

SOUTH AFRICA / JUDGMENT

Democratic Alliance v Kouga Municipality and Others (2502/12) [2012]

ZAECPEHC 95 (20 December 2012)

[2012] ZAECPEHC 95

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

E Revelas

CASE / FILE NUMBER

2502/12

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE – PORT ELIZABETH

Case No: 2502/12

In the matter between

THE DEMOCRATIC ALLIANCEApplicant

and

THE KOUGA MUNICIPALITYFirst Respondent

THE EXECUTIVE MAYOR OF THE FIRST

RESPONDENT, MR BOOI KOERATSecond Respondent

THE MUNICIPAL MANAGER OF THE FIRST

RESPONDENT, MR SIDNEY FADIThird Respondent

THE ACTING MUNICIPAL MANAGER

OF THE FIRST RESPONDENT,

MS COLLEEN DREYERFourth Respondent

MR VERNON STUURMAN, A MEMBER

OF THE MAYORAL COMMITTEE OF THE

FIRST RESPONDENTFifth Respondent

MR PATRICK KOTA, A MEMBER OF THE
MAYORAL COMMITTEE OF THE FIRST
RESPONDENTSixth Respondent
MS VIRGINIA CAMEALIO-BENJAMIN,
A MEMBER OF THE MAYORAL COMMITTEE
OF THE FIRST RESPONDENTSeventh Respondent
MS ANGELINA MASETI, A MEMBER OF THE
RESPONDENTEight Respondent
MR PHUMZILE OLIPHANT, A MEMBER OF
THE MAYORAL COMMITTEE OF THE FIRST
RESPONDENTNinth Respondent
THE HONOURABLE MR MLIBO QOBOSHIYANE,
THE MEC: LOCAL GOVERNMENT
AND TRADITIONAL AFFAIRS,
EASTERN CAPE PROVINCETenth Respondent
MR J JANSENEleventh Respondent
MR V FELTONTwelfth Respondent
MS T TOMThirteenth Respondent
MS C BURGERFourteenth Respondent

JUDGMENT

REVELAS J

- [1] The applicant seeks to review and set aside the resolution of the mayoral committee of the first respondent (the municipality) taken on 11 June 2012, appointing the eleventh to fifteenth respondents respectively as directors in four departments of the municipality, and the fourteenth respondent as its Chief Financial Officer. The appointments were made in terms of section 56 of the Municipal Systems Act 32 of 2000 (the Systems Act).
- [2] The Council of the first respondent, having accepted that it was impermissible for the mayoral committee to have made the appointments of the respondents concerned, by implication, abandoned that resolution. On 29 June 2012 the Council of the first respondent appointed the same respondents to the same positions. The applicant also seeks to set aside this resolution of the Council.

- [3] It was common cause between the parties that the mayoral committee did not have the necessary power, authority or jurisdiction to make the appointments in question and therefore its decision was null void. The applicant, relied on the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at 243 A-F, where it was held that a void administrative act nonetheless remains extant in fact, and until it is set aside, it could provide the foundation for legal validity of future acts.
- [4] The respondents relied on the exception to the aforementioned general rule, that it is not necessary to bring an application to set aside a decision, where the decision-maker (as in the present matter) had no jurisdiction or power at all to make the decision.
- [5] In the recent decision of *The Master of the High Court v Motala* NO 2012(3) SA 325 (SCA), a court order which was a nullity was held (in paragraph [14] of the judgment), to be of no force and effect. The court held: “Being a nullity, a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court”.
- [6] (See also: Voet, *Commentarius ad Pandectas* 49.8.1 and 3, *Sliom v Wallach’s Printing and Publishing Company Ltd* 1925 TPD 650 at 656).
- [7] Clearly, there is no reason to set aside the first decision of the mayoral committee.
- [8] The applicant argued that the second decision ought to be set aside on the grounds that in the absence of an approved organogram (a practice that has been abolished by the municipality) all contracts of employment of municipal employees are automatically invalid by virtue of the provisions of section 66 of the Systems Act. This point was raised for the first time, not when the applicant participated in the vote as to which managers should be appointed, but only in its replying affidavit.
- [9] At the time when the appointments were made, there was a “staff establishment” in place, as envisaged by section 66 of the Systems Act. Managers appointed in terms of section 56 of the Systems Act are to be dealt with separately from, the “staff establishment”, in my view.
- [10] It was correctly submitted that the appointment criteria of such person should rather include relevant skills as required by section 56(b) of the Systems Act, than form part of the “staff establishment”. Their duties are not created and developed under section 66(1)(b) but under section 57 of that Act. (See also Chapter 2 of the Municipal Performance Regulations). Furthermore, it is not possible to create directorates without simultaneously creating posts for directors. There is thus a “staff establishment” in place in any event. Even if there was a procedural flaw in the appointments in this regard, it does not warrant setting them aside because this objection ought to have been raised at the relevant time, its own candidates were elected for positions in the same manner. By its actions, the applicant condoned the flaw.
- [11] Accordingly, the application is dismissed with costs, including the costs of two counsel.

E REVELAS

Judge of the High Court

Counsel for the Applicant, Adv HJ van der Linde, instructed by Wikus Van Rensburg Attorneys.

Counsel for the Respondent's, Adv RG Buchanan SC, and Adv P Kroon, instructed by Van Der Walt Attorneys.

Date Heard: 6 December 2012

Date Delivered: 20 December 2012

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