

SOUTH AFRICA / JUDGMENT

Appel and Others v Democratic Alliance and Another (19623/2024) [2025] ZAWCHC 26 (4 February 2025) [2025] ZAWCHC 26

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

19623/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE NO: 19623/2024

DERICK

ANTONY APPEL

First

Applicant for Intervention

BONGIWE

MKHWIBISO

Second

Applicant for Intervention

MAMOTHIPANE

SYLVIA SHALE

Third

Applicant for Intervention

MZWANELE

MPAMBANI

Fourth

Applicant for Intervention

RINAH

LORRAINE MIENIES

Fifth

Applicant for Intervention

MBOGENI

ALFRED NOMKOKO

Sixth

Applicant for Intervention

MONWABISI

RAYMOND NONGXAZA

Seventh

Applicant for Intervention

And

DEMOCRATIC

ALLIANCE

First

Respondent

LINCOLN

DE BRUYN

Second

Respondent

In the matter between:

DEMOCRATIC
ALLIANCE
First
Applicant
LINCOLN
DE BRUYN
Second
Applicant
And
COUNCIL
OF THEEWATERSKLOOF
LOCAL
MUNICIPALITY
First
Respondent
SPEAKER
OF THEEWATERSKLOOF
LOCAL
MUNICIPALITY
Second
Respondent
THEEWATERSKLOOF
LOCAL
MUNICIPALITY
Third
Respondent
JOHN
MICHELS
Fourth

Respondent
THEUNIS
ZIMMERMAN
Fifth
Respondent
Heard: 18 December
2024

Delivered: Electronically on 04 February 2025

JUDGMENT

LEKHULENI J

Introduction

[1] This is an application brought on an urgent basis by the first to the eight applicants (“the intervening applicants”) for an order that they be granted leave to intervene in the main application in which this Court granted judgment on 15 September 2024 setting aside the decision of the Council of the Theewaterskloof Local Municipality to remove Councillor Lincoln De Bruyn from his position as the Municipality’s Executive Mayor and the subsequent election of Theunis Zimmerman as the new Executive Mayor. The applicants seek leave to intervene and appeal this Court’s judgment. The applicants have, simultaneously with the intervening

application, launched an application for leave to appeal the judgment of this Court delivered on 15 September 2024.

Background

Facts

[2] The intervening applicants are individual Councillors representing the African National Congress (“the ANC”) in the Theewaterskloof Local Municipality. On 19 September 2024, the Democratic Alliance (“the DA”) and Councillor Lincoln De Bruyn, the Executive Mayor of the Theewaterskloof Local Municipality, brought an urgent application (“the main application”) in this Court seeking a declaratory relief from this Court regarding two decisions made by the Council of Theewaterskloof Local Municipality.

[3] These decisions (“the impugned decisions”) were taken during a special council meeting held on Monday, 2 September

2024. The impugned decisions involved the removal of Councillor De Bruyn from his position as Executive Mayor of the Municipality and the subsequent election of Theunis Zimmerman as the new Executive

Mayor. In the main application, the DA and Councillor De Bruyn sought an order that the impugned decisions be declared unconstitutional,

unlawful and invalid and that they be reviewed and set aside.

[4] The intervening applicants were served with the main application on 5 September 2024. The DA and Councillor De Bruyn asserted in the main application that out of an abundance of caution, they served the application on all councillors, including the intervening applicants, and invited them to intervene as respondents if they wished. Despite the service of the main application upon them, the intervening applicants elected not to take up the invitation. Subsequently, the

court heard the main application on 20 September 2024 and gave judgment on 15 November 2024. Ostensibly, the intervening applicants

wilfully chose not to get involved in the matter. However, the Speaker of the Municipal Council opposed the main application.

[5] After considering the matter, the Court found that the procedure adopted by the Local Council to remove Councillor De Bruyn was flawed and riddled with irregularities. The Court found that the Council did not follow the procedure set forth in the Rules of Order adopted by the Council, which tightly regulates the Council's powers and proceedings of the Theewaterskloof Municipal Council. The Court concluded that Councillor De Bruyn and the Municipal Councillors were not afforded adequate time to consider the motion of no confidence, as stipulated in section 58 of the Local Government Municipal Structures Act 117 of 1998.

[6] In addition, the Court found that it was irrational for the Council to follow a process that precluded the Councillors and Councillor De Bruyn from fairly and adequately submitting relevant considerations and properly responding to the allegations against him in the motion of no confidence, calling for his removal. The procedure set forth by the Speaker did not enable the Council to make a rational decision regarding the motion of no confidence against Councillor De Bruyn. As a result, the Court concluded that the decision to remove Councillor De Bruyn from the position of Executive Mayor was unlawful, and the Court reviewed and set aside that decision.

[7] In this application, the intervening applicants contended that the urgent nature of the main application precluded them from adequately consulting with their respective constituencies and obtaining the requisite mandate to oppose the main application before the pronouncement of the judgment on 15 November 2024. They now seek to intervene in the main application. The intervening applicants asserted that they have now obtained the mandate and authorisation to oppose the main application and/or to apply for leave to appeal the judgment. The intervening applicants further averred that they have a direct and substantial interest in the matter and wanted to adduce further evidence not placed before the Court when the main

application was heard.

[8] The DA and Councillor De Bruyn, the respondents in the intervening application, opposed the applicants' application. The respondents contended that the main application in which the intervening applicants sought to intervene was served on them on 5 September

2024. Yet, the intervening applicants waited three months and five days before launching the present application on 10 December 2024 for an urgent hearing during the 2024 holiday season and during the court recess on 18 December 2024.

[9] The respondents asserted that the intervening applicants failed to demonstrate the requisite urgency. The focus of their efforts has been solely on whether they should be granted permission to intervene in the main application. Following that, they intend to pursue an application for leave to appeal the judgment they seek to contest, as

well as to request permission to introduce additional evidence.

Principal Submissions by the parties

[10] Mr Holland, the applicants' Counsel, submitted that the main application was heard on an urgent basis. In the circumstances, the intervening applicants did not have an adequate opportunity to consult with their constituencies, which they represent and obtain the necessary mandate from the ANC to oppose the main application before the judgment was delivered on 15 November 2024. Mr Holland submitted that the intervening applicants have since obtained the necessary mandate from their constituencies.

[11] The applicants' Counsel argued that despite not initially opposing the main application, the intervening applicants are the same Councillors who, on 16 August 2024, tabled the motion of no confidence seeking the removal of Councillor Lincoln De Bruyn as the interim Executive Mayor of the Municipality and who, on 2 September 2024, voted for the removal of Mr Lincoln De Bruyn at a lawfully convened and constituted special council meeting. Accordingly, Mr Holland argued that a valid case exists, providing sufficient grounds for this Court to grant the requested relief in the notice of motion.

[12] On the other hand, Mr Sive, Counsel for the respondents, challenged the urgency of this application. Counsel contended that the urgency associated with this application has been self-created. Mr Sive noted that the intervening applicants had more than two months and one week from 5 September 2024, when they were served with the main application, until 15 November 2024, when this Court pronounced its judgment to engage with the electorate and their constituencies and to request leave to intervene in the main application.

[13] Mr Sive asserted that the intervening applicants were invited to intervene in the main application but elected not to take up this invitation before the court granted the judgment on 15 November 2024. Counsel submitted that the applicants filed this urgent application three months after the main application was instituted without explaining their delay. The sole justification offered was that the urgent nature of the main application had restricted

their ability to engage with their constituencies and secure the necessary mandate to contest the main application prior to the delivery of the judgment on 15 November 2024.

- [14] On the merits of the application, Mr Sive submitted that the intervening applicants do not seek to intervene in the main application because the order will affect them, the electorate or their constituents in any way at all. Instead, so the contention proceeded, their case for intervention is entirely speculative. Beyond barely asserting that they have a direct and substantial interest in the outcome of the litigation, Mr Sive submitted that the applicants failed to plead what such interest is, let alone demonstrate that it exists. Counsel implored the court to strike the application from the roll, alternatively dismiss the application with a punitive cost order.

Issues

in dispute

- [15] There are three primary issues that arise for determination in this matter. The first issue is whether the intervening applicants' application was brought with the requisite degree of urgency or whether the urgency pleaded by the applicants is self-created. Secondly, whether the applicants should be granted leave to intervene in the main application. Thirdly, whether this court should grant permission to the intervening applicants to file an application for leave to appeal the order and judgment of this court delivered on 15 November 2024.

Applicable Legal Principles and Discussion

- [16] As explained above, this matter was brought on an urgent basis. The respondents have challenged the urgency with which this application was filed, asserting that the urgency is entirely and egregiously self-created. In the interest of thoroughness, I will address the three disputed issues *ad seriatim*.

Urgency

- [17] The legal principles applicable to the question of urgency are well-established. Urgency in applications involves mainly the abridgement of times prescribed by the rules and, secondarily, the departure from established filing and sifting times of the court.[1] Rule 6(12) of the Uniform Rules of Court confers courts with a wide discretion to decide whether an application justifies enrolment on the urgent court roll based on the facts and circumstances of each case.[2] An application is urgent when an applicant cannot obtain substantial redress in due course.[3] The degree of departure from the modes of service and time frame in the Uniform Rules must be commensurate with the urgency in each case.[4]
- [18] It is common cause that the main application, in which the intervening applicants seek to participate, was served on them on 6 September 2024. The intervening applicants chose not to participate in or contest the main application. Three months thereafter, the intervening applicants brought this application to intervene in the main application on an urgent basis.

The reasons for urgency advanced by the intervening applicants are that this matter is by its very nature urgent as it concerns the exercise by a local authority of its plenary powers in the public interest. The intervening applicants asserted that the urgency they have highlighted is justified, especially considering that a judgment has already been pronounced.

- [19] I have great difficulty with the proposition of the intervening applicants. The respondents instituted the main application in this matter on an urgent basis on 6 September 2024. Acting *ex abundanti cautela*, the respondents served the main application on all councillors, including the intervening applicants, and invited them to seek to intervene as respondents if they so wished. In other words, the intervening applicants were made aware of the relief sought in the main application. Nevertheless, they knowingly chose not to respond to the invitation to intervene before the Court delivered its judgment on 15 November 2024.
- [20] Concernedly, the intervening applicants submitted their urgent application to intervene during the recess period, three months after the launching of the main application. They provided no plausible explanation for their delay beyond asserting that the urgent nature of the main application precluded them from adequately consulting with their constituencies and securing the necessary mandate to contest the main application prior to the judgment being pronounced on 15 November 2024.
- [21] If indeed, upon perusal of the main application, the intervening applicants needed time to consult with their constituents, in my view, they could and should have approached this Court and sought such an indulgence so that they could place the case of their constituents before the Court. They failed to do that. Accordingly, their belated application and the reasons given for their failure to intervene or file a notice to oppose the main application are so inadequate to be accepted by this Court.
- [22] It is worth noting that the Speaker of the Council opposed the main application. In his deposition, the Speaker of the Council asserted that his authority to respond to the application of the respondents flowed from the Municipality's system of delegation, alternatively, the provisions of the Municipal Systems Act 32 of 2000. In other words, as members of the Council, the intervening applicants authorised the Speaker to respond to the main application. Expressed differently, the intervening applicants were aware of both the main application and the Speaker's response. They had sufficient time to present the evidence to the court that they claimed was overlooked in the main application.
- [23] Significantly, the intervening applicants had more than two months and one week from 06 September 2024, when they were served with the main application, until 15 November 2024, when this Court gave judgment, to consult with their constituencies and their electorate to seek leave to intervene in the main application. As correctly pointed out by the respondents, the intervening applicants had ample time to file their application to intervene. They had more than the normal 15-day period prescribed by Rule 6(5)(d)(ii) of the Uniform Rules to file an answering affidavit. They had sufficient time to fully consult with their electorate and

their constituencies before deciding to seek leave to intervene in the main application.

- [24] I must stress that the intervening applicants had to bring their application at the first available opportunity, and their failure to do so diminishes urgency.[5] The applicants have not sufficiently explained the substantial delay in launching this application. They brought this application three months after the main application was served on them. Our courts have more than once made it clear that self-created urgency ought not to be entertained.[6] The assertion that the main application was brought on an urgent basis, thereby frustrated their ability to contest it, is an unfounded afterthought that cannot be supported.
- [25] The intervening applicants were required by Rule 6(12)(b) of the Uniform Rules of Court to set forth explicitly in their founding affidavit the circumstances which they averred rendered this matter urgent and the reasons why they claim that they would not be afforded substantial redress at a hearing in due course.[7] The intervening applicants presented two main reasons in their founding affidavit to support their claim that this application is urgent. They argued that the matter is inherently urgent because it involves the exercise of a local authority's comprehensive powers in the public interest. Additionally, they asserted that since a judgment has already been delivered, the level of urgency they cite is warranted. I disagree with these propositions.
- [26] The applicants and the respondents were not taken by surprise when the judgment was delivered on 15 September 2024. On 8 November 2024, the registrar of this Court notified the parties that the judgment regarding the main application would be pronounced on or before 18 November 2024. Conceivably, this notice came to their attention as members of the Council which was cited as the first respondent in the main application. Nevertheless, the intervening applicants did not request to intervene before the judgment was delivered. The suggestion that since the pronouncement of the judgment, the degree of urgency relied on by the applicants is justified is fundamentally flawed and lacks merit.
- [27] The mere fact that an application concerns the exercise of a local authority of its plenary powers in the public interest does not automatically give rise to an inherent urgency. The fundamental point is that a matter is urgent because of the imminence and depth of harm that the applicant will suffer if relief is not given, not because of the category of the right the applicant asserts.[8]
- [28] Importantly, proceedings that involve the exercise by a local authority of its plenary powers in the public interest does not automatically render a matter urgent. To hold otherwise, in my view, would open the floodgates of applications from organs of State in the urgent court. Considering the preceding discussion, it is evident that the intervening applicants have not successfully articulated compelling reasons as to why they would be unable to obtain substantial redress at a hearing in due course.
- [29] In summation, the intervening applicants have failed to provide a full explanation, let alone a reasonable explanation, for their substantial delay in instituting this application. The urgency asserted by the applicants is entirely a self-created urgency.[9] There is no

justification for the intervening applicants' failure to bring this application earlier.

Accordingly, the applicants' application must ordinarily fail due to their decision to wait three months to approach the urgent court and their incomplete and paltry explanations for the delay.

- [30] Ordinarily, the above finding regarding urgency would lead to the applicants' application being struck off the roll. However, for the sake of completeness, I will consider the remaining issues raised by the applicants in their Notice of Motion.

Should the applicants be granted leave to intervene?

- [31] The applicants aver that the outcome of the main application or the judgment delivered by this Court on 15 November 2024 has profound consequences for the constituencies they represent. To this end, the applicants seek leave to intervene so that the application for leave to appeal and, more specifically, the grounds raised therein can be properly ventilated.
- [32] The intervening applicants further asserted that it would be in the interest of justice for this Court to grant them leave to intervene in the main application so that they can apply for leave to appeal the judgment of this Court. If granted leave to intervene, the applicants seek to apply for leave to adduce evidence that is pertinent to a proper adjudication of the main application, which was allegedly not disclosed by any of the parties to this Court when the judgment was pronounced on the main application on 15 November 2024.
- [33] Rule 12, read with Rule 6(14) of the Uniform Rules, sets out the circumstances under which a party may apply to intervene in action or application proceedings. In an application to intervene, an applicant must satisfy the Court that he has a direct and substantial interest in the subject matter of the litigation and could be prejudiced by the judgment of the Court.[10] The applicant must further satisfy the court that the application is made seriously and is not frivolous and that the allegations made by the applicant constitute a prima facie case or defence. The applicant does not need to satisfy the Court that he will succeed in his case or defence.[11]
- [34] In casu, the applicants seek to intervene notwithstanding that a judgment has already been delivered. The applicants assert that they want to appeal the judgment. I must emphasise that the mere fact that a judgment or final order has already been issued is not a bar to leave to intervene being granted if the intervention is sought for some legitimate process which can be instituted after the issue of the judgment or final order.[12] To intervene in proceedings, a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal.[13]
- [35] It is common cause that the Council has a legal interest in the judgment delivered on 15 November

2024. This is so because the Theewaterskloof Local Council is a product of the Constitution. Section 43(c) of the Constitution provides that the legislative authority of the local sphere of government is vested in the Municipal Councils, as set out in section
156. In terms of section 151(2) of the Constitution, the executive and legislative authority of a municipality is vested in its Municipal Council.
- [36] The Theewaterskloof Municipal Council, represented by the various councillors, including the intervening applicants, took the decision to remove Councillor De Bruyn as an Executive Mayor of the Theewaterskloof Local Municipal Council. In the judgment, this Court declared that the decision to remove the Executive Mayor and the subsequent appointment of Councillor Zimmerman was unconstitutional, unlawful and invalid.
- [37] As correctly pointed out by Mr Sive, the declaratory and review orders granted by this Court affected the Council's legal interests in exercising its powers under section 58 of the Local Government: Municipal Structures Act 117 of 1998 ("the Structures Act"). Section 58 of the Structures Act provides:
- "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."*
- [38] Evidently, the Theewaterskloof Municipal Council had a direct and substantial interest in the declaratory and review relief granted by this court in favour of the DA and Councillor De Bruyn in the main application. This interest stems from the Council's constitutional authority to govern local government affairs autonomously and to exercise the municipality's executive and legislative powers.
- [39] On the other hand, the individual Councillors do not have any rights themselves beyond the right conferred on the Council under section 58 of the Structures Act to remove the Executive Mayor from office. Furthermore, they do not have any right under the Constitution to govern the local government affairs of the local community individually or on their own initiative and exercise the municipality's executive and legislative authority. They can only do so corporately as members of the Municipal Council.
- [40] As previously stated, to succeed with their intervention application, the applicants, as Councillors, were each required to demonstrate that they have a direct and substantial interest in the outcome of the litigation. The applicants only claim to have a direct and substantial interest in the outcome of the litigation and assert that they represent the interests of the electorate and their own constituencies. However, they do not specify what that interest is or provide any evidence to show that such an interest exists. Accordingly, the applicants' application for leave to intervene in the main application stands to be dismissed. This leads me to the last issue in dispute.

Should the applicants be granted permission to file an application for leave to appeal the judgment of this Court delivered on 15 November 2024?

- [41] As discussed above, the applicants also seek permission to be granted permission to apply for leave to appeal the judgment of this Court. The applicants filed their application for leave to appeal without having secured the requisite permission to intervene. In their individual capacities, the intervening applicants were not parties to the main application. The applicants can only seek leave to appeal if they receive permission from this Court.
- [42] The 15-day period provided for by Rule 49(1)(a) of the Uniform Rules for filing an application for leave to appeal has since expired. The applicant did not file an application for condonation together with their application for permission to apply for leave to appeal. It is a well-established principle in our law that the failure to apply for leave to appeal within the designated timeframe will result in the lapsing of the right to pursue such an application. The only circumstance under which this right may be reinstated is through the granting of an application for condonation.[14]
- [43] To this end, I agree with the views expressed by Mr Sive that before condonation is sought by the applicants and granted by the court for the late lodging of the application for leave to appeal, permission to file the application for leave to appeal should not be granted. The applicants did not apply for condonation regarding their request for leave to appeal. Their submission of the application for leave to appeal without permission from this court is irrelevant. The applicants should have filed a condonation application simultaneously with their request for leave to appeal. As a result, the applicants' request for permission to apply for leave to appeal must fail.

Order

[44] In the result, the following order is granted:

44.1 The applicants' application is hereby dismissed. The applicants are ordered to pay the costs of this application jointly and severally, including the costs of Counsel on a party and party scale B.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants: Adv Holland

Instructed by: Brink Thomas Cassiem Attorneys

For the Respondents: Adv Sive

Instructed by: Minde Schapiro & Smith Inc

- [1] See Rule 6(12) (a) and (b) of the Uniform Rules.
- [2] Mogalakwena Local Municipality v Provincial Executive Council, Limpopo
- [2014] 4 AII 67 (GP) at para 63; Caledon Street Restaurants CC v D' Aviera 1998 JDR 0116 (SE) at 8.
- [3] Dlamini v City Manager of the City of Ekurhuleni Metropolitan Municipality
- [2023] ZAGPJHC 147 at para 27.
- [4] Republikeinse Publikasie (Edms) Bpk v Afrikaanse Pers Publikasie (edms) Bpk 1972 (1) SA 773 (A) at 782A-G.
- [5] Mhonko's Security Services CC v City of Cape Town (21132/2018) [2018] ZAWCHC 168 (30 November 2018) at para 13.
- [6] South African Social Security Agency v Minister of Social Development 2018 (10) BCLR 1291 (CC) at para 19; Metbank Limited v Absa Bank Limited (59303/2021) [2022] ZAGPJHC 6 (4 January 2022) at para 10.
- [7] Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977
- (4) SA 135 (W) at 137E-G.
- [8] Volvo Financial Services Southern Africa (Pty) Ltd v Adams Tkolose Trading CC (2023/067290) [2023] ZAGPJHC 846 (1 August 2023) para 8.
- [9] Big Blue Marketing CC v King Sabata Dalindyebo Local Municipality 2017 JDR 0302 (ECM) at para 10; Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd 2013 JDR 1989 (ECM) at para 9.
- [10] Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstap Municipality 1991 (1) SA 677 (TK) at 679D.
- [11] Mgobozi and Others v The Administrator of Natal 1963
- (3) SA 757 (D) at 760G; Ex parte Moosa: In re Hassim v Harrop Allin 1974
- (4) SA 412 (T) at 414B.
- [12] Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstap Municipality 1991 (1) SA 677 (TK) at 679D.
- [13] National Director of Public Prosecutions v Zuma
- [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 85.
- [14] Panayiotou v Shoprite Checkers (Pty) Ltd 2016 (3) SA 110 (GJ) at paras 39 and 61.

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