

SOUTH AFRICA / JUDGMENT

Abaqulusi Local Municipality and Another v Premier of the Province of KwaZulu-Natal and Others (3003/2022P) [2023] ZAKZPHC 97 (15 September 2023)

[2023] ZAKZPHC 97

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

R Singh

CASE / FILE NUMBER

3003/2022P

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG
CASE NO: 3003/2022P

In

the matter between:-

ABAQULUSI
LOCAL MUNICIPALITY
FIRST
APPLICANT
THE
SPEAKER,
ABAQULISI
LOCAL MUNICIPALITY
SECOND APPLICANT

and

THE
PREMIER OF THE PROVINCE OF
KWAZULU-NATAL
FIRST
RESPONDENT
THE

MEMBER OF THE
EXECUTIVE COMMITTEE:

CO-OPERATIVE
GOVERNANCE AND
TRADITIONAL
AFFAIRS, KWAZULU-NATAL
SECOND
RESPONDENT
THE
PROVINCIAL EXECUTIVE COUNCIL
THIRD RESPONDENT
MINISTER
OF CO-OPERATIVE GOVERNANCE
AND
TRADITIONAL AFFAIRS
FOURTH RESPONDENT
ORDER

[1]

The decision by the third respondent taken on 26 January 2022 and conveyed in the second respondent's letter dated 2 February 2022 to "retain" the powers of the second respondent in terms of the provisions of S139(1)(b) of the Republic of South Africa Constitution Act 108 of 1996, is declared to be unconstitutional and invalid and is hereby set aside.

[2]

The letter dated 2 February 2022, constituting notice given by the second respondent to the applicants, purportedly advising the applicants of the aforesaid decision, is hereby reviewed and set aside.

[3]

The first, second and third respondents are directed to pay the costs of the application for review, jointly and severally, the one paying the other to be absolved, with such costs to include the costs incurred consequent upon the employment of two counsel.

JUDGMENT

R. SINGH, AJ:

INTRODUCTION

- [1] This is a matter involving spheres of government at a provincial and local level and ultimately the citizenry within a municipality when provincial government exercises its powers to intervene in terms of S139(1) of the constitution.

- [2] The first applicant is a local municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998 (“the Municipal Structures Act”) which is responsible for inter alia the provision of services for the district of Vryheid which is situate in KwaZulu-Natal. The second applicant is the speaker of the said municipality. I shall collectively refer to the applicants as “the municipality”.
- [3] The municipality challenges the decision by the second and/or third respondents being the Member of the Executive Committee: Co-operative Governance and Traditional Affairs for the Province of KwaZulu-Natal and the Provincial Executive Council, respectively (I shall collectively refer to the first, second and third respondents as “the province”) to “retain” an intervention in the affairs of the municipality in terms of the provisions of section 139(1)(b) of the Republic of South Africa Constitution Act 108 of 1996 (“the constitution”). The application for review by the municipality is in terms of the provisions of the Uniform Rule 53 and the principle of legality.

THE FACTUAL BACKGROUND

- [4] The common cause facts between the parties were as follows:-
- (a) the municipality was placed under administration in terms of S139(1)(b) of the constitution by way of a notice dated 21 February 2019, following a resolution taken by the third respondent on that day;
 - (b) the intervention was “retained” by a notice dated 17 April 2020, for a period of six months to 31 October 2020, subject to a review before the expiry of the six month period and to its amendment by the addition of extra functions. The resolution in this regard was passed on 8 April 2020;
 - (c) by way of notice on 26 October 2020, following a resolution taken on 26 August 2020, the intervention was “retained” for a further period ending 31 March 2021;
 - (d) by way of notice dated 30 March 2021, the intervention was extended for a further period ending 31 October
2021. This was by way of a resolution taken on 28 March 2021;
- (e) by way of a letter dated 2 February 2022, the second respondent purported to “retain” the intervention subject to a review thereof, before or soon after 30 April 2022. The letter called upon the municipality to co-operate with the “Ministerial Representative”. I shall refer to this Notice as “the impugned decision”. The impugned decision was purportedly taken by the third respondent on 26 January 2022;
 - (f) upon receipt of the impugned decision, the municipality attempted to communicate with province and seek an undertaking that province would take steps to review or revoke its resolution to “retain” the intervention;
 - (g) no such undertaking from province was forthcoming.

[5] The municipality then launched the present application as an urgent application where in Part A of their notice of motion, they sought an interim order restraining province from implementing the impugned decision. The relief was opposed and was heard by my sister, Henriques J. who granted an interim order on 8 April 2022 together with an order that the first, second and third respondents pay the costs of the interim application (Part A of the notice of motion). Leave to appeal against the interim order was refused. Province then by way of petition approached the Supreme Court of Appeal for leave to appeal against the interim order. By the time the application for review came before me, the Supreme Court of Appeal dismissed the application for leave to appeal with costs on 20 July 2023.

THE

ISSUES

- [6] In my view, the issues to be determined are whether:-
- (a) the impugned decision to “retain” the powers of the third respondent in terms of the provisions of S139(1)(b) of the constitution after 31 October 2021 is unconstitutional and invalid and falls to be set aside in terms of S172(1)(a) of the constitution;
 - (b) if the impugned decision is unconstitutional and invalid, whether justice and equity of the matter dictates that the declaration of invalidity is suspended to allow the intervention to continue;
 - (c) the costs in respect of the application for review.

THE PRINCIPLE OF LEGALITY

- [7] The principle of legality dictates that the exercise of executive actions are subject to the tenets of the constitution. The courts are conferred with authority to determine the legality of the administrative action of various organs of state[1], [2]. The principle requires that:-
- (a) organs of state only exercise powers conferred upon them by the constitution or by way of law that is consistent with the constitution[3].
 - (b) any exercise of power by an organ of state must be rational and must be related to the purpose for which the power is given[4];
 - (c) a rational decision;
 - (d) the decision must be substantively and procedurally rational[5];
 - (e) any executive action taken must be in good faith and without material error of law[6].

THE RELEVANT PROVISIONS OF THE CONSTITUTION

- [8] S40 of the constitution states that government is constituted of national, provincial and local spheres and that all such spheres are distinct from each other yet interdependent and interrelated[7].

- [9] S151 of the constitution affirms that the executive authority of a municipality is vested with the municipal council and that a municipal council has the right to run the local affairs of its community. National or provincial government may not unnecessarily interfere with the municipality's ability to exercise its powers given that a municipality provides for "grass roots democracy".
- [10] S139(1) of the Constitution allows a provincial executive to intervene in a municipality when a municipality does not and cannot fulfil its executive obligations in terms of the constitution or the relevant laws. The provisions of this section is framed in the present tense and is concerned with a situation where there is ongoing failure on the part of a municipality to fulfil its obligations and not a past failure. Intervention is therefore is not appropriate for any past failures and meant to offer support to the municipality[8]. The duty of the provincial executive is to gather sufficient information using its monitoring powers and to satisfy itself that

there are objective facts[9] to justify an intervention.

- [11] In short, there must be rational connection in implementing the decision to intervene in terms of S139[10]. The decision to implement an intervention is the exercise of a public power and must not be made arbitrarily[11].
- [12] It is clear that an intervention in terms of S139 is invasive and must be utilized with great circumspection and not in a manner which undermines and unnecessarily usurps the functions of other spheres[12]. An intervention is also not meant to continue ad infinitum. It in my view, is meant to be rehabilitative and a mechanism which is meant to help a government sphere get on its feet and not "gag" the relevant government sphere.
- [13] It is also for the foregoing reasons that S147 of the Municipal Finance Management Act 56 of 2003 (MFMA) requires that provincial interventions be regularly reviewed by the MEC for Local Government or the MEC for Finance in a province. All of these safeguards are to ensure that a municipality which has been democratically elected is able to regulate its own affairs.

REMEDY

- [14] A court has no discretion but to declare a decision to be unlawful in terms of S172(1)(a) of the constitution once it finds that an irregularity has been committed. Once such finding is made, the consequences of such finding must be dealt with by an order that is just and equitable[13], [14], [15].
- [15] A court making a determination in terms of S172(1)(b) has wide remedial power[16].

THE MUNICIPALITY'S

SUBMISSIONS

- [16] Mr Goddard SC who appeared with Ms Palmer argued that each of the grounds of review are on the premise that the intervention ended on 31 October 2021, following a resolution which passed by the third respondent on 28 March 2021 that expressly stated “ending 31 October 2021”.
- [17] Further, province’s ministerial representative vacated his office and had taken up employment as a municipal manager at another municipality. The said ministerial representative’s signing authorities in respect of the municipal bank account also ended on 31 October 2021. This effectively meant that province did not have any presence in the municipality. After a new council was elected following the elections on 1 November 2021, municipality’s business affairs were conducted without intervention.
- [18] The municipality therefore argued that the impugned decision to “retain” the intervention was ultra vires and contrary to the provisions of S139 of the Constitution and the relevant provisions of MFMA. Province could therefore not “retain”

an intervention which ceased to exist in the first place.

- [19] With regard to the second ground of review, namely that the decision was substantively and procedurally irrational, the municipality argued that the irrationality arose as the impugned decision was premised on factually incorrect assumptions, namely that there was something to be “retained” when such intervention no longer existed.
- [20] The irrationality further arose because there was no failure to fulfil an executive obligation on the part of the municipality anywhere from the record and therefore province had failed to satisfy the jurisdictional threshold envisaged in S139(1)(b). It was submitted that all the facts relied upon in the impugned decision were out of date or not facts at all alternatively, without the true facts at the municipality being known.
- [21] The municipality further argued that province should only intervene and assume responsibility for municipal function unless really necessary and justified by the existence of requisite jurisdictional factors and after requisite procedures and safeguards had been observed. Province had failed to do this and therefore misconstrued its powers in terms of S139(1).
- [22] It was submitted that province had taken irrelevant considerations into account and ignored relevant considerations. Ultimately it was not permitted to act as it did therefore rendering the impugned decision contrary to the principle of legality.

PROVINCE’S

SUBMISSIONS

- [23] Mr Dickson SC who appeared on behalf of province argued that the provisions of S139 does not emphasize merely a discretion to intervene but also a duty to intervene where a municipality cannot, or does not, fulfil its executive obligations. He relied on the case of Premier, Gauteng and Others v Democratic Alliance and Others [17] which dealt with various principles to be considered when an intervention is to be made those being, namely that:-
- (a) there must be a failure to fulfil obligations;
 - (b) appropriate steps must be taken in light of such failure to fulfil obligations;
 - (c) responsibility must be taken for the unfulfilled obligations to the extent that it is necessary.
- [24] In its heads of argument, province submitted that the steps to be taken are non-exhaustive and the primary purpose should be to assist the municipality bearing in mind that people and their interest comes first.
- [25] In respect of the intervention itself, province in its heads of argument stated that the intervention continued from the initial decision until March 2021 when it was extended for a further period ending 31 October 2021. The local government elections took place on 1 November 2021 and in the meantime the Minister of Finance on 26 October 2021 wrote to the first respondent addressing the issues of interventions which spread over the elections and directed the first respondent on the continuation of interventions (“the letter”). It was further submitted that this had to be read with the COGTA/Treasury/SALGA circular (“the circular”). Province therefore complied with the letter and circular and at a meeting of the executive council which took place on 26 January 2022, it made a decision on “retaining” the intervention. It also took into account a “secret” memorandum to the third respondent in respect of the municipality (“the secret memorandum”).
- [26] At this point, I might mention that the letter identified thirty municipalities under different modes of intervention. In the absence of guidance in the constitution or any other legislation as to what would happen to municipalities under intervention during the transition from one term of municipal councils to the next, the letter was intended to guide province on what needed to be done in respect of affected municipalities. From the secret memorandum, it is clear that the purpose was to outline the progress made in the implementation of the intervention at the municipality following a decision of the third respondent to extend the intervention for “a further period extending to 31 October 2021”. The secret memorandum is undated and unsigned and is suggestive of having only considered the municipality for the period up to and including 31 October 2021 and not beyond that date.
- [27] With regard to the issue of “retaining” the intervention, province argued that the word “retain” is defined in the Shorter Oxford English Dictionary as “to keep in custody or under control; to prevent from departing, issuing or separating; to hold fixed in some place or position”. The state of affairs in respect of the municipality was extant up to 31 October 2021

and three months later the third respondent directed that it be “retained”. Province accordingly submitted that even if the state of intervention fell away, it was thereafter retained with the effect being of reinstating the intervention.

APPLICATION OF THE FACTS TO THE LAW

- [28] In arriving at a decision it is necessary to consider whether the evidence on record establishes factual existence of irregularity and if so, whether such irregularity is material.
- [29] There is no doubt that Sections 40 and 151 of the constitution are clear that the different spheres of government are distinct from each other and that a municipal council has the right to run the local affairs of its committee without undue interference from national or provincial government so that such municipality serves the community and citizenry that voted it into power in the first place. This right however is not unfettered and the provisions of S139(1) provide for intervention under appropriate circumstances.
- [30] Our courts have recognized that such intervention must however be based on a proper assessment of objective facts and not on any past failures on the part of a municipality to fulfil its executive obligations. I have mentioned earlier on in this judgment that the purpose of intervention is not to “gag” a municipality nor is the purpose to intervene to be taken arbitrarily. Further, intervention is not to be used as a means of penalizing a municipality. For provincial government to intervene without taking into consideration these factors, will result in it acting unconstitutionally, unlawfully and ultra vires.
- [31] There was nothing on the papers before me to suggest that province had notified the municipality on or before 31 October 2021 of any retention and/or extension of the intervention. Further the ministerial representative had vacated his office within the municipality and his signing authority in respect of the municipality’s bank account had also terminated by 31 October 2021. This was not disputed by province in its answering and supplementary affidavits on the papers. During the hearing, I specifically asked province’s counsel what province’s submissions were in this regard and it was submitted that the position was being in the process of being filled. I am therefore of the view that as at 31 October 2021, province did not have presence within the municipality nor was there evidence of any checks and balances in place to oversee the running of the municipality by province from 1 November 2021 until 2 February 2022 when the impugned decision was communicated to the municipality. The letter dated 2 February 2022 which purported to retain the intervention cannot therefore be construed to be reviving or resuscitating the intervention when province by 31 October 2021 simply have no presence within the municipality.
- [32] In its opposition to the application, province placed reliance on the letter dated 26 October 2021 which addressed the issue of interventions in respect of municipalities including, Abaqulusi Municipality and recommended that existing interventions should be continued. This was the reason why the intervention in question continued throughout and after the local elections. Province went on its papers to state that shortly after the letter or about the

same time, the circular was published dealing with transitional measures surrounding local government elections and provided guidelines for how interventions were to continue. Province was accordingly of the view that they had complied with the letter and the circular.

[33] Given the invasive effect of an intervention, I am of the view that province's submissions that it was acting on the recommendations of these two documents simply cannot pass muster. Provincial government does not exist to simply act as a rubber stamp to any circular or document received by any other governmental spheres. It is incumbent on province that before it intervenes in local government affairs to ensure that any recommendations and guidelines apply specifically to the local government sphere concerned. In casu province failed to do this and merely adopted the approach that any recommendations from the Minister of Finance and/or SALGA could be adopted with a blanket approach. Such an approach is in my view, unconstitutional, unlawful and falls to be set aside in terms of S172(1)(a) of the constitution. I am satisfied that the impugned decision is therefore unconstitutional, unlawful and must be set aside.

[34] This then brings me to what a just and equitable remedy is in the face of declaring the impugned decision to be unconstitutional. The municipality submitted that province had not provided any evidence as to what executive obligations were outstanding by the municipality despite being challenged to do so and further any financial reasons for a continued intervention were based on purported reasons ex post facto. Continued intervention is not justified and that the correct remedy would be to set aside the impugned decision. Municipality submitted

that there was insufficient evidence on the papers for me to decide whether the position in the municipality had improved or deteriorated

and to allow an intervention to continue based on that would be to undermine the democracy of the people that voted the municipality

into power.

[35] Mr Dickson SC submitted on province's behalf that even if I declare the impugned decision to be unconstitutional, S172(1)(b) gave me a discretion in the interest of justice to suspend the period of invalidity because the municipality had failed to fulfil its executive function and that the expenditure within the municipality was growing larger. There were also various breaches of the MFMA and overall the municipality was delinquent.

[36] I am of the view that the letter dated 2 February 2022 constituting notice given by the second respondent to the municipality advising the municipality of its decision to retain the powers of the second respondent in terms of S139(1)(b) of the constitution falls to be reviewed and set aside. It is not in the interest of justice or equity that province be allowed to continue with an intervention which had lapsed and in respect of which there are no objective and up to date facts to justify further intervention. If province believes that intervention is necessary, then it must conduct proper investigations to justify intervention. I say this

because for nearly three months, province did not have a presence within the municipality.

COSTS

- [37] Municipality argued that costs must follow the result and that they are entitled to the costs of the application in the event that I grant them the relief in part B of the notice of motion. Further province had failed to observe co-operative governance protocol and ultimately it would be the ratepayers who would suffer the most if an adequate order for costs is not made against province.
- [38] Mr Dickson relied on the Biowatch principle[18] and submitted that as both parties were organs of state, I ought to exercise my discretion and order each party to pay its own costs.
- [39] I am of the view that costs must follow the result and that the municipality has been successful in the application for review. The first, second and third respondents being the respondents who opposed the application must pay the costs of the application jointly and severally the one paying the other to be absolved including the costs consequent upon the employment of two counsel. The municipality in Part B of its notice of motion sought costs on an attorney and client scale. I am not satisfied that such a case is made out and costs are therefore awarded on a party and party scale.

CONCLUSION

- [40] In the result, I make the following order:-
- (a) The decision by the third respondent taken on 26 January 2022 and conveyed in the second respondent's letter dated 2 February 2022 to "retain" the powers of the second respondent in terms of the provisions of S139(1)(b) of the Republic of South Africa Constitution Act 108 of 1996, is declared to be unconstitutional and invalid and is hereby set aside.
 - (b) The letter dated 2 February 2022, constituting notice given by the second respondent to the applicants, purportedly advising the applicants of the aforesaid decision, is hereby reviewed and set aside.
 - (c) The first, second and third respondents are directed to pay the costs of the application for review, jointly and severally, the one paying the other to be absolved, with such costs to include the costs incurred consequent upon the employment of two counsel.

R. SINGH, AJ

DATE OF HEARING: 11 AUGUST 2023

DATE OF JUDGMENT: 15 SEPTEMBER 2023

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- [1] Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa [2000] ZACC 1; 2000 (2) SA 674 (CC) at paragraph 40;
- [2] Airports Company South Africa v Tswelokgotso Trading Enterprises CC (2019)
 - (1) SA 204 (GJ) at paras 6 and 7
- [3] Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council [1998] ZACC 17; 1999 (1) SA 374 (CC) at paragraphs 56 to 59
- [4] Pharmaceutical Manufacturers' case supra at paragraph 85
- [5] Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC) at paragraph 34
- [6] Democratic Alliance v President of South Africa and Others 2012 (1) SA 417 (SCA) at paragraph 112
- [7] City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 (6) SA 182 (CC) at paragraphs 43 to 44
- [8] City of Cape Town v Premier, Western Cape and Others 2008 (6) SA 345 (C) at paragraphs 79 to 80
- [9] Mnquna Local Municipality and Another v Premier of the Eastern Cape and Others [2012] JOL 283 11 (ECB)
- [10] Premier Gauteng and Others v Democratic Alliance 2022 (1) SA 16 (CC)
- [11] Merfong Demarcation Forum and Others v President of the Republic of South Africa and Others [2008] ZACC 10; 2008 (5) SA 171 CC at paragraph 62
- [12] City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 CC
- [13] Section 172(1)(b) of the Constitution
- [14] De Lange v Smut NO and Others [1998] ZACC 6; 1998 (7) BCLR 779 (CC) at paragraph 104
- [15] Bengwenyama Minerals (Pty) Limited and Others v Genorah Resources (Pty) Limited and Others 2011 (4) SA 113 (CC) at paragraph 81
- [16] State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23 CC at paragraph 53
- [17] 2022 (1) SA 16 (CC) at paragraphs 74 to 77

[18] 2009 (6) SA 232 (CC)

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