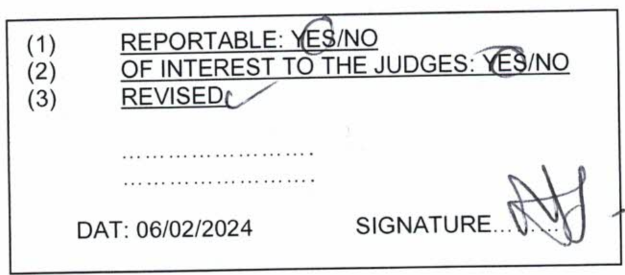
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)



(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED

……………………….
……………………….

DAT: 06/02/2024 SIGNATURE……

CASE NO: 8015/2023

In the matter between:

RALIPHADA NDIAMBANI GODFREY	**APPLICANT**
and	
MAKHADO MUNICIPALITY	**1ST RESPONDENT**
COUNCIL: MAKHADO MUNICIPALITY	**2ND RESPONDENT**
SPEAKER OF COUNCIL: MAKHADO MUNICIPALITY	**3RD RESPONDENT**
CHIEF WHIP OF COUNCIL: MAKHADO MUNICIPALITY	**4TH RESPONDENT**
MAYOR: MAKHADO MUNICIPALITY	**5TH RESPONDENT**

MUNICIPAL MANAGER: MAKHADO MUNICIPALITY	**7TH RESPONDENT**
MEC: COGTA LIMPOPO PROVINCE	**8TH RESPONDENT**
THANGAVHUELELO M	**9TH RESPONDENT**
NEPHAWE LT	**10TH RESPONDENT**
SAMWU: MAKHADO BRANCH	**11TH RESPONDENT**
IMATU: MAKHADO BRANCH	**12TH RESPONDENT**

JUDGMENT

This judgment is delivered electronically by way of dispatching same to email addresses of the parties' legal representatives and publishing same on SAFLII. The date of delivery of this judgment is deemed to be 6 February 2024.

SIKHWARI AJ

[1] On 19 September 2023 this court, per Madam Justice Nude-Odendaal, granted an interim interdict which was intended to operate as a rule *nisi* and interim court order pending the hearing of the review matter in Part B. The said order in Part A is not before the court for adjudication before me. This court is

simply called upon to adjudicate the review application in Part B. This ruling is in respect of the review matter. The court order of 19 September 2023 will fall away by operation of the law or lapse time.

[2] The respondents contended that this court has no jurisdiction to entertain the application as the nature of the dispute falls within the scope of labour law; and therefore, this matter should have been referred to the labour forums like Bargaining Council and / or the Labour Court. The respondents submitted that the applicant's case is about unfair discrimination on the basis of his gender as pleaded in his papers where it is said the applicant alleged that he was overlooked for the position of Chief Financial Officer of Makhado Local Municipality simply because he is a man; and as such he should have invoked section 6 (1) and 10 of the Employment Equity Act 55 of 1998, as amended which bestow jurisdiction at the CCMA or its equivalent being the Bargaining Council. The respondents further submitted that the employment of employees is not an administrative act which can be reviewed either under the principle of legality or rationality Respondents. To this extent, respondents relied on section 7 (3) of the Basic Conditions of Employment Act 75 of 1997, as amended. Respondents submitted that this is not a kind of a matter where the Labour Court enjoys concurrent jurisdiction with the High Court. Respondents further relied on the case of **Gcaba v Minister for**

Safety And Security and Others (CCT 64/08)) [2009] ZACC 26 (7 October 2009); 2010 (1) SA 238 (CC).

[3] In the case of **Gcaba *(supra),* at para 48 – 57**, the Constitutional Court held that:

> *"[48] The respondents argue that the applicant's claim is a labour matter which, by law, must be adjudicated through the finely-tuned mechanisms provided for in the LRA. The applicant's initial conduct and his founding affidavit in the High Court placed specific reliance on his right to fair labour practices under the LRA. On the basis of the principle confirmed in Chirwa, the respondents reiterated that the applicant was not entitled to pursue additional causes of action or remedies under PAJA.*
>
> *[49] Whilst the respondents accept that the power to appoint was one exercised by an organ of state in terms of the enabling provisions of statute and regulations, they contend that such power is private in nature and vests in the employer. The respondents submit that a decision by an employer whether or not to appoint an applicant for a post is no different from*

a decision to dismiss, or to change shift arrangements.

[50] Finally, the respondents contend that, as was held by the majority in Chirwa, it could not have been the intention of the legislature to allow a litigant to engage in "forum shopping", particularly in the light of the objects of the LRA, and on a proper reading of section 157(2) of the LRA.

[51] In order to evaluate and understand the divergent but arguable approaches to the interpretation of sections 23 and 33 of the Constitution, section 157 of the LRA and the provisions related thereto, it is useful to try to identify a few general principles and policy considerations which informed and have been informed by the interpretations put forward in Fedlife, Fredericks, Chirwa and other cases.

[52] First, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different

courts or fora. It speaks for itself that, for example, aggressive conduct of a sexual nature in the workplace could constitute a criminal offence, violate equality legislation, breach a contract, give rise to the actio iniuriarum in the law of delict and amount to an unfair labour practice. Areas of law are labelled or named for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation. Therefore, rigid compartmentalisation should be avoided.

[53] It is, furthermore, generally accepted that human rights are intrinsically interdependent, indivisible and inseparable. The constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes.

[54] A related principle is that legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights.

[55] However, another principle or policy consideration is that the Constitution recognises the need for specificity and specialisation in a modern and complex

society under the rule of law. Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution. Different kinds of relationships between citizens and the state and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality,[84] just administrative action (PAJA) and labour relations (LRA). Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in Chirwa by both Skweyiya J and Ngcobo J.[85] If litigants are at liberty to relegate the finely-tuned dispute resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees.

[56] Following from the previous points, forum shopping by litigants is not desirable.[87] Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered. One may especially not want litigants to

"relegate" the LRA dispensation because they do not "trust" its structures to do justice as much as the High Court could be trusted. After all, the LRA structures were created for the very purpose of dealing with labour matters, as stated in the relevant parts of the two majority judgments in Chirwa, referred to above.

[57] Lastly, in view of the perceived tensions between Chirwa and Fredericks, it may be useful to keep the essential meaning of and the reasons behind the doctrine of precedent in mind. Often expressed in the Latin maxim stare decisis et non quieta movere (to stand by decisions and not to disturb settled matters), it means that in the interests of certainty, equality before the law and the satisfaction of legitimate expectations, a court is bound by the previous decisions of a higher court and by its own previous decisions in similar matters."

[4] The respondents have specifically relied on the conclusion of the Court In the case of **Gcaba *(supra)* at para [75]**, where the Constitutional Court concluded as follows:

"[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa,[116] and not the substantive merits of the case. If Mr Gcaba's

case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court".

[5] In the case of **Chirwa v Transnet,** the dispute was more about unfair dismissal. The dispute in Chirwa is distinguishable from the issues in this case. **(See: Chirwa v Transnet Limited and Others (CCT 78/06) [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); [2008] 2 BLLR 97 (CC) ; (2008) 29 ILJ 73 (CC) (28 November 2007)).**

[6] In the case of **Baloyi v Public Protector and Others (CCT03/20) [2020] ZACC 27; 2021 (2) BCLR 101 (CC); [2021] 4 BLLR 325 (CC); (2021) 42 ILJ 961 (CC); 2022 (3) SA 321 (CC) (4 December 2020) at para 15 and 16,** the Constitutional Court held the following on applicable principles on jurisdiction between the Labour Court and High Court:

> *"[15] At the outset, it must be noted that, in principle, it would be in the interests of justice to grant leave to appeal in relation to Ms Baloyi's jurisdictional challenge. The challenge raises an important constitutional issue, which this Court has yet to rule on. It is also readily apparent that Ms Baloyi has reasonable prospects of success, taking into consideration the dicta from this Court weighing in her favour. In Chirwa, the majority of this Court stated that "the jurisdiction of the High Court is not ousted simply because a dispute is one that falls*

within the overall sphere of employment relations", which directly contradicts the rationale underpinning the High Court's judgment and the respondents' submissions.

[16] There are also several factors that weigh in favour of granting Ms Baloyi leave to appeal directly to this Court in relation to her jurisdictional challenge. For example, the constitutional issue raised by Ms Baloyi's jurisdictional challenge has been answered by the Supreme Court of Appeal on a number of occasions, but has not been expressly addressed by this Court. This Court therefore has the benefit of judgments by the Supreme Court of Appeal on this issue."

[7] The applicant's case on jurisdiction is that the Labour Court does not have exclusive jurisdiction in this matter. Applicants relied on the case of **De Villiers v Head of Department, Education, Western Cape Province (2010) 31 ILJ 1377 (LC) at para 14-19,** where it was held that:

"[14] It is tempting to read the ***Gcaba*** *judgment to suggest that public sector employees may pursue their employment-related grievances only through the processes established by the LRA and other labour legislation, and that in this respect at least, the door to administrative review has finally and irrevocably been closed to them. Such a reading would*

resonate with the majority judgments in Chirwa and their concerns with the implications of the emergence of a dual system of law, the need to prevent forum shopping in labour disputes and the desire to treat private and public sector workers equally.

[15] However, I do not understand the judgment in **Gcaba** to suggest that the conduct of a state employer can never be categorised as administrative action. To read the judgment in this manner would be to elevate a single factor in the SARFU test to a determinative and overriding consideration, something that the Court in Gcaba does not expressly do. The wording of the dictum quoted above regarding the relationship between sections 23 and 33 of the Constitution clearly acknowledges the existence of exceptions to the general rule, however limited those might be.

[16] Nor do I think that the fact that the impact of a decision made by a functionary is felt only by a confined class of employee (or, for that matter, as in the present case, by a single employee) necessarily deprives a public sector employee of a right of review. As Prof Hoexter points out, the notion of 'public impact' has traditionally been employed for the purpose of establishing whether, in relation to an apparently private body or transaction, the power being

exercised is a public power - a necessary condition for administrative action. She continues:

> *"It seems strange, then, that the Constitutional Court should apply this factor of public impact to a decision involving an avowedly public power (given the reasoning of Ngcobo J in Chirwa), and conclude from the absence of such impact that the decision is not administrative action.*

[17] Prof Hoexter refers to POPCRU v Minister of Correctional Services (No 1) **2008 (3) SA 91** *(ECD) ("POPCRU"), where Plasket J was faced with the question of whether the decision to dismiss correctional services officers constituted administrative action, in circumstances where the power to dismiss was founded in statute.*[8] *It was argued that this function was not administrative action, since it did not affect the public as a whole. Plasket J rejected this submission in the following terms:*

> *"In my view, the elusive concept of public power is not limited to exercises of power that impact on the public at large. Indeed, many administrative acts do not. The exercise of the power to arrest is a good example of administrative action that would only have a significant impact on the arrestee and, perhaps, the complainant. Another example would be a decision by the erstwhile Amnesty Committee of the Truth and Reconciliation Commission to grant a person amnesty from the civil and criminal consequences of his or her politically motivated crimes. In these instances what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim."*

In other words, many incontrovertibly administrative actions do not have an impact on the public, and very often it is only an individual who is affected by administrative action.[9]

[18] Plasket J emphasised inter alia that the fact that the power had a statutory basis was significant, because it placed the existence of public power largely, if not completely, beyond contention[10]*. Ultimately, an important function of the courts was to ensure:*

> "*... that when statutory powers (and other public powers sourced in common law or in customary law) are given in trust to public functionaries for the purpose of furthering the public interest, those public functionaries do not abuse the trust reposed in them, remain within the bounds of their empowerment and exercise their powers reasonably and in a procedurally fair manner.*"[11]

As Prof Hoexter concludes:

> "*In a general sense, however, every act of every public official has consequences for us all and for the type of society we live in. That is why we have administrative law in the first place.*"[12]

[19] In summary: as a general rule, conduct by the state in its capacity as an employer will generally have no

implications or consequences for other citizens, and it will therefore not constitute administrative action. Employment-related grievances by state employees must be dealt with in terms of the legislation that gives effect to the right to fair labour practices, or any applicable collective agreements concluded in terms of that legislation. Departures from the general rule are justified in appropriate cases. An assessment must be conducted on a case-by-case basis to determine whether such a departure is warranted. The relevant factors in this determination (following SARFU) are the source and nature of the power being exercised (this would ordinarily require a consideration of whether the conduct was rooted in contract or statute (see Cape Metropolitan Council v Metro Inspection Services cc **2001 (3) SA 1013** (SCA)), *whether it involves the exercise of a public duty, how closely the power is related to the implementation of legislation (as opposed to a policy matter) and the subject matter of the power. I venture to suggest that the existence of any alternative remedies may also be a relevant consideration - this was a matter that clearly weighed with the Court in both* ***Chirwa*** *and* ***Gcaba,*** *who it will be recalled, were found to have had remedies available to them under the applicable labour legislation."*

[8] In the case of **Moerane and Another v Buffalo City Metropolitan Municipality and Others (611/2017) [2017]**

ZAECGHC 126 (5 December 2017) at para 24-27, Lowe J held that:

> *"[24] I am fully in agreement with Mr Rorke SC that in so finding, the learned judges were applying the principles laid down in President of the Republic of South Africa decided some 17 years ago. I agree that the same reasoning applies in respect of so-called "Section 56 Managers" such as First Applicant. That the decision was taken by First Respondent's Council does not change the argument in my view. Essentially First Respondent's decision of 29 February 2016, to appoint the First Applicant as head of Department, ahead of other prospective candidates for the position, clearly fell within the meaning ascribed to "administrative action" in PAJA, the Council exercising a public power which adversely affected the rights of other prospective applicants and which had direct, external legal effect, and which constitutes an executive function.*
>
> *[25] I further agree that whilst the distinction between administrative action and political or executive action is sometimes difficult to draw, that is most certainly not the case in this matter.*
>
> *[26] There was in this matter a public recruitment process, only one applicant appointed thereafter to the relevant*

position, being the first applicant. The other prospective applicants failed and their rights were clearly affected by the decision, falling in my view squarely within the definition of administrative action in PAJA.

[27] It must be said, that I further agree with Respondents' argument that had the decision been taken by the City Manager, and had he had the power to do so, the decision would surely have been "administrative action" – that the decision was taken by Council cannot in my view distinguish the matter."

[9] Applicant submitted that the principle on matters enjoying concurrent jurisdiction in **De Villiers** was not overturned on appeal although the decision of the court a quo was overruled. Applicant submitted that his case is distinguishable from both **Gcaba** and **Chirwa** *(supra).*

[10] This court is of the view that a legislation or principle ousting jurisdiction of the High Court to hear a particular dispute must say so in no uncertain terms, or else jurisdiction of the high court will always be assumed in terms of its inherent powers. Section 10 of the Employment Equity Act 55 of 1998, as amended, is the one which has ousted the jurisdiction of the high court in certain type of matters which ordinarily will fall within the sphere of the High Court. However, on proper scrutiny of the aforesaid section 10 of EEA in the context of this

matter, it finds no application. The case of the applicant is not only limited in the allegations of unfair or gender discrimination. That is one of the implied sources of complaint amongst many. The gender issue is not even the most prominent one. The prominent complainant of the applicant is that the Council of Makhado Local Municipality has failed to implement the recommendation of the panel on the suitable candidate for the position of the CFO without rational explanation or explanation at all in the circumstances where the said Council had no right to do so; thereby acting irrationally, unreasonably and in conflict with the law. This court agrees with the applicant that both **Chirwa** and **Gcaba** judgments are misplaced in this case.

[11] This court is satisfied that it does have jurisdiction to hear the review matter in Part B. In the circumstances, the point in *limine* for the lack of jurisdiction stands to be dismissed. Costs will follow the ruling in the merits of the main case.

[12] The respondents contend that the decision not to appoint the applicant is not an administrative act; and it cannot therefore be subjected to a review process under PAJA or rule 53 or any ground of review.

[13] In the case of **Tshabalala v Council of the Maluti -A-Phofung Local Municipality and Another (1537/2022) [2022]**

ZAFSHC 230 (19 September 2022), at para 12, 13, 14, 17 and 18, the court held that:

"[12] The respondents contend that the applicant's remedy does not lie with review in terms of PAJA. This contention is premised on the view held by the respondents that the functions of a Municipal Council are excluded from the definition of 'administrative action' in PAJA. The respondents contend further that failure to appoint the applicant is a quintessential labour related issue and accordingly, so the argument goes, on the strength of Gcaba v Minister of Safety and Security[5], does not amount to administrative action within the meaning of PAJA.

[13] The Court in President of the Republic of South Africa & Others v South African Rugby Union & Others (hereinafter referred so as SARFU) held as follows:

"[141] In s33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a

member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

[142] As we have seen, one of the constitutional responsibilities of the President and cabinet members in the national sphere (and premiers of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of s33. Cabinet members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being

administrative action for the purposes of s33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute 'administrative action' as contemplated ins33, but not all acts by such members will do so.

[143] Determining whether an action should be characterised as the implementation of legislation, or the formulation of policy may be difficult. It will, as we have sad above, depend primarily upon the nature of power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on one hand to policy matters, which are not administrative, and on the other hand to the implementation of legislation, which is. while the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitute administrative action for the purposes of s33. Difficult boundaries may have to be drawn in deciding what should and what should not

be characterized as administrative action for the purposes of s33. These will need to be drawn carefully in the light of the provisions of the Constitution and the general constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."

[14] PAJA simply excludes the executive powers and functions of the Municipal Council and its legislative functions. This means therefore that non-executive functions of the Municipal Council are subject to PAJA. The question is not who took the decision but whether the task itself is administrative or not as held in SARFU. The respondents seem to espouse the view that PAJA excludes the functions of the Municipal Council in toto. In this way the view cannot be correct as illustrated by SARFU above. In Mlokothi v Amathole District Municipality and Another, the court concluded that the appointment of a Municipal Manager was an 'administrative action'. By parity of reasoning this should apply to the appointment of the applicant as such appointment ought to take place in terms s56 of the Municipal Systems Act. I cannot see how it can be argued that the recruitment and appointment of

the Director in casu can be seen as executive or legislative in nature.

[17] It is common cause that the applicant emerged as the highest scoring candidate in the interview as well as the competency test. The applicant has a prima facie right as he seeks to assert his right to a fair administrative action. He does not seek a final interdict and thus only has to establish a right though open to some doubt.

[18] I decline to deal with the contention that the recruitment process was vitiated by the alleged irregularities for the simple reason that the court which will be seized with the review application will be better placed to adjudicate the said issue. In my view, it appears that the respondents had condoned some acts, by way of an illustration, the Municipal Manager, as chairperson of the selection panel proceeded with the interview well being aware that the timelines for the interview process had not been complied with. In his answering affidavit he proffers no explanation why this was done. He was obliged to furnish the Council with the report after interviews. He is silent on why this was not done. He does not play open cards with the court as the Municipal Manager of the respondents."

[14] It is common cause that the Municipal Manager of Makhado Local Municipality was the chairperson of the Selection Panel in this present case. The recommendations of the Selection Panel in a letter dated 12 May 2023 was communicated by the Municipal Manager on his or her official capacity as the chairperson of the Selection Panel. Consequently, this court is of the view that the decision to appoint or not to appoint a senior manager or CFO of the Municipality in this case is an administrative act which could be reviewed and / or set aside. Therefore, this court is competent to proceed to decide the merits of the review application in Part B.

[15] There are several common cause factors which, *inter alia*, are that Makhado Local Municipality ("Municipality") had advertised a permanent post of its Chief Financial Officer ("CFO"). The Selection Panel was composed by the Municipality Council in line with the application legal compliance guidelines. The applicant and the eighth respondents were some of the candidates who applied for the said post of the CFO; and they were both shortlisted for interviews by the Selection Panel. At the interview stage of the process, the applicant was found to be suitable for appointment by the highest score of 86%. He was followed by the eighth respondent who was also found to be suitable for appointment by a score of 69%, which was 17% below the score of the applicant. The next candidates who obtained third position with 45% was the ninth respondent. These were the only three candidates who were found to be

suitable for appointment to the position of the CFO. The other candidate who got 44% was one Mr TD Tshikundu, and he was found not to be suitable for appointment.

[16] The next stage of the process was the competency test where both the applicant and eight respondents were both found to be competent for appointment in the position of the CFO of the Municipality. Mr LT Nephawe, the ninth respondent, was found not to be competent.

[17] The purpose of the competence test was explained by the body which conducted the said tests on behalf of the Municipality in the following terms:

> *"This assessment only relates to the leading and core competencies required for the effective performance of a senior manager as outlined in Notice 583 of Government Gazette 37245, 17 January 2014: Annexure 8 of "Local Government: Municipal Systems Act (32/2000): Local Government: Regulations on appointment and conditions of employment of senior managers" ("Competency Framework"). It does not reflect the functional competencies required for specific roles within the Department. The implementation of assessment results as contained in this report must be implemented by the requirements of the Directive on the use of competency-*

based assessment for the Senior Manager within the Municipality.

Please note that these results may not be used for any other purposes unless the assessee consents thereto."

[18] It is further common cause that the eighth respondent had scored more marks or points than the applicant in the competence test stage of the process though they were both found to be competent. The eighth respondent holds a Masters' Degree in Business Management which is an NQF 8 academic qualification which is a requirement where a Municipality has an annual budget of over R1 billion. This is the case with Makhado Local Municipality. The applicant on the other hand does not have the NQF 8 academic qualification.

[19] It is further common cause that the applicant has been acting in the position of the CFO at Makhado Local Municipality for the period from 1 May 2018 to 31 October 2018 as well as from 1 November 2020 to date of filing of the papers on September 2023; and during that period the Municipality obtained unqualified audits for 3 successive years as of September 2023. The court does knowledge of the state of the applicant after the filing of the court papers. The insinuation by the applicant is that he had brought financial stability to the Municipality whereas the eighth respondent has been occupying the post of the CFO at Vhembe District Municipality

and that Municipality never obtained an unqualified audit during her tenure of several years.

[20] The seventh respondent informed the Municipality that the position of CFO must be a 5-yesr contract one, as opposed to making it a permanent one. This issue is now moot as it is common cause that by operation of the law, the position of the CFO is now a permanent one in the Republic of South Africa.

[21] After completing the selection process, the Selection Panel recommended the applicant as the suitable person for appointment as the CFO of the Municipality. The said Selection Panel forwarded its recommendation dated 12 May 2023 to the Council of the Municipality and / or necessary structure(s) thereof *(See: letter of recommendation dated 12 May 2023, at page 78 of Bundle 1).*

[22] The Selection Panel never said it was recommending both the applicant and the eighth respondent. The said panel was unequivocally clear that the applicant is the most suitable candidate for appointment. The only condition in which the eighth respondent could be considered it only in the event of the applicant the applicant could decline the appointment. It is common cause that this fact of the applicant declining the recommendation has never occurred. Therefore, there were no sound or reasonable grounds for the Council of the Municipality to bypass the applicant and appoint the eighth respondent.

[23] The ninth respondent was found not to be appointable after failing the competency assessment test and also performing poorly in the oral / written interview in person. The proper context of the competency assessment was not to disqualify a candidate who otherwise passed all earlier phases of the selection process. The context indicates that the competency assessment was actually intended to confirm the competency of the suitable candidate, as opposed to excluding him or her from the process or to create a super stand-alone stage of the process.

[24] On 30 August 2023, the Council of the Municipality took a decision in terms of Item A.94.30.08.23 of the 175th Special Council Meeting of Makhado Local Municipality for appointing Ms M Thangavhuelelo (eighth respondent) as the Chief Financial Officer of Makhado Local Municipality. No reasons were furnished as to why the recommendations of the Selection Panel are being disregarded. These are the material common cause factors.

[25] The records filed by the respondents in terms of rule 53 (1) of the uniform rules of this court reveal that the Council appointed Ms M Thangavhuelelo, *"who is a female candidate."* It is not clear if the fact that the eighth respondent is a female candidate has played a role or not in influencing the decision of the Council other than to simply mention in her gender; which is a

matter of common cause fact. It is further not clear if the inclusion of the words *"a female candidate"* was a repetition of the description appearing in letter of recommendations from the Selection Panel dated 12 May 2023 in which genders of the three candidates, (being applicant, eighth respondent and ninth respondent) were mentioned on the right side of their achievement results. This court will not engage in a speculative process; and will accordingly not take this issue further.

[26] The record of the minutes of the Council meeting of 30 August 2023 do not show any deliberations by Council members on the need to appoint a female candidate. The advertisement of the post did not mention that it was seeking a female candidate. The mentioning of the gender of the candidate who is being appointed in total disregard of the Selection Panel's decision which had knowledge of the gender of all the candidates and / or their respective scores on both the oral interview and the competency process is prejudicial to the applicant and goes to the extent of acting arbitrarily on the part of the Council in disregard of the Municipal Systems Act and the Constitution of the Republic of South Africa. It shows an inclination on the part of the Council of the Municipality to take a decision they wish without observing principles of the law and fairness to the parties as well as fairness of the process itself. It borders on acting *ultra vires* simply because power to appoint a CFO has been bestowed on Council.

[27] The respondents' counsel submitted further that the fact that the applicant was overlooked is that he did not possess an NQF 8 qualification which is the equivalent of a masters' degree. Applicant's counsel referred the court to Regulations 15 and 16, as amended by Regulations 10 and 11 of published in the Government Gazette No 41996 of 26 October 2018, of the Public Finance Management Act which provides that the attainment of competency level within time frame of 18 months must be included in the performance agreement for the employment of such an employee. Counsel of the respondents submitted that the amendment of the Regulation does not extend to allow the grace period of 18 months to remedy the lack of NQF 8 qualification, but could not provide authority to support his views. I disagree with counsel of the respondents in this regard. The original Regulations were published in the Government Gazette No 29967 published on 15 June 2007; and amended by the one of 26 October 2018 as stated above.

[28] This court is of the view that the fact that the applicant did not possess the NQF 8 academic qualification is not a sound ground to disregard the recommendations of the Selection Panel. If that was so, then the Council should have spelt it out on 30 August 2023 in the minutes of the said meeting when the decision was taken. The applicant still the window period of 18 months from the date of his appointment to acquire such a qualification.

[29] The competency assessment stage is not a stand-alone criterion which has the capacity to over-rule the results of the previous stages like shortlisting, oral or written (in person) interview in which the applicant had excelled by far. It is part of a broader process. The competency assessment is intended to gave the competence of a candidates who have passed the interview stage and found to be suitable for appointment. It is not intended to eliminate a candidate who was found to be suitable in the oral / written in person interview such as the applicant in this case. The approach might have been different if that candidate was found to be not competent; which is not the case in *casu*.

[30] In my view, the applicant's application must succeed. Costs will follow will follow the outcome of the main application for review in Part B; and such costs will include costs of two counsel where two counsel were employed.

[31] In the premises, I make the following order:

1. That condonation for the late filing of answering affidavit by the first, second, third, fourth, fifth and sixth respondents is granted.

2. That point in *limine* raised by the first, second, third, fourth, fifth and sixth respondents on the court's lack of

jurisdiction to hear the review application in Part B of the application herein is dismissed.

3. That the resolution of the Council of Makhado Local Municipality (second respondent) dated 30 August 2023 more particularly Item A.94.30.08.23 of the 175th Special Council Meeting of Makhado Local Municipality of appointing Ms M Thangavhuelelo (eighth respondent) as the Chief Financial Officer of Makhado Local Municipality (first respondent) in disregard of the selection panel's recommendations dated 12 May 2023 and not appointing Mr Ndiambani Godfrey Raliphada (the applicant") as the Chief Financial Officer of Makhado Local Municipality as recommended is:

   3.1. declared to be unlawful, unreasonable, and procedurally unfair and in contravention of Municipal Systems Act 32 of 2000 and Constitution of the Republic of South Africa,

   3.2. reviewed and set aside.

4. That the first, second, third, fourth, fifth and sixth respondents are ordered to pay costs of the application on party and party scale jointly and severally with the one paying the other to be absolved, and such costs

must include costs of two counsel where two counsel were employed.

MS SIKHWARI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DVISION, POLOKWANE

APPEARANCES:

For Applicant	**:**	**Adv J Roux SC**
Instructed by	**:**	**Nemakonde M Inc Attorneys**
For 1-6 Respondents	**:**	**Adv T Ngcukaitobi SC** **Adv R Nelwamondo**
Instructed by	**:**	**Makhuvha EM Attorneys**
Date of Hearing	**:**	**1 December 2023**
Date of Judgment	**:**	**6 February 2024**