



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1041 /2022

In the matter between:

B P MOLATSELI

APPLICANT

and

**THE SPEAKER:
DIHLABENG LOCAL MUNICIPALITY**

1st RESPONDENT

**DIHLABENG LOCAL
MUNICIPALITY**

2nd RESPONDENT

**THE EXECUTIVE MAYOR:
DIHLABENG: LOCAL MUNICIPALITY**

3rd RESPONDENT

**THE MEC: FREE STATE PROVINCIAL
GOVERNMENT: DEPARTMENT OF
COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

4th RESPONDENT

M A B MOSIMA

5th RESPONDENT

CORAM: DAFFUE, J *et* MOLITSOANE, J

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 30 MAY 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 10 October 2022. The date and time for hand down is deemed to be 10 October 2022 at 08:30.

[1] On 25 March 2022 the Applicant obtained the following interim relief on a semi urgent basis in accordance with Part A, of the notice of motion:

'1. ...

2. Pending the finalisation of a review application the Applicant is to institute in accordance with prayer 3 below:

2.1 The Fifth Respondent is interdicted and restrained from performing any functions associated with the office of the Second Respondent's Municipal Manager;

2.2 The Fifth Respondent is interdicted and restrained from holding herself out as the Second Respondent's duly appointed Municipal Manager;

2.3 The Second and Third Respondents are ordered to allow the Applicant to continue to perform the functions associated with that of the Municipal Manager of the Second Respondent.

2.4 The Third Respondent is interdicted and restrained from calling any meeting of the Council of the Second Respondent, to conduct such meeting under his own chairmanship or that of any person other than the First Respondent, to perform the functions of the First Respondent in any capacity whatsoever, and to take any resolutions or cause to be taken any resolutions at such a meeting

2.5 The costs to stand over for adjudication in the review.'

- [2] a) The Applicant is Busa Petrus Molatseli, a duly appointed Municipal Manager of the Dihlabeng Local Municipality (the Municipality);
- b) The First Respondent is the Speaker of the Municipal Council of the Municipality (the Speaker);

- c) The Second Respondent is the Dihlabeng Local Municipality, a local sphere of government and organ of state as envisaged in s 239 of the Constitution and established in terms of s 12(1) of the Local Government Municipal Structures Act 117 of 1998;
- d) The Third Respondent is the Executive Mayor of the Municipality (the Mayor);
- e) The Fourth Respondent is the Member of the Executive Council: Free State Provincial Government: Department of Cooperative Governance and Traditional Affairs;
- f) The Fifth Respondent is Ms M.A.B. Mosima, a Director of the Municipality.

[3] The opposed review application in accordance with Part B of the notice of motion wherein the Applicant sought that all resolutions taken at the meeting of 9 February 2022 commencing at 12h00 be reviewed and set aside was allocated to us. I shall briefly refer to the background facts in the next paragraphs to set the scene for the conclusions to be arrived at.

[4] On 28 January 2022 the Speaker convened a Council meeting in terms of her general powers. The Applicant was part of the meeting. All business on the agenda of the meeting was dealt with except for an item which dealt with a report that had to be submitted to the Municipality concerning allegations of fraud and corruption allegedly committed by certain individuals. The outstanding item could not be deliberated upon because certain Councillors of the African

National Congress walked out of the meeting. The end result was that the quorum for the meeting could not be maintained. The Speaker adjourned the meeting to be continued on 9 February 2022.

- [5] Prior to the meeting an agenda was circulated entitled 'Continuation Meeting of the Council Meeting 9 February 2022'. On 9 February 2022 the meeting chaired by the Speaker commenced at 10h00 but was closed and adjourned at 11h10 after the Speaker had refused to place a further item on the agenda. The Speaker then left the scene.
- [6] It is common cause that hardly fifty minutes later, at 12h00 the same day, the Mayor purported to reconvene another meeting of the Council. In the reconvened meeting Councillor Nhlapo was appointed Acting Speaker of the day. In the said meeting the Fifth Respondent was appointed as the Acting Municipal Manager of the Municipality. A decision was taken in the meeting to place the Applicant on 'special leave'. The dispute between the parties arose as a result of this meeting of the Council convened by the Mayor and the resolutions taken.
- [7] The Respondents already conceded during argument in respect of Part A of the notice of motion that the last mentioned meeting was unlawful and consequently, any resolutions taken at the meeting are unlawful and ought to be set aside. This remained the attitude of the Third and Fifth Respondents in an affidavit filed by them to deal with costs

only. The merits of the application having been conceded, the only issue left for adjudication is the costs reserved on 25 March 2022 and the further costs incurred in these proceedings thereafter.

[8] It is trite law that a successful party is entitled to costs subject to certain exceptions. While the purpose of an award of costs is to indemnify the successful party, this general rule is subject to the rule that the award of costs lies in the discretion of the Court. The Applicant seeks costs against the Second Respondent and punitive costs against the Third and Fifth Respondents in their personal capacities.

[9] The principles with regard to costs were set out as follows in *Ferreira v Levin NO and Others: Vryenhoek and Others v Powell NO and Others*:¹

‘The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by

¹ 1996 (2) SA 621 (CC) para [3].

their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation.'

[10] Section 55 read with s 59 of the Local Government: Municipal Systems Act 32 of 2000 sets out the functions and duties of the Municipal Manager who is both the head of administration and accounting officer of a Municipality. In terms of s 55(1)(m) the Municipal Manager also exercises powers and performs duties delegated by the Municipal Council or sub-delegated by other authorities of the Municipality.

[11] Mr Louis Radley of Peyper Attorneys is a panel attorney of the Municipality and he was at all relevant times during the proceedings until a few days before the hearing of the review application the attorney of record for the Municipality, the Mayor and the Fifth Respondent. His instruction to oppose the application was given by the Fifth Respondent in her capacity as the Acting Municipal Manager, having been appointed in that capacity at the aforesaid meeting of 9 February 2022 which has now been conceded to be unlawfully held.

[12] Following the interim order of 25 March 2022 the Applicant resumed his duties as Municipal Manager of the Municipality. On 23 March 2022 he addressed correspondence to Mr Radley in which the following was inter alia said:

'2.1 Your office is acting for and on behalf of the 2nd, 3rd and 5th respondents;

- 2.2 *As you are aware, and in terms of the Court Order granted on 25 March 2022, the 5th respondent cannot act on behalf of the 2nd respondent.*
- 2.3 *You are immediately to file a Notice of Withdrawal of Attorneys on behalf of the second respondent, failing which you will be acting in contravention of your service agreement entered into with Dihlabeng Local Municipality in that you will be acting against your own client.'*

[13] Pursuant to this letter Mr Radley withdrew as the attorney of the Municipality as well as the Third and Fifth Respondents. Consequently, the Municipality was without legal representation after this withdrawal.

[14] In my view the Applicant was obliged to urgently inform the Council of the state of affairs particularly with regard to the interim order obtained as well as the way forward in respect of the review application. He was conflicted in this matter and there was an obligation on him to advise the Council of the need, if any, to terminate the mandate of Peyper Attorneys and he was duty bound to advise Council that a decision had to be taken on further legal representation if so advised instead of acting unilaterally.

[15] What is most disturbing is that he ensured that the Municipality was not legally represented and over and above that the Council was not asked to take a decision on the way forward in the review application and yet he continued to seek costs against it. In my view he acted mala fide. He is the head of the administration and accounting officer of the

Municipality. The letter that he wrote was written on the official letterhead of the Municipality and in his capacity as the Municipal Manager. He could not claim relief against the Second Respondent and still give instructions on its behalf. As he was conflicted, he should have refrained from taking any action against the Municipality save in respect of relief conceded. He cannot honestly insist that he is entitled to costs against the Municipality when he ensured that the hands of the Municipality were 'bound behind its back' during these proceedings.

- [16] The problem is compounded further by the conduct of his attorney, Mr Lessing. He, like Mr Radley, is a panel attorney of the Municipality. He is the instructing attorney of the Applicant. When this court became aware that Peyper Attorneys had withdrawn as attorneys just when the application was to be heard, it sought an explanation for the withdrawal as attorneys of record of the Respondents. In the explanation given to this court, a letter was appended from the Applicant's attorneys dated 26 April 2022 in which Mr Lessing, inter alia, said the following to Peyper Attorneys:

'It is our instructions that the Municipal Manager, Mr Busa Molatseli, instructed you to immediately withdraw as representatives of the Second Respondent in this matter.

We urgently require that you file your notice of withdrawal as attorneys of record for the Second Respondent as soon as possible.'

[17] It is clear that Mr Lessing took instructions from the Applicant acting on behalf of the Municipality as well as from the Applicant personally. It is difficult to fathom how the Applicant and Mr Lessing could believe that it was ethically and legally possible to act as such. It is exactly this conduct of the Applicant and his legal representatives which calls on this court to deprive the successful party of his costs. I am of the view that the Applicant, though successful on the merits, is not entitled to costs against the Municipality.

[18] The Applicant contended that the Mayor and the Fifth Respondent should be mulcted with punitive costs in their personal capacities in that they did not participate in deliberations of the full Council in the course of the legitimate business of the Council. The Applicant relies heavily on *Swartbooï & Others*² where the Constitutional Court held that the order requiring from Councillors voting in favour of the decision to pay the costs of the application amounted to civil liability in civil proceedings in terms of s 28(1)(b)³ of the Municipal Structures Act. The Court observed that:

‘[18] For the purpose of this case it is therefore sufficient to say that section 28 protection covers the conduct of members of a Municipal Council (as distinct from a meeting of any of its committees) that constitutes participation in deliberations of the full council in the course of the legitimate business of the council.’

² 2006 (1) SA 203 (CC).

³ Section 28(1)(b)(i) of The Structures Act provides as follows:

“(1) Provincial legislation in terms of section 161 of the Constitution must provide at least-
(b) that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-
(i) anything that they have said in, produced before or submitted to the council or any of its committees...”

- [19] It was submitted on behalf of the Applicant that the Mayor, in continuing with the impugned meeting of 9 February 2022 could not claim that he participated in the legitimate business of the Council. With regard to the Fifth Respondent it is contended by the Applicant that the Fifth Respondent involved herself in the position of Acting Municipal Manager and should have foreseen the perils in taking the office of the accounting officer of the Municipality.
- [20] It is common cause that the meeting of 9 February 2022 was convened by the Mayor. According to the evidence 32 Councillors attended the meeting and took resolutions which were later set aside. It is the undisputed evidence of the Respondents that the decisions taken during that meeting were the decisions of the majority of the Councillors who voted therefor. It is undisputed that such decisions were not taken by the Mayor and the Fifth Respondent alone. They were decisions of the collective. The decisions taken by the Councillors including the Third and Fifth Respondents were not taken by the said parties in their personal capacities. The opposition of Part A of the notice motion by the Third and Fifth Respondent was also at the instance of the Municipality. It cannot be said that participation in the meeting by the Mayor and the Fifth Respondent lifted the cover of protection afforded by s 28 of the Structures Act.
- [21] Even if it could be said that I am wrong in this regard, the Applicant failed to join the remaining 30 Councillors who participated in the meeting of 9 February 2022. All the

Councillors who participated in the meeting have a substantial interest in the outcome of the relief sought should the Court find that their participation in the meeting of 9 February 2022 attracted liability for civil costs against them. Failure to join them constitutes a serious non-joinder.

[22] Finally, the following should be emphasised to show why the applicant shall not be entitled to the costs of the application:

22.1 As mentioned, he caused Mr Radley to withdraw as attorney for the Municipality in a letter on an official letterhead of the Municipality;

22.2 His attorney, Mr Lessing, caused a Rule 7(1) notice to be served on Peyper Attorneys claiming that they may not act further on behalf of the Municipality until such time as they have satisfied the Court of their authority to do so;

22.3 A few days before the hearing of the review application the Mayor and Ms Mosima were forced to obtain the services of new attorneys after the withdrawal of Peyper Attorneys notwithstanding the fact that they did not intend to oppose the review application on the merits, but merely did not want a costs order against them;

22.4 The Applicant's actions resulted in the Municipality being without legal representation during the hearing before us as Mr Louw appeared only on behalf of the Mayor and Ms Mosima, the third and fifth respondents;

22.5 The prosecution of Part B of the notice of motion would have been entirely unnecessary if the parties could reach an agreement on costs and in this regard the Applicant's failure to arrange that a special Council meeting be convened to consider the issue cannot be over-emphasised.

22.6 The interests of justice do not favour that we mulct any of the parties with costs.

ORDER

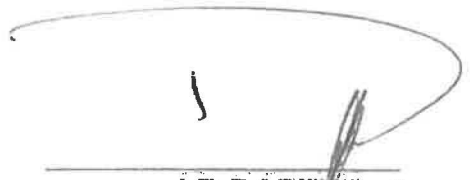
[23] The following order is issued:

1. The Council meeting of 9 February 2022 which commenced at 12h00 and all decisions taken thereat are reviewed and set aside;
2. Each party shall bear their own costs in respect of Part A of the proceedings as well as the further proceedings pertaining to the review application.



P E MOLITSOANE, J

I concur,



J P DAFFUE, J

On behalf of the Applicant:
Instructed by:

Adv J S Rautenbach
Honey Attorneys
BLOEMFONTEIN

On behalf of the 3rd and 5th Respondent:
Instructed by:

Adv M C Louw
Kramer Weihmann
BLOEMFONTEIN