



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

Heard: 22 March 2024

Judgment delivered: 25 March 2024

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 720/2024

In the matter between: -

**LEONARD MAKENNA
ELZERONE VAN NIEKERK
FRANS MANS
RACHEL JANSEN
PAUL VAN NIEKERK**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT**

and

**THEMBELIHLE LOCAL MUNICIPALITY
THEMBELIHLE LOCAL MUNICIPALITY:
MUNICIPAL COUNCIL
THEMBELIHLE LOCAL MUNICIPALITY:
MUNICIPAL COUNCIL SPEAKER
(JAMIAN NKOSANA)**

**FIRST RESPONDENT
SECOND RESPONDENT

THIRD RESPONDENT**

**THEMBELIHLE LOCAL MUNICIPALITY:
CHIEF FINANCIAL OFFICER
(MR R SHUPING)**

FOURTH RESPONDENT

**MEC: CO-OPERATIVE GOVERNANCE,
HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS:
NORTHERN CAPE PROVINCE**

FIFTH RESPONDENT

JUDGMENT

STANTON J

INTRODUCTION: -

[1] On 19 March 2024, the applicants, five of the councillors of the Thembelihle Local Municipality ("the Municipality") launched this urgent application in accordance with the provisions of Uniform Rule 6(12), in which they seek the following relief, namely that: -

- 1.1 The third respondent, Mr J Nkosana ("the Speaker") of the Municipality be ordered to convene a special council meeting, to be held no later than 29 March 2024, to table a disciplinary report in relation to the fourth respondent, Mr R Shuping ("Mr Shuping") as per the directive of the fifth respondent, the MEC: Co-operative Governance, Human Settlements and Traditional Affairs: Northern Cape Province ("the MEC"), dated 11 March 2024 to allow the council members of the Municipality to make the necessary decisions in relation to the findings of the disciplinary report;
- 1.2 In the alternative, and in the event that the Speaker fails to convene a special council meeting, that the MEC be ordered to appoint a person

to convene and chair a special council meeting in terms of the provisions of section 29(1A) of the Local Government: Municipal Structures Act ("the Structures Act"); and

- 1.3 The Municipality, the Municipal Council and the Speaker be ordered to pay the costs of the application on an attorney and client scale, jointly and severally, the one absolving the other.
- [2] The Speaker opposed the application and the MEC filed a notice to abide with the decision of the Court. Neither the Municipality nor Mr Shuping opposed the application.

THE APPLICANTS' CASE: -

- [3] According to the applicants: -

- 3.1 On 22 June 2022, the first applicant, in his capacity as Executive Mayor of the Municipality ("the Mayor") issued a letter to the Speaker advising him of the Municipal Council's intentions to institute disciplinary proceedings in respect of alleged offences committed by Mr Shuping in his capacity as the then Acting Municipal Manager of the Municipality;
- 3.2 On 29 July 2022, the Mayor addressed a second letter to Mr Shuping placing him on precautionary suspension with full benefits pending investigations into the alleged acts of misconduct against him as per the resolution of the Municipal Council;
- 3.3 The Municipality and the Municipal Council appointed an investigator in terms of Regulation 5(3) of the Local Government: Disciplinary Regulations for Senior Managers ("the Regulations") and during March 2023 a detailed disciplinary report was provided to Mr Leserwane, the Acting Municipal Manager;

- 3.4 The Mayor was, however, never provided with a copy of the disciplinary report, despite numerous verbal requests that he be provided with same;
- 3.5 The disciplinary report was also not tabled before the Municipal Council, despite various meetings between the Mayor, the Speaker and Mr Shuping;
- 3.6 On 13 December 2023, the Municipal Council resolved to reinstate Mr Shuping with effect from 08 January 2024, without tabling the disciplinary report;
- 3.7 On 08 January 2024, the Mayor requested the MEC in writing to intervene in the matter;
- 3.8 On 11 March 2024, the MEC, in a letter addressed to the Mayor, directed that the disciplinary report should be tabled within 7 days of receipt of his letter;
- 3.9 On 12 March 2024, the Mayor provided the Speaker with a copy of the MEC's directive and informed him that a special council meeting should be convened within 7 days; and
- 3.10 The Speaker failed to call a meeting within the 7 days and as a consequence this application was issued.

APPLICABLE LEGISLATIVE FRAMEWORK: -

- [4] The applicants rely on the following legislative prescripts support of their application: -

- 4.1 Regulation 5, which in part reads: -

- "(1) Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.*
- (2) An allegation referred to in sub-regulation (1) must be tabled by the mayor or the municipal manager, as the case may be, before the municipal council not later than seven [7] days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting within seven [7] days to consider the said report.*
- (3) If the municipal council is satisfied that -*
- (a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven [7] days appoint an independent investigator to investigate the allegation[s] of misconduct; and*
 - (b) there is no evidence to support the allegation[s] of misconduct against the senior manager, the municipal council must within seven [7] days dismiss the allegation[s] of misconduct.*
- (4) The investigator appointed in terms of sub-regulation (3)(a) must, within a period of thirty [30] days of his or her appointment, submit a report with recommendations to the mayor or municipal manager, as the case may be.*
- (5) The report contemplated in sub-regulation (4) must be tabled before the municipal council in the manner and within the timeframe as set out in sub-regulation (2).";*

4.2 Section 29 of the Structures Act that stipulates: -

- "(1) The speaker of a municipal council decides when and where that 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;*

(1A) If the speaker or acting speaker refuses to call a meeting of council as requested in terms of subsection (1), the municipal manager, or in the absence of refusal by the municipal manager., a person designated by the MEC for local government in the province, may call and chair the meeting."

THE THIRD RESPONDENT'S CASE: -

[5] The Speaker, in his answering affidavit, reserved his rights to frame a proper response in a supplementary affidavit, but opposed the application on the following grounds: -

- 5.1 The application is not urgent, alternatively that urgency was self-created;
- 5.2 The non- joinder of councillors MB Mpamba, TE Diena, VS Dolopi, T Yola and MS Visser;
- 5.3 The applicants failed to establish the requisites of a final interdict; and
- 5.4 Non-compliance with the Structures Act.

URGENCY: -

[6] The applicants submit that the application should be heard on an urgent basis for the following reasons: -

- 6.1 The Mayor sought intervention from the MEC after exhausting all available internal remedies;
- 6.2 The MEC only intervened on 11 March 2024 and gave clear instructions and directives pertaining to the convening of the meeting within 7 days of receipt of his letter;

- 6.3 The delay to table the disciplinary report causes great prejudice to the Municipality and the Municipal Council as the Municipality is not afforded an opportunity to make a decision in respect of Mr Shuping who has total access to the Municipality's finances and bank accounts;
- 6.4 The Municipality is prejudiced in view of the fact that the Speaker continues to make decisions on its behalf that are binding to the Municipality, and which exposes the Municipality to immediate risks;
- 6.5 The failure by the Speaker to call an urgent special council meeting to table the report is a total disregard to the powers and functions bestowed upon the councillors by the necessary legislative framework;
- 6.6 The Speaker continues to violate the existing legal framework and directives from the MEC to the detriment of the Municipality;
- 6.7 The unlawful conduct of the Speaker constitutes an interference with the administration of the Municipality;
- 6.8 The Speaker is determined to misuse his powers to prevent duly appointed members of the Municipal Council to carry out their duties as required by law;
- 6.8 A decision on the fate of Mr Shipping needs to be taken immediately after the disciplinary report is tabled;
- 6.9 The Speaker creates instability in the Municipality that makes it impossible for the applicants to perform their functions properly;
- 6.10 The unlawful conduct of the Speaker needs to be curbed on an extremely urgent basis;

- 6.11 Mr Shuping continues to handle the affairs of the Municipality without any structure holding him accountable;
- 6.12 There is an immediate risk that the Municipal Council may be resolved in terms of the provisions of section 139(1)(c) of the Constitution of the Republic South Africa 108 of 1996;
- 6.13 The interest of justice requires the application to be heard on an urgent basis; and
- 6.14 Regulation 5(5) emphasises the fact that the report must be tabled as a matter of urgency.
- [7] In addition, Mr J Mongala, on behalf of the applicants, argued that the MEC's directive was the impetus that required the applicants to file this application on an urgent basis.
- [8] The requirements for urgency in applications have been dealt with numerous times by the courts. Rule 6(12)(b) of the Uniform Rules of Court provides: -
- "In every affidavit or petition filed in support of any application under para (a) of this subrule, the applicant shall set forth explicitly the circumstance which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course".*
- [9] There are thus two requirements that must be set forth in the founding affidavit in order to satisfy the requirements of the rule.¹ Whether an applicant has succeeded in satisfying the requirements for urgency must be determined by the contents of the founding affidavit.²

¹ Salt and Another v Smith 1991(2) SA 186 (NM) at 187 A.

² IL&B Marcow Caterers v Greatermans SA 1981(4) SA 108(C) at 111A.

- [10] In ***Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)***,³ Coetzee J held with reference to Rule 6(12)(b) that: -

'Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.'

- [11] In ***Vermaak v Taung Local Municipality***,⁴ the Court confirmed that:-

"The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a Court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the Court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date."

- [12] In ***Nelia's Liquor Store CC v Vresthena (Pty) Ltd & another***,⁵ the following is stated: -

"[32] The question of whether sufficient grounds exist for a matter qualifying to be considered as urgent and that condonation, as envisaged in terms of rule 6(12)(a), should be extended to an applicant must be considered with due and judicial regard to the following:

- 32.1 the relief requested by an applicant;*
- 32.2 the facts of the matter, with specific reference to the chronology of events leading up to and culminating in the launching of the application on an urgent basis;*

³ 977(4) SA 135(W) at 137F.

⁴ (JR315/13) [2013] ZALCHB 43 (12 MARCH 2013) AT [12]; SEE ALSO EAST ROCK TRADING (PTY) LTD & OTHERS V EAGLE VALLEY GRANITE [2012] JOL 28244 (GJS) AT [7] – [9].

⁵ (UM 39/2019) 2019 ZANWHC 21 (2 May 2019).

32.3 *any other extraordinary factor(s) which may be present in the particular circumstances of the case which may render it necessary and in the interest of justice to extend the relief contemplated in Rule 6(12) to an applicant, notwithstanding the fact that considerations emanating from the above referred to two subparagraphs may militate against the granting of the relief set out in rule 6(12).*

[33] *An applicant must not only set forth sufficient grounds as referred to in the preceding paragraph but must also explain any dilatory behavior on its part. The onus to do so, rests squarely on an applicant."*

- [13] In the matter of ***East Rock Trading 7 (Pty) Ltd & another v Eagle Valley Granite (Pty) Ltd & others***,⁶ with regard to the reasons why an applicant claims that he cannot be afforded substantial redress at a hearing in due course, the Court remarked as follows:-

"It is important to note that the Rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard."

- [14] The respondents were only afforded 24 hours to file their notice of intention to oppose; and 26 hours before the answering affidavits had to be filed.
- [15] Having regard to the explanations advanced by the applicants, I am, for the following reasons, not persuaded that they sufficiently justified the necessity to circumvent the ordinary time periods as set out in the Uniform Rules of Court on an extremely urgent basis: -

⁶ [2012] JOL 28244 (GSJ) AT [7].

- 15.1 The disciplinary report became available during March 2023. The applicants, however, do not explain with any specificity when the alleged meetings between the Mayor, the Speaker and Mr Shuping took place or why the Mayor waited almost 10 months until 08 January 2024 to request the MEC to intervene;
- 15.2 The Mayor fails to provide an explanation on whether he took any steps between 18 January 2024 until the MEC eventually provided the directive on 11 March 2024; and
- 15.3 The Mayor does not elucidate why he did not take any steps subsequent to the council meeting of 13 December 2024.
- [16] A sufficient explanation is therefore not proffered for the dilatory behaviour on the part of the applicants. In my view, the applicants also failed to explicitly set out the circumstance which they aver rendered the matter so urgent as to only allow the respondents to file their answering affidavits within one day.
- [17] Save for a bald statement that the applicants will not be able to obtain substantial redress in due course, this allegation remains unsubstantiated. The applicants accordingly failed to make out a case in this regard.
- [18] An analysis of the circumstances averred by the applicants that the matter is urgent, simply does not stand scrutiny. This failure is a fatal defect. For this reason alone, the application must fail with costs.

COSTS: -

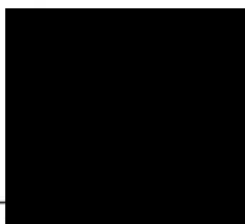
- [19] The convention is that costs are awarded against the unsuccessful party. Courts may, however, depart from this general rule and decide each case on its own merits.

[20] The Mayor and the Speaker requested that a cost order should be granted on an attorney and client scale.

[21] In view of the fact that the applicants rely on the MEC's directive to convene the meeting within 7 days, I am not persuaded that there was vexatious or *mala fide* conduct on behalf of the applicants that warrants a punitive cost order.

WHEREFORE I MAKE THE FOLLOWING ORDER: -

The application is struck from the roll, with costs.



STANTON, A

On behalf of the applicant:s

Adv. J Mongala

On instruction of Moribe Attorneys

On behalf of third respondent:

Adv. A Eillert

On instruction of Duncan & Rothman Attorneys