

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

WCC: 23535/2024

Before: The Honourable Ms. Justice Slingers

Hearing: 18 November 2024

Judgment: 02 December 2024

In the matter between:

THEEWATERSKLOOF LOCAL MUNICIPALITY

First Applicant

and

**COUNCIL OF THEEWATERSKLOOF
LOCAL MUNICIPALITY**

First Respondent

**SPEAKER OF THEEWATERSKLOOF
LOCAL MUNICIPALITY**

Second Respondent

LINCOLN DE BRUYN

First Applicant for Intervention /

Third Respondent

PETRUS STANDER

Second Applicant for Intervention /

Fourth Respondent

CHRIS CLOETE

Third Applicant for Intervention /

Fifth Respondent

CAROL DE BRUYN BENJAMIN

Fourth Applicant for Intervention /

Sixth Respondent

YVONNE VAN TONDER

Fifth Applicant for Intervention /

Seventh Respondent

MEKI PLATO-MENTOOR

Sixth Applicant for Intervention /

Eight Respondent

DAWID JOOSTE	Seventh Applicant for Intervention / Ninth Respondent
JONATHAN SMITH	Eight Applicant for Intervention / Tenth Respondent
DENZIL JACOBS	Ninth Applicant for Intervention / Eleventh Respondent
SAMUEL FREDERICKS	Tenth Applicant for Intervention / Twelfth Respondent
MICHELLE BOTES	Eleventh Applicant for Intervention / Thirteenth Respondent
DEMOCRATIC ALLIANCE	Twelfth Applicant for Intervention / Fourteenth Respondent

This judgment is deemed to have been handed down electronically on 2 December 2024 by email circulation to the parties' legal representatives' email addresses.

JUDGMENT

SLINGERS J

Introduction

[1] On 31 October 2024 Theewaterskloof Local Municipality (**'the Municipality'**) approached the above court on an urgent basis and obtained the following substantive relief in terms of an order granted by the Honourable Madam Justice Ndita (**'the Order'**):

- '2. *The First and Second Respondents are interdicted and restrained from, inter alia, participating in and /or voting on the motion of no-confidence proceedings that they have instituted for the removal of Theunis Zimmerman as the Executive Mayor of the Theewaterskloof Local Municipality, which motion is to be considered on 31 October 2024 at 10h00 ("the motion").*

3. *The First and Second Respondents are interdicted and restrained from proceeding with the voting on the motion pending the final determination of the application issued under case number: 12623/24 in the above Honourable Court (DA Alliance // Lincoln De Bruyn // Council of Theewaterskloof Local Municipality & Others Case : 12623/24).*

[2] In this urgent application the third to twelfth respondents seek an order in the following terms:

- (i) the reconsideration and setting aside of the Order under Rule 6(12)(c);
- (ii) to the extent necessary:
 - (a) condonation of the non-compliance by the first to tenth applicants for intervention as the third to twelfth respondents (**‘the respondents’**) with the Uniform Rules of Court relating to forms, service and time periods, and a direction that the application be dealt with as a matter of urgency under Uniform Rule 6(12); and
 - (b) that leave be granted to the first to tenth applicants to intervene as the third to twelfth respondents; and
- (iii) that Zimmerman be directed to pay, in his personal capacity, the costs of the application, including the costs of counsel, on an attorney and client scale, alternatively scale C.

[3] The applicant does not oppose the application for intervention which is uncontentious.

[4] Rule 6(12)(c) and provides that:

‘A person against whom an order was granted in such person’s absence in an urgent application may by notice set down the matter for reconsideration of the order.’

[5] The application that gave rise to the Order of 31 October 2024 (**'the main application'**) was issued on 31 October 2024 and served via email at 07h51 on the same day. It gave notice of its hearing at 9h15 on 31 October 2024¹ and requested any person who intended to oppose the application to file notice of such intention by 08h30 and to serve their answering papers by 09h00 on 31 October 2024.

[6] The deponent to the affidavit filed in support of the reconsideration application is Lincoln De Bruyn (**'De Bruyn'**), the executive mayor of the municipality, who deposed to the affidavit in his capacity as a member of the Democratic Alliance (**'DA'**) as well as in his personal capacity.

Mootness

[7] Judgment in *DA Alliance // Lincoln De Bruyn // Council of Theewaterskloof Local Municipality & Others* Case with case number 12623/24 was handed down on Friday, 15 November 2024. The judgment found the decision to remove De Bruyn as the Executive Mayor and the decision to elect Zimmerman as his replacement (**'the decisions'**) to be unconstitutional, unlawful and invalid. Consequently, that court reviewed and set aside the decisions.

[8] During the hearing of this application on Monday, 18 November 2024, counsel for the applicant argued that the judgment of 15 November 2024 (**'the judgment'**) rendered this application moot and therefore this court need not determine the reconsideration application. Furthermore, he argued that the reconsideration application was no longer urgent as a result of the judgment.

¹ The Notice of Motion

[9] The respondents argued that the matter has not been rendered moot by the judgment as that matter has not been finally determined, as per paragraph 3 of the Order. This followed from the fact that the applicant could appeal the judgment. In reply, the applicant submitted that at the date of hearing the reconsideration application no leave to appeal had been filed against the judgment and that it was mere speculation that an appeal would be pursued. However, the applicant stopped short of furnishing an undertaking that it would not pursue an appeal. On the contrary, the applicant argued that if any appeal was lodged against the judgment the respondents would have recourse to section 18 of the Superior Courts Act, Act 10 of 2013.

[10] The judgment to set aside the decisions is final in nature. Therefore, the operation and execution thereof would be suspended should the applicant apply for leave to appeal.² The practical consequence of this suspension would be that Zimmerman would continue to act as executive mayor, pending any appeal process. And the Council would be prohibited from proceeding with the voting on a motion of no confidence against Zimmerman.

[11] If the Order is not set aside and the applicant appeals the judgment, the Council would be restrained and inhibited from exercising its oversight role as provided for in section 58 of the Municipal Structures Act and from discharging its constitutional obligations. Not only does this demonstrate that the issue is not moot, it also renders the application urgent.

[12] Furthermore, as stated in the judgment:

² Section 18(1) of the Superior Courts Act, Act 10 of 2013

'If indeed, the impugned decisions leading to the removal of Councillor De Bruyn from his position as an Executive Mayor are unlawful, it would constitute an ongoing affront to democracy which requires urgent rectification by this Court.'

[13] Furthermore, mootness is not an absolute bar to determining a matter as there may be circumstances where the interests of justice require that the matter be adjudicated, notwithstanding its mootness.³

[14] In determining whether the interests of justice requires the determination of a moot issue, a court would consider whether its decision would have any practical effect either on the parties before it or on others as well as other factors such as the nature and extent of the practical effect, the importance of the issue, the complexity and the fullness or otherwise of the argument.⁴

[15] In the present matter, the issues have been fully ventilated on the papers. Secondly, the application pertains to the mechanism of a vote of no confidence which is an important tool for holding an executive mayor accountable. Thirdly, it is averred that the applicant abused court process when it sought and obtained the Order. These issues are sufficiently important that even had the application been rendered moot by the judgment, it would nevertheless have been in the interests of justice to entertain it.

Reconsideration

[16] In the reconsideration application, the respondents advanced the following challenges:

³ *Centre for Child Law and Others v South African Council for Educators and Others* 2024 (4) SA 473 (SCA); *Bwanya v The Master of the High Court and Others* 2022 (3) SA 250 (CC)

⁴ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC)

- (i) the Municipality cannot interdict the Council;
- (ii) lack of Zimmerman's authority to bring the application;
- (iii) failure to make out a case for an interim interdict; and
- (iv) non-compliance with OUTA.

[17] In *Nelson Mandela Bay Municipality and Others v Qaba and Others*⁵ (**'Nelson Mandela Bay Municipality'**) the court considered whether a municipality could institute legal proceedings against its council. It found that it was not legally and conceptually possible for a municipality to sue its council. This finding was made after the court considered chapter 7 of the Constitution, more specifically sections 160 and 151.

[18] That court went on to find that:

'Rather, a municipality acts and performs its functions through the agency of its council....'

[19] Section 151(2) of the Constitution vests the executive and legislative authority of the Municipality in its Council and section 160(1)(a) of the Constitution empowers the Council to make decisions concerning the exercise of all the powers and the performance of all the functions of the municipality.⁶

[20] The court in *Nelson Mandela Bay Municipality* went on to hold that a municipality holds no power or authority separate from its council. Furthermore, a municipality cannot have a legal interest that is separate or indistinguishable from its council.

⁵ 2022 JDR 1006 (ECP)

⁶ *City of Cape Town v Independent Outdoor Medial (Pty) Limited and Others* 2023 JDR 2257 (CC)

[21] The reasoning of the court in Nelson Mandela Bay Municipality cannot be faulted and I am in full agreement with the conclusion reached therein. Consequently, the application instituted by the Theewaterskloof Local Municipality against the Council of the Theewaterskloof Municipality is not legally sustainable.

[22] Secondly, the respondents aver that as the Council did not authorize Zimmerman and/or his legal representatives to bring the main application, it was brought without the necessary authorisation.

[23] Zimmerman contends that Council Resolution: No C21/2024 which was approved during February 2024 bestows upon him the delegated authority to institute or defend any court proceedings for and on behalf of the Municipality. The resolution empowers Zimmerman to '*... institute legal proceedings against other organs of state in order to enforce the municipality's rights, where all steps in terms of the principles of co-operative government has failed*'.

[24] However, it is clear from wording of Council Resolution: No C21/2024 that the delegation was limited to instituting legal proceedings against other organs of state and for the objective of enforcing the Municipality's rights. Furthermore, legal proceedings could only be resorted to after all other steps in terms of the principles of co-operative government had failed.

[25] During the hearing of the application, counsel for Zimmerman remained steadfast that the main application constituted litigation against other organs of state. As set out above, a municipality cannot conceptually institute legal proceedings against its council as the council is the agency through which the municipality performs its functions. Furthermore, a municipality cannot have a separate legal interest to that

of its Council. Therefore, there is no merit in the contention that the Council is a separate and different organ of state to that of the Municipality.

[26] Zimmerman's legal counsel conceded that his delegation to institute legal proceedings could only be activated after *all steps in terms of the principles of co-operative government failed* and that no such steps were taken.

[27] Zimmerman's reliance on Council Resolution: No C21/2024 for the necessary delegation to bring the main application is misplaced and does not assist him.

[28] In addressing the requirements for the grant of an interim interdict, Zimmerman states the following in respect of a *prima facie* right:

'A prima facie right. Unless the interim relief is granted, the subject matter of the relief sought in the pending application under case number : 12623/24 will become moot, in the sense that such relief will no longer be capable of being granted without irrevocable prejudice to the new incumbent.'

[29] The above excerpt does not comply with the necessary pre-requisites of establishing a *prima facie* right. It does not identify the right nor the facts and /or circumstances upon which it is based.

[30] In light hereof, it cannot be said that Zimmerman has met the requirements for the grant of an interim interdict.

[31] Section 58 of the Local Government: Municipal Structures Act, Act 117 of 1998(**'the Structures Act'**) provides that:

'A municipal council, by resolution may remove its executive mayor or deputy executive mayor from office. Prior notice of an intention to move a motion for the removal of the executive mayor or deputy executive mayor must be given.'

[32] The relief sought by Zimmerman in the main action sought to limit or restrain the statutory power set out in section 58 of the Structures Act bestowed on the Council to remove the Executive Mayor.

[33] Therefore, the decision of the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others ('OUTA')* is applicable.⁷ Thus, the relief in the main action could only have been granted in the clearest of cases and after a careful consideration of the any harm to the doctrine of separation of powers.

[34] The founding affidavit fails to address the requirements of OUTA in that it does set out any facts and/or circumstances which show that there will be no infringement of the doctrine of separation of powers nor that it is one of the clearest of cases which call for the granting of an interim interdict.

[35] On the contrary, the relief granted in the main action contravenes the doctrine of separation of powers as it prohibits the Council from being able to hold Zimmerman, as the Executive Mayor, accountable by way of the vote of no confidence.

[36] In the circumstances, the application for reconsideration must succeed.

Costs

[37] It is undisputed that Zimmerman received notice of the council meeting scheduled to take place on 31 October 2024 as early as 23 October 2024. Furthermore, he was aware that he would face a vote of no-confidence at the meeting scheduled for 31 October 2024. It is also undisputed that Zimmerman waited until the

⁷ 2012 (6) SA 223 (CC)

morning of 31 October 2024 to institute and serve the main application.⁸ Zimmerman failed to disclose these facts in his founding affidavit.

[38] In addressing the requirements for the granting of an interim interdict, Zimmerman states that there is no satisfactory remedy as damages will not remedy any reputational damage and in dealing with irreparable harm, he states that he has a well-grounded fear of irreparable harm as the conduct complained of would necessarily lead to reputational harm.

[39] The emphasis on reputational harm is indicative that Zimmerman acted out of self-interest in bringing the main application.

[40] As set out above, Zimmerman served the main notice via email at 07h51 on 31 October 2024, with the application scheduled to be heard at 09h15 that same day. This allowed any respondent a mere thirty eight (38) minutes to file a notice to oppose and sixty eight (68) minutes to file answering papers.

[41] This extreme abbreviation of the period for service practically amounted to no service and effectively rendered the main application an *ex-parte* application. Thus, breaching one of the cornerstones of our legal system which demands that a person is entitled to notice of legal proceedings against him/her.⁹

[42] Furthermore, Zimmerman was obliged to bring the main application as soon as possible, failing which he had to provide cogent reasons for any delay.¹⁰ As stated above, not only did Zimmerman fail to disclose that he had a week's notice of the planned council meeting with a vote of no confidence on its agenda, he also failed to explain his delay in bringing the application.

⁸ Page 36, para 11 of the answering affidavit read with paragraph 35.1 of the replying affidavit.

⁹ *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA)

¹⁰ *Dladla v Ethekwini Municipality* (unreported, KZD case no 2799/2023 dated 4 April 2023)

[43] Zimmerman's failure to disclose that he delayed in bringing the application, considered with the wholly inadequate service of the application on the respondents, the lack of authority to institute the proceedings, and the legally unsustainable nature of the relief sought, cumulatively considered render this application an abuse of process.

[44] Therefore, I make the following orders:

- (i) the non-compliance by the first to tenth applicants for intervention as the third to twelfth respondents with the Uniform Rules of Court relating to forms, service and time periods is condoned and the application is dealt with in terms of Rule 6(12);
- (ii) the first to tenth applicants for intervention are granted leave to intervene as the third to twelve respondents;
- (iii) the Order granted by Madam Justice Ndita on 31 October 2024 under the above case number is reconsidered and set aside; and
- (iv) the costs of the application, including the costs of counsel, are to be paid on an attorney- client scale by Theunis Zimmerman in his personal capacity.



H M Slingers

**Judge of the High Court
2 December 2024**