

SOUTH AFRICA / JUDGMENT

Mdunge v Ubuhlebezwe Municipality and Others (14159/17P) [2019] ZAKZPHC 1 (21 January 2019)

[2019] ZAKZPHC 1

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Masipa

CASE / FILE NUMBER

14159/17P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO: 14159/17P

In

the matter between:

MDUNGE
NICHOLAS
APPLICANT
AND
UBUHLEBEZWE
MUNICIPALITY
FIRST RESPONDENT
SPEAKER
OF UBUHLEBEZWE
MUNICIPALITY
(and in his personal
Capacity
as CZ MNGONYAMA) SECOND
RESPONDENT
MUNICIPAL
MANAGER UBUHLEBEZWE
Capacity
as GM SINEKE) THIRD
RESPONDENT
MEC

FOR CO-OPERATIVE GOVERNANCE
AND
TRADITIONAL AFFAIRS-KZN FOURTH
RESPONDENT
INDEPENDENT
ELECTORAL COMMISSION FIFTH
RESPONDENT
E B
NGUBO SIXTH
RESPONDENT
C N
NTABENI SEVENTH
RESPONDENT
E T
SHOBA EIGHTH
RESPONDENT
G J
NGUBO NINTH
RESPONDENT
B M
CALUZA TENTH
RESPONDENT
T C
DLAMINI ELEVENTH
RESPONDENT
H C
JILI TWELFTH
RESPONDENT
N Z
JILI THIRTEENTH
RESPONDENT
B M
KHUBONI FOURTEENTH
RESPONDENT
Z C
KHUMALO FIFTEENTH
RESPONDENT
V C
MKHIZE SIXTEENTH
RESPONDENT
P B
MPUNGOSE SEVENTEENTH
RESPONDENT
S M
MSIMANGO EIGHTEENTH
RESPONDENT
M C
NDLOVU NINETEENTH
RESPONDENT
P
NDLOVU TWENTIETH

RESPONDENT
B R
MDULI TWENTY-FIRST
RESPONDENT
M C
NKOTWANA TWENTY-SECOND
RESPONDENT
T B
NXUMALO TWENTY-THIRD
RESPONDENT
N G
RADEBE TWENTY-FOURTH
RESPONDENT
Z M
SHABALALA TWENTY-FIFTH
RESPONDENT
B R
ZULU TWENTY-SIXTH
RESPONDENT
ORDER
The

following order is made:

1.
The application is dismissed.
2.
The first respondent is to pay the applicant's costs up to and including costs for the 28 March 2018 which costs are to include costs for one counsel.

JUDGMENT

Delivered on: 21 January 2019

Masipa J

Background

[1] The applicant in this matter approached court for interim relief set out in part A of Notice of Motion. In terms of part A, the relief sought was as follows:

'1. Dispensing with the forms and service provided for in the Uniform Rules of Court and directing that the application be heard on an urgent basis in terms of Uniform Rule of Court 6(12);

2. Pending the outcome of Part B below, paragraphs 3-9 shall operate as an interim interdict and Court Order;

3. Ordering the first respondent to reinstate me with immediate effect as Ward 9 Councillor with all the benefits and entitlements;
4. Ordering the third respondent not to inform the fifth respondent in terms of s 18(1)(b) of Schedule 1 [Electoral System for Metro and Local Councils] of the Municipal Structures Act 117 of 1998 (the act), as amended, to fill my vacancy;
5. Ordering the fifth respondent not to declare my position as ward 9 Councillor as vacant in terms of s 18(1)(a) in terms of Schedule 1 [Electoral System for Metro and Local Councils] of the Act; and
6. Ordering the second respondent to permit me to carry out my duties and responsibilities as Ward 9 Councillor and participate in all activities of the first respondent.
7. Granting the Applicant leave to supplement his founding papers within
- (10) Court days from the granting of an order under part A;
8. Granting the Applicant further or alternative relief; and
9. That costs be reserved for determination under Part B save in the event of opposition in which event any party opposes Part B be held jointly and severally liable.'
- [2] The application also sought relief in terms of part B of the Notice of Motion which was effectively for the review and setting aside of numerous decisions by the first, second and third respondents and that such decisions be declared unlawful and void.

The relief sought in respect of part B, the review application was as follows:

PART B

1. Setting aside the dismissal of the Applicant as the Ward 9 Councillor as unlawful and invalid;
2. Setting aside the decisions and resolutions of the in-committee meeting of the 16th November 2017, chaired by the second respondent;
3. Setting aside the correspondence of the third respondent dated 7 December 2017 addressed to the Applicant as unlawful and invalid;
4. Declaring the conduct of all Councillors who participated, voted and took a decision to dismiss the Applicant as unlawful and invalid and thereby set aside.
5. Declaring any alleged concurrence granted by the Fourth Respondent to the First Respondent to dismiss me as Ward 9 Councillor as unlawful and invalid and thereby set aside;

6. Ordering all the Councillors who participated and supported an unlawful decision to expel the Applicant as liable for all the legal costs of the urgent application of 20 December 2017 and the main application (review) together with the third respondent, occasioned by the employment of two Counsel;
7. Ordering the Fourth Respondent for her role in granting the First Respondent the alleged unlawful and invalid concurrence to expel the Applicant as liable for the legal costs of this application; and
8. Granting the Applicant further or alternative relief.'

Condonation

- [3] The applicant in this matter filed its heads of argument on 8 August 2018 and failed to apply for condonation for the non-compliance with the provisions of Rule 9.4.1 of the Practice Directive for this court.[1]
- [4] In terms of the Practice Directive, the applicant was required to deliver its Heads of Argument not less than ten clear court days before the hearing of the matter. The ten clear days ended on 4 August 2018. In view of the late filing of the Heads of Argument the applicant was required to seek the court's indulgence by applying for condonation as provided for in the Practice Directive but failed to do so.
- [5] According to Mr Sethene appearing on behalf of the applicant, since the merits of the matter are not in dispute, it is unnecessary for him to seek the indulgence of the court. Ms Bhagwandeem who appeared for the first to third respondents and sixth to 26th respondents held a different view. She however indicated the need to bring this matter to finality and suggested that the absence of the applicant's condonation application be considered when the court deals with the issue of costs.
- [6] In view of voluminous papers in the matter and the issues involved which required finality, and having read the papers, I proceeded to listen to arguments on the merits of the matter. This however should not be mistaken as being an approval or condonation of the applicant's disregard of the Practice Directive. In fact,

as has been suggested by Ms Bhagwandeem this issue will be re-visited when the Court considers the issue of costs.

The Rule Nisi

- [7] Pursuant to an urgent application which was heard by Chetty J, the rule nisi was issued in respect of part A of the relief sought with the return date being 31 January 2018. On 31 January 2018, the rule nisi was extended to 26 February 2018 and the parties were directed to exchange affidavits.

- [8] On 26 February 2018, the matter was postponed to 28 March 2018. There was no mention of the rule nisi being extended. The purpose for the postponement on 31 January 2018 was to allow for the joinder of the second to 26th respondents. Prior to dealing with the merits of the review application which is relevant to this judgment, I deal with the one issue of the rule nisi which was not extended on the 26 February 2018.
- [9] Ms Bhagwandeem submitted that since the rule nisi was not extended on 26 February 2018, it had effectively lapsed and so was the protection afforded by it to the applicant. I agree with this submission since a rule nisi is an order of court with a fixed period of validity and once the period of validity has expired the rule lapses.[2] If the applicant sought the revival of the rule, he could have made the necessary application as provided for in uniform rule 27(4). In the absence of such application, and since there had been no court order extending the rule nisi, it has lapsed.
- [10] It is necessary to distinguish this case from *Crundall Brothers (Pvt) Ltd v Lazarus*[3] where the court held that the postponement of a rule nisi had an automatic effect of extending the rule. In that case, the only relief was provided by the rule nisi and consequently, the court found that to hold that the rule had lapsed would render the postponement nugatory as there would be no rule to confirm on the postponed return date. In the current matter, the relief sought in respect of the review application is not dependant on the existence or otherwise of the rule and is capable of being determined even in the absence of the lapsed rule nisi. What was removed by the lapsing of the rule was the interim protection of the applicant.

The Review

The

Facts

- [11] The facts in this matter are that the applicant was elected as a ward councillor of ward 9 of the first respondent on 3 August 2016, following the local Government elections which he contested as an independent candidate. The first respondent is a Municipality established in terms of s 12 of the Local Government: Municipal Structures Act, 117 of 1998 ('the Municipal Structures Act'). Save for the fourth and fifth respondents, the respondents are responsible for the management of the first respondent and serve as its executive committee members. The fourth and fifth respondents are cited as interested parties.
- [12] The applicant was formerly a member of the African National Congress ('the ANC') and was in 2011 elected as a ward councillor following local government elections serving a term of 5 years. In 2016, he resigned from the ANC and contended the 2016 local government elections as an independent candidate.

- [13] In October 2017, he attended a political rally by the Young Communist League and the Congress of South African Trade Unions (COSATU) in Durban. At the rally he wore a kanga bearing an 'ANC' insignia and had on few other occasions worn a T-shirt on which the writing 'CR17' appeared, which is a reference to Cyril Ramaphosa as a presidential candidate.
- [14] According to the applicant, this angered his adversaries within the ANC. While not a member of the ANC he wished for Mr Ramaphosa to be elected the president of the ANC which he said was for the good of the country. Subsequent to the rally and on 10 November 2017, the applicant received correspondence from the second respondent raising allegations of him attending a public rally wearing regalia of a political party which was said to be at odds with s 27(f)(ii) of the Local Government Municipal Structures Act (the Municipal Structures Act") regulating the code of conduct for councillors, The section relied on was in fact incorrectly cited since the said section deals with instances where a councillor becomes a member of a party which had not nominated him to the position and has nothing to do with the conduct of councillors..
- [15] The applicant's conduct was categorised as serious misconduct and he was called upon to show cause in writing by 13 November 2017 as to why he should not be charged. According to the applicant, s 27(f)(ii) applied to members who were part of political parties which he was not. Consequently, he did not respond to the substance of the allegations raised in the letter of 10 November 2017.
- [16] On 16 November 2017, following a full council meeting, an in-committee meeting was held and the applicant was asked to leave the said meeting. He was thereafter not allowed to return and was informed that he was no longer a councillor. On 7 December 2018, he was informed in writing that it had been unanimously resolved on 16 November 2017 that he be released as a councillor for breaching the Municipal Structures Act and that he was dismissed from his position with effect from 7 December 2017.
- [17] The applicant contends that he was never charged or served with charges and was never called upon to appear before a disciplinary hearing. The applicant contends further that in addition to s 27(f)(ii) of the Municipal Structures Act not being applicable to him, it is not relevant, since it makes no reference to wearing political regalia. Consequently, there was no basis to dismiss him as he had not breached the provisions of the code of conduct for councillors.
- [18] The applicant sought a cost order against the respondents on the basis that they exercised public power without lawful authority and that such exercise was illegal or ultra vires. He contended further that the first respondent's councillors contravened item 2A of schedule 1 of the Local Government: Municipal Systems Act, 2011 when they moved for his dismissal since this was in conflict with legislation applicable to local government. Therefore the sixth to the 26th respondents should be held personally responsible for costs. Indeed the relevant provision regulating conduct of councillors is provided for in schedule 1 of the Local

Government: Municipal Systems 2011 ('the Municipal Systems Act') and not as was suggested by the first to third respondents that this was regulated by S27(f)(ii) of the Municipal Structures Act.

- [19] The applicant also contends that the third respondent is a seasoned municipal manager having served in a similar capacity before. He was required to advise the first respondent's council to ensure that its decisions and resolutions are within the bounds of legality at all times. Having failed to do so, his conduct amounted to dereliction his statutory duties. On 8 December 2017 the applicant's attorney responded to the third respondent and advised him that the applicant's letter of dismissal was illegal and invalid and is to be set aside. The third respondent denied any illegality.

It was his conduct which led to the urgent applications resulting in the first respondents incurring financial costs.

- [20] In their opposing affidavits the first, second and third respondents raised four points in limine which mainly related to the issue of urgency. The Court when it granted the rule nisi would have considered those issues. Having ruled earlier in this judgment that the rule nisi lapsed, this court will not consider those issues. In any event, these were not advanced during arguments by Ms Bhagwande.
- [21] According to the first to third respondents the applicant had, seven months prior to the August 2016 elections, been removed as a councillor of ward 9 by his then political organisation, the ANC. Effective from 3 August 2016, the applicant was an independent councillor who was precluded from membership of, or affiliation or associations with, any political party, or organisation, as such conduct would contravene s 27(f)(ii) of the Municipal Structures Act. Having considered the provisions of the Municipal Structures Act, I find that this section was incorrectly relied upon and was irrelevant to the allegations raised against the applicant.
- [22] In view of his position as an independent ward councillor, the applicant was accountable to the people who elected him and not any political party. During July 2017, the second respondent received a complaint from one Jeffrey Nhlanhla Shoba that on 23 July 2017 the applicant arrived at Shoba's farm to transport a large number of ANC members to an ANC Women's League meeting. The complaint was that in doing so, the applicant was associating himself with certain members of the ANC who were intimidating members of the ANC Women's League. Shoba also laid a criminal charge against the applicant.
- [23] The first to third respondents contend that the applicant's conduct demonstrated that he was not an independent councillor. His conduct demonstrated that he was associating himself with a political party in clear violation of the prohibition on him to do so. During November 2017, the second and third respondents as well as members of the Executive Committee of the first respondent received further reports from members of the public and other officials that the applicant was affiliating or associating himself with the ANC.

- [24] The reports were that the applicant had been seen wearing political regalia of the ANC and attending meetings plus those of its alliance partner, the South African Communist party ('the SACP'). This was supported by photographs which the respondents contend was posted on the applicant's Facebook account. Several such photos were annexed to the opposing affidavit covering the period of 15 - 31 October 2017. On 15 October 2017, he was photographed wearing a T-shirt bearing the words 'SIYAVUMA' which the respondents said was a slogan for the ANC deputy president. The photograph was at the SACP and Young Communist League rally.
- [25] On 21 October 2017 the applicant posted or published on Facebook that Cyril Ramaphosa, the deputy president of the ANC, was his incoming president. On 31 October 2017 the applicant was photographed wrapped in a kanga with the ANC emblem. The respondents contended that the applicant was at all material times conducting himself as a member of the ANC and was canvassing for a preferred candidate with ANC members. It is contended further that the applicant was instructing such members which he was precluded from doing as an independent councillor.
- [26] Arising from the applicant's aforesaid conduct the respondents contended that he had indisputably re-joined the ANC or affiliated or associated with the ANC in contravention of s 27(f)(ii) of the Municipal Structures Act. According to the respondents, the applicant no longer qualified to be a councillor. He was said to have vacated the office by conduct. The respondents' council forwarded the letter of 10 November 2017 to him.
- [27] The applicant replied to that letter on 13 November 2017 by disputing the allegations raised against him and requesting evidence to remind him of the incidents wherein he was said to have beached the provisions of s 27(f)(ii) of the Municipal Structures Act. The respondents provided the applicant with photographs of the incidents. The applicant failed or ignored the respondents' letter calling upon him to show cause why he should not be charged. The respondents contended that the applicant was not entitled to the relief sought since he failed to provide a plausible explanation for his conduct.
- [28] The first respondent confirmed that on 16 November 2017 its council continued to debate the applicant's purported contravention. The Deputy Mayor presented the allegations against the applicant before the council being briefly that as an independent councillor the applicant made public his affiliation to the ANC thereby renouncing his seat as an independent councillor and that the first respondent's council was required to take corrective action.
- [29] Although not specifically stated by the respondents, it is apparent that the applicant had been requested to leave the meeting when the issue was discussed. This is consistent with his version since the respondent mentions that the applicant was not allowed back into the meeting and was informed that he would be advised of the outcome of the meeting in respect of his issue.

- [30] The meeting resolved that the applicant be removed as a councillor and for all necessary steps to be taken in this regard which included advising the fourth and fifth respondents and the initiation of a bi-election; hence the letter to the applicant dismissing him from his position as a councillor. The respondents contended that, in view of the applicant's conduct associating himself with the ANC, the applicant showed a total disregard to the constituency as an independent councillor. They averred that there was no merit for this application launched by the applicant. The respondents asked for a punitive cost order against the applicant.
- [31] In reply to the respondents' contention, the applicant avers that it was unclear from the opposing affidavit whether he was dismissed on 16 November 2017 or 7 December 2017. He contends further that the respondents have placed no evidence before the court to prove that he joined a political party subsequent to his appointment as an independent councillor. The applicant correctly submitted that this was because no proof existed.
- [32] The applicant denied that the first respondent had powers to send him the letters of 10 November and 7 December 2017, to take action against him, or to expel him as a councillor, and submitted that the first to third and the 6th to 26th respondents failed to refer the court to any municipal legislation which granted them the authority to act against him. He averred that the powers which the respondents purported to exercise vest with the fourth respondent in terms of the Code of Conduct for councillors ('the Councillor's code').
- [33] The applicant denied that he had ignored the first respondents' letter of 10 November 2017 and referred to his letter of the 13 November 2017. He denied that he was present at the meeting of 16 November 2017 when his fate was deliberated upon. Importantly, the applicant contends that he was not afforded the opportunity to be heard before his fate was decided despite being present in the vicinity of the meeting and his attempts to gain entry. The applicant was unaware of any complaints by his constituency.
- [34] The applicant confirms that he attended ANC rallies and that he wrapped himself with a kanga bearing the ANC emblem. Also, that he was seen wearing the 'CR17' T-shirt, which conduct he suggests angered his adversaries who were campaigning for Dr Nkosazana Dlamini Zuma ('NDZ'). He confirmed the Facebook posts which were intended to encourage the ANC members to vote for Mr Ramaphosa as their president.
- [35] According to the applicant, the letter of 10 November 2017 was influenced by the NDZ camp. In terms of s 19(1)(c) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') every citizen has the freedom to make political choices including campaigning for a political party or any cause. According to the applicant, campaigning for Mr Ramaphosa was an exercise of his constitutional right. He averred therefore that his dismissal was an infringement of his constitutional right.

- [36] The applicant contends that the fourth respondent's office failed its constitutional duty to prevent the first respondent's unlawful conduct. The applicant contends that the resolution by the first respondent's council contravened the principle of legality and that the decision to dismiss him was irrational, arbitrary and attacked the principles of natural justice. He contends that he committed no misconduct or criminal offence.
- [37] The applicant also contends that in terms of s 44 of the Municipal Structures Act, his dismissal should have been discussed by the first respondent's executive committee which was then required to recommend the dismissal to the municipal council. In the absence of this, the decision to dismiss and the resolution taken were illegal, irrational and arbitrary and must be reviewed and set aside.
- [38] While the fourth respondent filed an affidavit abiding the decision of the court, in that affidavit the fourth respondent denies having supported the first respondent in the dismissal of the applicant and denies any justification for a declaratory order sought by the applicant against the fourth respondent.
- [39] On 22 November 2017, the fourth respondent received a letter from the first respondent advising of its resolution to release the applicant as a councillor and sought for the fourth respondent's concurrence. Pursuant to this, a meeting was held between the first respondent's representative and the lawyers of the fourth respondent. At this meeting it was explained that any complaint of a breach under the Councillor's Code of Conduct was actionable by the fourth respondent. There was therefore no support by the fourth respondent that the applicant be removed from his position as a councillor.

Further Affidavits

- [40] Pursuant to the delivery of the applicant's replying affidavit and without leave of the court, the applicant filed a supplementary affidavit dated 8 May 2018 which he contends was necessitated by the letter of 22 March 2018 from the third respondent seeking to rescind its decision to dismiss him. This conduct was, according to the applicant, not competent since the applicant was legally represented and also that it amounted to a concession that his dismissal had been unlawful from the beginning. He submitted that the fourth and fifth respondents should be absolved from paying costs and that a cost order should be made against the first to third respondents and the sixth to twenty sixth respondents ('the respondents') jointly and severally he one paying the other to be absolved.
- [41] Similar to the applicant's conduct, the respondents filed supplementary answering affidavits dated 1 August 2018 without leave of the court. Uniform rule 6(5)(e) provides that further affidavits may only be allowed at the discretion of the court. As was held in *Hano Trading CC v JR 209 Investments (Pty) Limited*[4] a court 'has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this

regard where there is good reason for doing so'[5] and that 'to permit the filing of further affidavits severely prejudices the party who has to meet a case based on those submissions'[6].

[42] The court stated in *James Brown & Hamer (Pty) Ltd*[7] that:

‘It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received...’

[43] In *Standard Bank of SA Ltd v Sewpersadh & another*[8] the court correctly held that a litigant is not allowed to simply take it upon himself to file an additional affidavit. Where a party wishes to file a further affidavit, a formal application for leave to do so must be made. The court ruled that the affidavit fell to be regarded as non-existent.

[44] It is trite that there are three sets of affidavits allowed in proceedings which are dealt with by way of application. Further affidavits may only be filed with leave of the court which will only be granted in special circumstances such as where something new arises from a replying affidavit.[9] In that instance, there must be a satisfactory explanation why the information was not placed before the court in the initial affidavits.[10] A reading of the further affidavits filed make it apparent that there were issues which arose pursuant to the permitted affidavits which called for the filing of further affidavits. While leave of this court was not sought as is required by the provisions of uniform rule 6(5)(e), such affidavits were essential for the proper consideration of the matter since they placed relevant facts before the court. It is therefore in the interest of justice that they be allowed.

[45] The third respondent as the deponent of the further affidavit filed on behalf of the respondents set out the history of the matter. This included a contention that the rule nisi lapsed on 26 February 2018 as it was not extended, with the result that the applicant’s protection arising from the interim relief had expired.

[46] The third respondent confirmed the meeting between the representatives of the first respondent and the fourth respondent. He averred however that following the meeting a decision was taken by the representatives of the first respondent to rescind its decision to remove the applicant as a councillor. To formalise this, a resolution was taken on 22 March 2018.

- [47] On 22 March 2018 the first respondent's attorneys sent an email to the applicant's attorneys with the proposed settlement that the first respondent withdraws the decision to dismiss the applicant as a ward councillor coupled with a tender to pay the applicant's party and party costs including fees for one counsel. The applicant's attorney undertook to revert to the offer by 23 March 2018. This was prior to the joinder of the sixth to the 26th respondents. The offer was rejected as the parties could not reach agreement on the issue of costs.
- [48] The first to the third respondents contended that the matter was resolved as the applicant was effectively re-instated following the rescission of the first respondent's council decision. According to the respondents, an appropriate order finalising the matter should have been taken on 28 March 2018 when the matter was in court.
- [49] The third respondent contended that he was erroneously cited as a respondent in his personal capacity since he was not present at the council meeting when the resolution was taken. He contended further that since the essence of one matter, being the dismissal, was reserved, the joinder of the sixth to 26th respondents was unnecessary.

The Issue to be decided

- [50] What is apparent in terms of the main issues in this matter is that this court is called upon to determine whether the first respondent's decision to dismiss the applicant should be reviewed and set aside. Another issue is that relating to costs of this application.

Analysis

- [51] As set out from the facts above, the applicant seeks this court to review and set aside the decision by the first respondent to dismiss him. It is apparent that the first respondent lacked the requisite authority to dismiss the applicant and that such power vests with the fourth respondent in terms of item 14 of schedule 2 of the Municipal Systems Act.
- [52] Consequently, the first respondent's resolution and subsequent conduct to dismiss the applicant was invalid and of no force and effect. However, since this was put into operation with the applicant being removed from office and prevented from performing his functions, it was necessary for him to approach court to seek appropriate relief.
- [53] It is evident that following the meeting between the representatives of the first respondent and those of the fourth respondent, some concession was made regarding the wrongfulness of the resolution passed by the first respondent's council and the subsequent conduct of dismissing the applicant. Consequently, the first respondent resolved to rescind the resolution and to reinstate the applicant as ward councillor for ward 9. The applicant suggests that the first respondent's conduct of rescinding the resolution was impractical and of no force since there is no provision for it and it was not sanctioned by the principles of legality.

[54] The applicant relied on *Economic Freedom Fighters and Others v Speaker of the National Assembly*[11] at para 75 where the following was said:

‘The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.’

[55] In *Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [12] the court stated that the nature of the mandate the Constitution entrusts to public officials does not require them to be infallible

and that the Constitution anticipates imperfection, subject to the corrections and constraints of the law. Therefore administrators

cannot without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken as this would amount to self-help. This would allow officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. The result would be confusion and conflict, to the detriment of the administration and the public and would undermine the courts’ supervision of the administration.

[56] It is correct that public figures must operate within the rule of law and that unless decisions have been set aside, they must be complied with. It is trite that a municipal council acts through its resolutions. As was stated by Nugent JA in *Manana v King Sabata Dalindyebo Municipality*[13]:

‘No doubt a municipal council is entitled to rescind or alter its resolutions. And no doubt an interested party is entitled to challenge its validity on review. But once a resolution is adopted in my view its officials are bound to execute it, whatever view they might have on the merit of the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review.’

[57] When errors are committed by the municipal council, these should be capable of correction by the rescission of such resolution and where necessary, the passing of necessary resolutions. This cannot amount to self-help since a correctly sanctioned administrative process would have been invoked for the correction of such error. It would not be necessary to approach court each time an error is committed and corrected by the municipal council otherwise the courts would be inundated with review applications to deal with resolved issues.

[58] The suggestion by the applicant that once a matter is before court, parties cannot resolve their dispute cannot be correct since this would prevent parties from settling matters out of court adding unnecessary work on the judiciary which is already heavily loaded with work.

Parties are in fact encouraged to resolve their own disputes and this can be seen in Rule 37 conferences[14] which amongst others consider whether parties have attempted to settle their disputes. Indeed the first respondent's conduct in rescinding its resolution to dismiss the applicant was competent and in compliance with the rule of law.

- [59] Since it was competent for the first respondent to rescind its decision, the basis for the review application fell away. Therefore the only issue remaining before the parties is that of costs. The relief sought by the applicant reviewing and setting aside the resolution is no longer necessary in light of this. This was in fact conceded to by the parties in their Heads of Argument.

Counsel's Costs

- [60] The respondents contended that the applicant is only entitled to the costs of one counsel since the matter was not unduly complicated and both counsel representing him were junior having practiced for two years and below. The applicant's conduct of pursuing the matter when the cause had fallen away was said to be a misuse of the court process which ought to be met with a punitive cost order.
- [61] It is evident as has been found in this judgment that the decision of the first respondent was invalid[15] since the first respondent's council usurped powers which rest with the fourth respondent. The applicant was therefore operating

within the protection of his rights when he approached court for the relief he sought in part B, the review application. This was accepted by the first to third respondents hence the tender for costs which was made prior to the hearing of the joinder application.

- [62] The applicant seeks a punitive costs order to hold the third respondent and the sixth to 26th respondents personally liable for his costs. As set out in the further affidavit filed by these respondents, the third respondent was not present when the decision sought to be reviewed was taken. Consequently, the applicant's contention that the third respondent failed to advise the first respondent's council cannot be sustained. As regards the sixth to 26th respondents, the merits of the case could have been resolved by 28 March 2018 which would have rendered the joinder application nugatory.
- [63] According to the applicant, the nature and complexity of the matter is such that it was reasonable for him to employ more than one counsel. Further that there were important questions of law raised in the matter. In the circumstances, it was argued that it was not overcautious for the applicant to employ two counsel. The applicant relies on the respondents' conduct of the matter, mainly the fact that it took approximately eight months for the respondents to realise that the first respondent's decision to dismiss the applicant was wrong. Mr Sethene relied on *Newman v Prinsloo*[16] where the court considered the use of two counsel and set the test to be whether it is 'a wise and reasonable precaution' for two counsel to be appointed.

[64] Ms Bhagwandeem denied that there was any complexity in the matter nor were there any issues of law which arose necessitating two counsel in the matter. This was especially because both counsel were junior with below two years' experience.

[65] In *City of Cape Town v Arun Property Development (Pty) Ltd & another*[17], the court held that when considering the reasonableness of counsel's fees, consideration must be given to among others 'the

complexity of the matter; the volume of the case; the level of counsel's fees . . . ; inflation; and the fact that counsel must be fairly compensated for preparation and presentation of argument'.

[66] While it was correct that the first respondent only became aware of the wrongfulness of its decision after meeting with the fourth respondent's attorneys, this does not mean the matter is complex. There is no indication that the first respondent had consulted its own attorneys for advice. What is apparent from the evidence is that the first and third respondents dealt with the matter on their own and clearly misinterpreted the extent of their powers.

[67] The applicant's institution of this application was well merited at least up until the 22 March 2018 (which is when the resolution was rescinded), including any subsequent consultation between him and his attorney and counsel to consider the legality of that rescission. Once the resolution was rescinded, he should have withdrawn the application. Therefore his cost should be limited to the 28 May 2018 when the matter was in court and could have been withdrawn.

[68]The applicant had the benefit of his attorneys including that of counsel. It was unnecessary for him to have two counsel in the matter. In fact, there is nothing before court to suggest what role was played by each of the counsel. Of course there appears to be some concession from Mr Sethene that the costs for two counsel be restricted only to part A of the matter. In my view, part A fell away when the rule nisi which was granted lapsed on 28 March 2018

[69] In respect of the costs associated with part B of the matter, the applicant's conduct of the matter in failing to file heads of argument timeously and then disregarding the provisions of the Practice Directive must be met with the contempt that it deserves. I am of the view that this can be met by not awarding the applicant any cost order. In any event, the relief sought by the applicant fell away when the decision to dismiss him was rescinded and the application in respect of Part B ought to have been withdrawn at that stage. Any costs incurred thereafter were unnecessary. The court is also displeased with the litigants disregard of the provisions of Uniform rule 6(5)(e) when they proceeded to file further affidavits without seeking leave of the court, notably, the respondents further affidavit was quite lengthy. Consequently, the courts view is that none of the parties in this mater deserve a cost order.

[70] In the premises, the following order is made:

DETAILS OF THE HEARING

Date of hearing:

22 August 2018

Date of Judgment:

21 January 2019

Appearances

Counsel for the applicant: Mr Sethene

Instructed by:

Sifiso Chili & Associates

Counsel for the first to third

and sixth to 26th respondents: Ms Bhagwandeem

Instructed by:

Gcolotela & Peter Incorporated

[1] Practice Manual of the KwaZulu-Natal Division of the High Court of 2 April 2004, as amended

[2] [zRPz]Fisher v Fisher 1965

(4) SA 644 (W).

[3] Crundall Brothers (Pvt) Ltd v Lazarus NO 1991

(3) SA 812 (ZH) at 823G-I

[4] Hano Trading CC v JR 209 Investments (Pty) Limited

[2012] JOL 29725 (SCA)

[5] Hano Trading, para 11

[6] Hano Trading, para 14

[7] James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963 (4) SA 656 (A) at 660D-F,

[8] Standard Bank of SA Ltd v Sewpersadh & another 2005 (4) SA 148 (C) para 12-13.

[9] Afric Oil (Pty) Ltd v Ramadaan Investments CC 2004 (1) SA 35 (N) at 38I-39B.

[10] Herbstein and Van Winsen Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5ed (2009) at 435.

- [11] *Economic Freedom Fighters v Speaker of the National Assembly & others; Democratic Alliance v Speaker of the National Assembly & others (Corruption Watch (RF) NPC as amicus curiae)* 2016 (5) BCLR 618 (CC).
- [12] *Member of the Executive Council for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (5) BCLR 547 (CC) para 88 - 89.
- [13] [zRPz] *Manana v King Sabata Dalindyebo Municipality* [2011] 3 All SA 140 (SCA)
- [14] Uniform rule 37.
- [15] See para 29(a) of *Ngqele v King Sabata* [2011] 8 BLLR 817 (ECM)
- [16] *Newman v Prinsloo & another* 1974 (4) SA 408 (W) at 411C-F. See also *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 at 678B
- [17] *City of Cape Town v Arun Property Development (Pty) Ltd & another* 2009 (5) SA 227 (C), para 24. See also *D B M Huurmasjiene v Administrateur, Oranje-Vrystaat* 1987 (4) SA 264 (O) and *President of the Republic of South Africa & others v Gauteng Lions Rugby Union & another* [2001] ZACC 5; 2002
- (1) BCLR 1 (CC)

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Prepared on 12 October 2026 · Esheria