REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – GRAHAMSTOWN) **CASE NO. CA 53/2013**

In the matter between :

LUNTO BOBO	**First Appellant**
NOMBINIE ABEGAIL SITYI	**Second Appellant**
MANKOMO ULYTH PANGO	**Third Appellant**
FUDUKILE WILLIAM MBOVANE	**Fourth Appellant**
SAKHUMZI WELCOME CAGA	**Fifth Appellant**
MHLELI DICKSON MATIKA	**Sixth Appellant**

and

ZUKISA FAKU	**First Respondent**
BUFFALO CITY MUNICIPALITY	**Second Respondent**
THE ACTING MUNICIPAL MANAGER, *NOMINE OFFICIO* OF THE BUFFALO CITY MUNICIPALITY	**Third Respondent**
LULEKA SIMON	**Fourth Respondent**
NOMIKI MGEZI	**Fifth Respondent**
NOMAZIZI JAKAVULA	**Sixth Respondent**
XOLISILE MPUPUSI	**Seventh Respondent**
THEMBISA NONDALA	**Eighth Respondent**
DESMOND MHANI	**Ninth Respondent**

Coram : **Nepgen J, Pickering J and Brooks A J**

Date heard : **26 August 2013**

Date delivered : **29 August 2013**

JUDGMENT

BROOKS A J :

INTRODUCTION

[1] The appellants are all Proportional Representation Councillors of Buffalo City Municipality ("*the municipality*") and are former members of the mayoral committee of the municipality. On 25th January 2010, the first respondent, the executive mayor of the municipality ("*the executive mayor*") addressed a letter to each of the appellants indicating her decision to withdraw their participation as members of the mayoral committee with immediate effect. Notwithstanding the concession made in the founding affidavits to the effect that in terms of the provisions of section 60 of the Local Government Municipal Structures Act, 117 of 1998 ("*the Act*"), the executive mayor had the right to dismiss members of the mayoral committee, on 14th April 2010 the appellants launched an application for an order declaring the executive mayor's decision removing the appellants from the mayoral committee to be unlawful and reinstating the appellants to the mayoral committee retrospectively with full benefits and emoluments. A concomitant order

directing first, second and third respondents jointly and severally to pay the costs of the application was also sought.

[2] The application was successfully opposed in the Court *a quo* (SANDI J). Whilst variously restated in the notice of appeal, in essence the grounds of appeal fall into three broad categories :

1. that the Court *a quo* erred in finding that the appellants had not been of assistance to the executive mayor in the governance of the municipality;

2. that the Court *a quo* erred in failing to find that the executive mayor was performing an administrative function when she removed the appellants from the mayoral committee;

3. that the Court *a quo* erred in failing to find that the *audi alterem partem* rule applied.

THE FACTUAL FINDING

[3] The relief was sought in the Court *a quo* on notice of motion. It amounts to final relief. It is trite that the Court will be guided in its analysis of the appellants' entitlement to final relief in such circumstances by a consideration of the facts alleged by the appellants in the founding affidavits which are admitted in the respondents' answering affidavits, read together with the allegations made therein by the respondents. Where, in the exercise of judicial discretion, a consideration of these facts justifies final relief, it will be granted.[1]

[4] In considering the factual matrix placed before it, the Court *a quo* enjoyed the benefit of the Constitutional Court's scrutiny of the primary function of a mayoral committee :

> "*The primary function of the mayoral committee is not concerned with the deliberative process, but with rendering assistance to the mayor in the exercise of his or her authority. This is with a view to ensuring efficient and effective government at local government level. The powers and functions of the executive mayor are set out in section 56 of the Structures Act.*"[2]

[1] Plascon-Evans Paints Ltd. v van Riebeeck Paints (Pty) Ltd. 1984 (3) SA 623 (AD) at 634 and National Director of Public Prosecutions v Zuma 2009 (2) SA 277 SCA at para. [26].
[2] Democratic Alliance & Another v Masondo N O & Another 2003 (2) BCLR 128 CC at para. [19].

[5] It is common cause between the parties that all six appellants were former members of the mayoral committee and that the decision of the executive mayor to release them from that membership was communicated by her in individual letters dated 25th January 2010. The facts alleged by the executive mayor in her answering affidavit include facts pertinent to her assessment of the performance of each of the appellants individually as members of the mayoral committee. She states that the removal of the appellants was largely due to the failure on the part of their departments to deliver what she described as accountable and good governance. In a number of the affected departments, disciplinary proceedings were underway against certain officials. The assistance she required from the appellants in order to govern in a proper manner was not forthcoming. In respect of each of the six appellants, more detailed allegations were made relating to specific problems which had arisen within each affected department resulting from a lack of leadership and guidance on the part of the respective appellants. In certain instances, this had led to the development of a very negative attitude within the mayoral committee, palpable attempts to undermine the position of the executive mayor, a failure of service delivery and public criticism levelled against the municipality.

[6] In their replying affidavits, the appellants allege in general terms that no basis exists for any allegation of non-performance on their part. The allegation is made that as mayoral committee members, the appellants always gave the executive mayor the assistance which was required. This allegation is qualified with an exculpatory undertone by a reference to the overall context of a decision alleged on the part of the executive mayor to retain almost all of her powers rather than to espouse the principle of delegation. The appellants professed to have served on other committees of council, to have attended council meetings with regularity and to have diligently and expeditiously carried out whatever tasks were allocated to them. They describe their attendance at meetings of the mayoral committee as regular, handling their portfolios with care, skill and integrity. Laudable as these allegations may sound, they remain generalisations, rather than coming to grips with the detail contained in the specific and negative allegations made about the appellants in the answering affidavit. Significantly, it is admitted in the replying affidavits that there has been a failure in a number of directorates of the municipality, but the appellants disclaim any connection between this failure and any conduct or omission on their part.

[7] The rather generalised treatment in the replying affidavits of the allegations made in the answering affidavit deposed to by the executive mayor does little to cast doubt on their relevance and veracity. Indeed, the only attack launched upon the factual allegations relating to poor performance on the part of the appellants which finds expression in the notice of appeal is the submission that the finding of the Court *a quo* that the appellants have not been of assistance to the executive mayor in the governance of the municipality, is at variance with the content of the executive mayor's letters addressed to the appellants on 25th January 2010 and upon removing them from office. Much emphasis was placed upon this aspect by *Mr Cole*, who appeared before us on behalf of the appellants. The letters' relevant portion, identical in each instance, states :

> "*Kindly allow me to express my sincere gratitude to your leadership and contribution towards the work of the committee and the mandate of the portfolio.*" (sic).

The contention that the portion of the letter quoted demonstrates a view of the appellants' performance which was actually held by the executive mayor is opportunistic. The letters purport to do no more than advise the appellants of their fate with a degree of politesse. No relevant factual statement of substance relating to their performance whilst

members of the mayoral committee is expressed therein. Nor is any offered by the appellants under oath in the founding affidavits.

[8] Accordingly, the factual finding of the Court *a quo* that the appellants have not been of assistance to the executive mayor in the governance of the municipality as provided for in section 60 (1) (a) of the Act cannot be faulted.

THE NATURE OF THE FUNCTION EXERCISED BY THE EXECUTIVE MAYOR

[9] It is common cause between the parties that in terms of Section 60 of the Act the executive mayor had the right to dismiss members of the mayoral committee. The fundamental basis relied upon by the appellants in approaching the Court *a quo* was the assertion that the exercise of this right by the executive mayor constitutes an administrative decision which can only be taken subsequent to the completion of due administrative process, *inter alia* affording the appellants some warning of the imminence of a decision and an opportunity to make representations in motivation of their retention as members of the mayoral committee.

[10] It is further common cause that no such warning or opportunity for representation was extended to the appellants. They refer to the actions of the executive mayor in removing them from the mayoral committee as "*high-handed conduct*". In her answering affidavit, the executive mayor explains that both the appointment and removal of individuals to and from the mayoral committee are exclusively executive decisions. They are the result of the exercise of power within the sole discretion of the executive mayor, requiring no prior consultative process with those affected by the decision. The fact that on a practical level there may be what are described in the answering affidavit as "*behind the scenes political consultations*" within the political party in power prior to the appointment of members to the mayoral committee does not alter this reality. The corresponding decision to remove members from the mayoral committee is an executive decision taken by the executive mayor. It is not an administrative decision capable of being taken on review and requires no administrative process in its fulfilment.

[11] *Mr Cole* urged us to accept that whether the executive mayor regarded her decision as executive or administrative was irrelevant, as either is reviewable under the law. In support of the argument we were referred

to **President of the Republic of South Africa & Another v Hugo.**[3] In that matter, what was being considered on review was the nature of the discretionary powers of the President under s82 (1) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution"), and more particularly the exercise by the President of his power to pardon and reprieve prisoners under s82 (1) (k) of the interim Constitution. Delivering the judgment of the majority of the Court, Goldstone J stated at para [29] :

> "*The interim Constitution places such matters within the power of the President. This does not mean that, if a president were to abuse this power vested in him or her under s82 (1) (k), a Court would be powerless, for it is implicit in the interim Constitution that the President will exercise that power in good faith. If, for instance, a president were to abuse his or her powers by acting in bad faith, I can see no reason why a Court should not intervene to correct such action and to declare it to be unconstitutional. For example, a decision to grant a pardon in consideration for a bribe could no doubt be set aside by a Court. So, too, if a president were to misconstrue his or her powers, I can see no objection to a Court correcting such an error, though it could not exercise the discretion itself. This is what happened in R v Home Secretary, Ex Parte Bentley*[4]*, but even then the Court declined to issue a mandamus or a declaration. It simply invited the Home Secretary to consider the case again in the light of the decision that he had misconstrued his powers."*[5]

---

[3] 1997 (4) SA 1 (CC).

[4] [1994] QB 349 (DC).

[5] The case considered the question whether the nature and subject matter of a decision taken in the exercise of the Royal Prerogative is reviewable. Watkins L J concluded that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process and that whether or not the matter in question is reviewable must be decided on a case by case basis. This approach is

Plainly, the Constitutional Court was concerned with issues surrounding the susceptibility to review of decisions flowing from the exercise of presidential prerogative. *In casu*, the analysis seeks to determine whether the executive mayor made an executive decision or performed an administrative function when dismissing the appellants. That her decision did not flow from presidential prerogative is beyond question, but it does not follow therefrom that her decision is administrative rather than executive.

[12] Something of the nuances involved in establishing the distinction between an executive decision or an administrative function is further highlighted by **President of the Republic of South Africa & Others v South African Rugby Football Union & Others**[6] upon which *Mr Cole* placed reliance in support of his argument that whether the decision of the executive mayor is to be regarded as executive or administrative is irrelevant, as either is reviewable under the law. Under scrutiny here were the powers conferred on the President by s84 (2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), all original constitutional powers concerned with matters

---

foreshadowed in the earlier South African cases which consider the prerogative power of pardon or remission of sentence. (Sachs v Dönges N O 1950 (2) SA 265 (A) at 307).

[6] 2000 (1) SA 1 (CC).

entrusted to the head of State, and in particular the power to appoint commissions of enquiry specified in s84 (2) (f). The exercise of some of the powers is strictly controlled by the express provisions of the Constitution, such as the powers conferred by ss84 (2) (a) – (c) concerning the assenting to and signature of Bills, which are regulated by s79 of the Constitution in that they are constitutional responsibilities directly related to the legislative process and the constitutional relationship between the Executive, the Legislature and the courts. In exercising these responsibilities, the President is not performing administrative acts within the meaning of s33 of the Constitution. The powers set out in ss84 (2) (d) and (e) are similarly narrow constitutional responsibilities not related to the administration of legislation but to the execution of provisions of the Constitution. The judgment identifies that the remaining s84 (2) powers are discretionary powers conferred on the President which are not constrained in any express manner by the Constitution, such as the conferral of honours, the appointment of ambassadors, the reception and recognition of foreign diplomatic representatives, the calling of referenda, the appointment of commissions of enquiry and the pardoning of offenders. None of these is concerned with the implementation of legislation. Plainly not

administrative in nature, they could never be subjected to the provisions of s33 of the Constitution.[7]

[13] What is evident from the judgments to which we were referred is that the characterisation of any particular power or function will be determined in part by reference to the nature of its origins, whether it is derived from a common-law or statutory source, in part by reference to any specific statutory provisions which may regulate the manner in which it is exercised and, indeed, by its subject matter.[8]

[14] Against this background, in seeking to persuade us that in making her decision to remove the appellants from the mayoral committee the executive mayor was performing an administrative function, *Mr Cole* drew an analogy between her power of appointment of members to the mayoral committee and the power of appointment of a chief reserved to the premier of any particular province of South Africa by s2 (7) of the Black Administration Act 38 of 1927. The analogy is short lived. Whilst it is so that both an executive mayor and a premier have their own origins in statute and perform administrative functions associated with

[7] Paras [148] to [156].

[8] Ultimately, what determines whether the exercise of a prerogative power is subject to the power of review is not its source but its subject matter. (President of the Republic of South Africa & Another v Hugo 1997 (4) SA (1) (CC) at para. [18].

the implementation of legislation, the distinction emerges when regard is had to the different roles played by a member of the mayoral committee, on the one hand, and a chief on the other. The former is not concerned with any deliberative process which forms part of any administrative function and purely renders assistance to the executive mayor in the exercise of his or her authority, whereas the latter has the role of a traditional leader who acquires all the duties, powers and administrative responsibilities which go with chieftainship. Consequently, in appointing a chief, a premier performs an administrative function.[9] In contrast, in appointing a member of the mayoral committee, the executive mayor does not.

[15] In my view, in deciding the point, the Court *a quo* correctly had regard to the wording of the Act. A comparison is made between the position pertaining to the removal of a member of the mayoral committee by an executive mayor, the situation *in casu*, and the position pertaining to the removal of a member of an executive committee by a municipal council. In the former situation, the position is governed by the provisions of section 60 of the Act. Once again, the Court *a quo* had the benefit of an interpretation of the Constitutional Court :

[9] Mkatshwa v Mkatshwa & Another 2002 (3) SA 441 (T) at 449 H.

> "*Section 60 (1) gives the power to the executive mayor to appoint members of the mayoral committee and to dismiss them. The function of the mayoral committee is to assist the executive mayor. The executive mayor also has the power to delegate specific responsibilities, executive powers and functions to members of the mayoral committee. The mayor's power to delegate is, however, not completely unfettered. In terms of section 60 (3) the municipal council may designate certain of the executive mayor's powers and functions to be '…. exercised and performed by the executive mayor together with the other members of the mayoral committee' ".*

and further :

> "*All the powers in section 60 (1) to appoint, dismiss and to delegate are given to the executive mayor. The municipal council cannot appoint the members of the mayoral committee and cannot dismiss them except by removing the executive mayor in terms of section 58 of the Structures Act. Also significant is the fact that the mayoral committee dissolves if and when the mayor ceases to hold office.*"[10]

The Act does not prescribe any procedure to be followed by an executive mayor in the appointment or dismissal of members to and from the mayoral committee. In the latter situation, the position is governed by section 53 of the Act, which prescribes that the removal from office of one or more of the members of the executive committee shall be achieved by resolution of the municipal council, subsequent to prior notice being given of an intention to move a motion for such removal.

---

[10] Democratic Alliance & Another v Masondo N O & Another (*supra*) at para. [13] and para. [25].

[16] The Court *a quo* concluded the comparison by finding that the legislature deliberately did not afford members of the mayoral committee with the same protection as that afforded members of a municipal council. The distinction is important, for the absence of provisions requiring that a specific procedure be adopted in the removal of a member of a mayoral committee is an important factor to be taken into account in the enquiry whether the executive mayor was exercising her executive power rather than performing an administrative function. In my view, the resultant finding in the Court *a quo* that in removing the mayoral committee from office the executive mayor was exercising her executive powers and not performing an administrative action capable of review, must stand.

[17] To some extent, the appellants may have been encouraged by the advice given to them by the acting municipal manager, namely that they ought to file an appeal with the municipal council in terms of the provisions of s62 of the Municipal Systems Act 32 of 2000. This was done, presumably, in an attempt to exhaust what are commonly referred to as "*internal remedies*" prior to launching the application. The grounds of appeal were based on the provisions of s3 of the Promotion of Administrative Justice Act 3 of 2000.

[18] Plainly, the advice given to the appellants by the acting municipal manager was incorrect. The mayoral committee is not a committee of the municipal council. The municipal council does not have the power to appoint or dismiss members of the mayoral committee. The exercise by the executive mayor of her executive powers in this arena does not fall within the ambit of the provisions of section 62 of the Municipal Systems Act 32 of 2000. Nor does the exercise of these powers qualify as administrative action in terms of the definitions section of the Promotion of Administrative Justice Act 3 of 2000. However, this erroneous advice could not have influenced the appellants in their decision to launch the application proceedings in the Court *a quo*. Nor did it seem to influence the content of either the founding or replying affidavits to the detriment of the appellants.

AUDI ALTEREM PARTEM

[19] The prospect of success of this third category of the attack upon the judgment of the Court *a quo* is informed to a significant degree by the finding that in removing the appellants from the mayoral committee the executive mayor was exercising an executive power. Invoking the principle of *audi alterem partem* the appellants allege that in the event

of a decision on the part of the executive mayor deciding to remove a member of the mayoral committee she is obliged by law to adhere to the principles of natural justice as well as the Constitution of the Republic of South Africa. In amplification of this assertion, they state that the executive mayor was obliged to give adequate prior notice of her intentions, stating her grievances against the affected members and affording them an opportunity to make representations and "*defend*" themselves in terms of the *audi alterem partem* principle.

[20] In essence, the argument is that the failure on the part of the executive mayor to adhere to the principles of natural justice resulted in a decision being taken which was capricious, malicious or arbitrary. This cannot withstand scrutiny. The response of the executive mayor to this line of reasoning maintains that in the exercise of the sole discretion which characterises an executive decision, she assessed the extent to which the appellants were of assistance in helping her govern the Municipality in a proper and orderly fashion, thereby fulfilling their duty as part of the mayoral committee to maintain good, accountable and effective governance, concluding that, for the reasons advanced in the answering affidavit, they were no longer of assistance to her in the discharge of her obligations.

[21] Section 33 (1) and s33 (2) of the Constitution contains peremptory provisions as follows :

> "*(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
>
> *(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*"

As an administrative functionary executing statutory duties, an executive mayor is not exempt from the provisions of s33 (1) and s33 (2) of the Constitution in appropriate circumstances.[11] These would be circumstances in which the decision of the executive mayor relates directly to the administration of legislation, rather than circumstances in which she gave expression to her right to exercise executive powers. The purported reliance upon the Constitution raised initially in the founding affidavits receives no elaboration. Accordingly, viewed from this perspective, the appellants' criticism of the decision taken by the executive mayor must be rejected.

[22] Claiming some justification for his argument in the arena of public policy, *Mr Cole* urged us to find that even if we were to conclude that

[11] Telley & Another v Minister of Home Affairs 1999 (3) SA 715 (D) at 728 D to F.

the decision of the executive mayor to remove the appellants from the mayoral committee was an executive decision, the legitimate expectation of the appellants, and indeed of society as a whole in our constitutional democracy, is that they should have the full benefit of all the principles of natural justice. In my view, having regard to what was stated in **Administrator, Transvaal, & Others v Traub & Others,**[12] the principle of legitimate expectation is not applicable in the circumstances of this matter and we do not have to deal further with the submission.

[23] I am of the view that in the light of the determination by the Constitutional Court[13] of the nature and function of the mayoral committee and the nature of the relationship between the mayoral committee and the executive mayor[14], its approach towards the role of procedural fairness in the analysis of the nature of the powers to appoint and dismiss conferred upon the President as expressed by Moseneke D C J in **Masetlha v President of the Republic of South Africa & Another**[15] is apposite here :

> "*[75] It is so that the audi principle, or the right to be heard, which is derived from tenets of natural justice, is part of the*

[12] 1989 (4) SA 731 (AD).
[13] Democratic Alliance & Another v Masondo N O & Another (*supra*) at para. [19].
[14] Democratic Alliance & Another v Masondo N O & Another (*supra*) at para. [13] and [25].
[15] 2008 (1) SA 566 (CC) at 592 E and 593 C to 594 A.

common law. It is inspired by the notion that people should be afforded a chance to participate in the decision that will affect them and more importantly an opportunity to influence the result of the decision. …."

followed by :

"*[77] It is clear that the Constitution and the legislative scheme give the President a special power to appoint and that it will be only reviewable on narrow grounds and constitutes executive action and not administrative action. The power to dismiss – being a corollary of the power to appoint – is similarly executive action that does not constitute administrative action, particularly in this special category of appointments. It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security. In Premier, Mpumalanga,[16] this court has had occasion to express itself on whether to impose a requirement of procedural fairness in the following terms :*

> *In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.[17]*

[78] This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority conferred must be exercised

---

[16] Premier, Mpumalanga, & Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) (1999 (2) BCLR 151).
[17] Id para. [41].

> *lawfully, rationally and in a manner consistent with the Constitution.*[18] *Procedural fairness is not a requirement. The authority in s85 (2) (e) of the Constitution is conferred in order to provide room for the President to fulfil executive functions and should not be constrained any more than through the principle of legality and rationality.*"

RATIONALITY

[24] Whilst the absence of rationality was not raised pertinently in the notice of appeal, this was raised as a specific aspect in argument. To the extent that it may have been hinted at in the founding affidavit and notice of appeal, the argument can be dealt with shortly. It is a requirement of the rule of law that the exercise of executive power such as is demonstrated by the executive mayor in this matter, should not be arbitrary. The decision taken must be related rationally to the purpose for which the power was given. Any decision not so related, and accordingly inconsistent with this requirement, is arbitrary. The determination of whether the requirement of rationality has been fulfilled in any given instance is an objective process.[19] In my view, an appropriate assessment of the factual matrix placed before the Court *a quo* demonstrates objectively that the decision taken by the executive

[18] See Pharmaceutical Manufacturers Association of SA & Another : In re : *Ex parte* President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) para. 85; and Prinsloo v van der Linde & Another 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759) para. 25.

[19] Pharmaceutical Manufacturers Association of SA & Another : In re : *Ex parte* President of the Republic of South Africa & Others (*supra*) at para. [85] and [86].

mayor was related rationally to the power given to her by s60 of the Act. The purpose it sought to achieve lay within her authority and, viewed objectively, it was rational.

CONCLUSION

[25] For the reasons stated in this judgment, I consider the decision of the executive mayor to exclude the appellants from the mayoral committee to have been an executive decision. It is an executive decision which satisfies the objective test for rationality. There was no obligation to invoke the *audi alterem partem* principle. The *status quo* pursuant to the decision of the executive mayor should accordingly be preserved.

[26] It follows that the appellants have failed to demonstrate that the court *a quo* erred in its assessment of the facts placed before it, or that it erred in the analysis of the nature of the decision taken by the executive mayor adverse to the interests of the appellants, or that it ought to have found that she ought to have afforded the appellants an opportunity to make representations to her prior to her making a decision on the future of their membership of the mayoral committee.

ORDER

[27] It is ordered that :

The appeal is dismissed with costs.

_____

R W N BROOKS
Judge of the High Court (Acting)

NEPGEN J :

I agree.

_____

J J NEPGEN
Judge of the High Court

PICKERING J :

I agree.

_____

J D PICKERING
Judge of the High Court

Appearances:

For the Appellants: *Adv S H Cole instructed by Neville Borman & Botha, Grahamstown*

For the Respondents: *Adv. E S J van Graan S.C. instructed by Netteltons, Grahamstown*