

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2023-009319

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED YES/NO
	
SIGNATURE	DATE
	13/2/2023

In the matter between:

RAYMOND DHLAMINI

First Applicant

DEMOCRATIC ALLIANCE

Second Applicant

and

**THE CITY MANAGER OF THE CITY OF
EKURHULENI METROPOLITAN MUNICIPALITY**

First Respondent

DR IMOGEN MASHAZI

Second Respondent

**COUNCIL OF THE CITY OF EKURUHLENI
METROPOLITAN MUNICIPALITY**

Third Respondent

**THE CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

Fourth Respondent

NTHABISENG TSHIVHENG

Fifth Respondent

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

Sixth Respondent

JUDGMENT

DODSON AJ:

- [1] This matter was heard in the urgent court. It has largely become resolved as a consequence of what became common cause in the course of argument.
- [2] The first applicant is the speaker of the third respondent municipal council. The position of speaker of a municipal council is provided for in part 2 of chapter 3 of the Local Government: Municipal Structures Act No. 117 of 1998 (“the Structures Act”) at sections 6 to 41.
- [3] On Thursday 26 January 2023, the first applicant (“the speaker”) presided over an ordinary meeting of the council. According to him, after the lunch break, several councillors became disruptive and stormed the speaker’s chair.
- [4] Acting under Rule 72(1) of the City of Ekurhuleni Metropolitan Municipality Standing Orders by-law (“the standing orders”), which empowers the speaker, in the event of grave disorder, to adjourn the meeting for such period as he or she deems necessary, he adjourned the meeting.
- [5] Later that day he received an email attaching a request from members of some of the political parties represented in the council, to resume the adjourned council meeting. The request was purportedly made in terms of section 29(1) of the Structures Act. Given their centrality to the matter, it is appropriate at this stage to quote the relevant parts of section 29:

“29. Meetings at municipal councils

- (1) The speaker of the municipal council decides when and where the council meets subject to section 18(2), but if a majority of the councillors requests the speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request.

(1A) If the speaker or acting speaker refuses to call a meeting of the council as requested in terms of subsection (1), the municipal manager, or, in the absence or refusal by the municipal manager, a person designated by the MEC for local government in the province, may call and chair the meeting.”

- [6] The request was repeated on Friday 27 January 2023. The speaker responded in writing confirming that the meeting had been adjourned in terms of rule 72 and saying, further -

“I have written to the whip of council to call for a multi-party meeting to address the issues which led to subsequent adjournment of the meeting. It is important the issues are addressed by that forum for the safety of all councillors so we continue to have a council meeting that allows for debates and freedom of speech.

...

Therefore, I will wait for the outcome of the multi-party meeting and communicate a date for the continuation of the meeting.”

- [7] Later on 27 January 2023, the first respondent, the city manager, wrote a letter to a set of political parties in response to the letter addressed to the speaker saying:

“After a due consideration of [the request], I have decided to abide by the request, as provided for in section 29(1) and section 29(1A) of the Municipal Structures Act and the 2021 amendment.”

- [8] Consequent upon her decision, she called a council meeting for Monday 30 January 2023. Having regard to the wording of section 29(1) and (1A) of the Structures Act and the powers of the speaker in rule 72 of the standing orders, the speaker took the view that there was no lawful basis for the city manager to call or chair a meeting of the council under either of these provisions of the Structures Act and that it was procedurally irrational. The speaker’s stance was that section 29(1) calls for a request to be made by a majority of councillors, whereas only 13 had signed the request addressed to him. In any event, he had lawfully adjourned the meeting under rule 72 and, with reference to section 29(1A), he had never refused to call a meeting of council.

- [9] Therefore, the speaker and the second applicant, the Democratic Alliance brought an urgent application on Sunday 29 January 2023 to interdict the second respondent and the council from proceeding with the meeting that had purportedly been called for 10h00 on Monday 30 January 2023. The urgent application was granted in the form of interim relief pending the final adjudication of a review of the city manager's decision to call the extraordinary council meeting.
- [10] The order notwithstanding, at 10h00 on Monday 30 January 2023, the city manager commenced the extraordinary council meeting but decided to adjourn it to Tuesday 31 January 2023.
- [11] On the same day, the applicants' attorneys wrote to the second respondent to emphasise that the mere convening of the meeting had constituted contempt of the court's order. They gave notice further that should she not cancel the meeting which she had purported to adjourn to Tuesday 31 January 202, they would again approach the court, this time with an urgent application to have her held in contempt of the order.
- [12] Later that day the city manager's attorneys wrote to the applicants' attorneys claiming that she had not taken any steps to proceed with the meeting on 30 January 2023 but instead had merely informed councillors that the business of the day would not continue and they adjourned the meeting until the next day so she could consider how to proceed once she had obtained a copy of the court's typed order. The letter said further that she had, after consulting with counsel, decided to cancel the extraordinary council meeting that she had purported to adjourn to Tuesday.
- [13] Also on that day, Monday 30 January 2023, the speaker wrote to all political parties with representatives in council as well as the chief whip, the chair of chairs and the secretary of council to inform them that, after considering all factors, he had "decided to call for

the continuation of the meeting which will be held on Thursday 2 February 2023 as it will be circulated on the notice of the meeting”.

[14] On Wednesday 1 February 2023, a multi-party whippy meeting was held and a demand emanating from that meeting was that the speaker recuse himself when a motion of no confidence in him was to be raised at the resumed meeting. The speaker took up the attitude that there was no basis for his recusal.

[15] The ordinary council meeting commenced on Thursday 2 February 2023 at 13h00. Shortly after that the speaker met with all the heads of the political parties to agree on a way forward to elect a new chief whip of council. That matter was then dealt with. After that there was a lengthy debate about the order of the agenda. According to the speaker, this debate implicated a complex question about how the council’s standing orders should be interpreted.

[16] At approximately 18h50, a proposal was made that the speaker was conflicted in the performance of his duties and that he should hand over his role as presiding officer to the “chair of chairs” whom I understand to be the senior chairperson of all the chairpersons of the various committees of the council. In response, the speaker pointed out that he was required by section 37(a) of the Structures Act to preside at the meeting of the council and by the standing orders to determine the proceedings of the council, and to keep order. These responsibilities could not be assumed by the chair of chairs. He therefore refused to accede to the proposal to hand over his duties as the presiding officer.

[17] This resulted in what the speaker described as several councillors engaging in extremely unruly and disruptive behaviour, resulting in a breakdown of the orderly process of discussion, deliberation and decision-making. Video footage was offered in support but it did not turn out to be necessary for me to have regard to it. Acting once

again in terms of his powers under rule 72(1) of the standing orders, he decided to adjourn the meeting at approximately 19h07.

[18] The speaker contends that his decision to adjourn the meeting was binding and enforceable against all relevant parties, including the city manager, the councillors and the council, and that it stood unless and until set aside by a competent court.

[19] After he had adjourned the meeting, councillors from the Democratic Alliance, the Freedom Front Plus, Inkatha Freedom Party and the African Christian Democratic Party left the council chamber.

[20] Some of the other councillors however remained in the council chambers. At approximately 19h19, some 12 minutes after adjournment of the council meeting, the city manager entered the council chamber. She sat in the speaker's chair. She claimed that she had "just received a second letter from the majority of political parties requesting her to reconvene the meeting". She went on to say –

"I respond to the second letter that I have just received from the majority of parties in council to chair this meeting in terms of section 29(1A) of the ... Structures Act to assist councillors or council to continue with its business of service delivery to the citizens of the City of Ekurhuleni."

[21] The speaker goes on in the founding affidavit to point out that the letter could never have constituted a valid request for the purposes of section 29(1A) of the Structures Act, that might otherwise have empowered her to call and chair a council meeting, for the following reasons –

[21.1] Section 29(1A) only empowers the city manager to call a meeting of council if the speaker refuses to agree to a valid request for such a meeting by a majority of councillors under section 29(1);

- [21.2] There was however no valid request for a meeting under section 29(1) for the speaker to consider. To constitute a valid request the letter would have to have been signed by a majority of the councillors. The speaker however claimed that the letter had been sent by a “majority of the political parties”;
- [21.3] The speaker had not refused to accede to any request in writing for a meeting under section 29(1);
- [21.4] In any event he would have had no power to accept any such demand because once a meeting has been adjourned by the speaker under rule 72(1), the decision is final and stands.
- [22] The speaker asserted further that the city manager’s decision to call and chair the meeting was procedurally irrational.
- [23] The speaker also points out that the city manager, when she made her decision, purportedly to resume the adjourned meeting, would have been fully aware of her lack of authority to do so, because of the focus on the provisions of section 29(1) and (1A) during the urgent proceedings in this court on the immediately preceding Sunday and Monday.
- [24] The speaker goes on to refer to a number of other provisions of the Structures Act, the standing orders and the Constitution that rendered the speaker’s purported resumption of the meeting, and the decisions that followed in the meeting, unlawful, void and invalid.
- [25] The decisions that were taken at the resumed meeting, all of which are impugned in these proceedings, were as follows:
- [25.1] The decision of the city manager to call, alternatively to continue with a council meeting after it had been adjourned by the speaker;

- [25.2] The decision of the city manager to preside at, dispose of the business of, and call for a rollcall at, the purportedly resumed meeting;
- [25.3] The decision of the city manager to put to a vote a motion for the appointment of the fifth respondent as acting speaker;
- [25.4] The decision of the council to appoint the fifth respondent as the acting speaker;
- [25.5] The decision to remove the speaker (i.e. the first applicant) from office as speaker;
- [25.6] The decision to suspend rule 83(2)(i) of the council standing orders;¹
- [25.7] The decision to rename Masoleng Park to Bokgabo Park;
- [25.8] The decision to require the city and the relevant department to consider complying with the obligation to consistently provide a weekly refuse removal service and credit the accounts of residents and businesses for the non-existent and/or erratic provision of waste removal services.
- [26] The applicants contend in the first instance that, the meeting having been unlawfully called by the city manager, and unlawfully chaired by her and, after her, the “acting speaker”, everything that took place at that meeting was unlawful and therefore a nullity. They enumerated multiple additional statutory breaches which they contend vitiated the various decisions. It is no longer necessary for me to go into the details of those alleged breaches.

¹ Rule 83 deals with the “nature of motions” and rule 83(2)(i) provides in relevant part that “[m]otions... may not be the same in substance as any motion debated in Council in the previous six (6) Months.” It is asserted by the applicants that this stands in the way of the desire of certain parties represented in the council to move a motion of no confidence in the current mayor, in respect of whom there was recently such a resolution debated.

[27] The applicants then applied urgently for these decisions to be declared void *ab initio* and a nullity, alternatively to review and set them aside, along with any further decisions that may have been taken consequent upon the decisions taken at the impugned meeting. They sought urgent final relief in this regard, alternatively, interim relief pending part B adjudication of their legality in due course.

[28] Answering affidavits were filed by the first to fourth respondents. The facts were largely uncontested. The main facts were in any event apparent from a transcript of the impugned proceedings, which was attached to the papers. They alleged that what underlay the application was a political dispute between the speaker and certain councillors and that what the applicants were trying to avoid was the legitimate deliberation by the council of a motion of no confidence in the speaker. The participating respondents also brought a counterapplication in which they sought the following relief:

“16.1 The speaker is requested to convene a meeting of council for Wednesday 15 February 2023;

16.2 The motion of no confidence the speaker recorded in an annexure to the founding affidavit would be considered at the meeting;

16.3 In the event that the motion is carried, the council will in the same meeting elect a new speaker in accordance with the council’s standing orders in the Municipal Structures Act;

16.4 The meeting is chaired by ElecXions Agency, or such other accredited agency available to conduct the meeting.”

[29] The applicants filed a replying affidavit in which they pointed out that there was no real contestation in the participating respondents’ answering affidavit, of their case as pleaded in the founding affidavit. The relief sought in the counterapplication, contemplating as it did this court directing a meeting chaired by an outside party, would give rise to a serious breach of the separation of powers doctrine and would also conflict with various constitutional and statutory provisions. The speaker also conveyed in the

replying affidavit that “in the event that this court grants the declaratory or review relief sought by the DA and myself in the main application, I intend duly to call a special council meeting by 16 February 2023, or as soon thereafter as reasonably possible.... This will enable the Council to function and conduct its business”.

[30] In the course of argument, the counter application was withdrawn. Counsel for the participating respondents went on to concede that the meeting of Thursday 2 October 2023 had been unlawfully resumed by the city manager, on account of non-compliance with section 29(1) and (1A), that the appointment of the fifth respondent as acting speaker had been unlawful and that the purported removal of the speaker from office was similarly unlawful. He was not willing to concede that the further decisions to suspend rule 83(2)(i) of the standing orders, to rename the park and to require the city and the relevant department to consider complying with refuse removal obligations, were unlawful. In any event, he contended that the relief in relation to those decisions was not urgent and could be the subject matter of a hearing in due course.

[31] Counsel did not, however, strongly resist the proposition put to him from the bench that, once the resumption of the meeting by the city manager is held to be unlawful, all of the decisions which followed it must, domino-like, fall too.² Nor did he strongly resist the proposition that it would be unfair to impose on another judge at a hearing in due course, the determination of these further questions when they could fairly be said to be ripe for immediate determination in the present hearing.

[32] In my view, the concession was correctly made that the actions of the city manager in calling and purporting to resume the council meeting on Thursday 2 February 2023, were unlawful. All of the decisions that followed these unlawful acts are similarly

² See, for example, *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC) (13 August 2018) at paras 31-35.

unlawful and invalid. This includes any decisions or actions taken pursuant to those decisions. There is no need to delay adjudication of some of these. The founding value of the supremacy of the Constitution and the rule of law in section 1(c) supports the quick imposition of legal certainty upon the affairs of the municipality. Legal certainty is also promoted by the review and setting aside of the impugned decisions, in addition to their declaration as a constitutional nullity.

[33] In the circumstances, I find that the applicants have made out a case for the grant of the substantive relief sought on a final basis.

[34] That leaves only the question of costs. The applicants seek an order of costs *de bonis propriis* against the city manager in her personal capacity (“a personal costs order”) on account of her role in the events precipitating the urgent application. For this reason, she has been joined in her personal capacity as second respondent, over and above her having been joined in her official capacity as first respondent. In particular, the applicants point to the fact that her unconstitutional conduct fell hot on the heels of the earlier order by this court interdicting her convening of a council meeting with reference to the same provisions of the Structures Act. They also refer to what she said at the impugned meeting regarding this court’s interim interdict granted only four days before:

“We need to clear the air that the interdict was based on the timeline that the Judge did not receive papers on time and the Judge only interdicted the meeting that was held at 10 o’clock. And if you remember, councillors, the meeting was never held. I came here and adjourned the meeting of 10 o’clock. And in terms of the court papers, the Judge was arguing that why are we not prepared to actually move the meeting to 16h00 same day or actually the following day. So anyway we left the matter at that and we also interdicted the decision of the Judge to grant the interdict to the DA.” (emphasis added)

[35] It was asserted that the latter comments reflected contempt for this court’s processes and authority.

[36] The city manager did not put up anything other than an affidavit confirming the main answering affidavit, which did not focus on resisting a personal costs order. On this basis, the applicants contend that the complaints against her stand uncontested and a case has properly been made out for a personal costs order. Counsel for the participating respondents, however, sought a fair opportunity for the city manager to defend herself in her personal capacity at a further hearing, asserting that she would advance an innocent explanation for the comments quoted above. The parties indicated that such a hearing could take place on this coming Thursday, if needs be.

[37] I have carefully considered the matter. There can be no doubt that the city manager's conduct was, from a constitutional perspective, brazen. This is so in respect of her conduct, even if she has an innocent explanation for her comments. The political role played by her when she in fact forms part of the administration of the Municipality, is problematic to say the least.

[38] However, she was not a lone ranger in this regard. She was acting on the unlawful instructions of a significant number of the political parties represented in council. Singling her out for a personal costs order seems to me to be disproportionate in the circumstances. I have therefore decided against such an award. However, this judgment should serve as a warning that the court will make personal costs orders against administrative officials and councillors guilty of repeat unconstitutional conduct, particularly where it involves disregard for court orders. Relevant in this regard are the following subsections of section 165 of the Constitution:

“(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”

[39] The position of municipal manager is dealt with in sections 55 to 57 of the Local Government: Municipal Systems Act No. 32 of 2000. Her role in relation to court orders was described in *Meadow Glen*³ as follows:

“[24] From the above-mentioned provisions it is clear that the municipal manager is, so far as the officials of a municipality are concerned, the responsible person tasked with overseeing the implementation of court orders against the municipality....The municipal manager is the official who is responsible for the overall administration of the municipality and the logical person to be held responsible. Even if, as must necessarily be the case, the municipal manager delegates tasks flowing from a court order to others it remains his or her responsibility to secure compliance therewith.”

[40] In this sense, the municipal manager is also expected to be an important enforcer of the Constitution in her own right. In future one would expect her to resist political pressure to act unconstitutionally. If she fails again on this score, she or others similarly placed should not expect leniency when it comes to a costs award.

[41] Counsel for the participating respondents also advanced an argument that the costs should be limited to those incurred until the time of the filing of the answering affidavit, given the constructive stance taken up in the answering affidavit. However, in truth, the concessions as to unconstitutionality were not to be found in the answering affidavit and the relief sought in the counter application was a constitutional non-starter. The concessions came during argument. I do however take into account (a) the constructive approach of counsel for the participating respondents in readily conceding the unconstitutionality at the hearing, (b) the fact that a costs order against the council is

³ *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* (767/2013) [2014] ZASCA 209; [2015] 1 All SA 299 (SCA); 2015 (2) SA 413 (SCA) (1 December 2014)

ultimately paid for by the ratepayers of a municipality and (c) the reasoning of Keightley J in awarding neither personal, nor attorney client costs in not dissimilar circumstances in *Phalatse*.⁴ I accordingly decline to order costs on a punitive scale.

[42] I make the following order:

[1] The rules, time limits, forms and procedures provided for in the Uniform Rules of Court are dispensed with in terms of Rule 6(12), to the extent necessary, and the application is heard as a matter of urgency.

[2] The following decisions (collectively “**the unlawful decisions**”) taken on Thursday, 2 February 2023, after the council meeting had been adjourned by the Speaker, Mr Raymond Dhlamini, including -

[2.1] the first respondent’s decisions -

[2.1.1] to purport to resume a council meeting after it had been adjourned by the speaker of the council; and

[2.1.2] at the adjourned Council Meeting to:

(a) preside;

(b) dispose of business;

⁴ *Phalatse and another v The Speaker of the City of Johannesburg and others* (unreported judgment of the Gauteng Division, Johannesburg under case number 2022/26790 dated 25 October 2022)

(c) call for a roll call; and

(d) allow and put to a vote, a motion for the appointment of councilor Tshivhenga as the “acting speaker” of the council; and

[2.2] the third respondent’s decisions to -

[2.2.1] appoint councillor Tshivhenga as the “acting speaker” of the council;

[2.2.2] remove Mr Raymond Dhlamini from the office of speaker of the council;

[2.2.3] suspend rule 83(2)(i) of the council standing orders;

[2.2.4] rename Masoleng Park to Bokgabo Park; and

[2.2.5] require the fourth respondent and the relevant department to consider complying with the obligation to consistently provide a weekly refuse removal service and credit the accounts of residents and businesses for the non-existent and/or erratic provision of waste removal services

are declared to be unlawful, unconstitutional and invalid.

[3] The unlawful decisions are reviewed and set aside.

[4] Any decisions or acts taken pursuant to the unlawful decisions are declared to be unlawful, unconstitutional and invalid and are reviewed and set aside.

[5] The costs incurred by the applicants are to be paid by the first, third and fourth respondents including, the costs of two counsel.



A.C. DODSON
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Counsel for the Applicants:

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Instructed by:

KM Mmuoe Attorneys

Date of hearing: 10 February 2023

Date of judgment: 13 February 2023