levels.

[43] The Board was required to act in accordance with its delegations of authority which obliged it to take the decision to appoint the applicant as CEO in consultation with the executive mayor of the municipality. An extract of the delegations is attached to the founding affidavit in the counter-application and there is no factual dispute in this regard. What is in dispute is whether this required consensus between Aspire and the executive mayor or whether it is was sufficient for the Board to inform the executive mayor, as it did on 5 October 2026, only after the decision to appoint was taken.

[44] Where a functionary is required to act 'in consultation with' another functionary, this means that there must be concurrence between the functionaries.[5] In other words, consensus must be reached and it is not sufficient to act without consultation and inform the other functionary after the act has been completed. Therefore, in the absence of consultation with the executive mayor, the Board had no authority to make a decision to appoint the applicant as chief executive officer.

[45] In addition to the failure to appoint the applicant in consultation with the executive mayor, there were multiple other serious governance defects in the appointment process. These included the improperly constituted selection panel, the exclusion of the shareholder representative which constituted non-compliance with section 93D of the Systems Act. Each of these defects independently provides sufficient grounds for declaring the decision to appoint the applicant invalid.

[46] I, however, prefer to determine the legality of the applicant's appointment on the basis of whether she met the mandatory statutory requirements for appointment as CEO in respect of the minimum competency levels.

[47] Regulation 2 of the competency regulations provides that the accounting officer of a municipal entity must generally have the skills, experience and capacity to assume and fulfil the responsibilities and exercise the functions and powers assigned to the accounting officer of a municipal entity. Section 119(1) of the MFMA requires that the accounting officer, that is the chief executive officer, of a municipal entity, must meet the prescribed competency levels. These competency levels are mandatory and are set out in regulation 3 of the competency regulations.

[48] In this regard, in *Nelson Mandela Bay Municipality v Qaba and Others*[6], Eksteen J has rejected an argument that the prescripts in respect of the minimum prescribed competency level are "*no more than guidelines*". With regards to a contention that the minimum prescribed competency levels are not prescriptive, he held as follows:

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[5] *McDonald and Others v Minister of Minerals and Energy and Others* 2007 (5) SA 642 at para 18.

[6] *Nelson Mandela Bay Municipality v Qaba and Others* (3042/2023) [2024] ZAECQBHC 27 (9 April 2024) at para 37.

‘The interpretation contained for is untenable. I have set out earlier the responsibilities that the MFMA imposes upon the CEO and the extent of his financial functions. In interpreting the provisions of regulation 2 of the competency regulations in the context of the general scheme of legislation, which I have discussed earlier it is imperative for a CEO to have achieved at least the minimum competency requirements for the financial management entrusted to him.’[7]

[49] At the time of the applicant’s appointment with the municipality, she had not achieved five of the specified mandatory unit standards in respect of financial and supply chain management competency areas as set out in regulation 3 of the regulations. This is an undisputed fact.

[50] Regulation 15(2) of the regulations provides an indulgence to a limited extent in respect of the appointment of certain officials. The regulation provides:

‘A person appointed as a financial official on or after the date of the commencement of this regulation which does not meet the minimum competency level in the unit standards for a competency area, required for the position in terms of these regulations, must attain that minimum competency level within 18 months of the date of appointment.’

[51] Regulation 16 stipulates that when an official is appointed who does not meet the minimum competency requirements, attainment of that minimum competency requirement within the timeframe stipulated in regulation 15, must be included in that official’s contract of employment and it must state that if not attained, it must be terminated automatically within one month after the applicable period.

[52] It follows therefore that the failure to meet the minimum competency requirements is not an absolute bar to appointment, provided that the official’s appointment is made conditional upon meeting the minimum competency requirements within 18 months. An unqualified person may therefore be appointed on condition that the contract of employment complies with the provisions of regulations 15 and 16 in that an express term is incorporated into his contract of

[7] *Nelson Mandela Bay Municipality v Qaba and Others*, supra at para 37.

employment that he or she will attain the competency levels within the prescribed period, failing which the appointment will automatically terminate.[8]

[53] Despite the fact that the applicant did not have the required competencies, the employment contract which was concluded pursuant to her appointment, is an unconditional fixed term contract and does not contain an express term requiring her to attain the minimum competency levels within a required period of time. This was undoubtedly unlawful.

[54] The appointment of CEO of a municipal entity constitutes the exercise of public power. As such, it is subject to the principle of legality, which requires that all exercises of public power must be lawful, rational and in compliance with statutory prescripts. In the absence of compliance with mandatory statutory requirements in the appointment of the applicant as CEO, the decision to appoint her as such is unlawful and ought to be declared invalid and set aside. Once a breach of legality is established, the court is obliged to declare the conduct inconsistent with the constitution and invalid in terms of section 172(1)(a). In my view, the appropriate relief in the circumstances of this matter is to set aside the decision to appoint the applicant as CEO of the fifth respondent.

Collusion

[55] The municipality and the executive mayor rely on allegations of collusion and favouritism to justify a cost order against the applicant in both the main application and the counter-application. In these circumstances, it is necessary to determine whether the evidence establishes such conduct on the part of the applicant, as it impacts directly on the appropriateness of any adverse cost order against her.

[56] The allegations of collusion and favouritism relied upon by the municipality and the executive mayor rests primarily on the fact that the applicant was present at the Board meetings held on 24 May 2022 and 11 August 2022 at which aspects of the recruitment process for the position of CEO were discussed. In my view those

[8] *Nelson Mandela Bay Municipality v Qaba and Others*, supra at para 34.

facts, whether considered individually or cumulatively, are insufficient to establish that the applicant colluded with the Board in her unlawful appointment.

[57] At the relevant times, the applicant was serving as acting CEO and attended Board meetings in that capacity. Her presence at Board meetings was therefore neither unusual nor improper. There is no evidence that she attended those meetings as a decisionmaker in relation to her own appointment nor that she participated in deliberations concerning the recruitment process. In respect of the meeting of 24 May 2022, the applicant’s evidence is that she was excused from the meeting when the recruitment of the CEO was discussed. Her evidence in this regard was not seriously challenged by the municipality and the executive mayor.

[58] Even if she remained present, mere attendance does not without more, translate into influence, manipulation, or collusion. Similarly, the meeting of 11 August 2022 concerned the noting of a process plan and advertisement. There's no evidence that the applicant shaped the criteria, controlled the process, or exercised any influence over the Board's decisions. The minutes do not support an inference that she used her presence to advance her own candidacy.

[59] Collusion and favouritism require proof of active participation, improper influence or concerted conduct between the applicant and the Board. There is not sufficient evidence that this occurred. More particularly there's no evidence that the applicant influenced the composition of the selection panel, participated in the shortlisting or interview process, influenced the exclusion of the shareholder representative, misrepresented her qualifications or competency status or induced the Board to disregard the statutory competency requirements or to conclude an unconditional contract of employment.

[60] The irregularities that ultimately rendered the appointment unlawful arose from governance failures by the Board, including the improper constitution of the selection panel and the failure to comply with the regulatory framework governing competency requirements. Those failures cannot be attributed to the applicant merely because she was present at meetings held in the ordinary course of her duties. Even if it is accepted that the applicant had insight into aspects of the

recruitment process by virtue of her position, such knowledge does not establish collusion.

[61] There is a material distinction between being aware of a process and actively conspiring to subvert it. The regulatory scheme itself recognises that candidates who do not meet all competency requirements may be lawfully appointed, provided that the appointment is conditional and compliant with regulations 15 and 16. The applicant's decision to apply for the position despite competency gaps was therefore not unlawful *per se*, nor does it suggest bad faith.

Costs

[62] The issue of costs must be determined in light of the outcome of both the main application and the counter-application, as well as the conduct of the respective parties throughout the litigation.

Costs in the Main Application

[63] In the main application, the applicant was substantially successful in obtaining the introductory relief sought, including the setting aside of the municipal council resolution of 13 October 2022 and the protection of her contractual position pending final determination. Furthermore, the municipality and the executive mayor conceded that the applicant was entitled to confirmation of the *rule nisi* in the main application.

[64] The general rule is that cost follows the result unless there are cogent reasons to depart therefrom. The interdictory relief granted in the main application protected the applicant from unlawful interference and restored legality pending final determination.

[65] In these circumstances, not granting costs to the applicant in the main application, would amount to a departure from the general rule and would undermine the principle that a litigant who is compelled to approach a court to vindicate clear legal rights should not be left out of pocket for having done so. There is nothing in the applicant's conduct in the main application that warrants depriving her of costs.

On the contrary, the litigation was necessitated entirely by the conduct of the municipality and the executive mayor.

[66] The decisive consideration is the nature of the municipality and executive mayor's conduct that gave rise to the main application. The municipality and the executive mayor did not approach the court at the outset to challenge the lawfulness of the Board's decision to appoint the applicant. Their conduct represents a troubling example of impermissible self-help by an organ of state.

[67] By 5 October 2022, they were in possession of a report from the chairperson of the Board detailing the process leading to the applicant's appointment, together with her contract of employment. Armed with that information, they were fully aware of both the fact of the appointment and the grounds upon which its lawfulness could be challenged. At that stage, the applicant had not yet resumed her duties, and nothing prevented the municipality from approaching a court urgently to review and set aside the appointment before it was implemented. Instead, it resorted to self-help by purporting to appoint the fourth respondent as acting CEO notwithstanding that: a) the applicant's contract of employment remained extant and had not been set aside; b) the Board's decision, even if unlawful, continued to produce valid consequences until set aside by a court of law.

[68] It is a fundamental principle of administrative law, as formulated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others,*[9] that an administrative act is valid and binding until judicially reviewed and set aside. It is settled law that an organ of state is not entitled to ignore or override an administrative decision merely because it considers it to be unlawful. Organs of state are not exempt from the processes of judicial review and must apply formally to a court to set aside an unlawful decision.[10]

[69] The municipality was therefore obliged to recognise the legal consequences of the Board's decision until a court declared it invalid. Instead of approaching the court to review and set aside the Board's decision, the municipality resorted to self-

[9] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

[10] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at para 64.

help. Such conduct is the very mischief that the principle as formulated in *Oudekraal* seeks to prevent. It is not conduct expected of an organ of state, which bears a constitutional obligation to act lawfully, rationally, and in accordance with due process.

[70] The attempted installation of the fourth respondent as CEO while the applicant's contract subsisted, created a real risk of administrative chaos, uncertainty in governance, and paralysis within a municipal entity. It was precisely this risk that necessitated the applicant to approach the court in the main application for urgent interdictory relief.

[71] In these circumstances it would be untenable to decline to follow the general rule applicable to costs in respect of the main application. To do so would effectively sanction the self-help by an organ of state, dilute the constitutional imperative of legality, and leave the successful litigant to bear the financial burden of restoring lawful administration.

[72] Therefore, when regard is had to the applicant's undisputed success in the main application, the concession of the relief sought therein, the municipality's failure to follow lawful review procedure and its resort to impermissible self-help with the potential to destabilise public administration, a deviation from the ordinary cost order would not reflect a judicial exercise of discretion. On the contrary, the proper principled exercise of discretion requires the municipality and the executive mayor to pay the costs of the main application.

Costs in the Counter-Application

[73] The counter-application however stands on a different footing. In the order that will be made below, the municipality and the executive mayor are successful in obtaining relief declaring unlawful and setting aside the decision of Aspire to appoint the applicant as its CEO, principally on the basis that the prescribed minimum competency requirements have not been. To that extent the counter-application succeeded.

[74] It is significant that the impugned decision was not that of the applicant, but that of Aspire. It was Aspire that constituted and conducted the selection process, failed to ensure that the selection panel was properly composed, failed to notify or involve the shareholder representative, and failed to ensure compliance with the statutory competency requirements. It was aware that the applicant does not meet the requirements and still appointed her without including an express term in the contract of employment that complies with regulations 15 and 16 of the competency regulations. Notably, despite it being the decisionmaker whose conduct was under scrutiny, the municipality and the executive mayor nevertheless sought a cost order against the applicant personally.

[75] In my view, such an approach is not justified on the facts of this matter. There was no evidence that the applicant misrepresented her qualifications to the Board or acted in bad faith in any way or was personally responsible for the procedural and substantive defects that ultimately rendered her appointment unlawful. As set out above, there was also no evidence of collusion.

[76] The blame for the defects in her appointment lies squarely at the door of those who appointed her, i.e. the erstwhile Board of Aspire. In short, the applicant was the beneficiary of an unlawful administrative act, but she was not its author.

[77] Regulation 15(2) expressly allows for the appointment of a person who does not yet meet the minimum competency levels, subject to a post-appointment compliance within 18 months. Applying for a position while failing to meet competency requirements is not *per se* unlawful conduct by the applicant because the regulatory scheme recognises that competency gaps are administratively manageable and not automatically disqualifying. The duty to manage non-compliance is placed squarely on the employer as regulation 16 requires the appointing authority to ensure that performance agreements include attainment of competencies and that the contract of employment expressly provides for automatic termination if competencies are not attained within the prescribed time period. These are governance obligations which lie entirely within the control of the municipal entity, in this case Aspire, and not the successful applicant who gets presented with an employment contract pursuant to a recruitment process. Regulation 16 places

statutory obligations on the municipal entity, and it is the municipal entity's conduct which is unlawful if it does not comply with its statutory obligation.

[78] While it may be accepted that a person appointed as CEO ought to be familiar with the applicable regulatory framework, including regulations 15 and 16, that does not, without more, establish bad faith or collusion. There is no evidence that the applicant drafted the contract of employment, misrepresented her competency status, or induced the omission of the mandatory clause required by regulation 16. At most her acceptance of the contract reflects acquiescence in a defective administrative process, not dishonesty or deception.

[79] Therefore, merely being a party to a contract that is defective by virtue of its non-compliance with the requirements of regulation 16 is in my view not sufficient to make the applicant liable for the payment of all the costs of the counter-application. There is no reason why the applicant should personally bear the costs of the judicial review of a decision of an organ of state which is reviewed and set aside because of the failure of that organ of state to comply with its statutory obligations.

[80] As authority for the proposition that the applicant should bear responsibility for the unlawful appointment process, Mr Rorke SC, who acted on behalf of the municipality and the executive mayor, referred me to the matter of *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd and Others ("Afrisec")*[11], where the court held as follows:

'The potential ills of nepotism, patronage, or worse, however do not only lie with those who may award contracts, but also with *those who receive them*.'[12] [My emphasis.]

[81] The court in *Afrisec* also held as follows:

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[11] *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd and others* (865/07) [2007] ZAECHC 155 (26 June 2007).

[12] *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd and others (supra)* at para 29.

‘Participants in the public procurement of goods and services are not entitled to close their eyes as to the propriety of their own involvement in that process; they have their obligation and legal means to assert in the public rules of the game before they participate.’

[82] The *dicta* set out above are in the context of public procurement, where private bidders actively participate in competitive processes governed by section 217 of the Constitution and may be complicit or turn a blind eye to illegalities in order to secure contracts. This matter concerns an employment appointment governed by a distinct statutory framework which expressly places obligations on the appointing authority. There was no evidence that the applicant misrepresented her qualifications, induced the omission of regulatory safeguards, or participated in the irregularities identified.

[83] *Afrisec* is therefore not authority for the proposition that a beneficiary of an unlawful administrative act, absent active participation or deception, must pay the legal costs associated with the judicial review of that unlawful administrative act.

[84] However, once the municipality and the mayor launched the counter-application and set out, in clear and cogent terms the statutory and regulatory defects that rendered the applicant’s appointment unlawful, there was no sustainable basis upon which the applicant could properly persist in opposing the relief sought in the counter-application. The material facts which rendered her appointment unlawful were largely common cause. In those circumstances, the applicants continued opposition served no legitimate purpose other than to delay the inevitable setting aside of her unlawful appointment.

[85] It is understandable that the municipality did not seek a cost order against the decisionmaker in this instance, being its own municipal entity. However, the appropriate cost order in my view, would have been to seek costs only against those respondents opposing the relief sought in the counter-application.

[86] Having said that, there was simply no merit in the applicant’s opposition to the counter-application. Had she from the outet conceded to the relief sought in respect

of the declaration of invalidity and the setting aside of her appointment, no adverse cost order would have been warranted against her.

[87] In the exercise of my discretion, taking into account the principles applicable to cost in matters involving the exercise of public power, in particular the fact that she was not the decisionmaker whose conduct gave rise to the review, I am of the view that she should not be mulcted with cost in respect of the counter-application as a whole, but should be liable only for the cost occasioned by her opposition thereto, as this opposition was wholly unmeritorious.

Order

[88] Accordingly, the following order is made:

1. Paragraph 2.1 of the *rule nisi* issued on 15 November 2022 in the main application, declaring unlawful and setting aside the resolution of the first respondent dated 13 October 2022, is hereby confirmed.

2. The first respondent shall pay the costs of the main application, including the costs of counsel, taxed on Scale C.

3. The decision of the fifth respondent on 19 September 2022, to appoint the applicant to the position of Chief Executive Officer of the fifth respondent, is declared invalid in terms of section 172(1)(a) and set aside in terms of section 172(1)(b) of the Constitution.

4. The conclusion of the fixed term employment contract between the applicant and the fifth respondent on 19 September 2022 is declared invalid in terms of section 172(1)(a) and set aside in terms of section 172(1)(b) of the Constitution.

5. The applicant is ordered to pay the cost occasioned by her opposition to the counter-application, including the costs of counsel, taxed on Scale C.

G APPELS

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:	Mr L. Phaladi
Instructed by:	MM Tshozi Incorporated Office No 16 Suffolk Road Berea EAST LONDON
For the Respondents:	Mr S. Rorke SC
Instructed by:	Wesley Pretorius & Associates Inc 24 Tottenham Road Baysville EAST LONDON

Heard: **27 November 2025**

Delivered: **31 March 2026**