

SOUTH AFRICA / JUDGMENT

Notyawa v Makana Municipality and Others (683/2017) [2017] ZAECHGC 138 (30 November 2017) [2017] ZAECHGC 138

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Roberson

CASE / FILE NUMBER

683/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO 683/2017

DATE

HEARD: 17/11/2017

DATE

DELIVERED: 30/11/2017

In

the matter between

MBULELO

PAUL GLADSTONE NOTYAWA APPLICANT

and

MAKANA

MUNICIPALITY 1ST

RESPONDENT

THE

MEMBER OF THE
EXECUTIVE COUNCIL:

CO-OPERATIVE
GOVERNANCE AND TRADITIONAL

AFFAIRS: EASTER CAPE NOMINE OFFICIO 2ND
RESPONDENT
PAMELA
YAKO NOMINE
OFFICIO 3RD
RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] The applicant brought an application for an order reviewing and setting aside certain decisions of the first and second respondents (the Municipality and the MEC respectively), and other relief. I dismissed the application with costs and the applicant has applied for leave to appeal against my decision.
- [2] On 12 March 2015 the applicant was appointed by the council of the of Municipality as municipal manager in terms of s 54A of the

Local Government:

Municipal Systems Act 32 of 2000 (the Systems Act). Following his appointment, by letter dated 24 April 2015, the MEG, acting in terms of s 54A (8) of the Systems Act, informed the mayor of the Municipality that he was not satisfied that the appointment was in line with the provisions of s 54 (he must have meant s 54A) because the applicant did not meet the minimum requirements for the position. The MEG instructed the Municipality to re-advertise the post. On 8 May 2015 the council resolved to accept the findings of the MEG and to re-advertise the post. On 29 May 2015 the applicant was informed by letter that the MEG did not concur with the council's recommendations and that his application was unsuccessful. A minute of a council meeting on 24 August 2015 recorded that when the council met on 8 May 2015 it tacitly rescinded its resolution of 12 March 2015 and recorded further that the council resolved that its resolution of 12 March 2015 be rescinded.

- [3] In his application, which was brought as a legality review, and expressly not brought in terms of the Promotion of Administrative

Action Act 3 of 2000 (PAJA), the applicant sought to review and set aside the decisions of the Municipality to re- advertise the post and to rescind its resolution to appoint him. As against the MEC, he sought to review and set aside the MEC's decision not to appoint him alternatively the refusal of the MEC to appoint him. Further relief sought was a declarator that he had been lawfully appointed as municipal manager and an order that the Municipality conclude an employment contract with him with effect from 1 April 2015 with full salary and benefits.

[4] Prominent at the hearing of the application was a contention by the Municipality and the MEG that the impugned decisions constituted administrative action and that the applicant should have brought the application in terms of PAJA. In that case, so it was contended, he should have brought an application in terms of s 9 of PAJA for an extension of the 180 day period within which an

application for a review of administrative action should be brought.

[5] I decided that the decisions did constitute administrative action and that the applicant should have proceeded in terms of PAJA and that because his application was launched outside the 180 day period he should have brought a substantive application in terms of s 9 of PAJA. Because he did not do so, his application for review could not be considered. (Opposition to Urban Tolling Alliance v South African National Roads Agency [2013] 4 All SA 639 (SCA) at para [26].) I was of the view that even if he had brought a substantive application, his explanation for the delay, which was contained in his founding affidavit, was not full or reasonable and it would not have been in the interests of justice to grant an extension. I considered various factors including the mootness of the relief claimed and the prospects of success in the application. I was further of the view that even if this had been a legality review, the delay was unreasonable and the same factors I considered would not have favoured condonation for the delay.

[6] The mootness point arose in relation to the conclusion of an employment contract between the applicant and the Municipality with

effect from 1 April 2015. Because of the provisions of s 57 (6) (a) of the Systems Act such a contract would have terminated one year after the election of the next council of the Municipality. The Municipal elections were held in August 2016 and the application was heard in July 2017.

[7] The substance of the grounds of appeal was that I erred in finding that PAJA was of application. Reference was made to the decision in *Member of the Executive Council for Co-operative Governance and Traditional Affairs v Imbabazane Municipality and Others* [2013] JOL 30050 (KZP). In that matter the MEC obtained an order, inter alia, declaring that the second respondent's appointment as municipal manager of the first respondent had terminated by operation of law, and that his appointment or continued employment after the date of termination was null and void. The court found that the MEC was entitled to bring the application as a legality review and not in terms of PAJA. In my view, and as was submitted on behalf of the Municipality, the facts of that matter were different and no decision had been taken in terms of a statutory procedure, as was the case in the present matter.

[8] I relied for support in my decision on the judgment of Pickering J in *Mlokoti v Amathole District Municipality and Another* 2009 (6) SA 354 (E) in which he found that the decision to appoint the second respondent as municipal manager was an administrative act. As was

further submitted on behalf of the Municipality, it was not suggested on behalf of the applicant that Pickering J was wrong.

- [9] A further ground of appeal, and this relates to mootness, was that I erred in not finding that an order of invalidity of the Municipality's decision to re-advertise the position of municipal manager and to rescind its decision to appoint

the applicant, would entitle the applicant to institute an action for constitutional damages. That submission in my view leaves out of the equation the question of delay, either in terms of PAJA or the common law. My decision on the question of delay and the lack of a substantive application for an extension of the 180 day period precluded me from deciding the merits of the application. I went further in that even if a substantive application for an extension of time had been brought, I was of the view that it would not have been in the interests of justice to grant an extension. Reliance was placed by the applicant on the judgment in *Kouga Municipality v De Beer and Another* 2008 (5) SA 503 (E). In that matter the decision of the municipality to withhold its consent to the cession of a lease between it and the respondent was found by the court a quo to be unlawful and unreasonable and was set aside. It was submitted on behalf of the appellant that the court a quo erred in not finding that the relief sought was academic. The period of the lease in question had expired the day before judgment was delivered. Chetty J, writing for the full court, was of the view that the remedy which the court a quo had in mind was an action for constitutional damages and the appellant's submission was rejected. In the present matter no decision was made on the validity or otherwise of the impugned decisions. The right to institute an action for constitutional damages therefore did not arise.

- [10] On the question of delay, it was submitted on behalf of the appellant that the consideration of the explanation for a delay was different when it came to a legality review. Reference was made to the judgment in *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at para [37] where the following was stated:

"While it is so that the case cannot be decided on an assumption of the appropriateness of PAJA as a regulatory framework if legality review might yield a different result, this need not be an insurmountable hurdle to disposing of the present matter within the confines of PAJA. It may well be that there are differences, even significant differences, between condonation in terms of s 9 of PAJA and unreasonable delay under legality review in some cases, but this is not so here. In the present matter, for reasons set out below, the delay is found to be both unreasonable and outside of the 180-day time limit. The practical implication is that, on these particular facts, it is essentially the same enquiry conducted by the court as would be the case if assessing the application for condonation within the framework of legality review. The delay in instituting review proceedings in terms of the principle of legality would have been unreasonable and would not have been met with condonation, for the same reasons that are set out below. Khumalo confirmed that unreasonable delay in legality review proceedings must be considered in the broader context of the matter, including

the prejudice that would result for other parties and the consequences of setting aside an action or decision."

[11] In my view this passage does not assist the applicant in the particular circumstances of his case. I considered the explanation

for the delay both as if it was a review in terms of PAJA or a legality review, and was of the view that in either case, the applicant would not have succeeded.

[12] For the above reasons I am of the view that an appeal would not have a reasonable prospect of success.

[13] It was submitted on behalf of the applicant that there was a compelling reason for granting leave to appeal, as envisaged in s 17

(1) (a) (ii) of the Superior Courts Act 10 of 2013. Reference was made to Aurecon (supra) at para [34] where Mbha AJ stated:

"An interesting question arose during the hearing: Is an administrator's right to review its own decision sourced in PAJA or the broader principle of legality? The position in our law on this question is presently uncertain."

In the footnote to this statement Mbha AJ stated:

"In *Khumalo and Another v MEG for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) (2014} (3) BCLR 333; [2013} ZACC 49) this court considered the nature of an application that was made in terms of s 158(1)(h) of the Labour Relations Act 66 of 1995 to review the administrative acts of decision making officials. In para 28 the majority found that the 'true nature of the application [was] one for judicial review under the principle of legality'. The minority, on the other hand, in para 92, found that 'the procedure for bringing [the] application to court was governed by the PAJA'. More generally, the interplay between review under PAJA and legality review has been extensively discussed and has, at times, given rise to differing interpretations in this court's jurisprudence. See the cases of *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2} SA 674 (CC) (2000

(3) BCLR 241; [2000] ZACC 1); *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) (2006 (1) BCLR 1; [2005] ZACC 14); *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) (2008

(1) BCLR 1; [2007] ZACC 20); *A/butt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) (2010 (5) BCLR 391; [2010] ZACC 4)."

[14] That does not in my view necessarily mean that in every matter where the nature of the application is in dispute there is uncertainty.

Leaving aside the question of delay, in the present matter, in my view, and especially in the light of the Mlokoti judgment (supra), the dispute was not such as to warrant leave to appeal for compelling reasons.

[15] Order

The application for leave to appeal is dismissed with costs, such costs to include, in the case of the second respondent, the costs of two counsel where so employed.

J M ROBERON

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv A Beyleveld SC, instructed by Wheeldon Rushmere & Cole Incorporated, Grahamstown

For the 1st Respondent Adv T J M Paterson SC, instructed by Whitesides Attorneys, Grahamstown

For the 2nd Respondent: Adv R Quinn SC and Adv P Benningfield SC, instructed by NN Dullabh & Co, Grahamstown

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