FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A78/2009

In the case between:

PETRUS FRANCOIS BOTHA Applicant

and

MATJHABENG MUNICIPALITY Respondent

CORAM: VAN ZYL, J *et* LEKALE, AJ

JUDGMENT: LEKALE, AJ

HEARD ON: 1 FEBRUARY 2010

DELIVERED ON: 18 FEBRUARY 2010

INTRODUCTION

[1] This is, in the main, an application for an order reviewing and setting aside a decision of the respondent taken on the 20th January 2009 at a special council meeting effectively:

1.1 allowing and entertaining a counter request to a seconded request for a secret ballot on a motion

proposed by the applicant calling for the removal of the executive mayor of the respondent from office;

1.2 subjecting to a vote a seconded request for a secret ballot on a motion for the removal of the executive mayor of the respondent from office.

[2] In the alternative to an order for judicial review the applicant seeks an order declaring, in terms of the respondent's applicable Standing Rules and Orders, that a seconded motion for a secret ballot cannot be countered or defeated by a motion for voting by way of show of hands.

[3] Although a notice of intention to oppose the application was filed on behalf of the respondent, the application is effectively unopposed insofar as the respondent's attorney, Mr Moroka appeared in chambers before the hearing of the application and announced that, after consultation with senior counsel, the respondent had decided to allow the application to proceed without appearance on its part. In this regard the court wishes to express its appreciation and thanks to Mr

Moroka for his professionalism.

[4] A closer perusal of the Notice of Motion reveals that no specific consequential relief is sought in the event of the application being granted. Realising the aforegoing the court enquired from Mr Claasen, appearing for the applicant and in the presence of Mr Moroka, after what an appropriate relief would be in such an eventuality. It was, thereupon, opined for the applicant, with Mr Moroka's approval, that in such circumstances it would be appropriate for the applicant to re-submit the motion in a proper form and in accordance with applicable Standing Rules and Orders.

BACKGROUND

[5] The applicant, a member of the respondent's council, sponsored a motion for the removal of the respondent's Executive Mayor ("Mayor") from office on various grounds in terms of a notice submitted on the 30th September 2008. The motion was duly seconded by 3 (three) other councillors. In the affidavit submitted in support of the application, the

applicant avers that he requested a secret ballot in respect of the relevant motion and that request was duly seconded. Save for an announcement in a letter to the respondent's Speaker ("Speaker") to the effect that the applicant intended to request a secret ballot in terms of the Standing Rules and Orders, the aforegoing is neither apparent *ex facie* the notice of motion nor is it captured verbatim in the minutes dispatched by the respondent as part of the record in terms of Rule 53 (1) (b) of the Uniform Rules of Court ("the Rules").

[6] On the 20th January 2009 a special meeting was held by the council of the respondent to deal with the motion in question. It is clear from the minutes that it was generally accepted by the meeting that the applicant, in fact, made such a duly seconded request for a secret ballot in respect of the said motion.

[7] At the meeting the applicant duly moved for the removal of the mayor in accordance with the said. The house was, however, divided on the issue and the motion had to be taken to a vote

in accordance with the applicant's request. The Speaker, however, allowed and entertained a counter request for voting on the motion to take place by show of hands in line with the standard procedure applicable to ordinary meetings after soliciting counsel from the respondent's in-house legal advisor.

[8] The issue of voting on the motion was, thereafter, put to a vote by way of show of hands on the basis that there were two opposing requests with regard to how voting was to take place before the council. Voting on the motion itself, eventually, took place by way of show of hands after the request for a secret ballot had been defeated.

[9] The motion for the removal of the Mayor was defeated after the applicant and all other councillors from the opposition had refrained from participating in the vote on the basis that the process was flawed and illegal.

[10] The applicant, eventually, launched the present proceedings after the respondent had refused to rescind the relevant decision when it was pointed out to it by the applicant's attorneys that the procedure followed and the advice given to the Speaker by the legal advisor were contrary to the provisions of Rule 83 read with Rule 85 of the respondent's valid and applicable Standing Rules and Orders.

[11] The respondent's position, as reflected in its written response to the applicant's lawyers dated the 16th February 2009, is that Rule 85 of the respondent's Standing Rules and Orders was amended on the 29th August 2006 to provide that a request for a secret ballot in terms of Rule 83 gets carried if it is seconded by the majority of councillors present at the meeting and that the applicant's request was neither seconded nor supported by the majority of councillors present at the relevant meeting.

[12] A notice of intention to oppose the application was delivered and the record, inclusive of the reasons for the relevant

decision was, eventually, furnished as required by Rule 53(1)(b) of the Rules. There is, however, effectivly no answer to the applicant's averments and contentions insofar as no answering affidavit was filed by and for the respondent.

ISSUE TO BE DETERMINED

[13] The salient questions to be decided are, effectively, the following:

13.1 what were the applicable Standing Rules and Orders as at the date of the relevant decision?

13.2 whether or not the relevant decision is consonant and in accordance with applicable Standing Rules and Orders.

APPLICANT'S CONTENTIONS

[14] The applicant effectively contends, *inter alia*, that:

14.1 the applicable Standing Rules and Orders are those accepted by the respondent's council on the 19th December 2000 because they were, *inter alia,* duly published in the Provincial Gazette on the 1st December 2000 as required by the Constitution of the Republic of

South Africa of 1996 ("the Constitution") and prescribed by the Local Government: Municipal Systems Act, no. 32 of 2000 ("the Systems Act");

14.2 the purported Standing Rules and Orders of 2006 were, in fact, of no force and effect as at the relevant date because they were never published in the official Provincial Gazette so as to take effect as provided by the Constitution;

14.3 The relevant decision of the Speaker is an administrative action as defined by the Promotion of Administrative Justice Act, no. 3 of 2000 ("PAJA");

14.4 the decision in question is not in accordance with applicable Standing Rules and Orders;

14.5 the decision has the effect of providing for that which the Standing Rules and Orders do not provide for;

14.6 the decision is procedurally unfair;

14.7 the decision is materially influenced by an error in the interpretation of the relevant Standing Rules and Orders;

14.8 the decision is in conflict with the Constitution.

APPLICABLE LAW

[15] As correctly submitted by Mr Claasen, section 162(1) of the Constitution provides that,

> **"(1) A municipal by-law may be enforced only after it has been published in the official gazette of the relevant province;**
>
> **(2) A provincial official gazette must publish a municipal by-law upon request by the municipality;**
>
> **(3) Municipal by-laws must be accessible to the public."**

[16] The Systems Act, as correctly contended for the applicant, provides as follows with regard to by-laws:

> **"12(3) No by-law may be passed by a municipal council unless –**
>
> **(a) …**
>
> **(b) the proposed by-law has been published for public comment in a manner that allows the public an opportunity to make representations with regard to the proposed by-law.**
>
> **13. A by-law passed by a municipal council –**

> **(a) must be published promptly in the Provincial Gazette, and, when feasible, also in a local newspaper or in any other particular manner to bring the contents of the by-law to the attention of the local community; and**
>
> **(b) takes effect once published or on a future date determined in or in terms of the by- law."**

[17] Section 14 of the Systems Act, further, gives the relevant Minister and Member of Executive Committee ("MEC") the power to make or amend standard draft Rules and Orders or by-laws after consultation with each other or at the request of organised local government nationally or provincially by notice in the Gazette or provincial gazette.

[18] It is clear from the Constitution and legislation that publication by notice in the Gazette is a *sine qua non* for a by-law to take effect.

[19] The 2000 Standing Rules and Orders provide as follows with regard to voting in the respondent's council and committee

meetings:

> **“83(1) Voting in a council or committee meeting is by show of hands, unless a councillor requests a secret ballot on any question. When such a request is received the provisions of Rule 85 applies.”**

> **“85(1) A request in terms of Rule 83 that a secret ballot be held in respect of any motion or proposal, is carried if it is seconded.”**

APPLICATION AND EFFECT OF THE LAW

[20] The applicant contends that the relevant actions of the respondent, through its Speaker, constitute an administrative action and that the relevant decision falls to be reviewed and set aside in terms of section 6 of PAJA.

[21] In the aforegoing regard, Mr Claasen cites and apparently relies on the decision in **SKWEIT v SPEAKER OF THE GREATER TAUNG LOCAL MUNICIPALITY** (case number 2317/07) (2008 ZANWHC52) where the decision to remove a

councillor as a member of its executive committee by a municipal council was, effectively, held to be an administrative action as defined by PAJA.

[22] Section 1 of PAJA defines an administrative action in relation to an organ of state such as the respondent as,

> **"Any decision taken, or any failure to take a decision by –**
>
> **(a) an organ of state, when –**
>
> **(i) exercising a power in terms of the Constitution or a provincial constitution with a small c; or**
>
> **(ii) exercising a public power or performing a public function in terms of any legislation.**
>
> **(b) …**
>
> **which affects the rights of any person adversely and has direct, external legal effect."**

[23] It follows from the aforegoing that, for an impugned conduct to be reviewable in terms of PAJA, it must constitute an administrative action as defined by PAJA.

[24] The enquiry into whether or not the conduct in question constitutes an administrative action and is, as such, subject to PAJA is twofold and involves, as a starting point, the constitutional stage which is concerned with whether or not the conduct involved constitutes administrative action within the meaning of section 33 of the Constitution. Only if that question is decided in the affirmative does the second stage of the enquiry arise viz. the statutory leg which relates to whether or not the conduct in question amounts to an administrative action for the purposes of PAJA and, as such, is reviewable in terms thereof.

(see the judgment of **Ngcobo** J in **Chirwa v Transnet Limited & others 2008 (3) BCLR 251 (CC) @ paragraph [139]** (Chirwa)).

[25] The focus in the constitutional stage of the enquiry is on the relevant function giving cause to the offending conduct and not the functionary whose conduct is in question.

(see **President of the Republic of South Africa & others v South African Rugby Football Union and others 2000**(1)

SA 1(CC) @ paragraph [141] (SARFU)).

[26] The constitutional stage of the enquiry is concerned with determining whether action should be characterised as the implementation of legislation and, as such, an administrative action or as the formulation of policy which does not constitute an administrative action. It involves a series of considerations including the source of the relevant power which was exercised, its nature and subject matter as well as whether it involves the exercise of public power. In making the relevant determination –

> **"difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the constitution and the overall constitutional purpose of an efficient, equitable and ethical public administrative. This can best be done on a case by case basis."**
>
> (see **SARFU** decision paragraph [143] and **Marais v Democratic Alliance 2002** (2) AIISA 424 (C) cited by the applicant).

[27] Once the impugned conduct passes the constitutional qualification test it falls to be subjected to the PAJA administrative action test (statutory test) which, in effect, involves the subjection of the impugned conduct to a series of considerations aimed at establishing whether or not it meets the seven requirements prescribed by section 1 of PAJA for qualifying as an administrative action. Some of the requirements are, in my view, part of the constitutional qualification test and, in their case and where appropriate, the relevant conduct may be regarded as having passed muster for the purposes of PAJA. The extent of the enquiry, in my view, depends on the facts of each case.

[28] For the purposes of the present matter those requirements are that the impugned conduct should be (1) a decision as defined, (2) made by an organ of state (3) when exercising a public power or performing a public function (4) in terms of any legislation (5) which affects the rights of any person adversely (6) and has direct external legal effect and (7) does not fall under any of the exclusions listed in the definition of

administrative action by PAJA.

(see **Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others** 2005 (6) SA 313 (SCA) referred to with approval by **Langa CJ** in **Chirwa** at paragraph [181]).

[29] In casu I am not satisfied that the conduct in question qualifies as an administrative action for the purposes of the Constitution. The aforegoing obtains because:

29.1 in my view the causes of the applicant's grief are, in effect, the rulings made by the Speaker, as the presiding chairperson, in the course of ensuring that the meeting was being conducted in accordance with the Standing Rules and Orders of the respondent;

29.2 the source of the Speaker's powers to make such rulings is section 37(a) read with section 37(f) of the Local Government: Municipal Structures Act (the Structures Act) which provides that the Speaker presides at council meetings and obliges him to ensure that meetings are conducted in accordance

with Standing Rules and Orders;

29.3 although the nature of the relevant power and function involved is obviously statutory, its subject matter viz. compliance with Standing Rules and Orders relating to voting at Council and Committee meetings, indicates that the exercise of the same and performance of the duty involved are limited to council meetings and do not impact on the general public. There is no apparent need for it to be exercised in the public interest. The power is confined to internal procedural affairs of the respondent which are applicable only to meetings and not to other operations involving, inter alia, interaction with members of the public. It is as much a matter of internal procedures of a municipal council as the election of its chairperson and executive committee by a municipal council is regarded as an internal matter by section 160 of the Constitution;

29.4 the relevant decision evidently affects the rights of

the applicant and other councillors in their capacities as councillors and not as members of the public;

29.5 in my view the Constitution and, *a fortiori*, PAJA are concerned with and applicable to situations where organs of state or private persons engage with the public through the exercise of powers and performance of public functions by virtue of the Constitution, legislation or any other empowering provisions. They are intended to protect members of the public in their capacities as such and not functionaries as they interact with one another in their official capacities and in the course of performing their official duties as such. As **Skweyiya J** in **Chirwa** @ paragraph [47] observed:

> **"The purpose of the administrative justice provisions is to bring about procedural fairness in dealings between the administration and members of the public."**

(see further the **Preamble** to **PAJA);**

29.6 the primary function of the respondent's council at the relevant meeting was to exercise its elective or decision - making powers concerning the exercise of its powers and functions as a municipality as provided for by section 160 of the Constitution. The exercise of the administrative powers of the respondent are the domain of the administration under the Municipal Manager as the head while the Executive Mayor exercises most of its executive powers as per Section 56 of Structures Act. The Speaker, as the chairperson of the council, is the head of the legislative side of the respondent and exercises those executive powers of the council as may have been delegated to him. The relevant decision-making powers are provided for under internal procedures by the Constitution.

(see generally sections 37; 55 and 58 of Structures Act).

29.7 the relevant decision was, as such, made in the context of an internal decision-making process a kin

to policy formulation and is, therefore, related thereto.

[30] Even if I am wrong in the aforegoing finding with regard to the constitutional leg of the enquiry, I am not satisfied that the relevant conduct satisfies the statutory test in terms of PAJA in that:

30.1 although the court is prepared to accept, without further ado, that the impugned conduct constitutes a decision for the purposes of PAJA despite nagging questions surrounding the administrative nature of the rulings in question which appears not to be of public administration nature, the rulings clearly had no direct, external legal effect. In this regard the following dictum of **Sachs J** in **Minister of Health and Ano. v New Clicks SA (Pty) Ltd and others** 2006 (2) SA 311 @ paragraph [583] is apposite:

> **"I believe that S37 of the Constitution of the Republic of South Africa, 1996 and PAJA are together designed to control the exercise of**

> **public power in a special and focused manner, with the object of protecting individuals or small groups in their dealings with the public administration from unfair processes or unreasonable decisions. The function should not be diffused. It involves the micro management of public power, and is all the more effective because of its intense and coherent focus."**

30.2 the rulings are, however, closely related to the exercise of a constitutional power insofar as they were made in the context of a decision – making process relating to exercise of powers and performance of functions of the municipality according to S 160 of the Constitution and are, thus, in my view, decisions for the purposes of PAJA;

30.3 the requirement for the decision to have direct external legal effect in the definition of **"administrative action"** buttresses the view expressed earlier that PAJA is intended to protect members of the public in their capacities as such

and in their interactions with functionaries who exercise constitutional or public powers and whose bargaining positions are, thereby, enhanced and strengthened vis-à-vis such members of the public. It is not intended to protect functionaries as they interact with one another as equals in their official capacities as such and as the representative or constituent part of the relevant authority. In casu one part of the equation is missing viz. the public and, as such, there was no transaction within the contemplation of PAJA. The respondent, for the purposes of PAJA, virtually dealt with itself at the relevant time;

30.4 the power exercised and the function performed by the Speaker at the relevant time can, in my judgement, hardly be regarded as being related to the exercise of public power or performance of public duty. In my view **"public power"** is a power conferred on a functionary, be it an organ of state or a private person, by an empowering provision for

the benefit of the public and the exercise or nonfeasance in respect of which affects the members of the public in their individual or collective capacities as such. The aforegoing accords, in my opinion, with the following view by De Smith, Woolf and Jowell in **JUDICIAL REVIEW OF ADMINISTRATIVE ACTION** (1995) 5th Edition at 167 and quoted with approval by Conradie JA, with regard to Promotion of Access to Information Act, no 2 of 2000 in **MITTALSTEEL SOUTH AFRICA LTD (FORMERLY ISCOR LTD) v HLATSHWAYO** 2007 (1) SA 66 (SCA) at page 75, paragraph I:

> **"A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest."**

See further **CHIRWA** *(supra)* at paragraph [138]).

30.5 in my judgement, the impact of the relevant decision is mainly, if not wholly, limited to the councillors, in their collective capacity as such, in the same way as the decision not to appoint the applicant to a senior position within the South African Police Service (SAPS) was found to have been felt mainly by the relevant applicant in **GCABA v MINISTER FOR SAFETY AND SECURITY AND OTHERS** case number CCT64/08 [2009] ZACC 26.

[31] The decision in **SKWEIT v SPEAKER OF THE GREATER TAUNG LOCAL MUNICIPALITY** (*supra)* is, in my respectful view, no authority for the proposition that decisions having no direct external legal effect and concerned only with internal administrative or elective affairs of municipal councils, as opposed to public administration, constitute administrative actions for purposes of PAJA insofar as:

31.1 the court therein did not specifically consider the question whether or not the removal of a councillor from its executive committee by a municipal council constitutes an administrative action for the purposes of PAJA. The court, with respect, appears to have simply accepted that as a *fait accompli* after finding that the respondent was an organ of state and that the Speaker was an administrator;

31.2 the court in that matter, further, seems, with respect, not to have enquired after whether or not the relevant decision was, in fact, a **"decision"** in terms of PAJA and whether or not the Speaker exercised a public power when the decision was made but to have, instead, accepted without further ado that if the speaker is entitled to exercise functions delegated to him or her by the council he or she was, in fact, performing such functions and *ipso facto* a public function when the applicant was removed from the committee. The learnt Judge, furthermore, appears, with due respect, not to have

considered whether or not the decision in question had a **“direct, external legal effect”** and did not fall under the specific exclusions as required by PAJA for it to constitute an administrative action.

[32] PAJA is, therefore, not applicable in this matter and the issue falls to be decided in terms of the court’s common law powers of judicial review insofar as the applicant, *inter alia*, effectively contends that the respondent acted outside the provisions of applicable Standing Rules and Orders in making the impugned decision.

<u>FINDINGS</u>

[33] It is clear from applicable law and the uncontroverted version of the applicant that:

33.1 the 2006 Standing Rules and Orders were of no force and effect as at the date of the relevant rulings insofar as they had not been published in the provincial gazette as at the relevant date. In this regard the court was unable to find anything in the available minutes of the respondent to show that the

relevant by-law was ever returned to the respondent at any stage with proof that it had been published;

33.2 the applicable and effective Standing Rules and Orders as at 20th January 2009 were those published on the 1st December 2000. In this regard it is worth noting that even the respondent's internal legal advisor referred to and dealt with these Standing Rules and Orders when he advised the speaker and never referred to the 2006 ones;

33.3 in terms of the said applicable Standing Rules and Orders, a request for a secret ballot in respect of any question gets carried or effected once it is seconded;

33.4 the applicant's request for a secret ballot was seconded;

33.5 the relevant Standing Rules and Orders do not authorise the respondent to allow and entertain a counter motion or request to the contrary once the request for a secret ballot has been seconded;

33.6 the respondent, therefore, acted outside the

applicable by-law when it, through its Speaker, allowed and entertained a counter request;

33.7 in the same vein, the respondent acted *ultra vires* the relevant Standing Rules and Orders when it subjected the applicant's seconded request for a secret ballot to a vote;

33.8 the relevant decision falls to be set aside on these grounds alone;

33.9 everything that followed after the irregular step was taken is, therefore, a nullity insofar as it was, further, not condoned by the applicant.

[34] The applicant relies on a number of grounds in support of the application. The court is, however, of the view that it is not necessary to deal with each of those grounds in the light of the above findings.

RELIEF

[35] Mr Claasen proposed that in the event of the relevant decision being set aside the appropriate further relief would be for the applicant to be allowed to re-submit the motion in accordance

with applicable rules and orders. The court finds no problem with this proposal.

COSTS

[36] There is nothing before the court to warrant a departure from the general rule with regard to costs and no request for such a departure is before the court.

ORDER

[37] In the premises the decision of the 20th January 2009 by the respondent allowing and entertaining a request countering the applicant's request for a secret ballot and subjecting the said motion or request by the applicant to a vote is hereby set aside.

[38] The respondent shall allow, accept and entertain a re-submission of the relevant motion by the applicant, if he is so advised, in accordance with the Standing Rules and Orders published on the 1st December 2000.

[39] The respondent is directed to pay the costs of the application.

L. J. LEKALE, AJ

I agree.

C. VAN ZYL, J

On behalf of applicant: Adv. J Y Claasen SC
Instructed by
Naudes
BLOEMFONTEIN

On behalf of respondent: No Appearance
Instructed by:
Moroka Attorneys
BLOEMFONTEIN

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