

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case Nr: 3444/2004

In the matter between:

LEBINA DANIël TSOTETSI

Applicant

and

NS MOHAPI

First Respondent

(in her capacity as Executive Mayor of
the Motheo District Municipality)

**THE MUNICIPAL COUNCIL OF THE
MOTHEO DISTRICT MUNICIPALITY**

Second Respondent

Case nr: 3446/2004

In the matter between:

NS MOHAPI

Applicant

(in her capacity as the Executive Mayor of
the Motheo District Municipality)

and

MOTHEO DISTRICT MUNICIPALITY
LEBINA DANIEL TSOTETSI

First Respondent
Second Respondent

CORAM: VAN DER MERWE J

JUDGMENT: VAN DER MERWE J

HEARD ON: 28 OCTOBER 2004

DELIVERED ON: 11 NOVEMBER 2004

[1] This judgment deals with the abovementioned two

applications, i.e. application no. 3444/2004 and 3446/2004. By agreement between the relevant parties the abovementioned two applications were heard simultaneously on the basis that subject to the applicable *onus*, the evidence in the one application may be referred to in respect of the other.

- [2] In application no. 3444/2004 the applicant is Mr. Lebina Daniël Tsotetsi. The first respondent cited in that application is Ms. Nontsokolo Selina Mohapi in her official capacity as executive mayor of the Motheo District Municipality. The municipal council of the Motheo District Municipality is the second respondent in that application. In application no. 3446/2004 the applicant is the said Ms. Mohapi in her capacity as executive mayor of Motheo District Municipality. The first respondent in that application is the Motheo District Municipality and the second respondent in that application is the aforesaid Mr. Lebina Daniël Tsotetsi. Neither the Motheo District Municipality nor its municipal council opposed any of the abovementioned applications.

Therefore also, there was no appearance on behalf of the municipal council at the hearing. For the sake of convenience I will in this judgment refer to the aforesaid Mr. Lebina Daniël Tsotetsi merely as Mr. Tsotetsi and to the aforesaid Ms. Nontsokolo Selina Mohapi in her official capacity as executive mayor of Motheo District Municipality, as Ms. Mohapi.

- [3] It is in my view convenient and proper to deal firstly with application no. 3444/2004 and thereafter with application no. 3446/2004.

Application no: 3444/2004

- [4] In this application Mr. Tsotetsi essentially claimed an order in terms of which his suspension by Ms. Mohapi on 4 October 2004 is rescinded with immediate effect, that disciplinary proceedings instituted by Ms. Mohapi against Mr. Tsotetsi is declared null and void, Ms. Mohapi is ordered to terminate those proceedings with immediate effect and

Ms. Mohapi is prevented from interfering with the carrying out of the official duties of Mr. Tsotetsi. Also Mr. Tsotetsi asked that Ms. Mohapi in her personal capacity be ordered to pay the costs of this application on attorney and own client scale.

- [5] It is common cause between the parties that Mr. Tsotetsi was employed by the Motheo District Municipality in the capacity of Strategic Executive Director: Corporate Services. It is furthermore undisputed that the municipal council of Motheo District Municipality during a meeting held on 10 September 2004, appointed Mr. Tsotetsi as acting municipal manager. It was accepted by both parties that the position of Strategic Executive Director: Corporate Services is that of a manager of Motheo District Municipality directly accountable to the municipal manager as referred to in section 56 of the Local Government: Municipal Systems Act, No. 32 of 2000 ("the Systems Act").

- [6] It is furthermore common cause that Ms. Mohapi in her

aforesaid capacity instituted disciplinary proceedings against Mr. Tsotetsi and that by letter dated 4 October 2004 signed by Ms. Mohapi, Mr. Tsotetsi was suspended with immediate effect pending the aforesaid disciplinary procedures. This letter was directed to Mr. Tsotetsi as Strategic Executive Director: Corporate Services and included the following as conditions of suspension:

- “4. You will not be allowed to remove anything from your office, except for your personal belongings;
- 5. You will not be allowed to enter any premises of the Municipality or your office during the period of suspension;
- 6. You will be prohibited to seek any information from members of staff or councillors of the Municipality;
- 7. You will furthermore be prohibited to make any official contact with either staff members or councillors of the Municipality.”

[7] In her answering affidavit in this application, dated 19 October 2004, Ms. Mohapi declared that Mr. Tsotetsi was

suspended by means of the aforementioned letter only in his capacity as Strategic Executive Director: Corporate Services and therefore, by necessary implication, not in the capacity of acting municipal manager. This, according to the affidavit of Ms. Mohapi was evident from the letter of suspension and it is obvious, she added, that Mr. Tsotetsi:

“has misconceived the capacity in which he was suspended.”

- [8] The declaration under oath that Mr. Tsotetsi was thus only suspended in the capacity of Strategic Executive Director: Corporate Services and not as acting municipal manager, is so clearly untenable that it cannot be accepted. It will in the first place be remembered that the conditions of suspension mentioned in the letter of 4 October 2004 included that Mr. Tsotetsi was prohibited from entering onto any premises of Motheo District Municipality and even from making any official contact with any staff members or councillors of the Motheo District Municipality. This is quite incompatible with the stance that after Mr. Tsotetsi was suspended per the

letter of 4 October 2004, he remained the acting municipal manager. In application No. 3446/04 Ms. Mohapi in the first place sought an order prohibiting Mr. Tsotetsi from participating directly or indirectly in any way whatsoever in the affairs and administration of Motheo District Municipality pending the final adjudication of the disciplinary enquiry instituted against Mr. Tsotetsi. In the second place, in that application, Miss. Mohapi sought an order preventing the taking place of a meeting of the municipal council of Motheo District Council called by Mr. Tsotetsi on 6 October 2004 to take place on 8 October 2004. This meeting was called for the purpose of dealing with a motion for the removal of Ms. Mohapi as executive mayor of Motheo District Municipality as well as a motion for removal of the speaker of this municipality. In her founding affidavit in that application, dated 8 October 2004, Ms. Mohapi stated as the very basis of her case in respect of the meeting of 8 October 2004, that because of his suspension, Mr. Tsotetsi was not empowered to convene the meeting in the capacity of acting municipal manager nor was he empowered to chair the meeting or any

part thereof. Finally, in a letter written by Miss. Mohapi herself and attached to her founding affidavit, the following is stated:

- “26. It merits mention to state that Motheo Municipality currently does not have a Municipal Manager and/or an Acting Municipal Manager, since I have already suspended the acting Municipal Manager, Mr. L D Tsotetsi as a result of the charges already mentioned hereinabove. A disciplinary hearing is scheduled for the 18th of October 2004. This process is on course and will be finalized expeditiously. Consequently there is no Municipal Manager in the institution to proceed on the mooted motions. I submit that these motions cannot be carried out for the reasons already stated.
27. Despite the fact that I have suspended the acting Municipal Manager, my office was served with a letter from the now suspended Acting Municipal Manager who still refuses to abide with the conditions of suspension, that a meeting will be held on the 8th October 2004 at 10h00 which will deal with our removal and that

me and the Speaker should attend.”

This letter was sent to various recipients on 7 October 2004.

The conduct of Ms. Mohapi of making a patently false statement under oath, obviously in an attempt to gain an advantage that turned out to be futile, is highly deplorable. However, the issue in question must be decided on the true facts, namely that Mr. Tsotetsi had been suspended on 4 October 2004 in the capacity of acting municipal manager and of Strategic Executor Director: Corporate Services. This was conceded by counsel for Ms. Mohapi.

[9] The case for Mr. Tsotetsi in this application is that Ms. Mohapi as executive mayor had no power to institute disciplinary proceedings against him or to suspend him in any of the aforementioned capacities. Therefore, so it was argued, the suspension of Mr. Tsotetsi and the disciplinary proceedings must be set aside.

[10] I am convinced that Ms. Mohapi, as executive mayor, had no power to suspend Mr. Tsotetsi either in the capacity of acting municipal manager or of Strategic Executive Director: Corporate Services or to institute disciplinary proceedings against Mr. Tsotetsi. The functions and powers of executive mayors are listed in section 56 of the Local Government: Municipal Structures Act No. 117/1998 (“the

Structures Act”). These functions and powers include, according to section 56(3)(f) of the Structures Act, such duties and powers as the relevant municipal council may delegate to the executive mayor in terms of section 59 of the Systems Act. In terms of section 59(2)(b) of the Systems Act, such delegation by a municipal council must be in writing. It is common cause that the municipal council of the Motheo District Municipality did not delegate any such duties and powers to its executive mayor. Apart from any delegated powers or the performance of a ceremonial role determined by a municipal council, in my judgment, the powers and functions of executive mayors in terms of section 56 of the Structures Act are to give direction to the municipal council by policy formulation, to monitor and oversee the performance of the municipality and to report to the municipal council. See in this regard **DEMOCRATIC ALLIANCE AND ANOTHER v MASONDO N.O. AND ANOTHER** 2003 (2) SA 413 (CC) at 424 para [32]. These powers and functions of an executive mayor do not include the power to institute disciplinary proceedings against

officials or employees of a municipality or to suspend any such official or employee. Moreover, in terms of section 82 of the Structures Act, a municipal council must appoint a municipal manager who is the head of administration and also the accounting officer of the municipality and must when necessary, appoint an acting municipal manager. Similarly a manager directly accountable to the municipal manager is appointed in terms of section 56 of the Systems Act by a municipal council after consultation with the municipal manager. In my judgment, in the absence of any contrary provision, a municipal manager, acting municipal manager or manager of accountable to the municipal manager, may, by necessary implication, only be suspended or removed from office by the municipal council or person(s) to whom the municipal council has properly delegated these powers.

- [11] The principle of legality of our law provides that a public body and public official may exercise no power and perform no function beyond that conferred upon them by law. The exercise of public power is only legitimate where lawful. See

FEDSURE LIFE ASSURANCE LTD AND OTHERS v
GREATER JOHANNESBURG TRANSITIONAL
METROPOLITAN COUNCIL AND OTHERS 1999 (1) SA
374 (CC) at 399 - 400.

[12] It follows that the suspension of Mr. Tsotetsi by Ms. Mohapi must be set aside. Counsel for Mr. Tsotetsi accepted that in the event of a dismissal of Application No. 3446/04 the further substantial relief claimed in the Application No. 3444/04 should not be granted. Although there are strong indications that Ms. Mohapi suspended Mr. Tsotetsi in order to attempt to prevent her removal as executive mayor on 8 October 2004, a factual finding to that effect cannot be made on the papers. In the absence of a finding of *mala fide* conduct on the part of Ms. Mohapi, I am not prepared to order her to pay costs in personal capacity or on a higher scale than party and party costs.

APPLICATION NO. 3446/2004

[13] In view of the conclusion that I have reached in this application, I do not consider it necessary to provide a detailed exposition of the factual background thereof. Suffice it for present purposes to say that on 6 October 2004 Mr. Tsotetsi, acting as acting municipal manager, gave notice that a special council meeting of the municipal council of Motheo District Municipality will be held on Friday 8 October at 10h00 in the council's chamber, Bloemfontein. The purpose of the meeting was to consider motions for removal by the municipal council of Ms. Mohapi as executive mayor and also for the removal of the speaker of the municipal council of the Motheo District Municipality. On the morning of 8 October 2004 Ms. Mohapi brought the present application on an urgent basis. In the notice of motion essentially a *rule nisi* was sought calling upon the respondents in this application to show cause firstly, why Mr. Tsotetsi should not be ordered not to participate directly or Indirectly in any affairs and administration of Motheo District Municipality pending the final adjudication of the disciplinary enquiry instituted against him and secondly, why the taking

place of the meeting of the municipal council of the Motheo District Municipality scheduled for 8 October 2004 at 10h00 should not be prevented from taking place, on the basis that the meeting had not been properly convened. In terms of the notice of motion, it was asked that an interim interdict with immediate effect be issued in accordance with the above.

[14] However, counsel for Ms. Mohapi and Mr. Tsotetsi only appeared in the Judge's chambers in connection with this application at approximately 10h25 on 8 October 2004, i.e. after the meeting had already commenced. Consequently the matter was postponed by agreement between counsel for Ms. Mohapi and Mr. Tsotetsi. Answering affidavits and replying affidavits have since been filed. It is common cause that the municipal council of the Motheo District Municipality on 8 October 2004 unanimously resolved to remove Ms. Mohapi as executive mayor and also to remove its speaker.

[15] At the hearing counsel were agreed that it would serve no useful purpose to issue a *rule nisi* in respect of the

application. Counsel were also agreed that the application should be determined on the basis that the the following final orders plus costs are claimed, namely an order interdicting Mr. Tsotetsi from participating directly or indirectly in any way whatsoever in the affairs and administration of Motheo District Municipality pending the final adjudication of the disciplinary inquiry instituted against Mr. Tsotetsi and an order in the following terms:

“Declaring the meeting called by the Second Respondent as scheduled for Friday, the 8th of OCTOBER 2004 at 10:00 in the Council’s Chambers, Freepan Building, Bloemfontein to have no force and effect.”

- [16] In the light thereof that the suspension of Mr. Tsotetsi must be set aside with immediate effect, he cannot be prohibited from participating in the affairs and administration of Motheo District Municipality and therefore the first aforesaid order must be refused.

[17] It is clear that the second order now claimed, is a declaratory order. The applicant seeks an order declaring the meeting as such to have no force and effect, without attacking or dealing with the resolutions taken at that meeting. In terms of section 19(1)(a)(iii) of the Supreme Court Act, no. 59 of 1959, I have a discretion to make such order. In my view however, there are weighty reasons for exercising my discretion against Ms. Mohapi and for refusing to make the declaratory order sought. As stated above, the municipal council of Motheo District Municipality at a meeting of 8 October 2004 resolved to remove Ms. Mohapi as executive mayor and also resolved to remove its speaker at the time. Even if these resolutions may have been flawed in some manner, they stand and are of force until set aside by a competent court. See in this regard OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS 2004 [3] ALL SA 1 (SCA). No application to review and set aside any of these resolutions, serves before me. There is a real prospect that such proceedings may be instituted in future. The question whether the meeting of 8

October 2004 had been improperly convened on any of the grounds mentioned in this application, may be an important issue in such proceedings. In these circumstances a declaratory order with the effect that the meeting of 8 October 2004 has no force or effect as is claimed, will pre-empt such proceedings. What is more, such pre-emption of proceedings will take place in the absence of interested parties, such as the speaker that had been removed as well as people that may since have been appointed as executive mayor and speaker respectively in the place of those removed on 8 October 2004.

[18] It follows that this application must be dismissed with costs, including costs that stood over for later determination.

[19] In the result, I make the following orders:

APPLICATION NO: 3444/2004

Prayer 1 of the Notice of Motion is granted, with costs

APPLICATION NO: 3446/2004

The application is dismissed with costs, including the costs that stood over.

C.H.G VAN DER MERWE, J

CASE NO: 3444/2004:

On behalf of Applicant: Advocate J.P. Daffue
Instructed by
Lovius Block Attorneys
BLOEMFONTEIN

On behalf of Respondents: Advocate W.J. Edeling
Instructed by
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BLOEMFONTEIN

CASE NO: 3446/2004

On behalf of Applicant: Advocate W.J. Edeling
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