

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 8 April 2013

Case Number: 16550/13

In the matter between:

THE DEMOCRATIC ALLIANCE

J C LANDSBERG

PROF A L COMBRINK

and

B E MOSIANE-SEGOTSO

X D KHAM

D N S TSAGAE

M D LEGOETE

H C STOLZ

TLOKWE CITY COUNCIL

B G MOUMAKWE N O

A J MAPHETHLE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

First Applicant

8/4/13

DATE

Second Applicant
SIGNATURE

Third Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eight Respondent

JUDGMENT

A B ROSSOUW A J

- [1] This matter came before me on 25 March 2013 by way of urgency. I delivered judgment on 29 March 2013, without giving full reasons. What follows, are my full reasons:
- [2] At the outset I want to express my gratitude towards Mr *Van der Merwe* SC and Mr *Botes* for their valuable heads of argument, which have been of great assistance.
- [3] This is an urgent application in terms of which the applicants seek an interim interdict that Prof Combrink (the third applicant) be reinstated as the executive mayor of the Tlokwe City Council (the sixth respondent) ('the Council') pending the outcome of an application under case number 12107/13 in terms whereof the validity of the election of Mr Maphetle (the eighth respondent) on 26 February 2013 as the executive mayor of the City Council, is challenged. I shall henceforth refer to these applications as the urgent application and the main application respectively.
- [4] The urgent application was met with a counter application in terms of which Mr Maphetle sought an order declaring the election of Prof Combrink to the office of executive mayor on 22 November 2012, as invalid and requested it to be set aside.

- [5] The relevant facts underlying the aforementioned applications can be summarised thus:
- [6] The Council is a municipal council as envisaged in Chapter 7 of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
- [7] In order to regulate its business and proceedings as envisaged in s 160 (6) (b) of the Constitution, the Council has published the Rules of Order ('Rules') of the municipality in terms of s 162 of the Constitution, which rules were accepted as by-laws in terms of s 156 of the Constitution and s 12 of the Local Government Municipal Systems Act 32 of 2000 ('the Systems Act').
- [8] The Council consists of 52 councillors: 30 councillors are representatives of the African National Congress ('ANC'), 19 councillors are representatives of the Democratic Alliance (the first applicant), 2 councillors are representatives of the Freedom Front Plus and 1 councillor represents the Congress of the People ('Cope').
- [9] Mr Maphethle was the Council's Executive Mayor up until 21 November 2012. He was elected by the ANC into office pursuant to the local government election that was conducted during May 2011.

- [10] On 14 September 2012, 2 councillors on behalf of the ANC submitted to the Manager: Office of the Speaker, a motion with allocated number 45/2012 ('motion 45'), to remove Mr Maphethle as the Council's executive mayor. This was done in terms of section 58 of the Local Government: Municipal Structures Act 117 of 1998 ('the Act').
- [11] The Council's 103rd ordinary meeting was held on 21 November 2012. At this meeting Ms Mosiane-Segotso (the first respondent) ('the Speaker') enquired from the two ANC councillors whether they were proceeding with the motion and they answered in the affirmative. The Speaker allowed the councillors to debate the matter whereafter an extensive debate ensued. The Speaker then ruled that voting would take place and explained the voting process. 37 of the councillors indicated verbally that they were in favour of the motion and 10 councillors indicated verbally that they opposed the motion. 1 councillor indicated verbally that he wanted to abstain from the voting process.
- [12] Mr Maphethle vacated the chair of executive mayor after the voting was conducted. Thereafter the Acting Municipal Manager of the Council took the chair and commenced with the election process for a new executive mayor. At this juncture 9 members of the ANC indicated that they did not want to be part of the process and left the meeting at 23:50. A tenth member left the meeting at midnight.

[13] The Speaker called for the nominations of the new Executive Mayor and two nominations were handed over to the Speaker. Prof Combrink of the DA and Mr Tsagae (the third respondent) of the ANC were nominated. Shortly after midnight, ie on 22 November 2012, Mr Tsagae accepted the nomination by signing the required form of written confirmation. Prof Combrink, who was not present at the meeting due to prior arrangements, accepted the nomination by way of a short message system (sms) at 00:09.

[14] Ballot papers were handed out to the remaining 39 councillors present to cast their secret vote for the new executive mayor. The Speaker announced the outcome of the election which was as follows: 20 votes in favour of Prof Combrink and 19 votes in favour of Mr Tsagae. The council then resolved as follows:

‘That cognisance be taken that Cllr Mrs Prof A Combrink be (sic) was elected as Executive Mayor of the Thlokwe City Council with immediate effect (2012-11-22).’

[15] The next ordinary meeting of the City Council was scheduled for 3 December 2012.

[16] The very same day, ie 22 November 2012 the Manager: Office of the Speaker received a motion on behalf of the ANC for the removal of Prof

Combrink as executive mayor. The motion was entered and numbered as 49/2012 ('motion 49'). The Speaker did not include motion 49 in the agenda for the Council's 104th meeting that was scheduled for 3 December 2012, because it was not received by the Speaker's office at least 10 working days prior to the next meeting, as is required in terms of the Rules.

- [17] On 3 December 2012 and under the auspices of s 44.5 of the Rules the Speaker allowed a debate regarding the legality of the method of Prof Combrink's acceptance of her nomination. There was an objection from the DA members alleging an abuse of s 44.5 of the Rules, which objection was overruled by the Speaker. In terms of a compromise proposal the acting municipal manager was instructed by the Council to obtain a legal opinion regarding the said method of acceptance. The council then resolved as follows:

'That the status quo with regard to councillor Prof Ms A L Combrink as the Executive Mayor of the Tlokwe City Council be maintained until a Court of Law has ruled otherwise or Council has resolved otherwise.'

- [18] The 105th ordinary meeting was scheduled for 29 January 2013. The Speaker prepared the agenda and put motion 49 for the removal of Prof Combrink as executive mayor on the agenda under the heading 'New motions and petitions'.

- [19] At the meeting of 29 January 2013 the aforesaid legal opinion was made available and debated and it was resolved 'That cognisance be taken thereof. At this meeting councillors Kham (second respondent) and Tsagae (third respondent) who proposed motion 49 were absent. The Speaker initially took the view that the said motion had lapsed in terms of the Rules of Order, but later ruled that it be deferred to the 106th ordinary meeting of 26 February 2013.
- [20] On 30 January 2013 two councillors, ie Mr Kham and Mr Stolz (the fourth and fifth respondents), proposed and seconded a new motion with allocated number 51/2013 ('motion 51'), for the removal of Prof Combrink as mayor and submitted it to the Speaker's office.
- [21] During the first half of February 2013 the Speaker prepared the notice for the next ordinary meeting that was scheduled for 26 February 2013. The Speaker signed the aforesaid notice on 11 February 2013 and the following items appeared on the notice: '[Item] 15. Motions or proposals deferred from previous meetings.' and '[Item] 16. New motions and petitions'. Motions 49 and 51 appeared on the agenda as well as the legal opinion that was dealt with at the meeting of 29 January 2013.
- [22] This caused the DA (the first applicant), Mr Landsberg (the second applicant), an elected councillor and caucus leader of the DA in the Council and Prof Combrink to write a letter through their attorneys to the

Speaker. This letter was received on behalf of the office of the Speaker on 22 February 2013. In this letter the Speaker was requested to remove the item pertaining to the legal opinion, which was dealt with at the 105th ordinary meeting and motions 49 and 51 from the agenda. The penultimate paragraph reads as follows:

'We want your written undertaking not later than close of business today that you will immediately remove those items from the agenda, and not to allow you to succumb to the demands of the ANC, by misappropriating the [Rules], by failure whereof we will ask the High Court for appropriate relief on Monday, 25 February 2013.'

[23] The Speaker replied in writing on the same date. She undertook to remove the item relating to the legal opinion as well as motion 49 from the agenda without addressing the applicants' request in respect of motion 51.

[24] In a further letter to the Speaker dated 22 February 2013 the applicants responded, inter alia, as follows:

'You cannot cure the previous deficiencies, by now merely removing them, and by saying that the last motion [motion 51] now becomes "legitimate" because of the previous motions removed.'

[25] On 25 February 2013 the applicants launched the main application under case number 12107/13; that is the day before the Council meeting. In the main application, a declaratory order is sought, the prayers of which could be summarised thus:

1. That the decision of the Speaker to place the item pertaining to the legitimacy of the process of the election of Prof Combrink on the agenda for the 106th ordinary meeting is void and is to be set aside, because the item was concluded at the 105th ordinary meeting;
2. That the Speaker's deference of motion 49 to the 106th ordinary meeting is void and to be set aside because motion 49 had lapsed in terms of s 19.1.4 of the Rules;
3. That the decision of the Speaker to place motion 51 on the agenda for the 106th ordinary meeting is void and is to be set aside, for the reason that the Speaker should have disallowed the acceptance of motion 51 and/or not having motion 51 placed on the agenda for the 106th ordinary meeting, since motion 51 was moved in contravention of the following sections of the Rules: 2.3, 19.7 and 19.8 read with s 58 of the Structures Act.

[26] The agenda for the 106th ordinary meeting was sent to all the councillors, but some of the councillors were only given 4 days notice of the meeting.

[27] At the ordinary meeting of 26 February 2013 the Speaker conceded that motion 49 should not have been included on the agenda and it was subsequently removed. The Speaker refused to remove motion 51, which was included under the heading 'Motions'. The Speaker's attention was then directed to the provisions of s 20.1.2 (b) of the Rules, which reads as follows:

'20.1.2 The speaker shall disallow a motion or proposal –

in respect of which –

(a) . . .

(b) a decision by a judicial or quasi-judicial body is pending.'

[28] The Speaker was requested by a counsellor of the DA to interpret rule 20.1.2 (b) on a point of order. In this regard the Speaker was referred to rule 40.1 of the Rules, which reads as follows:

"Any member may request that the ruling of the Speaker or chairperson as to the interpretation of the Rules of Order be recorded in the minutes and the Municipal Manager shall keep a register of such rulings.

[29] The Speaker refused to entertain the point of order as a point of order in the absence of an existing court order.

[30] All 52 councillors of the City Council were present at the meeting and each one of the 52 councillors partook in the voting of motion 51. The motion was carried with a majority vote as follows: 30 votes for and 22 votes against the removal of Prof Combrink as executive mayor. Subsequently, Prof Combrink and Mr Mpathle were nominated as the next executive mayor, which nominations were properly accepted. The result of the election was as follows: Number of votes cast: 52, number of votes for Cllr Maphethle: 31 and number of votes for Prof Combrink: 21. After the announcement of the results, Mr Mapethle took the chair as the Council's newly elected mayor.

[31] On about 19 March 2013 the applicants launched this urgent application under case number 13544/2013. The following relief is sought:

- '2. That, pending the finalisation of the application under case number 12107/13:
 - 2.1 the legal force and/or effect of the decision which was adopted by the [Council] on Tuesday, 26 February 2013, by virtue of [motion 51], is suspended;
 - 2.2 the Respondents are interdicted and/or prohibited from enforcing the decision which was adopted by the [Council] on Tuesday, 26 February 2013, by virtue of [motion 51], in terms of which [Prof Combrink] was removed from office as Executive Mayor; and
 - 2.4 that [Prof Combrink] is reinstated as the [City Council's] Executive Mayor.'

[32] Mr Maphethle launched a counter application against Prof Combrink. The following final relief is sought in the counter application:

- '1. That it be declared that the election of [Prof Combrink] as Executive Mayor of the [Council] on 21/22 November 2012 was invalid and be set aside.
2. Costs only in the event of opposition.'

[33] The real disputes between the parties are the following:

1. Whether proper notice was given of the 106th ordinary meeting.
2. Whether motion 51 was irregularly dealt with.
3. The validity of the election of Prof Combrink.

[34] I proceed to deal with these issues *seriatim*.

WHETHER PROPER NOTICE WAS GIVEN OF THE 106TH ORDINARY MEETING.

[35] It is clear from the provisions of s 2 of the Rules read with s 160 (3) (c) of the Constitution and s 30 (2) of the Structures Act that an executive mayor

may be removed from office at an ordinary meeting by a decision taken by Council by a majority of the votes cast.

- [36] Section 58 of the Structures Act merely requires prior notice of a meeting, without stipulating the period of notification. It reads as follows:

'A municipal council, by resolution, may remove its executive mayor or deputy executive mayor from office. *Prior notice of an intention to move a motion for the removal of the executive mayor or deputy executive mayor must be given.*' (Own italics).

- [37] Section 2.3 of the Rules regulates the manner and the period of notification of ordinary meetings as follows:

'Notice of the time and place of every ordinary meeting including the complete and final agenda *shall be served on every councillor at least five working days before the meeting.*' (Own italics).

- [38] *Mr Botes*, who appeared for the applicants, argued that all the councillors should have had 5 days prior notice of the ordinary meeting, failing which the meeting was irregular. His argument was based on the peremptory terms in which the rule is cast.

- [39] Legalistic debates as to whether a statutory provision is peremptory or merely directory and whether exact, as opposed to substantial compliance

is required, only tells us about the outcome of the interpretation and, as such, does not have any *a priori* significance. The correct approach is a common sense approach by asking the question whether there has been compliance with the provision. In deciding whether there has been compliance, the object sought to be achieved by the provision and the question whether the object has been achieved are of importance. The object sought to be achieved must be established from the intention of the legislature ascertained from the language, scope and purpose of the enactment as a whole and the provision in particular. (See *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) at 659B to F, *Ex parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T) at 1137H to 1138F and *Maharaj and others v Rampersad* 1964 (4) SA 638 (A) at 646C).

[40] In order to seek the object sought to be achieved, I am of the view that extensive interpretation and more in particular analogical interpretation could be invoked in the present case, in other words an interpretation based on a 'for the same reason' logic: provisions applicable to an expressly mentioned instance can, *ex identitate rationis*, be extended to other (similar) instances which are not expressly mentioned. (See L M du Plessis *The Interpretation of Statutes* p 155 to 156).

[41] The notification period mentioned in s 58 of the Structures Act must, analogically interpreted, be a reasonable period: This appears from the

provisions of s 160 (4) of the Constitution, which states that no by-law may be passed by a municipal council unless reasonable notice has been given. This constitutional requirement is echoed in s 12 (3) (a) of the Systems Act. The Rules originate from the Constitution and the System Act. Section 2 of the Rules makes no distinction between meetings for the purpose of passing by-laws and other meetings, such as the removal of an executive mayor. It follows logically that the legislator's intention could only have been that reasonable notice must be given of all meetings. In the light hereof, the notification period mentioned in s 2.2 of the Rules can only be construed as the Council's embodiment of what a reasonable period is.

[42] The reasonableness of the actual notification period will, in my view, depend on factors such as the subject matter of the tabled motion and the prejudice suffered, if any, because of the period of notification.

[43] In the present case, the subject matter of motion 51 was the replacement of [Prof Combrink] as executive mayor on party political grounds, which is something that, in my view, does not require an extensive notification period. All 52 counsellors were present and voted at the meeting. In any event, no prejudice was alleged in the applicants' founding affidavit.

- [44] In the premises, I find that the object of the provision of s 2.1 of the Rule has been achieved and, thus, that proper notice was given of the 106th meeting.

WHETHER MOTION 51 WAS IRREGULARLY DEALT WITH.

- [45] A number of arguments were raised by *Mr Botes* as to why motion 51 was irregularly dealt with. I shall deal with each of them.

- [46] The first argument was that the Speaker should have disallowed motion 51 to be tabled because s 20.1.2 (b) of the Rules disallows a motion in respect of which a decision by a judicial or quasi-judicial body is pending.

- [47] *Mr Botes* argued that the word 'decision' should be given a wide interpretation so as to include litigation and that, because of the pending (main) application, the motion could not have been tabled.

- [48] *Mr van der Merwe SC's* submission, in short, was that if it was the lawgiver's intention that the mere issue of any judicial or arbitration process or any application to be considered by a quasi-judicial body, (which could take years to reach finality, if ever) would have been sufficient to stifle the works of the Council, the provision would have

clearly said so. In any event, it is highly unlikely that the lawgiver intended such an absurd result.

- [49] In the *South African Concise Oxford Dictionary* the word 'decision' is defined as 'the action or process of deciding' and in *Herbert Porter & Co and another v Johannesburg Stock Exchange* 1974 (4) SA 781 (WLD) at 794A to B Coetzee J said the following:

'In *Words and Phrases Legally Defined*, vol 2 at p.33, s.v. "decision", the following extract from a judgement is given which I think, respectfully, is very apt: "The word 'decision' implies the exercise of judicial determination as the final and definitive result of examining a question."

- [50] In my view the use of the word 'decision' in the context of s 20.1.2 (b) of the Rules denotes a prescribed or agreed process that has progressed to a point where one can honestly say that there is a legal duty upon the decision-making body or person to make a decision.

- [51] When the 106th ordinary meeting was held, the main application was still a babe in arms, far too young to be exposed to the solids contained in a decision.

[52] I thus find that, under the circumstances, sec 20.1.2 (b) of the Rules did not prevent motion 51 to be tabled.

[53] The next argument was that the Speaker should have disallowed motion 51 on a number of grounds. This argument is based on the alleged non-compliance with the following sections of the Rules:

'19.1 Subject to the provisions of any other law –

19.1.1 ...

19.1.2 ...

19.1.3 notice of motion shall not be specified in the summons [agenda] for a meeting unless it is received at least ten (10) working days prior to such a meeting;'

and

'19.1.4 a motion shall lapse if the member who submitted it or a member assigned by him in writing, is not present at the meeting when such motion is being debated.'

and

'19.8 No member or party may *move* a motion in terms of this section –

19.8.1 which is intended to rescind or amend a resolution passed by the council within the preceding three months; or

19.8.2 which has the same purpose as a motion which was concluded within the preceding three months' (Own italics).

and

'19.7 no member or party shall have more than one motion as contemplated in subsection 19.1.1 entered upon the agenda with the exception of a deferred motion, . . .'

and

'20.1 The Speaker shall disallow a motion or proposal –

20.1.1 which is his opinion -

(a) might lead to the discussion of a matter already dealt with in the agenda or which has no bearing on the administration of or conditions in the municipality; . . . '

[54] Motion 51 was indeed received by the Office of the Speaker 10 days prior to the 106th meeting, so there was proper compliance with s 19.1.3.

[55] From the transcription of the 106th meeting, it is clear that the Council unanimously accepted that motion 49 had lapsed in terms of s 19.1.4 of the Rules and that the Council unanimously sanctioned the prior removal of motion 49 from the agenda by the Speaker. With motion 49 struck off the agenda, motion 51 was the only remaining motion that dealt with the removal of Prof Combrink. To hold that the Speaker was not entitled to remove the deferred motion 49 from the agenda beforehand as it resulted in there being two motions on the agenda that dealt with the same issue in contravention of s 19.8.2 would, in my view, be too technical an approach.

[56] Furthermore, the sole purpose and intent of motion 51 was clearly not to amend or rescind the resolution in terms of which Prof Combrink was accepted as the newly elected executive mayor, but to replace Prof Combrink as executive mayor, which the majority of members was entitled to do in terms of the provisions of s 58 of the Structures Act.

[57] In any event, motion 51 was only *moved* on 26 February 2013, ie after the three months had expired. I therefor find that the provisions of ss 19.7, 19.8.1 and 19.8.2 of the Rules were not violated.

[58] The alleged conclusion of the issue pertaining to the legitimacy of the election of Prof Combrink at the 105th ordinary meeting is, in my view, a separate issue that has no bearing on the regularity of the submission, tabling and moving of motion 51. It plays no role in this application. In any event, the said item was removed from the agenda of the 106th meeting at the applicant's request.

THE VALIDITY OF THE ELECTION OF PROF COMBRINK

[59] The procedure to be followed when electing an executive mayor is set out in the provisions of section 55 of the Structures Act. Subsection (3) of s 55 of the Structures Act stipulates that the procedure set out in Schedule 3 to

the Structures Act applies to the election of an executive Mayor. Section 3 (3) of Schedule 3 reads as follows:

'A person who is nominated must indicate acceptance of the nomination by signing either the nomination form or any other form of written confirmation.'

[60] The verb 'signing' prescribes the manner of acceptance of the nomination.

[61] The clear purpose of this provision is to create the best possible proof of the acceptance of a nomination for obvious reasons, namely to avoid any disputes that could arise as to whether a nominee was indeed available and willing to accept the demanding and weighty responsibilities attached to and associated with the position of an executive mayor. An sms message without an advanced electronic signature as provided for in s 13 (1) of the Electronic Communications and Transactions Act 25 of 2002, is no such proof. In any event, the only inference that could be drawn from an sms message is that a particular message has been sent from a certain phone. Although it would be reasonable to infer that the sender is also the author of the message, it certainly is no clear proof thereof. Thus, I find that the acceptance of the nomination by sms falls woefully short of the purpose of the provision.

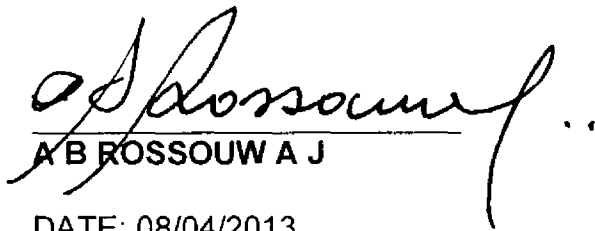
[62] I therefore find that Prof Combrink's acceptance of her nomination was invalid.

[63] The sixth, seventh and eighth respondents applied in terms of Uniform rule 32 (2) for the striking out of certain irrelevant, scandalous and vexatious allegations contained in the applicant's founding and replying affidavits in the urgent application and certain allegations contained in the applicants' founding affidavit in the main application. Even though the submissions made by Mr *van der Merwe* SC in this regard were not without merit, I am not persuaded that the said allegations, insofar as the urgent application is concerned, have prejudiced the sixth, seventh and eighth respondents in the conduct of their defence or have been prejudicial to their interests. The allegations contained in the urgent application have been properly answered, and in the event of the main application proceeding, the said respondents' option to invoke the provisions of Uniform rule 32 (2) is still open. The allegations complained of in the urgent application mainly consist of uncalled-for and/or irrelevant opinions, inferences and remarks, all of which I have for purposes of this judgment disregarded.

[64] In the light of my judgment I find it unnecessary to deal with the other issues raised by the respondents.

[65] In the result, I make the following order:

1. The application is dismissed with costs, including costs of two counsel.
2. The sixth, seventh and eight respondents' application in terms of Uniform rule 32 (2) is dismissed.
3. The counter application is granted with costs, including costs of two counsel.
4. It is declared that the election of the third respondent (in the counter application) as the executive mayor of the Tlokwe City Council (ninth respondent in the counter application) on 21/22 November 2012 was invalid and is set aside.


A B ROSSOUW A J

DATE: 08/04/2013