



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 2 January 2025

Case No. 052407-2024

In the matter between:

THE DEMOCRATIC ALLIANCE

Applicant

and

CITY OF JOHANNESBURG

First Respondent

COUNCIL OF THE CITY OF JOHANNESBURG

Second Respondent

CITY MANAGER, CITY OF JOHANNESBURG

Third Respondent

SPEAKER, CITY OF JOHANNESBURG

Fourth Respondent

MARGARET ARNOLDS

Fifth Respondent

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

Sixth Respondent

**MEC FOR CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS, GAUTENG**

Seventh Respondent

JUDGMENT

WILSON J:

- 1 Section 7 (1) of the Remuneration of Public Office Bearers Act 20 of 1998 (“the Act”) requires the sixth respondent, the Minister, to determine the upper limit of the salaries and allowances of members of a municipal council. An “allowance” is any “allowance, including out of pocket expenses, which forms part of an office bearer’s conditions of service, other than a salary and benefits” (section 1 of the Act). This definition extends to any perquisite that attaches to a municipal councillor’s office, including the provision of personal protection services to that councillor.

- 2 The Minister regularly publishes determinations placing limits on the extent to which a municipal council may extend personal protection services to its members. The Minister exercised this power on 18 August 2023, and again on 1 October 2024. In both determinations, the Minister made allowance for the executive mayor, deputy executive mayor, deputy mayor, speaker or whip of a municipal council to be provided with two “bodyguards per shift of a two shift system”. The determinations permit more generous provision than this in specific cases, but only “on the recommendations of the South African Police Service [“SAPS”].” In addition, the ministerial determinations allow that any other municipal councillor may be provided with personal security to the extent justified by “a threat and risk analysis conducted by” SAPS.

The City Council resolution

- 3 On 20 March 2024, the second respondent, the City Council, adopted a resolution endorsing a VIP protection policy. At the time the resolution was

adopted, the practice was to provide the Executive Mayor with ten personal protection officers. The fourth respondent, the Speaker, was given eight. Members of the City Council's Mayoral Committee and the chairs of two of its other committees were each afforded between two and five personal protection officers. The VIP protection policy apparently formalised this practice with minor adjustments. For example, the VIP protection policy reduced the number of officers available to the Executive Mayor from ten to eight. However, the policy still entrenched the provision of far more generous personal protection services to senior municipal councillors than the Act and the ministerial determinations permit.

- 4 It is common cause that the City Council has not obtained a threat assessment or other report from SAPS that might have justified any of these departures from the ministerial determinations.
- 5 The papers in this case suggest that the City Council might have thought that it could obtain a threat assessment after passing and implementing the 20 March 2024 resolution. If the City Council did think that, then it fell into error. Both the Minister's determinations and the Act require a threat assessment to be conducted before an expansion of security provision beyond the default limits set in the determinations can be implemented.
- 6 It is easy to see why this is so. Both the Act and the determinations are designed to prevent the creation of armies of security guards surrounding public office bearers, insulating them from the people they are appointed or elected to serve. The value of public accountability is enshrined in section 1 (d) of the Constitution. It is a basic requirement of accountability that public

office bearers should be reasonably accessible. They are not entitled to exist in a security bubble, abstracted from the day-to-day concerns of the general public.

- 7 That principle is subject to qualification if there is a genuine threat to the safety of a particular public office bearer or class of public office bearers. The Act and the ministerial determinations recognise this. A municipal councillor is entitled to an enhanced security allowance where SAPS determines that there is a threat to their security that cannot be met by the default levels of provision set out in the ministerial determinations. In addition, the ministerial determination of 1 October 2024 states that enhanced personal protection can only be provided to a municipal councillor once the municipal council has satisfied itself that a specific security threat justifies the provision of extra personal protection, and that it would be financially prudent to provide that protection. It follows that the SAPS threat assessment must precede the enhanced provision of security.
- 8 It is on this basis that the applicant, the DA, asks me to declare the 20 March 2024 resolution unconstitutional and invalid, and to set aside the personal protection allowances that it formalised. The DA stakes its claim on section 1 (c) of the Constitution, 1996. Section 1 (c), it has long been held, requires every exercise of public power to be consistent with the rule of law. The most basic feature of the rule of law is that the exercise of a power must adhere to the rules that create and regulate it (see, for example, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), paragraph 56).

- 9 For the reasons I have given, the 20 March 2024 resolution is wholly inconsistent with the Remuneration Act and the ministerial determinations made under it. For the same reasons, the pre-existing decisions to expand various municipal councillors' personal protection allowances beyond the provision made in the ministerial determinations, without having obtained a SAPS threat assessment justifying such an expansion, are likewise unlawful. Mr. Mphaga, who appeared for the first to fifth respondents ("the City"), did not seek to argue otherwise. Nor could he argue that the Act and the determinations are inapplicable to the resolution, to the VIP protection policy or to the allowances that they formalised. The resolution is accordingly invalid, and must be declared so. The City's VIP protection policy and the allowances it formalised must also be set aside.

Remedy

- 10 The real question in this case is what happens then. Section 172 (1) (b) of the Constitution empowers me, upon making a declaration of constitutional invalidity, to fashion just and equitable relief. That relief may include an order limiting the retrospective effect of the declaration, or an order suspending the declaration to allow the defect I have identified to be corrected. No-one has asked me to limit the retrospective effect of my order, but the City does ask that I suspend it so as to allow the City to correct the defect I have identified.
- 11 The defect I have identified is that the 20 March 2024 resolution, the VIP protection policy it endorsed, and the pre-existing personal protection allowances that the resolution and the policy formalised, are at odds with the ministerial determinations. The personal protection allowances made exceed

those permitted in the ministerial determinations without a SAPS threat assessment justifying more generous personal protection allowances for the particular office bearers who benefit from them. If it wishes to adopt its own VIP protection policy, the City Council must ensure that the policy is consistent with the Act and the ministerial determinations. It must also ensure that any decision to enhance a particular municipal councillor's personal protection allowance is consistent with the Act and the ministerial determinations.

- 12 The effect of setting aside the 20 March 2024 resolution, the VIP protection policy and the allowances that they formalised would be to reduce the number of personal protection officers available to the City's senior office bearers, unless a SAPS threat assessment can be obtained justifying the numbers presently allowed. The papers tell me nothing about whether such an assessment would likely justify expanded personal protection in any particular case, or how long it would take to obtain such an assessment.
- 13 The papers also tell me nothing about the likely practical effect of invalidating the 20 March 2024 resolution, and setting aside the personal protection allowances it formalised, on the safety of the City's senior officer bearers. There is little more than a reference in the application papers to a shooting incident involving the City Council's Chief Whip (the answering affidavit says that the Chief Whip was killed, but the letter to which the affidavit refers says only that he was "shot at").
- 14 At the hearing of this matter, I afforded the City a further week in which to adduce facts addressing the likely impact of relief reversing the resolution, the VIP policy, and the allowances that it formalised. Over two weeks later, the

City filed a short affidavit which contained almost no information of value. The affidavit emphasised that the City's Executive Mayor and the City Council's Speaker had recently been replaced. The affidavit referred again to the shooting incident involving the City Council's Chief Whip (it seems, happily, that the Chief Whip survived the incident, the contents of the answering affidavit notwithstanding).

- 15 The affidavit also referred to an incident in which an ordinary councillor was apparently killed during a protest in Alexandra. That is obviously tragic, but it is not directly relevant to the terms of a suspension order in this case, because the City's VIP protection policy does not provide an ordinary councillor with a personal protection officer as of right. Accordingly, invalidating the policy would make no difference to an ordinary municipal councillor.
- 16 In the end, the affidavit asked that I suspend any order I might make for three months, but it set out no facts that would justify a suspension of that length.
- 17 This leaves me without the information necessary to assess the likely impact of the orders I must make on the personal safety of those to whom the 20 March 2024 resolution and the VIP protection policy apply. Were the stakes lower, I would simply have declared the resolution invalid and set aside the VIP protection policy and the unlawful personal protection allowances with immediate effect. However, I do not think it would be wise to issue an order interfering with the personal protection services available to senior municipal councillors in circumstances where I cannot be sure that such an order would not place anyone in danger.

18 Accordingly, I will suspend my orders for a period of six weeks. I will allow for that period to be extended, provided that it can be shown that an extension is required to prevent imminent harm.

Costs

19 On the question of costs, the DA asked that the fifth respondent, Ms. Arnolds, pay the costs of this application in her personal capacity. However, no serious case was made out for this relief, and I decline to grant it.

20 The DA also asked that the various organs of the City who have opposed this application pay costs on the attorney and client scale. Here the DA was on firmer ground. The City opposed the application while putting up no substantial defence on the merits. It then did almost nothing to assist me in crafting a just and equitable remedy, even when given an additional opportunity to do so. The practice of empty opposition to transparently meritorious public law claims brought in good faith against organs of state must end. I intend to underscore that necessity with a costs order on the attorney and client scale.

21 I should add that I mean no criticism of the City's counsel or attorneys, who, I assume, advised their clients fully on the absence of any substantial defence to the merits of the application, and did what they could to extract useful information from the City when I sought assistance in crafting a just and equitable remedy.

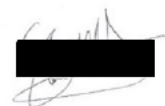
Order

22 For these reasons –

- 22.1 The second respondent's resolution, dated 20 March 2024, to adopt and approve the "Protection and Security for VIP Risk Management System Policy" is declared unconstitutional and invalid, and is set aside.
- 22.2 The first respondent's prior decision to provide the following personal protection allowances to municipal councillors of the second respondent is declared unconstitutional and invalid, and is set aside
-
- 22.2.1 the Executive Mayor's allocation of ten inspectors and the following JMPD vehicles: a BMW 3 Series, a BMW X5, a Toyota Rav 4, a VW Polo, a Toyota Hilux and a Lexus.
- 22.2.2 the Speaker's allocation of eight inspectors and the following JMPD vehicles: a BMW 3 Series, a BMW X3, a Toyota Rav4, a VW Polo and a Toyota Corolla;
- 22.2.3 the Member of the Mayoral Committee for Development and Planning's allocation of two inspectors and a BMW 3 Series JMPD vehicle;
- 22.2.4 the Member of the Mayoral Committee for Community Development's allocation of two inspectors and the following JMPD vehicles: a BMW 3 Series and a Toyota Rav 4;

- 22.2.5 the Member of the Mayoral Committee for Corporate & Shared Services' allocation of two inspectors and the following JMPD vehicles: a BMW X3 and a Hyundai;
- 22.2.6 the Member of the Mayoral Committee for Housing's allocation of four inspectors and the following JMPD vehicles: a BMW 3 Series and a VW Polo;
- 22.2.7 the Member of the Mayoral Committee for Economic Development's allocation of two inspectors and the following JMPD vehicles: a BMW 3 Series and a Toyota Corolla;
- 22.2.8 the Member of the Mayoral Committee for Transport's allocation of four inspectors and the following JMPD vehicles: a BMW 3 Series and a VW Polo;
- 22.2.9 the Member of the Mayoral Committee for Health & Social Development's allocation of two inspectors and the following JMPD vehicles: a BMW 3 Series and a VW Polo;
- 22.2.10 the Member of the Mayoral Committee for Finance's allocation of five inspectors and the following JMPD vehicles: a BMW 3 Series and a VW Polo;
- 22.2.11 the Member of the Mayoral Committee for Environment and Infrastructure Services' allocation of two inspectors and the following JMPD vehicles: a BMW 3 Series and a VW Polo;

- 22.2.12 the Member of the Mayoral Committee for Public Safety's allocation of four inspectors and a BMW 3 Series JMPD vehicle;
- 22.2.13 the Municipal Public Accounts Committee Chairperson's allocation of two inspectors and a BMW 3 Series JMPD vehicle;
- 22.2.14 the Chief Whip's allocation of two inspectors and a BMW 3 Series JMPD vehicle; and
- 22.2.15 the Chair of Chairs' allocation of four inspectors and the following JMPD vehicles: BMW 3 Series and a VW Polo.
- 22.3 The orders set out in paragraphs 22.1 and 22.2 above are suspended until noon on Friday 14 February 2025.
- 22.4 Any interested person may, at any time before this suspension expires, apply to Wilson J to extend the period of the suspension, having adduced facts showing that to do otherwise would result in imminent harm.
- 22.5 The first respondent will pay costs of this application, including the costs of two counsel, on the scale as between attorney and client.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 2 January 2025.

HEARD ON: 15 November 2024

FURTHER MATERIAL
RECEIVED ON: 2 and 6 December 2024

DECIDED ON: 2 January 2025

For the Applicant: E Cohen
D Sive
Instructed by Minde Shapiro and Smith Inc

For the First to
Fifth Respondents: M Mphaga SC
K Phureo
R Bvumbi
Instructed by Mpoyana Ledwaba Inc