



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not Reportable / Reportable

Case No: 6068/2023

In the matter between:

RURAL MAINTENANCE (PTY) LTD

1ST APPLICANT

RURAL MAINTENANCE FREE STATE (PTY) LTD

2ND APPLICANT

And

MINISTER OF FINANCE

1ST RESPONDENT

MUNICIPAL FINANCIAL RECOVERY SERVICE

2ND RESPONDENT

MINISTER OF COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS

3RD RESPONDENT

MEC FOR FINANCE, FREE STATE

4TH RESPONDENT

MAFUBE LOCAL MUNICIPALITY

5TH RESPONDENT

AUDITOR-GENERAL

6TH RESPONDENT

MINISTER OF COOPERATIVE GOVERNANCE AND

TRADITIONAL AFFAIRS, FREE STATE

7TH RESPONDENT

PREMIER, FREE STATE

8TH RESPONDENT

FREE STATE LOCAL GOVERNMENT ASSOCIATION

9TH RESPONDENT

MAFUBE BUSINESS FORUM NPC

10TH RESPONDENT

AFRIFORUM NPC

11TH RESPONDENT

Neutral citation: *Rural Maintenance (Pty) Ltd and Another v Minister of Finance and 10 Others (6068/2023)*

Coram: **Daniso, J**

Heard: **05 September 2024**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time of hand down is deemed to be at **16h00 on 30 December 2024**. A hard copy has been placed in the pigeonholes of the legal representatives of the parties.

Summary: Rule 53 (1)(b) of the Uniform Rules -whether an obligation to produce a record under rule 53 only arises once review jurisdiction has been established by the party seeking to compel the production of a record. Principle restated.

ORDER

- (1) The first and second respondents are directed to dispatch to the Registrar of this court the record and reasons of the financial recovery plan sought to be reviewed within ten days from the date of this order and to notify the applicants once they have done so.
- (2) The first, second and fifth respondents are ordered to pay the costs of this application, including the costs of two counsel on Scale C, jointly and severally.

JUDGMENT

Daniso, J

- [1] On 15 December 2011 the applicants (Rural), and the fifth respondent (the municipality) concluded a contract in terms of which the municipality outsources its electricity supply services to Rural for a fixed period of 25 years. At all material times hereto, the municipality was beset with ongoing financial challenges which impacted negatively on its ability to meet its financial commitments and to provide the basic services to the inhabitants with result that on 28 April 2022, the tenth and eleventh respondents obtained an order against the fifth respondent for the

imposition of a mandatory financial recovery plan on the fifth respondent to obviate its financial crisis as provided for in s139 (5) (a) of the Constitution.¹

- [2] Section 139 (5) (a) of the Constitution read with ss139 to 142 of the Local Government: Municipal Finance Management Act (the MFMA)² permits the provincial executive to intervene in the municipality's financial woes by requesting the National Treasury-consisting of the first and second respondents³ to develop a financial recovery plan detailing recommendations to ensure the municipality's financial viability and ability to provide basic services to its inhabitants. In this case, the National Treasury provided the requested financial recovery plan in August 2023 and one of the intervention measures proposed to assist the municipality in obviating its financial crisis is the re-assessment of the legality and regularity of the contract concluded by Rural and the municipality including its cancellation if the contract is found not to be in compliance with the relevant policies, regulations and national legislation. The municipality passed a resolution to implement the financial recovery plan on 5 September 2024.
- [3] Aggrieved with the recommendations proposed in the financial recovery plan, Rural launched review proceedings (the main application) in this court for the review and setting aside of both the financial recovery plan and its implementation by the municipality on the basis of unlawfulness and invalidity.
- [4] In these proceedings, Rural initially sought an order compelling both the municipality and National Treasury to produce the records and reasons of the proceedings relating to the financial recovery plan and the resolution for its implementation as contemplated in rule 53 (1) (b) of the Uniform Rules of Court.

¹ Constitution of the Republic of South Africa, 1996.

² Local Government: Municipal Finance Management Act 56 of 2003.

³ Ss 5 and 157 supra at fn 2.

[5] The municipality has since complied as a result, the only relief sought against it is that of costs. National Treasury insists that it is not obliged to provide the requested records as the recovery plan is not reviewable either under the Promotion of Administrative Justice Act (PAJA)⁴ or the principle of legality.

[6] Rule 53 provides thus:

“Reviews

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.”

[7] According to Rural, rule 53 (1)(b) entitles it to the requested record not only to be able to formulate the grounds of review as provided for in s6 of PAJA but for the court in the main application to be able to assess the legality of the impugned decision. Despite having made an undertaking to provide the record by 31

⁴ Act 3 of 2000.

January 2024, ultimately on 14 February 2024 after numerous requests for extensions, National Treasury reneged on its undertakings and refused to provide the requested record citing non-reviewability of the impugned decision.

- [8] Rural submits that National Treasury's grounds for refusing to provide the record is inapt as it will require the court to venture into the merits of the main application whereas, the issue of the reviewability of the impugned recovery plan ought to be determined at the main application not at this interlocutory stage of the proceedings. That aside, the impugned recovery plan is certainly a decision reviewable under PAJA as the definition of a decision in PAJA includes a proposed decision, in terms of s139(5) (a) (ii) of the Constitution read with ss 146(1) and (2) of the MFMA the financial recovery plan is mandatory, the municipality is obliged to implement the financial recovery plan and the proposed intervention materially affects Rural's rights as it is aimed at the re-assessment and termination of its contract. The refusal by National Treasury to provide the record constitutes an infringement of Rural's constitutional right to access to the forming the subject matter of the review and to have Rural's dispute resolved in a fair public hearing.⁵ The application must therefore succeed with costs of two counsel on scale C.
- [9] In sum, the gravamen of National Treasury's opposition against the relief sought by Rural is embodied in its rule 6(5)(d)(iii) notice which raises the following questions of law:

"1. Whether the "financial recovery plan" made by the First and Second National Treasury is capable of "being reviewed and set aside" pursuant to "the provisions of s139(5) of the Constitution of the Republic of South Africa, 1996, read with ss139 to 143 of the Local

⁵ Ss 32 and 34 of the Constitution.

Government Municipal Finance Management Act 56 of 2003”?

2. *Pursuant to question 2 (sic), above, whether:*

2.1. *Section 139(5) of the Constitution applies to the First and/or Second National Treasury, absent the jurisdictional prerequisite of section 139(7) of the Constitution being present;*

2.2. *Sections 139 to 143 of the Local Government Municipal Finance Management Act, 56 of 2003: -*

2.2.1. *applies to the First and/or Second National Treasury to the extent that the “financial recovery plan” does not constitute a “decision” capable of review; and/or*

2.2.2. *the First and/or Second National Treasury are the relevant “decision-maker” for the purpose of the review?*

2.3. *the “matter” (mentioned in paragraph 3 of the amended notice of motion) can, ought, could, or should be “remitted to the first and second National Treasury for the financial recovery plan to be redrawn”?*

3. *Pursuant to questions 1 and 2, above, and question 2.3.2. in particular, whether the First and/or Second National Treasury are, consequently,*

obliged to disclose the "record of decision" in terms of the Uniform Rules of Court — Rule 53."

- [10] According to National Treasury, the relief sought by Rural would be incompetent as the impugned decision is merely a recommendation and not a decision thus not capable of being reviewed under PAJA or the principle of legality. Furthermore, National Treasury is not the relevant decision maker in the context of review. The first respondent should not have been cited in these proceedings as he merely plays a supervising role in the intervention process therefore, he cannot be compelled to produce a record which is not his and the second respondent's role was merely to produce the financial recovery plan. Rural hopes that the reasons will fill in the gaps in their case, based on these reasons, National Treasury contends that the application must be dismissed with costs and the questions of law be upheld with costs on scale C.
- [11] National Treasury has delivered an unmeritorious opposition to Rural's case. As correctly pointed out by counsel for Rural, rule 53(1)(b) proceedings are not intended to be a mechanism for determining the reviewability of an impugned decision, that is a matter for the main application. The law is trite on this aspect. In *Murray and Others NNO v Ntombela and Others*⁶ the SCA held that:

"[14]...this Court – as was the high court –is not at this stage called upon to enter into the substantive merits of the review proceedings. Rather, what this Court is seized with is the interlocutory application brought by the respondents (as applicants) for an order directing the liquidators (as respondents) to provide them with the record of their decision..."

"[27] ...the fact that the respondents' review application may well be manifestly doomed to failure because the relief sought therein is legally untenable matters not at this stage. That issue will be ripe for determination only when the time comes for the substantive merits of the review itself to be considered. What we

⁶ (729/2022) [2024] ZASCA 24 (14 March 2024) para 14

are concerned with at this stage of the proceedings, is solely the respondents' entitlement, as of right, to the record evidencing the decision taken..."

[12] I am thus of the view that the above sums up the issue of contention between the parties and confirms that Rural's entitlement to receive the record in terms of rule 53(1)(b) does not only arise once it is established as a jurisdictional fact, that the proceedings sought to be reviewed are reviewable.

[13] Regarding National Treasury's contention that the reasons are sought in order to fill in the gaps in Rural's case, I hold the view that it is indeed the purpose of rule 53 (1)(b). As stated in *Helen Suzman Foundation v Judicial Service Commission*,⁷ the record is intended to enable an applicant to interrogate the lawfulness of decision sought to be reviewed, assess its options whether to advance its case and, if so inclined, to amend its notice of motion and supplement its grounds for review or even abandon it.⁸ In the result, I am of the view that a proper case has been made out for the granting of the order sought by Rural. The application succeeds.

Costs

[14] There is no reason why the costs should not follow the result. Counsel for Rural and National Treasury argued for costs on scale C, clearly taking into account the importance, complexity of the matter and either party's conduct and how it shaped these proceedings. Having regard to the scant basis of opposition, I am also of the

⁷ 2018 (4) SA 1 (CC) para 13.

⁸ See also *Bridon International GMBH v International Trade Administration Commission* [2012] ZASCA 82; 2013 (3) SA 197 (SCA) at para 31.

view that the costs of two counsel on scale C is warranted under these circumstances.

- [15] Inexplicably, despite not having opposed the application counsel for the municipality rose to oppose the award of costs on scale C on the grounds that the application was unopposed therefore the costs should be ordered on a party and party scale. I do not agree as on the facts germane to this matter, Rural had to launch an application to compel the municipality to provide the record and no reasons have been provided for failing to do so timeously.

Order

- [16] In the premises, I make the following order:

- (1) The first and second respondents are directed to dispatch the record and reasons of the financial recovery plan sought to be reviewed to the Registrar of this court within ten days from the date of this order and to notify the applicants once they have done so.
- (2) The first, second and fifth respondents are ordered to pay the costs of this application, including the costs of two counsel on Scale C, jointly and severally.

The Honourable [REDACTED]
2024 -12- 30
N.S. Daniso
N.S. DANISO, J

APPEARANCES

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