

SOUTH AFRICA / JUDGMENT

Mahapane and Others v Mohokare Local Municipality and Others (4913/2022)

[2022] ZAFSHC 344 (6 December 2022)

[2022] ZAFSHC 344

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

4913/2022

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FLYNOTES:

MUNICIPALITY – ABUSE OF POWER AND COSTS

Costs

– Municipality – Abuse of power – Reckless and negligent conduct in the decision-making process in local

government – Individual liability of councillors for costs – Local Government: Municipal Finance Management Act 56 of 2003, s 176(2).

IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

no: 4913/2022

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

PULE
MAHAPANE
First
Applicant
TEBOHO
MOCHECHEPA
Second
Applicant
THABISO
EMMANUEL
NA
Third
Applicant
TSEPO
NOVEMBER
Fourth
Applicant
and
MOHOKARE
LOCAL MUNICIPALITY
First
Respondent
SPEAKER
OF THE COUNCIL OF MOHOKARE
LOCAL
MUNICIPALITY: MR RJ THULO
Second
Respondent
MAYOR
OF MOHOKARE

LOCAL MUNICIPALITY:

MR
ZINGESI
MGAWULI
Third
Respondent
MOLATELO
JOHANNES KANWENDO
Fourth
Respondent
PHAKAMISA
DYONASE
Fifth
Respondent
MEMBER
OF THE EXECUTIVE COUNCIL FOR
THE
FREE STATE DEPARTMENT OF GOVERNANCE
&
TRADITIONAL
AFFAIRS[1]

Sixth
Respondent

CORAM: OPPERMAN,
J
HEARD

ON: 1
December 2022
DELIVERED

ON: The
judgment was handed down electronically by circulation to the
parties' legal representatives by email and release to SAFLII
on 6 December 2022. The date and time for hand-down is deemed to be 6
December 2022 at 15h00

JUDGMENT

BY: OPPERMAN, J

SUMMARY:

Costs

- individual liability of councillors for abuse of power and reckless and negligent conduct in the decision-making process in local government

JUDGMENT

[1] It is a proven fact that the Speaker[2] and the Mayor[3] of the Mohokare Local Municipality appointed a Municipal Manager that was clearly not fit and proper to be so appointed and in a process that was patently illegal. This case does not revolve around a naïve bona fide blunder by the Speaker of the Council of the Mohokare Local Municipality. The Speaker and the Mayor admitted the above but want

for the Applicants to carry the costs of this case.

[2] This is how the cause for the application unfolded:

1. On 23 May 2022 the First Respondent; the Municipality, advertised a vacancy for Municipal Manager.
2. The panel that was appointed for the selection of the candidate consisted of the Mayor (the Third Respondent), a Councillor Mr. Damon Job and a representative of Cogta, one Seipati Dlamini. The Fourth Respondent was one of the Applicants for the vacancy.
3. On 29 August 2022 the Speaker gave notice to the Councillors of a Special Council Meeting scheduled for Wednesday, 31 August 2022.

4. The appointment of the Municipal Manager was on the agenda.
5. The Speaker failed to disseminate the Mayor's panel report and recommendations on the appointment of the Fourth Respondent to the Council in advance. It was only made available during the meeting.
6. The Speaker insisted during the meeting that the Fourth Respondent will be appointed; this notwithstanding vehement opposition by some Councillors. He proceeded to unilaterally appoint the Fourth Respondent.
7. The Councillors were informed by the Speaker that they were not entitled to the minutes of the selection committee; this is incorrect.
8. The objections of the Councillors were so severe that:
21. The majority of the council was up in arms and disgruntled with this ruling and the meeting became so disorderly that Second Respondent adjourned the meeting without concluding the agenda business. So, Second Respondent's ruling was plainly inspired by his attempt to discard unhappiness of councillors regarding the aspects stated above, and not because the fact that the Applicants suggested that Fifth Respondent be appointed.[4]
9. The meeting of the 31st of August 2022 was digitally recorded to prove the allegation. The meeting was adjourned to 7 September 2022 but it never materialised.
10. The Mayor informed the Fifth Respondent that the Fourth Respondent was appointed as Municipal Manager whilst knowing that there was not a Resolution by the Council. The letter is alleged to be misleading and disingenuous. It is common cause that there was not a Resolution by the Councillors.
11. Arrangements were made by the Mayor for the Fourth Respondent to take up his position as Municipal Manager and the Applicants addressed a letter to the MEC: Cogta to intervene.
12. Of grave concern was the "proximal" relationship between the Mayor and the now illegitimately appointed Municipal Manager.
13. The objections were based on real and valid concerns in that firstly, the Fourth Respondent had only attained a competency score of "basic" and on this alone the appointment was unlawful.
14. The Human Resources Manager revealed on 29 September 2022 she discovered that the screening report from the Office of the Premier could not confirm that the Fourth Respondent is a South African Citizen, the Fourth Respondent's qualification, claimed to be a Bachelor's Degree Certificate, could not be verified and the screening results for employees who have resigned prior finalisation of their cases of misconduct, were not attached.
15. Delayed and insufficient reaction from the MEC caused an urgent application to the Court.

16. The Mayor and the Speaker maintain that if the Applicants directed a letter to them to address the issue, litigation would not have

resulted. This is not correct because they did not want to heed to reason during and after the Council Meeting. They also refused to make pertinent records available to the Applicants and the Court had to order this after the urgent application. Only after Counsel directed them so, did they, on 7 October 2022 admit the error.[5] This is on their own evidence.

17. Neither the Mayor nor the Speaker are lay-people to the demands of constitutional democracy. They cannot claim a bona fide mistake on the spur of the moment. They were warned of their legally inapt behaviour during the meeting and afterwards. They misrepresented the legality of the appointment by the fact that there was not any Resolution in existence. The autocratic mentality of a belief in the legality of a “casting ruling” in the circumstances of the case is without veracity in the Republic of South Africa that has its foundation in the Constitution.
18. There is an incontrovertible and crucial duty on the Speaker and the Mayor to ensure the legal veracity of any act or decision executed in their official capacity. They cannot plea ignorance on the facts of this case.
19. The haughtiness of their conduct is emphasized by the fact that they want to blame the Applicants for the litigation and are now in contempt of the Court Order of 7 October 2022.
20. They maintain that they immediately took steps to rectify the situation by referring the case back to the Council; but in the same breath declared that they only admitted the error of their ways on 7 October 2022 when the case already served before the Court. They, again, wanted to defy proper process by unceremoniously referring the decision back to Council.

21. The statement of the Applicants is correct that:

Even where a decision is defective or unlawful, government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.[6]

22. The conspectus of the contempt of the Constitutional imperative is broadened by the fact that the Second and the Third Respondents did not provide all the documents which they were ordered to provide in the 7 October - Court Order.
23. Even worse; prior to the documents being provided, the Speaker of the Municipality convened a Council meeting at 11h00 on 14 October 2022 and notwithstanding that the relevant item (appointment of the Municipal Manager) was not on the agenda, the Council again took a Resolution on the appointment of the Municipal Manager.
24. The above is apparently the subject of another urgent application for another interdict.

25. The First, Second and Third Respondents blatantly disregarded the further terms of the 7 October - Court Order by the late filing of their papers that caused another postponement of the case that was postponed, in the first place, to adjudicate the costs of the litigation.
26. As the Applicants correctly pointed out in their Heads of Argument:
13. Applicant succeeded substantially when respondents conceded to the granting of an interdict, and consequently costs should follow the event unless there are special circumstances. Respondents have not demonstrated any special circumstances but instead, have demonstrated an obstructive approach to the issue of costs, they have acted disdainfully towards the court by failing to comply with the terms of the court order and have put a dishonest version of events forward for attempting to justify the so
 - called casting ruling – causation of which they insincerely place at the feet of the Applicants. Respondents ought to be mulcted with costs as a mark of the Courts disapproval of their conduct.
14. The Speaker's conduct amounted to the usurpation of the council's powers whilst he clearly seems not to have considered the very reason for the relevant prescripts. The Mayor on the other hand refused to provide councillors with relevant information. Neither the speaker nor the Mayor were prepared to entertain the concerns of the Applicants and other councillors, and it was ultimately their conduct which led to the impugned decision. The situation is no different to Mlokoti supra. [7]
15. The purported defense that Applicants should have addressed a letter to Second or Third Respondent, whereupon they would have withdrawn the decision, has no merit. It has become trite, ever since Oudekraal,[8] that a decision of the nature cannot simply be withdrawn, but must be challenged by way of legal process. The Applicants were compelled to approach court for relief.
- [3] Research has shown that increased litigation involving the abuse of power and improper conduct of Municipal Councillors brought the issue of individual responsibility and liability for costs to the fore in the recent past. It is believed that the attribution of individual liability on Councillors for abuse of power will improve the decision-making process in local government, individual liability will restore public confidence as regards the decision-making of the council, behavioural patterns will not unfavourably affect decision-making in the council, Councillors influenced by the culture of party discipline will not vote in support of resolutions that are in conflict with any legislation applicable to local government, it will promote a culture of sound decision-making in local government as well as good governance and Councillors will endeavour to be diligent in casting their votes and act in good faith in the exercise of their functions.[9]

- [4] As indicated and by agreement between the parties and on 7 October 2022 the Court interdicted and forbade the appointment of the Municipal Manager with further regulatory orders to remedy the situation. The conduct was so grossly inappropriate that the following order was issued by the Court:
1. Applicants' non-compliance with the Uniform Rules pertaining to form, process, forms, service and time periods is condoned and the matter is heard as one of urgency.
 2. The decision pertaining to the appointment of Municipal Manager of the Mohokare Local Municipality ("First Respondent") is referred back to the Council of the First Respondent for an appropriate resolution in terms of Section 82 of the Local Government: Municipal Structures Act, 117 of 1998.
 3. Pending the Council resolution referred to in paragraph 2 above:
 - 3.1 The Fourth Respondent is interdicted from performing or purporting to perform any functions of or related to the office of the Municipal Manager of the First Respondent;
 - 3.2 The Fourth Respondent is interdicted from holding himself out as a Municipal Manager of the First Respondent;
 - 3.3 The Fourth Respondent is interdicted from enlisting the assistance of any acts related to the office of the Municipal Manager of the First Respondent;
 - 3.4 The Fourth Respondent is ordered to immediately vacate the offices of the First Respondent;
 - 3.5 The Fourth Respondent is interdicted from entering the offices of the First Respondent with the intent to report for work and/or carry out the functions of a Municipal Manager;
 - 3.6 The First, Second and Third Respondent are ordered not to give effect to or to cease giving effect to the purported decision by the Second Respondent to appoint Fourth Respondent as a Municipal Manager of the First Respondent.
 4. Second and Third Respondents shall, within five (5) days of date of this order, deliver to the Applicants' attorneys, the following documents:
 - 4.1 Copies of the advertisements published in accordance with Regulation 10(1) of the Regulations on appointment and conditions of employment of Senior manager ("the Regulations");
 - 4.2 Copies of all applications referred to in Regulation 11, specifically including the documents contemplated by Sub-regulation (11)(4) of the regulations.
 - 4.3 A copy of the Council resolution appointing a selection panel as contemplated by Regulation 12 of the regulations.

4.4 A copy of the report by the Mayor on the consultation with the selection panel, pertaining to the short-listing as performed in accordance with Regulation 13(1), alternatively the Minutes of such short-listing meeting.

4.5 A copy of the written report of the outcome of the screening process as contemplated by Regulation 14(2) of the regulations.

4.6 A copy of the Minutes of the selection panel pertaining to the interviews as contemplated by Regulation 15(1).

4.7 A copy of the attendance register of Applicants who attended interviews.

4.8 A copy of the records of the individual assessment of each panel member as contemplated by Regulation 15(3).

4.9 A copy of the competency assessment of each candidate, as contemplated by Regulation 16(1) read together with Regulation 16(2).

5. The issue of the costs of the application is postponed for determination by the above Honourable Court on 3 November 2022.

6. The Respondents opposing the application are to file answering affidavits (dealing with costs) if any, on or before 19 October 2022.

7. The Applicants are to file replying affidavits, if any, on or before 26 October 2022.

8. Heads of Argument will be filed in accordance with the Practice Directives of the Court.

[5] The issue of costs was now opposed by the First to Fourth Respondents. They wanted for the Applicants to bear the costs. In light of the above, the claim is without legal sense.

[6] The Applicants claim to be entitled to an order on the basis that the costs be paid by the First, Second and Third Respondents jointly and severally, including the costs of 3 November 2022. It is the Applicants prayer, in the alternative, for the Court to order that the Mohokare Local Municipality carries the costs and in addition; make an order in terms of the *Heyneke v Umhlathuze Municipality*

[2010] JOL 25625 (LC) dictum that:

The council of the respondent is directed to investigate and determine whether in terms of section 176(2) of the Local Government: Municipal Finance Management Act 56 of 2003[10] the costs ordered above should be recovered from any political office bearers and officials.

[7] The Second and Third Respondent's unlawful conduct is indeed to be labelled as deliberate and grossly negligent. The taxpayer and already financially besieged Municipalities, cannot be mulcted with costs that were incurred in a manner as is the case here. If the Court orders accountability jointly and severally, it might follow that the one paying to exempt the other. The Municipality will foot the bill and the taxpayer will bear the brunt. This is unfortunately

the relief motioned for by the Applicants. The Applicants were substantially successful in the application and acted with due diligence in the protection of the public's interest. The conduct of the Speaker and the Mayor must be investigated and managed by the Municipality. They may not escape with impunity.

[8] ORDER

1. The First Respondent is ordered to pay the costs of this case including the wasted costs incurred on 3 November 2022.
2. The Council of the First Respondent is directed to investigate and determine whether, in terms of section 176(2) of the Local Government: Municipal Finance Management Act 56 of 2003, the costs ordered above should be recovered from any political office bearers and officials.

M OPPERMAN, J

APPEARANCES

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[1] "Cogta".

[2] "Second Respondent".

- [3] “Third Respondent”.
- [4] Page 101 of the Bundle indexed on 24 November 2022.
- [5] Page 77 of the Bundle indexed on 24 November 2022.
- [6] Page 103 at paragraph 24 of the Bundle indexed on 24 November 2022.
- [7] *Mlokoti v Amathole District Municipality & another* [2009] 2 BLLR 168 (E).
- [8] *Oudekraal Estates Pty Ltd v City of Cape Town* 2004
- (6) SA 222 SCA.
- [9] Tom, SA, A CRITICAL ANALYSIS OF INDIVIDUAL LIABILITY OF COUNCILLORS IN SOUTH AFRICA, University of the Western Cape, December 2012, http://etd.uwc.ac.za/bitstream/Tom_LLM_2012 on 2 December 2022.
- [10]
176. Liability of functionaries exercising powers and functions in terms of this Act. — (1) No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials, and no other organ of state or person exercising a power or performing a function in terms of this Act, is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith. (2) Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.
- [10]
176. Liability of functionaries exercising powers and functions in terms of this Act. —
- (1) No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials, and no other organ of state or person exercising a power or performing a function in terms of this Act, is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith.
- (2) Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.

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