



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 4247/2023

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

**THE SPEAKER OF THE KNYSNA MUNICIPAL
COUNCIL**

First Respondent

**THE EXECUTIVE MAYOR OF THE KNYSNA
MUNICIPALITY**

Second Respondent

**THE MUNICIPAL MANAGER OF THE KNYSNA
MUNICIPALITY**

Third Respondent

OMBALI PHINEAS SEBOLA

Fourth Respondent

**WESTERN CAPE MINISTER, LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT
PLANNING**

Fifth Respondent

**MINISTER FOR CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

Sixth Respondent

Case Number: 4441/2023

In the matter between:

**WESTERN CAPE PROVINCIAL MINISTER
OF LOCAL GOVERNMENT, ENVIRONMENTAL
AFFAIRS AND DEVELOPMENT PLANNING**

Applicant

and

THE KNYSNA MUNICIPALITY

First Respondent

**THE SPEAKER OF THE KNYSNA MUNICIPAL
COUNCIL**

Second Respondent

**THE MUNICIPAL MANAGER OF KNYSNA
MUNICIPALITY**

Third Respondent

OMBALI PHINEAS SEBOLA

Fourth Respondent

Dates of hearing: 27 May 2024

Date of judgment: 28 May 2024

**JUDGMENT: LEAVE TO APPEAL APPLICATION DATED 13 MAY 2024 AND
SECTION 18(1) APPLICATIONS**

PANGARKER AJ

1. On 10 May 2024, pursuant to my judgment, I granted certain orders in case numbers 4247/23 and 4441/23 whereby the appointment of the municipal manager for Knysna Municipality was declared null and void and set aside. The orders were to have prospective effect only and would not affect the decisions taken by Mr Sebola in his capacity as municipal manager from date of his appointment to date of the Order.

2. The effect of the declaration of invalidity was that Mr Sebola was to vacate the position of municipal manager and the further remedial relief was that the appointment of a municipal manager was remitted to the Knysna Municipal Council which was to commence the advertisement process afresh¹. At all material times during the matters and the hearing, Nandi Bulabula Inc. were the legal representatives of the municipal respondents which included Mr Sebola as the fourth respondent in both applications.

3. On 16 May instant, my Registrar received an email from Ms Jonker of Minde Schapiro Inc for the DA, which attached an application in terms of section 18(1) of the Superior Courts Act 10 of 2013 and a Rule 7(1) notice, calling on Mr Duncan Korabie of Duncan Korabie Attorneys to lodge with the Registrar a copy of a power attorney signed by Mr Sebola that the former was duly authorized to act on his behalf in the prosecution of the leave to appeal application. Attached to the email was a copy of a leave to appeal application by Mr Sebola in both matters in relation to the whole judgment and Orders

¹ Pages 75-77 judgment

granted therein. The leave to appeal application, dated 13 May instant, was unsigned but bore the details of Duncan Korabie Attorneys for Mr Sebola.

4. This leave to appeal application was not filed with the Registrar nor brought to her attention by Mr Korabie, thus the first I was made aware of it was when I had sight of Ms Jonker's email and attachments. None of the other respondents in the matters lodged an application for leave to appeal. Ms Jonker requested that the applications and rule 7(1) notice be brought to my attention urgently as the DA had launched the section 18(1) application on an urgent basis. I noted that prayer 1 of the section 18 application sought that the Court hears the matter as one of urgency. Furthermore, the Notice sought that the applicant would seek the urgent relief on the first available date after 23 May.

5. On 17 May, the Registrar informed the legal representatives that my first availability for the hearing was on 27 May. Subsequently, on 22 May, Mr Korabie emailed the Registrar informing her that he represented Mr Sebola in the section 18 and leave to appeal applications in both matters. No leave to appeal application had at that stage been filed with the Registrar.

6. Also on 17 May, Ms Jonker confirmed that the DA's legal representatives were available on 27 May for the hearing. On 22 May, Mr Korabie addressed correspondence dated 6 May indicating, in summary, the following: he complained about the date of 27 May which was done without his consultation and consideration of his and his counsel's diary; that the previous counsel who represented Mr Sebola in the main applications indicated on 20 May that they were no longer available to represent him; that the time to prepare to argue the leave to appeal and section 18 applications was insufficient given that the record of proceedings were prepared for counsel and that he (Mr Korabie) had not yet received confirmation of the availability of senior counsel for the hearing.

7. Mr Korabie's correspondence further indicated that he required six weeks to consider the papers, consult with counsel, amend the leave to appeal and argue the applications. He contends that it would be unreasonable to expect of Mr Sebola to be ready to proceed with new legal representatives given that the matter was coming on for a year.

8. This correspondence was met by Ms Jonker indicating that Mr Sebola had not filed a notice to oppose the section 18 application by 20 May; that the six weeks requested was ridiculous; and that the contention that the record of proceedings was only received on 21 May was questionable as she wondered how the leave to appeal was drafted without reference to the record. Ms Jonker was of the view that the time period was sufficient to brief counsel and argue the matter and any request for a six week extension would be opposed but she was amenable to an extension of a day.

9. Later on 22 May, the MEC delivered his urgent section 18 application and a notice of opposition to Mr Sebola's leave to appeal application. Subsequent developments included Mr Korabie's further correspondence reiterating the further five weeks needed to prepare and consult and he questioned Ms Jonker's authority to depose to the DA's affidavit supporting the section 18 application.

10. The date of 27 May remained fixed and the matter was to be heard at 09h00. Approximately a half hour prior to the commencement of the hearing, the Registrar brought to my attention what purported to be an amended leave to appeal application which was seemingly served per email during the evening of Sunday 26 May. The grounds on which leave to appeal were sought were extended and suffice to point out that, on my perusal, I note that the amended application contains very serious allegations against Mr Borgstrom SC who represented Mr Sebola and the other municipal respondents at the main hearing.

11. Mr Korabie was present at the hearing on 27 May and I enquired whether Mr Sebola had provided a power of attorney authorizing him to act and whether he had right of appearance in the High Court. Mr Korabie confirmed that he did not have right of appearance in the High Court and that the power of attorney was only due to be filed by 31 May. Notwithstanding questions as to authority to act and no right of appearance in the High Court, Mr Korabie was given an opportunity to address the Rule 7 issue. Mr Bishop, counsel for the DA, disagreed with his understanding and import of rule 7.

12. Having heard the submissions, I accepted Mr Bishop's argument and found that there was non-compliance with rule 7, no power of attorney provided/filed and that Mr Korabie was at the time, not authorized to act for Mr Sebola in the leave to appeal and section 18 applications. The reasons for these findings are recorded *ex tempore* and not repeated herein. Consequently, Mr Korabie requested to be excused from the proceedings, which request was granted.

13. Counsel for the MEC and DA submitted that in the circumstances where the attorney was not authorized to act, the leave to appeal application dated 13 May, was to be dismissed or struck from the roll. My view is that in the circumstances and events which occurred and leading up to the hearing, the leave to appeal is to be struck from the roll.

14. Before turning to the section 18 applications, as a matter of transparency, I set out what occurred after yesterday's hearing which ended approximately 10h30. At the end of proceedings I indicated that as I had another matter waiting, judgment would be delivered electronically either later in the day or today. Having concluded the second matter at 13h00, I then proceeded to write the judgment.

15. At 14h55, the Registrar informed me that Mr Filand was present to hand deliver a bundle of documents on the request of Mr Korabie. Mr Filand, in the presence of the Registrar, informed me that he did not yet hold a brief to act for Mr Sebola but that Mr Korabie had requested him to deliver the documents. I informed Mr Filand that I would note the time and that the parties and legal representatives would be informed of the turn of events per email, which they duly were. As for the bundle, it was stamped 27 May 2024, and on a quick perusal, I noted that it contained: a leave to appeal application dated 26 May 2024, a power of attorney by Mr Sebola in respect of Mr Korabie related to case numbers 4247/23 and 4441/23, and a Legal Practice Council Fidelity Fund Certificate held by Mr Korabie. Whether this new or recent leave to appeal application is a copy of the amended application circulated on Sunday, is unclear and not something I need to pronounce upon.

16. At 15h40, I was met with another development, again emanating from Mr Korabie, and this time in the form of an email addressed to the Registrar, including the various legal representatives of the DA and MEC and a few others, attaching correspondence addressed directly to me. In the correspondence Mr Korabie “confirmed” my ruling regarding the rule 7 issue² and stated that because of the ruling, the application for leave to appeal was a nullity and *“...any proceedings flowing from that application constitutes a nullity. This includes the two section 18 applications as those application (sic) is premised on an application for leave to appeal that following the ruling this morning is non-existent”*³.

17. The correspondence then informs me that Mr Korabie has since prepared a new leave to appeal application which was served on all the parties concerned. This new application seems to be a reference to the application hand delivered by Mr Filand. The propriety of addressing correspondence directly to me aside, the question is whether Mr

² Par 2, correspondence dated 27 May instant

³ Par 3, correspondence 27 May instant

Korabie's understanding of the effect of the rule 7/no authority finding earlier in the proceedings, on the section 18 applications, is correct. In my view, this question requires consideration before turning to the section 18 applications.

18. The finding that Mr Korabie was not authorized to act for Mr Sebola in the 13 May leave to appeal application and also not potentially oppose the section 18 applications, though no answering affidavits were filed, render the leave to appeal a nullity. However, that does not mean that the section 18 applications are also a nullity. Mr Korabie's view that this is indeed the case, is based on a misconception of the law related to section 18.

19. Both counsel held the view that the fact that the leave to appeal was to be struck from the roll or dismissed because it was not authorized, did not mean that the section 18 applications would follow the same fate as they were not dependent on the leave to appeal application. With reference to ***Ntlemeza v Helen Suzman Foundation***⁴ it becomes apparent that the law as it stands is that the Court's power in terms of section 18, to order that a decision shall remain operative and be executed, is competent even after an applicant applies for leave to appeal the decision. In this instance, the High Court has an "*inherent right*"⁵ to control its own processes and judgments⁶.

20. I point out further that a section 18(1) application may also be brought where it is evident that there is an indication of an impending leave to appeal application or an intention to apply for leave to appeal is expressed⁷. Given that the leave to appeal application dated 13 May 2024 was served per email on the DA and MEC in the respective matters, it stands to reason that these parties would be entitled in those

⁴ 2017 (5) SA 402 SCA para 31-32

⁵ *Copthall Stores Ltd v Willoughby's Consolidated Co Ltd* (1) 1913 AD 305 at 308

⁶ See also *Ntlemeza*, par [32]

⁷ Erasmus Superior Court Practice, Volume 1, D-122, Original Service 2023

circumstances to approach the Court in terms of section 18 of the Act.

21. It follows from what is stated above that it is not a correct conclusion to draw, as Mr Korabie does in his recent correspondence addressed to me, that the section 18 applications are or were a nullity in light of the finding that he was not authorized to act at the time of launching the leave to appeal application. Put differently, the section 18 applications were not rendered null due to Mr Korabie's lack of authorization to act for Mr Sebola at the time. These applications, as I explain above with reference to **Ntlemeza**, would at the very least require an indication of an intention to apply for leave to appeal, and this threshold was met in the prevailing circumstances of these matters. In view of this finding, I thus proceed to consider the section 18 applications in turn.

22. Firstly, there are three requirements for relief sought under section 18, and these are:

22.1 Exceptional circumstances;

22.2 Irreparable harm to the party applying for relief in terms of section 18;

22.3 No irreparable harm to the other party (respondent in the section 18 application)⁸.

In respect of the irreparable harm requirement, the proof thereof should be on a balance of probabilities.

23. **In case number 4247/23**, the DA seeks relief that the operation and execution of the judgment and orders granted in its application on 10 May instant, are not suspended pending Mr Sebola's application for leave to appeal and any further applications, petition and/or appeal. The supporting affidavit by Ms Jonker, the longstanding attorney in this matter, points out that in the main application, Mr Sebola had along with the other municipal respondents, filed an affidavit wherein he accepted that he was unlawfully appointed by the Knysna Municipal Council. He had thus accepted that his appointment

⁸ Ntlemeza, par [36]; Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GJ) par 16

was unlawful.

24. Ms Jonker points out, correctly so, that this Court in its judgment and orders, did not grant the DA's additional relief which it had sought and decided the matter on the agreed grounds, which Mr Sebola had conceded. This too is correct, though I must add that in the judgment, I dealt extensively with whether the agreed grounds were competent and proper with reference to the prevailing authorities.

25. Mr Sebola's leave to appeal application dated 13 May 2024, was based on the following grounds or reasons: that the Court erred in that it over relied on the Steele report and it ignored his right to equality and fairness in the selection process as the defects in such process could not be attributed to Mr Sebola; the Court ignored the fact that it was the MEC who had the necessary standing to challenge the validity of the appointment (and not private parties), and that the Court ignored the fact that all the necessary information was before the Municipal Council when deciding on the appointment of municipal manager⁹. While the leave to appeal application was not authorized, Ms Jonker correctly addressed that the Court did not make some of the findings which it is alleged to have made in the leave to appeal.

26. Insofar as exceptional circumstances are concerned, the DA states that the respondents had accepted the illegality of Mr Sebola's appointment, and this is indeed correct, as it is addressed and remarked in several instances in the judgment. The contention is that after the Court's judgment and order, Mr Sebola was removed from the municipal manager position but then subsequent to a letter from a representative, he was reinstated (presumably because of the leave to appeal application). Ms Jonker raises serious concerns where, in view of the Court's order declaring the municipal manager appointment null and void, and setting it aside, we once more have Mr Sebola occupying this position and making decisions which raises the question as to the validity of his decisions in circumstances where he accepted and conceded that the

⁹ See para 1-4, Leave to appeal application dated 13 May 2024

appointment was invalid and this Court had granted specific orders regarding the prospective effect of its orders and Mr Sebola's decisions.

27. Having regard to the facts raised and submissions by Mr Bishop, on a cursory glance of the leave to appeal application, it is apparent that it was premised on either an incorrect understanding of the judgment and its orders. The Court made no finding that the Steele report disqualified Mr Sebola, nor findings that his written assessment was less effective than the other two candidates, nor that the Court blamed him for the defects in the assessment process. As for the standing issue, this was also addressed in detail in the judgment and it is correct as stated, that the MEC also brought his own application for similar relief. As for the absence of certain information before the Council, it became apparent that the Council and Mr Sebola admitted or accepted that to be the case.

28. The exceptional circumstance is a factual determination. In this matter, a person in an important position, whose appointment was declared null and void and who deposed to an affidavit accepting this to be so, nonetheless applied for leave to appeal the Court's judgment and orders based on meritless grounds. My reference here is to the 13 May leave to appeal application which precipitated the section 18 application. To add, the grounds were based either on a misunderstanding or mis-reading of the 10 May judgment, alternatively, reading into the judgment "findings" which were never made.

29. Having regard to Mr Bishops' submissions, I must agree that the impression gained is that Mr Sebola wishes to buy more time by occupying the position of municipal manager and to hinder the advertisement process and hence, appointment process for a new municipal manager. The position of municipal manager is a senior position in a Municipality, and the person holding that official position must be properly and lawfully appointed. Furthermore, the appointment holds significant public interest more

especially for the people of Knysna. By continuing to hold that office, in circumstances where it was accepted that the appointment was error-strewn and unlawful, and where the judgment set aside the appointment, taken with the factors mentioned above, amount to exceptional circumstances.

30. On the irreparable harm requirement, the DA was found to have standing and to be an own interest litigant which is represented on the Knysna Municipal Council. It is a political party which is represented in Knysna, and the continued unlawful position of Mr Sebola as municipal manager means that there exists an ongoing or continuous illegality which causes harm to the public interest. I have already referred to the questions which will arise as to the validity and lawfulness of decisions which Mr Sebola takes particularly so in circumstances where the orders granted on 10 May are not implemented.

31. In my view, furthermore, for Mr Sebola to remain in office until an appeal process is finalized, would not only raise questions as to the validity of his official decisions but also prevent the Knysna Municipal Council from acting in terms of the referral order granted by this Court in terms of which it is to commence the advertisement process for a new municipal manager. This too, cannot be in the public interest. In view hereof, I am satisfied that the DA has established on a balance of probabilities that irreparable harm will be suffered should the orders of 10 May not be carried through.

32. On the requirement of no irreparable harm to Mr Sebola were the section 18 application to be granted, the glaring fact is that the judgment and orders in no way prevent Mr Sebola from applying for the municipal manager post once it is advertised. As with any other candidate, he would have to (if successful) go through an assessment and selection process within the parameters of the legislation as I refer to in the judgment. Any loss of salary in my view, does not amount to irreparable harm. Mr

Sebola, given the facts apparent from the papers in the main application, is imminently employable and my finding is that he would not suffer irreparable harm should the section 18 application be granted. I am thus satisfied that the DA has met the threshold of the requirements for a section 18(1) application read with section 18(3).

33. **In case number 4441/23**, the MEC's section 18 application is premised on much of the same grounds as the DA's application. To add to the exceptional circumstance requirement, the MEC submits that it is exceptional for a party to agree that an order be granted which invalidates his appointment, only for that person to apply for leave to appeal exactly such order. I fully agree with Mr De Waal SC's submission on this point. At the risk of repetition, Mr Sebola deposed to an affidavit expressing such view and acceptance of the invalidity of his appointment and the Court took this into account. In my view, there is certainly merit that in applying for leave to appeal on the grounds which he raised and knowing full well that he accepted the invalidity of his appointment, he embarked upon an abuse of process. This amounts to an exceptional circumstance within the context and facts of this matter.

34. As for the irreparable harm requirements, this is set out succinctly and correctly from paragraph 21 of the section 18 affidavit. If Mr Sebola is allowed to remain in office as municipal manager until the appeal process runs its course, then the effect thereof would mean that the Knysna Municipality and third parties with whom Mr Sebola contracts within an official capacity, are bound by those decisions. The submission that the municipal manager acts as accounting officer and CEO for a municipality in terms of section 55(2) of the Local Government: Municipal Systems Act¹⁰ and is thus responsible for income and expenditure of the relevant Municipality is accepted.

35. The effect of Mr Sebola, who was unlawfully appointed and whose appointment was set aside, remaining in office for the duration of an appeal and acting as accounting officer and CEO for the Knysna Municipality would in all probability cause irreparable as

¹⁰ 32 of 2000

he will be making decisions in circumstances where the Orders granted on 10 May had prospective effect. Should he continue as municipal manager, decisions he makes as an unlawfully appointed person would give rise to further unlawful decisions, which would in all probability not only affect the finances of residents and taxpayers of Knysna, but cause potential harm and uncertainty in the Knysna Municipality.

36. It stands to reason that there would indeed be irreparable harm to the MEC, who as mentioned in the judgment, is the responsible person to oversee and monitor the appointment of municipal managers in accordance with section 54A and Regulations of the Systems Act. I agree with the view that were Mr Sebola allowed to remain in office until the appeal process is completed, not only would it undermine the Court order but it would also prevent the MEC from performing his legislative function in terms of section 54A. This would indeed cause irreparable harm to the MEC, and in my view, to the public interest.

37. I am in agreement with the MEC's view that no irreparable harm will fall on Mr Sebola if the section 18 application were to be granted not only for those reasons mentioned and found in the DA's application, but also as the Court granted no costs order against him in his personal capacity in the main application. I am thus satisfied that the MEC has met the requirements for an order in terms of section 18(1) read with (3).

38. As for urgency in both section 18 applications, I am satisfied that in the circumstances of the matters and given the orders granted on 10 May, plus the 13 May leave to appeal application, that the applications were indeed urgent. The 13 May leave to appeal application, for the reasons set out above, was indeed an abuse of process.

39. There are two remaining aspects: it was brought to my attention by counsel for the MEC in the main judgment, that Mr M Vassen, junior to Mr De Waal SC was not listed in the main judgment notwithstanding that he appeared with senior counsel at the hearing. Having reconsidered the Practice Note and my notes, it is indeed so that due to a typographical or clerical oversight, the reference to Mr Vassen was omitted from the main judgment. Mr Borgstrom SC was included in an email by Mr De Waal SC highlighting the oversight. In the circumstances, the oversight or error will be rectified in that Mr Vassen will be added to the appearance of behalf of the MEC in case number 4441/23 in the main judgment.

40. Lastly, on the outstanding rule 67A issue as per paragraphs 10 of the order in 4247/23 and paragraph 6 of 4441/23 of 10 May 2024, the submissions are accepted that section 67A would not apply to work done prior to 12 April 2024, hence, the costs orders are not to be amended.

41. In the result, I grant the following orders:

In case numbers 4247/23 and 4441/23

1. The Fourth Respondent's (Mr O P Sebola) leave to appeal application dated 13 May 2024 is struck from the roll with costs on scale B.
2. The applications in terms of section 18(1) read with section 18(3) of the Superior Courts Act 10 of 2013, are granted.
3. In terms of section 18(1) read with section 18(3) of the Superior Courts Act 10 of 2013, it is ordered that the operation and execution of the Court's judgment and orders handed down on 10 May 2024 in the abovementioned matters, are not

suspended and shall remain operative and be executable notwithstanding Mr Sebola's amended leave to appeal application(s), any Petition for leave to appeal and/or appeal.

4. The Fourth Respondent is ordered to pay the costs of the section 18 applications on Scale B.

**M PANGARKER
ACTING JUDGE OF THE HIGH
COURT**

Appearances in case number 4247/23

For Applicant (Democratic Alliance): M BISHOP

Instructed by: Minde Schapiro and Smith Inc.

Ms E Jonker

Appearances in case number 4441/23

For applicant: H DE WAAL SC

M VASSEN

Instructed by State Attorney, Cape Town

Ms Melapi

(Mr Korabie in attendance for Mr Sebola)