



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE PROVINCIAL DIVISION, KIMBERLEY)

Date Heard: 17 February 2022

Date Delivered: 25 February 2022

Case No: 2620/21 and 24/22

In the matter between:

BUSISWE PATIENCE MAGAGULI
PORTIA RAMAKETSE SELOGILWE
TEBOGO AFRICA

1st Applicant

2nd Applicant

3rd Applicant

and

MICHAEL SETLHOMOGI
GOITSEMODIMO HALTER
OLEBOGENG SAMUEL TEMODI
TSHOLOFETSO MOCUMIE
THABONYANE VAN WYK
NEO PITSO
LESEGO JANKI
ANETTE VAN WYK

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

7th Respondent

8th Respondent

ESTELLE DAVIES

9th Respondent

LEAN LE ROUX

10th Respondent

THE MUNICIPAL COUNCIL, PHOKWANE

LOCAL MUNICIPALITY

11th Respondent

MPHO MOJAKI

12th Respondent

Coram: Lever J

JUDGMENT

Lever J

1. In this matter the two cases identified by the case numbers set out above were heard together at the request of the parties involved. Both matters involved the same parties. An expedited date was arranged because the matter involves office bearers of the Phokwane Municipality. It was considered to be in the interests of all parties concerned and their respective constituencies to try and bring finality to this matter. Hopefully this approach would also bring the stability required for the said local municipality to render services to its inhabitants and stakeholders. This judgment was prepared in a shortened time frame in the hope that it would achieve that end.

2. Case number 2620/21 is an application that has two parts a part A and a part B. Part A was brought on an urgent basis seeking certain interim relief pending the finalisation of Part B together with certain other relief. Part A came before my sister Judge Mamosebo on the 20 December 2021. Judge Mamosebo handed down a written judgement on the 23 December 2021 in which she struck the matter off the roll and reserved the question of costs.
3. Before part B of case number 2620/21 could be enrolled the respondents in that matter together with Phokwane Local Municipality, with only the council having been cited in case number 2620/21, launched an urgent application by way of a rule *nisi* under case number 24/22. The relief sought in case number 24/22 was against the applicants in case number 2620/21 as well as the provincial management of the ANC and 50 unidentified members of the ANC. That application came before my brother Nxumalo J on the 7 January 2022. Nxumalo J granted a rule *nisi*. The respondents in case number 2620/21 anticipated the return day of the rule *nisi*. The anticipated rule nisi in case number 24/22 came before me on the 13 January 2022. After reading the papers and hearing oral argument, in an *ex tempore* judgment on that day, I discharged certain of the orders contained in the rule *nisi* and extended the remaining prayers of the rule *nisi* to the 18 February 2022.

4. By agreement between the parties both case 2620/21 and 24/22 were postponed for argument to the 17 and 18 February 2022. It was postponed to be dealt with over 2 days because it was anticipated that oral evidence might be required to deal with certain factual disputes that emerged in the papers.
5. On the morning of the 17 February 2022, the parties agreed that the decision in matter number 2620/21 would determine the fate of matter number 24/22. I agreed to deal with the matter on that basis.
6. The next debate was whether or not matter 2620/21 was a review or not. Mr Ngandwe, who appeared for the respondents (hereinafter "the respondents") in matter number 2620/21 maintained that it was. The importance of that question is that in this Division a review must be heard by 2 judges and this would have necessitated a further postponement of both matters.
7. Mr Motlogelwa who appeared for the applicants (hereinafter "the applicants") in matter number 2620/21 submitted that this matter involved certain declaratory orders, pure and simple. After debating the matter with him, he moved an amendment which he submitted would remove any possible doubt in the matter.
8. The respondents opposed the amendment. After hearing the parties on this question, I granted the amendment and ruled that it was not

in fact a review but could proceed on the basis that applicants merely sought certain declaratory orders. My reasons for such ruling were given in my *ex tempore* ruling and need not be repeated herein.

9. The next debate between the parties related to the question of whether or not there was a dispute of fact that needed to be referred to oral evidence.
10. Mr Motlogelwa, for the applicants, submitted that whilst there were disputes of fact, these were not material to the relief the applicants' sought.
11. Mr Ngandwe, for the respondents argued that the disputes of fact were both relevant and material to the matter at hand.
12. In my *ex tempore* ruling on this question, I ruled in favour of the applicants'. In short, my reason for doing so was, as submitted by Mr Motlogelwa, the matter could be decided on the basis of the facts admitted by the respondents in their answering affidavit, as contemplated in the test set out in *PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD*¹.
13. The matter then proceeded to oral arguments on the merits of matter 2620/21 on the 18 February 2022. It was agreed between

¹ 1984 (3) SA 623 (A) at 634-635.

the parties that the only live issue for this court to determine was the relief sought by the applicants in part B of matter 2620/21 and that the decision in this matter would determine the fate of matter 24/22.

14. In brief, the factual background to the matter is that the first applicant was appointed as the acting municipal manager by way of a resolution of the eleventh respondent (the council of the Phokwane Local Municipality) taken on the 8 October 2021. The said appointment in terms of the resolution was to take effect from the 11 October 2021. This was confirmed in her letter of appointment signed by the then mayor. The appointment of the first applicant as the acting municipal manager was for a period of 3 months commencing on the 11 October 2021 and ending on the 14 January 2022.
15. It is common cause that the local government elections took place on the 1 November 2021. It is also not disputed that the eleventh respondent has 19 seats, being 10 ward seats and 9 proportional representation seats (PR seats). It is also not in dispute that the African National Congress (ANC) won all 10 ward seats. It is also not disputed that the 9 PR seats were distributed between various opposition parties. As they acted in concert as a unit, in the activities relevant to this matter, their identities are not material at present.

16. After the election and on the 22 November 2021 the inaugural council meeting of the eleventh respondent was convened. The second applicant was elected as the Speaker of the eleventh respondent. The third applicant was elected as the Mayor of the eleventh respondent.
17. On the 6 December 2021 the second applicant gave notice of an ordinary Council meeting which was to be held on the 13 December 2021. One of the items on the agenda for such meeting was the extension of the first applicant's acting appointment as the municipal manager beyond the 14 January 2022 when such appointment was due to end.
18. The meeting was chaired by the second applicant as Speaker. The meeting was quorate when it commenced. The meeting conducted its business, but when it got to the item on the agenda relating to the extension of the acting appointment as municipal manager of the first applicant the meeting was adjourned by the speaker in circumstances described as "prevailing chaos" by the first applicant in the founding affidavit. Applicants contend that the chaos disrupted the meeting before the item dealing with the extension of the first applicant's appointment could be dealt with.
19. The respondents, in the answering affidavit filed on their behalf, admit that the meeting had been adjourned and that there was

chaos in the meeting. The respondents however contend that initially 3 alternative counter-proposals were placed before the meeting that this was whittled down to 2 counter-proposals that on the respondents version were voted on before the meeting was disrupted and the meeting adjourned.

20. The respondents also contend that the proposal to terminate the employment of the first applicant was carried with a vote of 10 Councillors to 9 Councillors against.
21. The respondents aver that once the second applicant had adjourned the meeting and instructed the members to vacate the Council chamber, the majority of councillors remained in chambers and formed a quorum. The councillors who remained behind requested the Speaker (second applicant) to reconvene the meeting at another venue due to safety concerns. The second applicant refused. They then decamped to another venue some distance away and on their version continued the meeting. The minute of that 'continuation' meeting is not perfect, but it seems that this continuation meeting resolved to terminate the employment of the first applicant and that the twelfth respondent be appointed in her stead.
22. Then on the 14 December 2021 a letter dated 13 December 2021 purporting to give effect to the said resolution was delivered to the

first applicant, terminating her appointment as the acting municipal manager with immediate effect.

23. It emerges from case number 24/22 that subsequent meetings were called and held and the original incumbents of the office of Speaker and Mayor were replaced from amongst the first to tenth respondents.
24. As already set out above, the parties agreed that the fate of matter 24/22 rested on the outcome of matter 2620/21. It was also agreed that the only live issue to be determined was the relief sought in Part B of matter number 2620/21.
25. The relief sought in Part B of the Notice of Motion as amended reads as follows:
 - "1. Declare that the purported termination of the First Applicant's employment as an acting Municipal Manager entailed (sic) in a letter dated 13 December 2021 is unlawful and invalid.
 2. Declare that the purported Council meeting organised and convened by the first respondent to the tenth respondent on 13 December 2021, and its resultant resolutions are invalid and unlawful.
 3. Declared (sic) that the first to tenth respondent lacks any authority to terminate my employment or convene any Council meeting, and that such conducts are unlawful and invalid.
 4. That any party which elects to oppose the relief sought be ordered to pay the costs of this application.
 5. Granting the applicants further and or alternative relief."
26. On the facts of the case as presented to this court, the first prayer, quoted above, resolves itself into an enquiry as to whether on such

facts, the first to tenth respondents could in law terminate the first applicant's employment as the acting municipal manager as they purported to do at the meeting of the 13 December 2021.

27. The second prayer, quoted above, resolves itself into the question as to whether on the facts admitted by the respondents in the applicants' case, taken together with the facts put up by the respondents, were they entitled to convene the continuation meeting on the 13 December 2021. The second aspect of this prayer relates to the resolutions purportedly adopted at the continuation meeting on the 13 December 2021. The first such resolution would already have been dealt with when dealing with the questions raised under prayer 1 above. The second resolution purportedly taken at the said meeting relates to the appointment of the twelfth respondent as the acting municipal manager ostensibly on the 13 December 2021.
28. Prayer 3, as quoted above is problematic, I can only deal with it in the context of the present application and not in the open-ended fashion as it is currently framed. I can in my view only deal with the authority or otherwise of the respondents and in particular the second (the new speaker), the third (the new mayor) and the twelfth (the new acting municipal manager) respondents to call and conduct meetings that pre-date any order that I make in this matter.

29. Turning now to the issues to be considered in respect of prayer 1 of Part B in case 2620/21. In my view the issue is governed by the provisions of s30(5) of the Local Government: Municipal Structures Act² (the Act), the said sub-section reads as follows:

“(5) Before a municipal council takes a decision on any of the following matters it must first require its executive committee or executive mayor, if it has such a committee or mayor, to submit to it a report and recommendation on the matter –
(a)...
(b)...
(c) the appointment and conditions of service of the municipal manager and a head of a department of the municipality.”

30. In my view this section applies to the appointment of Acting Municipal Managers as well. In any event Mr Ngandwe who appeared for the respondents has not challenged the applicability of this sub-section, even though it featured significantly in the debate that preceded my ruling on whether or not there were material disputes of fact. The said sub-section also featured prominently when the merits of this matter were debated.

31. In my view reference to “conditions of service of the municipal manager” also encompasses termination of such services.

² Act 117 of 1998

32. It is the respondents' position that such resolution summarily terminating the first applicant's appointment as the acting municipal manager was lawfully adopted at the meeting of the 13 December 2021. In these circumstances it was incumbent upon the respondents not only to allege compliance with s30(5) of the Act, but also establish such compliance. The respondents have not done so. In these circumstances the purported termination of the first applicant's appointment as the acting municipal manager cannot be lawful or valid. This conclusion entitles the applicants to the relief set out in prayer 1 of Part B in case 2620/21.
33. Turning now to the relief sought by the applicants in the second prayer. In order to resolve whether the continuation meeting of the 13 December 2021 was lawfully and validly convened and conducted. If it was lawfully and validly convened and conducted, then subject to any other applicable law the resolutions adopted at such meeting might be lawful and valid. However, if the said continuation meeting was not validly and lawfully convened then any resolutions purportedly adopted at such meeting would not be lawful or valid.
34. To determine in these motion proceedings if the applicants are entitled to the relief sought in prayer 2, I must look to the facts admitted by the respondents taken together with the facts put up by the respondents. If on those facts, the applicants are entitled to

such relief then it may be granted. This is an application of the Plascon-Evans test³.

35. In the respondents' answering affidavit in several places, they admit that there was chaos at the ordinary meeting that took place in the Council Chambers on the 13 December 2021. In several places in their answering affidavit the respondents admit that the second respondent adjourned the meeting. However, the respondents are not consistent in their version on these issues. In one place in their answering affidavit the respondents aver that the second applicant agitated for an unlawful adjournment of the meeting. This section appears after they have set out their own version of events when they deal with their response to the individual paragraphs of the applicants' founding affidavit.

36. This is a critical issue to be determined in this case. In this context I need to quote verbatim three paragraphs of the respondents answering affidavit in order to assess the credibility of this contention. The relevant paragraphs are in response to the applicants' contentions set out in paragraphs 4.11 to 4.13. The relevant paragraphs in the answering affidavit read as follows:

"60. I deny the contents of these sub-paragraphs and specifically that the Second Applicant did not do her best to quell the disruption. In fact to the contrary, she agitated for an

³ Plascon-Evans., above., at p634E to p635C.

- unlawful adjournment of the meeting and shouted instructions for members to evacuate the Council Chamber.
61. She also issued instructions for the chambers to be locked. I further deny that the meeting ended at this point because the continuation of the meeting proceeded to De Venue where it was safer to continue with the meeting. The Second and Third Applicants refused to attend the continuation of the meeting despite being invited to do so by the respondents.
62. It is for this reason that at the continuation meeting, the Respondents invoked Section 41 of the Local Government: Municipal Structures Act 117 of 1998 and appointed the First Respondent as an Acting Speaker.”
37. It is noteworthy that the passages of the answering affidavit quoted above are not consistent with other important passages in the answering affidavit. Specifically, at the beginning of the answering affidavit where the respondent’s set out their own version of the events in the manner in which they choose to present it. In this section of the answering affidavit the respondents on several occasions admit that there was chaos and disturbance of the meeting. They also freely volunteered when giving their own version before responding to the applicants’ case that the second applicant adjourned the meeting. In the passages quoted above the respondents seek to characterise the situation differently. As simply a continuation of the ordinary meeting. This would not be possible if there was a lawful adjournment.

38. The theme of the threat to the safety of the councillors and having to decamp to a new venue is consistent in the respondents' answering affidavit.
39. In the paragraphs quoted above and specifically in paragraph 60, the respondents set out a conclusion in law, being that second applicant agitated for an unlawful adjournment. Respondents rely on this conclusion without setting out the factual basis anywhere in their affidavit that would justify reaching such conclusion. In these circumstances, I have no basis to even consider the proposition that in adjourning the meeting the second applicant acted unlawfully.
40. The functions and duties of a Speaker are set out in s37 of the Act and in particular sub-sections 37(d) and (f) are applicable in the circumstances of this case. The said sub-section reads as follows:
- "37 The speaker of a municipal council-
- (a)...
 - (b)...
 - (c)...
 - (d) must maintain order during meetings;
 - (e)...
 - (f) must ensure that council meetings are conducted in accordance with the rules and orders of the council."
41. From the respondent's own version they accept as a fact the meeting was adjourned in circumstances where there was at the very least disturbances which led to the adjournment. There is no basis for

finding that the speaker acted unlawfully in adjourning the relevant meeting in the circumstances.

42. In addressing argument on this issue Mr Ngandwe urged me to rely on the SCA judgment in the case of *NORTHERN FREE STATE DISTRICT MUNICIPALITY v MATSHAI*⁴ and handed up a copy of the report. I have carefully read the said judgment. In my view the facts in Matshai are totally distinguishable from the facts of the present case. In Matshai: there was no disturbance; there was a prior resolution of the council to deal with the issue involving the speaker; the speaker purported to adjourn the meeting which could only have been in her own interest; and everyone including the mayor remained behind and gave effect to the prior council resolution to deal with the matter.
43. In the present matter: the respondents on their own version describe a disturbance; both resolutions purportedly adopted by the respondents would in any event be unlawful for want of compliance with s30(5) of the Act regardless of where they were purportedly taken; the speaker was not seeking to protect her personal interests; and the respondents on their own version asked the speaker to reconvene, showing that they must have accepted that

⁴ Case Number 90/2004. Judgment delivered 30 March 2005. Although the case is marked reportable I do not have the citation if it has been reported.

there had been an adjournment. In my view, the Matshai judgment is not applicable in the present circumstances.

44. This is sufficient to find that the continuation meeting was neither valid nor lawful. However, there are other grounds for reaching or substantiating this conclusion. The meeting having been adjourned there was no compliance with the eleventh respondent's standing orders 6 and 7 which require notice of the adjourned meeting to be given to all councillors. This was not done. All that the respondents say is that they invited the second and third applicants to attend the continuation meeting. Even if this constitutes notice the decision in *THE DEMOCRATIC ALLIANCE v MATIKA and OTHERS*⁵ requires that effective notice be given to all councillors. The respondents have not alleged that this was done. On this ground as well, the continuation meeting was not lawful or valid.
45. The second part of the relief sought in prayer 2 relates to the resolutions purportedly adopted or recorded on the 13 December 2021 at the continuation meeting. The first, relating to the termination of the appointment of the first applicant, has already been dealt with and the conclusion of this court is that such resolution was not lawful or valid for the reasons already set out. The second resolution relates to the appointment of the twelfth

⁵ 2019 (1) SA 214 (NCK).

respondent as the acting municipal manager to take the place of the first applicant. As already set out above this resolution also did not comply with s30(5) of the Act. In these circumstances it is also not lawful or valid.

46. In relation to prayer 3 the only order I am prepared to make is that the meetings called between the 13 December 2021 and the date of this judgment cannot be valid or lawful because the appointment of the 12 Respondent was neither lawful or valid. Accordingly, the twelfth respondent did not have the power to call any meetings under the provisions of s29(1A) of the Act.
47. Mr Ngandwe also raise the following issues in his oral submissions: that the appointment of the first applicant was void *ab initio* as she purported to rely on s54A of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) which had already been repealed at the time of her appointment; that the question of the first applicants appointment as acting municipal manager was moot as at the time that this matter was heard her appointment would in any event have come to an end; and that the applicants would have to establish the requirements for both a final interdict and a declaratory order, which he contended was not done.
48. Section 54A of the Systems Act is not relevant in the present circumstances. I hold this view because the first applicant's

appointment letter makes no reference to that section of the Systems Act. The resolution purportedly adopted by the ten respondents makes no mention of the said section in the Systems Act. Certainly, the termination letter delivered to the first applicant on the 14 December 2021 places no reliance on the said section or indeed any voidness *ab initio*. This was a development subsequent to the said purported termination and appears to have been opportunistically latched onto after the first applicant used the section to describe her appointment in the founding affidavit. In any event, first applicant's appointment must per force have been an administrative action which stands until it is set aside.⁶

49. In debating the question of mootness with Mr Ngadwe I put to him that in so far as mootness is concerned the question would be, was the matter moot at the time that the Notice of Motion in this matter was issued. Despite conceding this point on more than one occasion he nevertheless persisted with his contention that the matter was moot. The Constitutional Court held in the matter of MEC EDUCATION KZN & OTHERS v PILLAY⁷, that despite the matter being moot Pillay was still entitled to a declarator setting out her rights. In my opinion, the same position holds true in the present case.

⁶ Oudekraal Estates (Pty) Ltd v City of Cape Town & Others 2004 (6) SA 222 (SCA).

⁷ 2008 (2) BCLR 99 (CC) at

50. Finally, Mr Ngandwe conflates the issues of a final interdict and a declaratory order. A declaratory order is by no means an interdict even if it can be regarded as final relief. The position relating to a declaratory order is now governed by s21(1)(c) of the Superior Courts Act⁸. In this regard see the case of KAYA KATSA CC v HUY LE CAO & ANOTHER⁹.
51. In these circumstances, the *rule nisi* in case number 24/22 stands to be discharged.
52. The only outstanding issue is the question of costs. Mr Motlogelwa on behalf of the applicants submitted that if I find for the applicants then the respondents were not acting on behalf of the council, because they would have no standing to do so. On this basis he submitted that the first to the tenth respondents plus the twelfth respondent be ordered to pay the costs of both matters personally on a punitive scale of attorney and own client.
53. In regard to costs, Mr Ngandwe tried to bring the respondents' conduct within the realm of them trying to enforce their rights or acting in the public interest.
54. In my view neither position reflects the true situation and what would be just and equitable in the circumstances. The respondents

⁸ Act 10 of 2013.

⁹ 2019 JDR 0084 (FB)

excluding the eleventh respondent in matter number 2620/21 were reckless in the manner in which they proceeded to the continuation meeting. In my view they were acting opportunistically but I do not think they were deliberately dishonest or malicious. This is not a case where the said respondents were enforcing their own rights or acting in the public interest. It would in these circumstances not be equitable for the Council and indirectly the public to foot the bill in these circumstances. However, it would equally not be equitable for the said respondents to have to pay a punitive costs order on an attorney and client scale or even an attorney and own client scale.

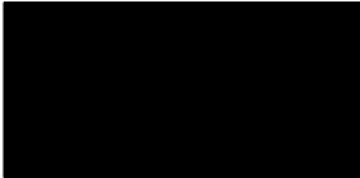
55. Further, each side employed multiple Counsel. At one stage in matter 24/22 one party had employed three counsel. In my view the facts of these cases do not warrant the employment of multiple counsel. The costs order I intend to make will reflect this.
56. In my view the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and twelfth respondents in case number 2620/21 will pay the costs of that case, restricted to the costs of one counsel and on a party and party scale. The said respondents will be jointly and severally liable for such costs, the one paying the others to be absolved.
57. Similarly, in case number 24/22 the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth

applicants will pay the costs of that case, restricted to one counsel and on a party and party scale. The said applicants will be jointly and severally liable for such costs, the one paying the others to be absolved.

In the circumstances, the following order is made:

- 1) It is declared that the purported termination of the First Applicant's employment as an acting Municipal Manager as set out in a letter dated 13 December 2021 is unlawful and invalid.
- 2) It is declared that the purported Council meeting organised by the first to the tenth respondents on the 13 December 2021, and its resultant resolutions are invalid and unlawful.
- 3) It is declared that any meetings convened by the first to the tenth respondents between the 13 December 2021 and the date of this judgment are unlawful and invalid.
- 4) The rule *nisi* issued under case number 24/2022 be and is hereby discharged.
- 5) The first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and twelfth respondents in case number 2620/21 will pay the costs of that case, restricted to the costs of one counsel and on a party and party scale. The said respondents will be jointly and severally liable for such costs, the one paying the others to be absolved.

- 6) In case number 24/22 the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth applicants will pay the costs of that case, restricted to one counsel and on a party and party scale. The said applicants will be jointly and severally liable for such costs, the one paying the others to be absolved.



Lawrence Lever

Judge

Northern Cape

Kimberley

Obo the Applicants: Adv. M Motlogelwa and Adv. P Mthombeni

Obo the Respondents: PJ Ngandwe and Adv. K. Lefalandi