

**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION: BLOEMFONTEIN**

Appeal Number: A261/2013

In the matter between:

**MATJHABENG MUNICIPALITY**

Appellant

And

**TSHYIZADLA NJILO**

Respondent

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**CORAM:** NAIDOO, J *et* MOENG, AJ

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**JUDGMENT:** MOENG, AJ

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**HEARD ON:** 8 DECEMBER 2014

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**DELIVERED ON:** 11 DECEMBER 2014

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- [1] This is an unopposed appeal against the judgment of the court a quo, delivered by the learned magistrate Mr. CF Nekosie in the Magistrates' Court Virginia. The central issue to be decided is whether Section 55(1) of the Municipal Systems Act 32 of 2000 ("MSA") authorises a municipal manager to act as agent of a municipality in launching an application in court.

[2] The appellant brought an application in the court *a quo* prohibiting the respondent from proceeding with the erection of buildings and for the demolition of additional buildings on erf 2169 Meloding Hostel Virginia. Appellant contended that the buildings did not comply with the regulations in terms of the National Building Regulations and Building Standards Act 103 of 1997, since no prior approval was obtained from the local authority before the commencement of the building process as required by section 4 of Act 103 of 1997.

[3] The respondent denied in *limine* that Mr. German Ramathebane ("Ramathebane"), the municipal manager and deponent to the appellant's founding affidavit, had the necessary authority and *locus standi* to act on behalf of the appellant. The averments in the founding affidavit which related to his authority to act read as follows:

*'I am an accounting officer of the applicant herein and as such duly authorised in terms of my employment contract read together with the provisions of section 115(3) of the Municipal Systems Act, 32 of 2000 to depose to this affidavit which will be used in the application.....'*

[4] He further stated in reply that:

*'I am in terms of the section 82(a) of the Local Government Municipal Structures Act 117 of 1998 the Head and Accounting Officer of the applicant. My power to institute legal proceedings is derived from section 55(1) of the Municipal Systems Act 32 of 2000 that provides that a municipal manager is inter alia responsible and accountable for the*

*implementation of national and provincial legislation applicable to the municipality.* ( my emphasis)

*It is undeniable that the duty to enforce the National Building Regulations and Building Standards Act 103 of 1997 rests on the applicant as evident from the provisions of section 21 of the Act and being the administrative head of the applicant, I have the authority and locus standi to act on behalf of the applicant.'*

- [5] The court *a quo*, in a well-reasoned judgment, upheld the point in *limine* and dismissed the application with costs. The learned magistrate concluded that section 115(3) upon which the appellant relied in the founding affidavit is intended to facilitate the service of documents and process on the municipality and does not empower the municipal manager to institute legal proceedings. He concluded that the authority to institute proceedings does not come into being by the mere appointment of a municipal manager but is dependent upon the roles and responsibilities assigned to him in terms of section 53 of the Municipal Systems Act, 32 of 2000. He in conclusion reasoned that no such document, defining his authority to institute legal proceedings, was attached and the applicant therefore failed to show that the institution of legal proceedings was authorised. It is against this decision that the current proceedings are directed.
- [6] Appellant approached us with an application for condonation for the late filing of the application for a date of hearing of the appeal and an order for the reinstatement of the lapsed appeal. This application was

unopposed and was accordingly granted. Sufficient reasons were advanced for the delay. I do not deem it necessary to delve further into the reasons for having granted same.

- [7] Section 55 (1)(p) of the MSA provides that as head of administration, the municipal manager of a municipality is subject to the policy directions of the municipal council, responsible and accountable for the implementation of national and provincial legislation applicable to the municipality. It is trite that the executive authority of a municipality does not vest in its municipal manager or any of its employees. Its executive authority is in terms of section 151(2) of the Constitution, vested in its municipal council. The municipal manager therefore executes his duties subject to the policy directions of the municipal council.
- [8] In **Manana v King Sabata Dalindyebo Municipality** [2011] 3 All SA 140 (SCA) at para [17] Nugent JA held that section 55(1) of the MSA is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. He further held that there is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. The Constitution vests all executive authority, which includes the authority to appoint staff, in the municipal council and legislation is not capable of lawfully divesting it of that power.

- [9] Section 55(1) (p) only caters for the implementation or execution of national or provincial legislation by the municipal manager. In *casu*, the municipal manager would be responsible to implement the National Building Regulations and Building Standards Act. This Act requires of the municipal manager to promote uniformity in the law relating to the erection of buildings in the area of jurisdiction of his municipality and prescribes building standards.
- [10] In terms of section 53 of the MSA, a municipality must, within the framework of and in accordance with relevant provisions of the Municipal Structures Act, the Systems Act and other applicable legislation, define the specific role and area of responsibility of the municipal manager in precise terms by way of separate terms of reference. If the municipal council intended to institute legal action, such a resolution should have been taken to empower the municipal manager to institute court proceedings on its behalf.
- [11] Mr. Greyling sought to find authority from **Nelson Mandela Metropolitan Municipality v Greyvenouw CC** (3263/02) [2003] ZAECHC 5 (21 February 2003) for his argument that section 55(1) of the MSA empowers a municipal manager to institute legal proceedings on behalf of a municipality. In **Nelson Mandela Metropolitan Municipality v Greyvenouw CC** the respondent also challenged the authority of the deponent on behalf of applicant, pointing out that no resolution or written authorisation formed part of

the papers. It was argued on behalf of applicant that the municipal manager derived his powers to institute legal proceedings from section 55 of the MSA.

- [12] What however distinguishes this matter from the facts *in casu* is that the applicant was in possession of a resolution of the erstwhile Port Elizabeth Municipality which delegated to the Chief Executive/Town Clerk (the predecessor in title of the Municipal Manager), the power to *'consider and take whatever action he may deem necessary in all legal actions, legal applications and arbitrations', to 'take all action necessary to conduct litigation and arbitration in the best interests of the Council' and, perhaps most pertinently, in 'the circumstances in which, in his opinion, immediate action is required, to protect the interests of the Council or to enforce the regulations, tariffs or Town Planning Scheme of the Council by way of interdict, mandamus or other court order, to institute or intervene in any legal proceedings including criminal prosecutions or in any court of law'*. Any reliance on this case is therefore misplaced.

- [13] In **Eveleth v Minister of Home Affairs** [2004] 3 All SA 322 (T), the court dealt with a similar provision in the Immigration Act. Deponent on behalf of the respondents attempted to rely on section 3(1) of the Immigration Act, which provided that for the purpose of the Act, the department may through its duly authorised officials represent the State in any proceedings in a Court. The Act however made it clear

that only a departmental officer who is duly authorised and directed by the first respondent may represent the State in court proceedings. The court held at 326F–H that once the authority of a departmental officer to represent the State is challenged, it is incumbent upon the State to produce proof that such officer is duly delegated, directed and authorised to represent it in the proceedings. The mere say-so of a departmental officer in an affidavit is no proof of either delegation or authority without submitting acceptable evidence or documentation to substantiate the averment.

- [14] In **ANC Umvoti Council Caucus and Others v Umvoti Municipality** 2010 (3) SA 31 (KZP), the Full Bench, after an analysis of the relevant legislation, was satisfied that no legislation directly authorised the speaker or the manager of a municipality to act as agent of a municipality in launching an application in court. The court was satisfied that since section 151(2) of the Constitution vested the executive and legislative authority of a municipality in its municipal council, it was necessary for the council to have delegated the power to institute legal proceedings. Such a delegation must be in writing, absent which, a council resolution was required to empower an official to institute court proceedings on its behalf.
- [15] The conclusion reached by the learned magistrate that the authority to institute proceedings does not come into being by the mere appointment of a municipal manager but is dependent upon the roles

and responsibilities assigned to him in terms of section 53 of the MSA can therefore not be faulted. Only a municipal manager who is duly authorised and directed by the council may represent the municipality in court proceedings.

[16] I am satisfied that section 55(1) of the MSA does not authorise a municipality manager to act as agent of a municipality in launching an application in court. I will therefore propose that the following order be made:

1. The appeal is dismissed.

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**L.B.J. MOENG, AJ**

I concur, and it is so ordered.

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**S NAIDOO, J**



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| On behalf of the appellant:  | Adv. P Du P Greyling<br>Instructed by:<br>Motaung Attorneys<br>BLOEMFONTEIN |
| On behalf of the respondent: | No appearance                                                               |