IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 4482/2024

Reportable	**Yes/No**

In the matter between:

THEMBELANI PEMBESHIYA	1st Applicant
NYANISEKA MXINWA	2nd Applicant
UNATHI MAYISELA	3rd Applicant
VUMILE THEKWINI	4th Applicant
SOMELEZE ZAZAZA	5th Applicant

and

KUMKANI MHLONTLO LOCAL MUNICIPALITY	1st Respondent
THE MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, EASTERN CAPE	2nd Respondent
NANDIPHA KHANYISILE SIBOBI	3rd Respondent

JUDGMENT

MHAMBI AJ

Introduction

[1] The Applicants brought a two-part application. Part A seeks an interim interdict pending the finalization of part B of the application.

[2] In the main, part A challenges the resolution of the 1st Respondent, "**the Municipality**", appointing the 3rd Respondent as it's Chief Financial Officer "**CFO**", the resolution was taken on 20 March 2024. The other reliefs are ancillary to this one.

[3] The application is opposed by the Municipality and the 3rd Respondent.

[4] They both challenge the *locus standi* of the Applicants and that the Applicants have not made a case for the grant of interim relief.

[5] The 1st Respondent goes further and says the reliefs sought in part A, even though are captioned as interim relief, are in fact suspension in nature, and that the case has not been made for suspension order.

6. Lastly, the Respondents contend that the matter is not sufficiently to be heard as an urgent application.

The facts of this case

[7] The Applicants are the residents of Malepelepe Community, Tsolo, within the jurisdiction of the Mhlontlo Local Municipality, the 1st Respondent.

[8] The Applicants alleged in the founding papers that on 20 March 2024, the Council of the Municipality took a resolution to appoint the 3rd Respondent as its CFO, allegedly she scored the highest amongst the interviewed candidates.

[9] They now challenge the 3rd Respondent's appointment, alleging that the 3rd Respondent was not supposed to have been appointed as she (3rd Respondent) had previously been dismissed by two Municipalities for allegations amongst others, financial misconduct, fraud, and corruption. The Applicants based their case on, amongst others, regulation 18(4) of the regulations of the Local Government Municipal Systems Act[1], "**the Systems Act**."

Issues for determination

[10] this Court has to determine: -

(i) Whether the matter is urgent.

(ii) Whether the Applicants have locus standi to bring this application.

(iii) Whether the requirements for the grant of interim relief have been satisfied.

Urgency

[11] On urgency, the deponent to the founding affidavit has alleged he learnt about the 3rd Respondent's appointment as CFO of the Municipality on Daily Dispatch. He alleged to have gathered relevant information and consulted with attorneys on 27 September 2024.

[1] Act 42 of 2000.

[12] The attorneys wrote a letter to the 2nd Respondent, the 2nd Respondent replied to the Applicants' attorneys' letter by email on 30 September 2024. Between 2 October and 3rd October 2024, there has been an exchange of letters between the Applicants' attorneys and the office of the 2nd Respondent. Applicants then instituted this application on 10 October 2024.

[13] The founding affidavit does not state with clear particularity why the matter is urgent, mostly submitted as the basis of urgency is that the matter is of public interest and concerns the appointment of the CFO of the Municipality, the deponent to the founding affidavit simply resuscitated the duties of the CFO as endowed in the Municipal Finance Management Act 56 of 2003.

[14] This Court regards that as nothing but conclusory and generalized averments with no explicit explanation as to urgency or no explanation has been proffered as to why this Court should dispense with ordinary forms and service provided for in the rules and dispose of the matter on an urgent basis.

[15] The authorities are very clear on urgency.

[16] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[2], the Court held that a matter is urgent if the Applicant cannot achieve substantial redress at a hearing in the ordinary course.

[17] In *Twentieth Century Fox Film Corporation and Another v Eagle Valley Granite (Pty) Ltd and Others*[3], the court expressed that when determining whether the matter is urgent, the court must assume that the Applicant's case in the merits is good.

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[2] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011).
[3] 1982 (3) SA 582 (W).

[18] In *Luma Meubel Vervaardiges (Edms)BPK V Makin and Another t/a Makins Furniture Manufacturers)*[4], the court expressed that litigants shall not constrain the ordinary time periods, or deviate from the Uniform rules of court, more than necessary.

[19] Further to that, the issue of further a matter should be enrolled as urgent application is governed by the provisions of rule 6(12) of the Uniform Rules. The aforesaid sub-rule allowed the court hearing urgent applications to depart or dispense from the ordinary forms and services provided for in the rules and hear the matter in a manner as the Court may direct by directive.

[20] Rule 6(12) requires the Applicant in an urgent application to set forth explicitly the circumstances under 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 that must be contained in an affidavit in support of the urgent application.

[21] In this matter, the Applicants have failed to set forth explicitly in the founding affidavit papers the circumstances that render the matter urgent and should be heard as such. No reasons are stated why the Applicant cannot be afforded substantial redress at a hearing in due course than an urgent application roll.

[22] It is a well-established principle of our law that a Court has a duty to protect itself against abuse of its processes, in *Nedcorbank Ltd v Gcilitshana*[5], referring to *Hudson v Hudson*[6], the court held that: -

> "Ordinarily, the reasons and motives of a party for instituting legal proceedings are irrelevant. However (w)hen the Court finds an attempt made to use for ulterior purposes machinery devised for a better administration of justice, it is the duty of the court to prevent such abuse".

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[4] 1997 (4) SA 135 (W).
[5] 2004 (1) SA 232 (SE) at para 27.
[6] 1927 AD 259.

[23] It is trite to mention that the fact that the Applicants seek to have their dispute resolved urgently does not render the matter urgent. Therefore, whether the matter is urgent depends on the relief sought seen in context with the facts of the case, as a result, urgency is determined on a case by case and is context-specific[7].

[24] The Applicants have not made a case for urgency instead urgency is pleaded on general, bald arguments and emotional assertions.

[25] In the context of the pleaded urgency, no case for urgency is made.

[26] For the sake of completion, I will also deal with the issue of *locus standi* of the Applicants and consider whether the case for the grant of interim relief has been made out.

[27] The submissions by the Applicant's Counsel in his heads of arguments in relation to urgency do not favour the case made on the founding papers

***Locus Standi* of Applicants**

[28] The Applicants are alleged to be the residents of the lower Malepelepe Community in the district of Tsolo, within the jurisdiction of the Municipality. They put reliance on Section 38(d) of the Constitution[8] to have locus standi to bring this application.

[29] Mr Genukile who appeared for the Applicants goes further and submits that, in terms of Section 5 of the Systems Act, members of the Local Community are accorded extensive rights and duties with respect to the governance of their community including contributing to the decision-making process and submitting written or oral recommendations and being informed of the decisions of the Municipal Council. This

[7] EMM v S.W. ZAPGJHC 710, 15 June 2023.
[8] Constitution of the Republic of South Africa, Act 108 of 1996.

submission, with respect, has no relevance and is not what the Applicants stated in their founding papers. In the founding papers, Applicants rely on Section 38(d) to establish their *locus standi*. They substantiate that they are community members that fall within the jurisdiction of the Municipality.

[30] I will deal with the Applicants' *locus standi* as it is stated in the papers, not beyond that.

[31] In this regard Section 38(d) of the Constitution reads: -

> "Anyone listed in this section has the right to approach the competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including declaration or rights. The persons who may approach a Court are: (d) anyone acting in the public *interest,"*

[32] The Constitutional Court has given guidance in this regard. In *Lawyers for Human Rights v Minister of Home Affairs and Others*,[9] The court dealt with what needs to be shown in order to establish whether a person or an entity is acting in the public interest.

[33] The Court referred to the judgment by O'Regan J in *Ferreira v Lenin NO, Vryenhoek v Powell NO*[10], where he said: -

> "This Court will be circumspect in affording applicants' standing by way of Section 7 (4) (b) (v) and will require an Applicant to show he or she is genuinely acting in public interest. Factors relevant to determining whether a person is genuinely acting in public interest will include considerations such as: whether there is another reasonable and effective manner in which challenge can be brought, the nature of the relief sought, the extent to which it is of general and

[9] 2004 (4) SA 125, 2004 (7) BCLR 775 (EC) at paras 14-16.
[10] 1995 ZACC 13, 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 CC.

prospective application, and the range of persons or groups who may be directly or indirectly affected by an order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be reconsidered in the light of the facts and circumstances of each case."

[34] The Court also said: -

"…(A) distinction must however be made between the subjective position of the person or organization claiming to act in the public interest on one hand, and whether, it is, objectively speaking, in the public interest for the particular proceedings to be brought …."

[35] In this matter having considered the *locus standi* of the Applicants, and the context in which it is pleaded, objectively considered, the Applicants have made a case for their locus standi to bring these proceedings.

The Requirements for Interim Relief

[36] The well-known requirements for interim relief have recently been affirmed in *Democratic Alliance V Hlophe and Others*[11], to be the following: -

(a) *Prima facie* right

(b) A reasonable apprehension of irreparable harm

(c) balance of convenience, and

(d) no alternative remedy

[11] 16170/2024, 16771/2024, 1646 3/2024, 2024 ZAWCHC 282, 27 September 2024 at paras 36 and 37.

[37] In *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*[12], the court emphasized that in adjudicating an application for interim relief, the Court shall exercise discretion resting on substantive consideration of justice.

[38] In doing so, the Court shall ensure that the objects, spirit and purport of the Constitution are promoted as set out in *OUTA*[13]**.**

[39] It is apposite for me to state that interdict *pendent lite* is an extraordinary remedy not to be granted lightly. In *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*[14]**,** the Constitutional Court held as follows: -

> "[47] An interim interdict pending an action is an extraordinary remedy within the discretion of the Court
>
> [48] In granting an interdict, the Court must exercise its discretion of all facts and circumstances. An interdict is not a remedy for the past invasion of rights: it is concerned with the present and future.

[40] An interdict is appropriate only when future injury is feared.

[41] It is worth noting what the Court said in *Steam Development Technologies 96 Degrees (Pty) Ltd v Minister, Department of Public Works and Infrastructure*[15], the Court held that: -

> "Even if all these requirements are met, the Court still enjoys an overriding discretion whether or not to grant the interim interdict."

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[12] 2023 (4) SA 325 (CC) at paras 279 -307.
[13] National Treasury and Others v Opposition to Urban Tolling Alliance and Others, 2012 (6) SA 223 (CC) at para 45.
[14] 2003 (1) SA 353 (CC) at paras 47– 48.
[15] Steam Development Technologies 96 Degrees Proprietary Limited v Minister: Department of Public Works & Infrastructure (Reasons for Interim Interdict) (4264/2023) [2024] ZAECGHC 20 (16 February 2024) at para 8.

Evaluation of Parties' submissions

[42] Applicants submitted that the 3rd Respondent was appointed on the basis of an impugned resolution, which is the subject of review in part of this application. If she continues her duties as CFO of the Municipality, the community will suffer.

[43] The Applicants suggested that the 3rd Respondent be put on suspension until part B is finalized, Mr Genukile submitted that the glaring evidence cannot be ignored at the convenience of the 3rd Respondent. He insisted on seeking interim relief with costs.

[44] Mr Madonsela, for the Municipality, pinned his argument in saying the application has no prospects of success in part B, therefore interim relief could not be granted. He submitted that an interdict is forward-looking and seeks to prevent future conduct not decisions already made, a challenge to past decisions lies at the heart of part B. He submitted the balance of convenience in favour of the Municipality and against the Applicants.

[45] Mr Mngunyana, representing the 3rd Respondent, concurred with Mr. Madonsela's arguments and contended that the balance of convenience does not support granting interim relief. He noted that the Applicants are seeking a suspension order, which they have framed as an application for an interdict. Granting this interim order would effectively suspend the 3rd Respondent without reviewing the resolution that appointed her as CFO. Additionally, he argued that the 3rd Respondent has a valid contract with the Municipality, which needs to be challenged under the Labour Relations Act.

[46] It is trite that an Applicant for an interim interdict must show that it is likely to sustain some irreparable harm irreversible character, to wit a reasonable apprehension of irreparable harm. That is the *prima facie* right the Applicants right the Applicants need to prove. The 3rd Respondent was appointed as CFO six months ago, there is no

evidence placed before the court that she is incompetent in the exercise of her duties as CFO.

[47] The Applicants have failed to establish irreparable harm satisfactory enough to grant the interim interdict, despite Part B.

[48] Having seriously considered all relevant factors, and the parties' submissions, this Court has applied its mind objectively, I am not convinced that the balance of convenience favours the grant of the interim order sought.

[49] In assessing the balance of convenience required, this Court has to consider the harm to be endured by the Applicants if the interim relief is not granted, and the Applicants succeed in part B, compare that to the harm to be borne by the 3rd Respondent, and the consequences of suspending her employment, and that of the 1st Respondent, to be without CFO during auditing period as informed, and Part B fails.

[50] This is one of the clearest cases that, in evaluating the balance of convenience, granting an interim interdict will be inappropriate and cause grave injustice. The rights of the Applicants remain protected by the pending review application. Consequently, the application in terms of part A should fail.

Costs

[51] I am satisfied that the Applicants are indigent community members seeking the administration of justice, whether they have a similar case or not, is not important. I see no basis to penalize them with costs.

Order

[52] In the result, the following order is issued

1. The Applicants' application in terms of Part A is dismissed.

2. The Applicants' application in terms of Part B is postponed *sine die*, to a date to be arranged with the Registrar.

3. There is no order as to costs.

M MHAMBI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant	:	*Adv Genukile*
Instructed by	:	Luyanda Mdludla Inc. Mthatha
Counsel for the 1st Respondent	:	*Adv Madonsela*
Instructed by	:	Mvuzo Notyesi Inc. Mthatha
Counsel for the 2nd Respondent	:	*Adv Mngunyana*
Instructed by	:	M. Nzima Attorneys Mthatha
Heard on	:	12 November 2024
Judgment Delivered on	:	26 November 2024