

SOUTH AFRICA / JUDGMENT

Moerane and Another v Buffalo City Metropolitan Municipality and Others (611/2017) [2017] ZAECHGHC 126 (5 December 2017) [2017] ZAECHGHC 126

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

611/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 611/2017

Date

heard:

02

November 2017

Date

delivered:

05

December 2017

In

the matter between:

NEO
MOERANE
First
Applicant
VUYANI
LWANA
Second
Applicant
and
BUFFALO
CITY METROPOLITAN MUNICIPALITY
First
Respondent
THE
ACTING MUNICIPAL MANAGER BUFFALO
CITY
METROPOLITAN MUNICIPALITY
Second
Respondent
THE
EXECUTIVE MAYOR, BUFFALO CITY
METROPOLITAN
MUNICIPALITY
Third
Respondent
THE
SPEAKER OF THE MUNICIPAL COUNCIL,
BUFFALO
CITY METROPOLITAN MUNICIPALITY
Fourth
Respondent
THE
MEMBER OF EXECUTIVE COMMITTEE (MEC)
FOR
CO-OPERATIVE GOVERNMENT AND
TRADITIONAL
AFFAIRS, EASTERN CAPE PROVINCE
Fifth
Respondent

JUDGMENT

LOWE, J

Introduction:

- [1] In this matter First Applicant (Second Applicant having withdrawn from the application) seeks an order that First, Second and Third Respondents be ordered to implement the Council Resolution of the First Respondent (29 February 2016) to confirm the permanent appointment of First Applicant as Head of Directorate: Municipal Services, with effect 1 March 2016.
- [2] Fifth Respondent has filed no opposing papers but argues through Counsel that the application should be dismissed.
- [3] The Acting Municipal Manager of First Respondent opposes the application on behalf of First, Third and Fourth Respondents and has instituted a Conditional Counter Application, based upon the possibility that First Respondent's resolution of 29 February 2016 is found not to be null and void in terms of the provisions of Section 56 (2) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). That conditional relief is that condonation be granted for the late filing of the counter application and that the impugned decision be reviewed and set aside, with Applicants to pay the costs.
- [4] In short apart from advancing her own application, First Applicant contends that the Acting Municipal Manager has no authority to oppose the main application or to bring the Conditional Counter-Claim ("Counter-Claim").
- [5] In reply First Respondent contends that the decision relied upon by First Applicant constitutes "administrative action" as defined in section 1 of the Promotion of Administrative Justice Act (PAJA).
- [6] In the alternative First Respondent contends that the resolution of its Council relied upon by First Applicant has been "implicitly revoked" by a subsequent Council decision to re-advertise certain positions.
- [7] Respondents contend that the Municipal Council's decision impugned, was either: null and void, or unlawful, and falls to be reviewed and set aside.
- [8] It is clear that the conditional counterclaim is brought on a PAJA basis.
- [9] In summary as to the locus standi of the Acting City Manager and City Manager, First Applicant contends that the first issue is whether the resolution constitutes

"administrative action", the second issue is whether a Municipal or City Manager is entitled to seek to set aside a resolution of Council, or to oppose an application based upon a resolution of Council, without the express will and specific authority of the Council itself. It is contended that the resolution itself is not "administrative action", and that PAJA is not applicable, and that consequently the Counter-Claim must fail being PAJA based; and in any event absent a resolution of Council setting aside its prior decision authorizing the bringing of this Counter-Claim and to oppose the relief sought, that this is incompetent.

- [10] Opposing this, Respondents contend that fundamentally there is no need to address the Counter-Claim as the Council resolution was null and void on a number of bases, and that this being so the application to compel First Respondent to implement same must simply fail with costs.
- [11] Respondents contend that only if the resolution is found to be valid (i.e. not null and void) does the Conditional Counter-Claim come into play; that condonation should be granted and that there are three principal grounds upon which the resolution falls to be reviewed and set aside. Firstly the improper composition of the selection panel; secondly that in taking the resolution, Council did not have before it all relevant information with the result that not all relevant considerations were taken into account; and thirdly that the First Applicant did not pass an essential competency assessment.
- [12] In the result, I consider that it would be sensible to first consider the locus standi issue; it following that absent authorization the opposition is not properly before me, this is linked however to a consideration of the issue of “administrative action”.
- [13] If I find there to be locus standi, the question of “administrative action” again only arises if on Respondents’ argument the resolution is found not to be null and void.
- [14] In that event it would be necessary to again consider the “administrative action” issue and consider what effect this may have on the counter-claim, though obviously intricately associated with locus standi. The point is, and this seems to be common cause between the parties in argument, that if indeed the Council decision constitutes
- “administrative action” properly construed, it is clear that the Municipal Manager or Acting City Manager has delegated authority to pursue not only the defence but the counter-claim.*
- [15] It seems essential, accordingly, to first consider the locus standi and “administrative action” issues which will potentially be dispositive of the locus standi objection, and essential to the Counter-Claim, if I were to find that the resolution was not null and void.

Administrative Action:

- [16] The PAJA, section 1:

“administrative action” means any decision taken, or any failure to take a decision, by-

- (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

- (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;
- (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d),
- (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;
- (cc) the executive powers or functions of a municipal council;
- (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
- (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
- (ff) a decision to institute or continue a prosecution;
- (gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;
- (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
- (ii) any decision taken, or failure to take a decision, in terms of section 4 (1)”

[171] The Court in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others*[1] held:

*“[141] In s 33 the adjective “administrative” not “executive” is used to qualify “action”. This suggests that the test for determining whether conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute “administrative action”. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is “administrative action” is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.*

[142] As we have seen, one of the constitutional responsibilities of the President and cabinet members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute “administrative action” within the meaning of s 33. Cabinet members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot

be construed as being administrative action for the purposes of s 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute “administrative action” as contemplated by s 33, but not all acts by such members will do so.

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

[18] Wallis J in *Sokhela & Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & Others*

[2] held:

*“[60] The lineaments of the enquiry that must now be undertaken are fairly clearly established. The question whether action taken by a public official or authority is administrative is central to the enquiry. The focus of the enquiry is primarily upon the nature of the power being exercised, rather than the identity of the person or body exercising the power. With the enactment of PAJA the grounds of judicial review of administrative action have been codified and the cause of action for judicial review of administrative action now ordinarily arises from PAJA. That requires a consideration of the action in question, against the requirements of the definition of ‘administrative action’ in PAJA. There are seven requirements, namely that there must be (i) a decision, (ii) by an organ of State, (iii) exercising a public power or performing a public function, (iv) in terms of any legislation, (v) that adversely affects someone's rights, (vi) which has a direct, external, legal effect, and (vii) that does not fall under any of the exclusions listed in s 1 of PAJA. As the judgment in *Grey's Marine* makes clear it is a requirement flowing from the definition of ‘decision’ in PAJA that the decision be one of an administrative nature. In deciding whether a decision is one of an administrative nature the appropriate starting point is to determine whether it would constitute administrative action within the meaning of s 33 of the Constitution. The boundaries between administrative action and other forms of conduct by organs of State will often be difficult to draw and this must be done carefully on a case by case basis, having regard to the provisions of the Constitution and the need for an efficient, equitable and ethical public administration.*”

- [61] The requirement that the decision should be of an administrative nature has been described as ‘something of a puzzle’. In my view it serves two important purposes. Firstly it focuses attention on the need for the court to determine whether the particular exercise of public power or performance of a public function under consideration is properly to be classified as administrative action. As the Constitutional Court recognised in *Fedsure*, that task of classification is mandated by the provisions of the Constitution itself. That does not mean that the former classification of administrative powers and functions, that was largely discredited and abandoned in our administrative law even before the advent of the interim Constitution, has now been revived. The present situation is that the Constitution draws an ostensibly simple distinction between acts that constitute administrative action and acts that do not, and the courts must draw that distinction or essay that process of constitutional classification. The court is required to make a positive decision in each case, whether a particular exercise of public power or performance of a public function is of an administrative character. Thus the determination of what constitutes administrative action does not occur by default, on the basis that, if it does not fit some other juristic pigeonhole, it is administrative action. There needs to be a positive finding that particular conduct is administrative action, in order for the power of judicial review under PAJA to be engaged. That approach ties in closely with the second purpose, which is to make it clear that the mere fact, that an exercise of public power or the performance of a public function does not fall within one of the exclusions in subparas (aa) - (ii) of the definition of “administrative action”, does not necessarily mean that the exercise of public power or performance of a public function in question constitutes administrative action. It precludes the determination of what constitutes administrative action from becoming a mechanical exercise in which the court merely asks itself whether a public power is being exercised or a public function is being performed, and then considers whether it falls within one or other of the exceptions. The inclusion, of the requirement that the decision be of an administrative nature, demands that a detailed analysis be undertaken of the nature of the public power or public function in question, to determine its true character. This serves in turn to demonstrate that the exceptions contained in the definition of administrative action are not a closed list, nor are cases falling outside those exceptions to be looked at on the basis that, if they are not *eiusdem generis* with the exceptions, they are automatically to be treated as constituting administrative action. There is accordingly no mechanical process by which to determine whether a particular exercise of public power or performance of a public function will constitute administrative action. That will have to be determined in each instance by a close analysis of the nature of the power or function and its source or purpose.”
- [19] Insofar as executive powers and functions of the Municipality are concerned, in terms of section 156 of the Constitution, a Municipality has “executive authority” over the matters listed in Part B of Schedules 4 and 5 to the Constitution. Section 11 of the Systems Act provides for

the various ways in which a Municipality exercises its executive and legislative authority.

[20] PAJA simply excludes the executive's powers and functions of the Municipal Council, and its legislative functions, from the operation of PAJA. This means effectively that only non-executive functions of the Municipal Council are subject to PAJA. Whilst it has been suggested that this may exclude any Municipal action qualifying as "administrative action", this seems to me to be clearly wrong and the better view is that "executive" should be read in accordance with its meaning in section 1(aa) and (bb) of PAJA so as to exclude only distinctively political decisions and not characteristically administrative tasks such as implementing

legislation.[3]

[21] As the Constitutional Court has pointed out in *President of Republic of South Africa and Others v South African Rugby Football Union and Others*[4] in determining what constitutes "administrative action", the question is not answered by identifying that person or entity who took the decision but whether the task itself is administrative or not.

[22] First Applicant argued that *Democratic Alliance v Ethekwini Municipality*[5] demonstrate the above two decisions to be incorrectly decided. This matter related to a decision by a Local Authorities Council to change names of streets under its control. It did not, in my view, lay down a rule that all decisions by a Municipal Council, in all circumstances, do not constitute "administrative action". On the contrary, it seems to me that the result clearly relied on the political nature of the decision, to rename streets and places, a decision clearly influenced by political considerations for which the elected members were politically accountable to the electorate, and thus the decision dependent on this crucial factor. This does not seem to me to be dispositive of the true issues relevant to a matter such as this, as I set out hereafter.

[23] In this court, *Pickering J in Mlokoti v Amathole District Municipality and Another*[6] and *Roberson J in Notyawa v Makana Municipality*[7] came to the conclusion, that decisions by Municipal Councils concerning the appointments of Municipal Managers were "administrative action". In the context of those matters, it seems to me that the decisions are clearly correct.

[24] I am fully in agreement with Mr Rorke SC that in so finding, the learned judges were applying the principles laid down in *President of the Republic of South Africa* decided some 17 years ago. I agree that the same reasoning applies in respect of so-called "Section 56 Managers" such as First Applicant. That the decision was taken by First Respondent's Council does not change the argument in my view. Essentially First Respondent's decision of 29 February 2016, to appoint the First Applicant as head of Department, ahead of other prospective candidates for the position, clearly fell within the meaning ascribed to "administrative action" in PAJA, the Council exercising a public power which adversely affected the rights of other prospective applicants and which had

direct, external legal effect, and which constitutes an executive function.

- [25] I further agree that whilst the distinction between administrative action and political or executive action is sometimes difficult to draw, that is most certainly not the case in this matter.
- [26] There was in this matter a public recruitment process, only one applicant appointed thereafter to the relevant position, being the first applicant. The other prospective applicants failed and their rights were clearly affected by the decision, falling in my view squarely within the definition of administrative action in PAJA[8].
- [27] It must be said, that I further agree with Respondents' argument that had the decision been taken by the City Manager, and had he had the power to do so, the decision would surely have been "administrative action" – that the decision was taken by Council cannot in my view distinguish the matter.
- [28] That being so, in my view, and applying the authorities referred to above, and particularly those referred to in Eastern Cape Division, I cannot but conclude that both in opposing the relief sought and in the counter-claim First Respondent (represented by Second Respondent) had the necessary authority so to do.
- [29] There is also in my view merit in the submission that the Constitutional Court's decision in Department of Transport and Others v Tasima (Pty) Limited[9] recognizes that it is permissible for Organs of State to launch reactive challenges, of the kind brought in this matter, relevant to litigation brought against them.
- [30] That being so, I turn to consider the next issue and that is whether the decision is itself one which was null and void, alternatively was unlawful, falling to be reviewed and set aside.
- [31] It was, as I understand, common cause between the parties that on a proper construction of Section 56 of the Systems Act the appointment

Managers directly accountable to Municipal Managers ("section 56 managers") are statutorily null and void in certain circumstances. It was indeed common cause that a reading of Section 56 (2) (a) in the context of Section 56 confirms that it is the appointment of a permanent section 56 Manager, without the requisite skill set, which is visited with nullity. This can only be so in public interest being the appointment of a permanent appointee who would satisfactorily be able to carry out the duties and obligations of a senior position within the Municipality. As was common cause this requires a reading into Section 56 (2) of a reference to Section 56 (1) (a) (i), being a reference to Senior Section 56 Managers.

- [32] In the result, if it is demonstrated on the papers that First Applicant did not have the requisite skill set, as she failed competency assessment carried out on behalf of First Respondent by The Assessment Toolbox, the decision to appoint her must be null and void.
- [33] In my view, Applicants demonstrate, on a proper analysis of the papers, that there is considerable merit in the submission that the competency test failed to render a result that First Applicant had the requisite skill set. First Applicant contends that the competency

assessment tool must be capable of being applied fairly and must be objectively sustainable. It is alleged that Respondents made no attempt to support the objective reliability of the test applied, nor that such tests were correctly and fairly applied. It seems to me on a proper analysis of the papers, the latter argument cannot be sustained and that there can be no doubt that, objectively viewed, First Applicant failed the test. It is my view more than sufficiently demonstrated that these tests were fairly applied by professionals and there can be no suspicion or suggestion that they were not correctly or fairly applied. It was argued that competency is a broader concept than simply a single test – an argument which misses the point that if that single test is failed it can hardly be argued that whatever may follow there can be a competency approval. The very purpose of the test was to demonstrate whether or not the relevant skill sets were available.

[34] Section 56

- (1) (b) makes it perfectly clear that one cannot ignore competency. Indeed the Regulations to the Systems Act and which form part thereof, and particularly Regulation 16 (1) make it perfectly clear that candidates recommended for appointment to the post of a Senior Manager “must undergo a competency assessment”. There is no suggestion, which carries any weight, that the competency assessment tool utilized was not capable of being applied fairly or was biased against any person or group of persons as per the Regulations, or that this was not decisive of the issue.

[35] If this is so, then and in that event the Council resolution was ultra vires the Systems Act and its Regulations, and can in no circumstances then be enforced nor was there, properly viewed, any “decision” taken.

[36] This it seems to me is the complete answer to the application, it being unnecessary then to rely upon the remaining arguments.

[37] There seems to me, in any event, to be a second reason why the resolution of council was null and void. Regulation 12 (4) required the selection panel to have a particular composition. Apart from the Municipal Manager and a member of the Municipal Committee or Councillor who is the portfolio ahead of the portfolio, there had to be “at least one other person, who is not a Councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post”. There seems to me to be considerable merit in the argument that whatever else, the subsection required the appointment of at least

one other person who was not a political affiliate, but one appropriate to the filling of an administrative post. Again on

Mr Rorke’s argument and on a proper analysis of the papers applying an appropriate test it is clear that there was no “other person” on the selection panel who was not a Councillor or staff member of the Municipality and who had the required expertise. If this is so, then similarly the decision must be null and void.

[38] Insofar as the Conditional Counter-Claim is concerned, there was a necessary application for condonation for the late filing thereof. In my view a proper case for condonation was made out in the Answering Affidavit and there is most certainly no prejudice occasioned by the delay. In any event similar to the issue of whether or not the decision was null and void, the application must succeed if the selection panel was improperly constituted, and it is inevitable that it must be concluded that this was the case. Further, it must be mentioned that when it took its resolution, Council relied on a report submitted to it by First Respondent's then Acting City Manager. That report made no mention that First Applicant had failed her competency assessment, referred to above, and furthermore suggested that this was a "psychometric test", whereas it was not, but out and out a competency assessment as required by Regulation 16. It must follow that the resolution taken

appointing First Applicant was unlawful, in that a mandatory and material procedure or condition prescribed by Regulation was not

complied with.

[39] I have carefully considered the counter arguments advanced by Mr Buchanan SC for First Applicant, but can find no merit therein.

[40] In the result, the application falls to be dismissed with costs whilst First Respondent's conditional counter-claim consequently falls to be granted insofar as is necessary, also with costs.

[41] In the result:

1. The application is dismissed.
2. The counter-application succeeds.
3. 3.1 Condonation is granted to the First Respondent for the late filing of its conditional counter-application to the extent that this may be necessary;

3.2 First Respondent's Council's decision on 29 February 2016 to appoint the First Applicant as Head of Department: Municipal Services is hereby reviewed and set aside.

4. First Applicant is to pay the Respondents' costs.

M.J. LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant:

Adv RG Buchanan SC

Instructed by:

Neville Borman & Botha

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[1] 2000

(1) SA 1 (CC) paras 141-143

[2] 2010

(5) SA 574 (KZP) paras 60-61

[3] See *Steele and Others v South Peninsula Municipal Council and Others* 2001 (3) SA 640 (C).
See also *Administrative Law*: 2nd edition Hoexter at 238.

[4] 2000

(1) SA 1(CC) at para 141

[5] 2011 ZASCA 221

[6] 2009

(6) SA 354 [C] at 376B to 377 I

[7] unreported case number 683/2017 ECD

[8] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer SASSA and Others* 2014

(1) SA 604 (CC) para 60.

[9] 2017

(2) SA 622 paras 138 – 140

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