



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

Case No: 6959/2020P

In the matter between:

MANDLAKAYISE ZUNGU

1ST APPLICANT

NKOSINATHI MLAMBU

2ND APPLICANT

and

MTUBATUBA LOCAL MUNICIPALITY

1ST RESPONDENT

**THE MUNICIPAL COUNCIL OF MTUBATUBA
MUNICIPALITY**

2ND RESPONDENT

THOBELANI NGCAMPHALALA

3RD RESPONDENT

MBONGELENI GINA

4TH RESPONDENT

D R NTULI

5TH RESPONDENT

**THE EXECUTIVE COMMITTEE OF MTUBATUBA
LOCAL MUNICIPALITY**

6TH RESPONDENT

MUNICIPAL MANAGER: S R NTULI

7TH RESPONDENT

**THE MEMBERS OF THE EXECUTIVE COMMITTEE
FOR CORPORATE GOVERNANCE AND TRADITIONAL
AFFAIRS IN KWAZULU –NATAL**

8TH RESPONDENT

**KWAZULU-NATAL DEPARTMENT OF COOPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS**

9TH RESPONDENT

MR MADONDO

10TH RESPONDENT

THE AFRICAN NATIONAL CONGRESS

11TH RESPONDENT

THE DEMOCRATIC ALLIANCE

12TH RESPONDENT

THE ECONOMIC FREEDOM FIGHTERS

13TH RESPONDENT

THE AFRICAN INDEPENDENT CONGRESS

14TH RESPONDENT

THE INKATHA FREEDOM PARTY

15TH RESPONDENT

MAVIS DAVIS

16TH RESPONDENT

ORDER

1. The application is dismissed.
2. The first respondent is ordered to pay costs of the application.

JUDGMENT

Mngadi. J

[1] This matter relates to the liability for costs on withdrawal of the application.

[2] The two applicants launched an urgent application against the sixteen (16) respondents. They sought a relief divided into Part A and Part B. In part A they sought reinstatement as Mayor and Deputy Mayor of the first respondent respectively pending the review and setting aside of the decision removing them from their positions as Mayor and Deputy respectively sought in Part B. The first respondent a local municipality opposed the application. The other respondents did not take any part in the litigation.

[3] The court (Gani AJ) dismissed with costs the relief sought in Part A. After the dismissal of the relief sought in Part A the applicants withdrew the application relating to Part B of the relief without tendering costs of the application. The first respondent in this application seeks an order that the applicants be held liable for the costs of the application incurred after the dismissal of Part A of the relief. The applicants oppose the application.

[4] It is apparent that the first respondent was in a tug of war between two political parties. Its leadership constantly changing hands between the two political parties.

[5] The applicants contend that when the relief foreshadowed in Part A was refused, the delay in hearing the application relating to the relief in Part B rendered the issue academic. It was expected that the application would be heard earlier. It later transpired that at the earliest the application would be heard in August 2021 which was a period

scheduled for local government elections during which ,in any case, new Mayors and Deputy Mayors would be elected.

[6] The applicants contend, further, that they were unlawfully removed from their positions in a council meeting of 30 September 2020. They launched the urgent application on 14 October 2020. The Court dismissed the application relating to Part A of the relief with costs on 19 November 2020.

[7] The first respondent contends that the applicants ought to have realized at the time they launched the application, that if Part A of the relief was not granted, Part B of the relief would be rendered moot through the passage of time.

[8] The first respondent points out that when Part A of the relief was refused on 19 November 2020, the applicants persisted with the application for Part B of the relief. They delivered a supplementary founding affidavit and an amended notice of motion, which necessitated the filing of further affidavits.

[9] The first respondent, to the contention by the applicants that the relief was *bona fide* and raised a constitutional issue, responds that in the judgment dismissing the relief sought in Part A, the court held that the applicants' conduct is not consistent with a genuinely held desire to contest the legality of the process. The court, further, held that there was undue delay in instituting the proceedings, which was inherently unfair to the respondents.

[10] The purpose of an award of costs is to indemnify the party put through the expense to institute or defend litigation. Party and party costs are costs necessarily and reasonably incurred as assessed by the taxing master. The question of an award of costs is within the judicial discretion of the court. The discretion to be exercised on reasonable grounds. The general rule is that costs follow the event, which means the party who succeeds should be awarded costs. Success relates to the issue in dispute, and it relates to

substantial success. Under exceptional circumstances, a successful party may be deprived of its costs. In rare cases it may be ordered to pay the costs of the losing party.

[11] It must be accepted that the applicants have no control in fixing the date of the hearing of the application relating to Part B of the relief. The applicants on the other hand knew the dates scheduled for the local government elections. On the papers and the time frames agreed contained in Gani AJ's judgment all the parties assumed that the application relating to Part B of the relief could be determined whilst it could still offer some relief to the applicants, if decided in their favour. Therefore, the applicants cannot be blamed for attempting to pursue the relief sought in Part B of the notice of motion. There is no indication that when it became clear that there would be a delay in hearing part B of the relief there was a delay in withdrawing the application.

[12] The issue whether the applicants were lawfully removed from their positions as Mayor and Deputy Mayor respectively was not decided in the judgment delivered on 19 November 2020. The court faulted the application in that they delayed in launching an urgent application and that they raised no objection when they were removed from their positions.

[13] The applicants launched the application within two weeks from date of their removal from their position. The reasoning that the applicants failed to object to their removal, in the manner in which it happened or did not happen, escapes me. The fact that the applicants participated in the meeting where in those that replaced them were elected is, in my view, irrelevant in the consideration of whether the applicants were lawfully removed or not. It is also, in my view, irrelevant that the applicants were nominated for the positions they were holding but lost the vote. In the result, I learn nothing in the judgment of Gani AJ delivered on 19 November 2020 for purposes of deciding the question of costs subsequently incurred.

[14] It is necessary, if it will not escalate the costs, to consider the merits of the dispute with a view to determine what would have been the outcome (*Moshaoane v Moshaoane*

and Another 1962(2) SA 684 (D) at 687. The applicants allege unlawful removal from their positions. In the founding affidavit in the main application deposed to by the first applicant makes the following case. The Speaker read the motion of no confidence to the Speaker, the Deputy Mayor and the Mayor. She asked the proposers of the motion to address the meeting relating to the motion. The proposers addressed the meeting. The Speaker indicated that since she was the subject of the motion she had to recuse herself from chairing the meeting and she recused herself. The Municipal Manager took over the chairing of the meeting. He immediately called for nominations for the appointment of new Speaker. There were two nominations of a councilor Ntuli and that of the Speaker that recused herself. A vote was taken by a secret ballot, councilor Ntuli got majority votes, and he was elected a new Speaker. Ntuli took over the chairing of the meeting. She called for nominations for the appointment of a Mayor. The first applicant and councilor Ngcamphalala were nominated. A vote was taken by secret ballot and councilor Ngcamphalala received more votes than the first applicant and he was declared appointed to the position of the Mayor. Nominations for the position of the Deputy Mayor were invited. The second applicant and councilor Gina were nominated. A vote was taken and councilor Gina received more votes than the second applicant and he was declared elected Deputy Mayor.

[15] The first respondent produced the minutes of the meeting in question. The minutes confirms the version of the applicants in regarding the events in the meeting. The minutes confirm that the Speaker recused herself from the meeting when a motion of no confidence in her was dealt with. The minutes show that the meeting did not deal with the motion of no confidence in the first applicant as the Mayor. In addition, the minutes shows that the meeting did not deal with a motion of no confidence in the second applicant in his position as the Deputy Mayor. There is, further, no indication that a motion of no confidence in the Speaker after she recused herself was taken by the meeting to its logical conclusion. In the circumstances, there is a strong indication that the applicants would have succeeded in the relief sought in Part B.

[16] In my view without prejudging the issue, the first respondent failed to *prima facie* show that the applicants were lawfully removed from their positions. If the applicants were not removed, it was improper for the meeting to embark on electing other persons in their positions. It matters not that the applicants participated in that process. The first respondent is in terms of the law in charge of the process. It has, when called upon, to show that a lawful process was followed. It is seized with a public duty to be carried out in a fair, transparent and accountable manner. In my view, the applicants have shown the likelihood of success in Part B of the relief.

[17] The applicants incurred costs as well as the first respondent. In relation to Part A of the relief, the applicants were ordered to pay costs of the application. The matter for one reason or another could not proceed to finality with regard to Part B of the relief. No party can be blamed for the matter not proceeding to finality. The applicants are public representatives. It is in the interest of the public for the first respondent to conduct its affairs in accordance with the law. It is the public duty of the applicants to hold the first respondent accountable. The first respondent ought to have properly reflected in the manner the meeting of 30 September 2020 was conducted in the light of the issues raised by the applicants. The litigation provided it with an opportunity to put its house in order. It was, in my view, not justified to pursue the applicants for the balance of the costs.

[18] Rule 41(1) provides that a person instituting proceedings may at any time before the matter has been set down withdraw by notice the proceedings. If in the notice there is no consent to pay costs, the other party may apply to court. The application for an order of costs is adjudicated by the court in terms of the principles that guide the courts in awarding costs. However, in this case, there is a question of costs relating to the withdrawn proceedings as well as costs relating to the application in terms of Rule 41(1) (c). The first respondent instead of delivering of a notice of the intention to ask for an order of costs launched a substantial notice of motion supported by a founding affidavit. It necessitated the filing of an answering affidavit followed by a replying affidavit. Parties filed heads of argument and the matter placed on the opposed roll. This was not necessary and the first respondent occasioned it. It must be taken into consideration

against the first respondent in the consideration of costs. See *Nel v OVS Staalkonstruksie Algemene Sweiswerke* 1977 (3) SA 993 (O) at 996H.

[19] The general principle is that the party withdrawing the legal proceedings is liable for costs of the proceedings as an unsuccessful litigant (*Germishuys v Douglas Besproeiingsraad* 1973(3) SA 299(NKA). However, each matter must be considered in its own unique circumstances. The first respondent by its failure to conduct the proceedings in the meeting in accordance with the law caused the unnecessary litigation. (See *Kent v Bevern & Co.* 1907, T.S. 395 at 401-402; *Chetty v Louis Joss Motors* 1948 (3) SA 329 T at 336; *Chenille Industries v Vorster* 1953 (2) SA 691 (O) at 702A). The withdrawal of the legal proceedings by the applicants due to mootness means success by the first respondent of a technical nature. In such a case, in certain circumstances, the court can deprive the first respondent of its costs(*London Exploration Cao Ltd v Cathapadyachy* (1891) 6 HCG 82 referred to in Herbstein & Van Winsen, *The Civil Pracrice of the High Court of South Africa* (5th ed.) Vol. 2 p968j).

[20] The applicants have succeeded in their opposition to the application. The general rule is that costs follow the result. However, the first respondent on the face of it, justifiable formed the view that as a successful party it was entitled to its costs. In my view, the first respondent did not consider the real issue raised in the aborted proceedings, in particular whether it bore any blame relating to that issue. It was incumbent on the first respondent before deciding to embark on an application for an order to compel the applicants to pay its unpaid costs of the aborted proceedings to consider the real issue, which gave rise to the litigation. There are no reasons to deviate from the general rule that costs follow the result.

[21] I order as follows.

1. The application is dismissed.
2. The first respondent is ordered to pay costs of the application.



Mngadi, J

APPEARANCES

Case Number : 6959/2020P

For the First Respondent : Toni Palmer

Instructed by : Nompumelelo Hadebe Inc.
PIETERMARITZBURG

For the Applicants : I. Veerasamy

Instructed by : Lourens De Klerk Attorneys
PIETERMARITZBURG

Heard on : 12 August 2021

Judgement delivered : 27 August 2021
in Motion Court