

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 846/2023P

In the matter between:

NONGOMA LOCAL MUNICIPALITY

FIRST APPLICANT

THE SPEAKER: CLLR BW ZULU

SECOND APPLICANT

THE MAYOR: CLLR M A MNCWANGO

THIRD APPLICANT

THE MUNICIPAL MANAGER: MTHANDENI ZUNGU

FOURTH APPLICANT

and

**THE MEC FOR COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS (KWAZULU- NATAL)**

FIRST RESPONDENT

MP PHAKADE

SECOND RESPONDENT

CLLR MILTON SOKHELA

THIRD RESPONDENT

CLLR LONDIWE NOMALUNGELO BUTHELEZI

FOURTH RESPONDENT

CLLR NM MTHEMBU

FIFTH RESPONDENT

CLLR CM NDABANDABA

SIXTH RESPONDENT

CLLR N MSOMI

SEVENTH RESPONDENT

CLLR N XABA	EIGHTH RESPONDENT
CLLR JC MTHIMKHULU	NINTH RESPONDENT
CLLR MDLULI	TENTH RESPONDENT
CLLR N NDWANDWE	ELEVENTH RESPONDENT
CLLR ZN SITHOLE	TWELFTH RESPONDENT
CLLR BH SITHOLE	THIRTEENTH RESPONDENT
CLLR KM DLADLA	FOURTEENTH RESPONDENT
CLLR M E NDWANDWE	FIFTEENTH RESPONDENT
CLLR NM MCHUNU	SIXTEENTH RESPONDENT
CLLR CSP SITHOLE	SEVENTEENTH RESPONDENT
CLLR NF ZUNGU	EIGHTEENTH RESPONDENT
CLLR N MANQELE	NINETEENTH RESPONDENT
CLLR SM ZULU	TWENTIETH RESPONDENT
CLLR DJ MTSHALI	TWENTY-FIRST RESPONDENT
CLLR BS MBATHA	TWENTY-SECOND RESPONDENT
CLLR BA MCWANGO	TWENTY-THIRD RESPONDENT

CLLR S V NXUMALO

TWENTY-FOURTH RESPONDENT

CLLR GS NKOSI

TWENTY-FIFTH RESPONDENT

CLLR NA MANQELE

TWENTY-SIXTH RESPONDENT

INTERESTED PARTIES

(AS LISTED IN ‘Schedule’)

TWENTY-SEVEN RESPONDENT

NATIONAL MINISTER OF COOPERATIVE

GOVERNANCE AND TRADITIONAL AFFAIRS

TWENTY-EIGHTH RESPONDENT

REASONS FOR ORDER

Mathenjwa AJ

Introduction

[1] On 2 February 2023, the applicants launched this application, seeking an order declaring the application to be urgent and that the decision of the first respondent to designate the second respondent to call, convene and chair a meeting of the first applicant be reviewed, declared unlawful and set aside. On 4 February 2023 the matter came before Ncube J who issued the following order:

‘1 It is declared that this application is urgent and that the Applicants’ non-compliance with the rules relating to the time periods relating to service and forms of service is hereby condoned in terms of Rule 6 (12) of the Uniform Rules of Court.

.2 A *rule nisi* hereby issued calling upon the respondents to show cause at 10:00 on 20 March 2023 as to why a final order in the following terms should not be made:

2.1 It is declared that the decision of First Respondent to appoint and designate the Second Respondent to call, convene and chair a meeting of the Council of the First Applicant purportedly pursuant to sections 29 (1) and 29 (1A) of the Local Government: Municipal Structures Act 117 of 1998 is hereby suspended and is to be treated as invalid and inoperative pending part B of this application.

2.2 It is declared that the operation of any decision taken by the Council of the First Applicant on 20 February 2023 to elect a new Speaker and Mayor is suspended and is to be treated as invalid and inoperative pending the resolution of part B of the application.

2.3 It is declared that anyone purportedly elected as Speaker and Mayor in relation to the Council of the First Applicant is hereby interdicted and restrained from purporting to hold the said positions of authority pending the resolution of part B of this application.

2.4 The second and third Applicants are to the extent necessary hereby reinstated to the positions of Speaker of Council and Mayor respectively pending the final resolution of part B of the application, and

2.5 The First Respondent must pay the Costs of this application, which costs to include the costs of two counsels; *alternatively* costs should be reserved.

3 Prayers in paragraphs 2.1 to 2.4 to operate as an interim interdict with immediate effect until the final determination of this matter.'

In part B of the application, the first respondent was required in terms of Uniform rule 53(1)(b) to dispatch a record of the decision which was sought to be reviewed and set aside and any other information which was before the first respondent when the decision was taken.

[2] On 20 March 2023, the matter came before Seegobin J. The learned judge issued an order extending the rule nisi, and directed the applicants to deliver supplementary affidavits, if any, in respect of part B of the application by 29 March 2023; the respondents were to deliver their answering affidavit, if any, on or before 11 April 2023; and the applicants were to deliver their replying affidavits, if any, on or before 14 April 2023. The applicants filed their supplementary affidavit together with an amended notice of motion, in terms of which they now also sought an order joining the Minister of Co-Operative Governance and Traditional Affairs as the 28th respondent, and sought to have section 29(1) and 29(1A) of the Local Government: Municipal Structures Act 117 of 1998 declared unconstitutional and invalid. The first respondent filed their answering affidavit wherein they disputed that section 29(1) and 29(1A) was unconstitutional, and contended that the applicants, under the guise of supplementing their review papers upon receipt of the record, introduced an entirely new cause of action. After representations were made to the Judge President, a hearing date of 15 June 2023 was allocated. On 24 May 2023, the registrar issued a notice of set down advising and directing the applicants to file their heads of argument by 2 June 2023 and the first and second respondents to file their heads of argument by 9 June 2023. The respondents filed their heads as required. The applicants, however, failed to file their heads of argument.

Application for postponement

[3] On 15 June 2023, when the matter came before me, Ms Lushaba appeared for the applicants and advised the court that she was briefed to seek a postponement of the matter. The reasons provided were that the applicants' senior counsel was abroad, their junior counsel stays in Cape Town, and they have not filed their heads of argument. Her brief was only to seek a postponement and she could not take the matter further. Mr Mntambo appeared for the Minister of Co-Operative Governance and Traditional Affairs (the 28th respondent). He advised the court that the Minister was only opposing part B of the application, that they would deliver their answering affidavit in respect of part B in due course, and that they were not opposing the postponement. Mr Pellimer SC, who appeared for the first and second respondents, opposed the postponement. He argued that the applicants brought the application on very little notice on the basis that it was

urgent, and for that reason, representations were made to the Deputy Judge President for the return date of the rule nisi to be set down urgently. Subsequently, the matter was set down for 20 March 2023. On 20 March 2023, the first and second respondents' counsel requested to have the rule nisi discharged alternatively to remove the paragraph in the rule nisi that made it operative until part B of the application was resolved, but the applicants' counsel opposed such relief. Seegobin J, however, adjourned the matter and extended the rule nisi. Mr Pellimer pointed out that the applicants thereafter amended their notice of motion to introduce new relief based on a constitutional challenge of section 29(1) and 29(1A) of the Municipal Structures Act and joined the Minister of Co-Operative Governance and Traditional Affairs as the 28th respondent.

[4] After hearing arguments, I refused the postponement on the basis that it was not in the interest of justice. In this application, the court issued interim relief and ordered the speaker and the mayor of the first applicant, who were ousted by a majority of councillors at a council meeting, to remain in their positions until the decision of the first respondent was reviewed and the rule nisi dealt with. When the matter came before me, a period of more than two months has elapsed since the rule nisi was issued. It is not clear from the record why part B of the application was not dealt with on 20 March 2023. The explanation given by the applicants' counsel is not satisfactory. She does not explain why another senior counsel was not briefed if their usual senior counsel was unavailable. Counsel also does not explain why their junior counsel, who stays in Cape Town, could not appear in court. Furthermore, counsel failed to explain why they have not filed their heads of argument. The applicants were informed on 24 May 2023 that the matter was set down for hearing on 15 June 2023, but they did not make arrangements to ensure that the matter would be heard and that the interim order would finally be dealt with on the allocated date. It is trite law that unavailability of counsel is not an excuse.¹ For these reasons, it is not in the interest of justice to postpone the application. This now brings me to the merits of the application.

¹ *Imperial Logistics Advance (Pty) Ltd v Remant Wealth Holdings (Pty) Ltd* [2022] ZASC 143 para 10.

Merits

[5] Mr Pellimer addressed the court on merits. Both Ms Lushaba and Mr Mntambo remained in attendance but did not address the court on the merits. The issue for determination in this application is whether jurisdictional facts existed for the first respondent to invoke section 29(1A), and to designate the second respondent to call and chair the meeting of the council. In their papers, the applicants contended that the jurisdictional facts did not exist for the following reasons: the second applicant did not refuse to call a meeting of the council; the first respondent failed to adhere to the *audi alteram partem* rule before designating the second respondent to call the meeting of the council; and the first respondent's conduct lacks rationality and was motivated by political considerations. The first and second respondents, in their answering affidavits, contended that the jurisdictional facts existed, and that the *audi alteram partem* rule was not applicable because the first respondent was exercising an executive power.

Jurisdictional facts in terms of section 29(1A)

[6] Section 29(1A) of the Municipal Structures Act requires the MEC for Local Government to designate a person to call, convene and chair a meeting of a municipal council if the speaker has refused to do so and the municipal manager was not available. The record filed by the first respondent contains reports and documents that were considered by the first respondent when taking the decision to designate the second respondent to call, convene and chair the meeting of the council of the first applicant. The council is constituted of 45 councillors, comprising of eight councillors from the National African Congress (ANC), 20 councillors from the Inkatha Freedom Party (IFP), 14 councillors from the National Freedom Party (NFP), two councillors from the Economic Freedom Fighters (EFF), and one councillor from the National People's Party (NAPF). On 31 January 2023, Councillor Sokhela (the third respondent) submitted a notice of vote of no confidence to the second applicant, against the second applicant, as the speaker of the first applicant. The notice was supported by 25 councillors who constituted a majority of councillors in the council of the first applicant. On 2 February 2023, Councillor Buthelezi (the fourth respondent) submitted a notice of vote of no confidence against the third applicant, as the mayor of the first applicant, to the municipal manager (the fourth applicant). The notice was supported by 25 councillors

who constituted a majority of councillors. In these notices, the relevant respondents requested the second applicant to call a meeting of the council for purposes of dealing with the votes of no confidence against the second and third applicants. On 2 February 2023, the second applicant addressed a letter to the third respondent and advised that he has an obligation to ensure that the rule of law is applied objectively in all council meetings, and that their request for a council meeting and/or notice of motion did not comply with the provisions of the Municipal Structures Act and the Standing Rules of Orders of Council and was accordingly rejected. The letter stated that the rejection did not constitute a refusal as contemplated by section 29(1A) of the Municipal Structures Act. The letter further stated that the municipal manager was not authorized to convene a meeting of the council.

[7] On 8 February 2023, the third respondent addressed a further letter to the fourth applicant requesting him to call a special meeting of the first applicant to deal with the vote of no confidence against the second and third applicants. The letter stated that they had requested the second applicant to call a meeting but that he was 'playing political tricks' and that he had failed to call the meeting. On 8 February 2023, the third respondent also addressed a letter to the second applicant and requested reasons for his failure to convene a meeting to deal with the vote of no confidence against him and the third applicant, as per the request of the majority of councillors. On 8 February 2023, the third respondent addressed a letter to the first respondent requesting the first respondent to convene a meeting of the council of the first applicant on the basis that both the second and fourth applicants had refused to call the meeting on request by the majority of councillors to do so. On 10 February 2023, the fourth applicant, in his capacity as the municipal manager, addressed a letter to the third respondent advising him that, in his view, the second applicant is entitled to decline to place matters before the council for consideration which are not legally compliant. He further stated that he had been advised that the second applicant had rejected their requests for a meeting on the basis that such requests were non-compliant with the legal prescripts, including the Standing Orders. The fourth applicant advised that he was not legally authorized to convene a meeting of the council. Again, on 10 February 2023, the third respondent addressed a letter requesting the first respondent to assist by coordinating and

convening a meeting of the council. In this letter, the third respondent further stated that the fourth applicant had advised them that he was not legally authorized to call the meeting.

[8] On 15 February 2023, the first respondent addressed a letter to the second applicant informing him that they had received a petition signed by 25 councillors requesting the first respondent to designate a person to convene and chair a meeting of the council in terms of section 29(1A). Furthermore, the first respondent advised that they have considered all the documents submitted and the rules of order of the first applicant. They noted the content of the responses by the second and fourth applicants, and that they have not provided valid reasons and the specific provisions of the law allegedly infringed by the movers of the notices of vote of no confidence. The first respondent further advised that they were satisfied that the second and fourth applicants have refused to convene the meeting. They had therefore elected to designate the second respondent to convene and chair the meeting of the council to consider matters tabled in the motion submitted by the majority of councillors. The first respondent further advised that the meeting would be convened on Monday 20 February 2023. On 16 February 2023, the second respondent issued a notice calling for the sitting of the council of the first applicant on 20 February 2023. Furthermore, on the same date, the second respondent addressed a letter to all councillors of the first applicant advising that the meeting scheduled for 20 February 2023 will not transact any business other than that for which the first respondent was requested to designate a person to preside over the meeting.

[9] In determining whether the jurisdictional facts existed enabling the first respondent to invoke section 29(1A), I have had regard to the record considered by the first respondent. It is common cause that the third and fourth respondents had written three letters to the second and fourth applicants requesting them to convene a council meeting for purposes of dealing with a vote of no confidence against the second and third applicants. The second applicant had advised them that their requests did not comply with the prescripts of the Municipal Structures Act and the provisions of the rules and order of the first applicant. The second applicant, however, did not advise them

what provisions were not complied with. Furthermore, the second applicant advised that the fourth applicant had no authority to convene the council meeting. The fourth applicant further advised that he had no authority to convene the meeting.

[10] The functions of the speaker with regard to a municipal council is set out in the Municipal Structures Act. Section 36(1) of the Municipal Structures Act provides that the speaker is the chairperson of a municipal council. Section 37 provides amongst others that the speaker must ensure that council meetings are conducted in accordance with the rules and orders of the council and must ensure compliance by councillors with the council's code of conduct. This function entails that the speaker has a responsibility to advise councillors to comply with rules of council. Should documents submitted by councillors to the office of the speaker not squarely comply with the rules and orders of council, the speaker has a duty to point out the nature of the failure to enable councillors to comply with the rules and orders. In the present matter, the second applicant had a duty to advise the third and fourth respondents on what basis their submitted notices of vote of no confidence did not comply with the rules and orders of the council. Despite the fact that the relevant respondents had written three letters requesting the second applicant to convene a council meeting, they were not informed on what basis their notices did not comply with the rules and orders. By simply shooting down the notices for alleged non-compliance with the rules and orders, the second applicant did not ensure that the third and fourth respondents complied with the rules and orders. The third and fourth respondents were ultimately frustrated and hindered from submitting the notices of vote of no confidence.

[11] The first respondent had sufficient information before them to draw a conclusion that the second applicant had refused to call a council meeting. In my view, even if the first respondent had requested and received reports from the second applicant, it would not have changed the conclusion reached, based on the available information that the second applicant had refused to call the council meeting. For these reasons, the second applicant had unreasonably refused to call the meeting. This brings me to the question of whether the first respondent's decision is vitiated by irrationality and ulterior purpose.

Rationality and ulterior purpose

[12] It is appropriate to point out that there is nothing in the wording of section 29(1A) that suggests that the MEC for Co-Operative Governance and Traditional Affairs is required to comply with the *audi alteram partem* rule before designating a person to call, convene and chair a council meeting. The Municipal Structures Act requires the MEC to designate a person to convene and chair a council meeting once the speaker has refused to do so and the municipal manager is not able to call the meeting. The MEC designates a person for purposes of assisting the municipal council to meet if the speaker and the municipal manager are unable to coordinate, call and chair the meeting of council. The exercise of such power by the MEC is provided for in a number of situations in the Municipal Structures Act. Section 36(3) enables a person designated by the MEC to chair a meeting for the election of a speaker, and section 29(2) enables a person designated by the MEC to call and chair a first meeting of the council of a municipality. In all instances, the MEC's designee does nothing other than chairing a meeting for purposes of enabling the council to deal with its business of the day.

[13] It is generally accepted that any conduct by the MEC in dealing with a municipal council must adhere to section 41(1)(h) of the Constitution which directs all spheres of government to

‘(h) co-operate with one another in mutual trust and good faith by—

- (i) fostering friendly relations;
- (ii) assisting and supporting one another;
- (iii) informing one another of, and consulting one another on, matters of common interest;
- (iv) co-ordinating their actions and legislation with one another;
- (v) adhering to agreed procedures; and

- (vi) avoiding legal proceedings against one another.'

In my view, the approach adopted by each sphere of government in dealing with each other is determined by the prevailing circumstances, provided such approach adheres to the constitutional directive to co-operate in mutual trust and good faith. Depending on the circumstances, in co-operating with one another, a sphere may assist and support another, and may inform or consult another sphere on matters of common interest. However, there are no fixed criteria on how the spheres must co-operate with one another.

[14] It is trite that in a judicial review, a court is not concerned with the merits of the decision under review, but the question is whether the decision taken by the public body under review was one which it was legally permitted to take in the way that it did. Legality, which is the incidence of the rule of law, requires the exercise of public power to be in compliance with the law and within the boundaries set by the law, and the rule of law requires rationality and the non-arbitrary exercise of power.² In this regard, the principle of the rule of law prevents the arbitrary exercise of power for an ulterior purpose. Rationality requires a relationship or connection between a legitimate government purpose and the means adopted to achieve such purpose.³ The standard for determining whether the decision was rationally related to the purpose for which it was given is an objective test.⁴

[15] In the present matter, the majority of councillors had submitted a vote of no confidence against the speaker. The record of proceedings before the first respondent which contained correspondence between the movers of the motion of no confidence and the speaker clearly shows that the second applicant had refused to call the

² *Masetlha v President of the Republic of South Africa and another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) para 173.

³ *New National Party of South Africa v Government of the Republic of South Africa and others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) para 19.

⁴ *United Democratic Movement v President of the Republic of South Africa and others (African Christian Democratic Party and others intervening; Institute for Democracy in South Africa and another as amici curiae)* (No 2) [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) paras 55-75.

meeting. There is no fixed approach to determine what would constitute procedural fairness when the MEC designates a person to call and chair a meeting of the council. What is procedurally fair is determined in the context of a specific case. In my view, the approach adopted by the first respondent was rationally connected to the intended purpose.

[16] In the present matter, there are accusations by the councillors who are the movers of the motion of no confidence that the second applicant's refusal to call a meeting is motivated by political considerations. There are counter-accusations by the applicants that the first respondent's exercise of the power to designate the second respondent to call, convene and chair the council meeting was motivated by political considerations. In my view, politicisation of litigation, perceived or otherwise, should not detract from the legal issue for consideration before the court, which is whether the power was exercised within the boundaries of the law, for a legitimate purpose and was not exercised arbitrarily. In the context of this matter, the first respondent informed the first applicant of the decision taken, the reason for the decision taken and of the date and time when the council meeting would be convened. Considering the situation that prevailed at the municipal council, time did not permit protracted consultations that could have prolonged the crisis in the first applicant's council. For that reason, the rule nisi should be discharged and the application for review should be dismissed.

Constitutional relief

[17] The relief sought for an order declaring section 29(1) and 29(1A) unconstitutional is not properly before this court. This relief was introduced with an amendment of the notice of motion after the original relief sought had been argued and a rule nisi issued on an urgent basis. The constitutional relief introduced a new cause of action which was not considered by the court which issued the rule nisi. The notice of motion and the applicants' founding affidavit that led to the issuing of the rule nisi did not raise any issue regarding the constitutional validity of section 29(1) and 29(1A) of the Municipal Structures Act. The applicants were aware of the existence of the section and the implications thereof at the time of deposing to their founding affidavits. The issue regarding constitutional validity of the section did not arise from the record of

proceedings filed by the first respondent. It is for that reason that the new relief based on the constitutional invalidity of section 29(1) and 29(1A) is not properly before court.

[18] In the event that I am wrong in finding that it is not properly before court, I will however proceed to deal with the merits of the constitutional challenge. In their supplementary affidavit, the second applicant contends that section 29(1) and 29(1A) is in conflict with the following sections of the Constitution:

- (a) section 160(6) which empowers a municipal council to make by-laws;
- (b) section 151(4) which prohibits provincial and national governments from compromising or impeding 'a municipality's ability or right to exercise its powers or perform its functions';
- (c) section 40(2) which directs spheres of government to adhere to the principles of co-operative governance; and
- (d) section 41 which directs the spheres of government to co-operate with one another.

[19] It is not in dispute that a provincial government's monitoring of local government is sourced directly from the Constitution.⁵ In *Certification of the Constitution of the Republic of South Africa 1996*,⁶ the provincial government monitoring power over local government was described as '... the antecedent or underlying power from which the provincial power to support, promote and supervise [local government] emerges...'. Therefore, the notion of intergovernmental supervision is necessary for the purposes of enabling the spheres of government not only to intrude into one another's autonomy but to support and assist one another. Intergovernmental supervision ought to sustain coherence in government and to prevent a collapse of government in one sphere.

⁵ Section 155(6)(a) of the Constitution.

⁶ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC) para 372.

Section 29(1) and 29(1A) enables the MEC to assist and facilitate a meeting of a municipal council whenever it fails to meet and carry on its business.

[20] The contention that section 29(1) offends the Constitution by not enabling the speaker to convene a council meeting on request of a minority of councillors is not sustainable. Section 160(3)(c) of the Constitution provides that '[a]ll other questions before a municipal council are decided by a majority of the votes cast'. Thus, the Constitution requires that the 'majority rule' should play a role in the decision-making of a municipal council. Furthermore, section 29(1) does not prevent the speaker from convening a meeting of the council on request by the minority members of council, all it does is to compel the speaker to convene the meeting if requested to do so by the majority of councillors. Municipal councils are not prevented from making provisions in their by-laws to enable minority councillors to request the speaker to convene a meeting of the municipal council on their request. For these reasons, the challenge to the constitutional validity of section 29(1) and 29(1A) should fail.

Costs

[21] With regard to the award of costs, I consider that the litigation is between spheres of government, and that the costs for such litigation is sourced from the same state revenue. For that reason, I do not make any order for costs.

Order

[22] It was for the above reasons that I granted the following order on 15 June 2023:

1. The adjournment is refused.
2. The aforesaid rule nisi be and is hereby discharged.
3. The application for review by the applicants be and is hereby dismissed.
4. No order as to costs.

Date of hearing: 15 June 2023

Date of granting of the order: 15 June 2023

Date of hand down of reasons for judgment and order: 3 July 2023

Appearances:

For the applicants:	Adv Lushaba
Instructed by:	Buthelezi Mtshali Mzulwini Inc Attorneys Durban
For the first and second respondents:	Adv Pellimer SC
Assisted by:	Adv M Mabonane
Instructed by:	Xaba Attorneys Inc Pietermaritzburg
For the twenty-eighth respondent:	Adv MS Mntambo
Instructed by:	The State Attorney Durban