

SOUTH AFRICA / JUDGMENT

Mbashe Traditional Leaders in Municipal Council v Mbashe Local Municipality (1282/2012) [2013] ZAECMHC 27 (26 September 2013) [2013] ZAECMHC 27

COURT

Eastern Cape High Court, Mthatha

BEFORE

F.B.A Dawood

CASE / FILE NUMBER

1282/2012

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IN THE HIGH COURT OF SOUTH
AFRICAEASTERN CAPE HIGH
COURT :MTHATHA
NOT REPORTABLE
CASE NO: 1282/2012

In the matter between :

MBHASHE TRADITIONAL
LEADERS IN
MUNICIPAL COUNCIL
.....APPLICANT
and
MBHASHE LOCAL MUNICIPALITY
.....RESPONDANTS

JUDGMENT

DAWOOD J :

- 1) The Applicants brought an Application wherein they sought the following relief as set out in the notice of motion:-

“

1.1. That the respondent's actions of terminating applicants' allowances or out of pocket expenses in January 2012 be and is hereby declared unlawful, invalid and of no force and effect.

1.2. That the respondent be and is hereby directed to forthwith re-instate applicants' allowances or out of pocket expenses in the same amount it was when it was terminated (R8480.00).

1.3. That the respondent's failure to pay applicants' allowances or out of pocket expenses during the period commencing in July 2009 to February 2010 be and is hereby declared unlawful, invalid and of no force and effect.

1.4. That the respondent be and is hereby ordered to effect the necessary adjustment to the applicants' allowances or out of pocket expenses for the period commencing in July 2009 to February 2010 in accordance with the resolutions respectively taken on 28th February 2011, 30th March 2011 and 20th April 2012.

1.5. That the respondent be and is hereby directed to forthwith account to the applicants for such money that might be due to them as allowances or out of pocket expenses and back pay in consequence of their appointments and identification to participate in the respondent's council proceedings.

1.6. That the respondent be and is hereby ordered to forthwith pay the amount that is due to the applicant as back pay.

1.7. That the respondent be and is hereby ordered to pay costs of this application on an attorney and client scale.

1.8. Further and/or alternative relief."

2) FACTUAL BACKGROUND

2.1) The Applicants herein alleged inter alia:-

- a) That they were appointed to participate in the Respondent's council in terms of the Municipal Structures Act number 117 of 1998 [herein referred to as The Municipal Structures Act].
- b) That they were entitled to payment of remuneration, which is better known as "out of pocket expenses".
- c) According to the Applicants the payment of such remuneration was required to be paid from the budget of the municipality in question in terms of The Municipal Structures Act.
- d) The Respondent's council in pursuance of the provisions of section 81 of Act 117 of 1998 met on the 28th of February 2011, 20th of March 2011 and 20th of April 2011 respectively and resolved that the allowances of the traditional leaders be reviewed and increased to R8480.00.

- e) That these allowances were terminated without them being informed or allowed to make representation in this regard.
- f) That the resolution is still in existence and deserves to be complied with.
- g) That the non-compliance with the dispensation is unlawful, invalid and of no force and effect.
- h) Paragraph 4 of annexure G.M reads as follows:-

The council at its meeting held on 28th of February 2011 resolved that:-

“5.2.3 that the municipality must review the remuneration of traditional leaders be increased to R8480-00.

5.2.4 that the allowances of the traditional leaders be increased to R8480

The matter is re-submitted for the council to consider paying the traditional leaders R8480-00 retrospectively from July 2009 to February 2011.”

- i) Annexure B which is in respect of the meeting of the 30th March 2011 reads inter alia as follows:-

5.2.3. “that the municipality must review the remuneration of traditional leaders.

5.2.4. that the allowances of the traditional leaders be increased to R8480.”

- j) Annexure “C” the council meeting 20th of April 2011 reads as follows:-

“..... The council at its meeting held on 28th of February 2011. It was resolved

8.1.1 that the municipality must review the remuneration of traditional leaders and

8.1.2 that the allowances of the traditional leaders be increased to R8480-00.

The matter is re-submitted to consider paying the traditional leaders R8480-00 retrospectively from July 2009 to February 2011

..... At the moment there was no sufficient budget for this purpose

8.1.3 (a) The council resolved that the matter should be referred to the office of the mayor.”

2.2) The Respondents’ response was inter alia:-

That the traditional leaders did not become entitled to remuneration for their participation at the meetings held by the Respondents.

They were only entitled to be paid their “out of pocket expenses” and not be remunerated in any other way for their attendance at the meeting.

That there is no provision made in the Municipal Structures Act of 1998 for an allowance.

That every traditional leader gets paid a salary in the normal course, and the attendance at a council meeting entitles each

traditional leader to no more than the “out of pocket expenses” envisaged in section 81 (5) of the Act.

That the payment of R8480 per month was contrary to the provisions for the Municipality Structures Act and constituted unauthorized, unnecessary and wasteful expenditure.

The Applicants were never employees of the respondent.

That the Resolution of the council meeting held on the 28th of February 2011 resolved nothing more than that a future task lies ahead for the council namely that they must, at some time in the future, review the remuneration of traditional leaders.

That the remuneration of traditional leaders is a salary issue whereas the payment of out of pocket expenses is an entirely different issue.

There is no resolution to the effect that the council reviewed the “out of pocket expense” tariff of traditional leaders and resolved to increase this tariff to R8480-00 per month. (my highlighting)

In circumstances where no resolution records that the council “has” reviewed the out of pocket expenses, it is clear that no increase of those expenses can take place until such time as the review has been dealt with.

The resolutions referred to by the Applicants have nothing to do with the increase in respect of out of pocket expense.

In all the circumstances it is absolutely clear that the “out of pocket expenses” were neither reviewed, nor increased in accordance with any official or legal resolution of council to the sum of R8480-00 and that is the end of the matter.(my emphasis)

3) ISSUES TO BE DETERMINED

3.1) Whether or not the Applicants claim, properly construed, fall within the ambit of the provisions of section 81 (5) of the Municipal Structures Act 117 of 1998, in that can the resolutions referring to allowances and remuneration be construed to be making reference to “out of pocket” expenses.

3.2) Whether or not a resolution was taken to review the “out of pocket expenses” and increase the same, thus entitling the Applicants to the relief they seek.

4) In dealing with the first issue the following factors are relevant.

(i) The Applicants in the founding papers relies upon the provisions of Section 81 (5) (b) of The Municipal Structures Act for their entitlement to payment of remuneration which they say is better known as “out of pocket expense”

(ii) The Applicant's claim accordingly on their own papers is based upon the provisions of Section 81 (5) of the Municipal Structures Act.

(iii) Section 81 (5) reads as follows:-

“ Part 6:

Participation of traditional leaders

81. Participation in municipal councils

- (1) Traditional authorities that traditionally observe a system of customary law in the area of a municipality, may participate through their leaders, identified in terms of subsection (2), in the proceedings of the council of that municipality, and those traditional leaders must be allowed to attend and participate in any meeting of the council.
- (2)
 - (a) The MEC for local government in a province, in accordance with Schedule 6 and by notice in the Provincial Gazette, must identify the traditional leaders who in terms of subsection (1) may participate in the proceedings of a municipal council.
 - (b) The number of traditional leaders that may participate in the proceedings of a municipal council may not exceed 20 per cent of the total number of councillors in that council, but if the council has fewer than 10 councillors, only one traditional leader may so participate.
 - (c) If the number of traditional leaders identified in a municipality's area of jurisdiction, exceeds 20 per cent of the total number of councillors the MEC for local government in the province may determine a system for the rotation of those traditional leaders.
- (3) Before a municipal council takes a decision on any matter directly affecting the area of a traditional authority, the council must give the leader of that authority the opportunity to express a view on that matter.
- (4) The MEC for local government in a province, after consulting the provincial House of Traditional Leaders, may by notice in the Provincial Gazette -
 - (a) regulate the participation of traditional leaders in the proceedings of a municipal council; and
 - (b) prescribe a role for traditional leaders in the affairs of a municipality.
- (5)
 - (a) When participating in the proceedings of a municipal council a traditional leader is subject to the appropriate provisions of the Code of Conduct set out in Schedule 1 of the Local Government: Municipal Systems Act, 2000.

[Subs. (5) substituted by s. 121 of Act 32/2000 and renumbered to (5)(a) by s. 18 of Act 51/2002]

(b)

- (i) A traditional leader who participates in the proceedings of a municipal council is entitled to the payment of out of pocket expenses in respect of such participation.(my emphasis)
- (ii) A municipal council must determine the criteria for, and calculation of, the out of pocket expenses referred to in subparagraph (i).
- (iii) Out of pocket expenses referred to in subparagraph (i) must be paid from the budget of the municipality in question.

[Para. (b) added by s. 18 of Act 51/2002]

[S.81 amended by s.5 of Act 33/2000]”(my emphasis)

Section 81 (5) (b) (i) of the Municipal Structures Act makes it abundantly clear that the traditional leaders are entitled to the payment of “out of pocket” expenses, for their participation in the meeting of council.

Section 81 does not make provisions for or mention the term allowances, salaries or remuneration.

These terms are however specifically mentioned in the Remuneration of Public Officers Bearers Act 20 of 1998 (herein after referred to as the Remunerations Act).

Section 5 of the Remunerations Act reads as follows:-

“Salaries, allowances and benefits of traditional leaders, non-traditional leader members of traditional councils, members of kingship or queenship councils, members of local Houses of Traditional Leaders, members of provincial houses of Traditional Leaders and members of National House of Traditional Leaders

- (1) Traditional leaders, non-traditional leader members of any traditional council, non-traditional leader members of any kingship or queenship council, non-traditional leader members of traditional sub-councils, non-traditional leader members of principal traditional councils; members of any local House of Traditional Leaders, members of any provincial house of Traditional Leaders and members of the National House of Traditional Leaders shall, despite anything to the contrary in any-other law contained, be entitled to such salaries and allowances as may from time to time be determined by the President after consultation with the Premier concerned by proclamation in the Gazette, after taking into consideration -
 - (a) any recommendations of the Commission;
 - (b) the role, status, duties, functions and responsibilities of different categories of traditional leaders, non-traditional leader members of traditional councils, non-traditional leader members of traditional sub-councils, non-traditional leader members of principal traditional councils; members of kingship or queenship councils, non-traditional members

of kingship or queenship councils, different members of the local Houses of Traditional Leaders, different members of the Houses of Traditional Leaders in the various provinces and different members of the National House of Traditional Leaders;

- (c) the affordability of different levels of remuneration of public office bearers;
 - (d) the current principles and levels of remuneration in society generally;
 - (e) the need for the promotion of equality and uniformity of salaries and allowances for equal work performed;
 - (f) the enhancement of co-operation, unity and understanding between traditional communities nationally;
 - (g) the extent of the role and functions of traditional leaders across provincial borders; and
 - (h) inflationary increases.
- (2) Despite the provisions of subsection (1), a traditional leader, a non-traditional leader member of a traditional council, non-traditional leader members of traditional sub-councils, non-traditional leader members of principal traditional councils; a member of a kingship or queenship council, a member of a local House of Traditional Leaders, a member of a provincial house of Traditional Leaders or a member of the National House of Traditional Leaders who holds different public offices simultaneously, is only entitled to the salary, allowances and benefits of the public office for which he or she earns the highest income, but -
- (a) this subsection shall not preclude the payment of out of pocket expenses for the performance of functions other than those for which such office bearer receives such highest income; and (my emphasis)
 - (b) where only an allowance has been determined in terms of subsection (1) in respect of a traditional leader's membership of a local House of Traditional Leaders, a provincial house of Traditional Leaders or the National House of Traditional Leaders, such a traditional leader shall be entitled to such an allowance in addition to his or her salary, allowances and benefits as a traditional leader.”(my emphasis)

(viii) The Remuneration Act deliberately distinguishes between the terms “salary” ; allowance and remuneration from the term “out of pocket expenses”

(ix) The Remuneration Act stipulates that “Salary and allowances or remuneration” are derived from the office which earns the traditional leader his or her “highest income”, (in this case their roles as traditional leaders), and “out of pocket expenses” are derived from any simultaneous position held, (in this case, their roles on the municipal council).

(x) Further section 81 (5) of the Municipal Structures Act specifically makes mention only of out of pocket expenses with regard to what they are entitled to for their participation on the municipal council.

(xi) There is accordingly no basis upon which out of pocket expenses can be referred to as salary, remuneration or allowance, upon an examination of these two Acts.

(xii) The Applicants accordingly cannot use the terms interchangeably as they are distinct concepts and are governed by different Acts.

(xiii) The relevant provisions of the Municipal Structures Act does not even make mention of the allowance or remuneration.

5) Turning to the second issue of whether or not a resolution was passed or taken to review or increase their out of pocket expenses,

the following factors are relevant:-

- a) The Applicants have pleaded that their claims is based on The Municipal Structures Act.
- b) The Applications accordingly in order to succeed must establish that the resolutions passed, whether in the present, past or future tense, refer to “out of pocket expenses” as defined in section 81 of the Municipal Structures Act.
- c) The resolutions referred to all use the term “allowances and remunerations”, which are terms that are distinguishable and have been distinguished in the respective Acts from the term “out of pocket expenses”.
- d) There is no resolution that refers to the term “out of pocket expenses”
- e) The resolutions relied upon by the Applicant to justify the payment of the amount claimed as “out of pocket” expenses

do not support their contention that reference is made to the payment of “out of pocket” expenses, in any of the resolutions.

- f) There is accordingly no valid resolution relied upon entitling the applicants to an increase in their out of pocket expenses in the amount claimed or at all.
 - g) The fact that the Applicants use the terms “allowance” and “out of pocket expenses” interchangeably, in the notice of motion and affidavit does not make them interchangeable.
 - h) The Applicant accordingly has failed to establish that a resolution was taken to increase their out of pocket expenses.
- 6) In light of the foregoing, and the fact that reliance was placed on section 81 of the Municipal Structures Act, there is no need to go into whether or not what was resolved was at odds with the Local Government: Municipal Finance Management Act 56 of 2003 and whether what was resolved and paid constituted an irregular expenditure as defined by

section 1 (c) of the Act considering that salary increases would be the purview of the President in consultation with the Premier and not the municipality, since the Applicant is actually claiming “out of pocket expenses” and not a remuneration or allowance or salary.

7) CONCLUSION

7.1) The Applicants have failed to discharge the onus resting upon them to establish their entitlement to the relief sought, having

regard to the foregoing which can briefly be summarised as follows:-

- a) The term remuneration and allowance cannot be used to describe “out of pocket” expenses upon a consideration of the provisions of Section 81 of the Municipal Structures Act and Section 5 of the Remuneration of Public Office Bearers Act.
- b) The term “out of pocket expenses” is distinct and distinguishable from the term allowance, salary or remuneration.
- c) There is no resolution referred to by the Applicant’s that refers to an increase in the payment of their “out of pocket” expenses.
- d) There is accordingly no resolution entitling the Applicants to the relief sought by them in the notice of motion.

8. ORDER

- a) The Application is accordingly dismissed with costs.

F.B.A DAWOOD

(JUDGE OF THE EASTERN CAPE HIGH COURT)

DATE HEARD: 03 MAY 2013

DATE DELIVERED: 26 SEPTEMBER 2013

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Prepared on 11 October 2026 · Esheria