IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No: A231/2020

Before: The Hon. Ms Justice Goliath (Deputy Judge President)
The Hon. Ms Justice Fortuin
The Hon. Ms Justice Slingers

Hearing: 23 July 2021
Judgment: 21 September 2021

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL LOCAL GOVERNMENT ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	Applicant
and	
PRINCE ALBERT MUNICIPALITY	First Respondent
GEORGE CHARLES VAN DER WESTHUIZEN	Second Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 21 SEPTEMBER 2021

GOLIATH DJP

[1] This is an appeal against the whole of the Judgment and Order granted by Vos AJ on 13 May 2020, dismissing the application in which the Appellant, the MEC for Local Government: Environmental Affairs and Development Planning ("the MEC") sought to review and set aside:

1.1 The appointment of a selection panel purportedly done pursuant to Regulation 12(4) of the Regulations on Appointment and Conditions of Employment of Senior Management as promulgated by the National Minister of Co-Operative Governance and Traditional Affairs ("the Minister") in 2014, ("the Appointment Regulations") to recruit and select an Operational Manager for the Prince Albert Municipality ("the First Respondent"); and

1.2 The appointment of the Mr George Charles Van der Westhuizen ("the Second Respondent"), as the Operational Manager of the First Respondent.

[2] The Respondents did not participate in the proceedings in the court *a quo* and the matter was heard on an unopposed basis. This appeal was also not opposed and the Respondents elected to abide by the decision of the court. The court *a quo* found that an order aimed at setting aside the appointment of members of the selection panel, would constitute a court order that was adverse to their individual interests. The court therefore concluded that it was not competent to grant such order in their absence due to their non-joinder in these proceedings. Consequently, the Court only considered the relief relating to the setting aside of the appointment of Mr Van der Westhuizen.

[3] It is common cause that at the time of the hearing of this matter, the Second Respondent was no longer in the employ of First Respondent, and the order of Vos AJ no longer has any practical effect between the parties and has become academic. The appellant asserted that notwithstanding the mootness of the alleged irregular appointment, the relief is persisted with because there are discrete legal issues and ramifications of public importance that would affect the functioning of municipalities and operations of local governments across the country in relation to future appointments of senior managers in the municipality. The Appellant argued that there is an imperative and dire need for legal certainty in relation to the correct interpretation of Regulation 12(4). The Appellant identified three main legal issues, which arise in this appeal. Firstly, the issue of the invalidity of the Appointment Regulations; Secondly the proper interpretation of Regulation 12(4) of the Appointment Regulations; and Third, the non-joinder of members of the selection panel.

[4] Section 16(2)(a)(i) of the Superior Court Act 10 of 2013 provides that where the issues in an appeal are of such a nature that the decision sought will have no practice effect or result, the appeal may be dismissed on this ground alone. The question of mootness was repeatedly dealt with by the Supreme Court of Appeal as well as the Constitutional Court. These cases demonstrate that a court hearing an appeal would not readily accept an invitation to adjudicate on issues, which are of such a nature that the decision sought, will have no practical effect or result. In **National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs** 2000(2) SA1; 2000(1) BCLR 39 the Court stated that *"a case is moot and therefore not justiciable, if it no longer presents an existing or live controversy, which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."*

[5] However, it is well established that the court has the discretionary power to entertain a matter considered to be moot. This discretion was applied in a limited number of cases where the appeal, though moot, raised a discreet legal point, which required no merits or factual matrix to resolve. In **Independent Electoral Commission v Langeberg Municipality** 2001(3) SA 925 (CC) at paragraph 9 the Constitutional Court reaffirmed the discretionary powers of the Court to decide on issues on appeal even if they no longer present existing or live controversies. In paragraph 11, the Court stated that:

> *"... That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced."*

[6] In **South African Reserve Bank and Another v Shuttleworth and Another** 2015 (8) BCLR 959 (CC) at paragraph 27 the Court stated:

> *"to the extent that it may be argued that this dispute is moot ... the court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this court from hearing this dispute. Instead, it is the interests of justice that dictates whether we should hear the matter."*

[7] The interpretation of Regulation 12 (4) is a central feature of the dispute in this matter, more particularly, the composition of the selection panel for the appointment

of a manager who is accountable to the municipal manager. The appellant essentially argued that this matter should be heard for the purposes of a litmus test case to set a precedent, and provide guidance and direction on a clearer interpretation of Regulation 12(4). I am in agreement with the Appellant that a discrete legal issue of public importance arose, and the outcome of the case will have significance not only for the appellant, but will be useful to establish legal rights and principles for similar cases in the future. Furthermore, I am satisfied that this case has a significant wider public interest beyond those directly involved. Consequently, the question then arises as to whether it is in the interests of justice for this court, in the exercise of its discretion, to entertain the appeal against the admittedly moot order of Vos AJ.

[8] The appointment of Mr Van der Westhuizen as Operational Manager of the Municipality is governed by the provisions of the Local Government: Municipal Systems Act, No. 32 of 2000 ("the Systems Act"). The Systems Act was assented to on 14 November 2000, and the date of commencement is 1 March 2001. The First Respondent's appointment as Operational Manager fell within the ambit of "*a manager directly accountable to its Municipal Manager*". The court *a quo* considered section 56 of the Systems Act as the starting point, because it deals with the appointment of managers, and provided that:

> *"56(a) a municipal council, after consultation with the Municipal Manager, appoints a manager directly accountable to the Municipal Manager; and*
>
> *(b) a person appointed as a manager in terms of paragraph (a), must have the relevant skills, and expertise to perform the duties associated with the post in question, taking into account the protection or advancement*

of persons or categories of persons disadvantaged by unfair discrimination."

[9] The Court pointed out that section 56 of the Systems Act did not provide for any selection panel to advise the Municipality on the appointment of an Operational Manager. The Court identified the provisions of Section 72 and 120 of the Systems Act to be relevant to the appointment of Second Respondent. Section 72(1) of the Systems Act provides inter alia, as follows:

"(1) The Minister may, subject to applicable labour legislation and after consultation with the bargaining council established for municipalities and the Minister for the Public Service and Administration, for the purposes of this Chapter make regulations or issue guidelines in accordance with section 120 to regulate or provide for the following matters:

(a) The setting of uniform standards for-

(i) Municipal staff establishments;

(ii) Municipal staff systems and procedures and the matters that must be dealt with in such systems and procedures; and

(iii) Any other matter concerning municipal personnel administration."

[10] Section 120 (1) of the Systems Act empowers the Minister of Co-Operative Governance and Traditional Affairs to make regulations or issue guidelines concerning:

(a) The matters listed in sections 22, 37, 49, 72, 86A and 104;

(b) Any matter that may be prescribed in terms of [the Systems Act];

(c) Any matter that may facilitate the application of [the Systems Act].

[11] On 5 July 2011, the Local Government Municipal Systems Amendment Act 7 of 2011 ("the Amendment Act") was promulgated. The Amendment Act impacted on provisions of the Systems Act. Section 3 of the Amendment Act substituted section 56 of the Systems Act with, inter alia, the following:

"(1)(a) A municipal council, after consultation with the Municipal Manager, must appoint-

(i) A manager directly accountable to the Municipal Manager; or

(ii) An acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed."

(b) *A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competencies and qualifications as prescribed."*

[12] Sub-section (4A) (a) of the amended section 56 also permitted the Minister to prescribe the process by which a municipal council was required to inform an MEC for local government of any appointments made under the section. Section 28 of the Amendment Act amended section 120(1)(a) expanding the number of sections to which it applied and now read as follows: *"The matters listed in sections 22, 37, 49, 54A, 56, 72, 86A and 104."*

[13] On 17 January 2014, the Minister, exercising his powers under section 120, read with section 72 of the Systems Act, published the Local Government: Regulations of Appointment and Conditions of Employment of Senior Managers, 2014. ("Appointment Regulations"). Regulation 1 of the Appointment Regulations defines *"senior manager"* to include *"a manager directly accountable to a Municipal Manager appointed in terms of section 56 of the* [Systems Act]. Regulation 2(2)(a) of the Appointment Regulations deals with the *"Scope of application"* of the Regulations and states the following:

> *"(2) These regulations must be read in conjunction with-*
>
> *(a) Any regulations or guidelines issued in terms of section 120 of the Act concerning matters listed in section 54A, 56, 57A and 72."*

[14] Regulation 12, which forms part of Chapter 3 of the Appointment Regulations, prescribes the procedure for the appointment of managers directly accountable to Municipal Managers. Regulation 12 (4) of the Appointment Regulations provides that:

> *"The selection panel for the appointment of a manager directly accountable to the municipal manager must consist of at least three and not more than five members, constituted as follows:*
>
> *(a) The municipal manager, who will be the chairperson;*
> *(b) A member of the mayoral committee or councillor who is the portfolio head of the relevant portfolio; and*
> *(c) At least one other person, who is not a councillor or a staff member of the municipality, and who has expertise, expertise, or experience in the area of the advertised post. "*

[15] On 9 March 2017, the Constitutional Court in **SAMWU v Minister of Co-Operative Governance and Traditional Affairs** 2017 (5) BCLR 641 (CC) declared the Amendment Act unconstitutional and invalid in its entirety. The Court found that the Amendment Act was incorrectly promulgated in terms of section 75 of the Constitution, which regulates ordinary Bills not affecting provinces, instead of a section 76. Consequently, the failure to comply with procedures as set out in section 76 of the Constitution, the Bill was rendered invalid. The Court held that the declaration of invalidity would operate prospectively and the declaration of invalidity was suspended for a period of 24 months to allow the legislature an opportunity to cure the defect.

[16] The period of suspension ended on 9 March 2019, without any new legislation being introduced, or any other regulations being published in its stead. An Amendment Bill was tabled 6 February 2019, but Parliament has not yet passed legislation to correct the defect. The Minister requested the Constitutional Court to extend the 24-month period with an additional 12 months, which was dismissed by the Constitutional Court. Resultantly, the Amendment Act has been declared unconstitutional and invalid, and cannot be enforced.

[17] Significantly, the Constitutional Court in **South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs** (supra) at paragraph 4 recognised the purpose of the Amendment Act as being to:

> *"inter alia, to address what was perceived to be an alarming increase in the instances of maladministration within municipalities. The Amendment Act introduced measures to ensure that professional qualifications, experience and*

competence were the overarching criteria governing the appointment of Municipal Managers or managers directly accountable to Municipal Managers in local government, as opposed to political affiliation."

[18] The court a quo had regard to the purpose of the Amendment Act and found that prior to the amendment of the Systems Act in 2011 (by the Amendment Act), there were no regulations in existence that dealt specifically with the appointment of senior managers pursuant to the constitution of a selection panel. The court further found that prior to the Amendment Act, section 120 of the Systems Act did not authorise the Minister to make regulations regarding matters listed in section 56. The court held that the Amendment Act amended section 120 of the Systems Act by stipulating that the Minister may henceforth make regulations, or issue guidelines concerning all matters listed in the new section 56. The court expressed the view that if the legislature was of the opinion that prior to the Amendment Act, the Minister did have the power in terms of section 72 and 120 of the Systems Act to make such regulations regarding the appointment of managers pursuant to the establishment of a selection panel, it would not again have given those specific powers to the Minister in terms of the Amendment Act.

[19] The court *a quo* found that the Appointment Regulations, including Regulation 12(4) of the Appointment Regulations was made under an invalid part of section 120 of the Systems Act. The invalid part is section 120(1) (a) that authorises the Minister to make regulations in respect of matters listed in section 56. Consequently, when the Minister made the Appointment Regulations on 17 January 2014, he made the

Regulations in terms of an invalid section of the Amendment Act. It therefore follows that, as the Amendment Act was invalid, Regulation 12(4) of the Appointment Regulations is also invalid. The court therefore concluded that Regulation 12(4) of the Appointment Regulations did not survive the Constitutional Court's declaration of invalidity of the Amendment Act. Therefore, in the absence of the Appointment Regulations, the municipality did not act unlawfully when it appointed Mr Van der Westhuizen.

[20] The Court *a quo* reasoned that even if Regulation 12(4) survived and is valid, the composition of the selection panel had complied with the prescripts of the Regulation. The court analysed Regulation 12(4) and interpreted its purpose to be to ensure that insofar as the composition of the selection panel is concerned, there should at least be the persons identified in the Regulation. The court found that Regulation 12(4) does not state clearly that the selection panel may not have more than one Councillor. The court found that the composition of the selection panel complied with the requirements of regulation 12(4). The court also found that the selection panel was properly constituted in terms of regulation 12(4) of the Appointment Regulations. Consequently, the court dismissed the application.

[21] The Appellant argued that the Appointment Regulations remained valid and of full force and effect despite the invalidity of the Amendment Act for the following reasons:

21.1 First, the Appointment Regulations were published when the amendments effected by the Amendment Act to the Systems Act were

in force, i.e. the Regulations emanated from a legally valid source, which would not be disturbed by the subsequent declaration of invalidity, operating prospectively.

21.2 Second, section 72 of the Systems Act empowers the Minister to make regulations, or issue guidelines in accordance with section 120 of the Systems Act to regulate and provide for any matter dealt with in Chapter 5 of the System Act, including municipal personnel administration.

21.3 Third, and in any event, section 120 of the Systems Act, in its unamended form, is wide enough to provide the requisite authority for the promulgation of regulations.

[22] The Appellant therefore contended that the Minister had the power in terms of section 72(1) (c) (iii) to make the relevant Appointment Regulations. The Appellant stated that one of the purposes of Regulation 12(4) of the Appointment Regulations is to prevent undue political influence over the recruitment of, and the selection process utilized in respect of senior managers. The inclusion of additional councillors onto the selection panel would result in the selection panel being dominated by councillors from the relevant municipality. The Appellant therefore submitted that having regard to the purpose of the Amendment Act and to the wording of Regulation 12(4), it is evident that, regardless of whether the selection panel consists of three, four or five members, there can only be one Councillor on the panel. The Applicant therefore argued that Regulation 12(4) governs not only the peremptory or obligatory third member, but also the optional fourth and fifth members of the selection panel. The Appellant expressed the view that Regulation 12(4) must be interpreted to mean that a selection panel may

never consist of more than one Councillor. The Appellant therefore contended that there was more than one Councillor on the selection panel in the appointment of the Second Respondent, which invalidated the proceedings.

[23] The Appellant argued that the invalidity of the Amendment Act did not affect Regulation 12 because section 56 was not the source of the Minister's power to make Regulation 12. The fact that the legislature contemplated the amendment of section 56 in order to grant specific powers in prescribing how certain appointments were to be dealt with did not necessarily mean that the general power under section 72 and 120 did not exist. Appellant therefore argued that the Minister would still have been able to proclaim the Appointment Regulations in terms of broad and general powers given to the Minister to regulate "*any other matter concerning municipal administration*". Accordingly, the current version of section 72 of the Systems Act, read with the current version of section 120 thereof, permitted the Minister to make the Appointment Regulations, including Rule 12(4) thereof.

[24] South Africa is a constitutional democracy with three tiers of government comprising of national, provincial and local government. The three tiers of government are distinctive, interdependent and interrelated. Consequently, each sphere of government must collaborate in order to attain commons goals such as effective, transparent accountable and coherent governance. Municipalities are organs of State and are part of a system of co-operative government, which allows the three spheres of government to work together effectively. National and Provincial government may assign functions and powers to local government, when those powers are best exercised at local level.

[25] Section 151(1) of the Constitution of the Republic of South Africa, 1996 provides that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. Section 154 provides that the *"national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers to perform and to perform their functions."* Section 155(6) provides that National and Provincial government have a constitutional obligation to monitor and support local government.

[26] The Systems Act appears to be national legislation enacted pursuant to the provisions of sections 154 and 155 of the Constitution of the Republic to support and strengthen the capacity of municipalities to manage their own affairs and to oversee the effective performance by municipalities of their functional areas of responsibilities. The Systems Act regulates the process of assigning powers and functions to local government and is part of a series of legislation, the purpose of which is to empower local government to fulfil its constitutional mandate and obligations. The Act sets out the core principles, mechanisms and processes that are necessary for municipalities to function. It defines the legal nature of a municipality and the manner in which municipal powers and functions are to be exercised. Municipalities must operate within the framework prescribed for them, has all the powers, and functions as assigned to them in terms of the Constitution. The Systems Act provides the legal framework for the appointment and functions of the most senior levels of municipal administration, namely the municipal manager and managers directly accountable to him or her. Section 54 of the Systems Act provides a role for the Appellant to intervene in relation

to the appointment of section 56 managers, which are alleged to be in contravention of the Act.

[27] Significantly, the court *a quo* referred to a circular dated 11 April 2019, published by the Minister of Co-Operative Governance and Traditional Affairs, styled *'Implications of the Constitutional Court Judgment declaring the Local Government: Municipal Systems Amendment Act, 2011 (Act No. 7 of 2011) invalid"*, which the Appellant annexed to his founding papers. The purpose of the circular was to inform municipalities and provincial departments responsible for local government about the status of the Amendment Act after the **SAMWU** ruling, to provide progress on measures taken towards complying with the Constitutional Court order, and to provide guidelines and transitional measures to be applied by municipalities until the Amendment Act is approved by Parliament and assented to by the President.

[28] In the circular, the Minister acknowledged that the Amendment Act was declared invalid. The Minister referred to the status of the regulations made in terms of sections 72 and 120 of the Systems Act affecting municipal managers and managers directly accountable to municipal managers, and summarized his conclusions. The Minister expressed the view that the invalidation of the Amendment Act does not apply to the Local Government: Municipal Systems Act 32 of 2000, including all amendments made prior to 2011 (the principal Act). The Minister indicated that this means that the Principal Act and all amendments made before 2011 remain operative and enforceable.

[29] The Court a quo deemed it necessary to analyse the circular and embarked on an analysis of the views of the Minister, thereby recognising that the views of the Minister are important in this matter. The Court criticized the Minister's view that some of the Appointment Regulations are invalid, while others are valid. However, the circular did not explicitly deal with the interpretation of Regulation 12(4). The Appellant made extensive submissions insofar as it relates to the powers of the Minister to promulgate Regulations or issue guidelines in accordance with section 72 read with section 120 of the Systems Act. Section 72 (1)(c)(iii) of the Systems Act empowers the Minister of Co-Operative Governance and Traditional Affairs to make regulations or issue guidelines in accordance with section 120 of the Systems Act to regulate and provide for any matter [other than those matters specifically stipulated in section 72(1)] concerning municipal personnel administration.

[30] Sections 72 and 120 is aimed at providing the Minister with the necessary regulatory powers to make regulations where required, to ensure the efficient functioning of municipalities. The promulgation of the Regulations constitutes an exercise of the regulation-making discretion vested in the Minister in the national sphere of government. It is inappropriate for courts to make orders interpreting statutory provisions and policy directives without joining the national or executive authority responsible for such enactments or provisions.

[31] In my view, it is undesirable for a court to make orders affecting regulations promulgated by the Minister without affording him an opportunity to respond to the legal challenge. The Minister has a direct abiding and crucial interest in the interpretation of Regulation 12(4) and should, at the very least, have been given an

opportunity to respond and express a view on the issues that arise in this matter. I am accordingly of the view that the Minister ought to have been joined as a party to the proceedings. The non-joinder of the Minister of Co-Operative Government and Traditional Affairs is fatal to the relief sought by the Appellant.

[32] The Municipal Systems Act defines a Municipality as the political structures, office bearers, administration, as well as the community who live in the area. It is therefore evident that the governance of Municipalities consists of various role players. In my view, it would be unwise for this court to opine on the interpretation of the rule in the absence of the participation of other interested parties. The Supreme Court of Appeal had cautioned against deciding a matter without the benefit of tested argument from both sides on questions that are necessary for the decision of the case. The Respondents did not participate in the proceedings and a decision on the correct interpretation of Regulation 12(4), would be based on the argument of only one party. (See: **Western Cape Education Department and Another v George** 1998 (3) SA 77 (SCA) AT 84E; **Port Elizabeth Municipality v Smit** 2002 (4) SA 241 (SA) at paragraph 11).

[33] The Court would derive many benefits from a thorough and discrete engagement with all interested parties in relation to the correct interpretation of Rule 12(4). All interested parties are necessary to participate for a fair and exhaustive adjudication of the matter, to facilitate a just determination. The appellant alluded to the political significance of an interpretation of Rule 12(4), which renders it imperative that political structures and civil society be engaged in any court challenge of this nature.

[34] Essentially the Appellant contended that this court should exercise its discretion and hear this matter as a litmus test case to determine the correct interpretation of Rule 12(4). Test cases are useful because they establish legal rights and principles, and thereby serve as precedent for future similar cases. In my view, it is not in the interests of justice to convert a dispute relating to an alleged irregular appointment into a precedent setting interpretation of Rule 12(4). I am satisfied that the interests of justice dictate that the legal question regarding the proper interpretation of Rule 12(4) would best be ventilated when a proper challenge involving all interested parties should arise. It is precisely because of the importance of the matter, the political undertones of Regulation (12)4, its impact on future appointments and the wider public interest, that a hearing of this matter should not be entertained on the basis of an unopposed review.

[35] In the result, I would have made the following order:

35.1 The appeal is dismissed.

35.2 The Chief Registrar is directed to furnish a copy of this judgment to the Office of the Minister of Co-operative Governance and Traditional Affairs as well as the Municipal Manager of the Municipality of Prince Albert.

GOLIATH, DJP

DEPUTY JUDGE PRESIDENT

SLINGERS J (FORTUIN J concurring) : Majority Judgment

INTRODUCTION

[1] I have read the judgment of the Deputy Judge President, Justice Goliath. Unfortunately, I disagree with the conclusions and order made therein and consequently set out my reasons therefore below.

[2] During 2019, the appellant brought an application wherein it sought the following substantive relief:

(i) reviewing and setting aside the appointment of the selection panel, purportedly done pursuant to regulation 12(4) of the regulations and conditions of employment of senior managers to recruit and select an operational manager for the first respondent; and

(ii) reviewing and setting aside the appointment of the second respondent as operational manager for the first respondent.

[3] Neither the first nor the second respondent opposed the application in the court *a quo*. On the contrary, the first respondent filed a notice to abide by the court's decision, which was to dismiss the application on 13 May 2020. As with the application in the court *a quo*, the appeal is not opposed.

[4] The appellant raises three legal issues in this appeal. These are:

(i) the validity of the appointment regulations;

(ii) the proper interpretation of regulation 12(4) of the appointment regulations and;

(iii) the non-joinder of the members of the selection panel to the proceedings.

[5] It is recorded in the appellant's heads of argument that the second respondent is no longer employed as the operational manager for the first respondent. Notwithstanding this fact, the appellant argued that the issues raised on appeal not only remained live between the appellant and the first respondent, but that it also raised discrete issues of public importance. However, the relief pertaining to the appointment of the second respondent as operational manager for the first respondent no longer had to be determined.

[6] The validity and /or interpretation of regulation 12(4) will directly impact on the appointment of managers directly accountable to municipal managers throughout the country. Therefore, the issues raised in the appeal not only remain between the first respondent and the appellant but it will also have a direct practical effect on the manner in which managers directly accountable to municipal managers are appointed.[1] Therefore, both Justice Goliath and I agree with the appellant that the appeal involves a discrete legal issue of public importance which may require the adjudication of the court as it will affect matters in the future.[2] Consequently, even if the appeal no longer presented a live controversy, I would have exercised my discretion in favour of entertaining the appeal as the outcome thereof would have a practical effect on the appointments made by the country's municipalities.[3]

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[1] *Minister of Justice and others v Estate Stransham- Ford* 2017 (3) SA 152 (SCA) at para 22

[2] *Child Law v Hoërskool Fochville and another* 2016 (2) SA 121 (SCA); *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC)

[3] *Legal Aid South Africa v Magidiwna* 2015 (6) SA 494 (CC)

JOINDER ISSUE

[7] At the outset I deal with the issue of joinder.

[8] The law in respect of non-joinder is trite. In *Absa Bank Ltd v Naude NO*[4], the court held that the question to be posed is whether or not the party to be joined has a substantial interest in the subject matter of the litigation and in *Matjhabeng Local Municipality v Eskom Holdings Ltd*[5] the Constitutional Court stated that:

'The law on joinder is well settled. No court can make finding adverse to any person's interests, without that person first being a party to the proceedings before. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security are, in the end, not arbitrarily deprived.'

[9] In determining whether or not the members of the selection panel had to be joined to the proceedings, the question must be posed whether or not they had a direct and substantial interest in the subject-matter of the litigation. In determining this issue, it may be asked whether or not any order or judgment

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[4] 2016 (6) SA 540 (SCA0
[5] 2018 (1) SA 1 (CC)

which the court handed down could be sustained without necessarily prejudicing the interests of the members of the selection panel.[6]

[10] The papers do not evidence any interest the members of the selection panel had in the subject matter of the litigation and did not sustain a finding that the relief being sought would prejudice their interests. Furthermore, the appellant sought to review the decision of the first respondent and not any action or decision of the selection panel.

[11] This issue of joinder was raised for the first time in the judgment of the court *a quo*. To *mero motu* raise and determine the issue of non-joiner without affording the appellant an opportunity of addressing the court thereon infringed the appellant's right a fair hearing and the court *a quo*'s decision, for this reason alone, cannot stand.[7]

[12] Furthermore, having regard to the nature of the relief sought and the papers filed in the application, I am of the view that the members of the selection committee had no direct and substantial interest in the litigation subject and that it was not necessary for them to be joined as parties to the proceedings.

THE APPOINTMENT REGULATIONS

THE SYSTEMS ACT

[13] The Local Government: Municipal Systems Act, Act 32 of 2000 **('the Systems Act')** came into operation on 1 March 2001. It was enacted to inter alia provide for *'a framework for local public administration and human resource*

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[6] *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA)
[7] *Knoop NO and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA)

development.'[8] At the outset I set out the sections relevant to the determination of this appeal.

[14] Section 1 of Systems Act defines staff in relation to a municipality as the employees of the municipality, including the municipal manager. An operational manager is a manager who is directly accountable to the municipal manager. Therefore, it follows that an operational manager, as an employee of the municipality, would also be considered staff.

[15] Section 56(1) of the Systems Act provided that:

'(a) a municipal council, after consultation with the Municipal Manager, appoints a manager directly accountable to the Municipal Manager; and

(b) a person appointed as a manger in terms of paragraph (a), must have the relevant skills, and expertise to perform the duties associated with the post in question, taking into account the protection or advancement of persons or categories of person disadvantaged by unfair discrimination.'

[16] Section 67(1) of the Systems Act states that:

'A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures, consistent with any uniform standards prescribed in terms of section 72(1)(c), to ensure fair, efficient, effective and transparent personnel administration, including-

[8] Preamble to the Systems Act.

(a) the recruitment, selection and appointment of persons as staff members;

(b) service conditions of staff;

(c) the supervision and management of staff;

(d) the monitoring, measuring and evaluating of performance of staff;

(e) the promotion and demotion of staff;

(f) the transfer of staff;

(g) grievance procedures;

(h) disciplinary procedures;

(i) the investigation of allegations of misconduct and complaints against staff;

(j) the dismissal and retrenchment of staff; and

(k) any other matter prescribed by regulation in terms of section 72.'

[17] Section 72(1)(c) of the Systems Act authorises the national Minister responsible for local government **('the Minister')** to make regulations or to issue guidelines in accordance with section 120 to regulate or provide for the setting of uniform standards for:

(i) municipal staff establishments;

(ii) municipal staff systems and procedures referred to in section 67(1) and the matters that must be dealt with in such systems and procedures, including transfers and termination of service; and

(iii) any other matter concerning municipal personnel administration.

[18] Section 120 of the Systems Act authorised the Minister to make regulations or issue guidelines not inconsistent with the Systems Act concerning any manners listed in sections 22, 37, 49, 72, 86A and 104; any matter that may be prescribed by the Systems Act and any matter that may facilitate the application of the Systems Act.

THE AMENDMENT ACT

[19] On 5 July 2011, the Local Government Municipal Systems Amendment Act, Act 7 of 2011 **('the Amendment Act')** commenced operation. Section 3 of the Amendment Act amended section 56 of the Systems Act to read as follows:

'(1)(a)A municipal council, after consultation with the Municipal Manager, must appoint-

(i) a manager directly accountable to the municipal manager; or

(ii) an acting manager directly accountable to the municipal manager under the circumstances and for a period as prescribed.

(b)A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competencies and qualifications as prescribed.'

[20] Sub-section (4A)(a) of section 56 of the Systems Act (as amended by the Amendment Act) also permitted the Minister to prescribe the process by which a municipal council was required to inform the MEC for local government of any appointments made under the section.

[21] Prior to the Amendment Act section 120(1)(a) applied to sections 22, 37, 49, 72, 86A and 104. After the Amendment Act, section 120(1)(a) was expanded to include sections 54A and 56. Thus, as amended, section 120(1)(a) applied to sections 22, 37, 49, 54A, 56, 72, 86A and 104 .

[22] Pursuant to his powers set out in section 120 read with section 72 of the Systems Act, the Minister published the Local Government: Regulations of Appointment and Conditions of Employment of Senior Managers in Government Gazette 37245 **('the appointment regulations')** on 17 January 2014. In the preamble to the regulations, the Minister clearly states that he makes the appointment regulations under section 120, read with section 72 of the Systems Act.

[23] Regulation 1 of the appointment regulations defines *'senior manager'* to include *'a manager directly accountable to a Municipal Manager appointed in terms of section 56 of the Systems Act.*

[24] Regulation 2a states that the appointment regulations must be read in conjunction with any regulations or guidelines issued in terms of section 120 of the Systems Act concerning matters listed in section 54A, 56, 57A and 72.

[25] Regulation 6(1) of the appointment regulations states that the recruitment, selection and appointment of senior managers must take place in accordance with the municipal systems and procedures contemplated in section 67 of the Systems Act that are consistent with sections 54A, 56, 57A and 72 thereof.

[26] Regulation 12 provided as follows:

(1) A municipal council must appoint a selection panel to make recommendations for the appointment of candidates to vacant senior manager posts.

(2) In deciding who to appoint to a selection panel, the following considerations must inform the decision:

(a) the nature of the post;

(b) the gender balance of the panel; and

(c) the skills, expertise, experience and availability of the persons to be involved.

(3) The selection panel for the appointment of a municipal manager must consist of at least three and not more than five members, constituted as follows:

(a) the mayor, who will be the chairperson, or his or her delegate;

(b) a councillor designated by the municipal council; and

(c) at least one other person, who is not a councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post.

(4) The selection panel for the appointment of a manager directly accountable to a municipal manager must consist of at least three and not more than five members, constituted as follows:

(a) the municipal manager, who will be the chairperson;

(b) a member of the mayoral committee or councillor who is the portfolio head of the relevant portfolio; and

(c) at least one other person, who is not a councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post.

CONSTITUTIONAL INVALIDITY

[27] On 9 March 2017, the Constitutional Court declared the Amendment Act unconstitutional and invalid but suspended the constitutional invalidity for a period of 24 months i.e. coming to an end on 9 March 2019.[9] No new legislation was introduced nor were any other regulations published in its stead.

[28] The court *a quo* found that the appointment regulations, more particularly regulation 12(4) did not survive the declaration of constitutional invalidity of the Amendment Act and that it was also rendered constitutionally invalid.

[29] The court *a quo* determined that regulation 12(4) was made in terms of section 56, duly amended by the Amendment Act and as the Amendment Act was declared constitutionally invalid, section 56 (as amended) was also rendered constitutionally invalid. The court *a quo* rejected the notion that regulation 12(4) could have been made in terms of the Minister's broad powers set out in section 72 read together with section 120 of the Systems Act and reasoned that if the legislature thought the Minister had the powers, prior to the Amendment Act, to

[9] *SAMWU v Minister of Co-Operative Governance and Traditional Affairs* 2017 (5) BCLR 641 (CC); [2017] ZACC 7 (9 March 2017)

make regulation 12(4) it would not have given him those specific powers in the Amendment Act.

[30] This finding fails to consider the general power of the Minister in terms of section 120 read with section 67(1)(a) and (k) and 72(1)(c)(iii) which would have empowered the Minister to make any regulations or issue guidelines to regulate matters relating to municipal personnel administration, and thus to make regulation 12(4).

[31] Furthermore, the reasoning of the court *a quo* is not consistent with the approach to interpretation prescribed in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[10] The interpretative exercise required an objective approach, unrelated to the intention with which the words may have been selected. The starting point was to consider the language of the provision, read in context and having regard to the purpose thereof and the background to the preparation and production of the document or regulation.

[32] The approach that words must be given their ordinary grammatical meaning in statutory interpretation, unless to do so would result in an absurdity was also endorsed by the Constitutional Court who went on to hold that (i) statutory provisions must always be interpreted purposively, (ii) the relevant statutory provision must be properly contextualised and (iii) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity[11].

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[10] 2012 (4) SA 593 (SCA) (see paras 18 and 23)
[11] *Cool Ideas v Hubbard* 2014 (4) SA 474 (CC)

[33] After applying the approach set out in *Natal Joint Municipal Penson Fund v Endumeni Municipality* and *Cool Ideas v Hubbard* by objectively considering the ordinary grammatical meaning of section 72 read together with section 120 of the Systems Act, it is clear that the Minister was clothed with the authority to make the appointment regulations independent of the Systems Amendment Act and therefore, that the validity of the Appointment Regulations remained intact notwithstanding the declaration of invalidity of the Systems Amendment Act.

THE INTERPRETATION OF APPOINTMENT REGULATION 12(4)

[34] I turn now to the interpretation of regulation 12(4) of the appointment regulations.

[35] The appellant submitted that irrespective of whether or not the selection panel consisted of three, four or five members, it could only contain two councillors, namely the municipal manager and the member of the mayoral committee or councillor who is the portfolio head of a relevant portfolio. This reasoning was rejected by the court *a quo* which found that regulation 12(4) does not state in clear words that the selection panel may not have more than one councillor and that regulation 12(4) had to be interpreted to mean that insofar as the composition of the selection panel was concerned, that there should at least be the persons identified in that regulation.

[36] It is clear from the wording of regulation 12(4) that the only category of persons to whom a minimum of representation applies is that of (c) which states that *'at least one other person who is not a councillor or staff member of the municipality, and who has expertise or experience in the area of the advertised*

post.' Therefore, it may be accepted that the only category of persons which could be increased on the selection panel would be the persons represented by category (c).

[37] Therefore, I agree with the appellant that the only sensible manner to read regulation 12(4)(c) is to interpret it not only as dealing with the mandatory third member, but also the optional fourth and fifth members of the selection panel. The constitution of the selection panel which appointed the second respondent consisted of four councillors and was therefore not in accordance with the prescripts of regulation 12(4).

CONCLUSION

[38] In the circumstances, I would propose the following order:

The appeal is upheld and the court *a quo's* order is set aside and replaced with the following:

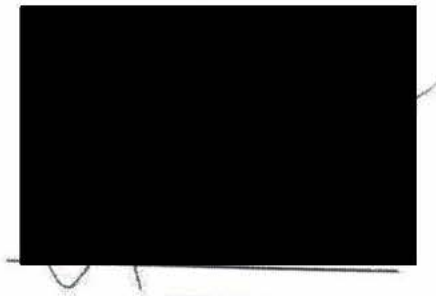
The appointment of the selection panel, purportedly done pursuant to regulation 12(4) of the Regulations on Appointment and Conditions of Employment of Senior Managers (GNR. 21 published under GG 37245, dated 17 January 2014), to recruit and select an Operational Manager for the first respondent is reviewed and set aside.

[redacted]

SLINGERS J

Judge of the High Court

I agree and it is so ordered.



FORTUIN J

Judge of the High Court