THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 996/2020

In the matter between:

ADRIAN PAUL BARNES **APPELLANT**

and

MANGAUNG METROPOLITAN MUNICIPALITY **FIRST RESPONDENT**

KETSEBAE ISRAEL KGAMANYANE **SECOND RESPONDENT**

Neutral citation: *Barnes v Mangaung Metropolitan Municipality and Another* (Case no 996/2020) [2022] ZASCA 77 (30 May 2022)

Coram: VAN DER MERWE, MOLEMELA, SCHIPPERS and GORVEN JJA and MAKAULA AJA

Heard: 18 May 2022

Delivered: 30 May 2022

Summary: Administrative law – review – principle of legality – appointment of first chief of metropolitan police – power to appoint a person who was not a registered traffic officer – interpretation of s 64D of South African Police Service Act 68 of 1995 – only requirement that person be fit and proper in instance of first

chief of police – no requirement that appointee be traffic officer – appeal dismissed.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mathebula J with Reinders J concurring), sitting as court of first instance:

The appeal is dismissed with costs.

JUDGMENT

Gorven JA (Van der Merwe, Molemela and Schippers JJA and Makaula AJA concurring)

[1] This appeal arises from an application to review and set aside the appointment of the second respondent (Mr Kgamanyane) as the first executive head of the metropolitan police service (metro police chief) of the first respondent, the Mangaung Metropolitan Municipality (the municipality). The appellant (Mr Barnes) was an unsuccessful applicant. Aggrieved at not having been appointed to the position, he approached the Free State Division of the High Court (the high court). Two judges, Mathebula J, with Reinders J concurring, dismissed the application with costs but granted Mr Barnes leave to appeal to this Court.

[2] The position of metro police chief was advertised in July 2017. After a shortlisting and interview process, Mr Kgamanyane and Mr Barnes emerged as the

two leading contenders. The panel conducting the interview rated Mr Kgamanyane higher than Mr Barnes. On 17 November 2017, the council of the municipality resolved to appoint Mr Kgamanyane as the first metro police chief. On 23 November 2017, Mr Barnes was told that his application had been unsuccessful. Mr Kgamanyane commenced in the position on 1 January 2018.

[3] The crisp contention which founded the application by Mr Barnes was that only a registered traffic officer could lawfully be appointed as metro police chief. He contended that, since it was accepted that Mr Kgamanyane was not registered as a traffic officer, his appointment was not competent in law. Put differently, Mr Barnes contended that the municipality lacked the power to appoint Mr Kgananyane as metro police chief unless he was a traffic officer. The founding and supplementary affidavits raised other grounds but, by the time the matter was argued before us, that was the only basis relied upon by Mr Barnes.

[4] The review application was brought under the principle of legality as well as the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Legality is a fundamental principle of our law. Where an entity is accorded public power by law, it may act only in accordance with those powers. If the entity acts outside of those powers, the action lacks legality and may be reviewed and set aside. This was articulated clearly in the matter of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*, which held:

‘It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.’[1]

[1] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 58.

When assessing the legality of any action, it is therefore necessary to establish whether the entity that acted did so within the powers accorded to it (*intra vires*) or beyond those powers (*ultra vires*).

[5] If it was a requirement that the appointee had to be registered as a traffic officer, that requirement was not met on the facts before us. The municipality would then have acted outside of the powers conferred on it and the appointment would be reviewable under the principle of legality. In such a case, the application ought to have succeeded. If the appointment amounted to administrative action as defined in PAJA, it would also be reviewable on this ground. It was contested whether the appointment constituted such administrative action under PAJA. In the light of this crisp issue, however, it is not necessary to decide this point.

[6] The matter turns on an interpretation of certain sections of the South African Police Service Act 68 of 1995 (the Act) and the regulations promulgated under it. Section 64C(1) of the Act provides:

'Subject to section 64D, a municipal council shall appoint a member of the municipal police service as the executive head thereof.'

Section 64D is to the following effect:

'When a municipal police service is established under section 64A, the municipal council in question shall appoint a fit and proper person as first executive head of the municipal police service.'

[7] Regulations were promulgated pursuant to the Act.[2] Regulation 11(1) reads:

[2] 'Regulations for Municipal Police Services published under GN R710 in *GG* 20142 of 11 June 1999, as amended by GN R854 in *GG* 20267 of 9 July 1999'.

'(1) Subject to the provisions of sections 64D and 64Q,[3] a person may be appointed as a member of a municipal police service, if such person –

(a) is registered as a traffic officer in terms of the Road Traffic Act, 1989 (Act 29 of 1989);

(b) applied in the form set out in Annexure 7 and affirms under oath or by way of solemn declaration that the particulars furnished in the application, are the truth;

(c) has permanent residence in the Republic of South Africa;

(d) is at least eighteen (18) years old of which documentary proof must be furnished;

(e) submits himself or herself to a medical examination as determined by the Executive Head and is found to be physically and mentally fit for appointment as a member of a municipal police service;

(f) is in possession of at least a senior certificate or equivalent qualification, of which documentary proof must be furnished;

(g) has no previous criminal convictions (excluding previous convictions relating to political activities in the previous dispensation) and such a person shall allow his or her fingerprints to be taken;

(h) has successfully completed the training determined by the National Commissioner;

(i) is proficient in English;

(j) takes the Oath of Office determined by the municipal council concerned; and

(k) complies with the requirements determined by the municipal council concerned in addition to the requirements set out in subregulations *(a)-(j)*.'

[8] In this matter, the municipal police service had been established under s 64A. This required the municipal council to appoint the first metro police chief. Those are the precise circumstances covered by the provisions of s 64D. As such s 64D was triggered and the present appointment was located squarely within its ambit. This was correctly conceded by Mr Barnes. It was thus undisputed that the

[3] Section 64Q(2)*(a)* reads:
'Every person who, on the date of the establishment of a municipal police service under section 64A for a particular municipality, is registered as a traffic officer in terms of any law and who is employed by that municipality may be appointed as a member of the municipal police service even though the person may not comply with the training requirements for appointment as a member of the municipal police service'.

provisions of s 64D governed the appointment. Section 64D accordingly had to be interpreted. The approach to this process is clear:

'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 into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[4]

And:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".'[5]

[9] Section 64D requires the municipality to 'appoint a fit and proper person' as the first metro police chief. This is the single requirement. The words do not

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18.

[5] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 12.

specify that any other criteria need be considered. Section 64C(1) provides the immediate context. It deals with appointments which follow that of the first metro police chief and requires the municipality to 'appoint a member of the municipal police service'. It makes the provisions of s 64C(1) 'subject to section 64D'. This means ineluctably that s 64C(1) does not apply to appointments under s 64D. This contextual interpretation is buttressed by practical considerations and makes good business sense. The reason for this provision not applying to the first appointment is quite simply that, at that time, there would be no members of the municipal police service from which to appoint the first metro police chief. This was accepted by Mr Barnes in argument. As such, he accepted that s 64C(1) did not apply to the appointment. He could thus not base his contention that Mr Kgamanyane had to be registered as a traffic officer on those provisions.

[10] Mr Barnes also accepted in argument that regulation 11(1)*(a)* did not apply to the appointment. This concession was correct for at least three reasons. First, the regulation relates to the appointment of a member of a municipal police service as opposed to the metro police chief. Secondly, the regulation is pertinently made subject to s 64D and must accordingly suffer the same consequence as reliance on s 64C(1) dealt with above. Thirdly, the Act cannot be interpreted in the light of the regulations promulgated under it.

[11] Before us, Mr Barnes raised only one argument in support of his contention. It was that, in order to be a 'fit and proper person' as envisaged by s 64D, an appointee had to be registered as a traffic officer. He submitted that, in the absence of a requirement that the appointee be registered as a traffic officer, the words 'fit and proper person' in s 64D would have no clear meaning in law and would be

incapable of being applied. He could cite no authority for that proposition and nor could I find any.

[12] The words 'fit and proper person' are commonly used in legislation as a criterion for appointment to various positions. A small sample of the numerous provisions to this effect will suffice.

(a) Section 191 of the Companies Act 71 of 2008 allows the relevant Minister to set up specialist committees and to appoint members to them. Section 192(2) sets out requirements for persons appointed to those committees:

'To be appointed or designated as a member of a specialist committee in terms of this section, a person must –

(a) be a fit and proper person;

(b) have appropriate expertise or experience; and

(c) have the ability to perform effectively as a member of that committee.'

(b) Section 45(3) and (4) of the National Credit Act 34 of 2005 set out some of the requirements for registration under that Act:

'(3) If an application complies with the provisions of this Act and the applicant meets the criteria set out in this Act for registration, the National Credit Regulator, after considering the application, must register the applicant subject to section 48 unless the National Credit Regulator after subjecting the applicant to a fit and proper test or any other prescribed test, is of the view that there are other compelling grounds that disqualify the applicant from being registered in terms of this Act.

(4) The Minister may prescribe the criteria to be considered in conducting a fit and proper test contemplated in subsection (3)'.

(c) Section 174(1) of the Constitution provides:

'Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen'.

(d) Section 2(3) of the State Attorneys Act 56 of 1957 provides:

'The Minister of Justice and Constitutional Development may, subject to the laws governing the public service and after consultation with the Solicitor-General, appoint –

(a) as State Attorneys, fit and proper persons who are admitted and entitled to practise as attorneys in any division of the High Court of South Africa, and who shall be the heads of offices of State Attorney established or deemed to have been established in terms of section 1;

(b) as many persons, who are fit and proper, and who are admitted and entitled to practise as attorneys in any division of the High Court of South Africa, as may be necessary for the proper performance of the business of an office of State Attorney; and

(c) such other persons as may be necessary for the proper performance of the business of an office of State Attorney.'

(e) Section 7(1)*(c)* of the Legal Practice Act 28 of 2014 provides for the appointment of certain members of the Legal Practice Council:

'subject to subsection (3), three fit and proper persons designated by the Minister, who, in the opinion of the Minister and by virtue of their knowledge and experience, are able to assist the Council in achieving its objects'.

(f) And s 24(2) of that Act provides:

'The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she –

(a) is duly qualified as set out in section 26;

(b) is a –

(i) South African citizen; or

(ii) permanent resident in the Republic;

(c) is a fit and proper person to be so admitted; and

(d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules'.

[13] In each of the above provisions, the requirement of being a fit and proper person is a requirement in and of itself. Where other criteria are to be considered along with that requirement, these are specified or imposed by way of regulations. This further context to interpreting s 64D shows that the legislature chose not to

add any further criteria to that of the appointee being a fit and proper person. This also distinguishes it from s 64C, which requires an appointee to come from the ranks of members of a municipal police service. Under regulation 11, those ranks require such a person to be registered as a traffic officer and meet a number of other requirements. None of these is specified as necessary for an appointee under s 64D.

[14] The requirement of being a fit and proper person is one which has come to have a settled meaning in our law. It is not shorn of meaning in the absence of a requirement that the appointee had to be a traffic officer. It is capable of application and has been applied in numerous contexts, either along with other requirements or on its own. While s 64D does not include any further requirements, the legislature included other requirements as regards ordinary members of a municipal police service by way of s 64Q and regulation 11(1), and for appointments of subsequent metro police chiefs of by way of s 64C(1). The submission that a municipality must include a requirement that the first metro police chief be registered as a traffic officer in order for the appointee to be a fit and proper person therefore does not pass muster.

[15] That being the case, Mr Barnes was incorrect to contend that the municipality acted beyond its powers when it appointed Mr Kgamanyane as the first metro police chief. The application to review the appointment was thus correctly dismissed by the high court. The appeal must suffer the same fate. The respondents were unable to advance any submissions in favour of their being entitled to the costs consequent on the appointment of two counsel. The same senior counsel who represented the respondents on appeal, appeared alone in the court a quo. In addition, the matter resolved itself into a crisp issue, which in my

view did not require the services of two counsel. Therefore, the costs of only one counsel should be allowed on appeal.

[16] In the result, the appeal is dismissed with costs.

T R GORVEN
JUDGE OF APPEAL

Appearances

For appellant:	S Grobler SC
Instructed by:	Jacob Boucher Attorneys, Bloemfontein
For respondent:	W R Mokhare SC, with him C Lithole
Instructed by:	Rampai Attorneys, Bloemfontein.