

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2024-063825

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
28/08/2026 DATE  SIGNATURE

In the matter between:

JOHANNES SELLO DIOKENG MAGORO

Applicant

and

MADIBENG LOCAL MUNICIPALITY

First Respondent

**MUNICIPAL MANAGER: MADIBENG LOCAL
MUNICIPALITY**

Second Respondent

ONTHATILE PALESA MALESE

Third Respondent

NYIKO CLEMENT NKUNA

Fourth Respondent

LEAH SOLVA MTHOMBENI

Fifth Respondent

STEWARD MOKGALE KWAPE

Sixth Respondent

Delivered: This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and uploading it to the electronic file of this matter on Caselines. The date and time of hand-down is deemed to be 28 August 2026.

JUDGMENT

TEFFO J

Introduction

[1] This is an opposed application for the review and setting aside of the appointment of the third respondent, Ms Onthatile Palesa Malese, to the position of Assistant Director: Minimum Information Security Standards ("MISS") (Post level 3) in the first respondent, the Madibeng Local Municipality ("the municipality"). The applicant, an unsuccessful candidate for the same post, relies on the principle of legality, alternatively on the Promotion of Administrative Justice Act¹ ("PAJA").²

[2] The notice of motion seeks orders reviewing and setting aside the recommendation made by the interview panel on or around February 2024 that the third respondent be appointed to the post; the agreement concluded between the first and third respondents whereby she was appointed; and the Resolution taken by the Council of the first respondent whereby she was appointed. This is together with costs against the respondents jointly and severally.³ This Court returns to the description of the third of these decisions below as the record shows that the appointment was in fact approved by the Acting Municipal Manager and not by a resolution of the council.

[3] The application is opposed by the municipality and its Municipal Manager, the first and second respondents, and the third respondent. The fourth to sixth respondents are the remaining candidates who were interviewed for the post.

¹ Act 3 of 2000.

² Founding affidavit ("FA") para 9.3, CaseLines 10-10; notice of motion, CaseLines 10-2 – 10-3.

³ Notice of motion, CaseLines 10-2 – 10-3.

They were joined by order of Fisher J on 5 May 2025 and took no part in the proceedings.⁴

[4] At the hearing, counsel for the third respondent raised, for the first time, the contention that this Court lacks jurisdiction because the dispute is in substance, an unfair labour practice falling within the exclusive jurisdiction of the Labour Court.

The background facts

[5] In early November 2023 the municipality advertised, among other vacancies, the post of Assistant Director: MISS (Post level 3), at a salary of R622 129,08, with a closing date of 24 November 2023. The report of the municipality's Corporate Support Services directorate records that the post was advertised externally on 2 November 2023. The founding affidavit places the advertisement on or around 6 November 2023. Nothing turns on the difference.⁵

[6] The advertisement stipulated the following minimum requirements for the post:⁶

“Grade 12 • Bachelor Degree/National Diploma (360 Credits) in Security Risk Management/Police Science • Firearm Competency for handling and use of the following weapons viz: Handgun, Rifle, Shotgun, Self-loading Rifle/Car, Handgun business, Rifle business, Shotgun business, Self-loading Rifle business/Car/Buss • Grade A PSIRA Registration • Valid driver's license and own vehicle • At least more than 5 years relevant experience of which 3 years will be on managerial level • No Criminal Record • Multilingual – English, Afrikaans, Tswana, Tsonga and Zulu • Good leadership and interpersonal skills • Computer literacy • Excellent problem-solving skills.”

⁴ Order of Fisher J, CaseLines 22-1 – 22-2.

⁵ Advertisement, annexure JSM1, CaseLines 10-19; FA para 10, CaseLines 10-10; report of Corporate Support Services dated 22 February 2024 (“the CSS report”), CaseLines 12-2.

⁶ Annexure JSM1, CaseLines 10-19; FA para 11, CaseLines 10-11; third respondent's answering affidavit (“Malese AA”) para 11, CaseLines 26A-6 – 26A-7.

[7] The applicant is employed by the municipality as its Chief Security Officer. He states in the founding affidavit that he had acted in the very post that was advertised from its inception in 2017 until on or around 31 January 2024. In the supplementary founding affidavit, the applicant describes nine non-consecutive months of acting between 2022 and 2024, supported by acting appointment letters. The applicant applied for the post before the closing date.⁷

[8] Five candidates were shortlisted on 29 January 2024: Mr Nkuna, Mr Kwape, the applicant, Ms Mthombeni and the third respondent. Interviews took place on 22 February 2024 before a panel comprising Mr D Masemola (Director: Corporate Support Services), Ms LJ Mokgatle (Acting Human Resources Manager), Mr M Khoza (Director: Public Safety, Fleet and Facilities Management) and Mr NW Phala (Director: Human Settlement Planning), with an administrator in attendance and representatives of both recognised unions present. The candidates were scored by Messrs Masemola, Khoza and Phala.⁸

[9] The score sheet reflects the following totals: the third respondent 63; Mr Nkuna 55; the applicant 52; Ms Mthombeni 52; and Mr Kwape 27.⁹

[10] On the same day Corporate Support Services reported that the highest scoring and recommended candidate, Ms Malese P O, be appointed as Assistant Director: MISS with effect from 01 March 2024. The recommendation was signed by Ms Mokgatle and Mr Masemola and approved by the Acting Municipal Manager. That is the only reason recorded in the contemporaneous documents for the appointment. The record contains no resolution of the municipal council, and none was suggested in argument. The approval by the Acting Municipal Manager accords with s 55(1)(e) of the Local Government: Municipal Systems Act (“the Systems Act”),¹⁰ in terms of which the municipal manager is responsible for the appointment of staff other than managers

⁷ FA paras 1, 12 and 18, CaseLines 10-8, 10-11 and 10-13 (annexures JSM6 – JSM8); supplementary founding affidavit (“SFA”) para 25, CaseLines 18-10 (annexures JSMD2 – JSMD4).

⁸ CSS report, CaseLines 12-2 – 12-3.

⁹ Score sheet, annexure OPM12, CaseLines 26A-38 (also in the rule 53 record); Malese AA para 67, CaseLines 26A-24 – 26A-25.

¹⁰ Act 32 of 2000.

directly accountable to him, subject to the Employment Equity Act¹¹ (“the EEA”).¹²

[11] On 28 February 2024 Mr Khoza informed the applicant that he had been unsuccessful and asked him to hand over to the incoming appointee. The third respondent assumed duty on or about 1 March 2024.¹³

[12] The applicant immediately pursued internal remedies. He requested the records informing the decision on 6 and 7 March 2024. He lodged a grievance on 15 March 2024, describing its nature on the prescribed form as an “unfair labour practice” and seeking relief that he be appointed to the post retrospectively. After various follow-ups, his grievance was dismissed by the second respondent’s office on 17 May 2024.¹⁴

[13] The review application was launched on 10 June 2024, some three months after the appointment took effect. The rule 53 record was delivered in tranches on 19 July, 29 July and 8 August 2024. Contending that the record remained incomplete, the applicant launched an application on 19 August 2024 to compel delivery of, among other things, the interview recordings, transcripts and the shortlisting checklist. In answer, the municipality stated under oath that the interviews were not mechanically recorded (the recording device used was found to be empty), that no transcripts or shortlisting checklist exist, and that it had filed everything in its possession. The compel application was withdrawn on 7 October 2024, on which date the applicant also applied to join the fourth to sixth respondents and the joinder was granted on 5 May 2025.¹⁵

The internal audit report

[14] The rule 53 record includes an internal audit report of June 2024, styled “Ad-hoc: Recruitment of new and Acting personnel”. The audit was performed

¹¹ Act 55 of 1998.

¹² CSS report, CaseLines 12-3; panel “Resolved” form, CaseLines 12-5.

¹³ FA paras 15 – 16, CaseLines 10-12.

¹⁴ FA paras 16 – 23, CaseLines 10-12 – 10-14 (annexures JSM3 – JSM5 and JSM10 – JSM12); the grievance form is quoted in the third respondent’s jurisdiction heads, CaseLines 29-24 – 29-25.

¹⁵ Notice of motion, CaseLines 10-2-10-4; compel application, CaseLines 02-2 – 02-5; notice of withdrawal, CaseLines 27-2; joinder application, CaseLines 13-2 – 13-14; order, CaseLines 22-1 – 22-2.

at the request of the Office of the Municipal Manager, approved by the Audit Committee, and reviewed the competency of all officials appointed from 1 July 2023, including verification that shortlisted candidates and appointees met the advertised requirements.¹⁶ The supplementary founding affidavit is founded principally upon it. Three of its findings, each rated “Critical”, are central.

[15] First, finding 3.7 records that none of the five candidates shortlisted for the post met all the minimum requirements. Mr Nkuna was not competent in the use of the rifle, shotgun and self-loading weapons listed in the advertisement. Mr Kwape had no managerial experience; the applicant was recorded as having no managerial experience (a conclusion he disputes). Ms Mthombeni held a Grade B rather than a Grade A PSIRA certificate and had no managerial experience. In respect of the third respondent, the PSIRA certificate was not attached (“only the application for the certificate was submitted”) and she did not have the required managerial experience. The finding concludes that “all the shortlisted candidates for the position of Assistant Director: MISS did not meet all the minimum requirements as per job specification”, and that a shortlisting report should have been completed explaining why they were nonetheless shortlisted, and records as causes “unfair labour practice”, “corruption and nepotism” and non-compliance with the municipality’s Recruitment, Selection and Appointment of Staff Policy (“the Recruitment Policy”).¹⁷

[16] Secondly, finding 3.8 addresses the appointment itself. Upon perusal of the third respondent’s personnel file, the auditors found that at the time of her application, her Grade A PSIRA registration status showed as “pending” and her certificate status was flagged as “pending renewal”; that she was found competent only in the handling of a handgun for business purposes, on the strength of a shooting-range certificate, whereas the post required competency in the various other listed firearms; and that from her curriculum vitae and personnel file she “does not [have] the required 3 year managerial experience

¹⁶ Internal audit report, CaseLines 12-31 – 12-71; mandate, objective and scope at CaseLines 12-33 at paras 1.1 & 1.2.

¹⁷ Finding 3.7, CaseLines 12-52 – 12-55.

as stated in the advertisement.” Management’s recorded comment is telling: “The candidate submitted the PSIRA certificate on the day of the interview, and the panel agreed that the candidate can submit the PSIRA certificate.”¹⁸

[17] Thirdly, finding 3.10 records that the auditors could not be furnished with a shortlisting report for any of the positions filled, notwithstanding clause 11.4 of the Recruitment Policy, which requires a selection panel to compile a shortlist based on the inherent requirements of the position as advertised and with due regard to s 20 of the EEA.¹⁹ The report contains further findings – including that the job specifications appeared to have been tailored to the profiles of the officials then acting in the posts, and management’s concession that the Municipal Staff Regulations pitch the experience for assistant-director posts at five to eight years of which two to three years must be supervisory – but it is unnecessary to rest anything on those findings.²⁰

The answering affidavits

[18] The third respondent denies that she failed to meet the advertised requirements and annexes her qualifications (OPM1 – OPM11) and the score sheet (OPM12). Her experience, on her own version, comprises five years as a police officer at Head Office Crime Intelligence, five years as a Traffic Inspector at the municipality, and nine months as an Assistant Superintendent. The third respondent asserts on that basis that she has more than 5 years relevant experience. She nowhere asserts that she has three years’ managerial experience. She contends that she should not be disqualified merely on the basis of not having the three-year managerial experience. The PSIRA certification of registration that the third respondent annexes is dated 5 January 2024 while the closing date for the applications for the position was 24 November 2023. The firearm certificate she annexes (OPM11) reflects competency in the knowledge of the Firearms Control Act and the handling and use of a handgun, including for business purposes, and no more.²¹ The third

¹⁸ Finding 3.8, CaseLines 12-57 – 12-58.

¹⁹ Finding 3.10, CaseLines 12-61.

²⁰ Findings 3.4 and 3.9, CaseLines 12-46 – 12-47 and 12-59 – 12-60.

²¹ Malese AA paras 12 – 15 and 64 – 67, CaseLines 26A-8 – 26A-10 and 26A-24 – 26A-25; PSIRA certificate, CaseLines 26A-35; certificate OPM11, CaseLines 26A-37.

applicant attacks the application on the basis that it is vague; the decision taken is not administrative action; a case has not been made out under either PAJA or the principle of legality; and that the Court should defer to the employer, warning that a contrary approach would invite litigation by every disgruntled candidate.

[19] At paragraph 8 of the municipality's answering affidavit the following averments have been made:

"I admit that the Third Respondent did not possess the relevant five (05) years' experience specified in the advertisement of which three years was supposed to be at the managerial level."

The municipality pleads, however, that the third respondent remained a "suitably qualified" candidate. She holds a Bachelor of Arts in Police Science, was a Traffic Inspector from 2017 to 2022 and became an Assistant Superintendent in 2023. Further, that she was scored the highest, and that her appointment increased the number of female assistant directors because only four of 48 managerial positions were held by women. Moreover, her appointment advanced the municipality's employment equity statistics and the competency regulations "cannot supersede" its constitutional duty to eliminate gender bias.²² In reply the applicant fastens upon the admission and adds that at the time of her candidacy, the third respondent held neither a valid Grade A PSIRA registration nor the various firearm competency certificates.²³

Condonation

[20] The supplementary founding affidavit and the replying affidavit were delivered out of time and condonation is sought in each. The explanations given are that: the record was delivered late and in tranches; the applicant only learned on 1 October 2024, when the municipality answered the compel application under oath, that the transcripts and shortlisting checklist he awaited

²² Municipality's answering affidavit paras 8 – 13, CaseLines 25-6 – 25-7; developed in its heads of argument with reliance on s 20(3) – (5) of the EEA, CaseLines 30-5 – 30-10.

²³ Replying affidavit paras 24 – 32, CaseLines 28-11 – 28-12.

do not exist; he withdrew the compel application on 7 October 2024 and supplemented on 24 October 2024. The reply awaited the finalisation of the joinder, which was granted on 5 May 2025, and was delivered on 1 July 2025. No hearing date was lost, no prejudice was identified, and the condonation applications were not opposed.²⁴ This Court finds the explanation reasonable. It is in the interests of justice that all the facts be before the Court. Condonation is therefore granted in both instances.

The issues

[21] The issues are: first, whether this Court has jurisdiction to entertain the matter; secondly, whether the decisions are to be tested under PAJA or under the principle of legality; thirdly, whether the shortlisting, recommendation and appointment of the third respondent were unlawful or irrational; fourthly, whether the municipality's reliance on s 20 of the EEA and employment equity sustains the appointment.

Jurisdiction

[22] The third respondent made the following submissions: the applicant is an employee aggrieved by his employer's failure to promote him. Section 186(2)(a) of the Labour Relations Act²⁵ ("the LRA") defines an unfair labour practice to include unfair conduct of an employer relating to promotion. The applicant's own grievance form describes his complaint as an "unfair labour practice" and his desired outcome as his own retrospective appointment. The dispute is an unfair labour practice dispute disguised as a review, for which the LRA provides remedies, and the High Court's jurisdiction is accordingly ousted. Counsel for the third respondent accepted that the answering affidavit did not challenge jurisdiction of this Court. However, he submitted, correctly, that a wrong concession of law does not bind a Court.²⁶ Nor can jurisdiction be conferred by

²⁴ SFA paras 35 – 44, CaseLines 18-12 – 18-14; replying affidavit paras 39 – 49, CaseLines 28-13 – 28-14.

²⁵ Act 66 of 1995.

²⁶ *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) para 67; *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC); *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC); and *Baloyi v Public Protector and Others* [2020] ZACC 27; 2021 (2) BCLR 101 (CC).

consent where it does not exist; this point, although raised at the eleventh hour, must be considered.

[23] The starting point is that jurisdiction is determined on the basis of the pleadings, and not the substantive merits of the case. That is the holding of the Constitutional Court in *Gcaba v Minister for Safety and Security and Others*,²⁷ on which the third respondent herself relies: the pleadings “contain the legal basis of the claim under which the applicant has chosen to invoke the Court’s competence.”²⁸ The applicant’s pleaded case is not a claim for relief under the LRA. He invokes no right in section 186(2) of the LRA. The applicant has not referred the dispute for conciliation or arbitration and does not seek any of the remedies in s 193(4) of the LRA. His pleaded case is that an organ of state exercised public power when it recommended and appointed a candidate to a post on its staff establishment in breach of binding regulations, its own policy and advertised criteria, and he seeks the review and setting aside of the impugned decision.

[24] Section 157(1) of the LRA confers exclusive jurisdiction on the Labour Court only in respect of matters that are, in terms of the LRA or any other law, to be determined by that court. Section 157(2) contemplates concurrent jurisdiction in respect of alleged violations of fundamental rights arising from employment. The Constitutional Court has held that the High Court’s jurisdiction is not ousted simply because a dispute is one that falls within the overall sphere of employment relations.²⁹ In *Baloyi v Public Protector and Others*, the very authority pressed by the third respondent, the Court reiterated that the High Court’s jurisdiction in respect of employment-related disputes is ousted only where the dispute is one for which the Labour Relations Act creates specific remedies, and it upheld the High Court’s jurisdiction over a legality challenge notwithstanding the availability, on different pleadings, of LRA remedies.³⁰

²⁷ 2010 (1) SA 238 (CC).

²⁸ *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) para 75.

²⁹ *Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others* 2002 (2) SA 693 (CC); see also *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA).

³⁰ [2020] ZACC 27; 2021 (2) BCLR 101 (CC) para 23.

[25] *Chirwa v Transnet Ltd and Others* and *Gcaba* do not assist the third respondent in this regard. What those cases decide, for present purposes, is that the employment conduct of the state including a failure to appoint or promote, does not generally constitute administrative action under PAJA. That conclusion goes to the viability of the PAJA cause of action, dealt with below; it does not deprive the High Court of its ordinary jurisdiction, under section 169 of the Constitution³¹ and section 21 of the Superior Courts Act,³² over a pleaded challenge to the legality of the exercise of public power.³³

[26] That the appointment of municipal staff is an exercise of public power is not open to serious doubt. The power is sourced in and regulated by statute: section 55(1)(e) of the Systems Act vests the appointment of staff in the municipal manager; section 67(1)(a) obliges the municipality to develop and adopt systems and procedures ensuring fair, efficient, effective and transparent recruitment, selection and appointment; and the Local Government: Municipal Staff Regulations, 2021 prescribe minimum requirements for appointment. In *Khumalo and Another v Member of the Executive Council for Education, KwaZulu-Natal*,³⁴ the Constitutional Court confirmed that the state's employment decisions of this kind are exercises of public power constrained by the principle of legality.³⁵ Directly in point is the judgment of the Supreme Court of Appeal, included in the applicant's bundle of authorities, on appeal from the *KwaZulu-Natal Division in the Nkandla Local Municipality & Others vs MEC for COGTA*³⁶ – a High Court review of municipal appointments – in which the argument that the setting aside of an appointment once the incumbent has assumed office is exclusively a dismissal matter under the LRA was rejected in terms as a “fallacy”.³⁷

³¹ The Constitution of the Republic of South Africa, 1996.

³² Act 10 of 2013.

³³ *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC); *Gcaba* (above); *Minister of Defence and Military Veterans v South African National Defence Union and Another* [2014] 4 All SA 441 (SCA), relied on in the third respondent's heads, CaseLines 29-14 at para 32.

³⁴ 2014 (5) SA 579 (CC).

³⁵ Local Government: Municipal Staff Regulations, 2021 (GN R.890, GG 45181 of 20 September 2021).

³⁶ *Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs and Mthonjaneni Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs* (Case no 485/2019) [2020] ZASCA 153 (26 November 2020) at para 18.

³⁷ Judgment on appeal from *MEC for Co-operative Governance and Traditional Affairs v Nkandla Local Municipality and Others* [2019] ZAKZPHC 4; (2019) 40 ILJ 996 (KZP); [2019] 3 All SA 772 (KZP).

[27] The reliance on the grievance form takes the matter no further. A layperson's description of his complaint on a prescribed internal form cannot recharacterize the cause of action he later pleads in court. A litigant whose facts sustain more than one cause of action is entitled to choose which to pursue. What he may not do is claim LRA remedies from a forum without LRA jurisdiction and that is not what the applicant does. The jurisdictional challenge accordingly fails.

PAJA or legality?

[28] On the authority of *Gcaba*, the decision to appoint (or not to appoint) an employee is generally not administrative action within the meaning of PAJA. The applicant's alternative reliance on PAJA therefore cannot succeed. Under the circumstances this Court finds it unnecessary to traverse the parties' extensive submissions on section 6 of PAJA. However, every exercise of public power whether or not it is administrative action, is constrained by the principle of legality, an incident of the rule of law. The repository of the power may exercise no power and perform no function beyond that conferred by law, and the exercise of the power must be rational, in the sense of being rationally related to the purpose for which the power was given. The test for rationality is objective.³⁸

[29] The third respondent's complaint that the grounds of review are vague is not sustainable. The founding affidavit pleads, in terms, that the appointment was made in breach of regulations 12(1) and 13(1) of the Municipal Staff Regulations and clause 14.4 of the Recruitment Policy, and that it was unlawful and irrational. The supplementary affidavit adds the audit findings and clauses 10.2, 10.3 and 11.4.3 of the policy. The case the respondents had to meet was plain and, as their affidavits show, they understood it perfectly well.³⁹

³⁸ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para at 85; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 49; *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 69.

³⁹ FA paras 24 – 27, CaseLines 10-14 – 10-17; SFA paras 10 – 34, CaseLines 18-7 – 18-12.

The governing prescripts

[30] Regulation 12(1) of the Municipal Staff Regulations is prohibitory in form. It provides that no person may be appointed as a staff member on a fixed-term contract, permanent basis, or probation, to any post on the approved staff establishment of a municipality, unless he or she possesses the relevant competencies, qualifications and experience, as set out in Annexure A.

[31] Regulation 13(1) requires that a person appointed must, where appropriate, have the necessary competencies and comply with the minimum requirements for educational qualifications, work experience and knowledge set out in Annexure A.⁴⁰ Clause 10.2 of the Recruitment Policy adopted on 6 May 2021, requires screening against the selection criteria and the generation of a shortlist report. Clause 10.3 requires that applicants should possess the minimum qualifications and experience that is set out in the advertisement. Clause 11.7 requires qualification verification by the Human Resources Manager before a final appointment is made; and clause 14.4 provides that a person shall be appointed only if the person complies with the qualification and/or proficiency requirements as per the job specification and the Employment Equity Act.⁴¹

[32] Two decisions of the Labour Court relied on by the applicant capture the governing principle. In *Letsogo v Department of Economics and Enterprise Development*,⁴² it was held that a selection panel could not mero motu change the requirements for the position. They did not have the power and/or the authority to do so. The requirements in the advertisement being the yardstick which all those who wanted to apply for the position had to possess prior to applying, and that if the requirements were to be changed, the position had to be re-advertised. In *Kwadukuza Municipality v Rajamoney and Others*,⁴³ the court held that the shortlisting of a candidate who does not meet the selection

⁴⁰ As quoted at FA paras 24.5 – 24.6, CaseLines 10-15 – 10-16, and in the applicant's heads, CaseLines 19-12 – 19-13.

⁴¹ Clauses 10.2 and 10.3 quoted at SFA paras 30 – 32, CaseLines 18-11 – 18-12; clauses 11.3, 11.4 and 11.7 quoted in the audit report, CaseLines 12-57; clause 14.4 quoted at FA para 27, CaseLines 10-17.

⁴² [2018] ZALCJHB 48; (2018) 39 ILJ 851 (LC).

⁴³ [2013] ZALCD 17 (13 June 2013).

criteria would be arbitrary as contrary to the selection criteria, not least because there would be people who desired to apply for the contested post but did not submit their applications merely because they did not meet the set requirements. Although those were unfair labour practice cases, the principle they articulate that an organ of state is bound by the criteria it publishes unless it lawfully amends them and re-advertises, is an obvious incident of lawfulness and rationality in a legality review.

Were the decisions lawful and rational?

[33] Because final relief is sought on motion, the facts must be approached on the respondents' version together with the facts admitted by them, save where a denial is so far-fetched or clearly untenable that it may be rejected on the papers.⁴⁴ On that approach the decisive facts are established, because they emerge from the respondents' own affidavits, their own documents and the municipality's own record.

The managerial experience requirement

[34] The municipality admits in terms that the third respondent did not possess the relevant five (5) years' experience specified in the advertisement of which three years was supposed to be at the managerial level."⁴⁵ This evidence is corroborated by the third respondent where she states that her highest-ranking experience is nine months as an Assistant Superintendent, and that she met the requirement and that she ought not to be disqualified merely on the basis of not having the three-year managerial experience.⁴⁶ On all versions, then, the successful candidate did not meet an express minimum requirement of the advertisement.

The Grade A PSIRA registration

[35] The advertisement required Grade A PSIRA registration. The audit found that at the time of her application, the third respondent's registration status was pending, and management's comment confirms that her certificate was first

⁴⁴*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C.

⁴⁵ Municipality's answering affidavit para 8, CaseLines 25-6.

⁴⁶ Malese AA paras 14 and 64 – 66, CaseLines 26A-9 – 26A-10 and 26A-24.

produced on the day of the interview, the panel having agreed that the candidate can submit it then. The certificate she herself annexes is dated 5 January 2024, six weeks after the closing date. The third respondent's bare assertion of compliance, contradicted by the very documents she attaches and by the record, does not raise a genuine dispute of fact.⁴⁷

The firearm competencies

[36] The advertisement required competency across a specified range of weapons. The only firearm competency evidenced for the third respondent in the record and in her own papers is in respect of the handgun (including for business purposes). Her generalised statement that further competencies were obtained in traffic and police training is unsupported by any certificate and was found by the auditors, on inspection of her personnel file, not to be the case.⁴⁸

The process

[37] Clause 10.2 of the Recruitment Policy required a shortlist report. None exists for any post filled (finding 3.10). All five candidates were shortlisted although, on the auditors' assessment, none met all the minimum requirements (finding 3.7). Clause 11.7 required qualification verification before appointment. The panel's acceptance of an outstanding registration certificate on the day of the interview demonstrates that no such verification preceded shortlisting. According to the municipality's evidence the interviews were not recorded, and no shortlisting checklist exists. It cannot therefore be disputed that the very records by which the regularity of the process could be tested, were never created or kept.⁴⁹

[38] The conclusion is unavoidable. Regulation 12(1) of the Municipal Staff Regulations⁵⁰ forbade the appointment of a person who does not possess the relevant competencies, qualifications and experience. Clause 14.4 of the

⁴⁷ Finding 3.8 and management comment, CaseLines 12-57 – 12-58; PSIRA certificate, CaseLines 26A-35.

⁴⁸ Certificate OPM11, CaseLines 26A-37; Malese AA para 12.11, CaseLines 26A-9; finding 3.8, CaseLines 12-57.

⁴⁹ Findings 3.7 and 3.10, CaseLines 12-52 – 12-55 and 12-61; municipality's answering affidavit in the compel application, CaseLines 26-3 – 26-10.

⁵⁰ Supra.

municipality's own policy permitted appointment only if the person complies with the job specification. The third respondent did not comply in at least three respects at the material times. Her appointment was accordingly unlawful. It was also irrational to appoint to a post carved out by published minimum criteria, a candidate who does not meet those criteria without amending and re-advertising the post, and without any recorded authorised deviation. This bears no rational relation to the purpose of the empowering scheme which is fair, transparent, and merit-based selection from among those eligible. The third respondent's interview scores cannot cure the defect. Assessment presupposes eligibility, and scoring ineligible candidates against eligible ones (and against each other) is precisely the arbitrariness described in *Kwadukuza*.

[39] Two further grounds require only brief mention. The applicant contended that the panel was not properly constituted because no written designation under clause 11.4.3 of the policy appears. He further contends that the record is silent on the point is not proof of its absence. Based on the conclusion this Court will reach, this Court finds it unnecessary to decide these grounds. This Court also does not deem it necessary to make any finding on the audit report's recorded causes of corruption and nepotism, or on the applicant's suggestion of bias. The application succeeds on lawfulness and rationality, and no finding of bad faith is made against any individual.

The employment equity defence

[40] The municipality's answer is built on section 20(3) to (5) of the EEA. The section provides that a person may be suitably qualified for a job as a result of any one of, or any combination of, formal qualifications, prior learning, relevant experience, or the capacity to acquire, within a reasonable time, the ability to do the job. The employer must review all those factors, and it may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience. It relies on *Alexander v Provincial Administration of the Western Cape Department of Health*⁵¹ for the purpose of those provisions and, in its bundle, on *South African Police Service v Solidarity obo Barnard*,⁵² and

⁵¹ 2005 (6) BLLR 539 (LC).

⁵² 2014 (6) SA 123 (CC).

submits that the appointment redressed a stark gender imbalance in its managerial ranks.

[41] The defence fails, for three reasons. First, on its own terms s 20(5) of EEA protects a candidate from being excluded “solely” on the ground of a lack of relevant experience. The third respondent’s shortfalls were not confined to experience. At the material times she also lacked the advertised Grade A PSIRA registration and the specified firearm competencies. Section 20(5) has nothing to say about those.

[42] Secondly, section 20 of EEA informs how an employer formulates and applies selection criteria within a lawful process. It is not a licence to disregard, after the fact, binding subordinate legislation or the employer’s own advertised *minima*. Clause 14.4 of the municipality’s policy itself requires compliance with the job specification and the EEA. The two operate together, not in the alternative. If the municipality considered its advertised requirements unduly restrictive, or an obstacle to equity as its own auditors later suggested of the experience requirement – the lawful course was to amend the requirements and re-advertise, as *Letsogo* holds. It did neither.

[43] Thirdly, the equity justification is an *ex post facto* rationalisation. The contemporaneous record discloses a single reason for the appointment which is that the third respondent scored the highest.⁵³ No employment equity plan features in the evidence. There is no panel minute or report that invokes section 20, section 15 or any reference to representivity, and the four out of 48 statistics make their first appearance in the answering affidavit. The rationality of an exercise of public power falls to be assessed on the reasons and material at the time. *Barnard*⁵⁴ which concerned the lawful implementation of a valid employment equity plan, and the non-appointment of a candidate to preserve representivity, is far removed from an appointment made contrary to binding eligibility prescripts in the absence of any plan or measure placed in evidence.

⁵³CSS report, CaseLines 12-3.

⁵⁴ *Barnard* above n 53.

It does not assist the municipality, nor does *Alexander*⁵⁵, which concerned the EEA's own framework, not a dispensation from legality.

Remedy

[44] An unlawful and irrational exercise of public power falls to be declared invalid and set aside. The Court retains a discretion in terms of section 172(1)(b) of the Constitution of South Africa, to make any order that is just and equitable in regulating the consequences.⁵⁶

[45] As to the form of the order, prayer 3 of the notice of motion attacks a resolution taken by the Council. However, the record establishes that the decision was taken by the Acting Municipal Manager on the panel's recommendation. Nothing turns on the misdescription. The decisions taken, namely, the panel's recommendation of 22 February 2024 and the first respondent's approval of the appointment with effect from 1 March 2024, were identified with precision in the papers and fully ventilated.

[46] The third respondent has occupied the post since 1 March 2024, and no finding of wrongdoing is made against her personally. Justice and equity require that the setting aside operate prospectively from the date of this order and that the third respondent not be required to repay remuneration or benefits received for services rendered. The equities considered in the *Nkandla* appeal – where the responsible functionary had delayed for fifteen and eighteen months without explanation while the incumbents served for years, are not comparable. In *casu*, the applicant grieved at once and litigated within three months.⁵⁷

[47] Substitution is neither sought nor appropriate. The applicant's comparative merits including his dispute with the audit report's assessment of his own managerial experience need not and cannot be adjudicated on these papers. On the auditors' assessment every shortlisted candidate fell short in

⁵⁵ *Alexander* above n 52.

⁵⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26; see also *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).

⁵⁷ *Nkandla* appeal above n 37 at paras 42 and 95.

some respect, which is precisely why the appropriate remedy is a fresh, lawful process should the municipality elect to fill the post. That answer also disposes of the third respondent's floodgates warning. This Court does not choose candidates for the municipality. It holds the municipality to its own law. An employer faithful to its own prescripts has nothing to fear from disgruntled candidates.⁵⁸

Costs

[48] The applicant is substantially successful and there is no reason why costs should not follow the result as against the first and second respondents, who persisted in opposing the application in the teeth of their own internal audit report and their own admissions. The third respondent opposed the application to protect her employment. Her jurisdictional point, though unsuccessful, was not frivolous. I am of the view that fairness dictates that no costs order should be made against the third respondent, and none in respect of the fourth to sixth respondents, who elected not to oppose the application.

Order

[49] In the result, the following order is made:

1. The late filing of the applicant's supplementary founding affidavit and replying affidavit is condoned.
2. It is declared that: (a) the recommendation of the interview panel of 22 February 2024 that the third respondent be appointed as Assistant Director: Minimum Information Security Standards (Post level 3); and (b) the first respondent's decision, taken by its Acting Municipal Manager on or about 22 February 2024, to appoint the third respondent to that post with effect from 1 March 2024, are unlawful and invalid.
3. The recommendation and decision referred to in paragraph 2, and the contract of employment concluded between the first and third respondents pursuant thereto, are reviewed and set aside.

⁵⁸Malese AA para 51, CaseLines 26A-21.

4. The setting aside operates from the date of this order. The third respondent shall not be required to repay any remuneration or benefits received in respect of services rendered in the post.
5. Should the first respondent elect to fill the post, it shall commence a fresh recruitment and selection process in compliance with the Local Government: Municipal Staff Regulations, 2021 and its Recruitment, Selection and Appointment of Staff Policy, in which process the third respondent shall be entitled to participate, if eligible.
6. The first and second respondents shall pay the applicant's costs for the application, jointly and severally, the one paying the other to be absolved.



M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the applicant	V L Makofane and V C Nyabane
Instructed by	Maimane Attorneys Inc c/o MM Phakane Attorneys Inc
For the first and second respondents	K C Mokgope
Instructed by	Mpoyana Ledwaba Inc
For the third respondent	T Segage
Instructed by	Mthombeni & Ramaboea Inc
Date of hearing	28 January 2026
Date of judgment	28 August 2026