

SOUTH AFRICA / JUDGMENT

Phokwane Local Municipality and Another v Mojaki and Another (487/2020) [2020] ZANCHC 54 (21 August 2020)

[2020] ZANCHC 54

COURT

Northern Cape High Court, Kimberley

BEFORE

Mayet, AJ

CASE / FILE NUMBER

487/2020

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case

Number 487/2020

PHOKWANE LOCAL MUNICIPALITY

First

Applicant

THE

ADMINISTRATOR AND ACCOUNTING OFFICER OF

Second Applicant

THE PHOKWANE

LOCAL MUNICIPALITY

and

MOJAKI

MPHO SYLVESTER

First

Respondent

THE

PHOKWANE MUNICIPALITY COUNCIL

Second

Respondent

JUDGMENT

MAYET,AJ

Introduction

[1] This is the extended return day of the rule nisi granted on 28 February 2020 by Chwaro AJ sitting in the urgent court. The order reads:

"1. Directing that the Applicants failure to comply with the provisions of Rule 6(5) of the Uniform Rules of Court with regard to form and service and time periods be condoned and that this application be dealt with as one of urgency in terms of Rule 6(12)(a) and (b) of the Uniform Rules of Court.

2. That a rule nisi be and is hereby issued, calling upon the First Respondent or any other parties to furnish reasons, if any on Friday 17 April 2020 at 09h30, why the following orders should not be made pending the finalisation of an application for the review of the decisions of the Phokwane Municipal Council made on 25 October 2019 and 18 February 2020, which application will be instituted within 30 days of the confirmation of this order:

2.1 Interdicting and prohibiting the First Respondent from disrupting or obstructing the activities and administration of the First and Second Applicants including giving instructions to any employee of the First Applicant;

2.2 Interdicting and prohibiting the First Respondent from purporting to act as the Acting Municipality Manager of the First Applicant and/or representing to third parties that he is the Acting Municipal Manager of the First Applicant;

2.3 That the First Respondent be ordered to vacate the office of the Acting Municipal Manager of the First Applicant within 24 hours after service of the order;

2.4 That the First Respondent be interdicted from entering the municipal offices of the First Applicant save for any purposes other than a consumer of municipal services and/or as a ratepayer;

2.5 That the prayers set out in paragraph 2.1 and 2.4 serve as an interim order with immediate effect."

[2] On the return date, 17 April 2020, the rule nisi was extended to 8 May 2020. The Respondents filed their answering affidavit on 8 May 2020 and the rule nisi was further extended with the directive that the Applicants reply on or before the 22 May 2020.

[3] The matter came before me on 19 June 2020. After hearing oral submissions, I confirmed the rule nisi. My reasons are set out hereunder.

Background

[4] The First Applicant is the Phokwane Local Municipality ("the Phokwane Municipality"). Being a municipality, it is subject to section 139 of the Constitution of South Africa, 1996, which provides that when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, a Provincial Executive Council may assume responsibility and appoint an administrator to the extent necessary to maintain essential services, meet established minimum standards or prevent the municipality from taking unreasonable steps, or maintain economic unity.

[5] On 27 March 2019, the Provincial Executive Council of the Northern Cape resolved to intervene in the Phokwane Municipality in terms of section 139(1)(b) and section 139(5) of the Constitution for a period of six months subject to review or intervention by the Minister for the Department of Cooperative Governance, Human Settlement and Traditional Affairs or the National Council of Provinces or the Northern Cape Provincial Legislature ("the section 139(1)(b) and section 139(5) intervention").

[6] On 8 April 2019 the Provincial Executive Council of the Northern Cape gave written notice to the Second Respondent ("the Municipal

Council") of the section 139(1)(b) and section 139(5) intervention on the basis that the Phokwane Municipality had failed

to fulfil its executive obligations in respect of:

[6.1] the provision of uninterrupted water service to the community in terms of section 11 of the Water Services Act 108 of 1997;

[6.2] the appointment of a Chief Financial Officer and/or Acting Chief Financial Officer and adherence to the provisions of sections 51, 54A, 56, 65 to 67 of the Municipal Systems Act 32 of 2000 ("the Municipal Systems Act") in respect of other senior managers; and

[6.3] the provision of effective and efficient oversight in the administration and management of the financial affairs of the municipality through proper and diligent financial accountability and compliance with sections 64 to 66, 71 to 72 and 126 of the Municipal Finance Management Act 56 of 2003 ("the MFMA").

[7] The section 139(1)(b) and section 139(5) intervention did not dissolve the Municipal Council and it remained in existence albeit with limited powers as set out in the notice:

"7. The Municipal Council is NOT DISSOLVED but will remain in existence for the duration of the intervention, but with no authority on water, the organisation of the administration of the municipality in terms of section 51 of the Local Government: Municipal Systems act 32 of 2000 (BUT MUST APPROVE THE APPOINTMENT OF SENIOR MANAGERS) and the financial affairs of the municipality;

8. The Municipal Council must give effect to the directives and instructions of the Administrator and the Technical Experts to the extent it is necessary to fulfil the neglected obligation and to ensure that it is performed.

9. All senior municipal officials (Municipal Manager, Chief Financial Officer and Director: Corporate Services) and all personnel falling

under such officials must give effect to the directives and instructions of the Administrator and the Technical Experts to the

extent that it is necessary to fulfil the neglected obligation and to ensure that it is performed."

[8] Pursuant to the section 139(1)(b) and section 139(5) intervention, the Second Applicant was appointed as the administrator for the Phokwane Municipality ("the Administrator").

[9] On 26 April 2019, the Municipal Council brought an urgent application to interdict the section 139(1)(b) and section 139(5) intervention

pending an application to review and set aside the decision. The application was dismissed and no further steps have been taken to review the section 139 (1)(b) and section 139(5) intervention.

[10] The First Respondent is employed by the Phokwane Municipality as Director Corporate Services, in terms of a written contract

subject to the provisions of section 56 of the Municipal Systems Act for a fixed term period commencing on 1 March 2017 and terminating on 31 February 2022.

[11] On 25 October 2019, at a special general meeting, the Municipal Council resolved to to appoint the First Respondent as Acting Municipal

Manager on a month to month basis as the post of the Municipal Manager was vacant. Thereafter, the First Respondent purported to act as the Acting Municipal Manager.

[12] On 13 November 2019, the Administrator gave written notice to the First Respondent in terms of section 6(2) of the Local Government:

Disciplinary Regulations for Senior Managers, 2010, informing him that the Phokwane Municipality was investigating various allegations

of serious misconduct against him. The allegations of serious misconduct included inter alia the personification of a duly appointed Acting Municipal Manager, attempt to gain access to the Phokwane Municipality bank account without authority and generally causing instability by issuing instructions to municipal staff which contradict the instructions of the Administrator. The notice called upon the First Respondent to make written representations within seven days as to why he should not be placed on precautionary suspension. On 21 November 2019, the Administrator suspended the First Respondent by way of written notice delivered on 22 November 2019.

- [13] On 25 November 2019, the First Respondent informed the Administrator that he rejected the suspension as he was appointed in terms of a Municipal Council resolution and his actions were in accordance with the Municipal Council mandate. However, the First Respondent vacated his offices of the Phokwane Municipality and did not continue to act as the Acting Municipal Manager of the Phokwane Municipality.
- [14] On 18 February 2020, the Municipal Council at a special general meeting, resolved that the First Respondent report for duty on 19 February
2020. As a result, the First Respondent returned to the offices of the Phokwane Municipality and purported to act in his capacity as Director: Corporate Services as well as the Acting Municipal Manager.
- [15] On 24 and 25 February 2020, a conflict of authority arose between the Administrator and the First Respondent regarding instructions issued by the First Respondent relating to the supply of water which had financial implications for the Phokwane Municipality. This prompted the Applicants to launch the urgent application on 28 February 2020.

Issues

- [16] At issue is whether the Applicants have made out a case entitling confirmation of the rule nisi.
- [17] The Respondents resist the confirmation of the rule nisi on four grounds, namely :
- [20.1] The matter is not urgent, alternatively the urgency is selfcreated;
- [20.2] The application is mala fide as the rule nisi procedure is reserved for:
- [20.2.1] extremely urgent matters;
- [20.2.2] instances where potential respondents are unknown;
- [20.2.3] the Respondents were denied the opportunity to oppose the urgent application.
- [20.3] The deponent to the founding affidavit has no locus standi; and
- [20.4] After the grant of the rule nisi on 28 February 2020, the Applicants seek final relief and do not meet the requirements for final relief.
- [18] The Applicants submit that the rule nisi should be confirmed as:
- [21.1] Urgency has already been determined;
- [21.2] The Respondents attorney of record agreed to the rule nisi being granted and the application is not mala fide;
- [21.3] In the absence of review, the appointment of the Administrator in terms of section 139 is valid; and

[21.4] Confirmation of the rule nisi is interim relief.

[19] I turn to examine the submissions from the contesting parties.

Urgency

[20] It is clear from the order granted on 28 February 2020, that Chwaro AJ sitting in the urgent court, condoned the Applicants failure to comply with the Uniform Rules of Court and in granting the rule nisi found that there was urgency.

[21] In terms of rule 6(12) of the Uniform Rules, the court has discretionary power to dispense with the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure. Furthermore, rule 6(8) of the Uniform Rules makes provision for the Respondents to anticipate the return date in order to expedite the proceedings.

[22] In the heads and in oral argument, the Respondents emphasised that the matter is not urgent and was not urgent at the grant of the rule nisi. The Respondents contend that the urgency is selfcreated and the Applicants failed to set out facts justifying urgency.

[23] It is not disputed that the urgent application was served and that the Respondents attorney of record agreed to the grant of the rule nisi subject to a return date no later than 17 April 2020.

[24] In *Apleni v President of the Republic of South Africa* [2018] 1 All SA 728 (GP) Fabricius J dealing with the issue of urgency in the context of public funds stated:

"... Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the Rule of Law, and may have a detrimental impact upon the public purse, the relevant relief sought ought normally be urgently considered."

[25] Having regard to the timeframes between the resolution of 18 February 2020, the First Respondent's return to the Phokwane Municipality on 19 February 2020 and the events that transpired on 24 and 25 February 2020 as well as having had the benefit of the full set of pleadings, heads of argument augmented by oral argument at the hearing, I am satisfied that urgency was established on 28 February 2020 when the rule nisi was granted and there are no hallmarks of selfcreated urgency .

Mala Fides

[26] The second challenge is that the granting of the rule nisi was mala fide as the Respondents were denied the opportunity to oppose the the urgent application and the rule nisi procedure is reserved for exceptional and extremely urgent matters usually in circumstances where the potential respondents are unknown.

[27] It is not disputed that the Respondents received the urgent application and consented to the rule nisi being granted. In *Drotske NO and Another v Coetzee* (2767/2012) (2012) ZAFSHC 176 (20 September 2012), Ebrahim J stated that:

"The Rule nisi is therefore fundamental to both procedural and substantive fairness, that is its main purpose, for it allows flexibility in circumstances where a rigid application of the audi alteram parte rule might have the effect of defeating the very rights sought to be enforced or protected. Where a temporary interdict is necessary to prohibit a party from doing something until cause is shown by him against it, the court is asked to make a specific order that the rule nisi should act immediately as a temporary interdict, pending the return day. The utility of the rule nisi acting at the same time as an interim order has been endorsed by the courts. (*Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674 H 675 A)"

[28] I am unable to find substance in the challenge that Respondents were not afforded the opportunity to oppose the urgent application and the application is mala fides for two reasons: first, the Respondents consented to the urgent order and second, the inherent nature of the rule nisi procedure ensures that the Respondents were afforded the opportunity to file their answering affidavit and oppose the confirmation of the rule nisi.

[29] Insofar of the argument that the rule nisi procedure is reserved for exceptional and extremely urgent matters where potential respondents are unknown, the Respondents cite various authorities which do not assist as: *Luna Meubel Vervardigers (Edms) Bpkv Makin* 1977 (4) SA 135 (W) concerns the requirements for urgent applications in general; *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (SJ SA 333 (W) deals with good cause in terms of Rule 6(12), *Harvey v Niland* 2006 (2) SA 436 (ECG) concerns a final interdict and *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) concerns ineffective service of an urgent application and *Sutherland J* held that in circumstances where the purported service was de facto no service at all then the order is in effect taken ex parte. It did not concern a rule nisi.

[30] I am unable to find any substance or authority in support of the contention that the rule nisi procedure is reserved for exceptional and extremely urgent matters instances where potential respondents are unknown and the Applicants were mala fides.

Locus Standi: Administrator

[31] The Respondents third bone of contention is that the Administrator lacks locus standi as he holds no resolution authorising him to institute the application and depose to the affidavit on behalf of the Phokwane Municipality.

The Respondents aver further that the ostensible authority which vests in the Administrator does not afford him the authority to

institute legal proceedings.

[32] In terms of the section 139(1)(b) and section 139(5) intervention, the provincial government effectively steps into the shoes of the Municipal Council and delegates this by appointing an Administrator. The identification of the executive obligation is an essential element in the intervention process as it determines the scope of the responsibility assumed.

[33] The Provincial Executive Council of the Northern Cape assumed executive responsibility and/or obligations of the Municipal Council, set out in the section 139(1)(b) and section 139(5) intervention notice as follows:

"4. The following are areas where executive responsibility and/or obligation will be assumed by the MEC on behalf of the Executive Council:

Technical Service:

The function as it relates to water services in terms of section 11 of the Water Service Act 108 of 1997 which will entail the maintenance of essential national standards or meet established minimum standards for the rendering of the water service;

Corporate Services:

The Organisation of the Administration in terms of section 51, 54A, 56, 65 to 000000">6000000">7 of the Local Government: Municipal Systems Act, 32 of 2000 of the Systems Act which includes undertaking the appointment of senior managers including disciplinary procedures for senior managers as prescribed where applicable and specifically takeover the following powers and functions:

- Review and Ratification of all decision of the municipal council and its committees;
- Review and Ratification of all decisions of the Municipal manager and section 56 managers;
- Devise a turnaround strategy for the municipality;
- Implementation of all findings and investigations undertaken by the MEC in terms of the Systems Act;
- Review the organisational structure of the municipality.

Financial Management and Administration

The provision of effective and efficient oversight in the administration and management of the financial affairs of the municipality including:

- The Administrator being a controlling signatory on the municipal bank account;
- Implement a system to control and approve all expenditure;
- Ensure implementation of financial systems, policies and procedures;
- Ensure implementation of the Property Rates Act,;

- Set out strategy for addressing financial problems including strategy for reducing unnecessary expenditure and increasing revenue collection, preparation of adjustment budget for 2018/19;
 - The preparation and implementation of a recovery plan approved by the municipal council and the diligent financial accountability and compliance with the _functions related to the implementation of sections 64 to 66, 71 to 72 and 126 of the Local Government : Municipal Finance Management Act 56 of 2003."
- [34] The Administrator was appointed in terms of section 139(1)(b) and section 139(5) of the Constitution and in terms of this appointment, he assumed the duties and functions of "the Municipal Manager/ Accounting officer in terms of the Municipal Systems Act 32 of 2000 ("the Municipal Systems Act") and Municipal Finance Management Act 56 of 2003 ("the MFMA"); and the Director: Corporate Services."
- [35] It is also evident from the Administrator's letter of appointment that he has the power to "ensure that the intervention facilitates the restoration of an environment conducive to proper financial administration and management, the rule of law and effective service delivery."
- [36] The conflict between the Administrator and the First Respondent concerned the supply of water which had financial implications for the Phokwane Municipality. I make no final findings of fact or of law for these are the province of the review court but I am satisfied for purposes of confirmation of the rule nisi that the Administrator has the necessary locus standi.

Final Interdict

- [37] The last argument raised by the Respondent is that the Applicants seek a final interdict. There are some instances where confirmation of the rule nisi will result in a final interdict. This is not such an instance.
- [38] A rule nisi, by its very nature is intended to govern a situation in the interim, for a period, until it is discharged or confirmed. *Herbstein and Van Winsen: The Civil Practice of the Superior Courts*, 5th Edition at 455 defines a rule nisi thus:

"an order directed to a particular person or persons calling upon him or them to appear in court on a certain date to show cause why the Rule should not be made absolute; or, in other words, why the court should not grant a final order. In a proper case, for example, an urgent application for an interdict, the court may grant interim relief by ordering that the Rule nisi will operate as a temporary interdict. This rule of practice should be applied and followed unless sound reasons exist to depart from it."

[39] The Supreme Court discussed the nature of a rule nisi in *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga V Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* [1995] ZASCA 49 at 19 dh where Corbett CJ stated:

"A rule nisi...contemplates that the relief sought will only be granted at some future date after the respondent has had time to show cause that it should not be granted... the interim interdict attached to a rule nisi usually seeks to maintain the status quo ante..."

[40] *Shoba supra* makes it clear that a rule nisi is not another name for an interim interdict. The two are not interchangeable. As Corbett CJ explains at 18J – 19B:

"The term "rule nisi" is derived from the English law and practice, and the rule may be defined as an order by a Court issued at the instance of the applicant and calling upon another party to show cause before the Court on a particular day why the relief applied for should not be granted (see Van Zyl's judicial Practice 3rd ed 450 et seq; *Tollman v Tolmann* 1963 (4) SA 44 (CJ at 46H). Walker's Oxford Companion to Law sv "nisi": states that a decree, rule or order is made nisi when it is not to take effect unless the person affected fails within a stated time to appear and show cause why it should not take effect. As Van Zyl points out, our common law knew the temporary interdict and a "curious mixture of our practice with the practice of England" took place and the practice arose of asking the Court for a rule nisi, returnable on a certain day, but in the meantime to operate as a temporary interdict.' (See too, *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674H 675C.) If the order authorising attachment is provisional and subject to confirmation, it must follow that an attachment effected and any entitlement acquired on the strength thereof must likewise be provisional and subject to confirmation."

[41] Confirmation of a rule nisi results in an interim interdict as it is subject to the outcome of pending proceedings instituted or to be instituted and does not involve a final determination of the rights and does not affect their final

determination.

Requirements for Interim Interdict

[42] In order to succeed in obtaining the confirmation of the rule nisi, the Applicants are required to establish a prima facie right, a wellgrounded apprehension of irreparable harm if the interim relief is not granted, the balanced of convenience in its favour and there must be an absence of alternative remedy. These cannot be considered in isolation but must be seen in conjunction with one another.

Prima Facie right

[43] The first requisite for an interim interdict in terms of *Webster v Mitchel* 1948 (1) SA 1186 (W) at 1189 read with the caveat in *Gool v Minister of justice* 1955 (2) SA 682 (CJ at 688DE is that a prima facie right must be established, even one that is open to some doubt.

[44] In their heads of argument, the Respondents concede that the Applicants have made out a prima facie case but contend that since the Administrator had no authority to bring the application as authorisation or ratification from the Municipal Council is required, the application is defective. The substance of this argument is that the Administrator cannot institute legal proceedings without the authorisation or ratification of the Municipal Council.

[45] Although the Municipal Council has not been dissolved, its powers are limited:

"7. The Municipal Council is NOT DISSOLVED but will remain in existence for the duration of the intervention, but with no authority on water, the organisation of the administration of the municipality in terms of section 51 of the Local Government: Municipal Systems act 32 of 2000 (BUT MUST APPROVE THEAPPOINTMENT OF SENIOR MANAGERS) and the financial affairs of the municipality."

[46] The intervention in terms of section 139(1)(b) and section 139(5) was designed to arrest the problems in the Phokwane Municipality.

Contradictory instructions and confusion of reporting lines distract and intrude on municipal service delivery with very serious

consequences for communities living in the area.

[47] The conflict between the Administrator and the First Respondent concerned the supply of water which had financial implications for the Phokwane Municipality.

[48] The Administrator assumed the responsibilities and obligations relating to the recruitment of senior managers and/or the organisation of the administration in terms of section 51, 54A, 56, 65 to 67 of the Municipal Systems Act which includes undertaking the appointment of senior managers including disciplinary procedures as prescribed and specifically review and ratification of all decisions of the Municipal Council, the Municipal Manager, section 56 managers as well as the efficient and effective oversight in the administration and management of the financial affairs of the Phokwane Municipality ensuring proper and diligent financial accountability and compliance with the MFMA.

[49] I am satisfied that the powers assumed in terms of the section 139(1)(b) and section 139(5) notice of intervention provide the Applicants with a prima facie right for the relief.

Balance of Convenience

[50] The senior position of the First Respondent and the Respondents apparent disregard of the authority of the Administrator are important factors in the consideration of the balance of convenience.

[51] On 18 February 2020, the Municipal Council held a Special Council Meeting at which the Administrator presented a report to regarding

the suspension and disciplinary charges against the First Respondent.

[52] Despite the section 139(1)(b) and section 139(5) intervention notice which specifically states that "The Municipal Council must give effect to the directives and instructions of the Administrator and the Technical Experts to the extent it is necessary to fulfil the neglected obligation and to ensure that it is performed" the Municipal Council resolved that the First Respondent report for duty on 19 February 2020.

[53] On 19 February 2020 the First Respondent returned to the offices of the Phokwane Municipality and purported to act in his capacity as Director: Corporate Services and Acting Municipal Manager.

[54] The prejudice to the Respondents if the interdict operates pending the review is considerably less than if the First Respondent is allowed to assume office as the Acting Municipal Manager. The balance of convenience therefore strongly favours the Applicants.

Irreparable Harm

[55] It is not in dispute that the First Respondent has been suspended by the Administrator for various allegations of serious misconduct inter alia the personification of a duly appointed Acting Municipal Manager, attempt to gain access to the Phokwane Municipality bank account without authority and generally causing instability by issuing instructions to municipal staff which contradict the instructions of the Administrator.

[56] In *Mojaki v Ngaka Modiri Molema District Municipality and others* (2015) 36 ILJ 1331 (LC) at para 34 the court held:

"The allegation that the applicant refused to obey instructions from the administrator is in my view very serious, taking into account in particular the level of his responsibility and seniority. It is for this reason that I am of the view that the facts and the circumstances justified the action taken by the administrator to suspend him. In other words, there exists an objectively justifiable basis for the administrator to deny the applicant access to the workplace."

[57] The First Respondent acting as the purported Acting Municipal Manager is able to deal with third parties and issue instructions to Phokwane Municipality employees which have potential financial implications for the Applicants and the potential for irreparable harm exists.

No other remedy

[58] As a consequence of the Respondents actions, conflict between the Administrator and the First Respondent similar to the incident on 24 and 25 February 2020, are inevitable. In the circumstances, I am satisfied that the Applicants have no alternative remedy.

Effect of Confirmation of Rule Nisi

[59] I am satisfied that the Applicants have met the requirements necessary for an interim interdict. The rule nisi is confirmed, but it is nevertheless still an interim order as it is made subject to the institution and finalisation of the review of the decisions of the Municipal Council.

Costs

[60] The general rule that costs are awarded to the successful party arises to indemnify the successful party for the expense to which he has been put through having been unjustly compelled to either initiate or defend litigation.[1] The general rule is subject to the overriding principle that the court has a judicial discretion in awarding costs.[2]

[61] The Applicants sought punitive costs against the Respondent. I do not agree.

Order

1. The rule nisi is confirmed.
2. The Respondents to pay the costs.

N. MAYET, AJ

NORTHERN CAPE DIVISION

Date heard:

19 June 2020

Date delivered:

21 August 2020

For the Applicant:

Adv. S Erasmus

For the Respondent:

Adv. P. Ngandwe

[1] Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488

[2] Griffiths v Mutual & Federal Insurance Co Ltd [1993] ZASCA 121; 1994 (1) SA 535 (A)

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