SOUTH AFRICA / JUDGMENT

Nelson Mandela Bay Municipality v Qaba and Others (3042/2023) [2024] ZAECQBHC 27 (9 April 2024)

[2024] ZAECQBHC 27

COURT
Eastern Cape High Court, Gqeberha

BEFORE
J W Eksteen

CASE / FILE NUMBER
3042/2023

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IN
THE HIGH COURT OF SOUTH AFRICA
EASTERN
CAPE DIVISION, GQEBERHA
NOT
REPORTABLE
Case
No.: 3042/2023
In

the matter between:

NELSON
MANDELA BAY
MUNICIPALITY
Applicant
And
ANELE
QABA
First
Respondent
MANDELA
BAY DEVELOPMENT AGENCY
Second
Respondent
GLENDA
ANNE PERUMAL
Third
Respondent
MXOLISIS

MOOLMAN
Fourth
Respondent
VUYANI
GALEN DYANTYI
Fifth
Respondent
NOMNIKELO
PINKY KONDLO
Sixth
Respondent
KHWEZI
GIDEON NTSHANYANA
Seventh
Respondent
THE
MINISTER OF FINANCE
Eighth
Respondent

JUDGMENT

EKSTEEN J:

[1] This is a review brought in terms of s 6 of the Promotion of Administrative Justice Act (PAJA) [1] in which the applicant, the Nelson Mandela Bay Municipality (the municipality) sought an order that the decision taken by the third to seventh respondents, in their capacities as directors and members of the board of the second respondent, the Mandela Bay Development

Agency (the MBDA), on 15 June 2023, to appoint the first respondent, Mr Qaba, in the position of chief executive officer (CEO) of the MBDA, be reviewed and set aside. The eighth respondent, the Minister of Finance (the Minister), was joined in the application by virtue of the interest which he has in the outcome of the application as a result of his promulgation of the Municipal Regulations on Minimum Competency Levels[2] (the minimum competency regulations). Mr Qaba and the directors of the MBDA opposed the application, but the Minister did not enter an appearance to defend.

Background

[2] The MBDA was established as a municipal entity in terms of s 86C of the Local Government: Municipal Systems Act[3] (the Systems Act), which is wholly owned and controlled by the municipality, but has an independent legal status as defined in s 86D of the Systems Act. The municipality is entitled to appoint and remove the directors of the board[4], but the board is empowered to appoint the CEO of the entity.[5] I shall revert to the relationship between the municipality and the MBDA.

[3] The municipality entered into a service delivery agreement (SDA) with the MBDA and the services that the MBDA was required to deliver included the rejuvenation of economic activity within the central business districts, harbours, nature conservation areas, and beach areas within the Nelson Mandela Metropolitan Municipality. It is also required to develop a five year strategic development plan in line with the municipality's development plan or plans and strategies, and to ensure optimum use of land and infrastructure

within the area or areas designated for development.[6] Hence, pursuant to its mandate, the board of the MBDA advertised, on 17 November 2022, inviting applications for the vacant post of CEO. The 'essential requirements' for the position, as advertised, were that the applicant should be in possession of a post-graduate qualification in the built environment/urban planning sector; a consideration of a recognised three year bachelor's degree in public administration/political science/social sciences/law or equivalent; and eight years relevant experience at a management level, of which at least five years had to be at senior management level. The advertisement further stipulated that if an applicant had received no reply in response to their application within sixty days from the closing date for applications, being 21 November 2022, they should consider their application to have been unsuccessful.

[4] Mr Qaba applied for the position, but he had none of the essential academic qualifications. He said that he had a B-Tech degree in Tourism Management; a national diploma in Travel and Tourism; and a Master of Business Leadership. He did not receive any response to his application within the sixty day period to which I have alluded.

[5] However, in January 2023, the MBDA again placed an advertisement (the second advertisement) inviting applications for the position of CEO. The second advertisement made no reference to the earlier one and the essential requirements for the position were significantly reduced. The second advertisement stipulated, as 'essential requirements (updated)', at least a bachelor's degree or a relevant qualification registered on the national qualification's framework at NQF level 7 with a minimum of 360 credits. The particular areas of study that had been essential for purposes of the first advertisement were no longer required. It now recorded that a postgraduate qualification would be advantageous, and it required merely five years' experience at the senior management level. The board provided no explanation for its decision to reduce the level of academic qualifications required for its CEO. The second advertisement concluded that the successful candidate would be expected to sign an employment contract for five years and a performance agreement. The closing date for applications in terms of the second agreement was set for 23 January 2023.

[6] Mr Qaba did not submit a new application in response to the second advertisement, but his original application was considered effective,

notwithstanding the lapse of sixty days without response. A selection process followed and a number of candidates, including Mr Qaba, were shortlisted for the position. The shortlisted candidates were required to deliver a presentation to assess their competency. The shortlist was thereafter reduced, and those who had been considered sufficiently competent were subjected to

psychometric assessments. Thereafter, the list was reduced to two candidates, and Mr Qaba was eventually appointed in June 2023 as the CEO of the MBDA. He was appointed on the maximum salary and benefit scale permissible for a CEO in a municipal entity under the control of the municipality. I revert to this issue.

[7] Prior to these events, Mr Qaba had been employed as the Executive Director: Economic Development, Tourism and Agriculture in the municipality and had been suspended, during June 2022, due to allegations of gross misconduct relating to supply chain management processes. The municipality had resolved, on 21 June 2022, that he be suspended pending the finalisation of an investigation into allegations of financial misconduct. It was during his period of suspension that he first submitted his application to the MBDA. However, a disciplinary process was never instituted. On 28 February 2023, the municipality and Mr Qaba signed a settlement agreement, in terms of which Mr Qaba vacated his office in exchange for a monetary remuneration equivalent to the remaining sixteen months of his contract of employment. Mr Qaba was paid R3 million.

[8] Against this background the appointment of Mr Qaba as the CEO of the MBDA raised the ire of National Treasury and of the municipality.

Treasury questioned the lawfulness of Mr Qaba's appointment and demanded further information relating to the process that was followed. They advised the municipality to suspend Mr Qaba's appointment as CEO of the MBDA, and cautioned them to consider their advice so as 'to avoid any form of penalty as it relates to withholding of conditional grants allocated in terms of the Division of Revenue Act’.

[9] On 9 August 2023, the Minister addressed the executive mayor in respect of a number of matters of alleged maladministration in the

municipality, including the appointment of Mr Qaba. He expressed great concern about the integrity of 'the city's

decision' to appoint Mr Qaba as the CEO of the MBDA. He said that he was concerned about the governance of the board of directors

of the MBDA, who had implemented irregular decisions that contravened statutory prescripts and had failed to obtain approval from the municipal council when they were required to do so. The Minister appeared to perceive the appointment of Mr Qaba, without the consent of the municipal council, to be in breach of their statutory duties. Thus, the Minister put the municipality to terms to review and set aside the appointment of Mr Qaba. Hence, the present application.

The review

[10] As adumbrated, earlier, the review was launched in terms of s 6(2) of PAJA and rule 53 of the Uniform Rules of Court. The material grounds of review, for purposes of this judgment, relied upon by the municipality were that:

10.1 A mandatory and material procedural condition prescribed by the empowering provision was not complied with (s 6(2)(b) of PAJA);

10.2 the action taken was procedurally unfair (s 6(2)(c) of PAJA);

10.3 the administrator's actions were materially influenced by an error of law (s 6(2)(d) of PAJA);

10.4 the administrator took into account irrelevant considerations or failed to take relevant considerations into account (s 6(2)(e)(iii);

10.5 the administrator acted arbitrarily or capriciously (s 6(2)(e)(vi));

10.6 the action in itself is not rationally connected to the information before the administrator (s 6(2)(f)(cc));

10.7 the action offends the principle of legality and the rule of law.

[11] The notice of motion called upon the board[7] to provide:

'All records, correspondence, including internal memoranda, reports, documents, directives, policy documents, agenda and agenda items,

audio recordings, transcripts of audio recordings, records of deliberations, minutes of meeting and any other documents relating to the decision(s) or processes, which resulted in the appointment of the first respondent as chief executive officer of the second

respondent.'

[12] The board duly provided a substantial record[8], but they failed to disclose Mr Qaba's application for appointment, which included his curriculum vitae (CV), a performance

agreement as envisaged in the second advertisement, to which I have referred earlier, or his contract of employment. Upon demand made thereafter, the MBDA produced Mr Qaba's application (including his CV) and his contract of employment. In addition, they produced an unsigned draft performance agreement. I shall revert to these.

[13] As I have said, the Minister perceived that the board's conduct in appointing Mr Qaba without the prior approval of the municipality was unlawful and in breach of their fiduciary duty to the municipality. In the review, the municipality supported this perception, which depends largely on the interpretation of legislation and regulations made by the relevant ministers in terms of such legislation. I shall revert to these issues.

Intergovernmental relations

[14] In limine, the MBDA and Ms Perumal, the chairperson of the board, urged that the review application should not be entertained at this stage as the municipality had failed, before the institution of these proceedings, to comply with the provisions of the Intergovernmental

Relations Framework Act[9] (the Framework Act).

[15] The Framework Act was promulgated pursuant to s 41(2) of the Constitution. Section 41 of the Constitution sets out the principle of cooperative governance and intergovernmental relations. Section 41(3) of the Constitution enjoins an organ of state involved

in an intergovernmental dispute to make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and requires them to exhaust all other remedies before they approach a court to resolve their dispute. These principles are reflected in s 45 of the Framework Act.[10] Mr Ronaasen, on behalf of the municipality, contended that the definitions of 'government' and 'intergovernmental

dispute' are dispositive of the argument. The Framework Act defines 'government' as meaning:

'(a) The national government;

(b) a provincial government; or

(c) a local government.'

[16] It proceeds to define an 'intergovernmental dispute' as a dispute between different governments or between organs of state from different governments. Accordingly, what the Framework Act envisages, is that any dispute which arises between different spheres of government or between different governments within the same sphere of government should be subjected to the dispute resolution mechanisms provided for in the Framework Act. The present dispute relates to organs of state within the same government, being the Nelson Mandela Bay Municipality.[11] I consider that Mr Ronaasen is correct that the Framework Act does not apply to this dispute.

[17] The Systems Act, too, requires of the municipality to establish and maintain clear channels of communication between itself and the MBDA,[12] but it contains no moratorium on litigation and the failure of the municipality to have engaged as envisaged in the Systems Act is not a bar to the review.

[18] There is a further and more fundamental reason why neither the Framework Act nor the Systems Act can bar the litigation. Central to the current dispute is Mr Qaba. In the event that the review is upheld, Mr Qaba's appointment as CEO will be set aside. Such relief could never be implemented without having a material impact on his rights. Accordingly, he would be an essential party to any dispute resolution mechanism. Mr Qaba, in his personal capacity, is not an organ of state as defined in s 239 of the Constitution, and neither party has advanced any argument in support of such a conclusion. For these reasons I conclude that the Framework Act did not find application to the dispute under consideration, and the point in limine cannot succeed.

The Systems Act and the appointment regulations

[19] Much of the dispute between the parties turns on the interpretation of legislation and regulations made pursuant thereto. Central to the dispute is the application of the 'Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers' (the appointment regulations)[13]. The municipality, in its papers and in the presentation of the review, has relied heavily on the provisions of the appointment

regulations.

[20] Mr Buchanan, on behalf of the MBDA and the board, contended that the appointment regulations find no application to the appointment of the CEO of the MBDA. They were made by the Minister for Cooperative Governance and Traditional Affairs (the Minister of Cooperative Governance), pursuant to the powers vested in him in terms of s 120 of the Systems Act[14]. As I have said, the MBDA was established as a separate legal entity in terms of s 86C of the Systems Act. Although it is wholly owned and controlled by the municipality, and they have the power to appoint and remove directors, the appointment of the CEO is the prerogative of the board.[15] Once appointed, the CEO is accountable to the board for the management of the MBDA.[16] The municipality is enjoined by s 93A of the Systems Act to refrain from interfering in the functions of the board.[17]

[21] Against this statutory background the Minister for Cooperative Governance made the appointment regulations. The material portion of s 120 of the Systems Act provides:

'(1) The Minister may, by notice in the Gazette ..., make regulations or issue guidelines not inconsistent with this Act concerning-

(a) the matters listed in sections 22, 37, 49, 54A, 56, ... 72, ...'

[22] The Minister of Cooperative Governance made the regulations under s 120, read with s 72, of the Systems Act. Section 120 of the Systems Act empowers him to make regulations on a wide variety of other issues, too, arising from the act. However, it is an established principle of law that when a person exercising a public power has committed themselves unequivocally to an empowering

provision to justify the authority to exercise that power, they stand or fall by that choice. They are, generally speaking, not free to rely on some other sources of authority that may allow them to do what they had purported to do.[18] In this matter, it has not been suggested that he enjoyed the power under any other provision listed in s 120 and it is not necessary to consider this issue any further.

[23] Section 72 of the Systems Act, that the Minister of Cooperative Governance relied upon, empowers him to make regulations or issue guidelines, in accordance with s 120, in respect of various matters relating to public administration and human resources in local government. He is specifically entitled to make regulations relating to duties, remuneration, benefits and other terms and conditions of employment of municipal managers and managers directly accountable to municipal managers,[19] but the power is confined to matters arising from Chapter 7 of the Systems Act.[20] Chapter 7 relates only to municipal

staff and contains no reference to municipal entities or staff employed by such entities.

[24] Regulation 2 is central to the municipality's argument in respect of the application of the appointment regulations to the appointment of Mr Qaba. Regulation 2 purports to circumscribe the scope of the appointment regulations, and it stipulates that they also apply to municipal entities. As I have said, the matter listed in s 72 of the Systems Act has no bearing at all on municipal entities. Accordingly, prima facie, I consider that regulation 2, to the extent that it purports to include municipal entities in the appointment regulations, is ultra vires the Systems Act. It seems to me that the Minister of Cooperative Governance was simply not empowered to make regulations relating to the appointment of staff of the MBDA under section 120, read with s 72, of the Systems Act. However, the Minister of Cooperative Governance is not a party to the litigation, is not before me, and has not had an opportunity to address this issue. In the circumstances I shall refrain from making a definitive finding in this regard. I shall assume, for purposes of this judgment, that he did have that power.

[25] Mr Buchanan presented his argument on the applicability of the appointment regulations on a slightly different basis. He contended, even assuming the power of the Minister of Cooperative Governance to make regulations in respect of the appointment of staff in the MBDA, they could not apply to the appointment of the CEO, because it would be incompatible with the provisions of s 93J of the Systems Act, which grants the power to the board to make the appointment. As I shall demonstrate, the application of the appointment regulations would fundamentally undermine, and are incompatible with, the original powers granted to the board by the Systems Act.

[26] Chapter 3 of the appointment regulations regulates the appointment of 'senior managers'. 'Senior managers' are defined in the appointment regulations to include a municipal manager or acting municipal manager, appointed in terms of s 54A[21] of the Systems Act, and managers directly accountable to the municipal manager, appointed in terms of s 56[22] of the Systems Act. There is no reference in the appointment regulations to a municipal entity or its CEO. Regulation 12 provides for a municipal council to appoint a selection panel to make recommendations in respect of the appointment of candidates to vacant senior manager posts.[23] In terms of regulation 16, candidates recommended for appointments to the post of a senior manager, including a municipal manager, must undergo a competency assessment as circumscribed in regulation 16. The selection panel must then submit a report in respect of their selection process to the municipal counsel and make a recommendation on the suitability of candidates who comply with the relevant competency requirements for the post. The municipal council must then, in terms of regulation 17, make a decision on the appointment of the appropriate candidate[24] and inform all interviewed candidates, including applicants who were unsuccessful, of the outcome of the interview.

[27] Self-evidently, in respect of the appointment of the CEO of the MBDA, the provisions of the appointment regulations are irreconcilable with the Systems Act to the extent that it seeks to usurp the function of the board arising from the legislation.[25] Accordingly, on a proper interpretation of the appointment regulations, read in the context of the empowering

legislation, they do not apply to the appointment of the CEO of a municipal entity established in terms of s 86C of the Systems Act. I am not required, for purposes of this judgment, to consider whether the appointment regulations may be applied in respect of other officials in a municipal entity and I express no view in that regard.

[28] Recognising this difficulty, the municipality sought to invoke the provisions of s 93L of the Systems Act to bring the appointment process prescribed in the appointment regulations within the ambit of the act. Section 93L provides for a code of conduct for directors and members of staff of municipal entities. It stipulates that the code for municipal staff members, contained in Schedule 2 to the Systems Act, applies, with necessary changes, to members of staff of a municipal entity. Section 93L(3) proceeds to provide that:

"For purposes of this section, any reference in Schedule 1 or 2 to a 'counsellor', or 'MEC for local government in the province', 'municipal council', 'municipality', and 'rules and orders' must, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a director of a municipal entity, parent municipality, board of directors, municipal entity and procedural rules, respectively." (My underlining)

These provisions apply, expressly, only to the code of conduct and accordingly cannot come to the assistance of the municipality.

[29] Mr Ronaasen further laid emphasis on the provisions of regulation 2(b) of the appointment regulations, which provides for the regulations to be read in conjunction with the Local Government: Municipal Regulations on Minimum Competency Levels, 2007 (the competency

regulations), issued in terms of the Municipal Finance Management Act (the MFMA).[26] Both sets of regulations apply, of course, to the appointment of municipal officials. However, Mr Ronaasen, contended that the competency regulations, legitimately published by the Minister, have the effect of incorporating the appointment regulations, by reference, also in respect of the CEO of a municipality. That brings me to the MFMA and the competency regulations. The interpretation and application of the competency regulations were equally contentious.

[30] Chapter 10 of the MFMA deals with municipal entities. It provides for the CEO of the MBDA, appointed in terms of s 93J of the Systems Act, to be the accounting officer of the entity.[27] The accounting officer is responsible for the financial administration of the entity and he must ensure that the resources of the entity are effectively, efficiently, economically and transparently used. He is obliged to ensure that a full and

proper record of the financial affairs of the entity are kept and that the entity has and maintains effective, efficient and transparent systems of financial and risk management, and of internal audit, complying with, and operating in accordance with, any prescribed norms and standards. [28] He is responsible for the asset and liability management and the revenue management of the entity.[29] Thus, he bears the overall responsibility for the management of the revenue, expenditure, assets and liabilities and financial dealings of the entity. This may, as is the case

with the MBDA, involve the management of large amounts of money, all of which are public funds. Accordingly, the MFMA provides that the accounting officer must meet the prescribed financial management competency levels.[30] The competency regulations prescribe the minimum competencies required to fulfill the functions of a CEO[31] in a municipal entity.

[31] The minimum competency levels prescribed for an accounting officer in a municipal entity are set out in chapter 2 of the competency

regulations and are equivalent to those prescribed for municipal managers under the appointment regulations. They also prescribe

minimum competency levels for various other financial and supply chain officials. Regulation 13[32] of the competency regulations, upon which Mr Ronaasen relied, requires the CEO of a municipal entity to ensure that competency

assessments of all financial officials and supply chain management officials are undertaken in terms of Regulation 16 of the appointment

regulations, in order to identify gaps in competency levels of those officials, as part of the recruitment process. Thus, as I have said, Mr Ronaasen argued that irrespective of the authority of the Minister of Cooperative Governance to make regulations in respect of the appointment of employees of a municipal entity, the Minister has incorporated the provisions of the appointment

regulations in the competency regulations, which he was entitled to issue. Accordingly, so the argument went, the provisions of Regulation 12–17, to which I referred to earlier, must be complied with in respect of the appointment of the CEO of the

MBDA.[33]

[32] The authority of the Minister to make competency regulations is not in issue, but the argument requires an interpretation of Regulation 13 in its proper context. The approach to interpretation of documents, including statutes, has been authoritatively stated in Endumeni Municipality[34]. It is the process of attributing meaning to words in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purposes to which it is directed and the material known to those responsible for its production.[35] Regulation 13 is itself not a model of clarity. As adumbrated earlier, it requires the CEO to ensure that competency assessments, in the form prescribed in the appointment regulations, are done in respect of all financial officials during the recruitment process. However, a ‘financial official’ is defined in the regulation to include an accounting officer. For the reasons set out earlier the appointment regulations cannot find application in respect of the appointment of the CEO by the municipal entity by virtue of the provisions of s 93J and 93A(c) of the Systems Act. Nor could it be required of a CEO to ensure his own assessment, or to identify gaps in his own competency levels, before his appointment to the vacant position. I consider that, on a proper construction of competency regulation 13, it requires the CEO of the municipal entity, in the discharge of his obligations under the MFMA, to which I have referred to earlier, to ensure that all subordinate officials undergo

competency assessments in accordance with the provisions of regulation 16. Such a construction would accord with the provisions of the MFMA and of the Systems Act in respect of the appointment of all financial officials in the municipal entity, save for the CEO, whose appointment is the prerogative of the board. It leads, ineluctably, to the conclusion that neither the appointment regulations nor the competency regulations prescribe a particular process for the assessment of the suitability of the CEO. That does not mean that he should not be properly assessed to ensure that he has in fact achieved the minimum competency, but the method of

assessment is not prescribed. It is the responsibility of the board, who is required in law to act in the best interests of the MBDA, and is accountable to the municipality as envisaged in s 93B of the Systems Act, to ensure that the candidate meets the minimum competency as envisaged in s 107 of the MFMA. As I shall show, it was common cause that Mr Qaba had not achieved the minimum competency level in unit standards prescribed for financial and supply chain management.

[33] However, both Mr Qaba and the municipality rely on regulations 15 and 16 of the competency regulations. In regulation 15(2) of the competency regulations, the Minister has provided for an indulgence in respect of the appointment of certain officials. The regulation provides:

'A person appointed as a financial ... official on or after the date of the commencement of this regulation who does not meet the minimum competency level in the unit standards for a competency area, required for the position in terms of these Regulations, must attain that minimum competency level within 18 months of the date of appointment.'

[34] Regulation 16 stipulates that, when a financial official is required to conclude a performance agreement, as stipulated in the second advertisement, and is appointed on the basis set out in regulation 15, the performance agreement must include, as a performance target, the attainment of the minimum competency level within the prescribed period[36] and his contract of employment must stipulate that if he does not attain the minimum competency levels within the stipulated period his employment contract would terminate automatically within one month after the lapse of the applicable period.[37] The effect of these regulations is that an unqualified candidate may be appointed, subject to an express term in his contract of employment incorporating the resolutive condition that the contract will come to an end if the candidate does not acquire the necessary competency levels in unit standards within eighteen months of the conclusion of the contract.

[35] The CEO, as I have said, must meet the prescribed financial management competency levels. [38] I have explained earlier the extent of the financial responsibility placed on the shoulders of the CEO in terms of the MFMA which require of him to meet the minimum competency levels prescribed. If regulations 15 and 16 are held to be valid and enforceable it would permit a series of short-term appointments of successive unqualified CEO's placing the finances of the MBDA at risk for years. Section 107 of the MFMA provides no latitude for condonation of insufficient competency in financial management and an interpretation that

permits such a concession would, prima facie, be contrary to the object of the MFMA.[39] However, although the Minister is a party to the review, he has not entered an appearance to defend. Accordingly, because the municipality has not contended that regulations 15 and 16 are ultra vires the MFMA, he has not had an opportunity to address the issue. In my view it would be inappropriate, in these circumstances, to make such a finding in the review. I proceed, accordingly, as the parties did, on an assumption of the legitimacy of these provisions.

Prescribed competency levels

[36] The Minister has prescribed that an accounting officer of a municipal entity must generally have the skills, experience and capacity to assume and fulfil the responsibilities and exercise the functions and powers assigned, in terms of the MFMA, to them.[40] He has further prescribed that an accounting officer of a municipal entity must, at the very least be competent in the unit standards prescribed for the financial and supply chain management competency areas identified in the competency regulations.[41] These are the financial management competency levels contemplated in the MFMA.

[37] Mr Buchanan argued that the minimum prescribed competency levels are not prescriptive and should be interpreted as being no more than guidelines, because regulation 2(2) requires of a CEO, 'generally', to have the skills experience and capacity for the position. The interpretation contended for is untenable. I have set out earlier the responsibilities that the MFMA imposes upon the CEO and the extent of his financial functions. Interpreting the provisions of regulation 2 of the competency regulations, in the context of the general scheme of legislation, which I have discussed earlier, it is imperative for a CEO to have achieved at least the minimum competency requirements for the financial management entrusted to him. It may be that the functions and responsibilities of a particular municipal entity may, having regard to the nature of the entity and the extent of its mandate, require of the CEO to have greater qualifications than the minimum prescribed. The MBDA is required to manage substantial amounts of money and I have described the nature of its mandate, as set out in the SDA, earlier. Hence, the first advertisement required a post-graduate qualification specifically directed at the built environment or urban planning sector. This is a greater and more focused qualification than that prescribed as the minimum in the competency regulations but, no doubt, was perceived to be necessary for a CEO in the MBDA to fulfil the responsibilities and exercise the functions of powers assigned to him in terms of the MFMA and the SDA. It is not apparent from the papers of the board, or of Mr Qaba, why Mr Qaba thought that he might qualify for an appointment in response to the first advertisement, nor is the reason for the second advertisement explained. However, the second advertisement was published, with the concurrence of the municipality, and the application for appointment was measured against the second advertisement.

[38] In his application for the position of CEO Mr Qaba had annexed a CV in which he represented that he had obtained a National Treasury Minimum Competency Requirements certificate. However, the municipality contended that Mr Qaba had been in their employ

from 2014 until February 2023 as an Executive Director: Economic Tourism and Agriculture and that he had not attained the minimum competencies required by the regulations. In the review, both the board and Mr Qaba acknowledged that he had not obtained the necessary minimum competencies for the position. Both the board and Mr Qaba were somewhat coy of the actual competencies which Mr Qaba had attained. Neither took this court into their confidence by disclosing the extent of his shortcoming.

[39] As adumbrated earlier, both Mr Qaba and the board sought refuge in the provisions of Regulation 15(2) of the competency regulations.

The board contended that Mr Qaba was entitled to eighteen months in order to achieve the minimum competencies and that the period had not yet lapsed when the review was launched. Mr Qaba, likewise, relied on the provisions of the regulation and said that he was in the process of now obtaining these competencies.[42]

[40] As I have said, I assume, for purposes of this judgment, the validity of regulation 15(2), but it is subject to regulation 16.

Notwithstanding the provisions of the second advertisement, that required the successful candidate to conclude a performance agreement, neither the board nor Mr Qaba have been forthcoming with a signed performance agreement. Rather, two, unsigned, draft performance agreements were discovered. Mr Qaba's contract of employment was signed on 20 June 2023. It is an unconditional fixed term contract of employment that records that it, together with the annexures to it, the agency's policies, codes and procedures as adopted from time to time, constitutes the entire and only agreement between them in respect of his employment.

It does not contain the resolutive condition that it will automatically terminate in the event of his failure to achieve the necessary competencies within the prescribed period.

[41] I am driven, ineluctably, to the conclusion that he was not appointed in terms of regulations 15 and 16. He represented to the board that he was in possession of a certificate verifying that he met the minimum competencies required, and he was appointed unconditionally. He did not sign a performance agreement.

[42] The conclusion to which I have come finds support in the salary package awarded to Mr Qaba. Section 89 of the MFMA provides for the parent municipality to determine the upper limits of salary, allowances, and other benefits of a CEO and senior management in the municipal entity. The municipality had adopted the upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers, proclaimed by the Minister for Cooperative Governance and published in the Government Gazette on 18 November 2022. It was common ground that the CEO of a municipal entity is entitled to the annual total remuneration package equivalent to that for managers directly accountable to a municipal manager in terms of the said upper limits. These upper limits provide guidelines and stipulate a minimum, midpoint and maximum remuneration package, dependent on the competencies of the individual appointed. The

municipality is a category 8 municipality as defined in these provisions. Mr Qaba was appointed on the maximum salary permissible under these upper limits. His salary package does not reflect any allowance for the fact that he had not met the competency levels prescribed for the post.

[43] To summarise, Mr Qaba represented to the board, by the submission of his CV that he did possess the minimum competencies required for the position. He was appointed, unconditionally, for a period of five years. The fact that he was perceived to be fully competent is borne out by his remuneration package at the highest permissible level for the CEO of a municipal entity. Thus, the decision to appoint him was materially influenced by an error of law and was unlawful.

[44] If it is accepted that the board were aware of the shortcomings in his competency levels, his appointment was still not subject to the attainment of further qualifications. In these circumstances the decision to appoint Mr Qaba, unconditionally, was materially influenced by an error of law, was not rationally connected to the information before the board and was unlawful. In fixing his remuneration, the board failed to give consideration to relevant considerations, being his insufficient competency levels, and their decision in this regard was not rationally connected to the information before them.

[45] In conclusion, Mr Buchanan emphasised that the municipality had, at all material times, a representative present at meetings of the selection committee and during the process of selection. Thus, he submitted, that it was not open to the municipality, who raised no objections during the process of selection, to seek now to set aside the appointment of Mr Qaba. He submitted that it has only occurred as a consequence of the demands of the Minister to which I have referred earlier. I think that there is merit in the submission relating to the Minister and, for the reasons set out earlier, the Minister's perception of the legal position was incorrect. But that cannot redound to Mr Qaba's credit where the appointment in dispute was made irregularly and unlawfully to a position in a public entity, managing public funds.

The relief

[46] Section 8 of PAJA empowers a court in proceedings for judicial review to grant 'any order that is just and equitable'. Its remedial power is bounded only by considerations of justice and equity.[43] Mr Ngqakayi, on behalf of Mr Qaba, submitted that it would not be just and equitable to set aside the decision to appoint him, as it would be unduly prejudicial to him. He argued that Mr Qaba had taken life changing decisions on account of his appointment and had rejected other employment opportunities elsewhere. These are, of course, matters that are material to the exercise of my discretion.

[47] However, as I have said, Mr Qaba responded only to the first advertisement. It is difficult to comprehend on what basis it was conceived that he qualified for the appointment. He submitted his CV which purported to confirm that he had a certificate from National Treasury verifying that he had met all the competency levels required. This was not true, he

was subsequently appointed, unconditionally, contrary to the provisions of s 107 of the MFMA and the competency regulations and awarded a salary package, which he continues to receive, at the upper limit permissible for the post, for which he was not qualified. On consideration of all the factors, I consider that the only appropriate relief is to review and set aside the decision to appoint Mr Qaba.

[48] In the result, it is ordered that:

1. The decision taken by the third to seventh respondents, in their capacities as directors and members of the board of the second

respondent, on 15 June 2023, to appoint the first respondent to the position of chief executive officer of the second respondent, is hereby reviewed and set aside.

2. The first to seventh respondents are to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant:

Adv O Ronaasen SC

Instructed by:

Kuban Chetty Inc, Gqeberha

For 1st Respondent: Mr Ngqakayi

Instructed by: Ntlabezo Attorneys, Gqeberha

For 2nd – 7th Respondent: Adv R Buchanan SC

Instructed by:

Peyper Attorneys c/o

Struwig Jaftha Potgieter Inc, Gqeberha

Date Heard:

22 February 2024

Date Delivered: 09 April 2024

[1] Act 3 of 2000.

[2] Promulgated in terms of the Municipal Finance Management Act in Government Notice R493 published in Government Gazette 29967 on 15 June 2007, as amended by Government Notice R1146 published in Government Gazette 41996 on 26 October 2018.

[3] Act 32 of 2000.

[4] Section 93E and 93G of the Systems Act.

[5] Section 93J.

[6] Clause 7 of the Service Delivery Agreement concluded in July 2022.

[7] In terms of rule 53(1)(b).

[8] Initially the record was incomplete, but the missing portion was provided on 17 January 2024.

[9] Act No 13 of 2005.

[10] Section 45(1) provides: 'No government or organ of state may institute judicial proceedings in order to settle an

intergovernmental dispute unless the dispute is declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of the Chapter were unsuccessful.'

[11] See Basic Education for All and Others v Minister of Basic Education and Others 2014 (4) SA 274 (GP) at para 33.

[12] Section 93A and 93D(2)(a).

[13] Published under Government Notice 21 in Government Gazette 37245 of 17 January 2014 in terms of the Systems Act.

[14] Section 120 empowers the Minister to make regulations and issue guidelines by notice in the gazette and after consultation with organised local government representing local government nationally concerning numerous issues relating to the Systems Act.

[15] Section 93J(1) of the Systems Act provides that: 'The board of directors of a municipal entity must appoint a chief executive officer of the municipal entity'.

[16] Section 93J(2) of the Systems Act.

[17] Section 93A(b) of the Systems Act provides that: 'The parent municipality of a municipal entity must allow the board of directors ... of the municipal entity to fulfil their responsibilities.'

[18] Afriforum NPC v Minister of Tourism and Others and a similar matter 2022 (1) SA 359 (SCA) at para 49; and Minister of Education v Harris 2001 (4) SA 1297 (CC) para 17-19.

[19] Section 72(2A) of the Systems Act.

[20] Section 72(1) of the Systems Act.

[21] Section 54A relates to the appointment of municipal managers and acting municipal managers in a municipality.

[22] Section 56 provides for the appointment of managers directly accountable to municipal managers in a municipality. They do not find application to CEOs in a municipal entity.

[23] The functions of the selection panel are circumscribed in regulations 13, 14, 15 and 16.

[24] Regulation 17(2).

[25] Section 93J and 93A(b).

[26] Published under Government Notice 493 in Government Gazette 29967 of 15 June 2007.

[27] Section 93 of the Systems Act.

[28] Section 95 of the MFMA.

[29] Section 96 and 97 of the MFMA.

[30] Section 107 of the MFA.

[31] The competency regulations were issued by the Minister pursuant to the powers vested in him in s 168 of the MFMA.

[32] The material portion of the regulation states: 'The ... chief executive officer of a municipal entity must ensure that competency assessments of all financial officials and supply chain management officials are undertaken in terms of Regulation 16 of the Local Government: Regulations on Appointment and Conditions of Employment of senior managers in order to identify and address gaps in competency levels of those officials, as part of the recruitment process.'

[33] In terms of the definitions of the section contained in the competency regulations 'financial official' is defined to include an accounting officer.

[34]Natal-Joint Municipal Pension Fund v Endumeni Municipality 2012

(4) SA 593 (SCA).

[35] Para 18

[36] Competency regulation 16(1)(a).

[37] Competency regulation 16(1)(b)(i).

[38] In terms of s 107 of the MFMA.

[39] See s 2 of the MFMA.

[40] Regulation 2(2) of the competency regulations.

[41] Regulation 3 of the competency regulations.

[42] At the hearing of the review application Mr Qaba contended that he had now achieved the required competency levels. No verifiable

proof for the assertion has been produced and the board did not support him on this.

[43] State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) at para 53; Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011

(4) SA 113 (CC) at para 82.

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