

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 1542/2007
Date heard: 31/03/2008
Date delivered: 18/04/2008

In the matter of:

SCHALK WILLEM BURGER LUBBE

APPLICANT

versus

**NAMA KHOI MUNICIPALITY
UNA ELIZABETH SIMBOYA
AUBREY NEVE BAARTMAN
MEC: DEPT HOUSING & LOCAL GOVERNMENT
NORTHERN CAPE
Z DE JONGH
M ISAACS
R MOUTON
J VAN DER WESTHUIZEN
L KHUZE
JM THEUNIS**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

**FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT
NINTH RESPONDENT
TENTH RESPONDENT**

Coram: MAJIEDT J *et* WILLIAMS J

JUDGEMENT

MAJIEDT J:

A. INTRODUCTION

1. This is an application for the review and setting aside of two decisions taken by the first respondent on 27 September 2007 and 6 November 2007 respectively. These decisions are to the same effect, namely:
 - a) to note an appeal against a judgment of this Court in the matter between the applicant and the first respondent and others under case number 1293/2006;
 - b) that the legal costs incurred in respect of the said appeal be paid by the first respondent; and
 - c) that the third respondent be appointed as acting municipal manager to the first respondent retrospectively from 1 October 2006 until a permanent municipal manager is appointed by way of a five year contract.
2. Although the applicant had originally sought an order compelling the third respondent to vacate his post as acting municipal manager to the first respondent with immediate effect and also for a costs order *de boniis propriis* against the 2nd, 5th, 6th, 7th, 8th, 9th and 10th respondents, alternatively against first and second respondents, this relief was not proceeded with during the course of argument by counsel for the applicant, Mr. Coetzee. The applicant merely seeks an order reviewing and setting aside the aforementioned decisions.

B. THE PARTIES

- 3.1 The applicant is a councillor of the first respondent's council and also a member of its Executive Committee.
- 3.2 The first respondent is a municipality duly established in terms of the provisions contained in the Local Government: Municipal Systems Act, 32 of 2000 (*"the Systems Act"*). Its offices are situated at Springbok. For the sake of convenience, I shall refer to the first respondent's council herein simply as *"the Council"*.
- 3.3 The second respondent is a councillor and mayor of the first respondent.
- 3.4 The third respondent is the acting municipal manager of the first respondent. His appointment as acting municipal manager lies at the heart of the dispute between the parties herein.
- 3.5 The fourth respondent is cited in his official capacity as the political authority responsible for all local governments in this province. No relief is sought against him.
- 3.6 The fifth to tenth respondents are all councillors of the first respondent. The sixth respondent is the Speaker of the Council. The second, fifth, sixth, seventh, eighth, ninth and tenth respondents are all members of the majority party in the Council, namely the African National Congress, while the applicant belongs to an opposition party.

C. BACKGROUND and ISSUES

4. The respondents have quite properly conceded that the decision

taken on 27 September 2007 stands to be reviewed and should be set aside, by reason of the fact that the meeting whereat the aforementioned decision had been taken had not been quorate. Nothing further needs to be said about this decision, save to make mention of it in the chronology of events insofar as it may be relevant to the decision of 6 November 2007.

5. The present matter constitutes the latest in a growing saga of litigation between the parties herein. It is of some considerable concern to us that this Court is increasingly being asked to intervene in disputes emanating from the Council and more will be said about this at the end of this judgment.
6. After the previous municipal manager of the Council, Mr. Engelbrecht, had reached retirement age and had declined an offer to continue in an acting capacity, a need had arisen to appoint a new municipal manager on a permanent basis. In the interim, the third respondent was appointed, first as an office manager to the mayor (second respondent) and to the speaker (sixth respondent) and thereafter as acting municipal manager. This decision had been taken at a meeting of the executive committee of first respondent on 4 October 2006 and thereafter at a meeting of the first respondent on 30 October 2006. These decisions were set aside on review by a judgment of this Court (per Olivier J, Mokgholola AJ concurring) under case number 1293/2006. The *ratio decidendi* of the judgment setting aside the aforementioned decision is that the executive committee had no authority in law to appoint an acting municipal manager and secondly that the Council was not empowered in law to ratify an

invalid act, namely the “appointment” of the third respondent by the executive committee which had no authority to do so.

7. From the foregoing exposition of the facts it is plain that the decisions of the first respondent (and here I am referring to its council and its executive committee) had been set aside on the basis that there was no authority in law to take the decisions which it did. As I have already alluded to, a further decision of 27 September 2007 regarding the same matter was also invalid (and that much is common cause between the parties) by virtue of the fact that the meeting was inquorate. This pattern of invalid administrative actions is quite troubling and I will revert to same later herein.
8. The decision taken on 6 November 2007 has to be seen in the context that the first respondent had (correctly so) viewed its earlier decision taken on 27 September 2007 as being invalid by reason of the absence of a quorum at that meeting. A decision in the exact same terms was then taken again on 6 November 2007 so as to remedy the aforementioned defect. It bears repetition herein that the effect of the decision of 6 November 2007 is that an appeal be lodged against the judgment of Olivier J and Mokgholoa AJ, that the first respondent bears the cost of that appeal and that the third respondent be appointed as acting municipal manager with retrospective effect from 1 October 2006 until such time as a permanent fulltime appointment is made.
9. The applicant primarily attacks the aforementioned decision of the first respondent on two bases, namely:

- a) That the provisions of clause 42(1) of the Regulations governing the first respondent's meeting procedures were not complied with; and
- b) That the provisions of s30(5) of the Local Government: Municipal Structures Act, No 117/1998 (*"the Structures Act"*) had to be complied with.

I shall discuss these two grounds of attack separately. Before doing so, however, it is necessary to consider first an aspect raised by the respondents which, if they are correct in their contentions, would render these two grounds of attack academic.

D. EFFECTIVENESS OF THE REVIEW ORDER SOUGHT BY THE APPLICANT

- 10. Mr. Albertus, who appears for the respondents herein, has raised the issue of whether an order in favour of the applicant would have any effect in view of a decision taken by the first respondent on 28 May 2007. On his argument, even if the applicant should succeed in having the decision of 6 November 2007 reviewed and set aside by this Court, it would be ineffective in view of the existence of this decision taken by the first respondent on 28 May 2007.
- 11. Mention is made by the applicant in his replying affidavit of this decision of 28 May 2007 when the Council had appointed the third respondent as the acting municipal manager. An extract from the minutes of that meeting is also appended to the replying affidavit.

That extract reflects the following:

“2.4 Aanstelling van Waarnemende Munisipale Bestuurder.
Die vergadering word meegedeel dat Mnr. Baartman tydens die vergadering van die Uitvoerende Komitee op 25 Mei 2007 aangestel is as Kantoorbestuurder in die kantoor van die Burgermeester en Speaker. Die versoek is nou dat die aanstelling vanaf Waarnemende Munisipale Bestuurder verskuif word. **Besluit deur die Spesiale Raadsvergadering van 28 Mei 2007 dat Mnr. NA Baartman aangestel word as Waarnemende Munisipale Bestuurder van Nama Khoi Munisipaliteit totdat die proses vir die aanstelling van die Munisipale Bestuurder afgehandel is. Hierdie aanstelling is onderworpe daaraan dat Mnr. Baartman nie daarop kan aandring dat hy in die pos van Munisipale Bestuurder aangestel moet word omdat hy vir 6 maande of langer waargeneem het in die pos. Hy word aangestel op posvlak 1 kerf 2.”**

According to the said minutes the applicant had seconded this motion which the second respondent in her capacity as mayor had introduced. The extract of the verbatim minutes is of some importance and I quote it in full below. Firstly the mayor, the second respondent herein, introduces the resolution as follows:

“Wat ek na die Raad toe bring is ons aanbeveling dat hy voortgaan om waar te neem as die Munisipale Bestuurder. Dit is al wat ons na die Raad toe bring. Dankie Speaker.”

I must explain that the “hy” referred to in the aforementioned extract is the third respondent, Mr. Baartman. The minutes reflect that the speaker then responds as follows:

“Baie dankie Burgermeester. Wat die Burgermeester dus vra is ‘n voorstel van die Raadslede se kant om – as ek dit reg had, Mnr. Baartman aan te stel as Waarnemende – dis ‘n aanbeveling – of as Waarnemende Munisipale Bestuurder totdat die proses afgehandel is van die aanstelling vir ‘n Munisipale Bestuurder. Raadslid John stel dit voor. Enige sekondant?”

The applicant is then recorded by the minutes to state as follows:

“Voorsitter, ek wil dit sekondeer met ‘n duidelikheidstelling. Die waarnemings-

gedeelte gekondoneer word en dat hy aangaan totdat die proses voltooi soos wat u nou gesê het, maar met geen toekomstige eis om te sê ek het aanmekeer diens gehad – langer as ses maande en nou is ek reeds (onhoorbaar) en ek het weer gaan kyk na die notule wat ons gekry het wat ons gelees het en geteruggerapporteer het dat dit in orde is.”

12. Mr. Albertus’ argument is that, by virtue of the applicant seconding the aforementioned resolution, even if the decision of 6 November 2007 is set aside, this decision of 28 May 2007 had been reached by consensus, including that of the applicant, has never been assailed, nor is it the subject of the attack in the review application now before us.
- 13.1 I am in agreement with Mr. Coetzee that this argument has no merit whatsoever.
- 13.2 Firstly, it must be understood that in the context of the events, the third respondent had been appointed as office manager of the Speaker and the Mayor on 25 May 2007. At the time of this particular meeting, i.e. 28 May 2007, the decision taken on 6 October 2006 and 30 October 2006 appointing the third respondent as acting municipal manager was the subject of the dispute between the very same parties in this matter now before us, namely as a review application under case number 1293/2006, referred to earlier herein, to have the said decision set aside. That eventually culminated in the judgment by Olivier J and Mokgholola AJ granting the relief sought on review. There was, therefore, in the minds of all concerned an existing decision of October 2006 appointing the third respondent as acting municipal manager. The applicant had taken the view at that stage that such decision was reviewable and had therefore launched his

application under case number 1293/2006. The respondents on the other hand, took the contrary view that the October 2006 decision was valid and binding and they consequently fiercely resisted the relief sought under case number 1293/2006.

- 13.3 Given the aforementioned facts, there would be no reason whatsoever for the Council to take a new decision regarding the very same topic, namely the appointment of an acting municipal manager. In the same vein, there would be no reason whatsoever for the applicant to retract his earlier stance, namely that the decision of October 2006 was reviewable. It is utterly illogical that the applicant would all of a sudden during May 2007 support a new resolution for the appointment of third respondent as acting municipal manager. The probabilities therefore overwhelmingly indicate that at the meeting of May 2007 the Council did not intend, as I hereby hold, to take a new resolution to have the third respondent appointed as acting municipal manager.
14. What must also be borne in mind further is the fact that originally the aforementioned appointment had been made in October 2006 on a month to month basis. In my view, the object of the meeting in May 2007 was to provide a firmer basis for appointment of the third respondent in an acting capacity, namely until a permanent appointment is made. Furthermore, as Mr. Coetzee has correctly submitted, from the applicant's perspective the emphasis during this meeting was placed on the fact that no legitimate expectation should be raised with the third respondent that he would be entitled to a permanent appointment in the post, for having acting therein for a lengthy period of time. Put differently, from the

applicant's perspective (and the minutes reflect this), what he was supporting was not a new resolution appointing the third respondent as acting municipal manager, but a firmer basis for his acting stint with regard to period of time and also that a caveat be placed on record that the third respondent should not expect to be permanently appointed in the position only by virtue of the fact that he had acted in the position for a lengthy period of time. Consequently Mr. Albertus' reliance on this particular "resolution" is misconceived in my view.

I now turn to a discussion of the two bases of attack against the decision of 6 November 2007.

**E. ALLEGED NON-COMPLIANCE WITH THE PROVISIONS
CONTAINED IN SECTION 30(5) OF THE STRUCTURES ACT**

15. Section 30(5) of the Structures Act provides as follows:

“(5) Before a Municipal Council takes a decision on any one of the following matters it must first require its executive committee or executive mayor, if it has such a committee or mayor, to submit to it a report and recommendation on the matter:

- a) Any matter mentioned in section 160(2) of the Constitution;
- b) The approval of an integrated development plan for the Municipality, and any amendment to that plan;
- c) The appointment and conditions of service of the Municipal Manager and the Head of the Department of the Municipality.”

From the foregoing it is plain that the issue to be decided by us is the alleged non-compliance of the provisions contained in s30(5) (c) as quoted above.

In conjunction with this particular provision should be read the provisions of s82 of the same Act, which provides as follows:

- “(82) Appointment.
- (1) A municipal council must appoint -
 - a) A municipal manager as the head of administration and also the accounting officer for the municipality;
 - b) When necessary an acting municipal manager.
 - (2) A person appointed as municipal manager must have the relevant skills and expertise to perform the duties associated with that post.”

16. It is the applicant’s contention that the minutes of the meeting of 6 November 2007 reflects that there was no report or recommendation from the executive committee or executive mayor before the first respondent when the decision was taken to appoint

the third respondent as the acting municipal manager. It is in fact common cause between the parties that this is indeed the case. Mr. Albertus has met this contention with the submission that s30(5) of the Structures Act does not deal with the appointment of an acting municipal manager at all. He submits that on a proper interpretation of this subsection, read with the provision contained in s82, there can be little doubt that the intention of the Legislature was to exclude from the operation of s30(5) the appointment of an acting municipal manager. Mr. Coetzee, on the other hand, has submitted that a construction of the statutory provisions as contended by Mr. Albertus, could lead to absurd results in practice, something which the Legislature is presumed not to have intended.

- 17.1 Recently, the SCA cited with approval the following dictum of Wessels AJA in **Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd & another 1962(1) SA458(A)** at 476 E-G in respect of the proper approach to be followed when considering a statutory provision:

“In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, ie with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute, as well as the

‘matter of the statute, its apparent scope and purpose, and within limits, its background’.

In the ultimate result the Court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.”

See: **Desert Palace Hotel Resort v Northern Cape Gambling Board 2007(3) SA 187 (SCA)** at par 8 (190 E-G).

See also: **Feldman v Midgin NO 2006(6) SA 12 (SCA)** at par. 16 (17 D-F).

17.2 The so called “golden rule” of literal interpretation of a statute was authoritatively laid down by Innes J in **Venter v R 1907 TS 910** at 914-915 and has been confirmed many times subsequently; see *inter alia* **Van Heerden v Joubert 1994(4) SA 793 (A)** at 795 E-G; **Manyasha v Minister of Law & Order 1999(2) SA 179 (SCA)** at 186 B-C.

17.3 An application of the aforementioned principles to the present matter leads to the inescapable conclusion that, as Mr Albertus has contended, the statutory provision does not include the appointment of an **acting** municipal manager. But is there merit in the contention by Mr. Coetzee that this can lead to absurd results in practice? I think not.

17.4 In **Venter v R**, *supra*, Innes J stated (at 914-915) that:

“(W)hen to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account

See further the dictum of Scott JA in **Hanekom v Builders Market Klerksdorp (Pty) Ltd and others 2007(3) SA 95 (SCA)** at 98 H-I:

“Over the years courts have repeatedly warned of the dangers of departing

too readily from the ordinary meaning of the words of the statute and have stressed that the absurdity must be 'utterly glaring' or the true intention quite clear and not merely a matter of surmise or probability. On the other hand, as accepted in *Venter v Rex*, ambiguity in the provision in question is not a requirement for departure from its literal meaning. It has also been accepted that to avoid the absurdity or give effect to the true intention of the Legislature, it is permissible not only to cut down or restrict the language used but also to expand it. See, for example, the comments of Corbett J in *S v Burger* 1963 (4) SA 304 (C) at 308A - 309B (cited with approval by Friedman J in *De Villiers v Kinsale Properties Share Block Ltd* 1986 (2) SA 592 (D) at 594G - 595E).

17.4 In the present matter the absurdity contended for has not been outlined. No examples of such absurdities have been advanced, save that an acting appointment may be effected for such lengthy periods that it may in effect become a *de facto* permanent appointment. But that is not the case here. No such averments are to be found in the applicant's papers, nor am I convinced that there are grounds for such a belief.

17.5 I am therefore satisfied that s30(5) does not apply to the appointment of an acting municipal manager and that such an interpretation would not lead to absurd results.

F. ALLEGED NON-COMPLIANCE WITH CLAUSE 42(1)

18. Only the Afrikaans version of the regulations governing the first respondent's meeting procedures had been placed before us. Clause 42(1) thereof reads as follows:

“42. MANIER VAN STEM

(1) Elke geopponeerde mosie of voorstel sal deur die Voorsitter by die Raad ingedien word, wat die lede sal vra om deur middel van die opsteek van hande, behalwe waar die Raad anders besluit, te wys of hulle daarvoor of daarteen is. Hy/sy sal daarvolgens die uitslag van die stem verklaar.”

The applicant's case is that there had been no show of hands when the decision of 6 November 2007 had been taken. Instead, the applicant and certain councillors had voiced their opposition to the resolution and requested the speaker (the sixth respondent) to note their said opposition. Thereafter the speaker simply assumed that the other councillors were in favour of the resolution and noted the decision of the Council. It is important to repeat the minutes in this regard *verbatim*. It reads as follows:

“Raadslede KR Groenewald, SJ Engelbrecht, HP Cloete, RC Rainers van die Onafhanklike Demokrate, asook Raadslid LL Vries versoek dat hulle teenstem teen die voorstel van Raadslede Simboyia/De Jongh, genotuleer word. Die besluit van Raadsvergadering van 6 November 2007 is dus
 (1) dat die besluit wat nou geneem word terugwerkend is tot en met 27 September 2007;
 (2) dat Nama Khoi Munisipaliteit appél aanteken teen die uitspraak van die hofsaak tussen SWB Lubbe v Nama Khoi Munisipaliteit;
 (3) dat die regskostes ten opsigte van die hofsaak betaalbaar is deur Nama Khoi Munisipaliteit;
 (4) dat Mnr. NA Baartman terugwerkend vanaf 1 Oktober 2006 aangestel word as waarnemende munisipale bestuurder totdat Nama Khoi Munisipaliteit 'n permanente munisipale bestuurder op 'n vyfjaar kontrak basis aanstel.”

19. The respondents have not in their answering affidavits controverted the averment that no show of hands had occurred. This aspect is therefore common cause. Mr. Coetzee, on behalf of the applicant, has submitted that in view of this common cause fact, no proper decision had been taken, since the peremptory stipulations of clause 42 above had not been complied with. Mr. Albertus on the other hand, has submitted that since clause 42(1) makes provision therefor that the Council may deviate from the procedure of the showing of hands, a proper decision had in fact been taken.
20. In my view the proviso in regulation 42(1) above (“*behalwe waar*

die raad anders besluit") envisages situations where the Council may take the view that voting by secret ballot would be more apposite in the circumstances of a particular agenda item. The ultimate effect of this particular regulation is that a decision must be taken through a vote, which must be recorded. This entails the making of a choice, whether by show of hands or by secret ballot, by all councillors for or against a particular resolution. It is inconceivable, in my view, that a situation can arise where assumptions are made that all those who have not requested that their vote against a particular resolution be noted, *a fortiori* vote in favour of the resolution.

21. Moreover, and related to my aforementioned view, is the fact that the approach advocated by Mr. Albertus, does not make provision for a situation where a councillor/s may choose to abstain from voting for or against a particular resolution. In all the circumstances I am of the view that Mr. Coetzee is correct that there has not been compliance with this particular regulation.
22. Mr. Albertus has referred to the provisions contained in regulation 42(2) which make provision that an objection may be raised by a councillor and that a division of votes may be declared. He has pointed out in his argument that not a single councillor had raised an objection in terms of this regulation. I am of the view that this does not assist the respondents at all. Where the procedure had not been correctly followed, it constitutes an irregularity and the question that arises next is what the effect thereof is.
23. Regulation 42(1) *supra* is couched in peremptory terms as is

illustrated by the use of the word “*sa*”. These regulations were issued in accordance with s156(2) of the Constitution, Act 108 of 1996, which reads as follows:

“(2) A municipality may make and administer by-laws for the effective administration of the matters it has the right to administer.”

Section 14 of the Systems Act makes provision for the manner of publication of such by-laws. In my view, therefore, these regulations have statutory force in the form of subordinate or delegated legislation. Local government institutions are therefore bound by them and can exercise powers only insofar as it is permitted by such subordinate legislation (it goes without saying that applicable subordinate or delegated legislation will prevail only in the absence of applicable supreme or original legislation). This doctrine of legality is firmly entrenched in our law; See inter alia:

Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others 1999(1) SA374 (CC);

President of the Republic of South Africa and others v SARFU and others 1999(2) SA14 (CC);

Pharmaceutical Manufacturers of South Africa: in re Ex Parte President of the RSA 2000(2) SA675 (CC) at 687 B-H.

In the Fedsure case *supra*, the Constitutional Court held as follows:

“It seems central to the concession of our Constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense then the principle of legality is implied within the terms of the interim constitution.” - at par58.

24. Quite clearly delegated legislation must pass constitutional muster and must meet the well established common law tests for validity such as:

- a) Competence of delegation;
- b) Delegated legislation may not conflict with original legislation;
- c) The requirement of administrative lawfulness must be met;
- d) Delegated legislation must not be *ultra vires*;
- e) There is a prohibition on the vagueness of delegated legislation;
- f) The common law prohibitions on the unreasonableness, unfairness and discriminatory operation of delegated legislation are now encapsulated by the investing thereof with constitutional supremacy.

See in this regard, generally: Joubert (ed), **Law of South Africa**, 1st reissue, Vol. 25 (Part 1) and cases cited there.

In the present matter there is no attack at all on the validity of the delegated/subordinate legislation in question here.

25. Consequently and for the reasons aforementioned, I am of the view that the first respondent's failure to comply with peremptory subordinate legislative provisions, renders its decision reviewable.

G. CONCLUSION

26. The decision of 6 November 2007 should, for the foregoing reasons, be set aside.

27. Costs should follow the outcome and I include the reserved costs of 30 November 2007 and 14 March 2008. The respondents who have opposed this matter and who are councillors of the first respondent (i.e. 2nd, 5th, 6th, 7th, 8th, 9th and 10th respondents) are somewhat fortunate to escape not being mulcted in costs *de boniis propriis* herein. The consistent pattern of unlawful administrative action, largely due to their conduct, is extremely troubling. It may conceivably stifle service delivery to the citizens of Springbok and surrounding areas. This sort of persistent conduct borders on malfeasance and, if continued, may well culminate in costs orders against individual councillors in their personal capacities. Such continued conduct is to be deprecated in the strongest terms.

28. The following order is issued:

28.1 The first respondent's decision of 6 November 2007 where it was decided, *inter alia*, that first respondent lodges an appeal against the judgment of Olivier J et Mokgholola AJ in case number 1293/2006, that all costs in the said matter be for the account of first respondent and that the third respondent is appointed as acting municipal manager of the first respondent retrospectively from 1 October 2006, is hereby set aside.

28.2 The first respondent is ordered to pay the costs of this application.

SA MAJIEDT
JUDGE

I CONCUR.

CC WILLIAMS
JUDGE

FOR THE APPLICANT : ADV W COETZEE
instructed by ENGELSMAN MAGABANE INC

FOR THE RESPONDENTS : ADV MA ALBERTUS SC
instructed by TOWELL & GROENEWALD ATTORNEYS

DATE OF HEARING : 2008-03-31
DATE OF JUDGEMENT : 2008-04-18