IN THE HIGH COURT OF SOUTH AFRCA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case no: 12734/2020

In the matter between:

GEORGE MUNICIPALITY Applicant

and

RANDAL VAN STADEN Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 4 OCTOBER 2021

SHER, J:

1. This is an application in terms of which the George municipality seeks an Order reviewing and setting aside the appointment of the respondent as the Manager: Sewer Network, in March 2017. The post falls within the municipality's Civil Engineering Services directorate.

The background

2. The respondent was appointed pursuant to a vacancy which arose in 2015. A job description for the position which was approved by the head of department in April 2015 listed, as part of the job specifications, the 'essential' and the 'preferred' requirements for the post. The essential requirements constituted the minimum, necessary requirements that a successful candidate needed, in order to be eligible for the position. The preferred requirements constituted the ideal requirements which a suitable candidate would have.

3. A national diploma in civil engineering and 10 years relevant experience in a civil engineering environment were set as essential requirements for the post, whilst a

B.Tech degree in civil engineering and professional registration as an engineering technician with the Engineering Council were listed as preferred requirements.

4. In terms of the municipality's recruitment and selection policy (which was adopted in 2012) an advertisement for a position in the municipality was to be based on the audited job description for it, and only candidates who met the minimum i.e the essential requirements, or who could be expected to meet such requirements within a reasonable time, could be shortlisted and appointed.

5. An advertisement for the vacancy was drawn up and signed off by the municipal manager on 16 March 2016, before it was placed. The closing date for applications was 1 April 2016.

6. The advertisement listed a national diploma in civil engineering as the requisite essential educational qualification which was needed, and registration as a professional civil engineering technician as the added practical qualification which was required, although as indicated this was not an essential requirement listed in terms of the approved job description. The advertisement also stipulated that only 3 years relevant experience was required contrary to the 10 years stipulated in the job description, and that candidates should be able to communicate in 2 of the 3 official languages which were spoken in the Western Cape. The latter requirement was also not an essential one in terms of the job description. Thus, the advertisement was a 'mish-mash' of essential, preferred, and non-essential requirements.

7. Applications from some 20 candidates were received, but as it was felt that the pool of applicants was not sufficiently representative of certain designated, under-represented groups in terms of the municipality's employment equity plan, the post was re-advertised again in August 2016. The second advertisement attracted no additional applicants from such groups, beyond the 5 that had originally applied.

8. A shortlist of 11 candidates was drawn up on 14 December 2016 and interviews and practical assessments took place on 23 February 2017. Ultimately, only 2 candidates qualified for the position in terms of the criteria which had been set viz the respondent and one Van Rooi, with the respondent obtaining a marginally higher score.

9. On 23 March 2017 the Director: Civil Engineering Services recommended that the position be awarded to the respondent, and some 4 days later the Municipal

Manager signed a letter (which he correctly dated 27 March 2017 above his signature, albeit that the letter was dated 7 March at the top thereof) in which the respondent was informed that his application was successful, and subject to his accepting the offer in writing, he would be appointed to the position with effect from 15 May 2017. The respondent duly accepted the offer on 19 April 2017.

10. On 29 March 2017 Van Rooi lodged a complaint with the office of the Public Protector. He averred that the respondent's appointment was irregular because at the time when the respondent applied for and had been appointed to the position, he was not yet registered with the Engineering Council. In this regard it appears that the respondent's application for registration as a technician was pending at the time of his application, and was only effected on 22 March 2017.

11. The Public Protector took more than 2 years to investigate the complaint (which, on the face of it, appears to have been a fairly uncomplicated and straightforward one), and to render a report.

12. Her office first engaged with the municipality in August 2017, some 5 months after the complaint had been lodged. This was followed by an exchange of correspondence between the parties from October 2017 to May 2018, whereafter the matter became dormant for some time.

13. In May 2019 the Public Protector caused a formal notice to be served on the Municipal Manager in terms of which certain information was sought. From his response it appears that the municipality's council resolved on 31 January 2019 to appoint an external service provider to investigate the circumstances leading up to the respondent's appointment and to consider whether there had been a breach of the municipality's recruitment policy by its human resources division. In addition, it appeared that the Municipal Manager had previously instructed the Director: Corporate Services and the Deputy Director: Legal Services and Compliance to review the municipality's recruitment policy in order to ensure that it complied with all relevant legislation.

14. In a lengthy and repetitive report the Public Protector eventually concluded on 25 October 2019, some 2½ years after receiving the complaint, that the respondent's appointment had not been 'fair and proper' i.e in accordance with the relevant legislative

and municipal prescripts regulating the recruitment and selection of staff, and as such the municipality's conduct amounted to maladministration.

15. The Public Protector held that in appointing the applicant the Municipal Manager had breached s 55(1) of the Municipal Systems Act[1], read together with Item 2 of the Code of Conduct,[2] which required him as head of the municipality's administration to implement and execute its policies and to ensure the due and proper appointment of its staff, in accordance therewith.

16. The Public Protector's conclusions were based on the finding that, by stipulating in its advertisements that registration as a professional engineering technician was an essential requirement for the post, the municipality had breached the terms of its recruitment policy.

17. In addition, the Public Protector held that the respondent's appointment had been irregular because he was not registered with the Engineering Council at the time when he applied for and when he was appointed to the position, as he was only registered as a (candidate) engineering technician on 22 March 2017.

18. Consequently, the Public Protector directed that a number of remedial steps were to be taken. In the first place, she directed that disciplinary action should be taken against the Municipal Manager and the other officials who had been involved in the appointment of the respondent, within 30 business days from the date of her report.

19. Secondly, she directed that the municipality should conduct an evaluation of the respondent's qualifications, experience and competence against the requirements of the job and the description of the position, and a report in this regard should similarly be submitted to Council within the same time period.

20. Finally, the Public Protector directed that proceedings for the review of the respondent's appointment should be instituted in terms of ss 6 and 7 of the Promotion of Administrative Justice Act [3], within 30 business days from the date of her report.

21. I digress to point out that the latter directive does not square with a further directive which was made[4] that the municipality's Council should consider the report of

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[1] Act 32 of 2000.
[2] Promulgated in terms of Schedule 2 thereof.
[3] Act 3 of 2000.
[4] In para 7.5.2.1 of the report.

the respondent's assessment and take a resolution on the matter within 60 business days. As it would have been necessary for Council to pass a resolution authorizing the institution of proceedings the review would accordingly not have been able to have been instituted within 30 days from the date of the Public Protector's report.

22. Be that as it may, it appears that no disciplinary action was taken against any municipal officials, let alone the Municipal Manager, and the review was eventually only launched on 10 September 2020, one month short of a year after the release of the Public Protector's report and some 9 months later than was directed by her; and some 3 ½ years after the respondent's appointment.

23. An evaluation of the respondent's qualifications, experience and competence vis-à-vis the job description and its requirements was carried out by the municipality, and although a copy thereof was not annexed to the papers it is common cause that it was favourable to the respondent.

24. In the light of this, and given that the respondent had been carrying out his functions and duties in a satisfactory manner from the time of his appointment and was not to blame for any flaws in the process that led up to it, the applicant proposed that in the event the Court were minded to declare that the appointment was invalid and should be set aside, it should direct that this should not be with retrospective effect.

25. In addition, the applicant proposed (at least initially) [5] that pending the outcome of any rerun of the appointment process any declaration of invalidity which might issue

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[5] In supplementary heads of argument which it filed the applicant warned, with reference to the recent decision of the SCA in *BW Brightwater Way Props (Pty) Ltd v Eastern Cape Development Corporation* [2021] 47 ZASCA, that a declaration whereby the respondent's appointment was declared invalid should not be nullified by making an order which effectively upheld it, by granting the respondent future rights in terms thereof. In effect therefore the applicant contended that the Court could not make an Order allowing the respondent to continue in his position, subsequent to a declaration that his appointment was invalid, other than by suspending it for the purpose of the readvertisement and filling anew of the post. In *Brightwater* although a lease was invalidated by the Court a *quo*, it held that notwithstanding its declaration in this regard the lessee could continue to occupy the premises for the remainder of the lease period. The SCA held, with reference to the decisions in *Gijima* and *Asla,* that when formulating a just and equitable remedy, per s 172(1)(b) of the Constitution, following upon a declaration of constitutional invalidity in terms of s 172(1)(a), the most that a Court can do is to preserve and uphold rights that previously accrued as at the date of the declaration (by limiting the retrospective operation of the declaration of invalidity in terms of s 172(1)(b)(ii)), and it cannot seek to preserve or to continue 'future' rights ie rights which would have accrued in the future but for the declaration of invalidity. Thus, in tender cases this commonly translates into an Order whereby although the award of the tender will be declared constitutionally invalid in terms of s 172(1)(a) and will be set aside, the court will allow the contractor to be paid for work performed to date of the Order, thereby preserving the right to payment which accrued to the contractor prior to the declaration of invalidity.

should also be suspended from having prospective operation, so as to allow the respondent to continue in the position for the time being, pending the re-advertisement and filling of the position afresh.

The law

26. Ever since the decision of the Constitutional Court in *Gijima* [6] it has been accepted that an organ of state cannot apply for the review and correction of its own decisions in terms of the Promotion of Administrative Justice Act ('PAJA'), and must do so in terms of the principle of legality, to which the exercise of all public power is subject.[7] Considering that the decision in *Gijima*, which was handed down in 2017, was confirmed by the Constitutional Court on 16 April 2019 in its subsequent decision in *Asla,*[8] one would have assumed that the Public Protector would have been alive to this by the time she delivered her report at the end of October 2020.

27. The main implication of this for the purposes of these proceedings is that whereas, had this been a PAJA review the proceedings would have had to have been launched within a period of no later than 180 days from the date when the appointment was made (subject to condonation), as the review was properly brought as a legality review the question which needs to be determined is simply whether the delay in launching proceedings was unreasonable.[9] In this regard it is trite that the clock started running not from the time that the applicant became aware, but when it 'reasonably ought to have become aware', of the action being taken which required review i.e of the defects in the process of appointment.[10]

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[6] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

[7] The basis for this appears to be that the State cannot in one and the same breath be both the bearer of the obligation to give effect to the right to fair administrative action and the holder of such right. Thus, as was indicated by Mabindla-Boqwana JA in the recent decision of the SCA in *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* ([2021] ZASCA 90 (25 June 2021); [2021] 2 All SA 700 (SCA); para 25 (with reference to comments that were made in *Gijima* at para 27) it appears that only private persons can lay claim to such rights in terms of s 33 of the Constitution, not organs of state.

[8] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC).

[9] *Id*, para 6; *Special Investigating Unit* n 7, para 27.

[10] *Id*, *Asla* para 49, *Special Investigating Unit* para 28.

28. It is by now also well-established that a Court has the power either to refuse a legality review in circumstances where there has been an unreasonable or undue delay,[11] or it may in appropriate circumstances 'overlook' i.e condone it.

29. In this regard in *Khumalo*[12] (the facts of which are not dissimilar in certain material respects to those in this matter), the Constitutional Court held that whereas s 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay it elevates the need for expeditious and diligent compliance by organs of state with their constitutional duties, to an obligation which forms a central part of the principle of legality. It is a requirement which is based on 'strong' public interest in the certainty and finality of decisions that have been taken by functionaries and organs of state, because those who are the subject of such decisions base their actions thereon.

30. In that matter the Constitutional Court set aside an Order which had been granted by the Labour Court[13] in terms of which it had reviewed and set aside the appointment of Mr Khumalo to the position of Chief Personnel Officer (Human Resources) in the KwaZulu-Natal Department of Education, on the basis that he did not meet the requirements which had been set out in an advertisement for the post.

31. Contrary to the Labour Court, the Constitutional Court held that the delay of about 20 months which it had taken the MEC to launch review proceedings had not been adequately explained and was unreasonable, and given the adverse consequences which would occur were it to be overlooked, which would lead to Mr Khumalo losing the job which he had occupied by that time for nigh on 9 years, it could not be condoned.

32. Whether a delay is unreasonable or undue involves a factual enquiry upon which a value judgment is to be made in the light of all relevant circumstances.[14] In *Govan*

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[11] *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at para 46, as confirmed in *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 44.
[12] *Id*, para 46.
[13] Reported *sub nom MEC Department of Education KwaZulu-Natal v Khumalo and Another* [2010] ZALC 79; 2011 (1) BCLR 94 (LC).
[14] *Gqwetha v Transkei Development Corporation Ltd & Ors* 2006 (2) SA 603 (SCA) para 24; *Khumalo* para 49.

Mbeki Municipality[15] and *Special Investigating Unit*,[16] two of its most recent decisions on the point this year, the SCA emphasized with reference to the decision of the Constitutional Court in *Asla* that when an organ of state has delayed before approaching a Court for an Order reviewing a decision it has taken, it must furnish a proper and acceptable explanation which covers the entire period of delay.

33. In determining whether to overlook a delay that is considered to be unreasonable the Court must have regard for a number of factors. It must firstly consider the likely consequences of setting aside the decision in question, including any potential prejudice that may be suffered by affected parties. And in this regard, where the decision is one which was made in the context of public-sector employment, such as the one in this matter, the Constitutional Court has remarked[17] that the 'value of security' for employees and the need to mitigate the inherent inequality of the workplace must be borne in mind.

34. As a counterpoint to any adverse consequences that may eventuate following a declaration of constitutional invalidity the Court must recognize that in terms of s 172 (1)(b) of the Constitution it has the power to mitigate any unfairness that may occur by making an Order that is just and equitable. To this end it may limit the retrospective operation of a declaration of invalidity[18] and/or it may make an Order suspending the invalidity for any period and on any condition as it may deem appropriate, in order to afford the competent authority an opportunity to correct the defect.[19]

35. In the second place the Court must have regard for the nature of the decision that is to be reviewed and the merits of the challenge thereto. Thus, it will have to consider whether any failure on the part of the decision-maker to comply with statutory and/or policy prescripts was egregious[20] and whether it involved a violation of the Constitution. Where there is 'clear and undisputed'[21] unlawfulness or where there is

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[15] *Govan Mbeki Municipality v New Credit Solutions (Pty) Ltd* [2021] 2 All SA 700 (SCA), 2021 (4) SA 436 (SCA) para 35.
[16] Note 7 para 29.
[17] *Khumalo* n 11 para 52.
[18] Section 172(1)(b)(i).
[19] Section 172(1)(b)(ii).
[20] *Asla* n 8 paras 54-56; *South African National Roads Agency Limited v City of Cape Town* [2016] 4 All SA 332 (SCA); 2017 (1) SA 468 (SCA) para 81.
[21] *Asla* para 66.

'indisputable and clear inconsistency' [22] with the Constitution the Court may be compelled to declare the decision invalid and to make an Order in terms of s 172(1)(a) of the Constitution declaring it to be inconsistent therewith, irrespective of the length of the delay involved.[23] But, the Constitutional Court has also held, in order to ensure that the rationale behind the rules pertaining to undue delay is not undermined, this principle should be applied 'narrowly and restrictively'.[24]

36. Lastly, the Court must also have regard for the conduct of the applicant. In this regard in *Kirland* [25] Cameron J reminded us that:

> '[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.'

An assessment

37. I am of the view that the review must fail at the first hurdle i.e at the level of delay. In this regard the explanation which the municipality has sought to provide is materially unsatisfactory, in a number of respects.

38. The municipality contends that the period of delay which must be considered is not 3 ½ years but only a period of about 9 months, between the time when it received the instruction in the Public Protector's report to launch review proceedings and the date when the application was finally launched, and it claims that it has provided a satisfactory explanation for this period. On both scores I do not agree.

39. In my view, even if one considers the period of 9 months which the applicant relies on it is evident that its conduct in this time was not only dilatory but lackadaisical in the extreme, and the explanation it has provided is full of holes.

40. Although the Public Protector's report was only received by it on 31 October 2020, by its own admission the municipality chose not to comply with the directive

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[22] *Special Investigating Unit* n 7, para 79.
[23] This is referred to as the *Gijima* principle, as enunciated in para 52 of the judgment.
[24] *Asla* n 8 para 71.
[25] *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Limited t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) para 82.

contained therein because it decided to obtain a legal opinion in respect thereof instead. Why it required an opinion in relation to a directive which it was bound to comply with unless it had been set aside by an Order of Court, has not been explained.

41. It was supplied with the opinion in February 2020. Clearly, given that it subsequently proceeded to launch review proceedings, the opinion must have endorsed the Public Protector's directive that a review should be brought. But once again the applicant did not proceed to take the necessary action with the requisite degree of alacrity one would have expected and a further delay of some 5 months ensued, until 6 July 2020, when its council eventually passed the necessary resolution authorizing the institution of proceedings, at which time it also apparently gave instructions to its legal representatives to proceed. Yet, despite this, there was again a further lengthy delay and papers were only finalized and issued some 2 months later on 10 September 2020. No explanation of any sorts has been given for this. Thus, it is evident that even on the basis that one is dealing with an explanation in respect of a period of 9 months only, the applicant was clearly in no hurry to carry out the instruction it had been given by the Public Protector and was extremely dilatory.

42. Contrary to what it suggests, it is evident from the municipality's own papers that it did not need to wait to be told by the Public Protector that the process by which the respondent had been appointed was irregular. In the founding affidavit the Municipal Manager says that Van Rooi complained to the municipality about the outcome of the appointment process 'shortly' (sic) after it was concluded. Given that Van Rooi lodged his complaint with the Public Protector's office on 27 March 2017 i.e the same day on which the Municipal Manager made an offer to the respondent, one can safely assume that he probably lodged his complaint with the municipality at or about the same time.

43. Coyly, the Municipal Manager does not say what the complaint entailed. It must surely have been in writing, given that Van Rooi lodged a written complaint with the Public Protector. Yet a copy of the complaint was not annexed to the founding affidavit.

44. The Municipal Manager says that at that stage the municipality did not appreciate that 'something had gone wrong' with the process viz that there was a disjunct between the actual and the advertised requirements for the position. He says he is unable to say 'precisely when' the municipality came to understand that something had gone wrong,

but to the best of his recollection it only became aware of the disjunct ‘as a result and during’ (sic) the Public Protector’s investigation. These loose comments hardly constitute a satisfactory explanation, let alone a plausible or tenable one. They hide more than what they reveal, and one is constrained to ask why.

45. As is evident from the terms of the complaint which Van Rooi lodged with the Public Protector’s office, he alleged that the respondent’s appointment was inconsistent with the municipality’s recruitment and selection policy, because at the time the respondent applied for and was appointed to the position he was not registered as an engineering technician, contrary to the stipulated requirement in this regard, as per the advertisements. It is reasonable to infer that this was probably also the basis of the complaint which Van Rooi lodged with the municipality.

46. Whatever the circumstances, there is no indication that the municipality made any attempt to investigate the complaint that was lodged with it, such as it was. In fact, it is apparent that it did not even have the courtesy to acknowledge receipt of the complaint or to contact or interview Van Rooi, or even to follow up with him at any stage thereafter, and it appears to have simply ignored the complaint until the Public Protector commenced her investigation.

47. As was previously pointed out, from 22 August 2017 onwards the Public Protector addressed a series of letters to the municipality, all the way through to May 2018. On 10 February 2018 representatives from her office interviewed the Deputy Director: Water and Sanitation and the Director: Civil Engineering Services as well as two HR managers of the municipality. One would have thought that by this stage the municipality must have been well aware of what the essential aspects of the complaint entailed, and it must surely have realized that there was a contradiction between the requirements for the position as listed in the advertisements, as compared to those which had been set out in the job description, and that they were consequently more onerous than was required. Despite this, the municipality’s officials did nothing but to sit back and await the outcome of the Public Protector’s investigation.

48. Neither the exchange of correspondence over the period of some 10 months nor the meeting with its officials prompted the municipality into launching an investigation into the circumstances pertaining to the respondent’s appointment, until 31 January

2019, when, according to the Public Protector it resolved that an external service provider should be appointed to investigate the allegation that there had been a transgression of the municipality's recruitment and selection policy. Notably, the Municipal Manager failed to mention or deal with any of this in his affidavit. He did not even make mention of the resolution that was taken in January 2019, nor did he take the Court into his confidence in regard to the investigation which was launched pursuant thereto, or what the outcome thereof was. Once again, one must ask why this is so.

49. By his own admission[26] however, by the time the Municipal Manager responded to the Public Protector's notice in terms of s 7(9) of the Public Protector's Act[27] on 5 June 2019, the municipality was well 'aware of the problems relative to' the respondent's appointment, but still elected nonetheless to do nothing but to await the outcome of the Public Protector's investigation. Thus, it allowed a further year and 3 months to elapse. This is hardly the behaviour which is expected of a responsible organ of state. It is trite that just as in the case of the award of tenders and the conclusion of procurement contracts, organs of state are required to investigate any allegations of impropriety in relation to appointments of personnel as soon as they become aware of them, and if they are compelled to bring proceedings for the review thereof they must do so as soon as is reasonably possible.

50. In the circumstances, the averment that it was only when the report of the Public Protector came out in October 2020 that the municipality became aware of what happened does not hold water. On its own version it ought reasonably to have become aware of the disjunct between the requirements listed in the advertisements and those listed in the job description in March 2017, or failing this during the various engagements it had in correspondence and meetings with the Public Protector between August 2017 and May 2018, or at least by the time when it resolved early in January 2019 to conduct an investigation. Even on its own version at the very latest it knew exactly what the problems were pertaining to the respondent's appointment by 5 June 2019. Despite this it chose to do nothing about reviewing the appointment until September 2020.

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[26] *Vide* para 38 of the founding affidavit.
[27] Act 23 of 1994.

51. Thus, in actual fact the delay in this matter is not a period of some 9 months but one which extends over a number of years, and it is one that was clearly unreasonable and egregious.

52. In considering whether it should nonetheless be overlooked the following circumstances must be taken into account. In the first place as far as the nature of the irregularity which occurred is concerned, on the available evidence it merely consisted of an inadvertent failure to properly comply with the terms of a municipal policy, rather than a deliberate and wilful breach of a statutory or constitutional prescript. Although the policy was clearly binding on the municipality, the circumstances are not such that one is dealing with a manifest and egregious unlawfulness in an appointment process, such as one commonly finds in instances where corruption or some form of undue political influence or pressure is involved. At worst the municipality simply 'erroneously'[28] required applicants for the position to have a practical qualification i.e to be registered with their professional regulatory body, when this was not necessary in terms of the job description.

53. Although this would understandably have disqualified a number of candidates who would otherwise have sought to apply for the position, as far as the interests of the municipality and those who it is meant to serve are concerned (its ratepayers and consumers of its services) the requirement of professional registration was an advantage, not a hindrance. It resulted in applications from candidates who were not only possessed of the necessary academic qualification, but also of the necessary practical professional registration, thereby ensuring that an appointment could be made of a candidate who was qualified to practice as an engineer. One would think that this would be a vital and elementary requirement for someone who is required to manage a middle-sized municipality's sewer network.

54. (To my mind, the same can be said about the requirement that candidates should be conversant in 2 of the 3 official languages which are spoken in the Western Cape.

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[28] For the purposes of the judgment I have assumed (without deciding), as the municipality contends, that in terms of its recruitment policy it was not at liberty to put 'nice-to-have' i.e preferred requirements in its advertisements, as opposed to essential i.e minimum requirements that were necessary, at least not without distinguishing between them, thereby ensuring that whereas candidates who had the preferred qualifications could be attracted those who did not would not be disqualified and the candidate who was ultimately appointed would not have been appointed unfairly.

Whilst this was not an actual requirement for the position, let alone a preferred one, it can hardly be disputed that having a manager who is proficient in 2 languages in its employ, as opposed to only one, would be an advantage for the municipality and members of the public it is meant to serve.) The real shortfall, if any, in the requirements which were listed in the advertisement is that pertaining to the experience which was required i.e. 3 years, whereas the job description required 10 years' experience. But in this respect the 'lower' standard would hardly have served to disqualify potential candidates and would have widened the pool rather than to narrow it. And in any event, it is common cause that the respondent in fact had the requisite 10 years plus experience at the time when he applied. I may point out that neither Van Rooi nor the Public Protector took issue with either of these requirements, and the applicant has also rightly not sought to contend that the appointment process was vitiated because of them.

55. In the second place it should be noted that the finding by the Public Protector that the respondent was not regularly appointed because at the time he was not registered with the Engineering Council, was wrong. The policy provided that candidates could be shortlisted even though they were not in possession of the necessary minimum requirements, provided they could be expected to meet these within a reasonable time.[29] As previously pointed out, at the time when he applied for the position the respondent's registration was pending, and this was disclosed to the municipality and accepted by it. His registration occurred on 22 March 2017, some 5 days *before* the letter containing the offer of employment was signed off by the Municipal Manager and sent to him, and about a month before he formally accepted the offer. Thus, he was registered as an engineering technician (albeit as a candidate), by the time of his appointment. In addition, as I have already pointed out there is also no suggestion that any form of corruption or undue influence played any part in the appointment process.

56. In the third place, there is no question about the respondent's abilities and competence to do the work. An assessment that was carried out in 2019 at the direction of the Public Protector confirmed this, and in the founding affidavit the Municipal Manager also confirmed that at the time of the launching of the application in

[29] Para 8.4.2 of the policy.

September 2020 the respondent's performance in the job was satisfactory. The respondent legitimately and in good faith applied for, and was awarded the position; having met the advertised requirements which the municipality set for it. He was a meritorious and deserving candidate who scored the highest out of the 2 candidates who were qualified for the position, and he is clearly an asset to the municipality as he has been performing his duties in an exemplary fashion to date. He left a position in the private sector to take up this one and is currently in the process of completing his B.Tech degree.

57. In my view, were the delay to be overlooked and the appointment of the respondent to be set aside at this stage it would cause immense, if not irreparable, harm to him and his career and would severely prejudice him. He would have to search for new employment at a time when jobs are scarce, particularly in the public sector, where budgetary constraints are the order of the day.

58. At this point in time the respondent has already spent 4 ½ successful years in the position. In my view, setting aside his appointment so late in the day (for the purposes of this exercise I have assumed, without deciding, that there is some merit in the review), would also severely undermine the underlying rationale of the principles pertaining to unnecessary and unreasonable delay in self-reviews by organs of state. It would encourage dilatoriness on the part of organs of state and would reward the applicant for its lackadaisical attitude to its constitutional responsibilities. It would also cause some degree of prejudice and harm to the municipality and those it is meant to serve, in that the post would have to be re-advertised and filled afresh, thereby possibly compromising the delivery of sanitation services to consumers in the municipality's area of jurisdiction.

59. And last, but not least, given that the complainant and the only qualifying challenger at the time, Van Rooi, has sadly passed away in the interim, it would in my view be somewhat pointless and futile and hardly in the interests of those whom the municipality is meant to serve, to recommence the process afresh, on the basis of a relatively minor instance of breach or non-compliance with a municipal policy. I point out that this is not a case of an abusive, autocratic exercise of authority by a municipality or a functionary employed by it. The meeting at which a shortlist of candidates was drawn

up was one at which not only municipal officials were in attendance but also members of the relevant trade unions.

60. In supplementary heads of argument which the applicant filed it contended that in the light of the decision in April this year of the SCA in *Brightwater,* [30] given the peremptory terms of s 172(1)(a) of the Constitution the Court was compelled to declare the appointment of the respondent inconsistent with the Constitution and invalid to the extent thereof, notwithstanding the delay, and the best that it could do in terms of affording him any just and equitable relief was to declare that his rights to the date of the declaration i.e. those rights which had previously accrued to him as the date thereof, were preserved. It submitted that the Court could not go beyond that, by making any Order in relation to any future employment rights, other than suspending the declaration of invalidity pending the filling of the post afresh, as that would effectively invalidate any finding of constitutional invalidity.

61. In my view the applicant has misinterpreted the ratio of the judgment in *Brightwater* and has failed to have regard for the fact that delay was not an issue in that matter. The judgment dealt with the question of whether, having declared a lease agreement constitutionally invalid a Court was nonetheless entitled when fashioning a just and equitable remedy to hold that the lessee could exercise 'future' rights it would have had, but for the declaration. The matter is clearly distinguishable from the facts of this matter.

62. In both *Govan Mbeki* as well as *Special Investigating Unit,* which were decided in April and June this year respectively,[31] the SCA reaffirmed that, save in instances of manifest unlawfulness and clear inconsistency with the Constitution, a Court is entitled to refuse to entertain a legality review at the instance of an organ of state, where there has been an egregious and unreasonable delay. In doing so it upheld the stance which was adopted by the Constitutional Court in *Khumalo*.

Conclusion

63. Consequently, in my view, having regard for the factors referred to this is a matter where the delay cannot be condoned and the review must be dismissed.

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[30] Note 5, a decision which was handed down on 19 April 2021.
[31] *Vide* notes 15 and 7.

64. As far as costs are concerned these should follow the result. In this regard the respondent was not only justified in opposing the application but has also incurred considerable and unnecessary legal costs in doing so. Through no fault of his own he has been compelled to fight to keep his position, notwithstanding that he won it fairly and on merit, and in my view fairness and justice dictates that he should be fully indemnified in respect of the costs that he has incurred and should not just be awarded costs on the party-party scale.

65. In the result, the application is dismissed with costs, on the attorney-client scale.

M SHER
Judge of the High Court
(Signature appended digitally)

Appearances:

Applicant's counsel: S Rosenberg SC and CJ Quinn
Applicant's attorneys: Stadler & Swart Inc (George)
Respondent's counsel: CS Bosch
Respondent's attorneys: MacGregor Erasmus Inc (Cape Town)