

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A138/2009

In the appeal between:

KADIMO MASEKOANE

1st Appellant
(1st Respondent in the Court *a quo*)

**DIE XHARIEP DISTRIKS-
MUNISIPALITEIT**

2nd Appellant
(2nd Respondent in the Court *a quo*)

and

**DIE LETSEMENG PLAASLIKE
MUNISIPALITEIT**

1st Respondent
(1st Applicant in the Court *a quo*)

MUFI JERRY MOLUSI

2nd Respondent
(2nd Applicant in the Court *a quo*)

CORAM:

MUSI, JP *et* WRIGHT, J *et* VAN ZYL, J

JUDGMENT BY:

H.M. MUSI, JP *et* WRIGHT, J

HEARD ON:

15th FEBRUARY 2010

DELIVERED ON:

18 MARCH 2010

- [1] This is an appeal against the granting of an interdict initially in the form of a rule *nisi* but subsequently confirmed by the court *a quo*.

[2] The parties will be referred to as they were cited in the court *a quo*. The applicants there, the Letsemeng Local Municipality as first applicant and Mufi Jerry Molusi as second applicant (the present respondents), brought the application against Kadimo Masekoane and the Xhariep District Municipality as first and second respondents respectively (the present appellants). A third respondent was also cited but, he (or she) did not oppose the application or play any role in the proceedings.

[3] The relevant portion of the rule *nisi* (subsequently confirmed) reads as follows:

“2. Die respondente opgeroep word om redes, indien enige, voor die bogenoemde Agbare Hof aan te voer om 09h30 op Donderdag 22 Januarie 2009, of so gou moontlik daarna as wat die aansoek aangehoor kan word, waarom die volgende bevel nie verleen sal word nie:

2.1 dat die raad van die tweede respondent, hangende die finale beslissing van hierdie aansoek belet word om enige raadsvergadering te hou.

- 2.2 dat verklaar word dat die tweede applikant ooreenkomstig die bepalings van artikel 23(1)(b) van die Wet op Plaaslike Regering: Munisipale Strukture, 117 van 1998 (die Strukturewet) soos ge lees met Bylae 2 daartoe, deur die raad van die eerste applikant aangestel is om die eerste applikant in die raad van die tweede respondent te verteenwoordig.
- 2.3 dat die respondente beveel word om die tweede applikant toe te laat om sy regte en verpligtinge bedoel in Hoofstuk 3 van die Strukture-Wet, artikel 4 van die Wet op Plaaslike Regering: Munisipale Stelsels, 32 van 2000 soos ge lees met Bylae 1 daartoe asook sy regte en verpligtinge bedoel in die “Standard Rules and Orders” wat op 1 Desember 2000 ingevolge die bepalings van artikel 148A van die Ordonnansie op Plaaslike Bestuur, 8 van 1962 (VS) in die Provinsiale Koerant gepubliseer is, uit te oefen en na te kom.
- 2.4 dat die eerste en die tweede respondente, gesamentlik en afsonderlik beveel word om die koste van hierdie aansoek te betaal en dat die derde respondent, indien hy die aansoek bestry, gesamentlik en afsonderlik met die eerste en tweede respondente beveel word om die koste van hierdie aansoek te betaal.”

[4] Sub-paragraph 2.1 of the above-mentioned is now irrelevant as the application was finally determined in the court *a quo*'s judgment of the 26th February 2009. With regard to sub-paragraph 2.4 the Court ordered second respondent to pay the costs of the application. With regard to sub-paragraphs 2.2 and 2.3 it is common cause that the second applicant has since resigned as councillor of the first applicant, and therefore no longer represents first applicant on the council of second respondent. The order therefore serves no further purpose and whatever decision may be given on appeal will have no practical effect.

[5] Section 21A(1) of the Supreme Court Act reads as follows:

“(1) When at the hearing of any civil appeal to the Supreme Court of Appeal or any Provincial or Local Division of the High Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

Sub-section 3 also reads as follows:

“(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result is to be determined without reference to consideration of costs.”

[6] The applicants did not oppose the appeal perhaps because it will not have any practical effect or perhaps because of the provisions of section 45(1) of the Intergovernmental Relation Framework Act, no 13 of 2005 (to which reference will be made again later) or merely not to occasion further costs.

[7] At the very start of Mr Wessels’s (appearing for the first and second respondents, that is the appellants) heads of argument, he referred to this aspect and argued that the court should not dismiss the appeal in view of section 21A(1). It was therefore not necessary to take the steps envisaged in section 21A(2) of the said Act.

[8] After referring to various decisions with regard to section 21A of the Supreme Court Act, Mpati DP (as he then was) stated the

following in **LAND EN LANDBOUONTWIKKELINGS-BANK
VAN SUID-AFRIKA v CONRADIE** 2005 (4) SA 506 (SCA) at
511A:

“It is apparent from these decisions that this Court will not make determinations on issues that are otherwise moot merely because the parties believe that, although the decision or order will have no practical result between them, a practical result could be achieved in other aspects.”

[9] The following paragraphs in **RADIO PRETORIA v CHAIRMAN,
ICASA** 2005 (1) SA 47 (SCA) are of import in deciding the
matter:

“[39] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), Ackermann J said the following at para [21] (footnote 18) with reference to *F T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC):

‘A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the

Court is to avoid giving advisory opinions on abstract propositions of law.'

[44] In the *Groblersdalse Stadsraad* case, *supra*, Olivier JA said the following at 1143A - C:

'Die bedoeling van art 21A van die Wet op die Hooggeregshof is klaarblyklik om die drukkende werkklas van Howe van appèl te verlig. Appèlle behoort slegs vir beregting voorgelê te word as daar 'n werklike, praktiese uitwerking of gevolg van 'n uitspraak van die Hof van appèl sal wees. Praktisyns behoort dus deurgaans die doel van art 21A voor oë te hou; in die besonder by 'n aansoek om na 'n hoër Hof te appelleer en by die voortsetting, voorbereiding en beredenering van die appèl.'

[45] In the *Rotek* case, *supra*, at 63H - I the following appears (at para [26]):

'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle spelt out in the *Groblersdalse Stadsraad* case, above, namely that Courts will not make determinations that will have no practical effect.'

These statements by this Court continue to be ignored.”

[10] The only reason given by Mr Wessels as to why the case should be heard was that it would provide guidance to second respondent (and perhaps other municipalities) with regard to future conduct.

[11] The only case Mr Wessels relied on in his heads was the matter of QUEENSTOWN GIRLS HIGH SCHOOL v MEC DEPARTMENT OF EDUCATION, EASTERN CAPE AND OTHERS 2009 (5) SA 183 (BHC). If the judgment in this case is considered it appears that there were other considerations applicable (in spite of the Judge conceding that there was some merit in relying on section 21A) which appear especially from paragraphs 19 and 20 of the judgment.

[12] To consider Mr Wessels’s request that in spite of the matter being academic, the Court should decide whether the rule *nisi* should have been discharged, it is necessary to refer to certain other aspects of the matter.

[13] It is common cause (or cannot be disputed) that the second applicant was appointed as a replacement of one Mona in terms of section 23 read with section 27(e) of the Local Government Municipal Structures Act, no 117 of 1998, and this was a unanimous decision (see annexures MW2 & MW3 to the Founding Affidavit). What is even more astounding is that the Xhariep District Municipality (2nd Respondent) replied to this decision as follows:

**“RE: CONFIRMATION LETTER: WITHDRAWAL AND
REPLACEMENT OF CLLR V.A. MONA AS SECONDED
DELEGATE: LETSEMENG L M**

1. This office herewith acknowledges receipt of the letter from the Speaker of Letsemeng L.M. dated July 2008 as hereinafter referred.
2. The legislative authority to nominate a councilor to represent that L M is vested in Council and is this nomination thus valid.
3. I therefore confirm that Cllr M. J. Molusi is the newly seconded representative as per Council resolution of 16/07/2008 with effect from the date of receipt of the

attached confirmation.

4. Cllr V. Mona is therefore accordingly replaced.”

How can the same district Municipality now argue that the rule nisi should not have been granted? (For purposes of this judgment it is not necessary to enter into a discussion of the disputes with regard to first respondent’s appointment as EXCO representative as set out in paragraph (1) of the opposing affidavit and disputed in paragraph 4 and especially paragraph 6 of the replying affidavit.)

- [14] It is further necessary to point out that the respondents’ main argument why Mona was not properly “replaced” with second applicant was based on the interpretation of section 26 and 27 (e) of Act 117 of 1998 (The Structures Act) and reads as follows in the heads of Mr Wessels:

“2.5 Die Hof *a quo* het egter bevind dat die vervanging van **Mona** deur of met die tweede applikant kon geskied en regmatig was uit hoofde van die bepalings van Artikel 27(e) van die Wet en wat as volg lees:

“n Raadslid ontruim die amp gedurende ‘n ampstermyn

indien daardie raadslid 'n verteenwoordiger van 'n plaaslike raad op 'n distriksraad is ... deur die plaaslike raad vervang word as sy verteenwoordiger op die distriksraad."

- 2.6 Dit word egter aan die hand gedoen dat die betrokke vervanging van 'n raadslid waarna in Artikel 27(e) van die Wet verwys word, verwys na en alleen kan geskied uit hoofde of op grond van die omstandighede vermeld en voorsiening voor gemaak in Artikel 26(1)(b) van die Wet.
- 2.7 Dit sou ook absurd wees indien 'n plaaslike munisipaliteit sy verteenwoordiger op 'n distriksmunisipaliteit se raad kort-kort kon vervang.

3.

Dit word dus respekvol aan die hand gedoen dat Artikel 27(e) van die Wet in konteks met Artikel 26 daarvan gelees moet word en dat dit noodwendigerwys tot die gevolgtrekking lei dat die tweede voorbehoudsbepaling van Artikel 27(e) verwys na of betrekking het op die omstandighede waarvoor in Artikel 26(1)(b) voorsiening gemaak word.

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1986 (4) SA 903 (AA) TE 9121 I – 915 H"

When it was pointed out to him that this argument was based on a misreading of the Act, especially after the substitution thereof effected by section 9 of Act no 55 of 2008, counsel withdrew this argument.

- [15] After this Mr Wessels was constrained to fall back on a further argument also mentioned briefly in his heads. This was that the procedure used to appoint second applicant was incorrect, and that he should have been “elected” even if he was a replacement. In considering this submission it should be borne in mind that section 23 of Act number 117 of 1998 refers to both elections and appointments, and the fact that Molusi was unanimously appointed by first applicant’s councillors. Counsel was therefore constrained to argue that section 16 of Schedule 2 referred to both original councillors and “replacement” councillors who were to represent their local municipality in the district municipality. Why this Court should give an opinion on this aspect of the procedure in view of the prevailing facts, is difficult to discern. There is no longer any live dispute between the parties and there is no indication that another case with similar facts may arise in the future.

[16] The whole question should also be decided in view of the background provided by the Constitution to disputes of this kind and whether they should be taken to court by municipalities. Section 4(1)(h)(vi) of the Constitution provides as follows:

“All spheres of government and all organs of state within each sphere must

(h) co-operate with one another in mutual trust and good faith by

...

(vi) avoiding legal proceedings against each other.”

Section 45(1) of the Intergovernmental Relations Framework Act no 13 of 2005, sets out what steps should to be taken in the case of intergovernmental disputes (which the providing of an “opinion” by this court would amount to).

[17] The conclusion to which the above seems to point is that the appeal against the Court *a quo*’s judgment in this case was totally unnecessary (as the respondents seem to have

realized) and that the appeal is probably meant to obtain a costs order against first applicant. This is an appropriate case where the provisions of section 21A of the Supreme Court Act should be applied. Nor do the interests of justice dictate otherwise in view of the provisions of the Constitution read with section 4(1) of Act No. 13 of 2005 which discourage organs of State to litigate against one another.

[18] The appeal is therefore dismissed.

H. M. MUSI, JP

G. F. WRIGHT, J

I concur.

C. VAN ZYL, J

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