IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: A358/15

In the matter between:

REYNOLDS STEVENS Appellant

And

CAPE AGULHAS LOCAL MUNICIPALITY First Respondent

THE MUNICIPAL COUNCIL OF CAPE AGULHAS LOCAL MUNICIPALITY Second Respondent

THE MUNICIPAL MANAGER OF CAPE AGULHAS LOCAL MUNICIPALITY Third Respondent

DEAN O'NEILL Fourth Respondent

THE MEC: LOCAL GOVERNMENT, ENVIRONMENTAL AFFIARS AND DEVELOPMENT PLANNING, PROVINCIAL GOVERNMENT OF THE WESTERN CAPE Fifth Respondent

AFRICAN NATIONAL CONGRESS Sixth Respondent

DEMOCRATIC ALLIANCE Seventh Respondent

JUDGMENT: FRIDAY 8 APRIL 2016

SCHIPPERS J:

[1] This is an appeal, with leave from the Supreme Court of Appeal, against an order by the court below dismissing with costs the appellant's application to review and set aside the fourth respondent's appointment as municipal manager of the first respondent, the Cape Agulhas Local Municipality ("the Municipality"), in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In the review proceedings the appellant also sought an order that he be appointed as municipal manager of the Municipality; alternatively, that the decision to appoint the municipal manager be remitted to the Municipality, together with directions which the court considers appropriate.

[2] Prior to launching the review proceedings under PAJA in this court on 13 June 2014, the appellant referred a dispute relating to the Municipality's failure to appoint him to the position of municipal manager (which he initially characterised as an unfair labour practice and subsequently, an unfair dismissal), to the South African Local Government Bargaining Council ("the Bargaining Council") on 26 July 2013. However, the appellant abandoned those proceedings in March 2014, after the Bargaining Council refused his application for condonation of the late referral of the unfair dismissal dispute.

Factual overview

[3] The basic facts, for present purposes, are common ground. The appellant was the former municipal manager of the Municipality, employed on a fixed-term contract for five years, from 1 August 2008 to 31 July 2013.

[4] On 7 April 2013 the Municipality placed an advertisement for the post of municipal manager. The closing date was 28 April 2013. The second respondent assigned the recruitment and selection process to the Mayoral Committee ("the Committee") of the Municipality. The Executive Mayor, Mr Richard Mitchell ("Mitchell"); the Deputy Mayor, Mr Dirk Jantjies ("Jantjies"); and Mr Raymond Mokotwana ("Mokotwana") served on the Committee, which had to make a recommendation on the appointment of the municipal manager to the second respondent. The Committee was assisted by a specialist human resources consultant, namely ODS Consultants CC ("ODS").

[5] The appellant and the fourth respondent, a former municipal manager of Matzikama Municipality in the Western Cape, applied for the post. Six candidates, including the appellant and fourth respondent, were shortlisted and invited to attend an interview and evaluation session. Four candidates attended the evaluation session. According to the Selection Report by ODS dated July 2013, the appellant was ranked first in the selection process and the fourth respondent, second; and the appellant was also the preferred candidate for appointment as municipal manager. The Report further states that there was a "technical problem", namely that at the time of the selection process, the appellant was not in possession of a certificate relating to the Municipal Minimum Competency Levels Training - a requirement for appointment to the post of municipal manager. The appellant had completed the training but was

waiting for Stellenbosch University to issue his results. ODS expressed the view that the appellant's appointment may lead to a dispute if the other candidates for the post were to claim that they complied with the requirements and thus were the only suitable candidates. ODS recommended that the second respondent take cognizance of the problem; and that it should decide which candidate is the most suitable and offer employment to that candidate.

[6] On 8 July 2013 the appellant attended a meeting at which Mitchell, Jantjies, Mokotwana and the Speaker of the Municipal Council were present. When the appointment of the municipal manager came up for discussion, the appellant asked to be excused from the meeting. However, he was told to remain since the Committee had already finalised its recommendation to the second respondent. He was informed that he was the preferred candidate for the post and that the second respondent would confirm his appointment as municipal manager at its meeting on 9 July 2013.

[7] However, the appellant was not appointed as municipal manager on 9 July 2013. That day Mitchell, Jantjies, Mokotwana and the Speaker informed the appellant that the meeting of the second respondent had been called off pursuant to an instruction from the provincial leadership of the African National Congress (ANC). The appellant responded that he had no other option but to enforce his rights.

[8] At a meeting of the second respondent on 23 July 2013, the fourth respondent was appointed to the position of municipal manager of the Municipality. Prior to that meeting, a delegation of the ANC was present in Mitchell's office the entire morning and also attended the meeting. The appellant contends that the delegation attended the meeting to ensure that the ANC coalition councillors carried out a political instruction - the appointment

of the fourth respondent as municipal manager. The first to third respondents deny this. They say that the resolution to appoint the fourth respondent was unanimous, and that there was no objection by councillors of the Democratic Alliance. For present purposes, it is unnecessary to decide whether the fourth respondent was indeed appointed pursuant to a political instruction from the ANC.

[9] On 26 July 2013 the appellant, assisted by the representative of his trade union - the South African Municipal Workers' Union (SAMWU) - referred a dispute to the Bargaining Council. The appellant claimed that the Municipality's failure to appoint him to the position of municipal manager was an unfair labour practice, based on non-appointment, as contemplated in s 186(2)(a) of the Labour Relations Act 66 of 1995 (LRA).[1] I shall refer to that dispute as the "unfair labour practice dispute".

[10] In an affidavit made on 21 February 2014 in his application for condonation of the late filing of a dispute in the proceedings before the Bargaining Council (annexed to the founding papers), the appellant states that the unfair labour practice dispute was referred to conciliation on 26 July 2013. The Bargaining Council issued a certificate of outcome declaring the unfair labour practice dispute unresolved, and the matter was set down for arbitration, by mutual agreement, on 24 January 2014.[2]

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[1] Section 186(2)(a) of the LRA reads:
" '**Unfair labour practice**' means any unfair act or omission that arises between an employer and an *employee* involving-
(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding *disputes* about dismissals for a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee*;"

[2] Clause 12.10 of the Constitution of the SALGBC provides that if conciliation has failed, the conciliator must issue a certificate stating whether or not the dispute has been resolved. In terms of clause 13.1, any party to a dispute may refer it to the Bargaining Council for arbitration if the dispute has been referred to a conciliator and a certificate has been issued in terms of clause 12.10.

[11] In his affidavit in the proceedings before the Bargaining Council, the appellant also states that he sought to reclassify the dispute as an unfair dismissal in terms of s 186(1)(b) of the LRA, instead of an unfair labour practice; that notice of his intention to reclassify the dispute was given to the Municipality in December 2013; that the facts of the dispute had always remained the same; and that it was simply a case of incorrect categorisation of the dispute as an unfair labour practice when it should have been unfair dismissal.

[12] At the arbitration on 24 January 2014, held under the auspices of the Bargaining Council, the appellant was represented by the same attorneys who act for him in this application. The Municipality was also legally represented. Two preliminary points relating to the jurisdiction of the Bargaining Council and reclassification of the dispute were argued on behalf of the parties. The arbitrator found in favour of the Municipality.

[13] The appellant then decided to refer a dispute based on unfair dismissal to the Bargaining Council ("the unfair dismissal dispute"). That dispute should have been referred to the Council by 23 August 2013. It was however only referred on 26 February 2014 - some six months later.[3] The appellant thus had to bring an application for condonation of the late referral of the unfair dismissal dispute. The Municipality opposed that application.

[14] The appellant was represented by counsel in the condonation application. On 31 March 2014 the Bargaining Council delivered its ruling. It accepted that the delay between the date of the alleged dismissal - 23 July 2013 to 24 January 2014 - was sufficiently explained, based on the fact that an incorrect referral had

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[3] In terms of clause 12.3 of the Constitution of the SALGBC, a dispute concerning the fairness of a dismissal must be referred within 30 days from the date on which internal proceedings are exhausted.

been made. The late referral of the unfair dismissal dispute would have been condoned had the appellant referred it on 24 January 2014 or very soon thereafter, but the appellant and/or his legal representatives had allowed a further delay of 32 days, and failed to show good cause for condonation of that delay. The application for condonation was therefore refused.

[15] After condonation of the late filing of the unfair dismissal dispute was refused on 31 March 2014, the appellant did nothing to advance his case which had been before the Bargaining Council. More specifically, he did not approach the Labour Court to review and set aside the decision refusing condonation.

[16] On 13 June 2014 - more than two months later - the appellant launched this application as one of urgency, to review and set aside the appointment of the fourth respondent as municipal manager, in terms of PAJA. There is no explanation for this further delay in the founding affidavit. The appellant claims that the impugned decision falls to be reviewed basically on the ground that the fourth respondent's appointment was as a result of a political instruction from the ANC. He contends that the decision-maker was biased;[4] that the administrative action was procedurally unfair;[5] that it was taken for a reason not authorised by the empowering provision, for an ulterior purpose, because of the unauthorised dictates of another body, in bad faith, and arbitrarily or capriciously;[6] that the action itself is not rationally connected to the purpose for which it was taken;[7] that it is unreasonable;[8] and that it is otherwise unconstitutional or unlawful.[9]

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4 Section 6(2)(a)(iii) of PAJA.
5 Section 6(2)(c) of PAJA.
6 Sections 6(2)(e)(i), (ii), (iv), (v) and (vi) of PAJA.
7 Section 6(2)(f)(ii) of PAJA.
8 Section 6(2)(h) of PAJA.
9 Section 6(2)(i) of PAJA.

The Bargaining Council has jurisdiction

[17] The court below held that it did not have jurisdiction to decide this case, essentially on the following grounds. The appellant had correctly referred a dispute to the Bargaining Council as the dispute fell squarely under the LRA. Having submitted himself to the jurisdiction of the Bargaining Council, the appellant should have pursued that dispute to its end. When condonation was refused for the late referral of the unfair dismissal dispute, the appellant should have reviewed the decision of the Bargaining Council in terms of s 145 or 158(1)(g) of the LRA. He should not have abandoned the LRA route in favour of the PAJA route. Generally, employment and labour related issues do not constitute administrative action as contemplated in PAJA.

[18] The first question is whether the bargaining council had jurisdiction to decide the unfair dismissal dispute. In my view, it did, for the reasons set out below.

[19] The Bargaining Council is established in terms of s 27 of the LRA.[10] Its constitution states that its scope of registration is the Local Government Undertaking in South Africa.[11] The powers and functions of a bargaining council are set out in s 28 of the LRA. These include the prevention and resolution of labour disputes, and performing the dispute resolution functions referred to in s 51 of the LRA, which are also incorporated in the Constitution of the SALGBC.[12]

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[10] Section 27 of the LRA reads:

"(1) One or more registered *trade unions* and one or more registered *employers' organisations* may establish a *bargaining council* for a *sector* and *area* by-

(a) adopting a constitution that meets the requirements of section 30; and

(b) obtaining registration of the *bargaining council* in terms of section 29."

[11] Clause 1.2 of the Constitution of the SALGBC.

[12] Clauses 3.1.2 and 3.1.4 of the Constitution of the SALGBC.

[20] In terms of s 51 of the LRA, a "dispute" includes any dispute about a matter of mutual interest between on the one hand, one or more employees; and on the other, one or more employers.

[21] The dispute which the appellant referred to the Bargaining Council for resolution, was one of unfair dismissal as contemplated in s 186(1)(b) of the LRA. The relevant provisions read:

> "(1) **'Dismissal'** means that-
> (a) …
> (b) an *employee* employed in terms of a fixed-term contract of employment reasonably expected the employer-
> (i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;"

[22] The appellant's claim that he was unfairly dismissed within the meaning of s 186(1)(b), is best described in his own words:

> "I am of the view that I have good prospects of succeeding in a referral under Section 186(1)(b) in that I was informed by the Respondent on 8 July 2013 that I would be appointed to the position of Municipal Manager. However, what transpired on 23 July 2013, was that during the course of the meeting, which was adjourned briefly, a political decision was taken to appoint the second preferred candidate, Mr O'Neill. This decision was both procedurally and substantively unfair in that I was the recommended candidate, having received the highest score in the interview process and was further advised of my successful application for the position by the Respondent and furthermore the Respondent failed to follow its own procedure in determining the appointment of a Municipal Manager."[13]

[23] In my view, and on his own showing, the appellant's claim falls within the ambit of s 186(1)(b) of the LRA. First, it is a dispute about a matter of mutual interest between an employee and an employer, as envisaged in s 51 of

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[13] Appellant's founding affidavit in the application for condonation in the proceedings before the Bargaining Council made on 21 February 2014, para 5.

the LRA. Second, the appellant claims that whilst employed on a fixed-term contract - which only came to an end on 31 July 2013 - he was informed by the Municipality on 8 July 2013 that his application for the position of municipal manager had been successful, and that he would be appointed to that position. He thus reasonably expected the reintroduction or renewal of a fixed-term contract of employment as a municipal manager, which did not happen.

[24] In any event, I consider that the Bargaining Council would have jurisdiction by virtue of the appellant's complaint that the decision to appoint the fourth respondent was procedurally and substantively unfair, because the appellant had received the highest score in the interview process, was the recommended candidate and was advised by the Municipality that he would be appointed as municipal manager.

[25] The unfair dismissal dispute, the impact of which is felt mainly by the appellant with little or no direct consequence for any other citizen, is quintessentially a labour-related issue.[14] So too, the appellant's claim that the appointment of the fourth respondent was procedurally and substantively unfair.

[26] It is precisely because the appellant's complaints are quintessentially labour-related issues, that the Bargaining Council - a structure established under the LRA - has jurisdiction. As the Constitutional Court said in *Gcaba*, the Labour Court and other LRA structures have been created as a special mechanism to adjudicate labour disputes such as alleged unfair dismissals grounded in the LRA, and not applications for administrative review. The Court went on to say that the High Court adjudicates alleged violations of

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[14] *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) para 66.

constitutional rights and administrative review applications, which corresponds with a proper interpretation of s 157(1) and (2) of the LRA.[15]

[27] Sections 157(1) and (2) of the LRA read:

> "(1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-
> (a) employment and from labour relations;
> (b) any dispute over the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
> (c) the application of any law for the administration of which the Minister is responsible."

[28] The Constitutional Court has held that s 157(1) confirms that the Labour Court has exclusive jurisdiction in any matter which the LRA prescribes should be determined by it; that s 157(1) should therefore be given expansive content to protect the special status of the Labour Court; and that s 157(2) should not be construed to permit the High Court to have jurisdiction over those matters as well.[16]

[29] Section 157(2) confers limited constitutional jurisdiction on the Labour Court in respect of matters involving alleged or threatened violations of the rights in the Bill of Rights, arising out of employment and labour relations.[17] Its purpose is to extend the jurisdiction of the Labour Court to such matters; rather than to restrict or extend the jurisdiction of the High Court.[18] This power of the

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15 *Gcaba* n 14 above para 69.
16 *Gcaba* n 14 above para 70.
17 *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) para 115 per Ngcobo J.
18 *Gcaba* n 14 above para 71.

Labour Court to deal with such disputes is essential to its role as a specialist court, responsible for developing a coherent and evolving employment and labour relations jurisprudence.[19] Section 157(2) should be interpreted to mean that the Labour Court is able to determine constitutional issues which arise before it in the specific jurisdictional areas created for it by the LRA and which are covered by s 157(2)(a), (b) and (c).[20]

[30] Applying these principles to the facts in the instant case, the Bargaining Council is a specialist structure established to deal with labour and employment related disputes such as alleged unfair dismissals grounded in the LRA, as contemplated in s 157(1). So viewed, it unquestionably has jurisdiction in respect of the unfair dismissal dispute as well as the appellant's claim that the decision to appoint the fourth respondent was procedurally and substantively unfair.

[31] This finding, in my view, is not inconsistent with the provisions s 54A(4) of the Local Government: Municipal Systems Act 32 of 2000 ("the Municipal Systems Act"). It reads:

> "(4) 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
> (b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post."

[32] The unfair dismissal dispute was not that the Municipality did not advertise the post or that it failed to attract a pool of candidates nationally, as contemplated in s 54A(4) of the Municipal Systems Act. Instead, the appellant's case before the Bargaining Council was that the post was advertised nationally; that he obtained the highest score in the evaluation process; that he

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19 *Chirwa* n 17 above para 118 per Ngcobo J.
20 *Gcaba* n 14 above para 72.

was the preferred candidate; that on 8 July 2013 he had been informed by the Municipality that he would be appointed to the position of municipal manager; and that it failed to enter into a new fixed-term contract with him.

It was not open to the appellant to approach this court under PAJA

[33] In *Chirwa*,[21] the employee initiated proceedings in the Commission for Conciliation and Arbitration (CCMA) on the grounds that her dismissal was unfair. When the dispute was not resolved by conciliation, she did not continue with the CCMA process. Instead, she instituted proceedings in the High Court alleging that in dismissing her, her employer had not complied with the mandatory provisions of the LRA and had therefore infringed her constitutional right to just administrative action as given effect to in PAJA. She did so because she was advised that she had two causes of action: one arising from the provisions of the LRA and another, from PAJA.

[34] The dictum by Ngcobo J in *Chirwa* makes it clear that a party may not initiate a process under the LRA and halfway through that process, allege another cause of action and institute proceedings in the High Court:

> "Ordinarily and as a matter of judicial policy, even if the High Court had concurrent jurisdiction with the Labour Court in this matter, it should be impermissible for a party to initiate the process in the CCMA alleging one cause of action namely unfair labour practice, and halfway through that process allege another cause of action and initiate proceedings in the High Court. It seems to me that where two courts have concurrent jurisdiction, and a party initiates proceedings in one system alleging a particular cause of action, the party is bound to complete the process initiated under the system that he or she has elected. Concurrent jurisdiction means that a party must make an election before initiating proceedings. A party should not be allowed to change his or her cause of action midstream and then switch from one court system to

[21] Note 14 above.

another. In effect the applicant is inviting us to countenance such a practice. It is an invitation which should in my view be firmly rejected." [22]

[35] This approach was affirmed in *Gcaba*, in which it was held that forum-shopping is undesirable; and that once a litigant has chosen a particular cause of action and system of remedies, for example, the structures provided by the LRA, he should not be allowed to abandon that cause as soon as a negative decision is encountered.[23]

[36] That is exactly what happened in this case. The appellant abandoned his cause of action under the LRA when condonation of the late filing of the unfair dismissal was refused, and then launched this application. The court below was thus correct in holding that the appellant could not abandon the LRA proceedings midstream. And the appellant's contention that the referral of the unfair labour dispute to the Bargaining Council constitutes an internal remedy contemplated in s 7(2) of PAJA, is wrong. It is no "internal" remedy. Instead, it is a different cause of action and remedy under the LRA which the appellant had to take to its conclusion.

[37] I would make the following order:

(a) The appeal is dismissed with costs.

(b) The order of the court below is confirmed.

SCHIPPERS J

[22] *Chirwa* n 17 para 85.
[23] *Gcaba* n 14 para 57.

DLODLO J:

[38] I agree.

DLODLO J

BLIGNAULT J:

[39] I have read the judgment of Schippers J. Whilst I agree with the orders proposed by him I do so for the other reasons. They follow hereunder.

[40] Appellant, Mr Reynold Stevens, applied for the vacant post of the municipal manager of first respondent, the Cape Agulhas Local Municipality ('the Municipality'). His application was not successful. Second respondent, the Municipal Council of Cape Agulhas Local Municipality ('the Municipal Council'), instead appointed fourth respondent, Mr Dean O'Neill, to the position.

[41] On 13 June 2013 appellant launched a review application in terms of the Promotion of Administration of Justice Act 3 of 2000 ('PAJA') for the review and setting aside of the appointment of fourth respondent as municipal manager by the Municipal Council and the appointment of himself in that position. The review application was opposed by first, second, third and fourth respondents. The MEC: Local Government, Environmental Affairs and Development Planning, Provincial Government of the Western Cape, the African National Congress and the Democratic Alliance were cited as fifth, sixth and seventh

respondents respectively. They did not oppose the application and abided the decision of the court.

[42] The court below dismissed appellant's review application with costs. Having obtained leave to appeal from the Supreme Court of Appeal, appellant lodged this appeal to this court, a full bench of this division, against the dismissal of his application.

The legislative framework

[43] The appointment of a municipal manager by a municipality is governed by the provisions of section 54A of the Local Government: Municipal Systems Act 32 of 2000 ('the Municipal Systems Act'). Sub-sections 54A(1),(2),(3) and(4), insofar relevant, read as follows:

> 54A Appointment of municipal managers and acting municipal managers
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> (1) The municipal council must appoint-
>
> (a) a municipal manager as head of the administration of the municipal council; or
>
> (b) acting municipal manager under circumstances and for a period as prescribed.
>
> (2) A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.
>
> … …
>
> (3) 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-
>
> (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
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> (b) the appointment was otherwise made in contravention of this Act.

(4) 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
(b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.

[44] The *'qualifications'* referred to in section 54A(2) of the Municipal Systems Act were prescribed by Regulation 493 dated 15 June 2007. The relevant regulation is encapsulated in the advertisement as follows:

> 'In order to meet the needs of the Cape Agulhas Municipality, the successful applicant will comply with the following requirements:
> … …
> - Certificate in Municipal Finance Management (SAQA qualification ID no 48965) for Accounting Officers of municipalities, as is provided for in Regulation 493 dated 15 June 2007 obtained before the prescribed date of 1 January 2013… …'

Appellant's affidavits

[45] Appellant had previously been appointed as municipal manager of the Municipality on 1 August 2008 for a five year period which ended on 31 July 2013. The Municipal Council was therefore obligated to appoint a person to that position with effect from 1 August 2013. The vacant position was advertised on 7 April 2013 with the closing date being 28 April 2013. The Municipal Council mandated the mayoral committee of the Municipality to deal with the selection process and make a recommendation to it. The mayoral committee was assisted in this task by specialised human resource consultants, ODS Consultants CC.

[46] One of the requirements of the position was that a candidate had to be in possession of a certificate in respect of municipal finance management for

accounting officers of municipalities, obtained before the prescribed date of 1 January 2013. Appellant said that he had completed the course by that date but he was still waiting for the University of Stellenbosch to issue his results. He had disclosed this to the selection panel.

[47] Appellant said that the fact that he was not yet in possession of the certificate was not an obstacle since he was covered by an exemption and extension of the compliance deadline, which had been issued in respect of the Municipality's officials by Circular 60 issued by the National Treasury during April 2012 in terms of the Minimum Competency Regulations of 15 June 2006. In terms thereof provision was made for municipalities to apply for consideration as 'special merit cases' ('SMC's'), delaying the enforcement of certain provisions for up to eighteen months from 1 January 2013, i e 30 June 2014. The Municipality had applied for SMC status, which was awarded by the National Treasury dated 3 September 2012. The effect of this was that appellant and other affected official were exempted from the requirements of the Minimum Competency Level Regulations.

[48] Appellant stated in para 5 of his affidavit that he was summoned to a meeting in the mayor's office on 8 July 2013 which was attended by the mayor and a number of councillors. He was informed that he had emerged as the top candidate for the post and that his appointment would be confirmed the next day.

[49] It appeared from the ODS Consultants' selection report that appellant was the preferred candidate for appointment as municipal manager. He obtained the best score of all the candidates. Fourth respondent obtained the second best score in terms of the criteria applied by ODS Consultants. The report of ODS Consultants, however, contained the following comment:

'5.2.1 The Selection Committee's finding in terms of the adopted selection policy was that Mr R Stevens is the preferred candidate for appointment as Municipal Manager. The technical problem is that the qualification was not fully completed at the time of the selection process while the remaining three candidates conform to all the requirements for the Municipal Minimum Competency Levels defined in the Act. The appointment of Mr Stevens may lead to a dispute as the other candidate may claim that they conform to the requirements and are the only suitable candidates for the post. We do not expect such a challenge, but it is important for council to note the risk when making an appointment. It should be noted that the cost of a dispute action may incur substantial cost and or the MEC for local government may intervene.'

[50] Appellant said that the municipal manager was to be appointed at the council meeting to be held on 9 July 2013 at 10h00. During the morning of that day, however, the Speaker, Ms Marthinus, cancelled the meeting. Applicant proceeded as follows:

'31. During the afternoon of 9 July 2013, Messrs Mitchell, Jantjies, Mokotwana, and Ms Marthinus came to my office to discuss the issue with me. They all expressed regret that the council meeting had been called off, and made no secret of the fact that this had been as a result of an instruction from the ANC provincial leadership. Mr Mokotwana, the ANC chief whip, informed me that he considered it necessary to inform me directly of the position out of respect and acknowledgement of my dignity. I expressed appreciation towards the delegation for coming to see me and informing directly of the position, but indicated to them that I, being my family's breadwinner, had no other option but to investigate and enforce my rights. It was, however, clear that the interference and instructions from the ANC provincial leadership was such that it would not be possible for ANC councillors to defy such instructions.'

[51] On 9 July 2013 the University of Stellenbosch issued a document with reference to appellant's results. It reads as follows:

'The School of Public Leadership, Stellenbosch University is the service provider for the Municipal Minimum Competency Levels Training that Mr Reynold Stevens (Identity Number: [64……]) is currently registered for (sic) in order to obtain the

necessary competencies in the various aspects of his occupation. He has successfully completed the unit standards mentioned below subject to LGSETA verification. The authority of this specific programme is the Local Government SETA (LGSETA) and is rolled out according to the Government Gazette: Municipal Finance Management Act, 2007. Should you need any further information or have any enquiries, do not hesitate to contact me.'

[52] Appellant said the following in para 36 of his founding affidavit:

'36. At the council meeting of 23 July 2013, the second-ranking candidate, the Fourth Respondent, was officially appointed. I have been informed that an instruction was received from Mr Songezo Mjongile, the ANC provincial secretary, by the ANC coalition councillors, that the Fourth Respondent had to be appointed. In this regard I annex hereto as "RS8", a copy of a letter addressed to Mr Mjongile by Mr Jantjies, the Deputy Mayor, complaining of the political interference which had occurred. I shall attempt to obtain a confirmatory affidavit by Mr Jantjies.'

[53] Mr Jantjies' letter dated 27 August 2013 was addressed to the Secretary General ANC National Office and copied to the ANC Western Cape Provincial Secretary, the ANC Overberg Regional Secretary and the ANC Chief Whip Cape Agulhas. The relevant part of Mr Jantjies' letter reads as follows:

'Uneasiness with local, regional and provincial ANC coalition-partners

The undersigned is an independent ward councillor and deputy-mayor of the Cape Agulhas Municipal Council, in the Overberg Region of the Western Cape. The Councillor, which comprises of nine councillors, is composed as follows: 4 – ANC, 4 – DA and 1 – independent. The author hereof, as the independent, holds the balance of power in Council. Due to the fact that I am an ex- long standing member of the ANC, I opted to form a coalition with the ANC since he last local elections, which resulted in Cape Agulhas becoming an ANC-led council. From within this capacity, I herewith wish to urgently engage with a delegation or representative of your National Executive Committee in respect of the under mentioned:

1. I am seriously concerned about my continued working relationship with the ANC in Council, which stems from the fact that my opinions on matters are being disregarded by the REC/PEC. One such example is the

> recent appointment of a new municipal manager. The ANC led coalition has supported the appointment of the previous incumbent, who was also the preferred candidate for a second term as per the selection processes. He qualified for the position in terms of the Municipal Systems Amended Act of 2011. In terms of the Municipal Minimum Competency requirements, the preferred candidate has a Special Merit Case status as per National Treasury Circular nr 60. However, prior to the official appointment of the preferred candidate, the REC/PEC interjected in council's official processes and instructed the ANC-councillors, seven minutes before the official council meeting was to start, to appoint the candidate that scored second best during the selection processes. The inputs and concerns that I have raised around this issue, was totally discarded.'

[54] In para 42 of his founding affidavit appellant said inter alia the following:

> 'During the morning of 23 July 2013 before the council meeting, an ANC delegation headed by Mr Mjongile was present in the office of the Executive Mayor for the entire morning, and also attended the council meeting, but they did not want to sign the attendance register and, therefore, their names do not reflect in the attendance register of the minutes.'

[55] Appellant annexed a copy of Circular 60 to his founding affidavit. The heading and the introductory paragraph thereof read as follows:

> 'Minimum Competency Level Regulations, Gazette 29967 of 15 June 2007. This circular provides an approach to managing the requirements of the above regulations towards the remaining eight-month deadline. MFMA sections 83, 107 and 119 outline the competency levels of financial officials. The Municipal Regulations on Minimum Competency Levels prescribe the required competency levels for uniform and consistent application of the Act.'

[56] An appointment of an official in terms of the Circular is, however, subject to certain conditions, the first two of which may be summarised as follows: (i) the municipality must write to the National Treasury seeking its concurrence to delay the enforcement of the required regulation; (ii) the application must be

accompanied by information explaining why the municipality was unable to appoint a duly qualified person.

[57] After learning that he had not been appointed to the position of municipal manager, appellant first sought to pursue the remedies which he was advised were available to him under the Labour Relations Act 66 of 1995 ('the LRA'). He referred the matter as an unfair labour practice dispute to the South African Local Government Bargaining Council ('SALGBC') on 26 July 2013. The SALGBC issued a 'certificate of outcome', declaring the dispute unresolved as an unfair labour practice based on promotion, which it found was an incorrect classification. The matter was thereafter set down for arbitration for 31 October 2013, which was postponed by mutual agreement. A preliminary date was set by the SALGBC for 12 December 2013 but it had failed to confirm the date with appellant's legal team who were unavailable. After an intervention from appellant's attorney the date was set for Friday 24 January 2014. On 24 January 2014 the parties argued two points *in limine*, relating to the jurisdiction of the SALGBC and a re-classification of the dispute from an unfair labour practice to an unfair dismissal dispute. Notice of the application for re-classification was given to first respondent during December 2013. Both *in limine* points taken against appellant were, however, successful and the arbitration did not proceed. Appellant was then compelled to institute new arbitration proceedings for which condonation of his delay was required. He applied for such condonation but this was refused by the arbitrator.

Respondents' answering affidavits

[58] Mr Richard Mitchell, the Executive Mayor of the Municipalty, deposed to two answering affidavits on behalf of first to fourth respondents. In the first affidavit, in the light of time constraints, he dealt mainly with certain

preliminary and procedural points. In a supplementary answering affidavit he dealt fully with respondents' opposition to the merits of the application.

[59] In paras 14 and 15 of his supplementary answering affidavit Mr Mitchell said the following in regard to appellant's qualifications:

> '14. Appellant was put on the short list, even though he did not have the necessary qualifications. He was the committee's preferred candidate and it was hoped that the exemption, which applies in respect of existing employees, could also be applied to the Appellant.
>
> 15. Existing employees had been granted exemption in order to get the qualifications at the time. Once their employment, however, came to an end and if they were to apply for reappointment, they were, we were advised, to be treated as new employees.'

[60] Mr Mitchell said this in regard to the exemption on which appellant relied:

> '17. Mr Steele of ODS Consultants, the consultants who advised and assisted the Municipality in the process of appointing a new Municipal Manager, later pointed the risk of litigation out to the committee and to Council should Appellant be appointed in the face of the legislative requirements set out in the advertisement not having been met by him. This concern was included in the report to Council.
>
> 18. The Committee (and Council) were advised the exemption did not apply to new appellants for the post, which the Appellant now was, with the result that he should not (according to Steele) have been considered for the position without the qualification. He was, according to Mr Steele, not a "suitable" candidate because of not having the necessary qualification for the post at the time of the interview. Applying the criteria provided for in the selection procedure resulted in Fourth Respondent being considered by Council to have been the most suitable.'

[61] Mr Mitchell pointed out that appellant's score in the evaluation process was marginally higher than that of fourth respondent. The council was, however, not bound to appoint the preferred candidate. It was obliged to

appoint the most suitable candidate. He described the proceedings at the meeting held on 23 July 2013 as follows:

> '71. At the council meeting held on 23 July 2013 the Speaker, Eve Marthinus, asked for proposals on the appointment of the municipal manager. Only one proposal in favour of the appointment of the Fourth Respondent was received.
>
> 72. Council thereafter on 23 July 2014 after the Council meeting scheduled for 9 July 2014 had been postponed to this date) determined for itself who would be the appropriate Municipal Manager.
>
> 73. It was Council who ultimately took the decision. The decision of Council was taken by 8 members as one of the councillors was on leave.'

[62] Mr Mitchell described the ANC caucus meeting held prior to the meeting:

> '82. Council was informed that if the requirements as set out in the advertisement were not applied, the Fourth Respondent could have his non-appointment reviewed and set aside and that of the Applicant set aside.
>
> 83. Mr Steele advised the Executive Mayor at the time, of these issues and concerns. Based on Mr Steele's advice, the Executive mayor submitted a report to Council. Council took the issues into account and resolved unanimously as it did. The Council's decision was not dependent on any caucus meeting. Not all the councillors are members of the ANC and accordingly not all of them were party to any caucus decision.
>
> 84. As is customary in local government, prior to council meetings separate caucus meeting are held by each represented political grouping in council. Each caucus would debate the Council agenda items and contemplate how the caucus members ought to be dealing with certain issues raised at the council meeting.
>
> 85. A caucus meeting was held on 8 July 2014 which was attended by ANC Councillors and the then independent councillor Jantjies.
>
> 86. At the caucus meeting of 8 July 2013 the report of Mr Steele was discussed by the caucus.
>
> 87. The caucus of the ANC, of which only two of these members were on the selection committee, concluded at that meeting that Fourth Respondent should be supported by them at the council meeting.'

[63] Mr Mitchell proceeded as follows:

> ’94. Council consists of members of various political parties who also base their decisions, in part, on their political affiliations and that which is discussed by their caucuses.
>
> 95. This is the reality of the process. It does not affect the lawfulness or procedural regularity of the decisions taken by Council.
>
> 96. In the present matter the members of the opposition parties in Council in fact also ultimately agreed with the ANC councillors that the Fourth Respondent be appointed as Municipal Manager.
>
> 97. The council consists of four DA members, four ANC members and one independent member. The agreement reached in respect of the Fourth Respondent’s appointment was unanimous.’

[64] In response to para 31 of appellant’s founding affidavit, Mr Mitchell said the following:

> ‘109. The decision to appoint the municipal manager is a function of the full Council. Individual or certain groups of councillors cannot make promises of appointment. The suggestion that Fourth Respondent was appointed because of outside political control is denied.
>
> 110. Council decided on the appointment of the Municipal Manager.’

[65] In answer to para 36 of appellant’s founding affidavit, which incorporated Mr Jantjies letter, Mr Mitchell said the following:

> ‘116. The letter referred to by the Applicant is not addressed to the ANC Provincial Secretary but to the ANC Secretary General. I cannot confirm or deny the allegations of instruction from the Provincial Secretary made by the Applicant.’

The issues

[66] Five main issues arise in this matter. The first concerns the jurisdiction of the High Court, as opposed to the Labour Court, to determine this application.

The second is whether the appointment of fourth respondent as municipal manager of the Municipality constituted an *'administrative action'* within the meaning of PAJA. The third main issue concerns the merits of appellant's grounds of review. The fourth is the validity of appellant's reliance on the exhaustion of his internal remedies. The fifth concerns the effect of appellant's delay in instituting the present proceedings.

Jurisdiction

[67] Respondents raised a defence *in limine* that the Labour Court has exclusive jurisdiction in terms of the LRA to adjudicate the present application. If it has exclusive jurisdiction then it would follow that the High Court does not have jurisdiction to determine the application in terms of PAJA.

[68] Respondents relied on two overlapping grounds for the submission that the Labour Court and not the High Court has jurisdiction to decide the present application. The first is that appellant's appointment fell within the ambit of the provisions of section 186(1)(b) of the LRA which rendered it subject to the provisions of the LRA. The second ground is that the dispute is quintessentially a labour matter, which, according to the judgment of the Constitutional Court in *v Gcaba Minister for Safety & Security and Others* 2010 (1) SA 238 (CC), should have been heard by the Labour Court.

[69] The exclusive jurisdiction of the Labour Court is defined in section 157(1) of the LRA, which reads as follows:

> '157 Jurisdiction of Labour Court
>
> (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all

> matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.'

[70] Respondents' contention is that the failure of the Municipal Council to appoint appellant as municipal manager was an unfair dismissal within the meaning of section 186(2)(b) of the LRA. The latter provision reads as follows:

> 'Dismissal means that -
>
> (a) …
>
> (b) an employee employed in terms of employment reasonably expected the employer –
>
> (1) to renew a fixed term contract on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.'

[71] Counsel for respondents submitted that appellant had previously been employed as municipal manager for a fixed period of five years. He reasonably expected that his contract would be extended for another five years. The Municipal Council's failure to appoint him for a further five years thus amounted to an unfair dismissal which allowed him to pursue the remedies available to him under the LRA. Counsel argued that the dispute was therefore quintessentially a labour matter which had to be determined in terms of the LRA.

[72] I do not agree with the construction of section 186(1)(b) of the LRA advanced on behalf of respondents. In my view there are two errors in counsel's reasoning. The first is that it is in direct conflict with the provisions of section 54A of the Municipal Systems Act (quoted above). The latter section provides *inter alia* for the selection of a suitable person who complies with the prescribed requirements for appointment. The nationwide advertising and the selection from a pool of candidates are in my view irreconcilable with the provisions of section 186(1)(b) of the LRA. A candidate in appellant's position

would have had an advantage above the other candidates in that the failure to appoint him would per se have constituted wrongful conduct in terms of the LRA. The effect of the latter section, I must say, was not mentioned at all in the actual selection process.

[73] In the law of the interpretation of statutes the principle expressed in the maxim *generalia specialibus non derogant* applies when there is an irreconcilable conflict between two statutes, The one dealing specifically with a particular topic will be regarded as impliedly repealing the one dealing with it more generally. Similarly the maxim *lex posterior priori derogat* also applies in such a conflict situation. A later statute is deemed to repeal an earlier statute on the same topic. See *LAWSA* second edition Volume 25 (Part 1) para 305. The application of both presumptions to the present case supports the conclusion that section 54A of the Municipal Systems Act repealed section 186(2)(b) of the LRA *pro tanto.*

[74] The second error in counsel's contentions is that they overlook the fact that the principal objective of the present application is the setting aside of fourth respondent's appointment. Although appellant seeks in a second prayer the appointment of himself as municipal manager, the primary object of the application is not appellant's appointment but the setting aside of fourth respondent's appointment. The setting aside of fourth respondent's appointment as municipal manager is indeed a prerequisite for appellant's possible future appointment but the latter would by no means be a foregone conclusion.

[75] Fourth respondent was not an employee of the Municipality when he applied for the position and there was no other contractual link between him and the Municipality. It is this lack of a contractual link between fourth respondent

and the Municipality which distinguishes the present case from those which have been described as quintessentially labour matters. In *Gcaba v Minister for Safety & Security and Others* 2010 (1) SA 238 (CC) the appellant was a commissioner in the South African Police. When his post was upgraded he unsuccessfully applied for the upgraded position. In *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) the appellant was described as a public sector employee. I was also referred by respondents' counsel to the judgment of the Supreme Court of Appeal in *Mkumatela v Nelson Mandela Metropolitan Municipality* and Another 2010 (4) BCLR 347 (SCA). In the latter case an employee of the respondent municipality applied unsuccessfully for promotion.

[76] It is my view therefore that the provisions of section 186(b)(2) of the LRA did not confer jurisdiction on the Labour Court to hear the dispute between the parties. The High Court thus has jurisdiction to determine the dispute.

Administrative action

[77] It is clear from sub-sections 6(1) and 6(2) of PAJA that the existence of an *'administrative action'* is a prerequisite for judicial review in terms of that statute. Sub-section 6(1) provides as follows:

> '(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.'

The introductory sentence of sub-section 6(2) is quoted hereunder. It is followed by a lengthy list of reviewable actions and reads as follows:

> '(2) A court or tribunal has the power to judicially review an administrative action if …'

[78] The relevant part of the definition of *'administrative action'* in section 1 of PAJA reads as follows:

> '"administrative action" means any decision taken, or any failure to take a decision, by-
>
> (a) an organ of state, when-
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation;
>
> which adversely affects the rights of any person and which has a direct, external legal effect, but does not include … ..'

[79] On the face of it the decision of the Municipal Council to appoint fourth respondent as municipal manager falls naturally within the ambit of that definition. The Municipal Council is a public authority. It is responsible to and answerable to the inhabitants of the Municipality for its administration. A municipal manager is the administrative head of the administration of the Municipality with a wide range of administrative powers which are set forth in section 55 of the Municipal Systems Act. He is also the accounting officer of the Municipality.

[80] The conclusion that the appointment of fourth respondent as municipal manager is an administrative action, is supported by authority. The judgment in *Mlokoti v Amathole District Municipality and Another* 2009 (6) SA 354 (E) is directly in point. It also concerned the appointment of a municipal manager. The unsuccessful applicant was described as an external candidate for the position which meant that he was not employed by the municipality at the time of his application. The court held that the decision of the municipality constituted administrative action as defined in PAJA.

[81] There are other cases of comparable appointments or awards in fields other than employment where an action by a public authority was regarded as administrative action. See the cases on public procurement and licensing in Hoexter *Administrative Law in South Africa* 2nd edition (2012) at 184-185. See also *Mkhatshwa* 2002(3) SA 433 (TPD) at 449 G - I (the appointment of a tribal chief by a premier); *Head of the Western Cape Education Department v Governing Body of the Point High School* 2008 (5) SA 18 (SCA) (the appointment of a principal and a deputy principal of a school); *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (a Minister's decision to let Waterfront property).

Grounds of review

[82] Appellant relies on two main grounds for reviewing the decision of the Municipal Council.

(1) The failure of the Municipal Council to consider his compliance with the necessary qualification, was materially influenced by an error of law within the meaning of section 6(2)(d) of PAJA, alternatively that the Municipal Council did not consider relevant considerations within the meaning of section 6(2)(e)(iii) of PAJA.

(2) The second ground of review is that the decision of the Municipal Council to appoint fourth respondent was taken *'because of the unauthorised or unwarranted dictates of another person or body'* within the meaning of section 6(1)(e)(iv) of PAJA.

[83] The difficulty that I have with appellant's first ground of review is that he failed to place sufficient evidence before the Municipal Council to enable it to make any firm findings in this regard. Appellant referred to the letter from the

University of Stellenbosch dated 9 July 2013 in support of his allegation that he complied timeously with the relevant legal requirements for the post. Appellant himself, however, described the contents of the letter as his '*preliminary results'*. The letter furthermore contains the phrase '*He has successfully completed the unit standards mentioned below subject to LGSETA verification.'* There is no explanation whether this *'verification'* was a substantive requirement or a mere formality. In the absence of such an explanation the Municipal Council could only speculate as to its meaning.

[84] Appellant's second ground of review, however, has merit. The specific complaint in this regard is that the decision to appoint fourth respondent was taken because of the unwarranted dictates of another person, namely the instruction given to the ANC councillors by Mr Mjongile. Applicant incorporated the letter of Mr Jantjies, dated 27 August 2013 in his founding affidavit. The contents thereof were confirmed by Mr Jantjies on affidavit. Mr Mitchell's response is evasive in the extreme. It reads as follows:

> 'The letter referred to by Applicant is not addressed to the ANC Provincial Secretary but to the ANC Secretary General. I cannot confirm or deny the allegation of instruction from the Provincial Secretary made by the Applicant.'

[85] Mr Mitchell's reference to the addressee of the letter is wholly irrelevant. His statement that he cannot confirm or deny the allegations of an instruction is simply disingenuous. There are other significant allegations of appellant which were simply evaded by Mr Mitchell. One instance is his allegation regarding the meeting during the afternoon of 9 July 2013, at which Mr Mitchell was present, where it was made clear to him that the meeting had been called off because of an instruction emanating from the ANC provincial leadership. See para [50] above. Another instance is appellant's allegation that an ANC delegation, headed by Mr Mjongile, was present in Mr Mitchell's office for the

entire morning before the meeting held on 23 July 2013. See para [53] above. In the circumstances I accept appellant's contention that the ANC councillors were instructed by Mr Mjongili to vote in favour of fourth respondent.

[86] The facts in the *Mlokoti* case *supra* bear a remarkable resemblance to those in the present case. See the passage at 379J-380D:

> 'Be that as it may, one fact emerges clearly from VM23, a fact which is not in any way refuted, and that is that the regional executive committee of the ANC instructed the caucus to appoint the second respondent and the caucus carried out this instruction. This is not an example of democracy in action as was submitted by Mr Quinn, certainly not of constitutional democracy. It, rather than the two legal opinions, amounted to a usurpation of the powers of first respondent's council by a political body which, on the papers, does not appear even to have had sight of the documents relevant to the selection process, including the findings of the interview panel. In my view, the involvement of the regional executive council of the ANC in the circumstances described in VM23 constituted an unauthorised and unwarranted intervention in the affairs of first respondent's council. It is clear that the councillors of the ANC supinely abdicated to their political party their responsibility to fill the position of the municipal manager with the best qualified and best suited candidate on the basis of qualifications, suitability, and with due regard to the provisions of the pertinent employment legislation as set out in para 1 of the recruitment policy. This was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters.'

[87] In the present case I am similarly satisfied that the instruction given by Mr Mjongile amounted to an unauthorised and unwarranted intervention in the affairs o fthe Municipal Council.

Internal remedies

[88] The provisions of sub-sections 7(1) and 7(2) of PAJA read as follows:

> '7 Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.'

[89] Counsel for appellant submitted that the pursuit of the remedies available to him in terms of the LRA, as described above, amounted to an exhaustion of his internal remedies within the meaning of sub-sections 7(1) and 7(2) of PAJA.

[90] I do not agree. In *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para (45) the Constitutional Court (per Mokgoro J) said this:

'[45] Thus, as the international jurisprudence illustrates, judicial enforcement of the duty to exhaust internal remedies, in giving content to the 'exceptional circumstances' exemption, must consider the availability, effectiveness and adequacy of the existing internal remedies.'

[91] In the present case, as I pointed out above, the Labour Court did not have jurisdiction to determine appellant's dispute. Any pursuit of his remedies in terms of the LRA was therefore bound to fail.

[92] The effect of this conclusion is twofold. The first is that appellant was not precluded from pursuing his application under PAJA by the fact that he did not exhaust his internal remedies for there was no valid remedy to exhaust. The

second, however, is that he is not excused from complying with the time limits imposed in terms of section 7(1) of PAJA.

Appellant's delay in launching the present proceedings

[93] Sections 7(1) and 9 of PAJA read as follows:

> '9 Variation of time
>
> (1) The period of -
>
> (a) 90 days referred to in section 5 may be reduced; or
>
> (b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
>
> (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

[94] Respondents raised the defence that appellant did not comply with these provisions. Its application, so it was contended, must for that reason alone, be dismissed.

[95] The relevant dates are the following:

(i) The Municipal Council's impugned appointment of fourth respondent as municipal manager was made on 23 July 2013. Appellant obtained knowledge thereof very soon thereafter.

(ii) Appellant instituted proceedings for relief under the LRA on 26 July 2013.

(iii) According to appellant the pursuit of his remedies under the LRA terminated on 31 March 2014 when the arbitrator refused his application for condonation of the late institution of his unfair dismissal proceedings in terms of the LRA.

(iv) Appellant launched the present review application on 12 June 2014.

[96] Appellant did not file an application for condonation of the delay together with his founding affidavit in the review application. It was filed as part of a replying affidavit on 15 August 2014. It reads as follows:

> 'In the event that it be found that this application has been filed outside of the period of 180 days prescribed in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000, that the period of 180 days referred to in the aforesaid provision be extended until 13 June 2014, being the date of filing of this application.'

[97] The explanation furnished by appellant for the delay is contained in his replying affidavit. It reads as follows:

> 'The application was launched within 180 days of the conclusion of the internal remedies that I pursued. I then had to consider my position carefully, and take and consider further legal advice. I do not believe that the legal issues in this matter are uncomplicated, and I proceeded cautiously before finally deciding to launch this application.'

[98] The nature of the enquiry in such a case was explained as follows in *Camps Bay Ratepayers' and Residents' Association v Harrison* (2010) 2 All SA 519 (SCA) para [5]:

> 'The appellants "might reasonably have been expected to have become aware" of the infringement when they first inspected the original plan and proceedings for review on that ground ought ordinarily have been commenced within 180 days of that date. Section 9(2) however allows the extension of these time frames where "the interests of justice so require". And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.'

[99] It seems to me that appellant's explanation for the delay is legally flawed and factually inadequate. It appears from my discussion above that the Labour

Court did not have jurisdiction to determine appellant's application for relief. His attempt to enforce his alleged rights under that statute was accordingly futile. As a matter of fact, furthermore, his delay was not properly explained given, in particular, the prejudice suffered by respondents.

[100] In considering the consequences of appellant's delay, the order which the court would have given had he been successful, is also relevant. Had appellant succeeded there would have been two options open to the court, namely to remit it to the Municipal Council for its decision or to substitute the court's own decision for that of the Municipal Council. In my view the appropriate order would have been to remit it to the Municipal Council. The reason is that the Municipal Council would be obliged to exercise its discretion afresh so that the result would by no means have been a foregone conclusion. The Municipal Council would have had to consider the candidates again, at least those on the short list, which would have included fourth respondent.

[101] In all the circumstances it would in my view not be in the interest of justice to condone appellant's delay in bringing the present application.

Conclusion

[102] In the result I would make the following order:

(1) Appellant's appeal is dismissed.

(2) The orders of the court below are upheld, including the costs orders.

(3) Appellant is ordered to pay the costs of appeal of the respondents who opposed the appeal.

BLIGNAULT J