

SOUTH AFRICA / JUDGMENT

African National Congress and Others v Lobelo and Others (UM81/2021) [2021] ZANWHC 52 (26 August 2021) [2021] ZANWHC 52

COURT

North West High Court, Mafikeng

BEFORE

M Z Makoti

CASE / FILE NUMBER

UM81/2021

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

CASE NO.: UM81/2021

In the matter between:

AFRICAN NATIONAL CONGRESS

1st Applicant

MODISAOTSILE SAM LETLAKANE

2nd Applicant

ELISA SEDIMOENG

3rd Applicant

JOSEPH OLAOTSOE MAKALELA

4th Applicant

NKAGISANG JOSEPH MOLEFABANGWE

5th Applicant

THEBEETSILE ABRAM MODISE

6th Applicant

LEBOGANG BOME

7th Applicant

PUSELETSO MERRIAM MOKOTO

8th Applicant

ABRAM THEMBINKOSI MABOVU

9th Applicant

BOORMAN PHUTIYAGAE

10th Applicant

And

MPULELO EUNICE LOBELO

1st Respondent

MBUYISELO ERIC BOOI

2nd Respondent

TUMELO DAVID MTHIMKHULU

3rd Respondent

MATSHEDISO MARGARET MOREO

4th Respondent

GABAHELE ELSIE KGASU

5th Respondent

KEATLARETSE EVELYN BLOU

6th Respondent

REBECCA BAITSUMEDU

7th Respondent

THERO SILAS TSHOLO

8th Respondent

THABO ALBERT MOREI

9th Respondent

TICKEY ELIZABETH CHABANKU

10th Respondent

THE MAYOR, DIMAKATSO LYDIA MALWANE

11th Respondent

MONTO ISAK MORUTI (MUNICIPAL MANAGER)

12th Respondent

THE MINISTER OF COOPERATIVE GOVERNANCE

13th Respondent

AND TRADITIONAL AFFAIRS

REASONS

FOR JUDGMENT

MAKOTI AJ

INTRODUCTION

- [1] In this matter the applicants are challenging their dismissals from positions as members of Council of Tswaing Local Municipality (“Tswaing”). This Court saw yet another matter involving a Municipality and which was instituted on urgent basis. I heard the application on 23 April 2021, after which I granted a number of orders in favour of the applicants. Subsequently, on 07 May 2021 the respondents filed a formal request for the reasons of my orders. Due to some administrative glitches I only received the request and the file during 05 August 2021.
- [2] The matter raised a number of technical points, which I shall deal with prior to attending to the merits of the application. Upon reading the papers filed and after hearing oral submissions from the legal representatives, I had no difficulty dismissing the points in limine that were raised.

POINTS IN LIMINE

- [3] The first technical point that was raised by the respondents was that the applicants did not have authority to act on behalf of the African National Congress ('the ANC'). It was their case that the application should be dismissed on that basis alone. I disagreed. It made no sense that the Court could be asked to shut the door on the faces of nine applicants, who were applicants in their own right, merely because they tagged the name of the ANC as co-applicant.
- [4] In *Haroun v Garlick*[1] Moosa J held, with reference to uniform rule 10, that the joinder of parties depends not only upon the nature of the subject matter but also upon the manner in which and the extent to which the court order sought may affect the interests of such parties. Quite apart from the ANC, all the nine applicants have supported the application, and collectively seek the orders setting aside their removal as councillors. I use removal and dismissal interchangeably. Pure logic dictated that even if the ANC was not cited correctly as a party or even if it was not cited at all in this application, that would not have resulted in any of the other nine applicants being non-suited to institute the application.
- [5] The second point emphasised form over substance. Relying on the case of *ABSA Bank Ltd v Botha NO and Others*[2] this regard the respondents sought the dismissal of the application on grounds that the deposition to the founding affidavit was not done appropriately. The contention was that the certificate of the commissioner of oaths was not correctly completed to show when and where the affidavit was signed. First, the certificate clearly and correctly identified the deponent as a female person. Secondly, the commissioner of oaths used a stamp which showed the place where the affidavit was commissioned, and the date of deposition also appeared *ex facie* the affidavit. In my view there was substantial compliance and the affidavit had to stand. With the technological advancements, it should be acceptable that the commissioner chose to use his official stamp instead of filling in the apparently missing details. Substance must prevail over form.[3]
- [6] It was the third point of non-joinder that was acutely surprising. The respondents contended that the applicants had failed to join the Member of the Executive Council ('the MEC') responsible for local government. This point was predicated on the basis that s 105 of the Municipal Systems Act provides that the MEC plays an important role coordinating, monitoring and supporting municipalities in the province. Additionally, it was argued that item 14(2) of the

Code of Conduct of Councillors ('the Code') authorised the MEC to remove a councillor for breach of the Code on receipt of recommendations from Council or from an ad hoc committee.

- [7] What the respondents did not suggest was that it was the MEC's decision to remove the applicants from their positions. They took and implemented the decision, and the MEC played no role in it. It is that decision and its implementation that the applicants have mounted this challenge over, and I see no reason why the MEC's non-joinder is helpful to the respondents. He was simply not a party with direct and substantial interest in the outcome of this application. The same should be said of the Independent Electoral Commission ('the

IEC”), which had no role in the decision that was taken independently by the respondents. In my view that decision can be set aside without any of those parties participating in this matter.

[8] Our law has become settled in that a party sought to be joined in Court proceedings has to have direct and substantial interest in the outcome of the proceedings in order to succeed. What constitutes a direct and substantial interest is a legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. Neither the MEC nor the IEC had any interest that could be adversely affected by the outcome of the application. Gautchi AJ (as he then was) gave a detailed exposition of Rule 12 of the Uniform Rules in *Shapiro vs South African Recoding Rights Association Ltd (Galeta Intervening)*[4] in which he held inter alia that:

“The Learned authors have clearly in mind a direct and substantial interest in the sense of an interest in right which is the subject

matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. Such an interest is referred to as a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the Court.” (Emphasis added)

[9] The respondents could not show with any conviction what the alleged legal rights were of the MEC and the IEC which stood to be adversely affected by the outcome of this application. This was not surprising because, simply put, there were none.

[10] The final point in limine was that of urgency. It is the respondents’ case that the application does not contain facts to support the case for urgency. Further, they alleged that the urgency is self-created and an abuse of Court processes. This is astonishing, and the respondents have not explained why they allege that the urgency is self-created. But urgency is first and foremost a question of fact. This means that a person seeking to be heard on urgent basis must set out facts which render the matter urgent. Thereafter, the applicant must provide reasons why there cannot be sufficient redress if the matter is to be heard in the future.

[11] Where an application is brought on the basis of urgency, the rules of court permit a court to dispense with the forms and service usually required, and to dispose of it ‘as to it seems meet’.[5] What lies at the heart of the consideration whether a case is sufficiently urgent is the question of absence of substantial redress

in an application in due course. If that requirement is satisfied, Rule 6(12) can be relied upon to come to the assistance of a litigant because if the it for the normal course, it will not obtain substantial redress. The converse is that, where an application that lacks urgency, it is considered as not properly on the court’s roll, and the court may decline to hear it.[6]

[12] In the Constitutional Court case of *South African Informal Traders Forum and Others v City of Johannesburg*[7] Moseneke J stated that:

“[37] Another of the City’s contentions was that the urgency the applicants relied on was self-created and ought not to be entertained. Even if it is accepted that urgency arose as early as October 2013, it was only prudent and salutary that the applicants first sought to engage the City before they rushed off to Court. That engagement, as mentioned above, produced the agreement of 2 November 2013. (Notes omitted)”

[38] I find nothing dilatory in the efforts of the applicants to engage the City and persuade it to restore them to their trading positions in the inner city. Their return to their trading stalls remained urgent throughout the engagements or negotiations attempted before an urgent application was launched. Even by the time they approached this Court, their claims were self-evidently urgent and so we concluded.”

[13] The facts clearly indicate that the respondents did, ostensibly on allegations that the second to tenth applicants have committed serious misconduct, take a resolution to terminate the applicants’ positions as councillors. The decisions carried effect immediately and the applicants were not called upon to provide representations as to why they should not be removed as councillors. What is most concerning, even at this stage, is the question whether the respondents were legally permitted to dismiss other elected councillors from their positions. This raises the question of legality which I will deal with below.

[14] In a recent judgement from this Division, in the matter of Groep and Others v Naledi Local Municipality and Others[8] Gura J found a matter of similar nature to be urgent on the basis of the legality questions that the matter invoked. The relevant

paragraph reads:

“[46] The Respondents submitted that this matter is not urgent and that the Applicants did nothing to show urgency. One should not overlook the fact that throughout their papers, the Applicants aver that the Council meeting was not lawfully constituted and that all its decisions on 19 November 2020 had been tainted with illegality. Amongst others, the Mayor and the Speaker were removed in this meeting. It remains to be seen whether due process was followed to remove them. It is my view that the matter is urgent, otherwise a decision to the contrary may have the effect that a court of law allows the perceived illegality to continue.” (Emphasis added)

[15] Likewise, this matter involves decisions which allegedly contravene the principles of legality or the rule of law regarding which Tuchten J remarked in Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others[9] that:

“[65] The case for the applicant is that the respondents are seeking unlawfully to take away its lawfully derived power to govern the municipality at a local government level. That case, if ultimately substantiated, is directed at redressing nothing less than a serious violation of the rule of law. ... Every action taken by someone who is in law a usurper of power is unlawful and, especially where third parties are involved,

might give rise to complex questions of fact and law. Where the funds of a municipality are disbursed by such a usurper, recovery might be attended by serious problems and even be impossible. I find that the applicant has shown that it will suffer prejudice which cannot be redressed at a hearing in due course.” (Emphasis added)

[16] In the circumstances, the compendium of facts in this matter render the application urgent and the Court should not wait another day to address the questions of legality raised in this matter.

THE MERITS

[17] The parties were ad idem that the second to the tenth applicants were members of Council of Tswaing. Also, it was a matter of common cause that on 08 April 2021 the respondents passed a resolution removing the second to tenth applicants from Council. Relevant to the issue at hand is the Code of Conduct for councillors, item 4 of which reads as follows:

“4. Sanctions for non-attendance of meetings

1. A municipal council may impose a fine as determined by the standing rules and orders of the municipal council on a councillor for:
 - a. not attending a meeting which that councillor is required to attend in terms of item 3; or
 - b. failing to remain in attendance at such a meeting.
2. A councillor who is absent from three or more consecutive meetings of a municipal council, or from three or more consecutive meetings of a committee, which that councillor is required to attend in terms of item 3, must be removed from office as a councilor.
3. Proceedings for the imposition of a fine or the removal of a councillor must be conducted in accordance with a uniform standing procedure which each municipal council must adopt for the purposes of this item. The uniform standing procedure must comply with the rules of natural justice.” (Emphasis added)

[18] Compliance with the rules of natural justice is a legislative injunction as well as an incident of the principle of legality. The primary procedural safeguards in South African administrative law are expressed by the twin principles of natural justice: audi alteram partem (“the audi principle”) and nemo iudex in sua causa that is, that a public official should hear the other side, and that one should not be a judge in his own cause. There can be no excuse in this constitutional dispensation that a decision, especially one that has adverse consequences, be taken without giving an affected person an opportunity to state his side of the story.[10]

[19] In *Administrator Transvaal and Others v Traub*[11] the Court held as follows:

“For these reasons I agree with the conclusion reached by the Judge a quo to the effect that the decision of the second appellant to turn down the applications of the respondents for the posts of SHO at the hospital was invalid by reason of his failure to accord the respondents a fair hearing before taking the decision.” (Emphasis added)

- [20] What this implies is that a decision ought not to be taken without affording a person an opportunity to state their case, regardless of whether one is perceived to have made himself or herself guilty of some serious misconduct. Paragraph 74 of the respondents’ answering affidavit reads:

“In any event, and the Applicants have conceded in their founding affidavit at paragraph 4.42.1 the Applicants were previously charged

for the same complaints on 3 November 2020 and a fine imposed on them.”

- [21] By this submission the respondents contended that it must be found that the applicants were given an opportunity to state their side of the story. Past misconduct can only serve as aggravating grounds for a harsher outcome, especially in circumstances where penalty for the previous misconduct was imposed. This is not persuasive. If the respondents took disciplinary action in the past, then their conduct as complained of was inexcusable because they know the correct procedures, which they chose not to follow.

- [22] The incidence of misconduct sanction of 3 November 2020 is not clear cut and I could not see how it could be helpful to the respondents. This is because in paragraph 4.42.2 of the same founding affidavit the applicants decried the fact that even on that occasion due processes of the law were not followed. It is not out of sync to have expected councillors to act within the ambit of the law, and they did not.

- [23] The respondents’ problems are compounded by the fact that they took the decisions by themselves, a function reposed exclusively in the domain of the MEC. In the case of the Democratic Alliance and Others v Oudtshoorn Municipality and Others[12] the Rogers J held as follows:

“[85] What is beyond doubt, however, is that Parliament, by way of a national law (the Systems Act), has decreed that, at least for all breaches of the Code apart from item 4(2), a council or special committee has the power to make findings of a breach and issue a formal warning, reprimand or fine whereas suspension and removal are the exclusive domain of the MEC. Parliament has already laid down that, even where a council or special committee has issued a warning, reprimand or fine, the

aggrieved councillor may appeal to the MEC. This indicates that the imposition of the more serious sanctions of suspension and removal should be in the hands of a higher level of government ...” (Emphasis added)

- [24] The provisions of item 14(6) provide that:

“(6) If the MEC is of the opinion that the councillor has breached a provision of this Code, and that such contravention warrants a suspension or removal from office, the MEC may-

- a. suspend the councillor for a period and on conditions determined by the MEC; or
- b. remove the councillor from office.”

[25] Nothing in the legislative scheme empowered councillors to remove other councillors from their positions. Under the circumstances, in taking the resolution to remove fellow councillors from their positions on 08 April 2021, the respondents have usurped the powers or functions reposed in the MEC. Their actions were ultra vires and unlawful. Based on these reasons the application had to succeed. In law conduct that is ultra vires is inimical to the rule of law and therefore unlawful.[13]

[26] The foregoing statements conform with the dictum of the Supreme Court of Appeal in the case of *Road Accident Fund v Makwetlane*[14] in which it was held that:

“... The doctrine of legality required of the Minister that he comply with the Constitution as well as act within the parameters of the power conferred upon him by the Act.”

[27] I found that the respondents not only impinged the rules of natural justice, but also took a decision that was above the scope of their functions. For these reasons the application had to succeed as evinced by the orders that I granted.

COSTS

[28] I granted a cost order against the first respondent. This was because of the history of this matter. It is so that the first respondent gave undertakings to the Court in a previous urgent application in which Petersen AJ, as he then was, sat. The undertaking to the Court was to the effect that council was to have special meeting on 31 March 2021. When the date approached the first respondent shifted goal posts, reasoning that the Court did not make an order to that effect.

[29] It seems to me that the reason why the Court ruled against the respondents in the previous urgent application was due to the undertaking which the Court accepted to have been reasonable. To depart from that position without justification was in my view an abuse of the position of Speaker, which this Court was displeased about. On that basis, it was the first respondent who had to be ordered to shoulder the costs of this application.

M. Z. MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

REPRESENTATIVES:

APPLICANT: ADV RF DE VILLIERS

JASSAT MITCHELL INC ATTORNEYS

C/O SMIT STANTON INC

MAHIKENG

RESPONDENT: ADV G MAMABOLO

MOTLATSI SELEKE ATTORNEYS

C/O NTSAMAI ATTORNEYS

REASONS

REQUESTED

: 07 MAY 2021

DATE OF JUDGMENT

: 26 AUGUST 2021

[1] [2007] 2 All SA 627 (C).

[2] 2013

(5) SA 563 (GSJ).

[3] Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530. SA Pulp and Paper Industries Ltd v Commissioner for Inland Revenue 1955 (1) SA 8 (T); Du Plessis v Joubert 1968 (1) SA 585 (A); Bozzone and Others v Secretary for Inland Revenue 1975 (4) SA 579 (A).

[4] 2008

(4) SA 145 (W).

[5] Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others (379/05) [2006] ZASCA 51; 2006 (4) SA 292 (SCA); [2006] 2 All SA 565 (SCA) (31 March 2006).

[6] In re: Several matters on the urgent court roll [2012] ZAGPJHC 165;

[2012] 4 All SA 570 (GSJ); 2013 (1) SA 549 (GSJ) (18 September 2012): “[19] Those matters that do not comply with the Rules and Practice Manual will not be afforded a hearing in this court. They fall to be struck from the roll with costs where appropriate.

[7] South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014).

[8] Case No: UM253/2020.

- [9] Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others (35248/14) [2014] ZAGPPHC 400; [2014] 4 All SA 67 (GP) (19 June 2014).
- [10] Publications Control Board v Central News Agency Ltd 1970 (3) SA 479 (A) at 488f; Nortjé en 'n ander v Minister van Korrektiewe Dienste and andere 2001 (3) SA 472 (SCA).
- [11] Administrator of Transvaal and Others v Traub and Others (4/88) [1989] ZASCA 90; [1989] 4 All SA 924 (AD) (24 August 1989).
- [12] Democratic Alliance and Others v Oudtshoorn Municipality and Others; In Re: Democratic Alliance and Another v Oudtshoorn Municipality and Others (3517/2014 , 8813/2014) [2014] ZAWCHC 132 (27 August 2014).
- [13] Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others [2000] ZACC 1; 2000 (2) SA 674 (CC).
- [14] Road Accident Fund v Makwetlane (649/2002) [2005] ZASCA 1 (17 February 2005).

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Prepared on 12 October 2026 · Esheria