

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: [REDACTED]
13/6/2024
DATE
SIGNATURE

CASE NO: 2023/049211

In the matter between:

SIMPHIWE HAMILTON

APPLICANT

and

MEMBER OF EXECUTIVE COUNCIL RESPONSIBLE

FOR ECONOMIC DEVELOPMENT, GAUTENG

1st RESPONDENT

GAUTENG GROWTH AND DEVELOPMENT AGENCY

2nd RESPONDENT

JUDGMENT

(The matter was heard in open court but judgment was delivered by uploading the judgment onto the electronic file of the matter on CaseLines, the date of the judgment is deemed to be the date of uploading thereof onto Caselines)

BEFORE: HOLLAND-MUTER J:

[1] The matter before the court stems from the appointment of the Applicant as Group Chief Executive Officer ("GCEO") of the Gauteng Growth Development Agency ("GGDA"), appointed by the former MEC (Parks Tau), on recommendation by the Second Respondent. The Member of the Executive Council is responsible for Economic Development, Gauteng. The appointment is now contested by the First Respondent (present MEC).

[2] The application was brought in *Two Parts*, with interim relief sought in *Part A* thereof pending the final adjudication of *Part B* of the application. *Part A* was resolved and based on the undertaking of the present MEC who agreed to suspend the recruitment and selection process she started with on the basis that *Part B* be determined and costs of *Part A* was reserved for determination when *Part B* is adjudicated.

BACKGROUND OF THE APPOINTMENT PROCESS:

[3] The Applicant was appointed for a six-month period with effect from 1 May 2022 until 31 October 2022 as the Deputy Director General for Business Regulations and Governance matters in the Gauteng Department of Economic Development ("GGED"). He was simultaneously seconded by the former MEC (Parks Tau) to be the acting GCEO of the GGDA for a period of six months. This was to be until 31 October 2022. The position of GCEO became vacant due to the suspension (during April 2022) and ultimate dismissal of the former GCEO from the GGDA.

[4] The vacant position of GCEO was advertised as from 31 July 2022 by the Board of GGDA on two media platforms i.e. the Sunday Times Newspaper and on the GGDA's website.

[5] The applicant and several other candidates applied for the post. The Board initiated and facilitated the recruitment process as part of its function being responsible for the daily management and operational activities of GGDA. The recruitment process was done with the knowledge of the MEC Parks Tau and in accordance the Transversal Policy on Recruitment, Secondments and Transfers (*"TPRST"*).

[6] The Head of Department (*"HOD"*) of the Gauteng Department of Economic Development (*"GDED"*), Mr Blakes Mosley-Lefafola, represented the MEC (Tau) and kept Tau informed of the recruitment process. An interview panel was constituted by the Board with the knowledge of Tau. The panel consisted of the chairperson of the Board (Dr Vilakazi), the HOD (Mr Blakes Mosley-Lefafola) representing Tau, and four other board members. The GDED is the Second Respondent.

[7] The Interview Panel evaluated all the applications and four applicants were shortlisted, including the Applicant, to be interviewed. Virtual interviews were conducted on 20 August 2022 with the Applicant, Mr B Maninal, Ms S Mafoyane and Ms B Koyana. The interview panel recommended the Applicant and two shortlisted candidates, Mr B Maninal and Ms S Mafoyane for further competency assessments. These tests are required by section 11.6.1 of the TPRST. The panel, in the memorandum *"SH6"* dated 22 September 2022, recommended to the MEC (Tau) that the Applicant be appointment to the post of GSEO after all the tests were completed.

[8] Tau, after receiving the recommendations, signed the memorandum and thereby appointed the Applicant as per memorandum *"SH6"*. This was done on

24 September 2022. Tau acted in terms of section 8(3) of the Gauteng Growth Development Agency Act, Act 3 of 2003 (The "Act"), the section empowering the MEC to appoint the GCEO of GGDA.

[9] This application is the result of the now disputed appointment of the Applicant as the Group Chief Executive Officer (GCEO) of the Second Respondent (GGDA) pursuant a recruitment process undertaken by the Board of GGDA. The Board on 22 September 2022 recommended to the then MEC, Parks Tau, that the Applicant be appointed. Mr Tau duly appointed the Applicant to the post on 24 September 2022 acting in accordance with the provisions of section 8(3) of the Gauteng Growth Development Agency Act 5 of 2003. This provision empowers the MEC to appoint a GCEO of GGDA. This appointment was recorded and signed by Tau in a memorandum dated 24 September 2022.

[10] A political reshuffle occurred in the Gauteng Provincial Cabinet's structure before the former MEC (Mr P Tau) could provide the Applicant with a letter of appointment and contract. Mr Tau was replaced by Ms Tasneem Motara as the successor of Mr Tau as MEC and she assumed office of MEC at the beginning of October 2023. Tau was redeployed to National Government.

[11] Ms Motara was presented with annexure "SH6" by Dr Vilakazi after Ms Motara assumed office during the first week of October 2022. The memorandum was signed by Dr Vilakazi (as chairperson of the Board) on 23 September 2023. The memorandum was signed by Mr Blake Mosley-Lefatola (the HOD) on 24 September 2023 and Parks Tau signed the memorandum on 24 September 2024 as MEC. These facts were never disputed by the incoming MEC, Ms Motara, nor does she dispute that Parks Tau signed the memorandum in terms of section 8(3) of the Act when appointing the applicant as GCEO of the GGDA. The correctness of the memorandum "SH6" was also never disputed by the incoming MEC. She later raised other defences which will be dealt with below.

[12] The Board of the Second Respondent (GGDA) in Annexure "SH6" outlined the recruitment and selection process undertaken by it. This was done with the approval, knowledge and oversight by Parks Tau and he subsequently approved the recommendation by the Board to appoint the Applicant as GCEO of GGDA by signing the memorandum on 24 September 2022. The argument by Ms Motara that the Board acted without the knowledge of Parks Tau cannot succeed.

[13] Ms Motara, after receiving the memorandum "SH6", requested Dr Vilakazi to prepare a second memorandum to provide for her name to appear in the memorandum to consider the approval of the appointment of the Applicant. The second memorandum, nothing more than a duplication of "SH6", only differs from the first memorandum with the substitution of the name of Parks Tau with that of Ms Motara. The date of signature of Dr Vilakazi was changed from 23 September 2022 to 10 October 2022. The name of the HOD was left unchanged. Ms Motara however, never signed the second memorandum. The contents of the second memorandum did not vary from that of the original memorandum "SH6".

[14] Ms Motara refused to process the applicant's appointment as GCEO, initially challenging such appointment on the basis that the procedure undertaken by the Board for the recruitment and selection of a GCEO culminating in the recommendation by the Board to Parks Tau, was not mandated or authorised by Parks Tau. She further contended that the process followed by the Board, as set out in recruitment policy applicable for such appointments, as contained in the GDED Group Transversal Policy on Recruitment, Secondments and Transfers (*TPRST*), was not applicable for the recruitment and selection of the GCEO of GGDA. These defences cannot succeed. The whole process occurred with Tau's knowledge.

[15] During the meeting on 10 October 2022 at the *Saxon Hotel* in Johannesburg between Dr Vilakazi and Ms Motara, Dr Vilakazi informed Ms Motara about the information of the GGDA and the particular kind of GCEO needed to be appointed. Ms Motara acknowledged receiving “SH6” but made it very clear that she had no intention of approving the Applicant’s appointment as CGEO, as she had her own particular person for appointment in mind.

[16] The new MEC received all the “briefing documents” regarding the recommendations by the Board for the appointment of GCEO, the only recommendation therefore in the memorandum “SH6” as addressed to Tau. The MEC acknowledged on 10 November 2022 receiving the briefing documents relating to the recommendation by the Board regarding appointment of CGEO.

[17] The MEC extended the Applicant’s acting term of appointment as GCEO on 27 October 2022 for a further six (6) months purportedly that she needed some time to ascertain whether the applicant will be suitable to work with her. She contradicts herself herewith as she clearly made her point that she was not going to appoint the Applicant. This was a mere gesture to disguise her view.

[18] The MEC invited the Applicant to her residence at *Serengeti Estate* on 10 January 2023 where she disclosed to him the recommendation of the Board in the memorandum “SH6” to appoint him and of his subsequent appointment by the former MEC Tau on 24 September 2022. She informed him that she did not “sign off” such appointment pursuant the recommendation, in that she needed some time to ascertain whether he was the right person for the appointment as CGEO. The MEC informed the Applicant that this was partly reason of the decision to extend his acting appointment for a further six (6) months. She also informed the Applicant that she had two other preferred candidates but that he was at liberty to re-apply for the post.

[19] There is therefore uncontested that the MEC disclosed the Board's recommendation to Tau and that Tau approved of the applicant's appointment. She further did not raise her later "defence" that the applicant's appointment was not completed for the so-called "non-communication" to the applicant of his appointment by Tau.

[20] A dispute arose between the MEC and the Board over this issue resulting in the MEC dissolving the Board on 23 March 2023. The alleged grounds stated by the MEC for dissolving the Board was that the Board acting outside its mandate. Although not the issue before this court, it is subsidiary hereto. The dissolving of the Board was overturned by Nyati J in this court on 18 May 2023 under case number 2023-032601.

DEFENCES BY THE MEC:

[21] The defence of *non-communication* to the Applicant by the MEC (Tau or Motara) was only raised in the First Respondent's answering affidavit. The MEC's challenge to the appointment of the Applicant was that the Board had no mandate or authorization from the MEC (Tau) to embark on the recruitment and selection process asserting that the **TPRST** was not applicable for the recruitment or selection process undertaken by the Board. This defence has no merit at all and. The **TPRST** is the prescript of how such posts are advertised, how the recruitment process takes place and the shortlisting of applicants followed by interviews and final recommendation to the MEC in a memorandum ("Annexure SH6").

[22] It has to be remembered that the MEC, after receiving the memorandum "SH6", on 27 October 2022 extended the Applicant's acting term of office for a further six (6) months under the disguise that she wanted to satisfy herself that the Applicant was indeed fit for appointment to work with her. She alleged she

needed more time to establish this. She, as an after-thought, informed the Applicant that she had two other preferred candidates but that he could re-apply for appointment.

[23] The MEC at all material times challenged the applicant's appointment by Tau for reason that the Board lacked the necessary mandate or authorization from Tau to undertake the process/procedure followed for the recruitment and selection of the GCEO. The MEC contended that the process as set out in the *TPRST* was not applicable for the recruitment of the GCEO. This is denied by Dr Vilakazi in her supporting affidavit. If there was any truth in this defence, it is rather odd why Tau and Dr Vilakazi signed the memorandum containing the Board's recommendation. This argument falls short of any persuasive power.

[24] The second defence of "non-communication" only arised later when the MEC filed her answering affidavit. This entails the argument that the signing off of memorandum "SH6" by Tau was not the final step in appointment but that the non-communication of such signing off, together with no written contract of employment given to the Applicant, leaves the process uncompleted and up and to the signing of the memorandum by Tau does not constitute a "final decision". The MEC's argument is that the process was not completed and because it was as described by her to be a non-completed administrative act, the process cannot be reviewed because it does not constitute a final administrative action.

[25] This argument is clearly mistaken what an administrative action entails. I could find nothing that supports her view. The court must determine what constitute administrative action. Section 1 (i) of The Promotion of Administrative Justice Act, Act 3 of 2005 (PAJA) defines administrative action as:

(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; or

(b) a natural or a juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect.

[26] There is no dispute between the parties that the action by Tau constitutes an administrative action but the Motara argues that it was an *uncompleted administrative action* and therefore she could substitute it with her decision not to appoint the Applicant. This view is without any merit.

[27] The defence of “non-communication” cannot succeed for reason that there is no requirement in the *TPRST* that before any appointment of a GCEO is completed, personal communication of the decision of the MEC to appoint the GCEO must be communicated to the appointee before the appointment is “final”. There is no such requirement in the Act. The procedural process **after** the MEC appointed the Applicant was that the MEC should, or ensure that the Board of the GGDA, provide the appointee with a letter of appointment and a contract of employment as GCEO. The final appointment of the GCEO is not subject to the providing of the said documentation to the appointee. This is a mere obligation in terms of **Regulation (57)(d) of the Public Service Regulations 2016 GG No 40167**. An appointee will sign the letter of appointment after receiving such and thereafter the employer will provide the appointee with the necessary contract of employment. I could find no authority that any such appointment is only final once the appointee received a letter of appointment, and a contract of employment thereafter the appointee signed the letter of appointment.

[28] The MEC had her own agenda as already indicated when she informed the Board and the Applicant that she had two other persons in mind she would prefer to be appointed.

[29] The next defence by the MEC is that the appointment of the GCEO should first be referred to the Gauteng Provincial Executive Council (Provincial Exco) before the appointment is final is without any substance. There is no requirement of kind in terms of the Act, the TRPST of the Public Service Regulations. There is no statutory or other prescript or Provincial Exco directive in this instance. The validity of the appointment of the GCEO therefore does not have to be finalised by the Provincial Exco for lack of authority to appoint the GCEO. See **Ahmed v Minister of Home Affairs 2019 (2) SA (CC) at par [41-41]**.

[30] The MEC's extension of the Applicant's acting appointment as GCEO on 27 October 2022 for a further six months and her ostensible reason therefore to ascertain whether the applicant was a suitable candidate is in stark contrast with her real agenda as forthcoming from her now defences against the appointment and is indicative of her ulterior motive. The MEC, despite extending the Applicant's acting appointment on 27 October 2022 for six months, unilaterally prematurely terminated the acting appointment on 28 March 2023 without any cause or affording the Applicant any hearing at all. This is contrary the *audi alteram partem rule* affording the Applicant the opportunity to state his case. This happened while she was abroad in Portugal. This action of hers further violated the authority of Ms Kedibone Diale-Tlabela, the Acting MEC in her absence. The Acting MEC was clothed with the necessary authority but the MEC (Respondent) unlawfully and improperly disregarding the position of the Acting MEC. The First Respondent usurped herself the right to continue with the process while abroad disregarding legal principles of the authority of the Acting MEC in her absence. The termination of the Applicant's acting tenure was unlawful.

[31] The defences of the MEC are without any substance and cannot succeed.

CONDITIONAL COUNTERCLAIM:

[32] The MEC in the alternative, should the court find in favour of the Applicant, seeks relief in terms of a conditional counterclaim to review and set aside the appointment by Parks Tau. The reasons provided are without any substance and are rejected in toto. There is no need to dwell on these for lack of any substance thereto. She has no legal founding to stand on and the conditional counterclaim has no prospect of any success.

[33] The counterclaim (disguised as a review of the decision by Parks Tau) is brought in terms of section 172 of the Constitution. It should have been brought within a reasonable time since acquiring the knowledge of the appointment in October 2022. For undisclosed reasons, the MEC delayed for a period of almost 10 months before filing the conditional counterclaim.

[34] There is no acceptable explanation given for the undue long delay but this is indicative of her defiant attitude whilst proclaiming that no condonation is necessary. This argument is without any substance. No explanation is advanced for the undue long delay and the only reasonable inference is that she deems herself above the normal rules.

[35] There is no merit in the conditional counterclaim and it is rejected.

[36] There is further no explanation why the previous MEC (Parks Tau) was not joined to give him the opportunity to defend his actions. This amounts to another disregard of the *audi alteram partem* rule.

SECOND RESPONDENT:

[37] The Second Respondent abided with the relief sought by the Applicant as in Part B of the Notice of Motion and prays for the dismissal of the First Respondent's Conditional Counterclaim and consequent that the First Respondent to pay the costs incurred by the Applicant and the Second Respondent.

CONCLUSION:

[38] The only reasonable inference on the above is that the Applicant made out a proper case for the relief sought in Part B of the Notice of Motion and to dismiss the respondent's counterclaim.

COSTS:

[39] The purpose of an award for costs is to indemnify a successful litigant for the expenses he/she incurred during the litigation process. Taking into account the taxation process, such indemnification is seldom a complete indemnification. **Herbstein & Van Winsen, The Civil Procedure of the Supreme Court of South Africa, 4th Ed p 701.**

[40] The court has to exercise a discretion when awarding costs and it will take into account all relevant aspects of the whole process. This discretion needs to be exercised with caution. **Herbstein & Van Winsen supra p 704.**

[41] The ordinary rule is the costs follow success, unless there are circumstances where the court will, despite success, award costs against a

successful litigant. These aspects may include the conduct of a party during the litigation, excessive demands, failure to curtail proceedings and costs, causing unnecessary litigation and moral considerations. The list is not exhaustive but every case may differ from another in this regard.

[42] The court has considered all relevant aspects in this matter and there is a central issue that in my view exceeds all other aspects. The conduct of the First Respondent (MEC) was nothing more and nothing less than embarking on a road of defiance to the settled process and prescribed directives. The MEC had her own agenda and she wanted to appoint her choice irrespective of the completed process and appointment by her predecessor.

[43] The Second Respondent indicated to abide with the decision of the court and in fact all along followed the prescribed procedure and kept the previous MEC informed of the whole process. It will only be fair that the First Respondent be ordered to pay all the costs of the litigation.

ORDER:

[44] Having considered the above, the following order is granted:

1. The Applicant was duly appointed as per the recommendation of the Second Respondent (The Board-GGDA), recommending the appointment of the Applicant as GCEO of the Second Respondent and as approved by the former MEC (Parks Tau) of the Gauteng Department of Economic Development in terms of the memorandum dated 22 September 2022, a copy thereof annexed as Annexure "SH6" to the founding affidavit.
2. The First Respondent (MEC) and the Second Respondent (Board of GGDA) is directed to process the appointment of the Applicant as Group Chief Executive Officer (GCEO) of the Second Respondent, as approved by the former MEC of

the Gauteng Department of Economic Development in the memorandum dated 24 September 2022.

3. The failure and/or refusal of the First Respondent to process the appointment of the Applicant as Group Chief Executive Officer (GCEO) as per memorandum dated 24 September 2022 and approved by the former MEC of the Gauteng Department of Economic Development in terms of the memorandum dated 24 September 2022 is reviewed and set aside.

4. The Applicant is allowed to assume his duties as Group Chief Executive Officer (GCEO) of the Second Respondent (GGDA) with immediate effect.

5. The First Respondent (MEC) is ordered to pay the costs of the Applicant and the Second Respondent for Part A and B of the Notice of Motion on an attorney and client scale, including the costs of two counsel appointed where so employed.

6. The First Respondent's counterclaim is dismissed with costs on an attorney and client scale.



HOLLAND-MUTER J

Judge of the Pretoria High Court

Matter was heard on 13 February 2024

Judgment handed down on 13 June 2024

TO: Applicant:

Adv R Mogagabe SC

Adv L Maunatlala (where involved in preparation, drafting and relevant
other consultations within the discretion of the Taxing
Master)

First Respondent:

Adv I v Maleka SC

Adv T Scott

Second Respondent:

Adv C Orr SC