THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20424/2014

Reportable

In the matter between:

MULDERSDRIFT SUSTAINABLE DEVELOPMENT FORUM	**APPELLANT**

And

THE COUNCIL OF MOGALE CITY LOCAL MUNICIPALITY	**FIRST RESPONDENT**
THE EXECUTIVE MAYOR NO	**SECOND RESPONDENT**
DAN METLANA MASHITISHO	**THIRD RESPONDENT**

Neutral citation: *Muldersdrift Sustainable Development Forum v Mogale City* (20424/14) [2015] ZASCA 118 (11 September 2015)

Coram: Lewis, Tshiqi, Petse and Willis JJA and Baartman AJA

Heard: **25 August 2015**

Delivered: **11 September 2015**

Summary: Applicant for relief must demonstrate legal basis for order sought: applicant had no legal interest in, and no locus standi, to seek declaratory order that municipal manager's appointment to the post was invalid.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as the court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Willis JA (Lewis, Tshiqi and Petse JJA and Baartman AJA concurring):

[1] The appellant, an unincorporated voluntary association, sought an order in the Gauteng Division, Pretoria (Hughes J) declaring that the third respondent, Mr Dan Metlana Mashitisho had not been duly appointed as municipal manager of the first respondent (the municipality). The court a quo dismissed the application. The appellant appeals, with the leave of this court, against the order of the court a quo.

The Background Facts

[2] The second respondent, the executive mayor of the municipality and Mr Mashitisho concluded a contract appointing him as municipal manager on 2 October 2006. The duration of the appointment was stipulated as being for a fixed term of five years but pertinently left open the possibility of its renewal and extension. The contract expired on 30 September 2011. In the meantime, the executive mayor had recommended to the municipality that Mr Mashitisho's appointment be extended.

[3] On 9 June 2011 the municipality resolved that various of its powers and functions, 'other than those non-delegable ones mentioned hereunder', be delegated to the executive mayor. No mention was made of the appointment of the municipal manager. Purporting to act on behalf of the municipality, the executive mayor concluded a written agreement with Mr Mashitisho on 11 November 2011 extending his appointment to 30 September 2016. In this regard, the mayor had been

supported by the municipality's mayoral committee. The appointment was reported to the municipal council on 28 February 2012. The municipal council simply noted the fact. At that meeting, Mr Mashitisho was congratulated on his second appointment by the council.

[4] In the meantime, on 22 October 2012, the appellant had brought an application to review and set aside the municipal manager's decision to establish an emergency site and service centre on the remainder of portion 10 (a portion of portion 3) of the farm Honingklip 178 IQ, falling within the municipality's area of jurisdiction. After it had brought that application, the appellant became aware that the municipal manager had been re-appointed and considered that the proper appointment process had not been followed. The appellant informed the executive mayor accordingly on 6 December 2012. In February 2013, more than a year after the municipal manager had been appointed, the appellant launched a separate application – the one at issue in this appeal – to declare the appointment invalid.

[5] The appellant complains that the renewal of the appointment did not comply with the Local Government: Municipal Systems Act 32 of 2000 (the LGMS) and, in particular, sections 54A(1)*(a),* 54A(3)(*b),* 54A(4)*(a),* 57(1)*(a)* and 57(3)*(b)*. It sought an order that the appointment was invalid and the contract void. It avers that the appointment could properly have been made only by the municipal council itself and not by either the executive mayor or the mayoral committee; that the appointment had been made without prior advertising nationally for applications to fill the post and that, moreover, the contract of employment had not been extended in writing before it had expired. The first application has been held in abeyance pending the decision in this matter. The underlying reason for the appellant's application is that the appellant wishes to contest the establishment of the emergency site and service centre. The rationale appears to be that, if the municipal manager was appointed in a procedurally defective fashion, the appellant might have greater success in opposing the development.

[6] The municipality resisted the present application on two main grounds: (a) that the appellant lacks locus standi *in iudicio* to bring the application and (b) that the

bona fide renewal or extension of the contract is not governed by the provisions of the LGMS, upon which the appellant has relied.

[7] In its answering affidavit, the municipality has said that Mr Mashitisho 'served his five-year term successfully and his performance as Municipal Manager was beyond criticism' but has not denied that the appointment was made without advertising the post nationally and that his service on the extended term began before the written contract of employment to this effect had been concluded. The executive mayor of the municipality has said that he extended Mr Mashitisho's appointment by virtue of powers delegated to him in terms of a resolution of the council taken on 14 June 2011. The resolution makes no reference to the appointment of any persons, including the municipal manager. The minutes of a meeting of the municipal council held on 28 February 2012 record that the appointment of Mr Mashitisho as municipal manager had been done in the manner in which it was so as not to 'delay service delivery'.

[8] The court a quo dismissed the application on the basis that the proper procedure, which the appellant had not followed, would have been for the appellant to have brought a review application in terms of s 33 of the Constitution. This section relates to the right of every person to fair administrative action. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is designed to give effect to this constitutional requirement.[1]

The legal basis upon which the appellant seeks to challenge the re-appointment of the municipal manager

[9] The appellant did not bring its application in terms of s 38 of the Constitution, which relates to alleged infringements of rights enshrined in the Bill of Rights. Indeed, the appellant expressly disavowed any such intention. Furthermore, the appellant did not rely on PAJA and did not seek to review the decision on the common law grounds relating to legality. The appellant relied simply on the

[1]See for example *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 22; (CCT 27/03) [2004] ZACC 15. See also *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC) para 29; (CCT 25/12) [2012] ZACC 28 and *Tulip Diamonds FZE v Minister for Justice and Constitutional Development & others* 2013 (10) BCLR 1180 (CC) para 30; (CCT 93/12) [2013] ZACC 19.

provisions of s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959, which has been repealed, and replaced by s 21(1)*(c)* of the Superior Courts Act 10 of 2013. The subsection provides that a court has the power:

'in its discretion and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

I shall deal with the question whether the appellant is entitled to rely on the subsection in due course.

[10] Before making that enquiry, it should be noted, at the outset, that one cannot snatch a remedy from the air. In a unanimous judgment of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*[2] Howie P and Nugent JA, referred with approval to the following passage in Wade's *Administrative Law*:[3]

'The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason.'[4]

Although the passage deals with an administrative decision it would apply equally, in my view, to the right to claim a declaratory order under s 21(1)*(c)*.

The procedural defects in the municipal manager's re-appointment

[11] Section 54A(1)*(a)* of the LGMS provides that it is the municipal council itself that must make the appointment of the municipal manager. The portions of the LGMS, relating to the appointment of a municipal manager, upon which the appellant has relied are:

(i) Section 54A(1)*(a)*, which provides that:

'The municipal council must appoint –

(a) a municipal manager as head of the administration of the municipal council; or

... '

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[2]*Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA); (25/08) [2009] ZASCA 85.

[3]H W R Wade and C F Forsyth Administrative Law 7ed (1994) at 342.

[4]Id para 28.

(ii) Section 54A(3)(b), which provides that:

'A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision is null and void if –

(b) the appointment was otherwise made in contravention of this Act.'

(iii) Section 54A(4)*(a)*, which provides that:

'If the post of municipal manager becomes vacant, the municipal council must –

(a) advertise the post nationally to attract a pool of candidates nationwide; and

. . . '

(iv) Section 57(1)*(a),* which provides that:

'. . . the municipal manager . . . may be appointed to that position only –

(a) in terms of a written employment contract with the municipality. . .' and

(v) Section 57(3)*(b)*, which provides that:

'The employment contract referred to in subsection (1)*(a)* must –

(b) be signed by both parties before the commencement of service.'

[12] Section 59 of the LGMS, which relates to the delegation of powers within a municipality, provides that:

'(1) A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may —

(*a*) delegate appropriate powers, excluding a power mentioned in section 160 (2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76 (*b*) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members;

(*b*) instruct any such political structure, political office bearer, councillor, or staff member to perform any of the municipality's duties; and

(*c*) withdraw any delegation or instruction.

(2) A delegation or instruction in terms of subsection (1) —

(*a*) must not conflict with the Constitution, this Act or the Municipal Structures Act;

(*b*) must be in writing;

(*c*) is subject to any limitations, conditions and directions the municipal council may impose;

(*d*) may include the power to sub-delegate a delegated power;

(*e*) does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty; and

(*f*) must be reviewed when a new council is elected or, if it is a district council, elected and appointed.

(3) The municipal council—

(*a*) in accordance with procedures in its rules and orders, may, or at the request in writing of at least one quarter of the councillors, must, review any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction, and either confirm, vary or revoke the decision subject to any rights that may have accrued to a person; and

(a) may require its executive committee or executive mayor to review any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction.

(4) Any delegation or sub-delegation to a staff member of a power conferred on a municipal manager must be approved by the municipal council in accordance with the system of delegation referred to in subsection (1).'

[13] The requirement, in s 54A(1)*(a)* of the LGMS, that it is the municipal council which must appoint the municipal manager, read together with s 59(2), that a delegation must not conflict with the provisions of the LGMS itself, indicate that the delegation by a municipal council of its obligation to appoint a municipal manager is not permissible. The re-appointment of the municipal manager was indeed

procedurally defective. I am fortified in this view by reference to *Mgoqi v City of Cape Town & another; City of Cape Town v Mgoqi & another*[5] in which Van Zyl J said:

'From a perusal of the relevant legislation, it would appear that there is no provision in terms of which the municipal council may delegate to the executive mayor the all-important power to appoint a municipal manager. It gives rise to the irresistible inference that it was never the intention of the Legislature to sanction such a delegation.'[6]

The judge continued:

'If indeed it had been possible to delegate such power to the executive mayor, it would, as pointed out by *Mr Binns-Ward*, lead to an absurd situation. A municipal council wishing to appoint a municipal manager would be obliged to comply with s 30(5)*(c)* of the Structures Act, which requires that the executive mayor submit a report and a recommendation regarding his appointment and conditions of service. An executive mayor clothed with delegated power of making such appointment could, however, dispense with such requirement on the basis that he or she could not be expected to render a report or make a recommendation to himself or herself. This would amount to the municipal council delegating greater powers to the executive mayor than it itself possessed.'[7]

And, later:

'The city's second ground of review is an alternative to the first and relates to the city's system of delegations. It likewise contains no provision that the council may delegate the power to appoint a municipal manager to an executive mayor. It is common cause that the system of delegations contains an exhaustive list of all relevant delegations made by the council. The appointment of a municipal manager is not one of them.'[8]

[14] Accordingly, Van Zyl J concluded that the appointment of a municipal manager could not be delegated by the municipal council. The court's conclusion related, inter alia, to the interpretation of another statute, the Local Government: Municipal Structures Act 117 of 1998, but the principles of interpretation in regard to the issues before us remain the same.

[15] The renewal of the municipal manager's contract was thus procedurally defective. Only the council had the power to conclude such a contract, and its later ratification was not sufficient, given the wording of s 30(5)*(c)* of the Municipal

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[5]*Mgoqi v City of Cape Town & another; City of Cape Town v Mgoqi & another* 2006 (4) SA 355 (C).
[6]Id para 105.
[7]Id para 106.
[8]Para 109.

Structures Act which requires the mayor to submit a report and recommendation before making any appointment. Applying the principles set out in *Oudekraal* above, however, the procedural irregularity in the re-appointment of the municipal manager does not, without more, entitle the appellant to the relief which it has sought.

The interest of the appellant

[16] In each of the cases upon which the appellant has relied, and which dealt with s 19(1)(a)(iii) of the Supreme Court Act, it was made clear that, in order to succeed in obtaining a declaratory order, a party must establish a legally recognised interest in obtaining it.[9] In the circumstances of this case, the appellant has established no such interest. It is also far from clear that, had the municipal council acted correctly in the manner of the appointment of the municipal manager, it would have made any material difference to the interests which either the appellant or its members seek to advance. Recently, in *Illovo Opportunities Partnership #61 v Illovo Junction Properties (Pty) Ltd & others*[10] this court affirmed that, in order to obtain a declaratory order in terms of the s 21(1)*(c)* of the Superior Courts Act, the applicant must have a 'direct and substantial interest' in the order sought.[11] The appellant's interest cannot be so described.

The discretion of the court to grant a declaratory order

[17] It also needs to be emphasised that there is a two-stage substantive enquiry leading to the decision whether or not to grant a declaratory order: not only must the court be satisfied that the applicant has the necessary interest but also that the case

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[9]See *Eye of Africa Developments (Pty) Ltd v Shear 2012 (2) SA 186* (SCA) paras 30 and 31; (863/2010) [2011] ZASCA 266; *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* 2010 (1) SA 356 (SCA) para 23;(324/2008) [2009] ZASCA 66. *Langa CJ v Hlophe* 2009 (4) SA 382 (SCA) para 28; (697/08) [2009] ZASCA 36. *Trinity Asset Management (Pty) Ltd & others v Investec Bank Ltd &* others 2009 (4) SA 89 (SCA) para 16; (574/07) [2008] ZASCA 158. *Cordiant Trading CC v Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) paras 15 to 18; (237/2004) [2005] ZASCA 50.

[10]*Illovo Opportunities Partnership #61 v Illovo Junction Properties (Pty) Ltd & others* (490/13) [2014] ZASCA 119.

[11]Id para 14. See also *The Public Protector v Mail & Guardian Ltd & others* 2011 (4) SA 420 (SCA) para 29; (422/10) [2011] ZASCA 108 and *Cabinet of Transitional Government for Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388B-I; (522/86) [1988] ZASCA 32 and the authorities therein collated.

is a proper one for the exercise of the discretion given to the court.[12]

[18] Of course, the ratepayers – and indeed the residents – of a municipality have an interest in its municipal manager being properly appointed but this does not, without further ado, qualify it as a 'necessary' interest: something more is required.[13] In other words, it is not 'any old' interest that will suffice: the interest must be one that, in the eyes of the law, may deserve the intervention by the court on behalf of the applicant. There are insufficient considerations, appearing from the papers, to confer upon the appellant the necessary interest for it to derive locus standi. This is all the more so, given the period of a year between the appointment of the municipal manager and the challenge to it.

[19] Fraud or gross irregularity in the conduct of a public body may justify an exception to the more usually circumscribed approach to an applicant's 'necessary interest' in the matter.[14] From the papers in the present case, the flaws in the appointment of the municipal manager seem to derive from no more than an error on the part of the municipal council.

[20] The appellant's difficulties would have persisted, even if it had relied on section 38 of the Constitution or PAJA. I shall briefly consider these aspects, in turn.

Section 38 of the Constitution

[21] If the appellant were to have relied on s 38 of the Constitution in bringing its application, it would have encountered hurdles affecting its locus standi or standing

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[12] See *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2006] 1 All SA 103 (SCA) para 16; (237/2004) [2005] ZASCA 50. *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, Maphanga v Officer Commanding, South African Police Murder & Robbery Unit & others* 1995 (4) SA 1 (A) at 14F; (500/93,525/93) [1995] ZASCA 49. Ex Parte Nell 1963 (1) SA 754 (A) at 759H-760B; [1963] 2 ALL SA 55 (A) and *Durban City Council v Association of Building Societies* 1942 AD 27 at 32

[13]See, for example, *Kruger v President of Republic of South Africa & others* 2009 (1) SA 417 (CC) para 26. In this court it has been said that, in general, in order to have locus standi, the interest must be direct and substantial. See for example *Gross & others v Pentz* 1996 (4) SA 617 (A) at 632C-G; (414/95) [1996] ZASCA 78 and *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & another* 2009 (1) SA 317 (SCA) para 19; (458/2007) [2008] ZASCA 104. See also *Tulip Diamonds FZE v Minister for Justice and Constitutional Development & others* 2013 (10) BCLR 1180 (CC) paras 31 and 40; CCT 93/12) [2013] ZACC19.

[14]*Giant Concerts CC v Rinaldo Investments (Pty) Ltd* (supra) paras 34 and 38 and *Tulip Diamonds FZE v Minister for Justice and Constitutional Development & others* 2013 (supra) para 45.

to do so. The bar which has to be straddled is not formidably high. In *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others*[15] this court affirmed that a broad, rather than a narrow approach, should be adopted in regard to standing.[16]

[22] In *Tulip Diamonds FZE v Minister for Justice and Constitutional Development & others*[17] it was made clear that the overriding consideration for a court not only in deciding whether to hear an application in terms of s 38 of the Constitution but also whether to grant relief, is 'the interests of justice'.[18] In broad terms, there are two types of locus standi that derive from s 38: 'own interest' and 'public interest', the latter of which are brought by way of what are generally known as 'class applications'. *Tulip Diamonds* dealt with an 'own interest' application. This appeal is brought by an association acting in the interest of its members. Nevertheless, for the reasons set out above, even if the appellant had relied on s 38, the interests of justice would not have required that the court should come to its assistance: not only is its interest insufficient but the circumstances of the case do not call for the exercise of a discretion in its favour.

PAJA

[23] Counsel for the appellant contended that PAJA was irrelevant to the issue in question. Even if the appellant had relied on PAJA, the following aspect would be relevant: acting on the assumption that the appointment of the municipal manager would have constituted 'administrative action' in terms of s 1 of PAJA, the appellant would, in any event, have been way out of time in terms of the 180-day time limit provided for in s 7(1) of PAJA. In the circumstances of this case, the importance of finality would, almost certainly, have overridden other considerations, even if the appellant had otherwise been eligible to have an extension of the 180-day time bar

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[15] *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* 2011 (3) SA 549 (SCA); [2011] ZASCA 59; 52/2011 (31 March 2011).
[16] Id paras 19 and 20.
[17] *Tulip Diamonds FZE v Minister for Justice and Constitutional Development & others* 2013 (10) BCLR 1180 (CC); CCT 93/12) [2013] ZACC19.
[18] Id para 30. See also *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* (supra) paras 19 and 20.

considered in terms of s 9 of PAJA.[19]

Conclusion

[24] Other than the procedural issues relating to the appointment of the municipal manager, the appellant has not been able to demonstrate to this court what right it seeks to protect, or what interest it has in setting aside the appointment of the municipal manager. The only reason for the application appears to have been to bolster the appellant's case in the other application. It has advanced no reason to impugn the conduct of the municipal manager or the municipality in that application. The prejudice to the municipality and its ratepayers and residents in setting aside the appointment at this stage would outweigh any possible advantage, including protecting the integrity of the process of appointment of municipal managers. It would undermine the interests of justice to declare that appointment invalid: certainty in decision-making would not be achieved.

[25] The high court came to the correct decision in dismissing the application. The appeal cannot succeed.

[26] The following order is made:

The appeal is dismissed with costs.

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N P WILLIS

JUDGE OF APPEAL

[19]See for example *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) para 21; (268/03) [2004] ZASCA 78. *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) para 46; (242/2004) [2005] ZASCA 51. *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F; (CCT 12/07) [2007] ZACC 24. See also *Van Wyk v Unitas Hospital & another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 20 and the authorities therein cited and *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* [2010] 2 All SA 519 (SCA) paras 53 to 56; (560/08) [2010] ZASCA 3.

APPEARANCES:

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