You Rise and Fall on Your Papers:

Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality [2024] ZAWCHC 71*

1 Introduction

Chapter 7 of the Constitution of the Republic of South Africa, 1996 (the Constitution) is dedicated to setting the status, powers, and functions of local government. The provisions in this chapter are informed by and supported by a legislative framework that includes, among others, the Local Government: Municipal Systems Act (32 of 2000) (Municipal Systems Act), the Local Government: Municipal Structures Act (117 of 1998) (Municipal Structures Act), and the Local Government: Municipal Finance Management Act (56 of 2003) (MFMA). It is futile to enter into an argument about the powers and functions (or lack thereof) of municipalities without reference to these laws. This is why the case of *Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality* ([2024] ZAWCHC 71) failed at inception.

Courts are often warned not to engage in extrajudicial conduct (see article 14 of the Code of Judicial Conduct (GN R865 in *GG* 35802 of 2012-10-18), issued under the Judicial Service Commission Act 9 of 1994). In this matter, by not doing so, the court lost an opportunity to advance the jurisprudence of local government law, particularly regarding the extent to which national legislation restricts municipalities' activities and the unfettered exercise of their powers. And ultimately, a municipality escaped accountability. Therefore, although not surprising, the case's outcome is rather disappointing. It also puts into context how courts can be placed in a difficult position by having to determine the outcome of a case based solely on the arguments presented before it.

This case note illustrates how Bitou Municipality escaped accountability because the applicants did not demonstrate a sound understanding of local government law in advancing the case. The facts of this case are discussed below. This is followed by the applicants' case under heading 2 and the respondents reply under heading 3 below. Heading 4 provides a summary of the court's judgment. An analysis of the judgment follows under heading 5,

* The author wishes to acknowledge Simbongile Siyali for the vigorous debates that inspired the writing of this note, and Lourens Erasmus for the technical editing undertaken prior to submission. All viewpoints and any errors are the authors' own.

https://doi.org/10.17159/kefjpg59

and under heading 6, the author offers some commentary on the case. The case note concludes with heading 7.

In this case, the Plettenberg Bay Ratepayers and Residents Association, through its chairperson, approached the court seeking judicial review of Bitou Municipality's decision to lease vehicles for its executive mayor and deputy executive mayor.

Relying on the principle of legality, alternatively, the provisions of the Promotion of Administrative Justice Act (3 of 2000) (PAJA), the applicants sought to set aside a resolution of the Bitou Municipal Council under which the Council approved (a) the leasing of a vehicle for the executive mayor at a cost not exceeding R700 000 and (b) the extension of the existing lease agreement of the motor vehicle used by the deputy executive mayor until the office-bearer completes their tenure, if possible.

The chief financial officer (CFO) of Bitou Municipality compiled a report seeking approval to procure said vehicles in accordance with the new Municipal Cost Containment Regulations (2019) (GN 317 in *GG* 42514 of 2019-06-07) (Municipal Cost Containment Regulations) published under the MFMA. The CFO cited the Municipal Cost Containment Regulations and the MFMA as relevant legislation in the report.

The applicants, though, relied entirely on the Remuneration of Public Office Bearers Act (20 of 1998) (Remuneration Act) and the revised Notice on the Determination of Upper Limits of Salaries, Allowances and Benefits of Different Members of Municipal Councils (2020) (GN R475 in *GG* 43246 of 2020-04-24) (Determination Notice), to ask whether a municipal council could procure vehicles for its executive mayor and their deputy. Interestingly, the applicants did not formulate their challenge under the MFMA or the Municipal Cost Containment Regulations, despite the express reliance placed on these instruments in the CFO's report. It is interesting because the court issued a warning that should the Remuneration Act and its Determination Notice not find application, the relief sought by the applicants would be "stillborn"; and also, because of the MFMA's obvious relevance to financial matters of local government.

2 The applicants' case

2 1 Remuneration of Public Office Bearers Act 20 of 1998

This Act is a national framework that sets salaries and allowances for political office-bearers across all spheres, including municipal council members (Preamble). The Act further determines pension and medical aid benefits of the office-bearers (s 7(1)).

Section 7 of the Act is dedicated specifically to the salaries and allowances of municipal council members. It states that the allowances of councillors "shall from time to time be determined by the Minister, after consultation with the member of the Executive Council responsible for local government in each province". This would be the Determination Notice as mentioned above. It further provides that when determining salaries and

allowances, regard must be had, among other things, to (a) the roles, status, duties, functions and responsibilities of different members of the municipal council; (b) the different categories of municipalities having regard to their powers and functions; and (c) the affordability of different levels of remuneration of public office-bearers (s 7(1)(*a*)–(*h*)).

In addition to the criteria set out in section 7(1)(*a*)–(*h*) of the Remuneration Act, section 7(3) further states that the salaries and allowances of municipal office-bearers are "determined by that Municipal Council by resolution of a supporting vote of a majority of its members" and that the relevant council must have regard to the provisions as cited in section 7(1) above, the upper limits as set out by the Minister (in the Determination Notice), and the financial year of the municipal council concerned. This means that while municipal councils exercise autonomous authority to determine remuneration, they remain subject to national legislation and regulations.

2 2 Determination of Upper Limits of Salaries, Allowances and Benefits of Different Members of Municipal Councils (2020) (GN R475 in GG 43246 of 2020-04-24)

The determination on councillors' allowances was published by the Minister in 2020 as the Determination of Upper Limits of Salaries, Allowances and Benefits of Different Members of Municipal Councils. In addition to salary determination, the Determination Notice deals with various categories of allowances for councillors, including claims for travel for using privately owned vehicles (items 6(2)(*b*), 7(2)(*c*) and 9(1)(*c*)). Item 9(1)(*e*) of the Determination Notice pronounces:

> "A councillor may, in exceptional circumstances and upon good cause shown, … utilise the municipal-owned vehicle for official purposes: Provided that the Municipal Council must, in line with applicable legislation and approved Municipal Council policy, exercise prudent financial management to ensure that the provision of a motor vehicle does not undermine the need to prioritise service delivery and sustain viable municipalities."

In line with the Remuneration Act and the Determination Notice, the applicants' argument hinged on the words "in exceptional circumstances and upon good cause". The applicants accepted that a councillor may use a municipal-owned vehicle if their car is under repair or if public transport is unsuitable (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 13). A councillor may also be permitted to use such a vehicle for an extended period and not merely a single trip (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 13). However, according to the applicants, the Determination Notice does not contemplate providing the executive and deputy mayors with vehicles beyond their performance of official duties (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 13). The applicants further contend that such "official duties" should not be interpreted to mean that municipalities are allowed to acquire motor vehicles as a tool of the

https://doi.org/10.17159/kefjpg59

trade, especially because "tools of trade" are tabulated in item 15 of the Determination Notice, and motor vehicles are not included.

3 The respondents' reply

According to the municipal manager, Bitou Municipality acted lawfully and in accordance with the legislative authority vested in the municipal council (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 22). The municipality argued that municipal councils have the legislative authority to purchase or lease vehicles for an authorised purpose because regulation 6(1) of the Municipal Cost Containment Regulations provides as much.

3 1 Municipal Cost Containment Regulations (2019) (GN 317 in GG 42514 of 2019-06-07)

The Municipal Cost Containment Regulations aim to ensure that resources acquired by municipalities "are used effectively, efficiently and economically". It further strives to achieve this by prescribing cost containment measures (reg 2). In terms of regulation 4(1), each municipality or municipal entity must develop, revise and implement a cost containment policy, which, in the case of a municipality, must be adopted by the municipal council.

Regulation 6 of the Municipal Cost Containment Regulations addresses the acquisition of motor vehicles for the use of political office-bearers. It states that "the threshold limit for vehicle purchases relating to official use by political office-bearers must not exceed R700 000 or 70% (VAT inclusive) of the total annual remuneration package for the different grades of municipalities, … whichever is lower" (reg 6(1)). The Regulations further provide that before a vehicle may be acquired, Council must, among other factors, consider the status of current vehicles in the municipality, whether it would be cheaper to purchase a vehicle or to hire one, and more importantly, Council must reflect on the extent of the municipality's service delivery backlog and consider whether it is prudent to purchase a car amid such a backlog (reg 6(3)(*a*)–(*e*)). The accounting officer must ensure that there is a policy regarding the use of municipal vehicles for official purposes (reg 6(7)).

Relying on regulation 6 in the Municipal Cost Containment Regulations, the municipality maintained that it acted justifiably, reasonably, and rationally in acquiring the vehicles, and that the applicants have not provided proof that such vehicles would be used or had been used for purposes other than "official use" (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 25).

4 The judgment

As stated before, the applicants called on the court to determine the powers of the municipal council to procure vehicles for the use of the mayor and the deputy mayor in terms of the Remuneration Act and the Determination Notice. The applicants' failure to prove their case under these legal instruments would render it moot. True to this, the municipality capitalised on

this approach by the applicants, asserting that the powers of the municipal council to procure said vehicles lie in the MFMA and the Municipal Cost Containment Regulations (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 31).

The court confirmed that the Remuneration Act is "what it purports to be" namely, that it deals with remuneration (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 33). It further found that the Determination Notice is a guideline that places limits on remuneration, benefits and allowances of political office-bearers – and neither the Act nor the Determination Notice prohibits the municipality from acquiring vehicles (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 35). The court stated that if anything, these legal instruments advise a municipal council on how it should permit councillors to use the fleet of vehicles available in their municipality to carry out their official duties (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 35). And the court explained that much like the Determination Notice, the Municipal Cost Containment Regulations do not undermine a municipal council's powers to procure vehicles for the official use of its councillors (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 39).

The question remains: where does the power of the municipal council come from? According to the court, the power lies in section 156 of the Constitution. This section grants extensive powers and functions to municipal councils, including that they have executive authority over and may administer their own affairs (ss 151(2), 156(1)–(2) of the Constitution). They also have fiscal powers (s 229 of the Constitution). These powers are subject to definition and regulation by national and provincial government, though, and this is where legal instruments such as the Municipal Cost Containment Regulations and the Determination Notice come into play (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 41). Yet, neither of these seeks to undermine the authority of municipal councils to exercise their legislative and executive powers and functions.

The court held that the powers of municipal councils are enshrined in the Municipal Systems Act, Municipal Structures Act, and the MFMA. These legal instruments provide councils with the authority to procure vehicles for specific use, including official use by political office-bearers (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 42). The applicants had to argue on the relevant provisions of these laws and their regulations. In failing to do so, the applicants based their entire case on incorrect legislative authority, and this error has therefore brought the matter to its end (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 45).

The court did not entertain a judicial review based on PAJA, as the legislative functions and executive powers of municipal councils are excluded from review under PAJA (*Plettenberg Bay Ratepayers and Residents Association v Bitou Municipality supra* par 46).

https://doi.org/10.17159/kefjpg59

5 Analysis

The applicants' case presents a worrisome picture of an ill-prepared legal team that failed to conduct sound research into local government law. This omission reflects an incomplete treatment of the legal framework governing the powers, functions, and financial responsibilities of local government.

As the court rightly pointed out, local government is not a creature of statute, nor does it act based on delegated powers from national and provincial government (see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) par 2–4; *City of Cape Town v Robertson* 2005 (3) BCLR 199 (CC) par 54–56). Rather, it derives its powers and functions directly from the Constitution and exercises those under a legislative framework tailored to regulate such. And under the Constitution, local government is obligated to meet its objectives within its financial and administrative capacity, making financial decision-making one of the most important functions of a municipal council (s 152(2) of the Constitution).

This does not mean, though, that local government may exercise its powers and functions unfettered, especially where municipal finances are concerned. Local government is still regulated by national and provincial legislation (legislative framework for local government). In this instance, regulation means that national and provincial government create norms and guidelines for the exercise of a power or the performance of a function by a municipality (s 155(7) of the Constitution; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* 2014 (5) BCLR 591 (CC) par 22). Fuo adds that regulation implies that national and provincial governments can manage and control local government rather than directly authorising its powers and functions (Fuo "Intrusion into the Autonomy of South African Local Government: Advancing the Minority Judgment in the *Merafong City* Case" 2017 50(2) *De Jure* 324 330).

According to Muir, regulation further entails that national and provincial governments should monitor, perform oversight, and provide support to municipalities (Muir "The Le Sueur Case and a Local Government's Constitutional Right to Govern" 2015 30(2) *Southern African Public Law* 556 559). This mechanism ensures that all spheres of government operate within the ambit of South Africa's constitutional scheme, which, of course, refers to the principles of co-operative government and intergovernmental relations as laid down in the Constitution (ss 40–41).

The applicants have every right to question the municipal council's financial conduct. This is envisaged by the MFMA as it compels local government to exercise sound and sustainable management of the financial affairs of municipalities (Preamble to the MFMA). In doing so, municipalities must be as transparent as possible, including publishing their annual budgets for public comment as required by section 22 of the MFMA.

The applicants missed the opportunity to question and perhaps base their dispute on why the municipality failed to revise its cost-containment policy

and publish it on its website. Furthermore, in a community rife with inequality, it would have been prudent for the applicants to question whether the acquisition of motor vehicles for use by the mayor and deputy mayor is a sound financial decision, especially amid a backlog in municipal service delivery. In terms of section 152(2) of the Constitution, a municipality must strive, within its financial and administrative capacity, to achieve the objectives of local government. This mandate is reiterated in section 153(3), which compels municipalities to structure and manage their budgeting processes to prioritise their local communities' basic needs. Furthermore, a municipality must undertake developmentally-oriented planning to contribute to the progressive realisation of the fundamental rights entrenched in sections 24, 25, 26, 27 and 29 of the Constitution (s 23(1)(*c*) of the Municipal Systems Act). Surely then, basic service delivery ought to take precedence over the transport needs of a mayor and would make for a compelling argument in court.

6 You rise and fall on your papers

The adage "you rise and fall on your papers" encapsulates a fundamental principle of legal practice and finds application in this matter: the success of an argument is often determined in the written form before it is presented orally in court. This principle underscores the importance of preparing comprehensive and well-researched pleadings. Counsel must conduct meticulous research and present their arguments with precision in their written submissions, as these documents serve as the foundation for any subsequent oral submissions before the presiding officer.

A failure to adequately prepare (as in this case) can have significant repercussions. Inadequate pleadings may weaken a party's case because the court ordinarily determines motion proceedings on the facts and legal grounds contained in the affidavits. This preconception can hinder the fairness of the proceedings and, in some instances, may adversely influence the judge's approach to the case. Counsel must therefore ensure that affidavits and written submissions identify the relevant facts, legal grounds, and relief with sufficient precision.

Various judicial decisions have reinforced the importance of well-prepared written submissions and have emphasised that a party's case is primarily advanced through the written record. In *National Director of Public Prosecutions v Zuma* (2009 (2) SA 277 (SCA)), the Supreme Court of Appeal emphasised that, in motion proceedings, affidavits serve a dual purpose: they function as both pleadings and evidence. The court made it clear that a party cannot supplement their case by introducing new arguments or facts in oral submissions or heads of argument. As such, litigants are bound by the contents of their papers, and no new information can be introduced after the pleadings are filed.

Similarly, in *Betlane v Shelly Court CC* (2011 (1) SA 388 (CC)), the Constitutional Court reaffirmed that litigants in motion proceedings "stand or fall by their papers". This judgment reinforced the principle that courts rely

https://doi.org/10.17159/kefjpg59

solely on the affidavits and documents before them, offering no opportunity for oral evidence to supplement or alter the case. The decision thus highlights the critical role of thorough and accurate pleadings in ensuring that a case is effectively presented and considered.

In light of these precedents, it is evident that the applicants' ability to prevail in litigation hinged significantly on the quality of their written (and subsequently their oral) submissions. This means that litigants must ensure that their affidavits and accompanying documents are exhaustive, precise, and compelling, as these form the basis for the court's decision-making. In doing so, they mitigate the risk of undermining their case before oral arguments are even made.

7 Conclusion

This note illustrates how Bitou Municipality escaped accountability because the applicants did not sufficiently demonstrate an understanding of local government law. In essence, the applicants relied on the Remuneration Act and its Determination Notice (legislative authority concerned with remuneration) to argue why the municipality was not entitled to acquire vehicles for its mayor and deputy, whereas the crux of the matter instead revolved around the powers and functions of local government as set out in the MFMA and its Municipal Cost Containment Regulations. In other words, the applicants relied on incorrect laws to argue the matter. The respondents relied on the applicants' research deficit and highlighted the local government's fiscal powers as a justification for their decision to acquire the vehicles. This left the court with no other choice but to dismiss the applicants' case.

While the court limited itself to constitutional and legislative provisions, certainly because these were sufficient, it had extensive research at its disposal. In addition to the availability of several judicial pronouncements, many scholars have dedicated their research to the powers and functions of local government (see, for instance, Fuo 2017 *De Jure* 324–345; Fuo "Public Participation in Decentralised Governments in Africa: Making Ambitious Constitutional Guarantees More Responsive" 2015 15(1) *Human Rights Law Journal* 167 170–174; Mathenjwa "The Legal Status of Local Government in South Africa under the New Constitutional Dispensation" 2018 33(2) *Southern African Public Law* 1 2–12; and De Visser and Du Plessis "Climate Governance and Federalism in South Africa" in Fenna, Jodoin and Setzer (eds) *Climate Governance and Federalism: A Forum of Federations Comparative Policy Analysis* (2023) 243–246). However, although there is an extensive body of literature and legal scholarship on the topic, this case could have served as a seminal reference point concerning the decision-making processes of a municipal council in the context of essential municipal needs of a community and where its priorities should lie.

The unsuccessful outcome in this case is not only a loss for the applicants, but also for all communities that expect their municipal councils to make decisions in their best interests. This is what the Code of Conduct for Councillors (2021) in Schedule 7 to the Municipal Structures Act envisages. The outcome should not be understood as conclusively resolving

whether the expenditure complied with every requirement of the applicable municipal finance framework. If anything, the applicants' lack of substantive argument placed the court in a unfortunate position, where a matter of considerable importance was decided on a technicality.

Nonhlanhla Ngcobo
BA (Law) LLB LLM PhD
Lecturer, North-West University, South Africa
https://orcid.org/0000-0002-0925-9516

https://doi.org/10.17159/kefjpg59