

SOUTH AFRICA / JUDGMENT

Mabasa and Another v Municipal Manager: O R Tambo District Municipality and Others

(2503/2022) [2024] ZAECMHC 7 (23 January 2024)

[2024] ZAECMHC 7

COURT

Eastern Cape High Court, Mthatha

BEFORE

Jolwana

CASE / FILE NUMBER

2503/2022

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IN THE HIGH COURT OF

SOUTH AFRICA

[EASTERN CAPE

DIVISION: MTHATHA]

CASE NO. 2503/2022

In

the matter between:

SITHEMBISO

MABASA

1st

Applicant

DEMOCRATIC

ALLIANCE

2nd

Applicant

And

MUNICIPAL

MANAGER: O R TAMBO

DISTRICT

MUNICIPALITY

1st

Respondent

OR

TAMBO DISTRICT MUNICIPALITY

2nd

Respondent

INDEPENDENT

ELECTORAL COMMISSION

3rd

Respondent
ZWELINZIMA
NTSODO
4th
Respondent

JUDGMENT

JOLWANA J:

Introduction.

- [1] This application concerns an order granted by this Court, per Griffiths J, on 19 July 2022^[1] (the court order). In terms of that court order Mr Mabasa was declared as the Democratic Alliance's elected councillor in the O.R. Tambo District Municipality (the municipality). The court further directed the first respondent (the municipal manager) to take all steps necessary to recognise Mr Mabasa as the Democratic Alliance's councillor in that municipality within three days of the service of the said court order. Other ancillary relief was granted consequent upon the granting of the above-mentioned main relief.
- [2] Mr Mabasa is a member of the Democratic Alliance. He, together with the Democratic Alliance have approached this Court as the first and second applicants respectively, seeking an order declaring the municipal manager in contempt of the above-mentioned court order. They further seek an order directing the municipal manager to purge his contempt with twenty-four hours. They also seek an order committing the municipal manager to prison for a period of ninety days which committal is to be suspended for a period of ten days to allow the municipal manager to cure the contempt by taking all steps necessary to appoint Mr Mabasa as the Democratic Alliance's councillor in the municipality.

Background.

- [3] The background facts leading to this application are not controversial and are briefly the following. On 1 November 2021 there were local government elections in this country for the election of councillors for all district, metropolitan and local municipalities. The Democratic Alliance won one seat in the municipality. It thereupon informed the third respondent (the IEC) on 19 November 2021 that Mr Mabasa would take up the single seat won by it in the municipality. However, on 01 December 2021 the fourth respondent (Mr Ntsodo), also a member of the Democratic Alliance, was incorrectly sworn in as the Democratic Alliance's councillor instead of Mr Mabasa. After a number of unsuccessful attempts by the Democratic Alliance, to have the matter resolved, the municipal manager failed to recognise Mr Mabasa as its duly elected councillor of the municipality. This is what led to the

court order dated 19 July 2022 being granted.

The applicants' case.

- [4] The applicants are now before this Court alleging non-compliance with the said court order by the municipal manager and seeking the relief referred to above. They allege that the court order dated 19 July 2022 imposed an obligation on the municipal manager to take all steps necessary to recognise Mr Mabasa as the Democratic Alliance's councillor in the municipality. Furthermore, section 23(5) of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) provides that an elected councillor is deemed to assume office on the date of the declaration of the results by the IEC. In addition to that, in terms of section 26(2) of the Structures Act a person assumes office as a councillor when declared elected or when appointed, as the case may be.
- [5] In terms of the court order dated 19 July 2022 read with the provisions of the Structures Act, a municipal manager is obliged to give effect to the electoral results. The municipal manager of the municipality must therefore recognise Mr Mabasa as the Democratic Alliance's councillor. He must do so by swearing him in and allowing him to commence his duties and receive his salary as such.
- [6] On 27 September 2022 the sheriff served the court order at the municipal manager's office. The relevant returns of service indicate that the said court order was served upon one Mawethu Rasi at the address of the municipal manager and the municipality who accepted service thereof on their behalf. On 29 September 2022 the applicants' attorneys addressed electronic correspondence to the municipal manager advising that Mr Mabasa would attend at the municipality to assume office as the councillor on 30 September 2022.
- [7] It appears that there was no response to the said correspondence. As a result, on 26 October 2022 the applicants' attorneys addressed another correspondence to the municipal manager. In that correspondence, the municipal manager was advised that since the court order dated 19 July 2022 was brought to his attention on 27 September 2022, he was acting in contempt thereof in failing to do what it directed him to do. He was further advised that should he not take steps immediately to remedy his contempt by complying with the said court order by close of business on 27 October 2022, the applicants would proceed with contempt of court proceedings. The municipal manager did not respond to the said correspondence and failed to take any steps to comply with the said court order. His non-compliance resulted in Mr Mabasa remaining unrecognised as a duly elected councillor in the municipality.
- [8] The applicants contend that the said court order, not only being in existence but also having been served, and not having been complied with, the fact of wilful and mala fide non-compliance should be inferred. The inference sought to be drawn would be subject to the municipal manager, through evidence, raising doubt as to the wilfulness and bad faith in his non-compliance.

The first respondent's case.

- [9] The application is opposed by the acting municipal manager who, in his answering affidavit, says the following. He assumed the position of the acting municipal manager of the municipality at the end of December 2022. At the time relevant to the events leading up to the institution of the proceedings which led to the granting of the court order dated 19 July 2022, he was not the incumbent municipal manager. However, because the relief sought is against the municipal manager in his/her official capacity he considered it prudent to put up a version about the non-compliance especially during the period of his incumbency. Essentially, he says he could not be in contempt of the said court order because he was simply not occupying the office of the municipal manager at the time the court order was granted and served in the office of the municipal manager.
- [10] With regard to the duties of an incumbent municipal manager concerning the election of councillors he states the following. A municipal manager would receive the outcome of the allocation of council seats from the IEC. This is done by the IEC by means of a publication of the outcome of the allocation of seats in the government gazette. This is the only legitimate and only independently verifiable means by which any municipality would know who is supposed to be sworn in as a councillor. Without this, a municipal manager would not know who should be invited for swearing in. Relying on political parties to indicate who should be sworn in would lead to a chaotic situation. He accepts that once the election results for local government elections are proclaimed by the IEC, all municipalities must give effect to the proclaimed results which are in any event, binding on them. They cannot for instance place the last candidate on the list of a political party at the top of that list and vice versa as they have no discretion or role to play in that regard.
- [11] After the conclusion of the local government elections in November 2021 the results were proclaimed by the IEC in the government gazette on 09 November 2021. In terms of the said proclamation, it was Mr Ntsodo who won the single seat of the Democratic Alliance in the council of the municipality. This is the result that the municipal manager was required to give effect to and did so by swearing in Mr Ntsodo. It is only if the councillor in that political party ceases to hold office, an event which must be declared by the IEC in writing, could the name of a person on top of the applicable party list, fill the vacancy. That declaration is not done by the political party concerned but by the IEC. The court has no jurisdiction to make the declaration, it being the IEC that is the statutory repository of that power. All that the court can do is, upon an application being made to it, direct the IEC to declare in writing the person whose name is on top of the applicable political party list to be elected to the vacancy should the IEC fail to make the declaration when it was required in law to do so.
- [12] On the basis of these facts, the then acting municipal manager contends that it was impossible to comply with the terms of the court order on the basis of which the municipal manager was sought to be held in contempt of court. However, because even the court that granted the order dated 19 July 2022 lacked jurisdiction to do so, the court order itself is a nullity and therefore unenforceable. Therefore, it cannot avail of the applicants to hold anyone in contempt thereof. I must hasten to point out that counsel for the municipal

respondents placed on record during oral submissions in court that the contentions in the answering affidavit which sought to question the jurisdiction of the court that granted the court order, and therefore the validity of the court order were being abandoned. It was being accepted on behalf of the municipal respondents that the court order

dated 19 July 2022 was valid having been properly granted by the court which had jurisdiction to grant it. As will become clear

hereinbelow, this concession was correctly made.

[13] The acting municipal manager maintained the contention that it was Mr Ntsodo's name that was, on the consideration of the government gazette, proclaimed as its councillor in the municipality as at the 01 December 2021. Therefore, any resolution of the issue of the person entitled to be sworn in by the municipal manager as the councillor of the Democratic Alliance between the IEC and the applicants as alleged ought to have led to the IEC declaring Mr Mabasa in writing as the person whose name was on top of the list. That would have been consequent upon a vacancy being created by the Democratic Alliance's removal of Mr Ntsodo as its councillor. He accepted that a municipal manager is indeed required to give effect to the results of the local

government elections of his municipality. He went as far as to say that to not do so is a sacrilegious usurpation of and the undermining of the rights of the electorate.

[14] He had not been able to induct Mr Mabasa as councillor of the Democratic Alliance when he became the acting municipal manager. This was because Mr Ntsodo remained in office as councillor. He, as the acting municipality manager and therefore the incumbent, had no duty to remove him. It was not his duty to tell the Democratic Alliance what to do in order to remove Mr Ntsodo from office. He maintained that until the IEC would have declared Mr Mabasa as indicated hereinbefore, the applicants should not be entitled to the relief sought.

The issues.

[15] The facts leading up to the granting of the court order dated 19 July 2022 are largely not in dispute. That factual matrix is, in any event, irrelevant to the question whether or not the applicants are entitled to the relief they seek. This is because the existence of the said court order is common cause. The second two requirements also present no controversy. Those are whether the acting municipal manager was aware of the said court order. It is common cause that the municipal manager did not comply with the said court order having been duly and properly served. The acting municipal manager also did not comply with it. He must have become aware of it at some point after he got appointed as the acting municipal manager hence, he filed the answering affidavit citing the reasons that he does for his non-compliance. That being the case the issue is whether or not the acting municipal manager's non-compliance was justified, based on his explanation for his non-compliance.

The analysis.

[16] Before delving deeper into the requirements for a contempt of court order and in particular, whether or not in this case the order finding the acting municipal manager guilty of the crime of contempt of court would be appropriate, I consider it apt to set out the constitutional pillars upon which our jurisprudence on the law of civil contempt is anchored. For the authority on our jurisprudence in this regard, I need look no further than the recent case of the Secretary of the Judicial Commission of Inquiry^[2] (the SJCI). In that case Khampepe ADCJ, writing for the majority, expressed herself as follows:

“As this Court held in Tasima 1, “the obligation to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system ... and is the stanchion around which a State founded on the supremacy of the Constitution and the rule of law is built”. It is perspicuous that the constitutional right of access to courts will be rendered an illusion unless orders made by courts are capable of being enforced by those in whose favour the orders were made. In SALC, it was said that “if the State, an organ of the State or State official does not abide by court orders, the democratic edifice will crumble stone by stone until it collapses and chaos ensues”. A complete denial of judicial mechanisms “would render

meaningless the whole process of taking disputes to courts for adjudication and that is a recipe for chaos and disorder”.

Accordingly, it is necessary for this Court to send, by virtue of a punitive sanction, an unequivocal message that its orders must be obeyed.

Finally, I hasten to point out that “contempt of court is not an issue inter partes [between the parties]; it is an issue between the court and the party who has not complied with a mandatory order of court.”

Notwithstanding that this order derives its life force from CCT295/20, these proceedings are a different creature altogether. We

are not required to pursue the same purpose as we did in CCT295/20: to order Mr Zuma to attend the Commission. Indeed, in Pheko II, this Court noted that “[a]t its origin the crime being denounced is the crime of disrespecting the courts, and ultimately

the rule of law”. Although the harm caused to successful litigants, like the applicant, through contempt of court is by no

means unimportant, the overall damage caused to society by conduct that poses the risk of rendering the Judiciary ineffective and

eventually powerless is at the very heart of why our law forbids such conduct. Therefore, as I have already said, the mischief I am called upon to address is not that Mr Zuma failed to comply with the summons, but rather, that he failed to comply with the order of this Court”.

[17] In this matter the mischief I am called upon to address is not that the municipal manager failed to attend to the swearing in of Mr Mabasa as the Democratic Alliance councillor in the municipality after the election results. That issue was before Griffiths J, and he dealt with it

which resulted in the court order dated 19 July 2022 being issued. The mischief I am called upon to address is the failure and/or refusal of the acting municipal manager to comply with the court order of Griffiths J dated 19 July 2022 thereby undermining the Constitution and rendering the Judiciary ineffective and powerless.

[18] As I earlier indicated the existence of the court order is not in issue. It was properly served if regard is had to the returns of service. It would therefore have come to the attention of the incumbent in the office of the municipal manager at the time of its service. The acting municipal manager who deposed to the answering affidavit does not deny being aware of it after he was appointed. His contention that this application should not succeed is, in the main, that Mr Ntsodo remains in office as he has not been removed from office as a councillor by the Democratic Alliance. He contends that it is not his duty to remove him or to tell the Democratic Alliance what to do to remove Mr Ntsodo from office. He further still maintains his other contentions about the declaration that the IEC must make. This essentially, is about the proclamation in the government gazette of who should be sworn in, which he says it was Mr Ntsodo in this case, there being no other name that has been declared by the IEC, as

he articulated his contention.

[19] The legal position regarding compliance with court orders which was referred to earlier as explained in SJCI is anchored on section 165 of the Constitution[3], particularly section 165(5). It is clear that in terms of section 165(5) of the Constitution, read with section 18(1) of the Superior Courts Act 10 of 2013[4], absent any appeal processes relating to the court order dated 19 July 2022, the municipal manager was simply not entitled to rely on his views on the applicable legislation or any other legal basis for his non-compliance. This is the case even if he may hold the view that a particular piece of legislation tells him otherwise. He must assume that the court would have been aware of and would have considered the applicable law before it directed him to act in a particular manner.

[20] Our law is very clear as recently confirmed in SJCI. The duty to comply with a court order is not and cannot be subject to a functionary's understanding of what the law is. If that were to be so, it would make a mockery of the very provisions of section 165 of the Constitution and would inevitably lead to the collapse of our constitutional edifice stone by stone as the court said in SJCI. Only an appropriate legal process such as an appeal process or another court order could validly suspend a duty to comply with a court order. He did nothing and remained supine as if the court had not directed him as it did or as if he had no duty to comply with it. This, seemingly based on his own understanding of the law. This is to be deprecated for the reasons aforesated.

[21] The court had, on 19 July 2022, declared Mr Mabasa as the elected councillor of the Democratic Alliance. It further effectively ordered that Mr Ntsodo was no longer the Democratic Alliance's councillor in that municipality. Therefore, the vacancy that the municipal manager said needed to be created by the removal of Mr Ntsodo was in fact

created as the court removed him from office. The acting municipal manager, on being aware of the court order, did not need another declaration or even the gazetting of Mr Mabasa as the duly elected councillor in that municipality as he seems to believe. His duty was to implement the court order by stopping Mr Ntsodo from enjoying any right or privilege, be it access to council chambers as a councillor or whatever else accrued to him on the basis of the IEC's previous declaration and gazetting of his name. He could have thereafter invited Mr Mabasa and sworn him in as a councillor. He did none of the above in complete defiance of the court order. His conduct was an overt impiety and denigration of our constitutional framework.

Should the relief sought therefore be granted?

[22] In the main, counsel for the municipal respondents, argued that there were serious difficulties for the court to grant any of the orders sought in the notice of motion, to the extent that the municipal manager had been cited only in his official capacity. It was argued that the relief sought for the municipal manager to be committed to prison for a period of ninety days; the order suspending the committal to prison for 10 days to enable the municipal manager to cure the contempt; the order sought for the court to impose any other punishment deemed appropriate by the court including imprisonment or a fine; and the punitive order for the costs of this application to be paid personally by the municipal manager were all fraught with difficulties. These orders were problematic, so went the submission, because the municipal manager was cited only and specifically in his official capacity. He was not also cited in a personal capacity.

The personal costs order.

[23] I consider it convenient to start with the issue of the personal costs order. The legal position regarding the circumstances in which an award of a personal costs order against public officials may be granted was clarified in quite some detail in Reserve Bank[5] from which I quote copiously. The court said:

“This Court has previously granted de bonis propriis costs (costs which a party is ordered to pay out of her own pocket as a penalty for improper conduct) against individuals in their personal capacities where their conduct showed a gross disregard for their professional responsibilities, and where they acted inappropriately and in an egregious manner. The assessment of the gravity of the conduct is objective and lies within the discretion of the court.

This Court recently affirmed the test for personal costs orders against public officials. In SASSA, it held:

‘It is now settled that public officials who are acting in a representative capacity may be ordered to pay costs out of their own

pockets, under specified circumstances. Personal liability for costs would, for example, arise where a public official is guilty of bad faith or gross negligence in conducting litigation’.

In SASSA, the Minister of Social Development contended that personal costs orders against public officials like her are unconstitutional because they would breach the separation of powers. This Court rejected that argument and held that the Constitution itself is the source of the judicial power to order personal costs against public officials who are guilty of bad faith or gross negligence in conducting litigation and discharging their constitutional obligations. It reasoned that the Constitution endows courts with the responsibility to uphold and enforce the Constitution, and the imposition of personal liability for costs on public officials who act contrary to their constitutional obligations is an important tool to be used for this purpose.

...

The purpose of a personal costs order against a public official is to vindicate the Constitution. These orders are not inconsistent with the Constitution; they are required for its protection because public officials who flout their constitutional obligations must be held to account. And when their defiance of their constitutional

obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer. This Court has repeatedly affirmed the principle that a public official who acts in a representative capacity may be ordered to pay costs out of their own pockets in certain circumstances.

The public protector falls into the category of a public litigant. A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. The need to hold government to the pain and duty of proper court process is sourced in the Constitution itself. This is because the Constitution regulates all public power and public officials are required to act in accordance with the law and the Constitution".

[24] There is no difference between a municipal manager and a public protector other than the instruments whence they come. The argument that a public official, in this case, the municipal manager, should not be held personally liable for costs because he was only cited in an official capacity misses the point in my view. The real question is whether, besides being cited in an official capacity, a case has been made for a conduct so egregious that an award of personal costs order against the municipal manager has been made. This is because, throughout, and even when they violate the Constitution and act so egregiously as to undermine the Constitution, as they sometimes do, public officials do so abusing public power. They, however, sometimes elect to depart from their constitutional duty and act, *mala fide* or grossly negligently sometimes in pursuit of other objectives thus abusing their authority. Should they, in those circumstances,

escape personal liability for costs and thus cause the taxpayer to foot the bill for their egregious conduct only because they were not cited in a personal capacity? I do not think so.

- [25] In those situations, I cannot see any basis for a just and equitable order including an order for punitive costs, where it is justified, not to be made solely because, the same person who has been cited in an official capacity has not also been cited in a personal capacity. What puts them in a position to act in an egregious manner sometimes is the public power they wield which they then abuse. Where there is no doubt as to who committed the egregious offending conduct, his not being cited in a personal capacity should not stop the court from marking its outrage against him by ordering him to pay the costs from his own pocket. The real issue, in my view, is whether the person sought to be punished or visited with an appropriate censure or from whose pocket the costs must be paid was given a fair hearing and had an opportunity to explain his conduct. It goes no further than that as far as I am concerned. I am emboldened in this view by the fact that the court in Reserve Bank did not limit the general discretion of the courts regarding costs by saying that it is subject to that public official having also been cited in a personal capacity. If it wanted to limit the exercise of that discretion the Constitutional Court would have said so as clearly as it always expresses itself.
- [26] This brings me to the actions of the acting municipal manager after he became aware of the court order. The court order dated 19 July 2022 was served at a time when Mr Matomela, the deponent to the answering affidavit, was not the incumbent in the office of the municipal manager. He, however, was appointed as the acting municipal manager in December 2022. He thereafter became aware of the court order at some stage but failed to comply with it which is why he got to depose to the answering affidavit. However, I am not satisfied that a case has been made that Mr Matomela's conduct as the then acting municipal manager, his failure to comply with the court order when he became aware of it, was intentional, in bad faith, or grossly negligent.
- [27] It could very well be that in conducting himself in the manner he did, Mr Matomela genuinely believed, of course incorrectly, that he needed to wait for the IEC to gazette the name of Mr Mabasa if regard is had to his explanation. It appears that instead, he started philosophising and being all sentimental about the applicable legal framework. He could not and should not have done so at the expense of his duty to comply with the court order. His views about the court order were utterly irrelevant to the extent that they did not lead him to lodge an appeal against it.

Is personal citation a requirement in contempt of court proceedings?

- [28] If regard is had to the relief sought by the applicants, it would have been observed that they want the municipal manager to be found guilty of a crime. This has very serious implications which include possible incarceration for a period of time. That could inevitably result in the deprivation of personal liberty which is enshrined in our Constitution. Therefore, the very idea of a deprivation of a personal right of a person, any person, without that person having been heard is irreconcilable with the jealousy with which the right to personal liberty is and should be regarded and protected by courts. Mr Matomela who

refused to comply with the court order citing all manner of excuses was not cited in a personal capacity. This means he cannot be found guilty of contempt of the court order as that could lead to a possible deprivation of his liberty. This is the legal position as I understand it.

[29] The Constitutional Court dealt with and clarified the issue of the need or requirement for personal joinder in Matjhabeng Local Municipality[6]. It said:

“A question of non-joinder was also raised. On 3 December 2015, the Chief Justice issued directions inviting parties to file written submissions on ‘whether municipal managers who fail to give effect to court orders can be found guilty of contempt in the absence of their joinder to the proceedings’. It is common cause that both Messrs Lepheana and Mkhonto were convicted and sentenced without having been joined as parties to the proceedings.

At common law, courts have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. A court could, mero motu, raise a question of joinder to safeguard the interests of a necessary party and decline to hear a matter until joinder has been effected. This is consistent with the Constitution.

The law on joinder is well settled. No court can make findings adverse to any person’s interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors’ rights to freedom and security of the person are, in the end, not arbitrarily deprived.

It follows that the objection of non-joinder by the municipality in Matjhabeng, specifically where the potential contemnor’s s 12(1) rights are in the balance, is not a purely idle or technical one – taken simply to cause delays and not from a real concern to safeguard the rights of those concerned. There is however a caveat: this should not be understood to suggest that joinder is always necessary. There may well be a situation where joinder is unnecessary, for example, when a rule nisi is issued, calling upon those concerned to appear and defend a charge or indictment against

them. Undeniably, in appropriate circumstances a rule nisi may be adequate even when there is a non-joinder in contempt of court proceedings. This means that the rule is not inflexible.”

Conclusion.

[30] My reading of Reserve Bank and Matjhabeng Local Municipality cases is that the issue of personal liability for costs and that of a possible deprivation of the section 12(1) constitutional right to personal freedom should not be muddled. In a situation in which a criminal sanction rather than a civil remedy to ensure compliance is in the offing it is obligatory to thread carefully by, at the very least, ensuring that the potential contemnor

understands that his personal rights are at stake. Having expressed myself as I have done on the issue of costs, in the exercise of my discretion, I do not think that this is an appropriate case for the imposition of a personal liability for costs against Mr Matomela, the erstwhile municipal manager or even his predecessor. However, the applicants are entitled to an order for ordinary costs.

[31] In the result the following order shall issue:

1. The municipal manager is ordered to comply with the court order of Griffiths J dated 19 July 2022 within ten days of the service of this order.
2. The municipal manager is ordered to pay the costs of this application.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances Counsel for the applicants : S. Sephton Instructed by : Minde Schapiro & Smith Inc. c/o Keightley Sigadla Nonkonyana Inc. Mthatha Counsel for the 1st & 2nd respondents : A Bodlani SC Instructed by : N.Z. Mtshabe Inc. Mthatha Date Heard : 02 November 2023 Date delivered : 23 January 2024

[1] The said court order reads as follows: 1. It is declared that the First Applicant was elected as the Second Applicant's councillor in the O.R. Tambo District Municipality, Eastern Cape on 1 November 2021. 2. To the extent necessary: 2.1 The First Respondent's decision to swear in the Fourth Respondent as the Second Applicant's

councillor, and or 2.2 Any decision by the Second Respondent purporting to recognise the Fourth Respondent as the Second Applicant's councillor in the O.R. Tambo District Municipality are declared inconsistent with the Constitution of the Republic of South Africa and invalid and set aside. 3. The First and Second Respondents are directed to take all steps necessary to recognise the First Applicant as the Second Applicant's councillor in the O.R. Tambo District Municipality within three days of service of this order. 4. Any decision taken by the Second Respondent while the Fourth Respondent was purporting to act as the Second Applicant's councillor shall remain valid notwithstanding his unlawful participation. 5. The Second Respondent to pay the costs of this application including costs of two counsel where so employed.

[1] The said court order reads as follows:

1. It is declared that the First Applicant was elected as the Second Applicant's councillor in the O.R. Tambo District Municipality, Eastern Cape on 1 November 2021.
2. To the extent necessary:
2.1 The First Respondent's decision to swear in the Fourth Respondent as the Second Applicant's councillor, and or

2.2 Any decision by the Second Respondent purporting to recognise the Fourth Respondent as the Second Applicant's councillor in the O.R. Tambo District Municipality are declared inconsistent with the Constitution of the Republic of South Africa and invalid and set aside.

3. The First and Second Respondents are directed to take all steps necessary to recognise the First Applicant as the Second Applicant's councillor in the O.R. Tambo District Municipality within three days of service of this order.
 4. Any decision taken by the Second Respondent while the Fourth Respondent was purporting to act as the Second Applicant's councillor shall remain valid notwithstanding his unlawful participation.
 5. The Second Respondent to pay the costs of this application including costs of two counsel where so employed.
- [2] Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of the State v Zuma 2021(5) SA 327 (CC) paras 60-61.
- [3] Constitution of the Republic of South Africa, 1996. Section 165 reads: (1) The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour, or prejudice.
- (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.
- [3] Constitution of the Republic of South Africa, 1996. Section 165 reads:
- (1) The judicial authority of the Republic is vested in the courts.
 - (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour, or prejudice.
 - (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.

[4] Section 18(1) reads: Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

[4] Section 18(1) reads:

Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

4. Public Protector v South African Reserve Bank 2019 (9) BCLR113 (CC), 2019 (6) SA 253(CC) at paras 146-8,153 and 155.

[6] Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited 2018 (1) SA 1 (CC) at paras 90-2 and 94.

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mabasa-and-another-v-municipal-unknown-topic-aecmhc-2024>

Prepared on 12 October 2026 · Esheria