



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: **5613/2018**

In the matter between:

ANNA MAGUGUDI OLIPHANT

Applicant

And

**THE SPEAKER OF THE MUNICIPAL
COUNCIL: FEZILE DABI DISTRICT MUNICIPALITY:
LUCKY KUBEKA**

1st Respondent

FEZILE DABI DISTRICT MUNICIPALITY

2nd Respondent

PAULUS MOEKETSI MOSHODI

3rd Respondent

HEARD ON: **07 MARCH 2019**

JUDGMENT BY: **CHESIWE, J**

DELIVERED ON: **15 AUGUST 2019**

REASONS FOR JUDGMENT

- [1] This is an Application to Compel that came before me in the unopposed motion court on 07th March 2019.
- [2] The Applicant seek the following relief in the application:
- “1. That the Respondents be compelled to comply with the direction of the Notice of Motion and to provide a complete record of the proceedings sought to be reviewed as set out in the Notice of Motion dated 07 November 2018.
2. That the Respondents be ordered to pay the cost of this application.”
- [3] I granted the order in terms of the above relief as sought by the Applicant. On the 17 April 2019 the First, Second and Third Respondent requested written reasons in respect of the order granted in the unopposed Motion. These are my reasons.
- [4] The Applicant is the former Executive Mayor of the Fezile Dabi District Municipality.
- [5] The First Respondent is The Speaker of the Municipal Council for the Fezile Dabi District Municipality, cited herein in his official capacity.
- [6] The Second Respondent is the Fezile Dabi District Municipality, an Organ of State in terms of the relevant legislation governing local spheres of government.

- [7] The Third Respondent is Paulus Moeketsi Mosholi, the newly elected Executive Mayor of the Second Respondent.
- [8] The background of this matter is summarized as follows: On the 17 October 2018 the Second Respondent passed a resolution in terms of which a vote of no confidence was passed against the Applicant in her capacity as Executive Mayor of the Second Respondent (a position she occupied since 2016). After the vote of no confidence was passed, the Applicant sent a letter dated 11 October 2018 informing The Speaker that the correct rules as set out in Rule 90 of the Municipality Standard Rules and Orders was not followed in the removal of the Applicant as the Executive Mayor. On the 06 November 2018 the Applicant launched a Review Application in which the Applicant sought to be reinstated in her former position as Executive Mayor, and that the vote of no confidence be reviewed and set aside. The Respondents filed a Notice to Oppose the application on the 20th November 2018.
- [9] On the 22 November 2018, the Applicant's Attorney sent a letter to the Attorney of the Respondents requesting the record of the proceedings, which letter reads as follows:
- "1. We refer to the above mentioned matter and your Notice of Intention to Opposed as served upon our offices on the 20th November 2018.
 2. In terms of the Notice of Motion your client has 15 (fifteen) days, after receipt thereof to file the record of the proceedings. We thus kindly enquire on when your client intends on filling the same as such has to be done on or before the 29th November 2018.

3. We trust you find the above in order and await your response.”

[10] The Legal Representative on behalf on of the Applicant wrote another letter requesting for the record of the proceedings and informed the Respondents’ Attorney that if the record is not received on 3rd December 2018, an application to compel will be launched in this Honourable Court. The Legal Representative on behalf of the Respondents requested in a correspondence attached as annexure “AO5” to the application that the Application to Compel be put in abeyance as the Legal Representative still had to consult with the Respondents.

[11] The Applicant on not receiving the record of proceedings proceeded to launch the Application to Compel which was set down on the unopposed roll of the 07th March 2019. Though a Notice to Oppose was filed by the Respondents on 29th January 2019, no opposing affidavit was filed.

[12] The issues for determination is whether the Respondents failed to deliver the record of proceedings as requested by the Applicant as set out in the notice of motion and in accordance with Rule 53 of the Uniform Rules of Court.

[13] Rule 53 of the Uniform Rules of Court provides that:

“(1) save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or

proceedings to the magistrate, presiding officer, chairman of that court, tribunal or board or to the officer, as the case may be, and to all other affected parties-

- (a) Calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
- (b) Calling upon the magistrate, presiding officer, chairman of other officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

[14] Section 6 of the Promotion of Administration Justice Act 3 of 2000 provides that:

- "(1) any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
- (2) A court or tribunal has the power to judicially review an administrative action."

[15] Section 33 of The Constitution of South Africa Act 108 of 1996 provides that:

- "(1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

[16] Section 34 of the Constitution of South Africa Act 108 of 1996 provides that: “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.”

[17] The Applicant served the Respondents with a Notice of Motion on the 8th November 2018, whereby the Respondent was called upon to supply the record of proceedings to the Applicant. After numerous letters to the Respondents’ Attorneys requesting these records, the Applicant had no option but to launch the Application to Compel which was served on the Respondents’ Attorneys on 25 February 2019. Bearing in mind that the letters, annexures “AO3” dated 22 November 2018 and “A04” dated 3 November 2018, were dispatched to the Respondents in order for the Applicant to be supplied with the record of the proceedings. In both these correspondence the Applicant made the same request. Instead the Respondents answered with a letter dated 05 December 2018, annexure “A05” that reads as follows:

- “1. We refer to the above and both your letters sent per fax to our offices on the 22nd December 2018 and 03 December 2018 respectively.
2. We are in the process of consultations with clients herein and shall be in a position to file the said documents during the course of next week and such kindly accept our sincere apologies for the delay as we have encountered circumstances being and our control
3. In light thereof, kindly put in abeyance your intended application to compel our client herein.

4. We hope the above is in order and request further that we use electronic mail herein for purposes of correspondence for swift and efficient exchange herein.”

[18] It appears from the Applicant’s founding affidavit, the Respondents failed to file a complete record of the proceedings and that prompted the launch of the Application to Compel which was acknowledged and signed by the Respondents’ Legal Representative on 25 February 2019. It was filed in court on 25 February 2019. The Respondents opposed the application and filed same on 29 March 2019. On closer analyses of the dates. The Respondent only filed the record of proceedings on the 01 March 2019, which is a further indication that the records were furnish only after the launched of the Application to Compel was filed on 25 February 2019.

[19] Indeed the Respondents opposed the application to compel by filling a notice of intention to oppose. However, failed to file an opposing affidavit within the required 10 days after receipt of the Application to Compel. Thus the matter was placed correctly on the unopposed roll and that the court had to deal with it as an unopposed matter and to grant the Applicant the relief sought.

[20] Rule 53 (b) provides that within 15 days after receipt of the Notice of Motion the Applicant is to be supplied with the record of the proceedings. The court stamp on the record of the proceedings as filed is dated 01 March 2019. From the date the Review Application was launched, the Respondents took approximately three months to furnish the Applicant with the record of the

proceedings. The Applicant cannot be faulted for having approached the Honourable court with an Application to Compel. The Applicant only launched the Application to Compel in January 2019, this was actually very accommodative towards the Respondents as the extension had already surpassed the required fifteen (15) days by far. It is understandable that the Applicant was exhausted by the delay caused by the Respondents in obtaining the record of the proceedings. The Applicant had been quite patient with the Respondents and thus acted within her constitutional rights to obtain the record of proceedings as is imperative to have the record for purpose of the review application.

[21] It has been emphasized by the courts in several review matters that without the records, a court cannot perform its constitutionally entrenched review function.¹ The consequences of lack of such information will in effect affect a litigant's rights in terms of section 34 of the Constitution, and thus violated those rights and nor will such a litigant have a fair public hearing before court without the record of proceedings.

[22] Thus Rule 53 is available to an applicant wishing to review decisions before court. It requires the decision-maker against whom a review application is made, in this instance the First, Second and Third Respondents to produce the record of proceedings and furnish such record within fifteen days of the

¹ Democratic Alliance v The Acting National Director of Public Prosecution (288/11) 2012 ZASCA 15 20 March 2012.

application. Undeniably a Rule 53 record is an invaluable tool in the review process.²

- [23] It is clear from the correspondence between the parties, that is, annexure “AO3” dated 22 November 2018, annexure “AO4” dated 3 November 2018 and annexure “AO5” dated 05 December 2018, that the Applicant has requested the record of the proceedings but to no avail. The Applicant only received such records on the 01 March 2019. The letter from the Respondents gave the Applicant the impression that the record will be furnished, but nothing came forth. The *dies* referred in the Notice of Motion run with no filing of the record of proceedings. The Applicant in annexures “AO3” and “AO4” forewarned the Respondents that the Application to Compel will be instituted if no records are received. Consequently due to the Respondents lack of timeous response, the Applicant had no other remedy than to launch the Application to Compel.
- [24] Indeed it is so that for the court to perform its judicial functions in terms of the provisions of Rule 53 of the Uniform Rules of Court, the court relies on the record of proceedings. The purpose of Rule 53 was stated in the matter of **Helen Suzman Foundation v Judicial Service Commission**,³ that: “by facilitating access to the record of the proceedings under review, the rule enables a the courts to perform their inherent review function to scrutinise the exercise of public power for compliance with the constitutional prescripts.”

² Turnbull-Jackson v Hibiscus Coast Municipality and Others [2014] ZACC 11 September 2014.

³ (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (24 April 2018)

[25] Hence the purpose of Rule 53 is to facilitate applications of review and thus it was imperative for the Applicant to be provided with the record of the proceedings. The Applicant had no other relief than to approach the Honourable court with an Application to Compel. Thus in my view the Respondents failed to comply with supplying the Applicant with the record of the proceedings within the prescribed period of 15 days as required. In my view the Applicant should be granted the relief sought.

[26] The Applicant would not have incurred costs had the Respondents timeously supplied the record of proceedings. As the Applicant has succeeded in this application, there was no reason not to grant the usual order that costs follow the successful party.

ORDER

[27] In the premises, I accordingly made the following order;

1. The Respondents be compelled to comply with the direction of the Notice of Motion and provide a complete record of the proceedings sought to be reviewed as set out in the Notice of Motion dated 07 November 2018.
2. That the Respondents be ordered to pay the cost of the application.

S. CHESIWE, J

On Behalf of the Applicant: Adv. D.C. Hattingh
Instructed By: Kramer Weihmann & Joubert Attorneys
BLOEMFONTEIN

On behalf of the First to Third Respondents: Mr. T Malgas
Instructed By: Moroka Attorneys
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