REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

14 JULY 2022
DATE

SIGNATURE

Case No: 54865/20

SOLLY DANIEL MOGALADI Applicant

and

TSHWANE ECONOMIC DEVELOPMENT AGENCY SOC LTD ("TEDA") First Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Second Respondent

HEAD ADMINISTRATOR Third Respondent

JUDGMENT

NDLOKOVANE AJ

INTRODUCTION

[1] This is an application to review and set aside the decision of the first respondent to *inter alia*; re-advertise the position of the Chief Executive Officer ("CEO"), which the applicant applied for and was appointed to by the Board ("the Board") of the first respondent.

[2] As a precursor to this application, the applicant approached this court in Part A hereof on an urgent basis to interdict the first respondent from appointing a CEO pending the finalisation of Part B herein.[1] This court accordingly granted the interim interdict sought. This interim interdict was granted on the 6th November 2020, with costs having being reserved for determination with the relief in part B. I hasten to mention that, these two applications are launched on different case numbers, the current one launched under case number:26791/2018, whereas part A launched under a different case number:54865/20. This is not conventional, as review proceedings are most of the time launched under the same case number as the main application.

[3] In essence the applicant approached this court for an order in the following terms:

3.1 The decision of the first respondent to re-advertise the position of the CEO which the applicant has applied for and was appointed to by the Board of the first respondent be reviewed and set aside and same be declared invalid, unlawful, and irrational.[2]

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1 Para 7 of the Applicant's Heads of Argument – p2; Caselines/paginated page – 4-34.
2 Para 2 of the Applicant's Heads of Argument – p1; Caselines/paginated page – 4-33.

3.2 The decision of the first respondent to seek concurrence on the appointment of the applicant from the second and third respondents on the appointment of the applicant to the position of the CEO be declared to be invalid, unlawful, and *ultra vires* with section 93J of the Municipal Systems Act 117 of 1998 ("MSA"), read together with section 6(2)(a)(i) of the Promotion of Administrative Justice Act of 3 of 2000("PAJA").

3.3 The decision of the second and third respondents to refuse concurrence on the appointment of the applicant to the position of CEO in the circumstances wherein the second and third respondents plays no role in the appointment of a CEO of the first respondent as per section 93J of the MSA be reviewed and set aside.

3.4 Declare the decision of the second and third respondents, to refuse concurrence on the appointment of the applicant to the position of CEO and for the position to be re-advertised, as invalid, unlawful, irrational, and *ultra vires* section 93J of the MSA read together with section 6(2)(a)(ii) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");[3] and

3.5 Declare that the whole conduct of the second and third respondents offends the principle of legality wherein the second and third respondents play no role in terms of section 93J of the MSA in the appointment of CEO of the first respondent.[4]

[4] This application is opposed by the first to third respondents.

THE PARTIES

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[3] Para 5 of the Applicant's Heads of Argument – p2; Caselines/paginated page – 4-34.
[4] Para 6 of the Applicant's Heads of Argument – p2; Caselines/paginated page – 4-34.

[5] The first respondent is **TSHWANE ECONOMIC DEVELOPMENT AGENCY SOC LTD ("TEDA")**, an organ of state, a state-owned company, which is a municipal entity of the second respondent, registered in terms of the companies Act and established with the primary purpose to accelerate the second respondent's economic development. The second respondent is **CITY OF TSHWANE METROPOLITAN MUNICIPALITY**, a municipality established in terms of Local Government Municipal Structures Act 117of 1998. The third respondent is the **HEAD ADMINISTRATOR**, appointed as the administrator of the second respondent, in terms of section 139(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996.

FACTUAL BACKGROUND

[6] The applicant was appointed CEO of the first respondent on 1 March 2015, for a period of five (5) years on a fixed term contract, which expired on 28 February 2020.[5]

[7] During November 2019, the first respondent advertised the position of CEO and the applicant applied for that position and was appointed by the board. The Board, in its letter of appointment marked as annexure SDM5 to the papers before me, sought concurrence on its appointment from the second and third respondents.

[8] On 23 March 2020, the chairperson of the Board addressed a letter to the Mayoral Committee of the second respondent seeking its concurrence on the appointment of the applicant.

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5 Para 9 of the Applicant's Heads of Argument – p2; Caselines/paginated page – 4-34; and Para 4.1 of the First Respondent's Heads of Argument – p3; Caselines/paginated page – 4-50.

[9] On 8 June 2020, the second respondent refused to grant concurrence regarding the appointment of the applicant as CEO.

[10] On 22 June 2020, the chairperson of the Board addressed a letter to the second respondent requesting reasons for the refusal of the concurrence.

[11] On 4 August 2020, the response to the request for reasons came from the third respondent. The response was coupled with the request to commence with the recruitment process of the CEO, in terms of annexure SDM13 annexed to the founding papers.

THE APPLICANT'S CASE

[12] In essence, the applicant's case is that the Board is the only body which decides on the appointment of a CEO and by seeking concurrence, as it has done, the Board abdicated its powers and acted contrary to the provisions of section 93J of the Systems Act, and to that extent, the decision to re-advertise the position of the CEO of the First respondent was invalid, unlawful, and irrational. This contention is denied by the first and second respondents. This then brings me to the next step, the question for determination by this court.

THE ISSUES FOR DETERMINATION

[13] The crisp question for determination is whether the concurrence sought is, in law, required for the appointment of a CEO?

[14] In amplification of its contention, the applicant further contended that it was sufficient for the first respondent to appoint the applicant as the CEO and out of courtesy inform the second respondent about the appointment. Further, the first respondent was not obliged or compelled by any statutory requirement to seek concurrence on his appointment to the position of CEO.

[15] In contrast, the first respondent on the other hand contends that the applicant's contention that only its Board has authority, competence and power to appoint its CEO is based on an extremely narrow interpretation of the wording of section 93J of the MSA and therefore incorrect. Instead, that a proper interpretation of section 93J of the MSA is only possible if regard is had to the context in which the section appears, so its arguments go. Also, that the context is provided by the other relevant sections of Chapter 8A of the MSA which deals with Municipal Entities such as the first respondent.[6] In this regard, the first respondent pointed out specific sections of the MSA which it averred were crucial to the proper interpretation of section 93J of the MSA.I shall deal with those later in this judgement.

[16] On the other hand, the second respondent's contentions are amongst others, that the first respondent is its entity for which it is the sole shareholder. Further that the MSA gives it the power to enter into Service Delivery Agreements ("SDA"), of which the terms thereof are that the first respondent must seek its concurrence for appointment of senior executives. In the light of that contention, the second respondent averred that the SDA has not been attacked in these proceedings and that such failure to attack was fatal to the attack on the decision

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6 Para 8 of the First Respondent's Heads of Argument – p6; Caselines/paginated page – 4-53.

to seek concurrence as the first respondent was obliged to seek concurrence from the second respondent.

[17] Further, the second respondent contends that it is entitled to get involved in the appointment of the CEO not only due to the provisions of the SDA but also due to the provisions of the MSA, which provide for the appointment of directors. Consequently, the second respondent submits that a CEO is a director and thus those provisions are equally applicable.

APPLICABLE LEGAL PRESCRIPTS

[18] It is apposite for me to interrogate the provisions of section 93J of the MSA at this stage. Section 93J provides:

> **93J Appointment of chief executive officer**
>
> "(1) The board of directors of a municipal entity must appoint a chief executive officer of the municipal entity.
>
> (2) The chief executive officer of a municipal entity is accountable to the board of directors for the management of the municipal entity."

[19] The first respondent, in its contention that a proper interpretation of section 93J of the MSA is only possible if regard is had to the context in which the section appears, it relied on the following sections of the MSA which are summarised as follows:

19.1 Sections 86C, 86C (1) and 86C (2) specifically deal with the establishment and acquisition of private companies;

19.2 Section 86D specifically deals with the legal status of private companies.

19.3 Section 93A(a) specifically deals with the duties of parent municipalities with respect to municipal entities.

19.4 Sections 93B(a), 93B(b) and 93B(c)(i) provide for the duties and responsibilities of municipalities having sole control over a municipal entity.

19.5 Sections 93D(1)(a) and 93D(1)(b) deals with municipal representatives' attendance of municipal entity's meetings.

19.6 Sections 93E(2)(a) and (b) provide for the appointment of directors.

19.7 Sections 93G(a) and (b) provide for the removal or recall of directors; and

19.8 Section 93H(1)(b) provides for the duties of directors (my emphasis)"

[20] Even further, the first respondent sought to rely on the *dictum* in ***Endumeni Municipality in which the Supreme Court of Appeal*** wherein it was held:

"*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming to existence."*

[21] Clause 26 of the SDA provides that:

"*New executive personnel, being the Chief Executive Officer and the Chief Financial Officer appointed permanently to vacant positions reflected on the organogram, or staff appointed to such positions that become vacant during*

the performance of this agreement, shall be appointed only upon agreement between the parties."

ANALYSIS

[22] Regarding the question for determination in the present case, I am of the view that on a proper construction of the authorities as aforementioned, the use of the phrase "must" in the provisions of section 93J (1) is mandatory that the Board of directors of a municipal entity appoint a chief executive officer of the municipal entity.

[23] It then follows that the obligation to appoint the CEO falls squarely on the Board of directors and no other person or persons. I therefore agree with the applicant that on proper reading of section 93J, the second and third respondents play no role whatsoever in the appointment of the CEO of the first respondent.[7]

[24] I now proceed to examine the above provisions in the light of the first respondent's contention that section 93J should be interpreted in the context in which it appears in relation to those provisions. In this regard, it has referred me to a plethora of the sections of the MSA, which in my view do not assist its case. I say so for the following reasons:

24.1 Sections 86C, 86C (1), 86C (2) and 86D have no relevance or bearing in the interpretation of section 93J.

24.2 Sections 93A(a), 93B(a), 93B(b) and 93B(c)(i) generally provide for the duties and responsibilities of municipalities. Nothing therein can be construed to grant any powers of concurrence to

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7 Para 17 of the Applicant's Heads of Argument – p4; Caselines/paginated page – 4-36.

the municipalities in the appointment of the CEO of a municipal entity as postulated by the first respondent.

24.3 Sections 93D(1)(a) and 93D(1)(b) provide sufficient safeguards in as far the interests of the second respondent is concerned as opposed to what is being bandied by the first respondent.

24.4 Sections 93E(2)(a) and (b), 93G(a) and (b) and 93H(1)(b) provide for the appointment of directors, the removal or recall of directors and the duties of directors respectively. Nothing in there can be construed as an inference that those sections be regarded as a point of reference in interpretating the mandatory powers of the Board found under section93J.

[25] In my view had the legislature sought the aforesaid provisions to have any bearing on the interpretation of section 93J, it would have done so expressly. For instance, the legislature would have expressly provided under the duties of the directors that they must appoint the chief executive officer of the municipal entity with the concurrence of the parent municipality.

[26] Since appointment of a chief executive officer of a municipal entity is expressly provided for in section 93J and there arises no need for such a power or duty to appoint to be inferred from any other provision of the MSA.

[27] However, the first respondent seems to be oblivious to the requirement in the same dictum of *Endumeni* referred to above that:

> "*The 'inevitable point of departure is the language of the provision itself', read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

[28] In my view the language of section 93J is simple and straight forward. There are no absurdities or ambiguities which renders it complex to interpret. It is in the context of service delivery by an external mechanism in the form of a municipal entity in terms of section 76 of the MSA that section 93J should be interpreted.

[29] The purpose of section 93J is specifically to make provision for the appointment of the CEO of the external mechanism. Had the legislature sought the municipality to be involved in that process, it would have expressly provided for that. The background to the preparation and production of the relevant provisions was to create an external mechanism in the form of a municipal entity with its own autonomy in order to deliver municipal services by way of a service delivery agreement between itself and the municipality.

[30] By the first respondent's own admission the board of directors appoint the CEO who in turn is accountable to it.[8]

[31] It is worth noting that section 81 of the MSA provides for the responsibilities of municipalities when providing services through service delivery agreements with external mechanisms. None of the provisions of section 81 suggests that section 93J could be construed as giving context to the interpretation contended by the first respondent. I therefore do not find it necessary to give an exposition thereto.

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[8] Para 11 of the First Respondent's Heads of Argument – p11; Caselines/paginated page – 4-58.

[32] I do not deem it necessary to interrogate the provisions of the MFMA as postulated by the first respondent since they do not form part of the document or the provision that is sought to be interpreted herein.

Whether the applicant's failure to expressly challenge the SDA is fatal to his case

[33] To answer this question, I am of the view that the SDA is central to these proceedings.

[34] It is worth noting that the applicant challenged the decision to re-advertise the position of the CEO as being invalid, unlawful and irrational. Such decision was taken by the first respondent after the second respondent refused to provide concurrence in the appointment of the applicant to the position of the CEO in terms of clause 26 of the SDA.

[35] Similarly, the decision to seek concurrence from the second and third respondents and the refusal thereof was challenged for being in contravention of section 93J of the MSA, in the circumstances wherein the second and third respondents play no role in the appointment of the CEO of the first respondent;[9]

[36.] The whole conduct of the second and third respondents in the circumstances was challenged for being an affront to the principle of legality wherein the second and third respondents played no role in terms of section 93J of the MSA in the appointment of the CEO of the first respondents.[10]

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9 Para 3 of the Applicant's Heads of Argument – p1-2; Caselines/paginated page – 4-33–4-34.

10 Para 6 of the Applicant's Heads of Argument – p2; Caselines/paginated page – 4-34.

[37] I therefore consider it disingenuous for the second respondent to contend that the applicant failed to challenge the SDA. At the heart of the applicant's challenge is the provisions of clause 26 of the SDA although not expressly formulated as such in the court papers.

[38] In my view the second respondent's contention that due to the applicant's failure to challenge the SDA, therefore its provisions and consequences thus remain is misconstrued.[11]

The second respondent's contention in this regard is premised on the dictum **in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*** as aforesaid.

However, my view is that it is in these very proceedings that the provisions of clause 26 of the SDA is being challenged and therefore whatever finding of this court, it will be in relation to the validity of the SDA.It is my further view that the applicant has made out a case for the relief sought in the notice of motion.

[39] Clause 26 of the SDA, purports to oblige the first respondent to seek concurrence of the second respondent in the permanent appointment of the CEO.I am of the view that as it speaks to permanent appointments, it is inapplicable herein. However, for the sake of putting the contention to rest, it is nonetheless my view that the clause is contrary to section 93J, it being the law, is therefore supreme over a contract. Accordingly, I find that clause 26, ought to be reviewed and set aside for being unlawful, invalid, irrational and *ultra vires*.

[40] The conduct of the second respondent in imposing an obligation on the first respondent to seek its concurrence in the appointment of the CEO and its refusal to grant such concurrence absence of any statutory provision in the MSA in that regard offends the principle of legality.

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[11] Para 2.8 of the Second Respondent's Heads of Argument-p6; Caselines/paginated page – 4-73.

[41] Even if my conclusion regarding the reach of the applicant's pleaded case is incorrect, the SDA, to the extent that it directly contradicts and/or eradicates a statutory power granted to the Board is unenforceable as against the Board who is the legal custodian of the statutory mandate to appoint the CEO.

[42] Consequently, the applicant has made out a case for the relief sought in the notice of motion.

COSTS

[43] As mentioned earlier in my judgement, that the costs in part A were reserved pending finalisation of this application. From the order of the court in part A, it is apparent that the applicant was successful in part A,I see no reason that costs should not follow the cause in part A. Regarding part B and the reasons mentioned above, the whole conduct to oppose this application by the respondents, relating to the appointment of the applicant as CEO, was premised on baseless and unwarranted grounds and thus warrants a costs order against them and same deserves a punitive order against them. . Therefore, the applicant is entitled to costs on part A. and part B

ORDER

[44] The following Order is made:

[a] The decision of the first respondent to re-advertise the position of the CEO which the applicant has applied for and was appointed by the board of the first respondent is reviewed and set aside and same is declared invalid, unlawful and irrational.

[b] The decision of the first respondent to seek concurrence on the appointment of the applicant from the second and third respondents on the appointment of the applicant to the position of the CEO is declared to be invalid, unlawful, and *ultra vires* with section 93J of the Municipal Systems Act 117 of 1998 ("MSA"), read together with section 6(2)(a)(i) of the Promotion of Administrative Justice Act of 3 of 2000(PAJA).

[c] The decision of the second and third respondents to refuse concurrence on the appointment of the applicant to the position of the CEO in the circumstances wherein the second and third respondents plays no role in the appointment of the CEO of the first respondent as per section 93J of the MSA is reviewed and set aside;

[d] The decision of the second and third respondents, to refuse concurrence on the appointment of the applicant to the position of the CEO and for the position to be re-advertised, is declared invalid, unlawful, irrational and *ultra vires* section 93J of the MSA read together with section 6(2)(a)(ii) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");[12] and

[e] The conduct of the second and third respondents is declared to have offended the principle of legality wherein the second and third respondents played no role in terms of section 93J of the MSA in the appointment of the CEO of the first respondents.

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12 Para 5 of the Applicant's Heads of Argument – p2; Caselines/paginated page – 4-34.

N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 14 July 2022

APPEARANCES

FOR THE APPLICANT:	ADV. H MOLOTSI
FOR THE FIRST RESPONDENTS:	ADV K PRETORIUS
FOR THE SECOND RESPONDENT:	ADV MANGANYE
HEARD ON:	17 FEBRUARY 2022
DATE OF JUDGMENT:	14 July 2022