IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO. 11309//20

In the matter between:

PLETTENBERG BAY RATEPAYERS' AND RESIDENTS' ASSOCIATION	First Applicant
PETER GAYLARD	Second Applicant

and

THE BITOU MUNICIPALITY	First Respondent
MSIMBOTI PETER LOBESE	Second Respondent
SANDISO GCABAYI	Third Respondent

APPLICANTS' HEADS OF ARGUMENT

INTRODUCTION

1. There are two central issues in this case:

1.1. Whether the first respondent ('the Municipality') can lawfully acquire motor vehicles for the regular and exclusive use of its Mayor and Deputy Mayor (the second and third respondents) – the merits;

1.2. Whether the procedures by which the parties have sought to ventilate the issue have properly been invoked – the points in limine.[1]

[1] The *locus standi* of the Municipality to oppose the application is the subject of a separate, and substantive, challenge under Rule 7. The issue will be dealt with when the response of the Municipality comes to hand.

2. The determination of the points in limine requires an understanding of the merits so these heads of arguments will traverse the merits first.

THE MERITS

The Resolution to acquire mayoral vehicles

3. On 11 June 2020, the council resolved to obtain, on lease, a new motor vehicle 'for the … Mayor' and to extend the current lease on the vehicle 'being used by the Deputy Mayor'. The exact terms of the Resolution are as follows:

> 'PROCUREMENT OF VEHICLE USED FOR POLITICAL OFFICE BEARERS.
>
> Council File Ref: 6/2/1/9/1 Resolved:
>
> 1. That Council approves the leasing of the vehicle for the Executive Mayor and cost not to exceed R700 000.
> 2. That the existing lease agreement of the vehicle used by the Deputy Executive Mayor be extended till the end of his term of office, if possible.
>
> Proposed: Councillor M M Mbali
>
> Seconded: Councillor L M Seyisi
>
> To be Actioned by: Director: Financial Services Section.'[2]

The underlying object - the Resolution

4. In the written proposal tabled in support of the Resolution, the Chief Financial Officer, Mr Mkhefa:-

4.1. gave a summary of the vehicles to be acquired and the terms of the acquisition to the effect that the aggregate cost of vehicles, which would be leased for 36 months, would be R1,325,418;

4.2. explained that the object of the proposal was to 'seek Council approval for the procurement of vehicles *for the Executive Mayor and Deputy Executive Mayor …*'[3], an object he reiterated when, two pages later, he stated that the two vehicles were to be '*sourced for the Executive Mayor and Deputy Mayor.*[4]

[2] FA 26 Annexure PG3.1.
[3] FA 29 Annexure PG3.2
[4] FA 31 Annexure PG3.2

5. In motivating the decision, Mr Mkhefa placed the object beyond doubt by suggesting that the acquisitions were but a continuation of a current practice to provide vehicles for the regular and exclusive use of the Mayor and his Deputy. They were properly to be considered as 'tools of trade [to be used] in the execution of their responsibilities.' '[5]

6. By describing the acquisitions as vehicles 'for the Executive Mayor' and to be 'used by the Executive Mayor,' the resolution made plain that Council accepted the proposal and the motivation underlying it. It unequivocally sanctioned the acquisition of 'mayoral cars' dedicated to the regular and exclusive use of the Mayor and his Deputy.[6]

7. The Municipality nowhere contends that the vehicles will not be for the regular and exclusive use of the mayor and his Deputy. Quite the reverse, it fully accepts that such dedicated use is contemplated. What it contends, as will emerge below, is that such usage is permissible under law. This contention forms the gravamen of this litigation.

The unlawfulness of the resolution

8. The provision of vehicles for the use of Councillors (a category of official that encompasses a mayor and deputy mayor) is regulated by a Determination that that has the force of law. The current version has been in operation since 24 April 2020, but the provision germane to these proceedings was in fact first enacted in 2017. Its terms are comprehensively pleaded in the founding affidavit[7] and the actual regulation is annexed to the affidavit as PG4.[8]

9. For operative provision referred to is clause 9(1)(*e*).[9] It is to the effect that a vehicle owned by the Municipality may only be used by a councillor, first, if the utilization is for

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[5] 'The municipality have been providing over the years a vehicle to the Executive Mayor and recently to the Deputy Executive Mayor as part of the tools of trade in execution of their responsibilities.' FA 30 Annexure PG3.2.

[6] In years gone by, these were sumptuous vehicles emblazoned with number plates such as 'ND 1' or 'TJ 1'. As times became more straitened, the vehicles became more modest, but their use expanded so that, instead of being trotted out exclusively on official occasions, they became the equivalent of 'company cars' for the regular and exclusive use of the recipients. It is entirely proper, therefore, to still describe them as 'mayoral cars'. The applicants' case, of course, is that the provision of mayoral cars is no longer permissible.

[7] FA 10 para 16.

[8] FA 32.

[9] FA 11 para 18.2.1.

official purposes and, secondly, only subject to the conditions contemplated in the clause. The conditions envisage that:

9.1. the circumstances must be exceptional;

9.2. good cause must be shown for the utilization;

9.3. the utilization must be authorized by Mayor or (if he is conflicted) the Speaker; and

9.4. the provision of the vehicle must be prudent when considered within the context of the service-delivery and comparable obligations of the municipality taken as a whole.[10]

10. In construing the effect of this measure, the Ratepayers' Association specifically accepts that the provision of a municipal-owned for a period rather than a single trip can potentially fall within the compass of the clause. A Councillor might, depending on the circumstances, be permitted to use a municipal vehicle while his or her private car is being repaired if public transport is unavailable or unsuitable for the purpose.

11. But, the Ratepayers' Association emphasizes, the provision of a car for the dedicated use of Mayor or his Deputy is decidedly not permitted by the clause. The clause permits *ad hoc* utilization in situations of stringency and subject to special procedural safeguards; what it renders unlawful is the deployment of a vehicle for the regular and exclusive use of a Councillor.

12. That mayoral vehicles are impermissible is absolutely clear from the specific provisions abolishing the perquisite. It is to be found in the 2017 Determination that effectuated the change.

12.1. The provision, clause 18(3), states 'In the event that a municipality bought a mayoral vehicle before the publication of this Notice, the usage of the such motor vehicle between the period 1 July 2016 and the date of publication of this Notice will not be considered irregular.'

[10] FA 11 para 19.

12.2. The implication is clear: usage of a mayoral vehicle subsequent to publication of the Notice will be irregular. Such an irregularity is precisely what the Municipality's Resolution comprehends, and it is, to put the matter bluntly, completely unlawful.

13. Since a vehicle cannot be acquired in order to prosecute an illegal purpose, the acquisition in pursuit of such a purpose is itself unlawful. The Municipality makes a faint effort to contend otherwise, but there is no merit in its stance. If the transaction would, but for the object, not be performed, it cannot be performed once the object is shown to be illegal. So much is trite.

The justification advanced for the acquisition

14. In his report, Mr Mkhefa makes no mention of the Determination. For reasons that are unclear, he obviously believes it is irrelevant. His belief is wrong and had the unhappy consequence that the Council was never informed of the true regulatory framework, This dereliction of duty is most regrettable.

15. Mr Mkhefa focussed on demonstrating that the acquisition falls within the constraints set by the Cost Containment Regulations promulgated by the Minister of Finance under the Municipal Finance Management Act of 2003. This emerges from such statements as the following:

15.1. '[T]the procurement of vehicles for office bearers should follow the following prescripts …'

15.2. 'The threshold limit for vehicle purchases relating to official use for political office-bearers must not exceed R700 000 …

16. The closest he comes to the issue of utilization is in his statement that an 'accounting officer must ensure that there is a policy that addresses the use of municipal vehicles for official purposes.'[11]

16.1. Strangely, he points to no such policy but this is presumably because none is in place within the Bitou Municipality. The statement is, however, instructive in casting a

[11] FA 30 Annexure PG3.2 para 7.

spotlight over the issue of usage. What it plainly reveals is that usage, which is a consideration of importance, must be dealt with by a formal policy.

16.2. Such a policy must plainly comply with the usage requirements embodied in the law taken generally. Of cardinal importance, needless to say, is the provision prohibiting the deployment of vehicles for use as dedicated mayoral cars.

17. The Cost Containment Regulations are not empowering but constraining. They are, moreover, not focussed on mayoral incumbent specifically, but on municipal office-bearers in general. They constitute a brick, but only one brick, in a regulatory edifice that extends well beyond them. The point is made thus in the replying affidavit: 'The provision accordingly operates in tandem with such other provisions as might exist. Where the other provisions constrain, as here they do, this adds one further constraint.'

18. The Chief Financial Officer's belief that the provision is 'lawful authority' to acquire a vehicle for the use of the Mayor and Deputy Mayor is wholly misplaced. The position is simple: a car cannot be acquired for a political office bearer (1) at a cost of over R700 000 (2) or at all, if the car is being acquired for the dedicated use of a Councillor (including the mayor or deputy mayor). The Council would doubtless have appreciated as much had it been provided with the Determination outlawing the provision of mayoral vehicles. In such circumstances it would have declined to pass the Resolution it did.

POINTS IN LIMINE – NON-JOINDER

19. The Municipality contends, seemingly in earnest, that the Councillors should have been joined in these proceedings since they made the decision. The deliberations of the Council are not pertinently the subject of these proceedings. It is the decision itself or, to be more precise, its implementation by way of the conclusion of leases for the acquisition of the vehicles.

20. The decision of the Municipality is the subject of attack for unlawfulness, not the workings of the Council. The Council purported to take a decision in its capacity as an organ of the Municipality. The decision that ensued was a decision of the Municipality

in much the same way as a decision of a Board of Directors is the decision of the Company.[12]

POINTS IN LIMINE - LOCUS STANDI OF APPLICANTS

Nature of Objection to locus standi of the Ratepayers' Association

21. In these proceedings the Ratepayers' Association takes up the cudgels on behalf of the ratepayers and residents in the community, its members not least.[13] The Municipality contests its right to do so. Something is made of the fact that its membership numbers no more than a minority of the community, but the *per capita* representation enjoyed by the Association is not really the point in issue.

22. The objection is one of principle, not of numbers. What the Municipality contends:

22.1. first, is that the applicants have no direct and substantial interest in the outcome of these proceedings,[14]

22.2. and, secondly, that a decision of the Council, comprising elected representatives of the community, is determinative if it constitutes and exercise of executive power, and so cannot be challenged at the instance of members of the community.

The right to bring a representative action

23. The response to the first issue, which is scarcely pressed with vigour, is two-fold:

23.1. First, that an exception to the common law proscription of the *actio populari* covers actions brought by ratepayers;

23.2. Secondly, that the law has developed under our Constitution to the point where representative actions in the public interest are now entirely competent.

24. There is high authority for the proposition that a ratepayer has an actionable interest in the manner in which the municipality handles its funds and, in the process, manages its

[12] RA 116 para 10.
[13] FA 7 paras 4-7.
[14] AA 63 para 33, 84 para 101.

affairs. See *Jacobs en 'n Ander v Waks en Andere* (113/1990) [1991] ZASCA 152; 1992 (1) SA 521 (AD) at para [33]:

24.1. ‘Dit is 'n gevestigde beginsel dat 'n munisipale belastingbetaler ‘n genoegsame belang het by die aanwending van die munisipale fondse om hom met *locus standi* te beklee om 'n onregmatige besteding deur die Stadsraad van sodanige fondse by wyse van ‘n hofbevel te verhinder (sien bv die *Dalrymple*-saak supra, per INNES HR [*Dalrymple v Colonial Treasurer* 1910 TS 372] op 382-3 en 385, per Wessels R op 393-5, per Bristowe R op 400-1; en die *McCagie*-saak supra op 627-8 [*Director of Education, Transvaal v McCagie and Others* 1918 AD 616].

24.2. This can be translated thus: ‘It is an established principle that a municipal ratepayer enjoys a sufficient interest to interdict the unlawful management by the Council of its funds.’

25. It is a separate question whether ratepayers, seeking to vindicate this special interest, can be represented in the litigation by a representative body established to protect their interests. The position is as follows:

25.1. Section 38 of the Bill of Rights ushered in a new era in which the standing to sue was substantially enlarged for members of the public. People protected by the Bill can now sue to vindicate the right, not just in their interest, but on behalf of a person unable to bring action, as a ‘member, or in the interest of, a group or class or person’, and in the public interest. Since PAJA (The Promotion of Administrative Justice Act 3 of 2000) is an evocation of s 33 in the Bill,[15] litigation to review or otherwise remedy unlawful state action fall within the scope of this very wide provision.

25.2. The effect of the relaxation of the standing requirement is ‘to create scope for public interest, surrogate, representative and associational challenges to illegality. The risk that an unlawful decision could stand because an own-interest litigant cannot

[15] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) at para [28]. ‘PAJA, which was enacted to realise section 33, confers a right to challenge a decision in the exercise of a public power or the performance of a public function that “adversely affects the rights of any person and which has a direct, external legal effect”. PAJA provides that “any person” may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because “it seems clear that the provisions of section 38 ought to be read into the statute.” This is correct.’

establish standing is diminished by the fact that broad categories of other litigants, not acting in their own interest, are entitled to bring a challenge.'[16]

26. The Municipality suggests that the challenge mounted in the current litigation falls beyond the scope of the Administrative Justice Clause and thus of the Promotion of Administrative Justice Act 3 0f 2000 ('PAJA').[17]

26.1. Its contention is based on the fact that the 'executive powers or functions of a municipal council' are placed beyond the scope of PAJA. This is quite wrong.

26.2. No doubt it is so that, speaking generally, a polycentric decision of a political nature is beyond the scope of PAJA, but the decision under challenge in these proceedings is not of this nature. It is one concerned not with the exercise of an executive power but with the purported exercise of a power that the Municipality does not enjoy.

26.3. A Municipal Council that, by acting illegally, trespasses beyond its statutory powers exercises no proper power of an executive nature. The decision cannot, therefore, fall within the compass of the exception upon which reliance is placed.

27. If this submission is rejected, the Ratepayers' Association has another string to its bow. It is that the constitutional principal of legality applies.

27.1. Mystifyingly, the Municipality contends in its answer that no basis in legality has been laid in the founding affidavit.[18] This is simply wrong. Clause 24 squarely places reliance on the principle of legality, and the illegality of the decision to acquire the motor vehicles is the very pith and essence of the applicants' cause of action.

27.2. If a Ratepayers' Association can bring a claim under PAJA, there can be little reason why it should not equally, under the Constitution, have the *locus standi* to bring a claim based on the doctrine of illegality. As the *Giant* case reveals, the source of the

[16] *Giant* at para [46].
[17] AA 61 paras 26-29.
[18] AA 64 para 34.

right to represent the community in public interest litigation is grounded in the Constitution itself. It is not dependent on the wording of PAJA. [19]

27.3. To suggest that a representative action cannot be employed to rectify an illegality in the public interest would cast a cloak of impunity over malfeasance by a public institution unless some individual was rich enough to bring the body to account by way of legal action. In a constitutional democracy, such a result would be all but absurd.[20] It becomes all the more absurd when the case presents 'strong indications of … irregularity' that cry out for a remedy.[21] The current cases is of precisely such a nature.[22]

POINTS IN LIMINE - WANT OF URGENCY

28. In itself, this application is plainly urgent. If the vehicles are unlawfully acquired and they have to be returned, the waste of ratepayers' money will be considerable. The Municipality does not suggest otherwise.

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[19] *Giant* at para [29]: '[The applicant] seeks to vindicate a constitutional right. The injury it claims to have suffered is to the right to just administrative action conferred by section 33 of the Constitution. Hence its standing is determined under the Bill of Rights. Section 38 provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."'

[20] Instructive in this context is the following passage from *Giant* at para 34: 'To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."

The passage was cited with approval in *Areva NP Incorporated in France v Eskom Holdings Soc Limited and Others* [2016] ZACC 51, 2017 (6) BCLR 675 (CC) 2017 (6) SA 621 (CC) at para [40].

[21] *Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others* [2013] ZACC 19; 2013 (10) BCLR 1180 (CC); 2013 (2) SACR 443 (CC) at para [45].

[22] Cf *Organisation Undoing Tax Abuse NPC and Another v Myeni and Another* (15996/2017) [2019] ZAGPPHC 957, where the authorities are comprehensively reviewed. The case shows how broad are the rights of litigants to vindicate the public interest even absent any direct and substantial interest in the outcome of the case.

29. The case mounted by the Municipality is that the urgency is 'self-created'. This expression, as commonly employed as it is seldom examined, means one of two things:

29.1. No dispensation based on urgency would have been necessary had the applicant reacted sooner;

29.2. Some relaxation of the rules might have been necessary, but the parties and the Court would have been able to handle the matter with less haste.

30. In the present case, the Ratepayers' Association goes to some length to explain how it proceeded.

30.1. It says that the meeting was held during lockdown and probably electronically; that the motion was not on the original agenda but tabled as an addendum;[23] and that the Ratepayers' Association only became aware of the decision about six weeks later. When it discovered what was afoot, it acted as speedily as was possible in the circumstances.

30.2. The papers make it clear that an undertaking was given that released the pressure and (though there seems to be some confusing in the exchanges between the attorneys) that, enjoying the protection of the undertaking, it is happy to deal with this matter in the ordinary course. In the light of this, it is the Municipality that must be seen to be pressing for finality as a matter of urgency. If it wants more time to file supplementary papers, it should say so and the Ratepayers' Association will be happy to entertain suggestions.

31. The Ratepayers' Association emphasizes the logistical problems a small organization staffed by a handful of aging volunteers must inevitably face, particularly when the Municipality is so high-handed and unforthcoming. No doubt the Ratepayers' Association would act more speedily if it were able to employ someone at a suitable wage to do nothing but monitor the workings of the Council and press it for responses, but this is not the position and, as a matter of practicability, never will be. In the circumstances,

[23] FA 27 Annexure PG3.2.

the Court, it is submitted, can be expected to show appreciation of the situation and act accordingly.

32. It is important to bear in mind, in dealing with an application such as this, that the Ratepayers' Association vindicates not its own interests but the interests of its members and the community at large. In such circumstances the court should be slow to non-suit a litigant in the exercise of its discretion to sanction a relaxation of the rules based on urgency.[24]

COSTS

33. If successful in these proceedings, the applicants should be awarded their costs. Of course they fully appreciate that the payment will come out of a public purse to which its own members have contributed significantly. But there are good reasons why such an order must nevertheless be made and there is scope in the statutes for the recovery of an indemnity from individuals whose malfeasance causes loss to the Municipality. .

34. The Municipality, remarkably, shows no compunction in seeking the most punitive costs order it can conceive. In a shocking display of aggression and insensitivity, it invites the Court to make a special order of costs not just against the Ratepayers' Association but also against its members personally. It makes this outrageous claim even though it is knows full well that no costs order should be made against a body that litigates in the public interest unless the litigation is hopelessly misconceived.[25] Perhaps it thinks that this is such a case but, if so, the ratepayers of Bitou beg to differ.

RELIEF

[24] *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* [2017] ZAGPPHC 639 at para [70]: A public policy challenge is important, and where it is sought to be raised in pending proceedings, a court should, in my view, be slow to deny a party that right at interim stage, except in the clearest of cases. The applicants' public policy argument in respect of the loan agreements may well be rejected by a court in the application for a final relief. But can it be said at this interim stage that their argument is devoid of any merit whatsoever? I do not think so.'

[25] *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

35. The applicants move for final relief as contained in the Notice of Motion. If more time is required by the parties or the Court to determine this matter finally, it moves for the interim relief in the Notice of Motion.

MSM BRASSEY SC

Counsel for the Applicants

Sunday, 13 September 2020