

SOUTH AFRICA / JUDGMENT

Ncitha v Buffalo City Metropolitan Municipality (EL107/2022) [2022]

ZAECCELLC 21 (25 August 2022)

[2022] ZAECCELLC 21

COURT

Eastern Cape High Court, East London Local Court

BEFORE

FBA Dawood

CASE / FILE NUMBER

EL107/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

[EAST

LONDON CIRCUIT LOCAL DIVISION]

CASE

NO: EL107/2022

In

the matter between:

ZUKISWA
VERONICA
NCITHA
Applicant
and
BUFFALO
CITY METROPOLITAN MUNICIPALITY
Respondent

JUDGMENT

DAWOOD J:

[1] The applicant herein brought an application against the respondent wherein she sought the following relief: -

“1. That the decision by the respondent dated 28 September 2021 that the applicant does not qualify to receive legal services support be and is hereby reviewed and set aside.

2. That the decision referred to at 1 above be and hereby substituted with a decision that the applicant qualifies to receive legal services.
3. That the respondent provides the applicant with legal services for the conduct of her impending criminal case.
4. That the respondent pays the costs of this application on attorney and client scale.”

[2] The applicant stated inter alia that: -

- a) She was elected as Executive Mayor of Buffalo City Metropolitan Municipality, the respondent, on 31 May 2011 and acted in that position until 2016.
- b) During 2015, she was arrested and charged with fraud and corruption. She is currently out on bail in respect of that case.
- c) During July 2021, she received a telephone call from Mr. Zenzile, the head of Legal Services of the respondent, who requested that she reapply for legal representation support. She duly completed the written request in terms of section 109A of the Municipal Systems Act again on 23 July 2021 and submitted the same to the respondent. This request did not attract any response

from the respondent.

- d) It was only after her attorney of record sent the second letter dated 28 September 2021 that the respondent responded to her request on the same date. This is ‘the decision’ which she seeks to have reviewed, set aside and substituted.
- e) She was advised through her attorney of record that, according to the response by the respondent, she does not qualify for legal services support as outlined in section 109A of the Municipal Systems Act No. 32 of 2000. No further explanation was provided in the response.
- f) There were anomalies in the response by the respondent in annexure “D”:
 - (i) The written request which she had completed and submitted to the respondent was not completed by the Chief Whip and Speaker of Council, like with the first request she had submitted.
 - (ii) There was no indication on the request that it was approved or not approved, like with the first request.
 - (iii) The response was from Mr. Zenzile, the Head of Legal Services.
- g) Further to the above letter, her attorneys received by email on 6 October 2021 a memorandum from Mr Zenzile. The memorandum was directed to the Head of Directorate Executive Support Services: Ms Sidukwana. The memorandum makes reference to the decision of *Zuma v DA and EFF* in case number 1028/19 [2021] ZASCA dated 13 April 2021. In the memorandum, Zenzile made reference to her request for legal representation support. Zenzile also concluded in the memorandum that she is to convey to her legal representatives

that the respondent will no longer incur any further costs with regards to her case.

- h) She instructed her attorneys and he then drafted and sent an appeal in terms of PAJA. In the appeal, her attorney advised the respondent that its interpretation of Zuma decision is incorrect, and they do not agree with it. In the appeal, they further advised the respondent that in terms of the policy, the Legal Officer, Mr Zenzile, was not the correct person to have considered her request for legal representation support. Her attorney also advised Zenzile that the correct person to have considered her request in terms of the policy is the City Manager.
- i) According to clause 11.2 of the policy, the person vested with authority to consider an application for legal representation support shall be the Speaker in respect of the Executive Mayor and all other councillors, the Executive Mayor for the accounting officer and directors directly accountable to the accounting officer after consulting the whips of the various parties and the accounting officer in respect of all employees. It is further provided that the responsible person on behalf of the respondent shall exercise the discretion of the respondent to refuse an application or approve an application with or without conditions.
- j) Section 1 of PAJA defines administrative action as any decision taken, or any failure to take a decision by an organ of state when exercising a power in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person, and which has a direct, external legal effect.
- k) An empowering provision is defined in the PAJA as a law, rule of law. A rule of common law, customary law or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.
- l) Section 6(2)(a) of the PAJA provides that a court or tribunal has the power to review an administrative action if the administrator who took it was not authorised to do so by the empowering provision; or acted under a delegation of power which was not authorised by the empowering provision; or was biased or reasonably suspected of bias.
- m) She submitted that she had previously requested legal representation support in terms of section 109A of the Municipal Systems Act and the policy from the respondent and such support had been approved by the then City Manager.
- n) She was a councillor (Executive Mayor) when the cause of action arose, or alleged offence took place during her tenure as Executive Mayor.
- o) The legal proceedings for which she is seeking legal representation support falls within the definition of legal proceedings in the policy of the respondent.

- p) She qualified and met the criteria for approval of her request for legal representation by the respondent.
- q) She alleged that the decision not to approve her application (request) for legal representation support falls within the meaning of administrative action as contemplated in section 1 of PAJA.
- r) The respondent is an organ of state, namely local government, which was exercising a power in terms of the Constitution and was performing a public function in terms of legislation, namely the policy in terms of section 109A of the Municipal Systems Act.
- s) The decision adversely affects her rights, which has a direct external legal effect.
- t) The decision that she does not qualify for legal services support was reached without proper application thereto.
- u) The decision-maker, Zenzile merely stated that she does not qualify for legal services support as outlined in section 109A of the Municipal Systems Act No. 32 of 2000. No specific reference is made to the applicable provision of section 109A of the Municipal Systems Act.
- v) The decision-maker was irrational in reaching his decision that she does not qualify for legal services. Zenzile merely stated in the decision that the respondent has assessed her application (request) and informed her that she does not qualify to receive legal services support.
- w) Her application for legal representation support should have been considered by the Speaker of Council and not the Head of Legal Services, Zenzile. The decision-maker should have been the Speaker of the Council and not Mr Zenzile.
- x) The Speaker should have exercised his/her discretion in respect of her application for legal representation support and not the Head of Legal Services, Zenzile.
- y) She accordingly alleged that the person who took the decision of the respondent must be reviewed and set aside for inter alia the following reasons:
 - (i) The administrator who took the decision was not authorised to do so by the empowering provision;
 - (ii) A cursory reading of the decision of the respondent shows that the administrator who took the decision did not exercise his discretion when he took the decision to refuse the request for legal representation support;
 - (iii) If the administrator is to contend that he did exercise his discretion when he made the decision, he exercised it irrationally in the circumstances;
 - (iv) The administrator who took the decision acted under a delegation of power which was not authorised by the empowering provision; and

- (v) The same administrator was biased or reasonably suspected of bias.
- [3] The respondent inter alia pleaded as follows to the applicant's case: -
- (i) First, that the applicant has brought her application within the four corners of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").
- (ii) That the applicant alleges that the decision which she seeks to have reviewed and set aside, the decision by the respondent on 28 September 2021 to refuse the applicant legal representation in the criminal proceedings confronting her, constitutes administrative action.
- (iii) That the applicant is wrong in that:
- a) The decision does not have an external legal effect. The decision is one which arises from the applicant holding the office of mayor of the respondent, it is purely a decision internal to the respondent, with no direct consequence for or impact on any other citizen, and therefore does not fall within the compass of the definition of administrative action in section 1 of PAJA.
- b) The second reason is that the decision does not adversely affect the rights of a person. This is because the applicant has no right to be granted legal representation by the respondent.
- (iv) The applicant has accordingly not disclosed a cause of action in her founding affidavit.
- (v) The application accordingly falls to be dismissed on this basis alone, with costs.
- (vi) The conduct in respect of which the applicant faces criminal charges does not fall within the compass of what section 109A(a) of the Local Government Municipal Systems Act, 32 of 2000, ("the Systems Act") as stated as follows:
- a) The charges against the applicant, which are contained in the charge sheet which is annexed to annexure "B" to the applicant's founding affidavit, have not been brought against her as a result of any act or omission by her in "in the exercise of her powers or the performance of her duties" as contemplated by section 109A(a) of the Systems Act.
- b) It will be noted from the charge sheet that they all relate to issues of procurement by an organ of State, the respondent, arising from the funeral arrangements made after the death on 5 December 2013 of the former President of South Africa, Mr Nelson Rolihlahla Mandela.
- c) It is apparent from the preamble that the charges all relate to matters of procurement by an organ of State in respect of which section 217 of the Constitution of the Republic of South Africa, 1996, demands that this be done in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- d) The applicant, however, as a councillor and then mayor of the respondent was statutorily prohibited from involving herself in procurement matters by virtue of section 117 of the Local Government: Municipal Finance Management Act, 56 of 2003 ("the MFMA"). In addition, the applicant's Supply Chain Management Policy ("the SCMP") has clear and

strictly confined rules as to how procurement by the respondent of goods and services must take place. There is no provision in the SCMP which allows for, or requires, the mayor of the respondent to engage in procurement processes – in any manner whatsoever. On the contrary, section 4(5)(a) of the respondent's Supply Chain Management Policy also prohibits councillors from participation in procurement matters.

- e) As mayor, the applicant was an elected political leader of the respondent who carries the responsibility for ensuring good governance in the area of financial management and who is required to provide political leadership, oversight and monitoring of the executive. The general responsibilities of a mayor of a municipality, moreover, are spelt out in section 52 of the MFMA. She is required, inter alia, to provide political guidance over fiscal and financial affairs of a municipality. However, neither section 52 of the MFMA, nor any other provision thereof, allows a mayor to become proactively involved in, and to implicate herself in, procurement processes generally and specifically in the manner alleged in the charges preferred against the applicant.
- f) It is apparent, therefore, that when involving herself in the procurement of the goods and services which form the subject matter of the charges against her, the applicant was not exercising a power conferred upon her nor was she performing her duties. On the contrary, she was acting outside both her powers and her duties. Importantly, the applicant is accused of acting dishonestly and corruptly; her conduct in doing so, does not advance any governmental interest or purpose.
- g) In these circumstances, section 109A(a) of the Systems Act finds no application in respect of the applicant and the charges confronting her. She is thus not entitled legal representation, at the cost of the respondent, in the criminal proceedings she currently faces.

(vii) Finally, the respondent averred that, on their proper construction, both section 109A(a) of the Systems Act (if found to apply) and the respondent's policy confer a wide discretion on the respondent as to whether or not to grant an application by an applicant for the costs of legal representation. It will be argued that there is no closed list of considerations which must be taken into account in the exercise of that discretion. Given the matter raised above and in particular:

§ That the applicant in conducting herself in the manner alleged was not exercising a power conferred upon her nor was she performing her duties;

§ That the applicant is accused of acting dishonestly and corruptly; and

§ That her conduct does not advance any interest or purpose of the respondent.

- a) It is manifest that this is a case where, in refusing the applicant's application, the respondent exercised its discretion in an appropriate manner. Stated differently, in deciding the application in the manner which it did, the respondent's decision was rational.

b) The applicant, on this score, other than to advance impermissible assertion has placed no evidence before the honourable Court as to why it may be concluded that the discretion was exercised wrongly.

c) On this basis, as well the application falls to be dismissed with costs.

(viii) On the merits it was pleaded inter alia on behalf of the respondent: -

a) That the charges preferred against the applicant and in respect of which approval of legal representation was granted on 20 March 2019, as is apparent from the signatures to annexure “A” to the founding affidavit, were withdrawn by the National Prosecuting Authority in May 2019.

b) That during or about February 2021, the National Prosecuting Authority instituted fresh criminal proceedings and preferred new charges against the applicant, such charges being annexed to the letter from the applicant’s attorney dated 23 July 2021 which is annexure “B” to the applicant’s founding affidavit.

c) A reading of the preamble to the charge sheet makes it plain that the applicant, and her co-accused, are accused of:

aa) First, engaging with matters of procurement, something which falls outside of the applicant’s powers and duties; and

bb) Second, acting dishonestly and corruptly, something which does not advance the respondent’s interest or purpose.

d) The effect of this is, as the provisions of section 109A of the Systems Act are not available to the applicant and, even if they are, the respondent nonetheless discharged the discretion conferred on it by the section and its policy appropriately and rationally having regard to the nature of the charges preferred against the applicant.

e) When the National Prosecuting Authority instituted fresh criminal proceedings against the applicant, she – of her own accord – once again applied for representation at the cost of the respondent. In reapplying for legal representation, the applicant no doubt appreciated – correctly – that the approval previously given no longer applied given the withdrawal of the earlier charges by the National Prosecuting Authority.

f) The decision itself, to refuse the applicant’s legal representation, was taken by the Speaker of the respondent’s municipal council, Mr Humphrey Maxegwana, after consultation by him with the executive mayor, Mr Xola Pakati, the then deputy executive mayor, Ms Helen Neale-May, the then chief whip, Mr Mawethu Marata, and the municipal manager, Mr Andile Sihlahla. This after Mr Zenzile had briefed those present. A meeting between them took place in August 2021. This was directly before a meeting of the political office bearers, which is known in local government terminology as a meeting of the troika. It is not a formal meeting and consequently no minute or records are kept of such meetings.

- g) To the extent that it may be argued that the appeal was in terms of section 62(1) of the Systems Act, it that the section is available to the applicant. As pointed out above, the applicant has no rights in terms of section 109A of the Systems Act and, this being the case, it follows that section 62 does not confer on her the right to an appeal.
- h) In any event, the applicant does not seek to attack the alleged failure by the respondent to deal with her appeal and seeks no relief in respect of that alleged failure. The applicant's complaints, therefore, about the appeal are not relevant for this reason as well.
- i) It was alleged that Mr Zenzile was not the decision-maker. The decision taken by the Speaker was rational for the reasons already dealt with in this affidavit. Annexure "D" merely conveys the final result of the decision taken by the Speaker but does not give reasons for such decision. No reasons were ever requested.

[4] The issues for determination are inter alia the following:

- a) Did the applicant qualify for the provision of legal services in terms of section 109A of the Systems Act read with the BCMM policy document;
- b) Did the respondent's refusal fall within the ambit of review in terms of PAJA;
- c) If PAJA is applicable, then has the applicant established any of the grounds for review under PAJA entitling her to the relief she seeks.

[5] Applicability of section 109A of the Systems Act read with the BCMM policy document.

[A] In order to make a determination of this issue it is necessary to examine the policy document which incorporates the provisions of section 109A and relevant parts and reads as follows—

(i) Policy Statement:

"It is the policy of BCMM to support its employees and councillors with legal representation in legal matters arising from their official duties."

Scope of Policy:

This policy applies to all councillors and employees who qualify to be provided with legal representation from BCMM in terms of Section 109A of the Municipal Systems Act.

legal Framework:

The statutory framework on which sound provision of legal representation for BCMM councillors and employees Policy is founded is the following:

Section 109A of the Local Government: Municipal Systems Act (Act No.32 of 2000) which reads as follows:

'109A – Legal representation for employees or councillor of municipality.

A municipality may, subject to such terms and conditions as it may determine, provide an employee or councillor of the municipality with legal representation where –

- a) Legal proceedings have been instituted against the employee or councillor as a result of any act or omission by the employee or councillor in the exercise of his or her powers or the performance of his or her duties; or
- b) The employee or the councillor has been summoned to attend any inquest or inquiry arising from the exercise of his or her powers or the performance of his or her duties.”

[B] It is evident from the reading of this policy that:

- (i) the entitlement to legal representation arises only when the councillor, in this case the mayor, is going about exercising her powers or performing her duties.
- (ii) the Constitutional Court has held that it is fundamental to “...our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.” [1]
- (iii) the Supreme Court of Appeal held that “the proper question always is not whether an action by an official is precluded by law but whether it is permitted by law”. [2]
- (iv) the conduct of which the applicant stands charged, and in respect of which she has applied for legal representation, relates to her involvement in issues of procurement by an organ of state, the respondent, arising from the funeral arrangements made after the death on 5 December 2013 of the former President of South Africa, President Nelson Rolihlahla Mandela.
- (v) section 117 of the MFMA provides that councillors such as the applicant (who was the mayor of the respondent and a councillor at the time) are statutorily prohibited from involving themselves in procurement matters; and section 4(5)(a) of the Supply Management Policy also expressly prohibits councillors from participating in procurement matters.
- (vi) the applicant had no powers to involve herself in procurement matters.
- (vii) the applicant was in the circumstances neither exercising her powers when involving herself in procurement matters nor was she performing any of her duties. She was engaged in conduct which was not permitted by law and was acting outside the ambit of both her powers and duties.
- (viii) the legal proceedings for which she seeks financial support accordingly falls outside the ambit and definition of legal proceedings covered by the policy and section 109A(a) of the Systems Act.
- (ix) the applicant is accordingly precluded from claiming legal representation since the charges which she is facing do not arise as a result of an act or omission by her in the exercise of her powers or the performance of her duties.

- (x) the applicant is not entitled to be provided with any legal representation by the respondent as the conduct complained of falls outside of purview of section 109A(a) and the policy.

[C] The application is accordingly dismissed on this basis alone.

[6] Applicability or otherwise of PAJA to the proceedings

- (i) There is no need to go into the applicability or otherwise of PAJA as the finding above pertaining to section 109A not being available to the applicant suffices for the dismissal of her application. However, for the sake of completeness I shall briefly deal with PAJA in the context of this matter.

(ii) In *Minister of Defence and Military Veterans v Motau and Others*[3] it was stated that PAJA's definition of "administrative action", when read with the definition of "decision",

consists of these seven elements:

- (i) A decision of an administrative nature;
- (ii) By an organ of state or a natural or juristic person;
- (iii) Exercising a public power or performing a public function;
- (iv) In terms of any legislation or an empowering provision;
- (v) That adversely affects rights;
- (vi) That has a direct, external legal effect; and
- (vii) Does not fall under any of the listed exclusions.

(iii) The applicant in this matter has inter alia failed to establish how her conduct has an external legal effect nor has she established how the respondent was performing a public power or performing a public function since the legislation and policy relied upon related to internal affairs of its own employees and the performance of their duties. Accordingly, the determination of the applicability or otherwise of the policy and legislation would not result in the respondent performing a public power or public function in relation to any other citizen and this has no direct, external effect.

(iv) The applicant in any event has failed to establish that she has any right to claim legal representation in terms of the relevant legislation and policy having regard to the findings above. The policy accordingly conferred no rights on the applicant and therefore the decision did not affect her rights or have the potential to affect her rights.

- (v) The application would further have failed for wrongly relying on PAJA as the basis for claiming relief.

c) No purpose will be served by going into merits or further grounds as the above suffices for the dismissal of the application.

[7] Costs

- (i) The municipality failed to indicate clearly to the applicant that the reason that she was being refused legal representation was that the alleged unlawful conduct pertaining to procurement fell outside the ambit of her official duties and was thus not covered by the policy of the Systems Act.

- (ii) The letter sent to her simply reads as follows:

“We are in receipt of the correspondence dated 28 September 2021 regarding the decision to provide Legal Representation for Ms Zukiswa

Veronica Ncitha. As Buffalo City Metropolitan Municipality, we have assessed your application and it is with regret to inform you that Ms Zukiswa Veronica Ncitha does not qualify to receive legal services support as outlined in section 109A of the Municipal Systems Act No. 32 of 2000”.

- (iii) The respondent has further conceded that it has not given reasons for its decision but states that no reasons were requested.

- (iv) The obligation, in my view, is upon the respondent to indicate, as it did in the answering affidavit, the basis upon which it is refusing to grant legal representation and why it says the applicant was not eligible. This is particularly so in this case where, rightly or wrongly, it had previously granted her legal representation.

- (v) In light of the foregoing, I deem it just and equitable that each party pay its own costs.

[7] Order:

I accordingly make the following order: -

- (i) The application is dismissed.
(ii) Each party to pay its own costs.

FBA DAWOOD

JUDGE OF THE HIGH COURT

Date heard: 28 July 2022

Judgment

delivered: 25 August 2022

Appearances

For the applicant: Adv Pitt

Instructed by:

M.A FREDERICKS & ASSOCIATES

19 Stewart Drive

East London

Tel:

043 7431357

For the respondent: Adv Korke S.C

Instructed by:

WESLEY PRETORIUS & ASSOCIATES INC

24 Tottenham Road

Baysville

Tel:

043 7211740

[1] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others

[1998] ZACC 17; 1999 (1) SA 374 (CC) at para 58.

[2] Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others 2022

(1) SA 15 (SCA) at para 30.

[3] 2014 (5) SA 69 (CC) at para33.

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