

SOUTH AFRICA / JUDGMENT

Mhana and Others v Ngqwebo (CA 65/2011)

[2011] ZAECHGC 90 (1 November 2011)

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COURT

Eastern Cape High Court, Grahamstown

BEFORE

N. Dambuza, J.J. Nepgen, P.T. Mageza

CASE / FILE NUMBER

CA 65/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – GRAHAMSTOWN)

Case No.: CA65/2011 Date heard: 21 November 2011 Date delivered: November 2011 In the matter between: MAKHAYA MHANA (ex officio his position as The Honourable Mayor, Nxuba Municipality) First Appellant/ Respondent MLAMLI BONGCO (ex officio his position as Municipal Manager, Nxuba Municipality) Second Appellant/ Respondent BONGANI B FINCA (ex officio Provincial Electoral Officer, Eastern Cape Independent Electoral Commission) Third Appellant/ Respondent XOLANI MADLUNGU (c/o Bedford Resident Association, 156 Nonzwakazi Location, Bedford) Fourth Appellant/ Respondent L MPHLENZA (c/o Bedford Resident Association, 156 Nonzwakazi Location, Bedford) Fifth Appellant/ Respondent And FIKILE NGQWEBO Respondent/ Applicant

J U D G M E N T

DAMBUZA, J:

In the court a quo the respondent (the applicant in the proceedings before the court a quo) obtained an order reinstating him to his position as a councillor of the Nxuba Municipal Council, a position which he had held by virtue of being a duly elected representative of the Bedford Residence Association (“BERA”). His position as a councillor of the Nxuba Municipality (“the municipality”) followed the local government elections held in 2006.

The background facts which led to the proceedings in the court a quo were that the respondent had, until December 2008, been a councillor in the municipality by virtue of his membership of BERA. A dispute arose in October 2008 when a letter purporting to be from BERA was addressed to the second appellant, in his capacity as the manager of the municipality, advising of the

withdrawal of the respondent's name from the BERA party list. According to the letter, members of BERA had passed a vote of no confidence in the respondent and he had therefore ceased to be a councillor of BERA in terms of the Local Government: Municipal Systems Act 117 of 1998 ("the Act").

As a result of that letter, the respondent's position in the council was declared vacant by Independent Electoral Council and the fourth respondent was appointed as a councillor in that position.

The relief sought by the respondent was essentially a reversal of a declaration of a vacancy in respect of his position in the council and an order that he be reinstated to that position and be paid the salary and benefits to which he had been entitled as a councillor.

Before the court a quo the appellants had taken issue with, amongst others, the respondent's failure to join the municipality in the proceedings and the fact that he had, instead, only cited the first and second appellants in their capacities as the mayor and the manager of the municipality. This is the only ground on which the appellants' application for leave to appeal against the order of the court a quo succeeded and therefore the only issue before us on appeal.

On the wider issue relating to the declaration of vacancy in respect of the position held by the respondent in the council, the court a quo found that the withdrawal of respondent's name by BERA was not a valid reason for his removal from the council. The court held that such procedure was not provided for under sections 26 and 27 of the Act, the provisions that govern removal of councillors from a municipal council. The court held that in terms of the Act it is only where a councillor elected from a party list ceased to hold office that the Chief Electoral Officer of the Independent Electoral Council (IEC) is entitled to declare a vacancy and order that the person whose name is at the top of the same party list should fill the vacancy. In this case, so it was held, the respondent had not "ceased to hold office" as envisaged in the Act.

On the narrow issue before us the court a quo held that the municipal council has no role to play in the declaration of the vacancy in respect of the respondent's vacancy and the subsequent appointment of the fourth respondent as a councillor as this was the function of the IEC. The court then held that the contention that there was a non-joinder of the municipality was wrong.

The order granted by the court a quo reads thus:

"(a) The declaration by first, second and third respondents of a vacancy in the seat previously held by applicant as a councillor on the Nxuba Municipal Council on 1 December 2008 and his replacement by fourth respondent is hereby reviewed and set aside;

The applicant be immediately reinstated in the position of a councillor of the Nxuba Municipal Council in his capacity as the duly elected representative of the Bedford Residents Association (BERA);

The applicant be immediately placed in a position to fully carry out his functions as a councillor of the Nxuba Municipal Council inter alia by being allowed access to the municipal offices, being provided with all of the necessary administrative support and by being allowed to re-occupy the office as previously occupied by him;

The applicant should continue to receive the salary and benefits to which he was entitled as a councillor of the Nxuba Municipal Council retrospective to 1 December 2008 together with interest thereon at the legal rate;

The first and second respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.”

The essence of the appeal is that the court a quo erred in granting an order that the municipality should place the respondent in a position to resume his functions as a councillor and pay him accordingly when the municipality had not been party to the proceedings before the court a quo.¹

Mr Bosman who appeared on behalf of the appellants submitted that in as far as the order sought by the respondent required the municipality to enable the respondent to carry out his duties as a councillor and to pay him therefore, the municipality had a “direct substantial interest” in proceedings before the court a quo, should have been joined in the proceedings.²

From the papers and from the submissions made by both counsel before us it does appear that all the parties are in agreement that the municipality was a necessary party to the proceedings before the court a quo. The respondent contended, however that as: “both first and second respondents have been cited in their official capacities as the Nxuba Mayor and the Nxuba Municipal Manager respectively [and that] the practical effect thereof is that the Nxuba Municipality and/or the Nxuba Municipal Council are also joined in these proceedings.”³

In this regard Mr Kayser relied on section 2(a) of the Local Government: Municipal Systems Act 32 of 2000 which provides that a municipality “is an organ of state within the sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998”. Consequently so it was submitted on behalf of the respondent, it (the municipality) can be properly sued through its head as provided for in section 2 of the State Liability Act.⁴ Before us Mr Kayser persisted in the submission that the citation of first and second appellants in their respective capacities as the political and administrative heads of the council respectively constituted joinder of the municipality.

That submission however cannot stand. Firstly even ministers of government departments and public officials must be cited by their official title and not their personal name.⁵ Further, the position of a political head of a municipality is distinguishable from that of a political head of a government

department. Section 2(d) of the Municipal Systems Act states that a local government has “a separate legal personality” which excludes liability on the part of its community for the actions of the municipality. Unlike government departments therefore

municipalities are accorded a separate legal identity and are accorded specific names on establishment. Rule 17(4)(a) of the

Practice Rules in this Court states that every summons shall set forth, amongst others, the name by which the defendant is known to the plaintiff which, in this case, is the name of the municipality. Even further, unlike government departments municipal executive and legislative authority is exercised by the municipal council, and the council “takes all decisions of the municipality subject to section 59.”⁶ For the proceedings instituted by the respondent to be validly brought to the attention of the municipality, the municipality would have had to be sued in its own name.

Consequently the submission, on behalf of the respondent, that the citation of the first and second appellants constituted joinder of the municipality in the proceedings before the court a quo cannot stand and any order granted against the municipality falls to be set aside.

That is, however not the end of the matter. Mr Bosman was, constrained to concede that even the appeal succeeds in as far as the municipality should have been properly joined in the

application, paragraph (a) of the order of the court a quo remains valid. In essence this means that the declaration of a vacancy in respect of the position held by the respondent in the municipal council remains null and void and that effectively, the respondent has to be reinstated to his position in the council.

But the appeal succeeds to the extent that paragraphs (c) and (d) of the order of the court a quo fall to be set aside.

I would therefore issue the following order; that:

The appeal succeeds with costs and paragraphs (c) and (d) of the order of the court a quo are deleted from the order.

N. DAMBUZA

JUDGE OF THE HIGH COURT

NEPGEN, J

I agree, it is so ordered.

J.J. NEPGEN

MAGEZA, AJ

I agree.

P.T. MAGEZA

JUDGE OF THE HIGH COURT (ACTING)

For the appellants: Adv B.L. Boswell instructed by Neville Borman & Botha Attorneys of Grahamstown.

For the respondent: Adv J.S. Kayser instructed by Nolte Smit Attorneys of Grahamstown.

1 See paragraphs (c) and (d) of the order.

2 Rule 10 (3) of the Rules of this Court provides that several defendants may be sued in one action either jointly, jointly and severally or separately or in the alternative, whenever the question arising between them or anyone of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate question. The question as to whether all necessary parties have been joined does not depend upon the nature of the subject-matter of the suit but upon the manner in which, and the extent to which the court's order may affect the interests of third parties. The test is whether or not a party has "direct and substantial interest" in the subject matter of the subject-matter of the action; that is a legal interest in the subject-matter of the litigation which may be affected prejudicially by the judgment of the court. (See: Erasmus; Superior Courts Practice at B1-94 to B1-94 and the authorities cited therein).

3 Paragraph 6.1 of the respondent's replying affidavit.

4 Section 2 of the State Liability Act provides that in any action or other proceedings instituted by virtue of the provisions of section 1 of that Act (claims against the state), the Minister of the department concerned may be cited as nominal defendant or respondent.

5 See Harms; Amler's Precedents of pleadings; at 85 together with the authorities cited therein.

6 See section 11(1) of the Municipal Systems Act. Section 59 of that Act deals with delegation of municipal administrative authority. See also section 151 of the Constitution of the Republic of South Africa Act 106 of 1996 in terms of which the executive and legislative authority of the local sphere of government is vested in the Municipal Council.

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