

SOUTH AFRICA / JUDGMENT

Moerane v Buffalo City Metropolitan Municipality and Others (CA161/2018) [2020] ZAECGHC 18; (2020) 41 (ILJ) 1869 (ECG) (3 March 2020)

[2020] ZAECGHC 18

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.E. Smith, N.G. Beshe, S.M. Mfenyana

CASE / FILE NUMBER

CA161/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA161/2018

Date heard: 03/02/2020

Date delivered: 03/03/2020

In the matter between

NEO MOERANE

First Appellant

And

BUFFALO CITY METROPOLITAN MUNICIPALITY First Respondent

THE ACTING MUNICIPAL MANAGER, BUFFALO

CITY METROPOLITAN MUNICIPALITY

Second Respondent

THE EXECUTIVE MAYOR, BUFFALO CITY

METROPLITAN MUNICIPALITY

Third Respondent

THE SPEAKER OF THE MUNICIPALITY,

BUFFALO CITY METROPLITAN MUNICIPALITY

Fourth Respondent

THE MEMBER OF THE EXECUTIVE COMMITTEE

(MEC) FOR CO-OPERATIVE GOVERNMENT AND

TRADITIONAL AFFAIRS, EASTERN CAPE

PROVINCE

Fifth Respondent

JUDGMENT

SMITH J:

Introduction

- [1] This is an appeal against the judgment of Lowe J, delivered on 5 December 2017, and in terms of which he dismissed the application brought by the appellant and granted a conditional counter-application brought by the first respondent, namely the Buffalo City Metropolitan Municipality.
- [2] The appellant applied in the court a quo for an order declaring valid and binding the resolution adopted by the council of the first respondent on 29 February 2016, in terms of which she was appointed as Head of Directorate: Municipal Services, purportedly in terms of section 56 of the Local Government: Municipal Systems Act, No. 18 of 2000 (the Act). In addition, she also sought an order compelling first, second, and third respondents to implement the resolution. The appeal is with the leave of the court a quo.
- [4] On 20 January 2020 the first, second, third, and fourth respondents gave notice of their intention to apply, at the hearing of the matter on 3 February 2020, for an order declaring that the appeal had lapsed; alternatively striking the matter from the roll, with costs. That application was based on the appellant's failure to serve and file the appeal record timeously.
- [5] It is common cause that after Lowe J granted leave to appeal on 22 March 2018, the appellant delivered her notice of appeal on 19 April 2018, and applied for a set down date on 3 July 2018. The appeal record was, however, only served on the respondents on 10 January 2020, more than a year out of time.
- [6] The appellant thereafter filed an application on 30 January 2020 for condonation of her failure to file the record timeously. Her attorney, Mr. Justin Powers, filed an affidavit explaining the reasons for the delay.

- [7] Since the respondents in effect sought an order dismissing the appeal, we were constrained to adjudicate both interlocutory applications with due regard to the merits of the appeal. For reasons which will become apparent later, I choose to deal first with the merits of the appeal, since a pronouncement in that respect will also be dispositive of both applications.

The

facts

- [8] The facts are mostly common cause and can be summarised as follows.
- [9] The appellant was initially employed by the municipality as a Housing Projects Manager during January 2015. During November 2015 the municipality published a notice inviting applications in respect of various posts, inter alia, for the position of Head of Directorate: Municipal Services. The appellant submitted an application for that position. She was thereafter interviewed and subsequently informed that her application was successful.
- [10] After she was recommended for the position by the interviewing committee, the appellant underwent a competency test prescribed in terms of the Local Government Regulations on Appointment and Conditions of Employment of Senior Managers, published in Government Gazette No. 37245, (the Regulations). The Regulations require recommended candidates to undergo and pass a competency test. The test was administered by The Assessments Toolbox, a company that provides specialist services in respect of competency assessments. The latter provided a report to the council of the first respondent stating that the appellant had been found to be a poor match for the position for which she applied. The respondents assert that the report submitted to council by the then acting municipal manager, motivating for the appointment, was misleading in various respects. They contend that he had erroneously informed council that the test was a “psychometric test” (instead of a competency test) and conflated the competency requirement as being integral to the interviewing processes, when in fact it is a separate process prescribed by the Regulations as a sine qua non for the proper appointment of managers in terms of section 56 of the Act.
- [11] On 29 February 2016 the municipal council adopted the following resolution purportedly formalising her appointment:
- “That the council approved the appointment of Ms. N Moerane as Head of Directorate: Municipal Services with effect from 1 March 2016 or such later date as agreed to between the parties, on a permanent basis, subject to resolution number 2 of minute no BCM144/16 dated 29 February 2016.”*
- [12] The council resolution was never implemented, since the respondents contend that the appointment was a nullity because the appellant was found not to possess the required competencies and skills for the position, and the composition of the interviewing panel did not comply with the peremptory prescripts of the Regulations.

Interpretation of section 56(2) of the Act

[13] The impugned appointment was made in terms of section 56 of the Act, which provides for the appointment of managers directly accountable to the municipal manager. Subsection 56(2) provides that:

“(2) A decision to appoint a person referred to in subsection (1) (a) (ii) and any contract concluded between the municipal council and that person is null and void if -

- (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
- (b) the appointment was otherwise made in contravention of this Act, unless the Minister in terms of subsection (6) has waived any of the requirements listed in subsection 1(b).”

[14] Counsel were ad idem that although that subsection appears to refer only to the appointment of acting managers, it must be read to visit invalidity on permanent appointments also in those circumstances.

[15] A literal interpretation of the section, namely that it is only the appointment of acting managers without the requisite skills that are visited with nullity (and not those of permanent managers), will manifestly lead to absurd and even nonsensical results. On a proper and contextual interpretation subsection 56(2) aims to ensure that only persons who have the requisite skills and expertise to perform their duties optimally, are appointed. An interpretation that will result in a situation where those skills are required of acting managers but not of permanent managers, cannot be supported.

[16] Mr. Rorke SC, who appeared for the first to fourth respondents, has correctly submitted that section 56(2) in its present form is either the result of poor drafting or an unfortunate typographical error. It hence requires that the section be read as referring to permanent managers, namely those persons mentioned in section 56(1)(a)(i) of the Act.

[17] I am accordingly of the view that on a proper construction of section 56(2) the appointment of a person without the requisite expertise, competencies, or qualifications as a permanent section 56 manager, is null and void by operation of the law.

Appellant's contentions

[18] Mr. Buchanan SC, on behalf of the appellant, submitted that the second respondent had delayed unduly in bringing the counter-application without any satisfactory explanation. He argued that the application should have been dismissed for that reason alone. In this regard he pointed to the fact that the counter-application was only instituted during March 2017; more than a year after the impugned resolution was adopted.

[19] He argued furthermore that the second respondent (the municipal manager) did not have the requisite authority either to oppose the application or to institute the counter-application. He submitted that if the municipal manager were of the view that the decision was a nullity, he should have invited council to revisit or rescind it. Municipal managers have no general authority or locus standi to ignore a council's resolution or to launch a legal

challenge in respect thereof, in the event that the impugned resolution has not been rescinded by council; or so he argued.

- [20] Mr Buchanan submitted furthermore that it was incumbent on council, if it desired to revisit the decision, to do so in accordance with its standing rules and procedures relating to the rescission of its resolutions. It is common cause that no such procedure was adopted in this case. The resolution has accordingly not been rescinded and it remains valid and enforceable. The second respondent is thus constrained to give effect to it.
- [21] Regarding the merits, he argued that the grounds put up by the respondent for contesting the resolution was an afterthought and devoid of any merit. He submitted that the competency assessment tools utilised in terms of the competency test must be capable of being applied fairly and must be objectively sustainable. He argued that the respondents have failed to establish that the test was applied fairly and correctly.
- [22] And regarding the composition of the selection panel, he submitted that the acting portfolio head was part of the panel, and there has accordingly been substantial compliance with the prescripts of the Regulations.

Respondents' contentions

- [23] The first to fourth respondents contend that the appellant's appointment was null and void because she did not have the requisite competencies as required in terms of section 56(2)(a) of the Act.
- [24] In this regard they point to the fact that Regulation 16 provides that a candidate who has been recommended for appointment must pass a competency test. They contend that the appellant had been duly assessed by an objective and independent third party, namely The Assessment Toolbox, and was found to be a poor match for the position for which she had applied. The decision to appoint her was thus rendered null and void.
- [25] The respondents contend that since the council resolution was null and void by operation of law, it was strictly speaking not necessary for the second respondent to apply for the judicial review of that decision. The counter-application was thus a conditional one, brought *ex abundanti cautela*, in the event of the first point not being upheld.
- [26] In his counter-application the second respondent raised the following additional grounds for the contended invalidity of the appellant's appointment:
- (a) in terms of Regulation 12(4) the interviewing panel must be constituted by the municipal manager, who will be its chairperson; a member of the mayoral committee or councillor who is the portfolio head of the relevant portfolio; and at least one person who is not a councillor or staff member of the municipality and who has expertise in the area of the advertised post. None of the three councillors who served on the interviewing panel was either a member of the mayoral committee or portfolio head of the relevant committee as required by Regulations. He asserts that although substantial or adequate compliance with

that provision would suffice in certain circumstances, the purpose of Regulation 12(4) (b) is to ensure that there is at least one panel member who has the relevant experience and expertise to enable the committee properly to assess whether the candidate meets the requirements of the post. He contends that when viewed in the light of the purpose of that requirement, the composition of the interviewing committee did not comply with the Regulations. The non-compliance with that provision was accordingly critical; and

- (b) when it adopted the resolution council relied on the report submitted by the acting city manager which was misleading in two respects, namely: it made no mention of the fact that the appellant had failed her competency test; and it referred to the test as a “psychometric

test” whereas in truth and fact it was a competency test as contemplated by Regulation 16. The council resolution accordingly

amounted to unfair administrative action and was in breach of the principle of legality.

[27] The respondents subsequently also filed a supplementary affidavit establishing that the position to which the appellant seeks to be appointed by order of court, is no longer part of the first respondent’s staff establishment. Mr Rorke submitted that an order appointing her to the abolished position will be in conflict with the provisions of subsection 66(3), read with subsection 66(4) of the Act. Those sections, Mr Rorke submitted, prohibit in peremptory terms the appointment of a person to a post which is not part of the establishment, and renders such appointment null and void. He relied in this regard on the judgment of Griffiths J in *Nosipho Portia Ndabeni vs The Municipal Manager and OR Tambo District Municipality*, Case No 344/2019, 6 June 2019, Mthatha High Court. In that matter the learned judge held that a previous order by Mjali J, purporting to appoint the applicant to a post which did not form part of the establishment in contravention of section 66 of the Act, was a nullity. Mr Rorke argued that the appeal has thus in any event been rendered moot by this development. Mr. Bodlani, who appeared for the fifth respondent, supported Mr. Rorke’s

submissions.

[28] Mr Buchanan joined issue with this submission and submitted that the respondents should not be allowed to pull the rug from under the appellant’s

feet by attempting to render specific performance impossible by virtue of their own ex post facto machinations. He relied for his submissions on the judgment of Mjali J in the same case (namely *OR Tambo Municipality and Others v NP Ndabeni*), as well as the Supreme Court of Appeal judgment in *Manana v King Sabata Dalinyebo Municipality* (345/09) [2010] ZASCA 144 (25 November 2010).

Findings of the court a quo

[29] In dealing with the issue of the competency requirements Lowe J held as follows:

“It is in my view more than sufficiently demonstrated that these tests were fairly applied by professionals and there can be no suspicion of 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. “

[30] The learned judge also upheld the respondents’ contentions regarding the composition of the interviewing panel and found that:

“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 head of the portfolio, there had to be “at least one other person who is not a Councillor or 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 supplying 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 requisite experience. If this is so, then similarly the decision must be null and void.”

[31] The learned Judge, even though it was not strictly speaking necessary in the light of his findings regarding the contended nullity of the resolution, nevertheless granted the conditional counter-claim.

Discussion

[32] Both in the court a quo and in argument before us, counsel made extensive submissions regarding the issue as to whether the council resolution constituted

administrative action. These submissions were relevant mainly to the issue of the second respondent’s authority to oppose the application and to institute the counter-application.

[33] I am, however, of the view that the logical approach would be first to deal with the issue as to whether the resolution to appoint the appellant was a nullity by operation of law. It seems to me that a determination of that issue will of necessity also be dispositive of the question whether the second respondent had authority to raise the issue. If indeed the resolution was null and void for the reasons contended for by the respondents, there would have been nothing for council to revisit or rescind.

- [34] The relief sought by the appellant will impact directly on the second respondent. She sought an order compelling, inter alia, the former to implement the resolution and to finalise the applicant's Terms of Contract and Performance Agreement.
- [35] It seems to me axiomatic that it would have been remiss of the second respondent to acquiesce in the implementation of the resolution, well knowing it to be a nullity.
- [36] It also seems self-evident to me that in his capacity as the accounting officer of the municipality, he has a statutory obligation to bring such perceived defects to the attention of the court and to request the court to rule on its validity. In addition, it is anomalous that the appellant, having cited the second respondent in these proceedings and seeking substantive relief against him, now seeks to muffle him by arguing that he had no authority to oppose the application. I am accordingly of the view that the challenge to the second respondent's locus standi is misplaced and cannot be upheld.
- [37] As I have said previously, there can be little doubt that on a proper reading of section 56(2) of the Act the appointment of any person without the requisite skills is visited with invalidity.
- [38] The Regulations required the appellant to undergo a competency assessment before her appointment could become effective. She had been subjected to such an assessment and was found to be a poor match for the position.
- [39] The appellant's challenge to the objectivity and reliability of the competency test seems to me a rather self-defeating argument. If it is her case that the test was not a proper one, then it means that her competency had never been properly assessed as required by the Regulations. Her appointment would accordingly in any event be a nullity for that reason as well.
- [40] In the event, there is nothing in the papers to cast any doubt on the objectivity or reliability of the test. I am accordingly constrained to accept that she could not demonstrate that she possessed the required skills. She consequently did not have the requisite competencies and skills to fill the post, and the decision to appoint her was accordingly null and void, by operation of law.
- [41] Although I am in respectful agreement with the reasons stated by Lowe J for granting the conditional counter-application, I am of the view that in the light of my findings above, it is not necessary for me to rule on that issue. It is for obvious reasons also not necessary for me to pronounce on the argument regarding the contended mootness following upon the subsequent abolition of the post by the first respondent. It seems to me, however, that there can be little doubt that I cannot make an order appointing the appellant to a position which is no longer provided for in the municipality's staff establishment. Section 66(3) of the Act expressly and unequivocally prohibits such an appointment, and subsection 66(4) is equally unequivocal in its injunction that renders such an appointment a nullity. In the event, the questions as to whether the appellant would be entitled to some other relief or whether the

abolition of the post has rendered the appeal moot are issues which I do not have to decide.
The appeal must accordingly fail.

Order

[42] In the result the appeal is dismissed, with costs.

J.E. SMITH

JUDGE OF THE HIGH COURT

I agree,

N.G. BESHE

S.M. MFENYANA

ACTING JUDGE OF THE HIGH COURT

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