



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

CASE NO:10569/2023P

In the matter between:

KHAYELIHLE BHEKINKOSI KHUMALO

APPLICANT

and

**ZULULAND DISTRICT MUNICIPALITY
COUNCIL OF ZULULAND DISTRICT
MUNICIPALITY**

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

Nicholson AJ:

[1] This matter served before me on an urgent basis. The applicant seeks *inter alia* to be restored and reinstated as a member of the executive council of the second respondent.

[2] Although the matter was heard on an urgent basis, I reserved judgment because of the various authorities that were presented to me on the day, the fact that the applicant presented heads of argument mere hours before the hearing, and the respondents handing up an answering affidavit in court.

[3] The facts that appear common cause are:

- (a) On Friday, 7 July 2023, a councillor submitted a motion to the Municipal Manager proposing to remove the applicant as a member of the executive committee. The said motion was supported by Councillor Victor Dlamini.
- (b) On 10 July 2023, the Speaker of the Municipality issued a notice convening a special meeting of council on 11 July 2023 at 11h00.
- (c) On Tuesday, 11 July 2023, the council held the special meeting and a resolution removing the applicant as a member of the executive committee was adopted.

[4] The applicant avers that the crisp question that arises in this application is whether he was given adequate notice of the meeting in terms of which his removal was sought. The applicant was effectively provided with less than 24 hours' notice of the meeting.

[5] The applicant avers that the short notice contravenes s 53(1) of the Local Government: Municipal Structures Act 117 of 1998 and s 160(3)(c) read with s 160(8) of the Constitution. In essence, the applicant's argument is that his removal is in contravention of the Constitution and is therefore invalid.

[6] Mr Broster, who appeared for the respondents, conceded that the notice was inadequate and therefore could not advance any argument to the contrary. This concession was, in my view, correctly made. However, he argued that there was non-joinder of the African National Congress, being the political party of whom the applicant is a member and holds the seat on behalf of.

[7] Mr Broster further pointed out that the council's notice of motion¹ is irregular because it refers to the incorrect sections of the legislation and does not provide any reasons. Accordingly, the applicant's attack ought to have been properly phrased to attack the legal requirements of the said notice of motion.

[8] Mr Xulu, who appeared for applicant, stated that the said notice of motion is the responsibility of the respondents and not the applicant. Furthermore, the councillors

¹ Annexure "KB2" of the founding at indexed page 27.

who proposed and seconded the resolution are not ANC members. He argues that his application is based solely on legal grounds in that the relevant sections of the Municipal Structures Act were not complied with by affording adequate notice of the special meeting to the applicant.

[9] I understand this matter to be a legality review where I am asked to enquire into the non-compliance of the constitution and set the decision aside on that basis. In the circumstances, the narrow issue before me, is ‘was applicant provided reasonable notice of is removal from the executive committee?’. Accordingly, whether the Notice of Motion was correct, with respect, is irrelevant to the enquiry.

[10] I pause to mention that Mr Broster also suggested that in terms of the recent developments in law, the Constitutional Court has suggested that matters of this nature are not urgent. This point was not argued with much vigour.

[11] It is trite that in deciding urgency, the courts have a wide discretion which ought to be exercised judicially. I am of the view that this application is urgent. The applicant has referred me to various cases.² The crux of these judgments supported the applicant’s contention that where the required procedure was not followed, notwithstanding any perceived non-joinder, the correct approach is to restore the councillor to the position and allow council to remedy the defect. I find no reason to depart from these judgements.

[12] Section 53 of the Municipal Structures Act does not prescribe a specific notice period. It merely requires that prior notice be given to the member.

[13] In *Psychological Society of South Africa v Qwelane and others*³, the Constitutional court stated:

² *Ingquza Hill Local Municipality and another v Mdingi* [2021] ZASCA 75; 2023 (1) SA 70 (SCA); *Phalatse and another v Speaker of the City of Johannesburg and others* [2022] ZAGPJHC 1054; and *Buthlezi and others v Ditsobotla Local Municipality and others* [2021] ZANWHC 37.

³ 2017 (8) BCLR 1039 (CC)

[33] That was wrong. It is trite that at common law and in terms of the tenets of natural justice, hearing the other party *audi alteram partem* is an indispensable condition of fair proceedings. As Donaldson LJ put it in *Cheall*:

"[N]atural justice is not always or entirely about the fact or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, 'Justice must not only be done, it must also be seen to be done'."

[34] The principle is underpinned by two important considerations of legal policy. The first is recognising the subject's dignity and sense of worth. Second, there is a more pragmatic consideration. This is that *audi alteram partem* inherently conduces to better justice. Milne JA summarised both considerations in *South African Roads Board*. He said the application of the *audi alteram partem* principle:

"has a twofold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power."

[35] So the "no difference" approach is generally anathema. Courts resist accepting that the right to a hearing disappears when it is unlikely to affect the outcome. This was elucidated in *Zenzile*:

"It is trite . . . that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade Administrative Law 6th ed puts the matter thus at 533 - 534:

'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly'. (Footnotes omitted)

[14] It is apparent that the short notice of the meeting contravened the rules of natural justice, which has been enshrined in the Constitution via Section 33.

[15] Having considered the issue of the prospects of success in the ultimate review, my view is that the applicant enjoys a likely prospect of success given the very narrow ground of their legality review. I am also of the view that applicant has made out a case for the interim interdict.

[16] In the premises, the application must succeed.

[17] In the result, I make the following order:

1. The applicant's failure to comply with the provisions of the Uniform Rules of Court relating to service, notices and prescribed time periods is condoned, and the application is enrolled and heard as one of urgency in terms of the provisions of Uniform rule 6(12).
2. A *rule nisi* is issued calling upon the respondents to show cause, if any, on 1 September 2023 at 09h30, or so soon thereafter as the matter may be heard, why the following order should not be made final:
 - (a) that the resolution passed by the second respondent at a special council meeting held on 11 July 2023, in terms of which the applicant was removed as a member of the executive committee, be and is hereby reviewed, declared invalid, and inconsistent with s 53(1) of the Local Government: Municipal Structures Act 117 of 1998 as well as s 160(3)(c) of the Constitution and is accordingly set aside;
 - (b) that the applicant be and is hereby restored and reinstated as a member of the executive committee of the second respondent; and
 - (c) that the respondents pay the costs of this application, jointly and severally, one paying the other be absolved.
3. The relief sought in paragraph 2(a) above operates as an interim relief with immediate effect until either confirmed or discharged.



NICHOLSON AJ

Date heard: 21 July 2023

Date handed down: 1 August 2023

Appearances

For applicant: Mr Xulu

Instructed by: M Dlamini Attorneys

374 Lillian Ngoyi Road

Windermere

c/o S N Nxumalo Attorneys Inc

20 Otto Street

Pietermaritzburg

For respondents: Mr Broster SC

Instructed by: Not stated