REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

27 November 2023

CASE NO: 2023-041913

In the matter between:

THE DEMOCRATIC ALLIANCE Applicant

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY First Respondent

COUNCIL OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Second Respondent

THE CITY MANAGER OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Third Respondent

FLOYD BRINK Fourth Respondent

THE EXECUTIVE MAYOR OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Fifth Respondent

THE SPEAKER OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Sixth Respondent

COLLEEN MAKHUBELE Seventh Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, GAUTENG PROVINCIAL GOVERNMENT Eighth Respondent

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Ninth Respondent

THAPELO AMAD Tenth Respondent

JUDGMENT ON LEAVE TO APPEAL

S BUDLENDER AJ:

[1] On 7 November 2023, I delivered my judgment in the main application.

[2] On the same day, the first to seventh and tenth respondents in the main application delivered an application for leave to appeal against the whole of the judgment.

[2.1] It is, on reflection, somewhat surprising that all of these respondents would deliver an application for leave to appeal when only five of them opposed the main application. But no point was made of this and so I likewise make nothing of it.

[2.2] I refer to the parties seeking leave to appeal as "the City" and to the party opposing leave to appeal as "the DA".

A PRELIMINARY ISSUE

[3] It is necessary to deal with one preliminary issue.

[4] After I had asked the parties to arrange a mutually convenient date for the hearing of the application for leave to appeal, the attorneys for the City wrote a letter expressing doubt as to whether I should hear the application for leave to appeal. Their concerns rested primarily on the fact that, since hearing the main application, I had left the Bar and taken up a position employed by a private entity in the position of General Counsel. This prompted a response from the attorneys for the DA, disagreeing with the stance of the City.

[5] I thereafter wrote to both parties on 14 November 2023 as follows:

[5.1] Section 48 of the Superior Courts Act 10 of 2013 seemed to make clear that my powers as an acting Judge extended to dealing with applications for leave to appeal after my acting period expires.[1]

[5.2] In those circumstances, my understanding was that it remained my duty to hear and determine the application for leave to appeal.

[5.3] I noted that the City had indicated that it may wish to write to the Judge President regarding this matter. I emphasised that it was, of course, at liberty to do so and the Judge President would then have to deal with whatever request is made of him.

[5.4] Unless otherwise directed by the Judge President, I was intending to hear the application for leave to appeal on 22 November 2023, as arranged between the parties.

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[1] Section 48 provides: "Any person who has been appointed as an acting judge of a Superior Court must be regarded as having been appointed also for any period during which he or she is necessarily engaged in the disposal of any proceedings in which he or she has participated as such a judge, including an application for leave to appeal that has not yet been disposed of at the expiry of his or her period of appointment."

[6] When the matter commenced on 22 November 2023, it was confirmed by counsel for the City that:

[6.1] The City had decided not to write to the Judge President;

[6.2] The City accepted that I was empowered by section 48 of the Superior Courts Act to decide the application for leave to appeal; and

[6.3] The City did not wish to apply for my recusal.

[7] I therefore proceeded to hear the matter and reserved judgment for a brief period.

THE MERITS OF THE APPLICATION FOR LEAVE TO APPEAL

[8] The test for leave to appeal is well known and was cited by both sets of counsel. It is not necessary to rehearse it here. It suffices to say that:

[8.1] The first basis on which leave to appeal may be granted is where the court comes to the conclusion that the appeal would have a reasonable prospect of success.

[8.2] The second basis on which leave to appeal may be granted is where the court comes to the conclusion that "*there is some other compelling reason why the appeal should be heard*". Even under this ground, however, "*the merits remain vitally important and are often decisive*".[2]

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[2] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA) at para 10.

[9] The City delivered heads of argument running to just under fifty pages in advance of the hearing, while the DA also delivered heads of argument. I considered both sets of heads of argument in detail in advance of the hearing.

[10] As it happened, however, during the hearing counsel for the City only dealt with three grounds of appeal:

[10.1] The contention by the City that section 54A of the Local Government: Municipal Systems Act 32 of 2000 did not apply to the appointment of Mr Brink;

[10.2] The contention by the City that a procedural challenge to the resolutions was not available under the principle of legality; and

[10.3] The contention by the City that the remedy granted impermissibly interfered with its powers because it required it to appoint an acting Municipal Manager.

[11] I deal briefly with each in turn.

[12] The first issue can be disposed of rapidly.

[12.1] The judgment did not find that Section 54A of the Systems Act applied to the appointment of Mr Brink.

[12.2] The only reference to section 54A in the section of the judgment on the merits was when it quoted from a judgment of the Constitutional Court as follows:

"It is hard to imagine clearer examples of substantive resolutions. They are substantive resolutions with critical effects for the City and its residents. As the Constitutional Court has explained:

> *'[Section 54A] lays emphasis on the appointment of suitably qualified municipal managers owing to the position they hold in the administration of a municipality. The role played by the managers is crucial to the delivery of services to local communities and the proper functioning of municipalities whose main function is to provide services to local communities.'*[3]

[12.3] This is not a finding that section 54A applied to the appointment of Mr Brink. It was merely a statement about the important role of Municipal Manager. That was the case before and after section 54A was enacted.

[12.4] When this was raised with counsel for the City, he fairly abandoned reliance on this ground.

[13] The second ground related to the availability of procedural challenges under the principle of legality.

[13.1] The argument was as follows: (a) the judgment correctly found that only the principle of legality (not PAJA) was applicable to the resolutions; (b) the judgment invalidated the resolutions based on procedural irregularities; (c) however, review for such procedural irregularities is only permitted under PAJA – the most that one can do under the principle of legality is review for procedural irrationality.

[13.2] I have given careful consideration to the argument but am not

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[3] At para 34.3, quoting *Notyawa v Makana Municipality and Others* [2019] ZACC 43; 2020 (2) BCLR 136 (CC) at para 4

persuaded that it has prospects of success.

[13.3] The fundamental point about legality review is that it requires that any decision taken must be intra vires – that is within the limits of the power conferred. That applies both to procedural limits and substantive limits. This appears, for example, from the judgment of the Constitutional Court in *Law Society*, where it held:

> *"What the principle of legality entails in the present context is that our President may only exercise power that was lawfully conferred on her and in the manner prescribed…"*[4]

[13.4] That makes clear the unsurprising conclusion that a public power must be exercised in compliance with both the procedural and substantive constraints placed on it – if not, it is unlawful and invalid and may be reviewed under the principle of legality.

[13.5] Of course, a different question is whether the principle of legality includes review for procedural fairness. The Constitutional Court has held that it does not and that only review for procedural rationality is available under the principle of legality.[5]

[13.6] But that has no bearing on the present case. The judgment did not rely on procedural fairness. It instead reached a conclusion that the procedures required by the Standing Rules and Orders were breached – thus rendering the decisions procedurally unlawful and invalid. This

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[4] *Law Society of South Africa and Others v President of the Republic of South Africa and Others)* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018) at para 48 (emphasis added)

[5] Id, at para 64.

was expressly pleaded in the founding affidavit.

[13.7] Lastly, I note that in response to a question during argument on the leave to appeal application, counsel for the City expressly accepted in this regard that the Standing Rules and Orders were binding on the Council. That concession was rightly made in my view.

[13.8] It seems to me that once one concludes that the resolutions breached the procedures required by the Standing Rules and Orders, it must follow that this is a basis for a review under the principle of legality.

[13.9] I therefore do not consider that this ground bears prospects of success.

[14] The third ground relates to the question of remedy.

[14.1] The remedy granted in paragraphs 1 and 2 of the order set aside the two resolutions, which was then coupled with a limited order of suspension in paragraph 4 as follows:

> *"The orders in paragraphs 1 to 3 are suspended for ten court days from the date of this order to allow for the appointment of an Acting City Manager."*

[14.2] I engaged with counsel for the City about the precise nature of the complaint raised by his clients. He made clear that, assuming for the sake of argument that the finding on the merits was correct:

[14.2.1] There was no objection to the order setting aside the resolutions; and

[14.2.2] There was no complaint that the 10-day period of suspension was too short.

[14.3] Rather, the complaint lay elsewhere. It was that by referring to the appointment of an Acting City Manager in paragraph 4, the order had impermissibly tied the Council's hands as to what it could do during the ten-day period.

[14.4] I have considered this argument carefully but do not consider that it bears prospects of success.

[14.5] When I enquired what else the Council might wish to do during the ten-day period to fill the vacuum created by the setting aside order, counsel for the City pointed to the possibility of the MEC seconding someone to be the City Manager. But the order does not preclude that. Section 54A(6) provides that "*The municipal council may request the MEC for local government to second a suitable person, on such conditions as prescribed, to act in the advertised position until such time as a suitable candidate has been appointed."*[6] Thus, the only way a secondment could occur is via an acting appointment – which is what paragraph 4 of the order contemplates.

[14.6] The other possibility that counsel for the City offered was that the Council may wish to make a permanent appointment within the ten-day period, rather than an acting appointment. This overlooks the fact that the main tenor of the merits judgment was that the permanent

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[6] Emphasis added

appointment of a City Manager is a critical decision which, absent true urgency, cannot be rushed and must follow the proper process in the Rules and Standing Orders. A permanent appointment now of City Manager in less than ten days would not meet these requirements, especially when the lesser route of an acting appointment was available.

[14.7] It therefore does not seem to me that the complaint about paragraph 4 has prospects of success.

[14.8] Lastly, it is appropriate to say something about paragraph 3 of the order.

[14.8.1] That is the order which, following from the setting aside of the two resolutions, declared that any employment contract and/or performance contract any of the respondents may have concluded with Mr Brink pursuant to the resolutions was unconstitutional, unlawful and invalid.

[14.8.2] Though the issue was not pursued in oral argument, the notice of appeal contended that no basis had been made out for this order.

[14.8.3] However, the prayer concerning the contracts was sought in the Notice of Motion and on *All Pay II*, the “default position”

in s that the fate of the contracts must follow the fate of the resolutions.[7]

[14.8.4] While I certainly had the power to depart from this default position (a point emphasised by counsel for the City) a proper case had to be made out for this departure. As was quite properly accepted by counsel for the City, no specific basis was pleaded or argued by the City for a departure from this position.

[14.8.5] Once that is so, then the complaint about paragraph 3 does not appear to me to have prospects of success.

[14.9] The conclusion that the remedial appeal grounds do not bear prospects of success is significantly strengthened when one considers that the determination of a just and equitable remedy is a discretion in the true sense and "*an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range*."[8] No basis was laid out to meet this test.

CONCLUSION

[15] Having considered the three grounds of appeal raised during oral argument

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[7] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 30

[8] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) at para 82 to 92

and the remaining grounds raised in the application for leave to appeal and heads of argument, I am of the view that:

[15.1] the proposed appeal bears no prospects of success; and

[15.2] there is no other compelling reason for leave to appeal to be granted.

[16] I therefore make the following order:

The application for leave to appeal is dismissed with costs, including the costs of two counsel.

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S BUDLENDER
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 22 November 2023

DATE OF JUDGMENT: 27 November 2023