

# **IN THE HIGH COURT OF SOUTH-AFRICA (NORTH CAPE DIVISION)**

**KIMBERLEY**  
**CASE NO.: 291/09 – 325/09**  
**DATE HEARD: 17-03-2009**  
**DATE OF JUDGMENT: 03-04-2009**

In the matter between:

**291/2009**

**THE KHAI-MA MUNICIPALITY**

**APPLICANT**

And

**MAGDALENE BRUINTJIES GROENWALD**

**RESPONDENT**

**AND**

In the matter between:

**325/2009**

**THE KHAI-MA  
LOCAL MUNICIPALITY**

**FIRST APPLICANT**

**BAKER PJ**

**SECOND APPLICANT**

**BRUINTJIES GRONEWALD M**

**THIRD APPLICANT**

And

**VAN ROOYEN FXJ**

**FIRST RESPONDENT**

**VAN ROOI L**

**SECOND RESPONDENT**

**BRANDT S**

**THIRD RESPONDENT**

**GALL M**

**FOURTH RESPONDENT**

**CORAM: H J LACOCK J et C C WILLIAMS J:**

# ***J U D G M E N T***

**WILLIAMS J:**

1. On 17 February 2009, at a special council meeting of the Khai-Ma Local Municipality (*"the Municipality"*) attended by

councillors FXJ Van Rooyen, L Van Rooi, S Brandt and M Gall, the following resolutions were *inter alia* adopted:

- 1.1 That the suspended Municipal Manager (Mr. LD Beukes) be reinstated and all disciplinary charges against him be withdrawn and that the tenure of the acting municipal manager (Mr. PJ Baker) be terminated and he return to his previous position as Corporate manager
  - 1.2 That the mayor and speaker of the Municipality (Ms. M. Bruintjies-Groenewald) be suspended without pay, effective from 18 February 2009, pending a disciplinary enquiry and that the Council be authorised to take legal action to prevent Bruintjies-Groenewald from visiting the Municipality.
  - 1.3 That councillor FXJ Van Rooyen be appointed mayor of the municipality.
2. The two applications before us are a direct consequence of the meeting of 17 February 2009 and the resolutions adopted thereat.
  - 2.1 The first application under case no 291/09 was launched on 23 February 2009. Herein the Municipality seeks the following relief against Bruintjies-Groenewald:

- “2.1 That the respondent be interdicted from and/ or restrained from visiting applicant’s offices.*
- 2.2 That respondent be restrained from interfering with the workers at applicant’s offices.*
- 2.3 That respondent be interdicted and/ or restrained from intimidating applicant’s personnel herself and/ or with the assistance of outside agencies.*
- 2.4 That respondent be interdicted and/ or restrained for disrupting services at applicant’s offices.*
- 2.5 That respondent be interdicted and/ or restrained from misrepresenting herself as to be acting and/ or doing business in the name and stead of applicant.*
- 2.6 That respondent be ordered to pay any legal costs incurred by herself, the same which was done in the name and stead of applicant.*
- 2.7 That the resolution taken by applicant on 17 February 2009, to suspend respondent without pay until a full investigation was conducted, be confirmed.”*

2.2 The second application under case no 325/09 was launched on 25 February 2009. Herein the Municipality as the first applicant and Baker and Bruintjies-Groenewald as second and third applicants respectively (citing the four councillors who attended the meeting of 17 February 2009 as respondents), seek an order in the following terms:

- “[2] 1.1 That the Fourth Respondent is hereby declared not to be councillor of the First Applicant’s Council.*
- 1.2 The Fourth Respondent is hereby interdicted and restrained form holding himself out to be a Councillor of the First Applicant’s Council.*
- 1.3 The Special Meeting, held by the Respondents, on the 17<sup>th</sup> of February 2009, at the Pofadder Hospital, is hereby declared unlawful, invalid and null and void.*

1.4 *The resolutions adopted by the Respondents at the aforesaid Special Meeting, held on the 17<sup>th</sup> of*

*February 2009, at the Pofadder Hospital, contained in annexure "K2" to the Applicants' founding affidavit*

*herein, are hereby declared unlawful, and null and void ab initio.*

1.5 *In the alternative to paragraph 1.4 hereinabove, that the resolutions adopted by the Respondents at the aforesaid Special Meeting held by the Respondents, on the 17<sup>th</sup> of February 2009, at the Pofadder Hospital, contained in annexure "K2", be hereby reviewed and set aside.*

1.6 *The Respondents are hereby ordered to pay the Applicants' cost herein on the Attorney and Own Client scale, jointly and severally, the one paying, the others to be absolved."*

3. By agreement between the parties on 27 February 2009 Lacock J ordered that both applications be heard on 17 March 2009, that the respondents and applicants not hold any council meetings of the Municipality until finalisation of the applications and that Mr. PJ Baker continue to act as municipal manager.
4. In argument before us Mr. Simon who appeared for the applicant in case no 291/09 and the respondents in case no 325/09 and Mr. Cronje his opposite side in both matters, agreed and conceded that the outcome of case 325/09 would be largely decisive of both applications. Put differently, if application 325/09 is successful and the court finds the special meeting of 17 February 2009 and the resolutions adopted there to be unlawful or invalid, the application under case no 291/09

must necessarily fail. On the other hand, should case no 325/09 fail, the only real issue to be determined in case 291/09 was whether Mr. FXJ Van Rooyen, the deponent to the founding affidavit herein, had the authority to bring the application in the name of the municipality.

5. I now deal with the issues in case no 325/09. A brief background of the events leading up to and the circumstances surrounding the meeting of 17 February 2009, largely common cause, now follow:

- 5.1 The council of the Khai-Ma Local Municipality, which serves the town of Pofadder in the Northern Cape, in happier days consisted of seven councillors; the mayor/speaker and six ordinary councillors, the four respondents and councillors JJ Swartbooi and DA Swartbooi.

- 5.2 At a special council meeting held on 15 December 2008 it was resolved that the municipal manager, Mr. L Beukes, be suspended with immediate effect and that Mr. PJ Baker be appointed as acting municipal manager.

- 5.3 On 8 February 2009, the Provincial Executive Committee (*“the PEC”*) of the African National Congress (*“the ANC”*), Northern Cape took a decision to expel the third respondent, Mr. Gall, from the ANC and as a councillor by

reason of his mobilizing and canvassing for COPE, an

opposing party. Mr. Gall received written notice of his expulsion from the ANC on 11 February 2009.

- 5.4 On 13 February 2009 the four respondents requested the second applicant (the acting municipal manager) in writing to convene a special council meeting to be held at the Pofadder Raadsaal on 16 February 2009.
- 5.5 On 14 February 2009 the second applicant responded in writing to the above request, informing the respondents that a request for a special meeting had to be made by a majority of councillors and directed to the Speaker in terms of section 29(1) of the Local Government: Municipal Structures Act, no 117 of 1998. That since Mr. Gall was no longer a member of the ANC, he ceased to be a councillor and could not request or attend such a special meeting. In the result the special meeting was not requested by a majority of councillors and could not be convened.
- 5.6 The proposed meeting did not take place on 16 February 2009.
- 5.7 On 17 February the four respondents again in writing requested the second applicant to convene a special meeting of the council for 15h00 the same day at the Poffadder Raadsaal.

5.8 The second applicant somehow discovered that the four respondents were conducting the proposed meeting at the Pofadder Hospital and rushed to the hospital where the meeting was being conducted at the bedside of the

third respondent who had been hospitalised. He handed each of the respondents a copy of his response to their request for a special meeting, which was in essence a repetition of his response to the first request referred to in sub-paragraph 5.5 above, whereafter he left.

6. The applicants contend that the special meeting of 17 February 2009 was not properly convened or constituted and that the resolutions adopted thereat are thus invalid and unlawful and stand to be set aside.

7. Section 29(1) of the Structures Act sets out the procedure for the convening of municipal council meetings as follows:

*“The speaker of a municipal council decides when and where the council meets subject to section 18(2), but if a majority of the councillors request the Speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request.”*

(section 18(2) referred to herein is of no import to the issue at hand since it only provides for council meetings to be held at least quarterly.)

8. It is common cause that contrary to the provisions of section 29(1), the speaker (third applicant) was not requested to convene the meeting, but rather the second applicant.

9. Mr. Simon argued that it had become the practice of the council to convene meetings by request to the municipal manager and

referred us by way of an example to an earlier request for a meeting by councillors addressed to the municipal manager dated 1 December 2009. Besides the fact that one previous instance of similar conduct hardly constitutes a practice, the argument disregards the fact that the second applicant in both his written responses to the respondents' requests for council meetings specifically referred the respondents to the provisions of section 29(1) and their non-compliance therewith.

10. The other problem which arises is whether all the councillors had been notified of the proposed meeting. The founding affidavit deposed to by the second applicant is silent in this regard but one would hardly expect him, being of the view that the proposed meeting would be unlawful, to inform the other councillors (the third applicant, Ms. D Swartbooi and Mr. J Swartbooi) of such a meeting. Moreover the respondents had no reason to believe that the second applicant would inform the remaining councillors of the proposed meeting in the light of his refusal to convene such a meeting.

In fact, the answering affidavit deposed to by the first respondent, however contradictory it may appear, seem to

confirm that all the councillors were not informed of the meeting. In paragraph 30 thereof he states that:

*“All the councillors were informed of the meeting save for the 3(three) councillors who elected not to attend.”*

11. What further compounds the respondents' problems with regard to the convening of the meeting is that no notice had been given of the change of venue for the meeting. The respondents' request for a special council meeting dated 17 February 2009 specifically indicates the venue for the proposed meeting as the *“Pofadder Raadsaal”*. It is common cause however that the meeting in fact took place at the hospital bedside of the third respondent. In his answering affidavit the first respondent explains the situation as follows in paragraph 30 thereof:

*“The meeting of 17 February 2009 was scheduled to take place in the Hospital “Konferensiesaal”. It was only when it was found that is was only the 4 (four) of us that Brandt proposed that we convene in her ward to conduct the meeting. There was no obscure reason for same.”*

12. In the first place, the first respondent is incorrect in his averment that the meeting was scheduled to take place at the hospital conference room as is clear from the request mentioned in paragraph 11 above. Secondly the question remains as to who decided and when was it decided to change the venue from the *“Raadsaal”* to the hospital. One can only

surmise as to the answer but the fact remains that the three remaining councillors were not notified of the change of venue.

13. There can be no doubt in the circumstances that the special meeting of 17 February 2008 was not convened in accordance

with the prescriptions of the Structures Act and was therefore invalid and unlawful. It follows that whatever resolutions were adopted at the meeting have the same fate. On this basis alone the meeting and the resolutions adopted thereat cannot stand. We do not consider it necessary in these circumstances to deal with the issue of whether the special meeting was properly constituted.

14. The applicants also ask for a declaratory order that the fourth respondent is no longer a councillor of the municipal council as well as an order interdicting and restraining him from holding himself out to be a councillor.

15. Item 1(2) of Schedule 6B of the Constitution of the Republic of South Africa, No 108 of 1996 provides inter alia as follows:

*“Loss of retention of Council membership*

*(1) ...*

*(2) A councillor representing a ward in a Municipal Council ceases to be a member of that Council if that councillor, other than in accordance with item 2, 3 or 7-*

*a) ceases to be a member of a party which nominated that councilor as candidate in the ward election*

b) ...”

16. The power of the PEC, ANC, Northern Cape, to expel party members for the actions that the fourth respondent is accused of, derives from a decision taken by the National Executive Committee (*“the NEC”*) of the ANC during December 2008. Instructions in this regard are contained in a letter from the

Secretary General of the ANC to all provincial secretaries dated 3 February 2009 and which was delivered to the fourth respondent together with his letter of expulsion and reads as follows”

*“The NEC of December 2008 had a detailed discussion on how best to deal with ANC members who work for other parties from within the ANC structures. It was decided that:-*

- a) *The long standing decision about ANC members who stand as independent candidates in election against ANC candidates are assumed to have expelled themselves.*
  - b) *Equally ANC members who work for any other party in opposition to the ANC should be treated the same i.e. as having expelled themselves.”*
17. The applicants contend that by virtue of the provisions of Schedule 6 B of the constitution, referred to above in paragraph 15 above, the fourth respondent on receiving notification of his expulsion from the ANC on 11 February 2009 automatically ceased to be a councillor of the municipal council.

18. The respondents however aver that the fourth respondent had noted an appeal against his expulsion from the ANC on 13 February 2009. The respondents in the answering affidavit, maintain at paragraph 51 thereof that:

*“It is trite that a member revives his/her membership at the noting of an appeal. In fact, not only does the National Constitution 1996 guarantee same but it forms the bedrock of the ANC Constitution.”*

19. The ANC constitution does not form part of the papers before us, although alluded to, as is indicated in paragraph 18 above and in the respondents Heads of Argument. On the day of the hearing Mr. Simon attempted to hand in copies of the ANC constitution but was countered with an objection from Mr. Cronje on the basis of it being inadmissible hearsay and that the applicants would be prejudiced by not previously having been given an opportunity to deal with its contents. The objection was upheld.
20. Be that as it may, under our common law, the execution of a decision is suspended when an appeal is noted, pending the outcome of the appeal. There is nothing before us which points to a reversal of this rule in the present case.
21. Mr. Cronje argued strongly that the wording of the NEC decision (paragraph 16 above) is indicative thereof that there can be no appeal in the circumstances of the fourth respondent's expulsion, since such a person is deemed to have

expelled himself. Further argument for the applicants on the issue of the fourth respondent's appeal is that the notice of appeal is wholly inadequate since it does not disclose any grounds or reasons for the appeal and it therefore does not constitute a proper notice of appeal. The fourth respondent's notice of appeal addressed to the ANC Secretary General and the ANC Provincial Secretary merely states the following:

*“Hiermee wil ek skriftelik appelleer teen my skorsing as ANC Lid. Hoop u vind dit in orde”*

22. The arguments of Mr. Cronje may or may not have any merit, but in the absence of any direct provision, either in the NEC decision or the ANC Constitution, that the ordinary rules do not apply, we are not at liberty to make an order with such far-reaching consequences as to deny the fourth respondent his right to due process. See *Max v Independent Democrats and Others* 2006(3) SA 112(CPD).
23. The issues of appealability and the validity of the notice of appeal are best left to the internal disciplinary processes of the ANC. In the circumstances therefore, we do not intend to grant the relief sought in prayers [2]1.1 and 1.2 of the Notice of Motion in case no. 325/09.
24. The respondents have furthermore attacked the authority of the second applicant to bring the application on behalf of the municipality. During argument Mr. Simon launched an attack

on the *locus standi* of the second respondent to bring the application in his personal capacity as well.

25. As far as bringing the application in his personal capacity is concerned I do not believe that there can be any question of the second applicants' direct interest in the relief sought. In fact the respondents conceded this in their answering affidavit.
26. The issue as to whether the second applicant has *locus standi* to bring the application on behalf of the Municipality is however not as clear cut.
27. A municipal manager derives his powers and functions from section 55 of the Local Government: Municipal Systems Act, No 32 of 2000, (*"the Systems Act"*), "subject to the policy directions of the municipal council." He is also the accounting officer of the Municipality.
28. Section 55 of the Systems Act does not *per se* give a municipal manager the authority to litigate on behalf of a municipality without council authorisation. He is however as accounting officer responsible and accountable for:
  - "a) *all income and expenditure of the municipality;*
  - b) *All assets and the discharge of all liabilities of the municipality; and*
  - c) *Proper and diligent compliance with the Municipal Finance Management act".*

29. An attempt had been made by the third applicant to convene a special meeting of the council scheduled for 09h00 on 23 February 2009 to address and discuss the meeting of 17 February 2009 and the resolutions adopted thereat. A proposed resolution *“that the meeting held by Councillors Van Rooyen, Van Rooi, Brandt and Mr. M Gall, on the 17<sup>th</sup> February 2009, at the hospital bedside of Ms. Brandt in the*

*Pofadder Hospital and the resolutions purportedly adopted thereat were unlawful, invalid, null and void for non-compliance with section 29 of the Local Government: Municipal Structures Act, no 117 of 1998.”* appeared on the agenda.

The respondents failed to attend the meeting which resulted in the meeting being inquorate. It is therefore rather disingenuous for the respondents to argue that a council resolution is necessary to bring the application on behalf of the Municipality if it is clear from the above mentioned attitude of the respondents that no such resolution could have been obtained.

30. In these circumstances we are of the opinion that the second applicant was duty bound by virtue of his position as manager and accounting officer of the Municipality to bring the application on behalf of the Municipality, not only in the interests of the municipality but also the community which it serves. See *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003(6) 38(SCA) paragraphs 10-15.

31. Having come to the conclusions that we have, the application under case no 291/2009 must necessarily fail. The only outstanding issue would be that of costs.
32. In case no 291/09 Mr. FXJ Van Rooyen brought the application in the name of the Municipality without any authority or good

cause to do so. There is no reason why the Municipality should bear the costs of this application.

33. In case no 325/09 the respondents have conducted themselves in a manner unbecoming of public office bearers, willfully ignoring the statutory requirements which regulate the council meetings of the municipality. In the light of the partial success of their opposition to the application we are however of the opinion that it is appropriate to make no order as to costs in case no 325/09

In the circumstances the following orders are made:

**In case no 291/2009**

- a) The application is dismissed.
- b) Mr. FXJ Van Rooyen is ordered to pay the costs of the opposed application *de bonis propriis*.

**In case no 325/2009**

- a) The Special Council Meeting held by the respondents on 17 February 2009 at the Pofadder Hospital is hereby declared unlawful, invalid and null and void *ab initio*
  
- b) The resolutions adopted by the respondents at the aforesaid special meeting are hereby declared unlawful, invalid and void *ab initio*
  
- c) No order is made as to costs.

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**C.C WILLIAMS**  
**JUDGE**

I concur

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**H J LACOCK**

**JUDGE**

For applicants in case no. 325/09,  
and respondents in case no 291/09

-Adv Cronje  
Mathews & Partners

For respondents in case 325/07,  
and applicants in case no 291/09

-Adv Simon  
Haarhoffs Inc