



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

Case No: 4913/24

In the matter between

MNYAMEZELI JACKSON PENXA

APPLICANT

AND

THE CENTRAL KAROO DISTRICT MUNICIPALITY

1st RESPONDENT

**THE EXECUTIVE MAYOR OF THE CENTRAL KAROO
DISTRICT MUNICIPALITY**

2nd RESPONDENT

**THE SPEAKER OF THE CENTRAL KAROO DISTRICT
MUNICIPALITY COUNCIL**

3rd RESPONDENT

MZUNGISI GRATITUDE NKUNGWANA

4th RESPONDENT

RALPH ROLAND LINKS

5th RESPONDENT

**ANTON BREDELL, MINISTER OF LOCAL
GOVERNMENT, ENVIRONMENTAL AFFAIRS
AND DEVELOPMENT PLANNING**

6th RESPONDENT

Date Heard : 07 October 2024

Date Delivered: 10 October 2024 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an urgent application wherein the applicant (Penxa) sought an order that the judgment and order delivered in the matter between the parties be executed pending the fourth respondent's (Nkungwana) application for leave to appeal to the Supreme Court of Appeal and pending any further appeals by Nkungwana. Only Nkungwana opposed the application. The application is opposed on two grounds, to wit, no urgency and that if there was any urgency it was self-created and that no case was made for the relief sought as no exceptional circumstances existed.

URGENCY

[2] Penxa relied on five points on urgency. The first was that Nkungwana only filed his petition on 13 September 2024 and that he endeavoured to consult and issue this application as soon as possible thereafter. Secondly, there were both exceptional circumstances upon which he relied as well as the irreparable harm which would result from Nkungwana remaining in office. Thirdly, a decision to retain Nkungwana as the Municipal Manager (MM) of the Municipality, despite the court's referral order and Nkungwana's lack of competence, was bound to have a detrimental effect on the public purse of the Municipality and the public administration in view of the critical role of a MM as the risk to the public purse was exceptionally amplified by Nkungwana's lack of competence. Fourthly, the decision to retain Nkungwana in office was *prima facie* unlawful and the decision itself was inherently abhorrent to the rule of law and could not be countenanced to continue unchecked. Fifthly, Nkungwana was appointed on a fixed term contract commencing on 1 February 2024 and which may not exceed one year after the Local Government elections. The next Local Government elections were due in 2025. It was therefore self-evident that

a delay occasioned by bringing this application into the normal cause would render it moot.

[3] Nkungwana's case in opposition was that the judgment and order were issued almost 3 and a half months before the issuing of this application. Nkungwana filed an application for leave to appeal on 21 June 2024 and the first and third respondents filed their application for leave to appeal on 14 June 2024. At that point Penxa was unconcerned about the impact of the applications for leave to appeal on the execution of the order. If his current concerns were valid he would have filed this application immediately after the initial applications for leave to appeal were submitted. Penxa showed no concern about Nkungwana's ongoing appointment as MM from the time the first applications for leave to appeal were submitted until they were dismissed on 13 August 2024. Penxa did not rely on any new facts or circumstances which emerged between the filing of the first application for leave to appeal and the filing of the application for leave to appeal to the Supreme Court of Appeal, which caused or contributed to any exceptional circumstances or irreparable harm, justifying the institution of this application on 19 September 2024. The alleged grounds on which the section 18 application was premised, including the grounds for the alleged urgency on the matter, already existed when the first application for leave to appeal were delivered. Nevertheless, Penxa did not at that stage apply for the execution of the order. The matter was for these reasons not urgent and if it still was, such urgency was self-created. Penxa did not attempt to explain why he would not be able to afford substantial redress if the application was not heard on an urgent basis.

[4] I am persuaded by the applicant's reasons on the urgency of the matter. The courts are guardians of their own processes. Where a court apprehends, on the evidence before it, a to and fro of litigants and that further litigation was in the offing, it is just for the court to help crystallize the position for the parties [*Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 32]. This is more so where the issue related to the administrative stability of public administration, especially as regards matters of leadership competency at municipal level, which seems to be the weakest link on service delivery currently in our democratic state. I

am inclined to exercise my discretion in favour of accepting the urgency of the matter.

OPERATION AND EXECUTION OF ORDER

[5] The applicable subsections of section 18 of the Superior Courts Act, 2013 (Act No. 10 of 2013) (SuCA) provides:

“18 Suspension of decision pending appeal

1. Subject to subsection (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. ...
3. A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court do orders.”

The approach to the section was set out in *UFS v Afriforum & Another* [2016] 2018 (3) SA 428 (SCA) (UFS) at para 10 as follows:

“[10] It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of ‘exceptional circumstances’ in s 18(1), s 18(3) requires the applicant ‘in addition’ to prove on a balance of probabilities that he or she ‘will’ suffer irreparable harm if the order is not made, and that the other party ‘will not’ suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3),

however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted.”

[6] Penxa’s case was that an MM holds a central and senior position in local government as both the head of the administration and accounting officer for the municipality. The MM is responsible for the formation, development and management of effective, efficient and accountable administration. They are responsible for the management of the provision of services to the community and the appointment, management, training and discipline of staff, as well as advising political structures and office bearers in the municipality. The functioning of Nkungwana as MM, against the findings in the judgment and order, placed both the municipality and members of the public residing in its jurisdiction at risk. If Nkungwana was to remain in office until the entire appeal was finalized, it would prevent the municipality from acting in terms of the court order and would render implementation of the judgment moot in view of the limited time before the end of Nkungwana’s term. This was so because at the end of that term, the position of MM will have to be re-advertised. The harm that the public and Penxa would suffer was irreparable. The municipality was one of the poorest in the province and had a history of maladministration and the community needed to be protected. On the other hand the only harm to be suffered by Nkungwana was loss of income as MM. He was however well qualified academically and held various positions in municipal administrations and it would not be difficult for him to secure employment.

[7] On the other hand, Nkungwana’s case includes that if the order were to be executed pending his application for leave to appeal or the appeal, it will have the result that when his appeal was heard a new MM would have been appointed. Such an appointment would not be conditional but final and not subject to reconsideration after determination of the appeal and this will render his appeal moot and would violate his right of access to court. He would not receive any remuneration and had been denied access to his workplace until finalization of the appeal process. If the order was granted, he would appear to be incompetent for the position of MM when that was not the case and this will impact on his reputation in the industry, income and future employment prospects. If he applied for other employment opportunities,

this would affect his prospects of appeal as the appeal will become moot for that reason, if leave is granted.

[8] The MM is the most senior state official within public administration in a municipality. A person holding that position must meet all the requirements for appointments to that office. It is in the public interest that where an appointment of a person to that position was found wanting, the illegality not be allowed to continue on flimsy grounds, as this will harm the municipality, the public and those affected thereby, including Mr Penxa in this instance [*Democratic Alliance v Speaker of the Knysna Municipal Council and Others* (4247/2023; 4441/2023) [2024] ZAWCHC 141 (28 May 2024)]. In *Incubeta Holdings (pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) at para 27 and 28 it was said:

“[27] Do these circumstances give rise to 'exceptionality' as contemplated? In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'.

[28] The plight of the victor alone is probably all that is required to pass muster. Nonetheless, I am not unconscious of the undesirable outcome that relief granted by the court becomes a vacuous gesture. A court order ought not to be lightly allowed to evaporate, a fate which, seems to me, would tend to undermine the role of courts in the ordering of social relations.

[9] It cannot be in the public interest that Nkungwana remain in office until the appeal process is finalized, and thereby prevent the municipality from acting in its own interests and that of the community it served by ensuring that it appoints the MM properly. If the law is that a prospective MM should go through the eye of the needle of SALGA assessments to enable the thread to weave proper municipal management, it follows that an undue delay by someone who could not make the eye should not be allowed to derail progress towards finality of a municipal manager

appointment [*Ntlemeza* at para 39]. This is moreso where the prospect of the outcome of the case changing because of the appeal appears slim. No prospect of success is a factor to be considered [*UFS* at para 15] which in my view would mitigate any potential harm which may follow immediate execution. The damage to Nkungwana's reputation and the like, if any, would not be occasioned by the execution, but by the judgment and order [*Ntlemeza* at para 46]. Public interest and the crucial role of an MM in a municipality adds to factors that in my view support the conclusion of irreparable harm [*Ntlemeza* at para 47]. I am not persuaded that the applicant made out a case for an order for the 4th respondent to pay costs of this application on a scale as between attorney and client. I am not satisfied that Nkungwana's exploring of remedies available to him justified an expression of displeasure with him.

[10] For these reasons I am persuaded that on a balance of probabilities, the applicant made out a case for the following order:

(a) The judgment and order granted by this court on 5 June 2024 be executed pending the 4th respondent's application for leave to appeal to the Supreme Court of Appeal and pending any further appeals by any of the respondents.

(b) The 4th Respondent to pay the costs on scale B.

DM THULARE
JUDGE OF THE HIGH COURT