

SOUTH AFRICA / JUDGMENT

Plettenberg Bay Ratepayers and Residents Association and Another v Bitou Municipality and Others (11309/2020) [2024] ZAWCHC 71 (4 March 2024)

[2024] ZAWCHC 71

COURT

Western Cape High Court, Cape Town

BEFORE

Bhoopchand

CASE / FILE NUMBER

11309/2020

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FLYNOTES:

MUNICIPALITY – Vehicles – Leasing
for mayor and deputy – Ratepayers association seeking review
of resolution – Contending that impermissible
benefit –
Association identified incorrect legislative authority on which to
premise their case – Resolution
is one of acquisition and
not remuneration – Municipality had authority to procure
vehicles for specific purpose –
Authority arising from
Constitution and Systems Act – Application for judicial
review dismissed – Local Government: Municipal Systems Act
32 of 2000 – Constitution, s 156.
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
REPORTABLE

CASE: 11309/2020
PLETTENBERG BAY
RATEPAYERS & RESIDENTS FIRST
APPLICANT
ASSOCIATION
PETER
GAYLARD SECOND
APPLICANT
AND
THE BITOU
MUNICIPALITY FIRST
RESPONDENT
MSIMBOTI PETER
LOBESE SECOND
RESPONDENT
SANDISO
GCABAYI THIRD
RESPONDENT
THE SPEAKER OF THE
COUNCIL OF BITOU FOURTH
RESPONDENT
MUNICIPALITY
THE COUNCIL OF BITOU
MUNICIPALITY FIFTH
RESPONDENT

JUDGMENT

Bhoopchand AJ

1. This case is not about the propriety or morality of leasing opulent vehicles for municipal political office bearers at the height of the COVID pandemic in 2020 when morbidity, mortality, and austerity swept the land. It is about the rule of law and judicial intervention when municipal councils act illegally. In this instance, it is about whether the Applicants have made out a case alleging unlawfulness.
2. The Plettenberg Bay Ratepayers and Residents Association ("The First Applicant"), through its chairperson ("the Second Applicant"), ask for judicial review of a resolution of the Bitou Municipality to lease vehicles for its Executive Mayor and Deputy Executive Mayor ("the resolution"). The Bitou Municipality is an area of breathtaking natural beauty, where nature's gardens conquer the sweeping hills and valleys, where its waterways rush to nestle at the foot of the eastern headland that hangs precipitously over the ebbs and flows of the warm Agulhas current. It is an area where the stark inequities of our beloved country manifest alongside each other.

3. The Applicants rely on the principle of legality; alternatively, the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") for judicial review of the resolution. The First Applicant comprised 800 members in the Plettenberg Bay area of the municipality when it instituted this application.
4. Applicants seek to set aside the resolution of the Bitou Municipality cited as the First Respondent ("the Municipality"). The Executive Mayor of the Municipality is the Second Respondent, and the Deputy Executive Mayor is the Third Respondent. The Fourth and Fifth Respondents are the Speaker of the Municipal Council and the Municipal Council, respectively.
5. The resolution taken on 11 June 2020 is accurately reproduced below:

"PROCUREMENT OF VEHICLE USED FOR POLITICAL OFFICE BEARERS

Council File Ref: 6/2/1/9/1 Resolved:

1. That Council approves the leasing of the vehicle for the Executive Mayor and cost not to exceed R700 000.
2. That the existing lease agreement of the vehicle used by the Deputy Executive Mayor be extended till the end of his term of office, if possible.

Proposed: Councillor M. M. Mbali

Seconded: Councillor L.M Seyisi

To be actioned by: Director: Financial Services Section".

6. The Chief Financial Officer ("the CFO") prepared a report dated 3 June 2020. The CFO stated that the report's purpose was to seek the Municipal Council's approval to procure vehicles for the Executive Mayor and the Deputy Executive Mayor in line with the new cost containment regulations. The CFO cites the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA") and the regulation to it, i.e., the Municipal Cost Containment Regulations of 2019 ("the Cost Containment Regulations" / "the Regulations")^[1] as the legislation relevant to the report. The CFO circulated the report as an addendum to the agenda for the 11 June meeting of the Municipal Council.

THE APPLICANTS' CASE

7. The Applicants rely entirely on the Remuneration of Public Office Bearer's Act 20 of 1998 ("the Remuneration Act") and its 2020 revision notice, The Determination of Upper Limits of Salaries, Allowances and Benefits of Different Members of Municipal Councils ("the 2020 Determination"), as the basis for motivating this application for judicial review.^[2] At first blush, it seemed incongruous that the Applicants should rely on a remuneration statute determining the upper limits of salaries and allowances for public office bearers as authority for challenging a resolution that sought to procure cars for political office bearers. The court put this proposition to the Applicants' Counsel. Applicants' Counsel understood

that if the Remuneration Act and its Determinations did not apply to the relief they sought, the Applicant's case for judicial review would be stillborn.

Surprisingly, the Applicants did not seek a review of the decision from the perspective of the MFMA and its Cost Containment Regulations, the legislation cited by the CFO as relevant to the report. The court must consider the Remuneration Act and its notices to understand the Applicants' case.

8. The Remuneration Act provides a national framework for determining the salaries and allowances of the President, members of the National Assembly, permanent delegates to the National Council of Provinces, Deputy President, Ministers, Deputy Ministers, traditional leaders, members of provincial Houses of Traditional Leaders and members of the Council of Traditional Leaders. Furthermore, it provides a framework for determining the upper limit of salaries and allowances of Premiers, members of Executive Councils, provincial legislatures and Municipal Councils and a framework for deciding pension and medical aid benefits.[3]
9. Section 7 of the Remuneration Act deals with the upper limits of salaries and allowances of members of municipal councils. Section 7(1) provides for the Minister of COGTA to consider a prescribed set of factors[4] in determining the upper limits of salaries, allowances, and benefits and to publish the Determination in the Government Gazette. The Minister of COGTA has issued Determinations since at least the year 2000.
10. The Minister of COGTA published the 2020 Determination on 24 April 2020[5]. This Determination and the Cost Containment Regulations took effect, coincidentally, on the same day, i.e., 1 July 2019. [6] The preamble to the 2020 Determination, which places its role in perspective, states that:

"the salary and allowances of a councillor are determined by that municipal council by resolution of a supporting vote of the majority of its members, in consultation with the Member of the Executive Council responsible for local government in each province, having regard to the upper limits as set out hereunder, the financial year of a municipality and affordability of municipality to pay within the different grades of the remuneration of councillors, including the austerity measures as approved by national Cabinet".

11. Municipal Councils exercise independent power to determine remuneration, but the Determinations constrain the upper limits. The Determinations deal with, among others, the allowances of various categories of councillors and how councillors can claim travel allowances for using their privately owned vehicles. In addition, the Determinations pronounce on the provision of municipal-owned cars by municipal councils for the official use of its political office bearers in the context of claiming travel allowances.
12. Item 9(1) (e) of the 2020 Determination states that a councillor is permitted to use a municipal-owned motor vehicle in the following circumstances:

"A councillor may, in exceptional circumstances and upon good cause shown, and with the approval of the Mayor or Speaker, utilise the municipal-owned vehicle for official purposes. Provided that the municipal council must, in line with applicable legislation and approved municipal council policy, exercise prudent financial management to ensure that the provision of motor vehicle (sic) does not undermine the need to prioritise service delivery and sustain viable municipalities."

13. The Applicants accept that when a councillor's vehicle is under repairs or public transport is unsuitable; a municipal council may permit the councillor to use a municipal-owned vehicle for a more extended period rather than a single trip. The Applicants contend correctly that the clause does not contemplate providing the Executive Mayor or his deputy with cars for use beyond their performance of official duties.
14. The 2020 Determination advises that councillors use municipal-owned vehicles for official duty alone. The Determination defines the "tools of trade" as the resources provided by a municipal council to councillors to enable them to discharge their responsibilities most efficiently and effectively. The vehicle remains an asset of the municipality concerned. Section 15 of the 2020 Determination tabulates the items regarded as tools of trade. The list does include motor vehicles.
15. The history of the Determinations relating to the provision of municipal-owned motor vehicles in the context of travel allowances is informative. The court shall restrict this overview to the sub-items of the Determinations pertaining to the usage of municipal-owned vehicles for full-time councillors. As early as 2004, the Determinations acknowledged that municipal councils could make vehicles available to councillors for official use. Councillors availing municipal-owned cars at the behest of the municipal council for official purposes, including their attendance at ceremonial functions, could not claim travel allowances. The 2004

Determination

singled out full-time Executive Mayors and full-time Mayors of grade 6 municipalities for higher travelling allowances as part of their total remuneration package. The Mayors could, in addition, claim allowances for official travel outside of the municipality and use a council-owned vehicle when performing ceremonial duties.

16. By the time the 2014 Iteration of the Determination[7] took effect, municipal councils were permitted to make vehicles available to their executive mayors or mayors, deputy executive mayors or speakers where applicable, for use on official business. The use of municipal vehicles for official purposes was in addition

to the travel allowances they received for using their private cars. Councillors could structure their total remuneration package by adding allowances to their basic salary, provided it did not exceed a fixed percentage of their total remuneration. Municipal councils could make vehicles

available to other councillors for official business with the proviso that the councillor would not be entitled to a travel allowance. Councillors delegated to attend specific functions beyond the scope of their work could use municipal cars. The term "tools of trade" was defined. The Determination itemised a councillor's tools of trade. The list did not include motor vehicles.

17. The preamble to the 2017 Determination[8] spoke of austerity measures introduced by the national Cabinet. Councillors could utilise municipal-owned vehicles in exercising their official duties, provided that the municipal council exercised prudent financial management to ensure that the provision of motor vehicles did not undermine the need to prioritise service delivery and sustain viable municipalities. The Mayor or Speaker could sanction the usage of municipal vehicles in exceptional circumstances and upon good cause shown. A councillor using a municipal-owned car for official purposes would not be reimbursed for kilometres travelled.
18. The 2023 Determination[9] repeats reference to the austerity measures approved by the National Cabinet. Councillors could continue structuring their basic salary to allow for motor vehicle allowances. The exceptional circumstances and good cause shown criteria for using municipal-owned vehicles are still in force. A councillor using a municipal car for official purposes would not be reimbursed for kilometres travelled.
19. The Determinations never prohibited political office bearers' official use of municipal vehicles.
20. The Applicants refer to sections 167(1) and 167(2) of the MFMA to argue that the resolution benefits the councillors. These sections of the MFMA relate to remuneration. The Applicants contend further that the Municipality procured the cars for the use of the Executive Mayor and his Deputy beyond the performance of their official duties. The resolution, they assert, seeks to locate the provisions of motor vehicles as a species of the "tools of trade" necessary to execute mayoral responsibilities. Applicants contend that the Municipality attempted to escape the clutches of clause 9 of the 2020 Determination by describing the acquisition of vehicles for its Executive Mayor and his deputy as tools of trade.
21. The Applicants contend that the resolution constitutes a breach of clauses 9 and 15 of the Determination and is therefore unjustified, unreasonable, and irrational.

THE MUNICIPALITY'S ANSWER

22. The Municipal Manager deposed to the answering affidavit on behalf of the Municipality. The Municipality admitted that it had provided vehicles to the two political office bearers in the past but averred that it had acted lawfully. As for the resolution, the Municipal Manager asserted that the Municipal Council had legislative authority to purchase or lease vehicles for an authorised purpose.[10]

23. Regulation 6(1) of the Cost Containment Regulations expressly provided authority for the procurement of vehicles. The resolution accords with the cost-containment objectives of the Regulations. The 2020 Determination and sections 167(1) and 167(2) of the MFMA are irrelevant to the relief sought. No remuneration of a municipal councillor is at issue in the resolution, nor do the Applicants raise remuneration as part of their case. The resolution does not involve the provision of any general remuneration, bonus, bursary, loan, advance, or other benefit to the Executive Mayor and his deputy in contravention of section 167(2).
24. The Municipal Manager stated that section 7 of the 2020 Determination also provided authority to the Municipal Council to purchase or lease vehicles for an authorised purpose. The resolution did not make any reference to the tools of trade. The report by the CFO referred to the tools of trade in their ordinary meaning, i.e. the execution of their official duties. The Municipal Manager concludes the answering affidavit by stating that the challenge to the resolution based on PAJA or the principle of legality is without substance.
25. In the written representations on its behalf, the Municipality argued that the application is legally invalid for its purpose, and the facts as pleaded do not support a cognisable cause of action. The Determination was directed at salaries, allowances, and benefits, none of which were the subject of the resolution. The procurement of vehicles was not outlawed by any objective legal interpretation of the 2020 Determination. The Determination authorises a municipal councillor to utilise the municipal-owned vehicle for official purposes. There is no averment or proof that the political office bearers would use the municipal-owned vehicles for anything other than official purposes.

THE APPLICANTS IN REPLY

26. In the replying affidavit, the Applicants persisted with the allegation that the Municipality procured the vehicles for the day-to-day use of the Executive Mayor and his deputy. The continued use of the cars after the 2017 Determination was irregular. The Applicants maintained that the Remuneration Act applied, and the provision of motor vehicles was an impermissible benefit extended to the two political office bearers.
27. The Applicants then changed tack and attacked the resolution from the perspective of the Regulations. They asserted that the Municipality did not have a policy governing the use and control of vehicles. The objective of the Regulations was not meant to permit expenditure that would be impermissible under other enactments. The Regulations placed a ceiling on the price of vehicles a municipal council could acquire if the acquisition were permissible. Sub-regulation 6(1) of the Regulations is not permissive but regulatory and is not lawful authority for the Municipal Council to acquire vehicles.
28. The Applicants dismissed the meaning given to the "tools of trade" by the Municipal Manager. They repeated that the municipality used it as a loophole to benefit an official. Applicants criticised the suitability of the information provided in the CFO's report and the adequacy of the information regarding the legislation applicable to the resolution.

29. The Applicants cannot craft a new case in the replying affidavit.[11] To their credit, the Applicants did not pursue any new allegations raised in the replying affidavit in their written heads or oral arguments.[12]

ANALYSIS

30. The Applicants allege that it was unlawful for the Municipality to provide vehicles for its councillors save in exceptional circumstances since 2017. The Applicants contend that the Municipal Council did not have the authority to procure vehicles, at least not for their use beyond official duties. Entrusting a councillor with the exclusive enjoyment of a vehicle that can be used as and when

desired is not such a circumstance.[13] The Applicants rely entirely on the provisions of the Remuneration Act and the 2020 Determination to support their application. The Applicants state categorically that the resolution constitutes a breach of clauses 9 and 15 of the 2020 Determination and is

unjustified, unreasonable, and irrational.

31. The Municipality asserts that the Remuneration Act and the 2020 Determination are irrelevant to its power to procure vehicles for its political office bearers. The Municipality insisted that it procured the cars for the official use of its political office bearers. The Municipality, in turn, relies upon the MFMA and the Cost Containment Regulations as the Municipal Council's authority to procure vehicles for the stated purpose.
32. Thus, the issue for determination is whether the Remuneration Act and the 2020 Determination are authorities for the Municipal Council to procure vehicles for its Executive Mayor and his deputy. As a part of this exercise, the court shall also test the authority of the Regulations and the MFMA to empower the resolution.
33. The Remuneration Act is what it purports to be. The Act deals with remuneration. The 2020 Determination is a guideline that pegs the upper limits of remuneration, benefits, and allowances permitted at the local government level. The 2020 Determination acknowledges that municipal councils have the authority to determine the salary and allowances of a councillor. Even in remuneration matters, the Determinations do not attempt to usurp the authority of the local government to exercise its powers and functions.
34. The preamble to the 2020 Determination states that municipal councils determine the salary and allowances of a councillor by resolution of a supporting vote of the majority of its members in consultation with the member of the Executive Council responsible for local government in each province. Section 9 of the 2020 Determination further recognises the municipality's powers. It states that the usage of municipal-owned vehicles must align with applicable legislation and approved municipal council policy. It urges the municipality to exercise prudent financial management to ensure that assigning motor vehicles for the use

of its political office bearers does not undermine the need to prioritise service delivery and sustain viable municipalities.

35. The Remuneration Act and its Determinations do not prohibit the Municipality from procuring vehicles for official purposes. At best, it advises how a municipal council should permit its councillors to use the Municipality's existing fleet of vehicles within the context of remuneration and legitimate claims for travel allowances. Is the MFMA and the Regulations authority for the Municipality to acquire vehicles for the use of its political office bearers?
36. The CFO stated in his report that the procurement of vehicles for the Executive Mayor and the Deputy Executive Mayor was in line with the Cost Containment Regulations. The CFO noted that the law relevant to the information provided in his report was the MFMA and the Cost Containment Regulations. Neither of these statements ascribes authority to the MFMA or the Regulations.
37. The object of the MFMA is to secure sound and sustainable management of municipalities' fiscal and financial affairs by establishing norms, standards, and other requirements concerning the discharge of their functions. The Regulations were promulgated in terms of section 168(1) of the MFMA by the Minister of Finance with the concurrence of the Minister of Cooperative Governance and Traditional Affairs ("COGTA"). Section 168(1) permits the Minister of Finance, acting in concurrence with the Minister of COGTA, to make regulations or guidelines in 16 prescribed areas applicable to municipalities.[14] It took effect on 1 July 2019. The Regulations are directed at implementing cost containment measures and are aligned with the objects of sections 62(1)(a), 78(1)(b), 95(a), and 105(1) (b) of the MFMA. The latter sections of the MFMA exhort municipal officials to ensure that the municipalities use their resources effectively, efficiently, economically, and transparently.
38. The Regulations regulate the Municipal Council's acquisition of motor vehicles for political office bearers. As alluded to, the Municipal Council did not adopt the recommendations of its Municipal Manager, who recommended that it lease two new vehicles. Nor did the Municipal Council purchase new cars in line with Regulation 6.1 of the Cost Containment Regulations. The Municipal Council opted to lease a new vehicle for its Executive Mayor and to extend the lease on the Deputy Executive Mayor's vehicle. The Municipal Council exercised independent decision-making in formulating the resolution.
39. Like the 2020 Determination, the Regulations do not undermine the Municipal Council's power to procure vehicles for the official use of its political office bearers. Regulation 6 requires the accounting officer to provide the council with information relating to general and specific policies, including a policy that addresses the use of municipal vehicles for official purposes. Regulation 6 recognises the power of the Municipal Council to make and take the ultimate decision.

40. Neither the Regulations nor the MFMA permit nor prohibit the Municipal Council from acquiring vehicles for the stated purpose. What was the authority for the Municipal Council to procure cars for its political office bearers?
41. The Municipal Council's authority to make and take executive and legislative decisions arises from no lesser a legal instrument than the Constitution[15]. Section 156 of the Constitution has given extensive powers and functions to municipalities. Section 156(1) confers executive authority on local government to administer matters listed in Part B of Schedules 4 and 5 and any other matter assigned to it by national or provincial legislation. The powers of local government are subjected to definition and regulation by national and provincial governments when enacting local government legislation.[16] A municipality may make and administer bylaws[17] and exercise fiscal powers and functions[18]. Additionally, for issues that do not fit easily into the defined categories, section 156 (5) confers the right upon a municipality to exercise any power concerning a matter reasonably necessary for, or accidental to, the adequate performance of its functions. The power informing the adoption of the resolution sits comfortably within the latter provision.
42. The legislative instruments relevant to local government ingrain these rights. e.g., the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"), the Local Government: Municipal Structures Act 117 of 1998, and the MFMA translate the constitutional imperatives into legislation specific to the local government sphere. Section 11 of the Systems Act entrenches a municipality's executive and legislative authority. Section 11(1) enables a Municipality to exercise its legislative and executive authority within a determined area. Section 11(3) prescribes how a municipality exercises its powers. The Municipality thus had the authority to procure vehicles for a specific purpose. The authority arises from the Constitution and the Systems Act.
43. Once acquired by a Municipality, motor vehicles form part of its capital assets.[19] In the ordinary course, procuring vehicles would fall within the competency of a functionary who would use the procurement process and supply chain management plans to obtain them. The method of acquiring vehicles would fall into the category of administrative action. However, the decision to procure a motor vehicle for a specific purpose, i.e., for the official use of its political office bearers, is a policy issue[20] falling within the legislative competence of the Municipal Council. Carrying that decision into effect through the resolution is executive action. It required the Municipal Council to convene on 11 June 2020, consider the information and recommendations in the CFO's report, and decide whether to procure the vehicles for the particular purpose.
44. Neither the Remuneration Act nor the 2020 Determination or the Regulations and the MFMA are authorities for the Municipal Council's decision to lease a new vehicle for its Executive Mayor and to extend the lease on the car the Deputy Executive Mayor used. The Applicants' assertion that the vehicles were procured as tools of trade and for use beyond the performance of official duties does not lessen the futility of identifying the incorrect legislation to support this application. If these assertions were relevant and to the extent

that they constitute disputes of fact, the court would have probably accepted the Municipality's version.[21]

45. The Applicants have identified the incorrect legislative authority applicable to the legislation and have premised their entire case for judicial review on this authority. The resolution is one of acquisition and not of remuneration. In the context of this application, that has to be the end of the matter for the Applicants.
46. There is thus no scope for a judicial review premised on illegality in so far as the case presented by the Applicants is concerned. A review under PAJA would not have been competent either, even if the Applicants had managed to show that the resolution adversely affected their rights and had a direct external legal effect. A municipal council's legislative functions and executive powers are excluded from the ambit of a judicial review under PAJA in line with the doctrine of separation of powers. In categorising the powers exercised by the Municipal Council, the court recognises the difficulty in characterising the nature of a power exercised by all spheres of government into executive, legislative, or administrative categories[22].
47. Were there any prospects of success if the Applicants had grounded their case correctly?
48. Sub-Regulation 4 of the Cost Containment Regulations requires each municipality to develop, revise, adopt, and implement a cost containment policy consistent with the MFMA and the Regulations. The resulting Cost Containment policy must, among others, be reviewed annually, communicated on the municipality's website, and set out consequences for non-adherence to the measures contained therein. There is no indication that the Municipal Council complied with these provisions.
49. The CFO's report reproduces the content of sub-regulation 6 of the Cost Containment Regulations as the prescripts that the Municipal Council should follow to procure vehicles. Sub-regulation 6 of the Regulations refers to vehicles used for political office bearers. The content of sub-regulation 6.1 bears reproduction as it is pivotal to determining the ambit of the resolution.

"The threshold limit for vehicle purchases relating to official use by political office bearers must not exceed R700 000 or 70% (VAT inclusive) of the total annual remuneration package for the different grades of municipalities, as defined in the Public Office Bearers Act and the notices issued in terms thereof by the Minister of Cooperative Governance and Traditional Affairs, whichever is lower."[23]

50. The Cost Containment Regulations required the Municipality to use the government transversal contract mechanism to procure vehicles unless the Municipality could obtain the vehicles at a lower cost through other procurement procedures.[24] The Municipality's Accounting Officer or delegated official had to provide the council with specified information. The Municipal Council had to consider this information before deciding to procure a vehicle for the official use of its political office bearers.[25] The criteria included

the status of vehicles in use, the affordability options between purchasing and renting, the extent of service delivery backlogs, the type of terrain the vehicle would have to traverse, and any other policy of the council.

51. If the Municipality preferred the rental option, it had to be the most cost-effective option, and the cost had to be equivalent to or lower than that contemplated in sub-regulation 6(1). [26] The accounting officer had to review the expenditure regularly if the council opted to rent and ensure that the Municipality obtained value for money.[27] Regardless of their usage, the Municipality could only replace the vehicles at 120 000 km unless serious mechanical problems arose.[28] The accounting officer had to ensure a policy addressing the use of municipal vehicles for official purposes existed.[29]
52. The CFO of the Municipality stated in his report that the procurement of vehicles for the Executive Mayor and the Deputy Executive Mayor was in line with the Cost Containment Regulations. Had the report been consistent with the requirements of the Regulations, it would have contained information relating to service delivery backlogs, practical usage of the type of vehicle selected in the municipal terrain, any other policy of the council, and a policy that addresses the use of municipal vehicles for official purposes.[30]
53. The calculation of the value of the cars would appear inconsistent with Regulation 6(1). Adding finance charges over a 36-month lease to 70% of the office bearers' remuneration inflates the vehicles' total cost. Regulation 6(1) of the Regulations restricts the threshold limit for vehicle purchases to the lower value of R700 000 or 70% (VAT inclusive) of the total annual remuneration package.
54. Had the Applicants sought a judicial review of the resolution based upon the factors identified in the preceding paragraphs, provided the record of the debate that ensued before the adoption of the resolution, and supported their allegations about the perceived usage of the vehicles, the outcome may have been different. The court is in the dark about whether the Municipal Council addressed the aspects referred to in Regulation 6 of the Regulations or had the necessary policies in place in the debate leading to the adoption of the resolution. The parties did not make the record of the proceedings or the minutes thereof available to the court. But none of these issues matter as this is not the case that the court has to adjudicate. Neither did the Applicants attack the competency of the Municipal Council to exercise its executive and legislative functions or raise the acquisition of capital assets outside of a predetermined municipal budget.[31]
55. It is appropriate at this juncture to comment on the 2020 Determination and the Cost Containment Regulations. The Minister of COGTA produced the Determination and concurred with the Minister of Finance in promulgating the Regulations. The 2020 Determination and the Regulations took effect on the same day, i.e., 1 July 2019. The preamble to the Determination cites the austerity measures introduced by the National Cabinet, and item 9 advises municipal councils to provide municipal-owned vehicles for use by its political office bearers in extraordinary circumstances. Regulation 6(1), on the other

hand, suggests the purchase price of cars and sets a ceiling at a substantial amount.

56. Sub-regulation 7(6) (a) under the heading of travel and subsistence in the Cost Containment Regulations states that an official or a political office bearer of a municipality must utilise the municipal fleet, where viable, before incurring costs to hire vehicles. The Determination proposes using municipal vehicles in extraordinary circumstances only. The ambiguity in the provisions does not end here.
57. Regulation 6(1) links the purchase price of a vehicle for official use by political office bearers in the alternative to the R700 000 ceiling to 70% of the total annual remuneration package, whichever is lower, of the complete yearly remuneration package for the different grades of municipalities as defined in the Remuneration Act and its Determinations. This provision links the stipulated purchase price to the remuneration of a particular political office bearer. A reasonable interpretation of this clause could mean that a Municipal Council may elect to procure a vehicle for a specific political office bearer rather than procuring suitable vehicles for its fleet for use by its political office bearers. In circumstances where the Minister of COGTA produced the Determination and concurred in the formulation of the Regulations, these conflicting provisions need clarification and correction, if necessary. Their provisions need to be harmonious to complement each other.
58. While the Municipality will prevail in this application, they should not view their success complacently. Interested parties like the Applicants are legally empowered to call out the shortcomings in their practices and processes.[32]
59. The court turns to deal with the issue of costs. Counsel appointed by the Municipality submitted that Biowatch[33] should not apply if the Municipality prevails. The Municipality sought punitive costs orders against the Applicants in their written

submissions. In Biowatch, the Constitutional Court established the principle that generally, in litigation between the State and private parties seeking to assert a fundamental right, and the latter proves that the State has failed to fulfil its constitutional and statutory obligations, the State should bear the costs of litigants who have been successful against it. Ordinarily, no-cost orders should be granted against private litigants who fail. This application does not comprise constitutional litigation. It is about acquiring cars for use by political office bearers.

60. Biowatch does not apply. The Applicants were entitled to challenge the resolution, and there are no grounds to award punitive costs against them. The court sees no reason why costs should not follow the cause.

ORDER

61. The application for judicial review is dismissed with costs.

Bhoopchand AJ

Counsel for the Applicants: R J Howie

Attorney for the Applicants: M A Hurwitz Attorneys

Counsel for the Respondents: D.V D Merwe

Heads of argument prepared by: A-M de Vos SC, J P Snijders

Attorney for the Respondents: HDRS Inc.

This judgment was delivered to the parties by e-mail on 4 March 2024.

[1] The Municipal Cost Containment Regulations was published as general notice 317 in Government Gazette 42514 of 7 June 2019 to come into effect on 1 July 2019.

[2] The Applicants make a brief reference to the 2017 Determination when alleging that the First Respondent had acted illegally since 2017.

[3] Reproduced from the introduction to the Remuneration Act

[4] there are 9 altogether

[5] Government Notice R475 to the Remuneration Act in Gazette number 43246

[6] The Minister of Finance and the Minister of COGTA concurred in making the Regulations.

[7] Government Notice R64 to the Remuneration Act in Gazette number 37281

[8] Government Notice 313 to the Remuneration Act in Gazette number 40763

[9] Government Notice 3807 to the Remuneration Act in Gazette number 49142

[10] Para 70.4 of the answering affidavit.

[11] Director of Hospital Services v Mistry 1979

(1) SA 626 (AD) at 635H – 636D,

[12] Written arguments presented on behalf of the Applicants and oral arguments presented on behalf of both parties were regrettably

limited

[13] Para 15, FA

[14] None of the 16 areas refer directly to the procurement of vehicles for political office bearers, although 168(a) and (p) are of general application.

[15] The Constitution of the Republic of South Africa, Act 108 of 1996

[16] Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council [1998] ZACC 17; 1999 (1) SA 374 (CC) at para 35

[17] Section 156(2) of the Constitution

- [18] In accordance with section 229 of the Constitution
- [19] SA Metal & Machinery Co (Pty) Ltd v The City of Cape Town (9440/2010) [2010] ZAWCHC 442 (18 August 2010) at paras 26-27 on the ambit of what constitutes capital assets and references to 'Local Government Capital Asset Management Guideline - October 2008, on the National Treasury website.
- [20] Smith and Others v Stellenbosch Municipality and Others (unreported) (18381/2022) [2022] ZAWCHC 134 (11 July 2022) at para 38
- [21] This is in line with Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984
- (3) SA 623 (A) at 634E-635C.
- [22] See Fedsure supra and Diggers Development (Pty) Ltd v City of Matlosana and Another (47201/09) [2010] ZAGPPHC 15 (9 March 2010 at paras 28-39, (the latter for an exposition of the difficulty in characterising a particular decision., Smith and Others v Stellenbosch Municipality and Others, supra, at para 36
- [23] Sub-regulation 6(1)
- [24] Sub-regulation 6(2)
- [25] Sub-regulation 6(3)
- [26] Sub-regulation 6(3)(b)
- [27] Sub-regulation 6(4)
- [28] Sub-regulations 6(5) and 6(6)
- [29] Sub-regulation 6(7)
- [30] The necessary preconditions that must exist before an administrative power can be exercised, are referred to as “jurisdictional facts”- Kimberley Junior School v Head, Northern Cape Education Department 2010 (1) SA 217 (SCA) para 11, In the absence of such preconditions or jurisdictional facts, the administrative authority effectively has no power to act at all. Paola v Jeeva NO and Others [2003] ZASCA 100; 2004 (1) SA 396 (SCA) ([2003] 4 All SA 433) paras 11, 14 and 16, Ferndale Crossroads Share Block (Pty) Ltd v Johannesburg Metropolitan Municipality 2011 (1) SA 24 (SCA) para 22
- [31] Section 19 of the MFMA
- [32] Section 5 of the Systems Act: Rights and duties of members of the local community
- [33] Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC) at para 1

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