THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 151/2013
Reportable

In the matter between:

THE DEMOCRATIC ALLIANCE	**APPELLANT**
and	
THE KOUGA MUNICIPALITY	**FIRST RESPONDENT**
THE EXECUTIVE MAYOR OF THE FIRST RESPONDENT, MR BOOI KOERAT	**SECOND RESPONDENT**
THE MUNICIPAL MANAGER OF THE FIRST RESPONDENT, MR SIDNEY FADI	**THIRD RESPONDENT**
THE ACTING MUNICIPAL MANAGER OF THE FIRST RESPONDENT, MS COLLEEN DREYER	**FOURTH RESPONDENT**
MR VERNON STUURMAN, A MEMBER OF THE MAYORAL COMMITTEE OF THE FIRST RESPONDENT	**FIFTH RESPONDENT**
MR PATRICK KOTA, A MEMBER OF THE MAYORAL COMMITTEE OF THE FIRST RESPONDENT	**SIXTH RESPONDENT**
MS VIRGINIA CAMEALIO-BENJAMIN, A MEMBER OF THE MAYORAL COMMITTEE OF THE FIRST RESPONDENT	**SEVENTH RESPONDENT**
MS ANGELINA MASETI, A MEMBER OF THE MAYORAL COMMITTEE OF THE FIRST RESPONDENT	**EIGHTH RESPONDENT**
MR PHUMZILE OLIPHANT, A MEMBER OF THE MAYORAL COMMITTEE OF THE FIRST RESPONDENT	**NINTH RESPONDENT**
THE HONOURABLE MR MLIBO QOBOSHIYANE, THE MEC: LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE PROVINCE	**TENTH RESPONDENT**
MR J JANSEN	**ELEVENTH RESPONDENT**
MR V FELTON	**TWELFTH RESPONDENT**

MS T TOM **THIRTEENTH RESPONDENT**

MS C BURGER **FOURTEENTH RESPONDENT**

MS C ARENDSE **FIFTEENTH RESPONDENT**

Neutral citation: *The Democratic Alliance v The Kouga Municipality* (151/13) [2013] ZASCA 163 (26 November 2013)

Bench: Ponnan, Shongwe, Willis JJA and Van der Merwe and Meyer AJJA

Heard: **8 November 2013**
Delivered: **26 November 2013**

Summary: Local Government: Municipal Systems Act 32 of 2000 – appointment of managers contemplated by s 56 sought to be set aside – allegedly for want of compliance with s 56(1)(a) and s 66(3) of the Act.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Revelas J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

PONNAN JA, (SHONGWE, WILLIS JJA and VAN DER MERWE and MEYER AJJA concurring):

[1] The appellant, the Democratic Alliance (the DA), a registered political party and official opposition in this country, sought to review and set aside the appointments of the eleventh to fifteenth respondents[1] by the first respondent, the Kouga Municipality (the municipality), as managers contemplated by s 56 of the Local Government: Municipal Systems Act 32 of 2000 (the Act). The Eastern Cape High Court (per Revelas J) dismissed the application, but granted leave to the DA to appeal to this court. Neither the eleventh to the fifteenth respondents, nor any of the

[1] Mr J Jansen, Mr V Felton, Ms T Tom, Ms C Burger and Ms C Arendse.

other respondents[2] who were cited in the application and against whom no relief was sought, took any part in the proceedings either in the court below or in this court.

[2] Mr Nicolaas Botha, the DA's representative on the municipality's council, alleged in the founding affidavit in support of the application:

'20. The purpose of this application is to review and set aside the resolutions of the Mayoral Committee of the First Respondent taken on 11 June 2012 and of the Council of the First Respondent taken on 29 June 2012 appointing the Eleventh to Fifteenth Respondents respectively as Director : Social Services; Director : Infrastructure, Planning and Development; Director : Administration, Monitoring and Evaluation; Chief Financial Officer; and Director : LED, Tourism and Creative Industries in the administration of the First Respondent on five year fixed term contracts commencing initially on 1 July 2012 (in terms of the resolution of the Mayoral Committee aforesaid) and later amended by the Council of the First Respondent to 1 August 2012. The Applicant further seeks to have these decisions declared unlawful and therefore null and void.

21. I respectfully submit that both the resolutions of the Mayoral Committee and the Council of the First Respondent are reviewable and liable to be set aside and are therefore null and void in that these decisions were taken contrary to the provisions of the Local Government : Municipal Systems Act 32 of 2000 (the Systems Act) and the First Respondent's own policies and Rules of Order in those respects set out below.

22. Section 56 of the Systems Act enjoins a municipal council to appoint managers directly accountable to the Municipal Manager after consultation with the Municipal Manager. The appointments of the Eleventh – Fifteenth Respondents purported to be such appointments.

. . . .

27. It is cardinal to the appointment of any municipal employee including managers referred to in Section 56(1)(a)(ii) that a vacancy for such a position exists. A '*vacancy*' is defined in the Recruitment, Selection and Retention Policy of the First Respondent

[2] The Executive Mayor of the First Respondent, Mr Booi Koerat (Second Respondent), The Municipal Manager of the First Respondent, Mr Sidney Fadi (Third Respondent), The Acting Municipal Manager of the First Respondent, Ms Colleen Dreyer (Fourth Respondent), Mr Vernon Stuurman, a member of the Mayoral Committee of the First Respondent (Fifth Respondent), Mr Patrick Kota, a member of the Mayoral Committee of the First Respondent (Sixth Respondent), Ms Virginia Camealio-Benjamin, a member of the Mayoral Committee of the First Respondent (Seventh Respondent), Ms Angelina Maseti, a member of the Mayoral Committee of the First Respondent (Eighth Respondent), Mr Phumzile Oliphant, a member of the Mayoral Committee of the First Respondent (Ninth Respondent) and the Honourable Mr Mlibo Qoboshiyane, the MEC: Local Government and Traditional Affairs, Eastern Cape Province (Tenth Respondent).

as a position on an approved organogram that is not filled. To the best of my knowledge there was no approved updated organogram at any time relevant to this application. This is confirmed by a circular/report of the First Respondent's standing committee dated 24 July 2012 which I annex hereto marked "A".'

[3] In opposing the application, Mr Sidney Fadi, the municipal manager of the municipality, explained:

'5. As is apparent from the Applicant's founding affidavit, this application relates to the appointment of the Eleventh to Fifteenth Respondents as Managers in terms of section 56 of the Municipal Systems Act. Such Managers are senior Managers who report directly to me as Municipal Manager. They are generally referred to as section 56 Managers.

. . . .

13. The complaint is both factually and legally incorrect. As will become apparent from what I say below it was ultimately the First Respondent's Council – and not its mayoral committee – which resolved on 29 June 2012 that the section 56 Managers be appointed as directors. This it did on the recommendations of the First Respondent's selection committee after due consultation with me as Municipal Manager. The Applicant's principal complaint is therefore without foundation.

. . . .

15.

15.1 These five important positions all fell vacant during 2011. . . .

15.2 So as to ensure, as best possible, the continued smooth running of the First Respondent's affairs and the rendering by it of services to the public, acting section 56 Managers were appointed to these positions; their appointments were, however, extended from time to time. This was done in terms of the provisions of section 56(1)(a)(2) of the Municipal Systems Act. In terms of section 56(1)(c) of such Act, however, a person appointed as an acting section 56 Manager may not be appointed to act for a period that exceeds three months.

16. In light of this provision, the First Respondent received advice from its legal representatives in terms of which it was made to understand (correctly) that the continued appointment of acting Municipal Managers in these senior positions was not lawfully permissible and that steps had to be taken to resolve this urgently. The need, therefore, for the appointment of permanent section 56 Managers was real and

urgent. This urgent need has been recognised throughout by all concerned, including the Applicant and its councilors.

17.

17.1 Before dealing with how this was achieved, it is necessary to say something briefly about the history of appointments of managers to senior positions such as those of the section 56 Managers. The present processes governing the appointment of section 56 Managers, as provided for by section 56(1) of the Municipal Systems Act, were introduced into law by the promulgation with effect from 5 July 2011 of the Local Government: Municipal Systems Amendment Act, 7 of 2011.

17.2 Prior to that, however, managers directly accountable to the Municipal Manager (and indeed the Municipal Manager himself or herself) were appointed by the mayoral committee, in terms of a delegated authority, as read with section 60(3) of the Local Government: Municipal Structures Act 117 of 1998.

17.3 Appointments of this kind and in this fashion had occurred at the First Respondent for some years prior to 5 July 2011.

17.4 When the appointment process initially commenced the First Respondent's mayoral committee *bona fide* believed that the process it was required to follow remained that which it had followed in the past. In this regard it was mistaken, but this only subsequently came to light when the Applicant raised objections to the process followed by the First Respondent's mayoral committee and after advice was taken on the matter in light of those objections. I revert to this aspect below.

. . . .

48. Ad paragraph 27:

I admit that the First Respondent does not have an approved organogram reflecting that the five vacancies had not been filled. This, however, does not advance the Applicant's position at all. It is common cause that the five positions had to be filled. The Applicant knew and understood, moreover, that this had to be achieved urgently.

. . . .

54 Ad paragraph 36:

54.1 I refer to what I have already said concerning the absence of an organogram. I also point out that there is no complaint from the Applicant as to the merits of the candidates identified and recommended by the selection committee, and whose recommendation has now been accepted by the First Respondent's Council.'

[4] It was thus plain even at that early stage that the municipality did not seek to defend the validity of the resolution of the mayoral committee in respect of the

appointment of the section 56 managers. Its approach was articulated thus by Mr Fadi:

'29 I am advised that the effect of the provisions of section 56 of the Municipal Systems Act is that the purported decision by the mayoral committee on 11 June 2012 to appoint the section 56 Managers was *ultra vires* and of no force and effect. The First Respondent accordingly places no reliance whatsoever on the mayoral committee's purported acceptance of the selection committee's recommendations. The First Respondent recognizes and accepts that it is the function and responsibility of its council to make the appointments, after consultation with me.

. . .

34. In the Applicant's [that should read respondent's] submission, there is no reason why, as a matter of law or principle, the authority which has the power to accept the recommendations (the First Respondent's council) should not have done so in the circumstances. The mere fact that the mayoral committee may have erroneously purported to do so previously, does not invalidate in any way whatsoever the subsequent decision by the First Respondent's council. In acting as it did, the First Respondent's council acted within the parameters of the statutory framework and its conduct was accordingly lawful.'

[5] I have made reference to the affidavits in greater detail than is absolutely necessary because I do believe that when regard is had to the allegations contained therein, it is hard to resist the conclusion that the DA's case underwent a dramatic shift in reply. That much is apparent from Mr Botha's reply to paragraph 15.2 of Mr Fadi's answering affidavit, which reads:

'19. AD PARAGRAPH 15.2:

Section 56 of the Municipal Systems Act is but one of the provisions of the Act that has to be complied with for the legally valid appointment of a manager directly accountable to a municipal manager. I again refer to the First Respondent's non-compliance with Section 66 and the other respects in which the First Respondent had failed to comply with the Municipal Systems Act as set out in the founding affidavit.'

It appears to me that it was disingenuous for the DA to assert in reply that s 56 of the Act was 'but one of the provisions' to be complied with by the municipality in circumstances where that had been the only provision invoked by it in its founding affidavit. Moreover, it had been invoked in support of the contention 'that the Mayoral Committee is not empowered to make the appointments which it did having regard to

Section 56 of the Systems Act' rather than in support of the contention sought to be advanced by it in its replying affidavit. Likewise, it was equally disingenuous for it to state: (i) 'I again refer to the [municipality's] non-compliance with s 66', when there is no reference whatsoever to that section in its founding papers; or (ii) refer in vague and general terms to the 'other respects, in which [the municipality] had failed to comply with the [Act] as set out in the founding affidavit' when, in truth, no such 'other respects' are alluded to in the founding affidavit.

[6] Before this court, the DA restricted itself to two contentions: first, that there was no consultation with the municipal manager as required by s 56(1)*(a)* of the Act; and, second, that the appointments were of no force and effect by virtue of the provisions of s 66(3) of the Act.

As to the first

[7] Section 56(1)*(a)* provides:

'(1) *(a)* A municipal council, after consultation with the municipal manager, must appoint –

(i) a manager directly accountable to the municipal manager; or

(ii) an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.'

[8] In my view the first contention fails at a factual level. In a supplementary affidavit filed in answer to the new allegations raised in the DA's replying affidavit Mr Fadi stated:

'3.15. The Applicants contend further that there was a lack of consultation as envisaged by Section 56 of the Act. This is denied in the answering papers and, by way of amplification, I record as follows:

3.15.1. I attended all selection committee meetings save for the meeting which was postponed on 9 May 2012 and I was of course present at the meeting of 4 May 2012 . . . I thus, at all material times, participated in the discussions and consultations surround the appointments in question.

3.15.2. Outside of the selection committee meetings, I further held consultations in terms of which I, *inter alia*, raised an issue about the suitability of Ms T. Mati to be appointed to the post of Director of Administration, Monitoring and Evaluation . . . given her lack of experience. Pursuant to this consultation a decision was taken that Ms Tom (the Thirteenth Respondent) be recommended and appointed by the municipal council. In

the same context, I also raised concerns about the appointment of one Vumazonke who was accordingly not eventually appointed.

3.15.3. Whilst I cannot recall the exact dates of these consultations, I can say with certainty that it was prior to 29 June 2012, the date of the council meeting when the directors were appointed.'

That allegation stood unchallenged. I may add that even though this point was not squarely raised in the DA's founding affidavit, Mr Fadi, explained in his answering affidavit:

'24. It will be recalled that I, as the Municipal Manager of the First Respondent, had been involved directly in the selection process and the subsequent council meeting, although I did not attend every meeting of the selection committee, at these times delegated my authority to the Fourth Respondent.'

. . . .

30. The Second Respondent and his Mayoral Committee consulted with me, as it was duty bound to do in terms of its delegated authority conferred on the Second Respondent and to be executed together with other members of the mayoral committee, in terms of the provisions of s 56(a) of the Municipal Systems Act of 2000, on 22 June 2012, on the appointment of the Eleventh to Fifteenth Respondents, and I was in agreement with the result. An extract of the delegations register is attached hereto . . . .'

[9] It was thus not in dispute that the municipal manager had indeed participated in the selection process, the purpose of which was to consider the suitability of the proposed candidates. The selection committee met on more than one occasion. According to the municipality, the proposed appointments were, in terms of accepted practice, debated and fully ventilated at a full council meeting on 29 June 2012 - a meeting at which the municipal manager was present and in which he actively participated. Significantly, it was the municipal manager, according to Mr Botha, who introduced the very proposals that were, after a 'lively debate', accepted by the council.

[10] The mischief which the legislature sought to address in s 56(1)*(a)* of the Act, so it seems to me, was that it did not (understandably so) want the municipal manager to be excluded from decisions to appoint managers who were to be accountable to him and with whom he would be obliged to work. The provision was

thus enacted so as to ensure that the municipal manager would have an opportunity to comment on the suitability of his proposed subordinates. It cannot seriously be suggested that this objective was not achieved in this instance given the level and degree of involvement of the municipal manager in and indeed his influence on the appointment process. It is also necessary, to bear in mind that s 56(1)*(a)* requires only that the ultimate decision must be taken 'after consultation with' the manager. Bernard Bekink *Principles of Local Government Law* (2006) at 331 (footnote 28) puts it thus:

'Although prior consultation between the Council and the municipal manager should take place, it is still the Council's decision whom to appoint as managers. Only consultation is required; not consensus or agreement . . . .'

[11] Here the unchallenged evidence is that the municipal manager was satisfied with the appointment of the section 56 managers. Tellingly, the DA has not sought to suggest what additional consultation should have occurred or in what respects the process was inadequate. It follows, in my view, that the first contention raised by the DA is without any merit and must fail.

As to the second

[12] Section 66, headed 'Staff establishments' provides:

'(1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must –

(a) develop a staff establishment for the municipality, and submit the staff establishment to the municipal council for approval;

. . .

(b) provide a job description for each post on the staff establishment;

(c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and

(d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.

(2) Subsection (1) *(c)* and *(d)* do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57.

(3) No person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment of that municipality.

. . .

(4) A decision to employ a person in a municipality, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if the appointment was made in contravention of subsection (3).

. . .

(5) Any person who takes a decision contemplated in subsection (4), knowing that the decision is in contravention of subsection (3), may be held personally liable for any irregular or fruitless and wasteful expenditure that the municipality may incur as a result of the invalid decision.'

[13] When pressed during argument, counsel suggested from the bar in this court that the genesis for the DA's second contention is to be found in the following two sentences of paragraph 27 of its founding affidavit:

'To the best of my knowledge there was no approved updated organogram at any time relevant to this application. This is confirmed by a circular/report of the First Respondent's standing committee dated 24 July 2012 which I annex hereto marked "A".'

[14] Annexure A, which is dated 24 July 2012 and on the face of it appears to be a minute of a meeting of the Finance, Administration, Monitoring and Evaluation Committee, a standing committee of the municipality, to the extent here relevant, reads:

'ORGANOGRAM REVIEW

'1. Introduction

The Council has, in terms of item: 11/12 CFAME2 dated 1 December 2011, rescinded its organisational structure, staff establishment, which technically means that there is no organisational structure in place for the Kouga Local Municipality.

2. Background

The municipality has again, in order to respond to the challenges facing its constituency and the National and Provincial agenda, changed its strategy in line with the new mandate. The strategic objectives were replaced as follows:

OLD DIRECTORATE	**NEW DIRECTORATE**
Strategic Services	LED, Tourism & Creative Industries
Technical Services	Infrastructure, Planning & Development

Planning and Development	Merged with infrastructure, Planning and Development
Corporate Services	Administration, Monitoring & Evaluation
Community Services	Social Services
Finance	Finance'

[15] In a supplementary affidavit filed on behalf of the municipality, Mr Fadi stated:

'3.8. In this context, and in its replying papers, the Applicant, for the first time, makes reference to section 66 of the Municipal Systems Act and appears to contend that on an interpretation of that section any appointments which are made in the absence of an organogram are automatically invalid including the appointments of the Eleventh to Fifteenth Respondents.

3.9. It is my respectful submission that such an interpretation would result in an absurdity if for no other reason than the fact that it would mean that appointments essential for the proper functioning of the municipality (such as executive management positions), and which all parties acknowledge are essential, would be invalid if no organogram existed. If the municipality were unable to function it would self-evidently be unable to fulfil the purpose for which it was created, namely to serve the surrounding community.

3.10. In fact, if the validity of appointments was dependent on the existence of an organogram, it would mean that the hundreds of contracts of employment of all the employees of the municipality would be invalid if no organogram existed. This would be equally untenable.

. . .

3.12. I would thus simply record that the correct position is that, at the level of fact, the contentious positions do exist, the municipality cannot function without appointments into these positions and thus the municipality was entitled, as a matter of contract, to have made the appointments which it did.

3.13. In this context, and insofar as it may be necessary to do so, it is respectfully pointed out that, in any event, in terms of a decision by the council a post establishment was

created which included the positions to which the Eleventh to Fifteenth Respondents were appointed and this regard I record as follows:

3.13.1. It is clear that the Municipal Manager cannot appoint Section 57 Managers, nor can he appoint himself.

3.13.2. Therefore, the Municipal Manager as well as the appointment of Section 57 managers rests with the Council.

3.13.3. Attached hereto and marked Annexure "AA1" is a Council resolution dated the First of November 2011 whereby the Council attended to the amended post establishment of Section 57 Managers, as well as the Manager's amended salaries.'

[16] According to Annexure AA1 to Mr Fadi's affidavit, the municipality resolved on 1 November 2011:

'i) That the following Organizational Structure for the Kouga Municpality be approved:

Department	Job title	QTY	Post Level	New/Old Post	2011/ 2012
Office of the Municipal Manager	Director: Infrastructure, Planning & Technical Services	1	S. 57	New Title - Combined position. Interviews completed, awaiting confirmation of acceptance by preferred candidate	1
	Director: Social Development	1	S. 57	New Title – Old Post Vacant	1
	Director: LED, Tourism and Creative Industries	1	S. 57	New Title – Old Post – Position filled up to 31 December 2011	1
	Director: Administration, Monitoring & Evaluation	1	S. 57	New Title – Combined position. New appointed Director from 1 October 2011	

	Director: Finance	1	S. 57	New Title – Old post Position filled up to 30 June 2012	

ii) That the appointment of the 5 Directors referred to above will be based on a 5 year contract basis on an all inclusive package of R780,000 per annum for the 2011/2012 financial year, a performance bonus (as regulated by the applicable legislation) and a[n] annual salary increase according to the South African Local Government Bargaining Council (SALGBC).'

It will be immediately apparent that to all intents and purposes Annexure A to Mr Botha's founding affidavit mirrors Annexure AA1 to Mr Fadi's affidavit.

[17] Properly comprehended therefore, the high water mark of the DA's case appears to be that a minute of a meeting of a standing committee of the municipality recorded that the Council of the municipality had some seven months earlier 'rescinded its organisational structure, staff establishment' – whatever that may mean. And on the strength of that we were urged to conclude that the appointments in question fell foul of s 66(3) of the Act. Various obstacles, I daresay, stand in the way of that conclusion: First, as the minute of the Council meeting of the municipality of 1 December 2011 referred to in the introductory paragraph of Annexure A was not annexed to the papers, we can only speculate as to whether Annexure A correctly records the import and tenor of what had been resolved at that earlier meeting. Second, it was unclear whether 'organogram' and 'organisational structure/fixed establishment' are synonymous and thus whether the absence of an organogram meant, of necessity, that there was no fixed establishment in place. Third, s 57 of the Act provides:

'(1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only –

(a) in terms of a written employment contract with the municipally complying with the provisions of this section; and

(b) subject to a separate performance agreement concluded annually as provided for in subsection (2).'

That being the case, it remains unexplained whether persons in management positions, such as the eleventh to fifteenth respondents, whose appointments are the subject of separate contracts as also performance contracts, fell to be included in the resolution rescinding the ‘organisational structure/staff establishment’.

Fourth, it is clear from the DA's own papers that the new directorates (as envisaged by the new organogram or staff establishment) remained in existence when the appointments were made. Annexure A on which the DA relied makes it clear, to utilise the language of the minute, that the old directorate was being replaced by a new directorate, whilst Annexure AA1 to Mr Fadi’s affidavit alludes to ‘new title – old post’ or ‘new title – combined position’. One would therefore imagine that self-evidently it is not possible to create directorates without simultaneously creating posts of directors (namely the posts in question). The appointments to the contentious positions, namely the four director positions and the position of chief financial officer, appear to have been made on the premise that those directorates were then in existence. In fact the appointments which are the subject of this appeal reflect precisely the positions as set out in the new directorates. There was thus quite clearly a staff establishment in place at least insofar as it related to the directorate positions. Fifth, Mr Fadi in his answering affidavit stated:

'36. The First Respondent has as yet not concluded formal written agreements with the section 56 Managers. The First Respondent has, correctly in my submission, adopted the position that it should not do so until such time as the Tenth Respondent has deliberated upon the lawfulness or otherwise of the appointment of the section 56 Managers and he has elected to take steps, or declined to do so, to ensure compliance by the Municipal Council with the Municipal Systems Act. Once that process has been completed, and dependent obviously upon the outcome thereof, the First Respondent will conclude the necessary agreements of employment with the section 56 Managers.'

The rather speculative response that those allegations elicited from Mr Botha in his replying affidavit was:

'48. **AD PARAGRAPH 36:**

48.1 The Eleventh – Fifteenth Respondents took up their employment in their respective capacities with the First Respondent on 1 August 2012. It would therefore appear that they have signed formal written agreements as is required by the Act.'

[18] It is disconcerting to say the least that a simple throw-away line in paragraph 27 of the DA's founding affidavit could be relied on as the foundation for the second leg of the argument advanced on appeal. For, as Mhlantla AJA remarked in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA):

'[29] It is trite law that the applicant in motion proceedings must make out a proper case in the founding papers. Miller J in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*, puts the matter thus:

"In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet." '

[19] In truth though, as I have endeavoured to show, the DA's case on this leg is really to be sourced in Annexure A to Mr Botha's founding affidavit. But, as Cloete JA observed in *Minister of Land Affairs and Agriculture & others v D & F Wevell Trust & others* 2008 (2) SA 184 (SCA) at 200b-c:

'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence*: Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

[20] That is not to suggest that a party in motion proceedings may not advance legal argument in support of the relief claimed where such argument is not specifically mentioned in the papers. That, a court would countenance, provided that the argument arises from the facts alleged. (See *Cabinet for the Territory of South West Africa v Chikane & another* 1989 (1) SA 349 (AD).) Here though, facts which are relevant were not fully canvassed on the papers because the DA's contention that in the absence of an approved organogram the contracts of employment of the eleventh to fifteenth respondents was invalid by virtue of the provisions of s 66 of the

Act was similarly an argument that was raised somewhat obliquely for the first time in its replying affidavit.

[21] It follows that the DA's second contention must also fail. Given the obvious importance of the matter, inasmuch as the logical consequence of counsel's argument – one, I might add, from which counsel did not shrink - is that a red line may have to be drawn through all appointments made by the municipality (not just those of the eleventh to fifteenth respondents), one would have expected far greater rigour and attention to detail in the presentation of the case. It follows that the appeal must fail.

[22] It remains to comment on the approach of the high court to the matter. The record, in sum, ran to less than 270 pages. The matter was argued as an opposed motion on 6 December 2012 and on 20 December 2012 the high court handed down its judgment that spanned no more than three pages and was rather cryptic. The application for leave to appeal was heard on 5 February 2013 and the next day an order issued granting leave to appeal to this court. It was not accompanied by any reasons, so one is none the wiser as to what weighed with the high court in arriving at its conclusion that leave ought to be granted to the DA to appeal or why it was thought that the matter was deserving of the attention of this court.

[23] On 20 November 2012 in the First Annual British and Irish Legal Information Institute (BAILII) Lecture, Lord Neuberger in an address entitled 'No Judgment – No Justice'[3] had this to say:

'Judgments are the means through which the judges address the litigants and the public at large, and explain their reasons for reaching their conclusions. Judges are required to exercise judgement – and it is clear that without such judgement we would not have a justice system worthy of the name – and they give their individual judgement expression through their Judgments. Without judgement there would be no justice. And without Judgments there would be no justice, because decisions without reasons are certainly not justice: indeed, they are scarcely decisions at all. It is therefore an absolute necessity that Judgments are

[3] http://www.supremecourt.gov.uk/docs/speech-121120.pdf para 2.

readily accessible. Such accessibility is part and parcel of what it means for us to ensure that justice is seen to be done, to borrow from Lord Hewart CJ's famous phrase.'

[24] In a similar vein, but closer to home, in an address at the First Orientation Course for New Judges held at Magaliesberg on 21 July 1997, former Chief Justice Corbett observed:

'As a general rule, a court which delivers a final judgment is obliged to give reasons for its decision. This applies to both civil and criminal cases. In civil matters this is not a statutory rule but one of practice. In *Botes & another v Nedbank Ltd* the Appellate Division held that where a matter is opposed and the issues have been argued, litigants are entitled to be informed of the reasons for the judge's decision. The court pointed out that a reasoned judgment may well discourage an appeal by the loser; and the failure to state reasons may have the opposite effect, that is, encourage an ill-founded appeal. In addition, should the matter be taken on appeal, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case – and quite often they are – a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.'[4]

[25] In the result the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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V M PONNAN
JUDGE OF APPEAL

[4] The Hon MM Corbett 'Writing a Judgment – Address at the First Orientation Course for New Judges' (1998) 115 *SALJ* 116 at 117; see also The Rt Hon Sir Harry Gibbs GCMG, AC, KBE 'Judgment Writing' (1993) 67 *ALJ*. 494.

APPEARANCES:

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