

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

Case No:- 7663/19P

In the matter between:

**MARIA BUYISILE MABASO
LAWRENCE DUBE**

First Applicant
Second Applicant

and

**MICHAEL KHUMALO
MNCEDISI MAPISA
ELPHAS DLADLA NO
ABAQULUSI MUNICIPALITY
INKATHA FREEDOM PARTY
DEMOCRATIC ALLIANCE
ECONOMIC FREEDOM FIGHTERS
MEC FOR CO-OPERATIVE GOVERNMENT
AND TRADITIONAL AFFAIRS, KZN
AWELIHLE THERON SHONGWE
THE SPEAKER, ABAQULUSI MUNICIPALITY**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent

Eighth Respondent
Ninth Respondent
Tenth Respondent

JUDGMENT

Vahed J:

[1] This matter was argued before me on 29 October 2019. A decision is required before the meeting of the council of the fourth respondent, which is scheduled to commence at 10h00 on 31 October 2019. The judgment has therefore been prepared under considerable time pressure. The luxury of a

reasonable period of time in which to gather and assemble my thoughts has been denied me and I must do the best with the time and the materials that I have at my disposal.

[2] The matter concerns the position of the first respondent in his role as Speaker of the council of the fourth respondent (i.e. the tenth respondent in these proceedings). The applicants' ultimate aim is to have the first respondent removed as Speaker of the council of the fourth respondent and to have the second respondent removed from his position as Deputy Mayor of the fourth respondent. For that to be achieved the applicants, in this application, seek orders intimately connected with the occupation by the first respondent of the office of the tenth respondent.

[3] In *Tlouamma and others v Speaker of the National Assembly and others* 2016 (1) SA 534 (WCC) the court referred to the qualities of a Speaker (there with reference to a National Assembly but substantially equally applicable here) by *inter alia* referring to G Bergougous: *Presiding Officers of National Parliamentary Assemblies: A World Comparative Study* (1997) (Inter-Parliamentary Union, Geneva) at 97, 99 where the 'typical' Speaker as a person was defined as someone:-

"With long experience of parliamentary life, elected by the Assembly he presides for Parliament's term with no possibility of dismissal, belonging to the majority acting with impartiality, respecting and enduring respect for the rights of the opposition. His role primarily focuses on the chairing of public sittings, a task he may temporarily hand over to a replacement, appointed or elected for this purpose. During the sitting, he maintains order and discipline, ensures

respect for the rules of procedure by interpreting its provisions if need be, gives the floor or withdraws the right to speak, and initiates the voting procedure. On the other hand, he refrains from taking the floor during debates, gives up his right to propose legislation and only votes in exceptional circumstances.”

[4] Ignoring those aspects of that description that could define a Speaker of a National Assembly or Parliament, and putting aside for the moment the question whether the first respondent possesses lengthy experience in “parliamentary life”, the qualities spoken of apply equally to the qualities one expects to find in a Speaker in a local authority such as the fourth respondent. The question that poses itself in this application and in a related matter to which I shall refer presently, concern an acute examination as to whether those qualities are sufficiently exhibited by the first respondent when he discharges his office as the tenth respondent - the Speaker of the Abaqulusi Municipality.

[5] In *Tlouamma* the court also focused attention on what was said by Hollis King, a former Speaker in the Westminster Parliament, writing in *The Parliamentarian* vol 47 (1966) at 131 “*The Impartiality of the Speaker*” where he said:-

“(A)fter a long period of evolution, the impartiality of the modern Speaker has become almost mathematical – certainly beyond doubt or question.

And this the British Parliament believes to be right – that, while the House of Commons is a place where, rightly, the fiercest controversy takes place, it shall take place within an ambit of mutual respect for each other’s personal honour, for ordered and regular procedure, and for the protection of all opinions, even those of the smallest minority. And because this conception lies at the heart of parliamentary democracy, Parliament selects one of its

Members, divests him of his political past, and hands over to him the dignity and authority to preserve this fundamental idea.”

[6] In *Tlouamma* the court rightly observed that there are significant and fundamental differences between the Westminster system and those that obtain in South Africa. However our system has its roots in the Westminster system and certainly, while the differences exist, the notion of an independent Speaker while the person occupying the post discharges the office of Speaker, is beyond question.

[7] Thus, there lies lurking in the background of this application, the question as to whether the first respondent possesses those qualities and has discharged his office in accordance with those qualities. On the evidence placed before me there appears to be no doubt that first respondent leaves much to be desired when he discharges the office of Speaker of the fourth respondent.

[8] That, however, is not the question that I have to resolve. It is for the council of the fourth respondent to resolve when the question of his fitness to hold office ultimately comes to be debated before it.

[9] The relief that is sought from me is set out in the Notice of Motion in the following terms:-

- “1. The matter is to be heard as an urgent application and the forms and service provided in the rules are dispensed with.
2. It is ordered that the meeting of the fourth respondent scheduled to take place on 31 October 2019, shall take place as scheduled on 31 October 2019.
3. The tenth respondent is ordered to take all necessary steps to ensure that the said meeting is held.

4. It is ordered that at the said meeting the first applicant shall be permitted to propose and the second applicant shall be permitted to second, the motions, notice of which have been submitted by the applicants to the first respondent, calling for:

(a) The removal, in terms of section 40 of the Local Government: Municipal Structures Act, No. 117 of 1998 (the Structures Act) of the first respondent as speaker of the fourth respondent's council.

(b) The removal, in terms of section 53 of the Structures Act, of the second respondent, as a member of the executive committee and as deputy mayor of the fourth respondent's council.

5. It is ordered that in terms of the rule 9(a) of the rules of order and procedure of the fourth respondent's council, once the said motions have been proposed and seconded, they shall be put to the vote by the person presiding at the meeting.
6. The first respondent is interdicted from presiding at the said meeting when the said motions are proposed, seconded, debated and voted on.
7. The said meeting shall be presided over by the ninth respondent when the said motions are proposed, seconded, debated and voted on.
8. The first respondent is ordered to pay the costs of this application on the attorney and client scale, provided that if any other respondent opposes this application such respondent is ordered to pay such costs jointly and severally with the first respondent."

[10] As the notice of motion indicates that relief was sought as a matter of urgency and as final relief.

[11] The relief is opposed by the first, second, fourth, ninth and tenth respondents. I refer to them in this judgment as “the respondents”.

[12] First, the parties need to be identified.

[13] The first and second applicants are members of the council of the fourth respondent, the Abaqulusi Municipality. They are both members of the African National Congress (“the ANC”) and the first applicant is the whip for the caucus of the ANC in that council. The second applicant is also a member of council.

[14] They claim that the application is brought with the support of the other ANC members who are duly elected councillors of the fourth respondent.

[15] The first respondent is also a councillor and occupies the position of Speaker of the council of the fourth respondent. He is also cited in his official capacity as Speaker, as the tenth respondent.

[16] The second respondent is a councillor as well, and he is the Deputy Mayor of the fourth respondent, but presently discharging the functions of Mayor because that position is vacant.

[17] The third respondent is a civil servant appointed to act as administrator discharging certain functions of the fourth respondent, that appointment being made in terms of s 139 of the Constitution because the fourth respondent is under intervention by the provincial executive in terms of s 139(2) of the Constitution.

[18] The fifth, sixth and seventh respondents are the political parties who, in addition to the ANC, make up the composition of the council of the fourth respondent. The eighth respondent requires no further description. The ninth respondent however, is currently the acting municipal manager in the employ of the fourth respondent.

[19] The council of the fourth respondent is currently made up of 44 seats. The four political parties share those 44 seats with 22 being occupied by members of the ANC, 18 by the members of the Inkatha Freedom Party ("IFP"), 3 by the Democratic Alliance ("DA"), and a single seat by the Economic Freedom Fighters ("EFF"). The IFP, the DA and the EFF have formed a coalition to collectively oppose the ANC and as a result of the formation of that coalition the council of the fourth respondent municipality can be described as a "hung council", because the ANC and the coalition each command 22 votes in council.

[20] The ANC, for some time, has been attempting to have the first respondent removed from the office of the tenth respondent. In other words, they want him removed from the office of Speaker. They also want the second respondent removed from the office of Deputy Mayor. They pursue those objectives because they contend that the first and second respondents have not been fulfilling their roles and obligations as Speaker and Deputy Mayor respectively and have been acting to the prejudice of the fourth respondent and solely in the interests of their political party, ie. the IFP.

[21] The applicants contend that repeated efforts to have appropriate resolutions placed before a meeting of the council of the fourth respondent for debate and a vote have been consistently and unlawfully frustrated by the actions

of the first respondent. For that reason the relief set out earlier is being sought in this application.

[22] The applicants have approached this court previously. In an earlier application under case number 5856/2019P (“the pending application”) the first applicant sought relief against the first, second, third and fourth respondents and representatives of the fifth, sixth and seventh respondents. She sought relief in the following terms:-

- 1.1 First Respondent is directed to convene, within five days of the service of order, a Special meeting of the Abaqalusi Council for the purposes of enabling the council to vote on the Notice of Motion, a copy of which is annexed hereto marked “X.
- 1.2 It is directed that such voting shall be by secret ballot.
- 1.3 First Respondent is ordered to pay the costs of this application, provided that if any other Respondent(s) opposes this application it shall be requested that such Respondent(s) be ordered to pay such costs jointly and severally with First Respondent.”

[23] The reference to the Notice of Motion marked X is a reference to the council motion the applicants want debated and is repeated later in this judgment.

[24] That application is opposed, the requisite affidavits have been exchanged, and is awaiting hearing on the opposed motion roll in this court on 15 November 2019.

[25] The history of the interaction between the ANC for the one part, represented by the applicants in this application, and the first applicant in the

pending proceedings, and the first and other respondents, both in the pending proceedings and in this application, is as follows.

[26] The applicants contend that, since May 2019, they have on numerous occasions attempted to table and have the council of the fourth respondent vote on a motion for the removal of the first and second respondents from the positions they occupy. They contend that the first respondent has employed various strategies to prevent a vote on the motion, the most recent being on 26 September 2019.

[27] In the answering affidavit the first respondent takes the view that this application manifests as the pursuit of a ninth attempt on the part of the ANC to unseat him as Speaker. He sets out the eight previous occasions, the first of which, according to him, was in August 2018 and the last of which was on 26 September 2019. On each of those occasions no vote took place or, if the matter was voted on, it was defeated. For that state of affairs, on each occasion, the first respondent either blames the ANC councillors, or provides other reasons for the matter not being dealt with.

[28] The applicants and the ANC do not seem to take much issue with the number of occasions the matter either served, or purported to serve before the fourth respondent's council; but it does take issue with the reasons for the matter not being dealt with. It blames the IFP, or the coalition or, the first respondent's devious machinations.

[29] No purpose would be served by an examination of the differences between each of the groupings and their respective views of what occurred on each of the occasions when the matter served, or purported to serve, before council. The two groupings are firmly and intractably opposed to each other and each seeks to obtain maximum traction in their respective bids for control of the fourth respondent.

[30] The applicants highlight the events of two meetings to reinforce their claim to the relief set out in the notice of motion. These are the meetings that occurred on 1 August 2019 and 26 September 2019, and they draw attention to the conduct of the first respondent at these two meetings to demonstrate that he has acted irrationally and unlawfully and, will at future meetings, in all probability, act similarly.

[31] The motion that the first applicant sought to promote on each of the occasions complained of, and in particular on 1 August 2019, on 26 September 2019 and which she intends to promote at the meeting which is the subject of this application (i.e. on 31 October 2019) is for all intents and purpose identical. It reads as follows (imperfections retained):

“NOTICE OF MOTION

Notice of Motion is hereby submitted in terms of AbaQulusi Municipal by-laws, Rules of Order

This Motion serve as Notice to the following Councillors;

1. Hon. Speaker Cllr MB Khumalo
2. Hon. Mayor Cllr MJ Sibiya and
3. Hon. Deputy Mayor Cllr MC Maphisa

That Council intends to remove them from their respective offices due to the following reasons;

The Speaker since January 2019 has on more than two occasions, continuously called and presided over meeting of Council that were not quorating.

We therefore propose the following that:

- Proposer: Hon Cllr MB Mbaso Second: Hon. Cllr NS Mgidi
(signed) (signed)"

[33] At the meeting held on 1 August 2019 the motion served before the council. It appears to be common cause that it was allowed to be proposed by the applicant and it was duly seconded. A transcript of what transpired at the meeting has been put up. The transcript is largely unintelligible but it seems reasonably clear that at some point one of the councillors noted that the first applicant's name as spelt on the motion was incorrectly spelt as "Mbaso". Animated debate followed as to whether such a person existed within Council as a councillor. The first

respondent as Speaker allowed that debate to unfold and in fact at times took active part in that debate. Ultimately, the first respondent ruled on the matter in the following terms:

“SPEAKER:

WAIT A MOMENT.

DON'T EVEN GO TO THE POINT OF ORDER.

THE HONOURABLE COUNCILLOR SEEMS LIKE HE ONLY JOINED COUNCIL CHAMBERS

BECAUSE THE SPEAKER IS A MEMBER OF COUNCIL.

SO YOU KNOW THAT IF YOU SPEK OF A VOTE OF NO CONFIDENCE

THERE IS NO POINT WHERE IS SAYS THE SPEAKER MUST STEP OUT

BECAUSE HE IS IMPLICATED.

NO.

THERE IS.

EVEN OF YOU VOTE HE ALSO VOTES.

SO THERE IS NOTHING WRONG.

THE THING THAT I AM SAYING WE MUST FIX.

NO HONOURABLES THAT IS THE FACT.

THER EIS NO COUNCILLOR MBASO IS THIS CHAMBER.

SO IF THERE IS NOT COUNCILLOR MBASO THE MISTAKE THAT WAS
DONE.

THE COUNCILLOR THAT WAS PROPOSING WAS SUPPOSED TO.

IF IT IS INDEED WRONG AND SHE IS NOT MBASO SHE WAS SUPPOSED
TO REQUEST TO CORRECT IT WHEN SHE READ THE MOTION.

BECAUSE THIS WAS NOT WRITTEN BY THE ADMINISTRATION.

IT WAS WRITTEN BY HER.

WE TOOK IT AS SHE WROTE IT.

SO THAT IS WHY I WAS ASKING WHETHER THERE IS A COUNCILLOR
MBASO HERE.

SO WE SO NOT HAVE A COUNCILLOR MBASO.

SO THE MOTION IS NON-EXISTANT.

IF YOU WANT TO BRING ANOTHER ONE YOU HAVE A RIGHT TO BRING
ANOTHER MOTION.

THEREFORE I AM REJECTING THIS MOTION.

THANK YOU VERY MUCH.”

[34] Thus, it will be seen, that the motion was taken off the agenda as a result of its rejection by the first respondent.

[35] The council sat again the following day, 2 August 2019, where the identical motion was reintroduced, but then subsequently withdrawn by the first applicant.

[36] On 12 August 2019 the pending proceedings were commenced. The first applicant contends, in those proceedings, that they were commenced as expeditiously as possible after the 1 August 2019 debacle. The matter served on the urgent motion court roll on 16 August 2019, on which day it was adjourned *sine die*. After the exchange of affidavits, it was enrolled for hearing on 3 September 2019, on which date it was adjourned to 15 November 2019 for argument as an opposed motion on that day.

[37] The thrust of the first applicant's contentions in the pending proceedings was that given the conduct of the first respondent, she enjoyed no prospect of the first respondent convening a future meeting at which her motion would be properly tabled, debated and voted upon. For that reason she sought the order as set out in paragraph 1.1 of that application.

[38] The respondents who opposed that application contended, inter alia, that directory relief was misconceived in that the motion could be tabled at any of the future meetings of the fourth respondent, and contended further that further meetings were imminent, one in fact for 26 September 2019. They contended also that because the first applicant reintroduced the identical motion on 2 August

2019, that act indicated an acceptance of the fact that the ruling on 1 August 2019 was proper. The fact that the motion was subsequently withdrawn on 2 August 2019 was irrelevant to that argument.

[39] In the pending proceedings the respondents also indicated that the first applicant had in fact tabled the identical motion for debate at the meeting then to be held on 26 September 2019.

[40] As matters turned out the 26 September 2019 meeting did proceed and the motion again served before council. Again, in the present papers, the applicants put up a transcript of the meeting. The transcript is difficult to follow. By way of example the following extract in the transcript is attributed to the first applicant:

“THANK YOU, I WOULD LIKE TO APOLOGIZE ON BEHALF OF THE CONUNCILLOR. THE UMBASA THAT WAS TAKEN TO COURT. THE OF THE 5TH IS THE ONE WERE SPEAKING OF RIGHT NOW, SO THE WAY YOU ARE PUTTING IT, IT IS AS IF WHEN WE VOTE, IT IS NOT CLEAR WHICH CASE ARE VOTING FOR, IT WOULD BE BETTER IF YOU ARE SAYING THAT WE, THAT HAVE A NEW MOTION, IT IS THE ONE WANT BECAUSE THESE CASES YOU ARE SPEAKING OF INVOLVE MBASA REALLY, SPEAKER USE CORRECTLY PHRASE HIS WORDS AS TO HOW WE ARE GOING TO VOTE NOT THE WAY HE IS CURRENTLY PHRASING IT NOW.”

[41] The upshot of what transpired at the 26 September 2019 meeting is that the first respondent appears to have concluded that because of the pending proceedings the entire matter was *sub judice* and accordingly had to await the

outcome of the pending proceedings. The motion was not allowed to proceed. That is the impetus for the current proceedings.

[42] When the matter was argued before me Mr *Rall* SC, who with Mr *Crampton* appeared for the applicants, accepted that the applicants could have applied to review the actions of the first respondent, both in these proceedings and in the pending proceedings. He argued, however, that it was illogical to expect the applicant to return to court on repeated review applications each time the first respondent stepped out of line. So much the better, he said, was the route which the relief foreshadowed in the notice of motion provided. There would be no need to return to court and the first respondent's shenanigans would be thwarted once and for all. The first respondent's actions were clearly wrongful and illegal and if there were so for a review based on illegality, so too could they underpin a mandatory interdict.

[43] The need for the urgent application he said was based on the fact that, given the facts set out in the pending proceedings, the applicants legitimately expected that the motion would be put to the vote at the ordinary council meeting that was held on 26 September 2019. That did not happen because the first respondent prevented that vote through an unlawful abuse of his power. There was, Mr *Rall* argued, a reasonable apprehension that the first respondent would again prevent a vote on 31 October 2019 unless the order was granted.

[44] There was, according to the argument, a reasonable suspicion that the first respondent would be biased in relation to the motion, and on that ground

alone it was suggested that he ought to recuse himself from performing any official functions in relation to the motion. The principle underlying the relief preventing the first respondent from presiding at the meeting was that nobody can be a judge in his or her own case and that accordingly the applicants have sought to enforce the principle of legality, namely that all arms of government must act within the law. For that contention the applicants rely on *Natal Rugby Union v Gould* 1999 (1) SA 432 (A).

[45] Anticipating that the first respondent would act again, contrary to his duties to act fairly and impartially as Speaker, the applicants contended that I am entitled to make the order they seek. As authority for the proposition they refer to *Jacobson v Pretoria Southern Rent Board and others* 1952 (3) SA 385 (T). I was also urged to draw a parallel between the present case and that which occurred in *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A).

[46] In *Jacobson* the court intervened to direct that the members of the Rent Board recuse themselves from a forthcoming sitting because of irregularities that had occurred during two earlier sittings and in circumstances where they refused in advance to recuse themselves from a forthcoming hearing. In *Wahlhaus* the court took the rare and unusual step of intervening in pending criminal proceedings in the lower courts to prevent a grave injustice from occurring.

[47] Pre-empting an argument based on the separation of powers the applicants argue that the relief they seek does not ignore that principle. They

argue that the relief they seek is aimed fundamentally at upholding the principle of legality.

[48] Whilst maintaining the suggestion that it was eminently reasonable for the ninth respondent to be ordered to preside at the meeting to be held on 31 October 2019, the applicants were constrained to concede that the argument, that because he was not an elected member of the council he could not preside, had merit. They conceded too that in those circumstances the suggestion by the respondents that s 41 of the Local Government: Municipal Structures Act, 1998 provided the correct answer if I were to order that the first respondent was precluded from presiding at the meeting. That section provides that "[i]f the speaker of the municipal council is absent or not available to perform the functions of speaker, or during a vacancy, the council must elect another councillor to act as speaker".

[49] In argument before me Mr *Madonsela* SC, who with Mr *Boulle*, appeared for the respondents argued that the relief sought was founded on three fundamental and material misconceptions. I deal with each in turn.

[50] Firstly the relief sought offended the doctrine of separation of powers because it required this court to dictate to a separate sphere of government as to how to conduct its affairs. It required me to enquire into the first respondent's fitness to hold the office of the tenth respondent, i.e. the office of Speaker of the fourth respondent. For that contention the respondents rely principally on *United Democratic Movement v Speaker, National Assembly and others* 2017 (5) SA 300

(CC) and indicate that if I were to act as requested I "...would trench separation of powers...". The fitness or otherwise of the first respondent to hold office as Speaker "... is a power that rests firmly in the hands of the [Council of the fourth respondent]...".

[51] The second misconception relates to the choice and method of choice of a replacement speaker which is regulated by statute. I have already dealt with this aspect.

[52] The third misconception argued by the respondents relates to the entitlement of a Speaker to exercise discretion and decision-making without interference by a court, provided that there must always be a proper and rational basis for whatever choices he or she makes. A review of such decisions is always possible which can be set aside if they are irrational because, if they are indeed irrational, they are subject to review by a court on the principle of legality. The argument was that this remedy was always available to the applicants, but not exercised either in the pending proceedings or in the present matter.

[53] Relying on *Glenister v President of the Republic of South Africa and others* 2009 (1) SA 287 (CC) the respondents seek to remind this court that "... it is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers."

[54] Against that backdrop Mr *Madonsela* argued that the matter was not urgent. Given that the motion sought to be tabled and pursued was in all material respects identical to the one that is the subject matter of the pending proceedings, and given that it is always available to the applicants to request at any meeting of Council that the first respondent recuse himself, all of the applicants' complaints could and will be addressed if they are successful in the pending proceedings. There was no particular pressing case made out that the intended motion had to be debated at the 31 October 2019 meeting. Indeed, so the argument seems to suggest, the intended motion could be addressed as soon as possible once the pending proceedings were disposed of. Thus the urgency of the present application is more imagined than real.

[55] During argument that aspect of the matter was debated with Mr *Rall*. It was conceded that, but for the question of costs, if the applicants were successful in all their endeavours in the present application, everything sought in the pending proceedings would fall away. That concession, to my mind, is significant.

[56] All of the applicants' complaints, but for that which concerns the 26 September 2019 meeting, form part of the background and the litany of complaints underpinning the relief sought in the pending proceedings. The suggestion that the relief sought in these proceedings relate to an ordinary council meeting whereas the pending proceedings are unrelated and therefore different is, a distinction without a difference. The ultimate aim is to have the motion tabled, debated and then voted upon. Whether that is achieved via a special meeting as foreshadowed in the pending proceedings or as a result of an order obtained in these

proceedings is irrelevant. The hurdle the applicants need to overcome is the one of persuading this court that in the pending proceedings the order they seek is one this court can make or in the present proceedings the order they seek is one that I can make. In either case they are faced principally with the separation of powers argument and the other defences raised by the respondents. Restating the matter in this light then demands an answer to this question: is there any desperate urgency that the motion be debated at a meeting on 31 October 2019 as opposed to being debated at any other meeting after the issues have been properly ventilated, if, upon such ventilation, a court is inclined to make any order at all? That question has not been posed or answered in these papers. It is at that level that the respondents contend that the question of urgency must be viewed, addressed and resolved.

[57] There seems to me to be no acceptable explanation as to why, given the litany of complaints that the pending proceedings and this application have laid bare, the applicants could not have sought leave to deliver further affidavits in the pending proceedings, in an effort to place before the court that which occurred in the lead up to and at the 26 September 2019 meeting. That would have had the effect of strengthening and bolstering their case concerning the conduct of the first respondent. To argue that the present application is a separate matter entirely is to place form over substance.

[58] In viewing the matter in that perspective I make no prediction and offer no opinion on the approach that a court ought to adopt to the application foreshadowed in the pending proceedings. That is a matter for the court sitting on 15 November 2019 to decide and those issues are not before me today. However,

I cannot ignore that much of what is to serve before the court in the pending proceedings also serves before me today and, amongst those issues, the question of separation of powers looms large.

[59] The system of local government that we have chosen for ourselves in this country is something the applicants and the respondents have to live with. The first respondent, as an ordinary councillor and wearing his party political hat, has an ordinary vote in council. He uses that vote according to the dictates of his political party. Wearing his hat as the tenth respondent, the Speaker, where there is an equal number of votes on any issue, he has a deliberative or casting vote. That is the system that the parties have to live with. It is indeed problematical in a hung municipality.

[60] When the first respondent, wearing his hat as Speaker, exercises the rights and duties of Speaker he must do so without external influence. In *Tlouamma* reference was made to *Canada (House of Commons) v Vaid* [2005] 1 S.C.R. 667, 2005 SCC 3, [2006] 135 CRR (2d) 189 at para 20. There it was observed:

“It is a wise principle that the courts and Parliament strive to respect each other’s role in the conduct of public affairs. Parliament, for its part, refrains from commenting on matters before the courts under the *sub judice* rule. The courts, for their part, are careful not to interfere with the workings of Parliament. None of the parties to this proceeding questions the pre-eminent importance of the House of Commons as “the grand inquest of the nation”. Nor is doubt thrown by any party on the need for its legislative activities to proceed unimpeded by any external body or institution, including the courts. It would be intolerable, for example, if a member of the House of Commons who was overlooked by the Speaker at question period could invoke the investigatory powers of the Canadian Human Rights Commission with a

complaint that the Speaker's choice of another member of the House discriminated on some ground prohibited by the Canadian Human Rights Act, or to seek a ruling from the ordinary courts that the Speaker's choice violated the member's guarantee of free speech under the Charter. These are truly matters "internal to the House" to be resolved by its own procedures. Quite apart from the potential interference by outsiders in the direction of the House, such external intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable even if, in the end, the Speaker's rulings were vindicated as entirely proper."

[61] Thus the question that requires answering is whether it is appropriate for this court to intervene at this stage in anticipation of irrational and or illegal conduct on the part of the first respondent when he discharges his office as speaker of the fourth respondents council at any future meeting.

[62] In *United Democratic Movement* the court commenced its judgment with the following observations (footnotes omitted):-

"[1] South Africa is a constitutional democracy — a government of the people, by the people and for the people through the instrumentality of the Constitution. It is a system of governance that 'we the people' consciously and purposefully opted for to create a truly free, just and united nation. Central to this vision is the improvement of the quality of life of all citizens and the optimisation of the potential of each through good governance.

[2] Since constitutions and good governance do not self-actualise, governance structures had to be created to breathe life into our collective aspirations. Hence the existence of the legislative, executive and judicial arms of the state. They each have specific roles to play and are enjoined to interrelate as foreshadowed by the following principle that guided our Constitution-making process:

'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'

[3] Knowing that it is not practical for all 55 million of us to assume governance responsibilities and function effectively in these three arms of the state and its organs, 'we the people' designated messengers or servants to run our constitutional errands for the common good of us all. These errands can only be run successfully by people who are unwaveringly loyal to the core constitutional values of accountability, responsiveness and openness. And this would explain why all have to swear obedience to the Constitution before the assumption of office."

[63] Later the court said this:

"[7] Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests. *Amandla awethu, mannda ndiashu, maatla ke a rona*, or *matimba ya hina* (power belongs to us) and *mayibuye iAfrika* (restore Africa and its wealth) are much more than mere excitement-generating slogans. They convey a very profound reality that state power, the land and its wealth all belong to 'we the people', united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since state power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.

[8] This is all designed to ensure that the trappings or prestige of high office do not defocus or derail the repositories of the people's power from their core mandate or errand. For this reason, public office bearers, in all arms of the state, must regularly explain how they have lived up to the promises that inhere in the offices they occupy. And the objective is to arrest or address

underperformance and abuse of public power and resources. Since this matter is essentially about executive accountability, that is where the focus will be.”

[64] That description of the systems we have in place reinforces our constitutional contract. Each arm of the state must navigate strictly within its own sphere of operation and it must stick to its particular lane on the highway, for to change lanes, would put it on a collision course with other travellers along the same constitutional path. If we have chosen for ourselves that constitutional model; if we have chosen that particular highway then we must live, each of us, with its consequences. For the present case; if the first respondent, acting as Speaker, behaves irrationally, if a case can be made out in that regard, this court will be enjoined, on application, to review his conduct. Requesting that it engage in that process now stretching its arm into the future so to speak to manipulate the puppet strings so that future meetings unfold properly would be a bridge too far. Unlike a rent board or lower criminal court, in which respect this court has extraordinary but limited powers to be exercised on very narrow grounds, other branches of government demand of this court that the separation of powers be observed as a sacrosanct principle.

[65] The woes of the British people with regard to Brexit has dominated the international popular press in recent months. It is appropriate to refer to the first Brexit judgment of the United Kingdom Supreme Court, (*Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5) where Lord Neuberger said:

“3. It is worth emphasising that nobody has suggested that this is an inappropriate issue for the courts to determine. It is also worth emphasising that this case has nothing to do with issues such as the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union. Those are all political issues which are matters for ministers and Parliament to resolve. They are not issues which are appropriate for resolution by judges, whose duty is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society.”

[66] The internal workings of the council of the fourth respondent is a political matter for the councillors to resolve. The removal of the Speaker and his fitness to preside at meetings are issues which are inappropriate for judges to decide.

[67] The respondents also argued that the mechanism of the current application constituted a collateral challenge to the authority and decisions of the Speaker, given that he has already made rulings on the questions. Those rulings have not been subjected to review and accordingly stand until set aside. That argument was supported by reference to *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) where Cameron J, writing for the majority, said (footnotes omitted:

“[41] The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.

[42] The underlying principles are that the courts' role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them; and, unless set aside, a decision erroneously taken may well continue to have lawful consequences. Mogoeng CJ explained this forcefully, referring to *Kirland*, in *Economic Freedom Fighters*. He pointed out that our constitutional order hinges on the rule of law:

'No decision grounded [in] the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help". Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.'

[43] But it is important to note what *Kirland* did not do. It did not fossilise possibly unlawful — and constitutionally invalid — administrative action as indefinitely effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule-of-law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule-of-law reasons, the decision stands.

[44] *Oudekraal* and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances.

[68] There is much to be said for that argument but I am constrained to leave that question open. That debate is very much alive in the pending proceedings and it is preferable for the point to be decided there.

[69] Thus, on the question of the separation of powers argument, and on the argument that this application warrants no additional special treatment not achievable in the pending proceedings, the application must fail.

[70] I conclude by stressing that nothing I say in this judgment is to be construed as pre-judging the matters to be dealt with in the pending proceedings.

[71] The application is dismissed with costs, such costs to include the costs of two counsel where employed, and are to include all costs reserved on previous occasions.

Vahed J**Case Information:**

Date of Hearing	:	29 October 2019
Date of Judgment	:	30 October 2019
Counsel for the Applicants	:	AJ Rall SC with DP Crampton
Instructed by	:	Matthew Francis Inc Suite 4, 1 st floor Block A 21 Cascades Crescent Pietermaritzburg Tel: 033 940 8326 Ref: Y Maharaj/LM/04A023001
Counsel for the 1 st , 2 nd , 4 th , 9 th and 10 th respondents	:	TG Madonsela SC with AJ Boulle
Instructed by	:	Buthelezi Mtshali Mzulwini Inc Suite 7A Essenview Strathmore Park 305 Musgrave Road Durban Tel: 031 201 5541 Ref: ABAQ 1.2/ZM

c/o Govindasamy Ndzingi & Govender (GHG) Inc
211 Burger Street
Tel: 033 345 3427
Ref: B1100/20/65