

SOUTH AFRICA / JUDGMENT

Saku v Ngaka Modiri Molema District Municipality and Others (1321/2013) [2014] ZANWHC 2 (16 January 2014) [2014] ZANWHC 2

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

1321/2013

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IN

THE NORTH WEST HIGH COURT

MAFIKENG

CASE

NO.: 1321/2013

DATE:

16 JANUARY 2014

In

the matter between:

AUDREY

PHALADI

SAKU.....Applicant

And

NGAKA

MODIRI MOLEMA DISTRICT

MUNICIPALITY.....1st

Respondent

THE

INDEPENDENT ELECTORAL

COMMISSION.....2nd

Respondent

TEBOGO

RAMASHILABELE.....3rd

Respondent

MANKO

PRISCILLA

KANAITHE.....4th

Respondent

NOMSA

MARGARET
DUBE.....5th
Respondent
TUMELO
MOTSWENYANE.....6th
Respondent
G.S.
NOVOLO.....7th
Respondent
KGOELE
J
DATE
OF HEARING : 20 SEPTEMBER 2013
DATE
OF JUDGMENT : 16 JANUARY 2014
FOR
THE APPLICANT : Adv. M.M. Rip (SC)
FOR
THE RESPONDENT : Adv. J.H.F. Pistor (SC)
With
Him Adv. H.J. Scholtz

JUDGMENT

KGOELE J:

- [1] The applicant applied for a declaratory order seeking this Court to re-instate her as Councillor and Executive Mayor of the Council of the first respondent District Municipality (The Municipality). The application was ordinarily brought on an urgent basis but was struck off the roll due to lack of urgency. The applicant was represented by Advocate Rip SC, the first respondent (The Municipality) by Advocate Laubscher, whilst Advocate Pistor SC with him Advocate Scholtz represented the third respondent Mr Ramashilabele (the former Speaker of the Municipality), the fourth and sixth respondents. The second, fifth and seventh respondent did not oppose this application.
- [2] This matter is almost similar and closely related to the matter in Case No. 1220/13 which was firstly argued before this Court on the same day, but relates to resolutions that are disputed and that were purportedly passed by the first respondent on the 16 July 2013 together with certain actions that followed, that led thereto that the applicant was removed by the Independent Electoral Commission (IEC) as a Councillor. The factual background of this meeting had been summarised in the judgment of that matter and will not be repeated here. By virtue of the fact that the crux of the issues in this matter and the submissions to be made thereof were similar to the ones in Case No.1220/13, parties agreed that matter be argued first as the outcome thereof has a bearing on or has an effect of summarily disposing this one.

- [3] It is common cause that following the Local Government Elections in 2011 the applicant was elected on the African National Congress (ANC) list of candidates as a Councillor of the Municipality, thereafter, at the Council Meeting of 3 June 2011, as the Executive Mayor of the Municipality. She retained that position until she was found guilty of all the charges that were preferred against her and her membership suspended for a period not exceeding 3 years by a Provincial Disciplinary Committee hearing on the 17th May 2013. She filed a Notice to Appeal this verdict and suspension with the ANC head office on the 1st July 2013.
- [4] The present application is concerned with events which took place after the ruling of the Disciplinary Committee had been arrived at. On 16 July 2013 the Speaker of the Council of the Municipality, the third respondent, called a meeting of the Council. At the said meeting, applicant was removed as an Executive Mayor and Councillor N.P Kwenaithe, the fourth respondent was appointed as Acting Executive Mayor. Eight (8) new Councillors who were seconded by both Mafikeng Local Municipality and Ditsobotla Local Municipality were also sworn in. The sixth respondent who was also sworn in was elected as an Acting Municipal Manager. The first task that the sixth respondent proffered was to write on the 17 July 2013 to the IEC declaring a vacancy on the Council on the basis that applicant had been “expelled” as a member of the ANC by the Provincial Disciplinary Committee. The office of IEC acting on his request removed the applicant as a Councillor on the 24 July 2013 and declared a vacancy.
- [5] The first respondent (the Municipality) did not oppose the relief as sought by the applicant save for the cost order. The second

respondent filed an explanatory affidavit stating that they cannot undo their decision, since they are funtus officio ad abide by the decision of this Court in this regard. Subsequent to the filing of the papers, the applicant became aware of the fact that the National Disciplinary Committee under the Chairmanship of Mr Hanekom had set aside the decision of the Provincial Disciplinary Committee and had referred same back to the Disciplinary Committee for a re-hearing de novo.

- [6] Advocate Rip SC submitted on behalf of the applicant that the meeting of the 16th July 2013 was irregular and further, that all the resolutions and decision taken there stand to be set aside. He based his argument on the following grounds:-

6.1 that the Municipal Manager nor his delegate did not compile a notice of that particular meeting and in fact, was totally unaware that the meeting was to take place. This was a total disregard of Standing Order No. 6 of the Ngaka Modiri Molema District Municipality Standing Order Council of 2010 (The Standing Orders);

6.2 that no proper notice was given of the said meeting therefore the requirements of Standing Order No. 9 was not complied with;

6.3 that the agenda was not drawn up by the Municipal Manager in consultation with the Speaker and Executive Mayor as required by

Standing Order No. 11;

6.4 that a discussion of the removal of the applicant was considered notwithstanding that a notice including an agenda to that effect was not prior given to the Councillors as required by Standing Order No. 10;

6.5 that there was no quorum for the meeting as 8 Councillors that were purportedly delegated by the two Local Municipalities were sworn in at the meeting and participated in the meeting when required precedent had not been followed when replacing them before they were sworn in.

- [7] Advocate Rip SC submitted from the onset that in fact the last leg that applicant relies on that relates to the issue of the replacement of the 8 Councillors like in the matter that was argued before this Court in Case No. 1220/13 is the main crux in this application. He basically re-iterated and re-emphasized the same arguments and submissions that were made by Advocate Maritz SC who was representing the respondents in that matter which are to the effect that these new 8 Councillors who happened to be the same Councillors who were the subject matter in Case No 1220/13 could not be inaugurated as the Municipal Manager had not declared a vacancy of such Councillors to the IEC and further that the office of the IEC in turn did not select them from the lists as required by the Local Government Municipal Structures Act 117 of 1988 (the Structures Act), and therefore, were not members of the Council when they participated in the proceedings of the 16 July 2013.
- [8] On the other hand Advocate Pistor SC on behalf of the third, fourth and sixth respondents and who was representing the applicant Tebogo Frank Ramashilabele in the Case No. 1220/13 also repeated his arguments and submissions that relates to same issue in that matter.
- [9] This issue of replacement or not of these 8 Councillors relates to the interpretation of Section 23 of the Local Government: Municipal Structures Act 117 of 1998 (The Structures Act) which was the subject matter of a legal issue and was thoroughly ventilated in the Case No. 1220/13. I have already thoroughly considered this legal dispute in that matter, I am therefore of the view that there is no need to re-invent the wheel in this matter. The decision that I took in that matter brings me to summarily conclude in the current matter that it goes without saying that the 8 Councillors as submitted by the applicant's counsel in this matter were not members of the District Council yet when they participated in the meeting of the 16 July 2013 and therefore, at the meeting of the 16 July 2013, there was no quorum which was formed.
- [10] Consideration of this aspect alone which the applicant heavily relies on in her submission that the meeting was not properly constituted and convened, has the propensity of summarily disposing off this matter. Therefore, although the other legs upon which the applicant relies on that are enumerated under paragraphs 6.1 – 6.4 above are equally meritorious, there is in my view, no need for this Court to go to an extent of considering them seriatim.

- [11] Advocate Pistor SC urged this Court to exercise its overriding discretion against the applicant in the event that it finds that there were irregularities in respect of the meeting of the 16th which had the effect that the resolution in terms of which the applicant was so replaced resulted in a nullity. He maintained that the applicant's application should still be dismissed in that event and referred this Court to the matter of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 666 (SCA) wherein it was decided that a Court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. In the alternative, he submitted that this Court should rather postpone the matter until the position of the applicant is clarified.
- [12] In support of this alternative proposition he submitted that the application by the applicant amounts to a review. He maintained that although we now know what the result of the National Disciplinary Committee is, this Court should not lose sight of the fact that the applicant's membership at the ANC hangs in the balance because of her alleged misconduct. According to him, it is of extreme importance and in the interest of the public at large that stability and continuity be established and maintained in the Council of the first respondent Municipality. If the applicant is now re-instated and her Appeal against her suspension later fails, then she has to vacate her position within the near future and another person will have to again take over as a Mayor.
- [13] Advocate Rip SC on the other hand submitted that it is trite law that the decisions taken by the Municipal Council are not administrative actions therefore all of the arguments in *Oudekraal* matter are not relevant as they refer to review of administrative action.
- [14] The propositions by Advocate Pistor SC are in my view devoid of substance. This Court is seized with a decision that set aside the decision of the Provincial Disciplinary Committee. Accordingly, at this point in time, the applicant is still a member of the ANC. Her disciplinary matter was referred back to the Provincial Disciplinary Committee to start *de novo*. As a result, she will remain innocent until proven guilty. In addition, this Court is not seized with information as to how long do the process of finalising a disciplinary matter of this magnitude takes up until all the legal remedies are exhausted. In any event, the position of the applicant is at present clear and there are no reasons justifying the postponement of this matter as Advocate Pistor SC requested.

[15] COSTS

In the notice of motion the applicant sought for an order of costs only against the first, third and sixth respondents jointly and severally, the one paying the others to be absolved. In as far as the remaining respondents is concerned, costs order was sought only in the event they opposed this application. Advocate Laubscher on behalf of the first respondent indicated at the onset of the matter that he only opposed the matter as far as cost is concerned.

- [16] During arguments Advocate Rip SC on behalf of the applicant indicated that the applicant does not persist with the costs order against the first respondent. He submitted that the Municipality should not be ordered to pay the costs as it is evident from the facts of this case

that there are in-fighting between the members of the Municipality itself for personal agendas. He insisted that the costs order should only be made against the third, fourth and sixth respondents in their personal capacities as they acted ultra vires, in an underhand and dishonourable manner.

[17] Advocate Pistor SC on behalf of the third, fourth and sixth respondents who opposed the matter submitted that these respondents

at all the times relevant hereto acted in their capacities as Councillors of the first respondent Municipal Council. They acted

bona fide and on the basis of a letter of the ANC to the effect that the applicant was expelled. This was in the execution of their duties and in the belief that they were entitled by virtue of the relevant Legislation and Standing Orders to act as they did. According to him there is therefore no basis on the strength of which they can, or should, be ordered to pay costs in their personal capacity. Instead, even if this Court rules against the respondent, costs should be costs in their capacity as representative of the first respondent Municipal Council.

[18] On the third respondent's version as depicted in his founding affidavit in Case No. 1220/13, he on his own compiled a notice of the meeting and the agenda of the 16th. He furthermore at the said meeting allowed an item regarding the removal of the applicant in the discussion when it was not on the agenda. However the reasons for not complying with all of these in accordance with the prescribed Standing Orders were not provided. To come to some form of understanding of the third respondent's argument for the moment without conceding to this point assume that in as far as the Mayor is concerned, her position as such was still not clear. But in as far as the Municipal Manager is concerned, a person who was supposed to have executed the administrative duties of compiling the notice, agenda and sending out notices as required by the Standing Orders, it is inexplicable why the third respondent did not consult or request him to do / perform his duties that were imposed to him by the Statutes. The third respondent did not in any way in his papers suggest that he did on his behalf because the Municipal Manager refused. In paragraph 28.2 of the third, fourth and sixth respondents' answering affidavit it is alleged that it was not necessary for the third respondent to consult with the applicant or the Municipal Manager. This sweeping statement does not state in which respect and on what basis. The Standing Orders are clear and require that and in the absence of any plausible reason why it could not be complied with, the action of the third respondent remains tainted.

[19] Another disturbing feature of his action is borne by the fact that according to the papers before Court he was aware of the alleged expulsion of the applicant as early as the 9/07/2013 and even wrote a letter that he will hold a Special Meeting on the 17 July 2013 to deal with the absence of the Executive Mayor (applicant) and to elect an Acting Executive Mayor or Executive Mayor. Unfortunately he did not explain why he suddenly on the 12th July 2013 had a change of mind and decided to issue notices and an agenda for the 16th. What makes his action more suspicious is the fact that the time and venue of the said meeting was

altered by a cellular phone message at the late hours of the time scheduled for the meeting.

[20] On July 2013 the office of the MEC for Local Government and Traditional Affairs wrote a letter to the third respondent requiring

him to declare a vacancy with the office of the IEC as a result of the applicant having been expelled from the ANC and because the Municipal Manager did not do as requested by legislation. The letter also informed the third respondent that the party has already informed and updated the party list with IEC. The third respondent did not do as requested, instead decided to hold a meeting on the 16th to remove the applicant from her office. This letter serves as proof that IEC has a role in replacing and removing Councillors appointed by the Municipalities. Attached to the papers are correspondence in the form of e-mails dating back from April 2012 from the IEC wherein the office of the Mafikeng Local Municipality amongst others, were informed about how replacement of Councillors should be approached and in terms of what prescripts. Annexure “MPK9” is also a letter which is dated 13th September 2012 written by the Municipal Manager to the office of the third respondent informing the third respondent amongst others that:-

“2. I have noted with concern your decision to call and convene a Special Council Meeting for the purpose realigning the Portfolio

Committees as a result of new delegation of traditional affairs leaders deployed as well as the new secondment of Councillors from

Mafikeng Local Municipality.

3. I have noted with dismay that your decision fails to observe due processes of the law and/or alternatively legislative requirements as provided for in the Municipal Structures Act, No. 117 of 1998 as amended.
4. Despite that, it is my obligation to ensure that any process steered by the Municipal Council is in conformity with the legislature

prescripts”.

[21] It therefore becomes apparent that the third respondent had knowledge long before the 16th that for the replacement of Councillors in a District Municipality to take effect, the office of the IEC has a role to play and further that, a vacancy must also be declared. This explains the reason why the said Councillors did not assume office immediately. An interesting fact to note is that he himself, the third respondent, allowed some of the so called “replaced councillors” to participate in the meeting of the 16th.

Unfortunately all of these strengthen the view which the third respondent had alluded to in his affidavit that there are currently

two perceived political groupings at the Municipality, who have intra-political differences. This, as correctly submitted by the applicant's counsel, is not a problem at all as people or politicians especially, usually have different viewpoints. The fact remains that, the Rule of Law, the Constitution and the laws of the Country must be adhered to in order to solve any differences the people might have.

[22] I find the following remarks by Clive Plasket, an Associate Professor of Rhodes University, Grahamstown, found in his article titled "Protecting the Public Purse, Appropriate Relief and Cost Orders against public officers" that was published in the South African Law Journal (2000) Vol. 117 (Part 1) page 151 apposite in this matter:

"THE CONSTITUTIONAL DIMENSION"

The Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) contains four sets of provisions of relevance for present purposes – those that relate to how officials should do their jobs and the limits on and control of their powers.

First, section 1 contains a set of founding values for the democratic order created by the Constitution. Section 1 (c) lists as founding values constitutional supremacy and the rule of law. Section 1 (d) speaks of 'accountability, responsiveness and openness' as aims of the 'multi-party system of democratic government' created by the Constitution. Section 2 provides that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

Secondly, section 195(1) lists what are termed basic values and principles governing public administration. Among these basic values and principles are the following in terms of section 195(1)(a), a 'high standard of professional ethic must be promoted and maintained'; in terms of section 195(1)(b), 'efficient, economic and effective use of resources must be promoted'; and, in terms of section 195(1)(d), public administrators must provide services 'impartially, fairly, equitably and without bias'. These values and principles, plus the remaining six others in section 195(1), apply to the 'administration in every sphere of government', 'organs of state' and 'public enterprises' (section 195(2)). Section 237 adds to the obligations created by section 195(1). It provides: 'All constitutional obligations must be performed diligently and without delay'."

[23] I am of the view that there is a want of bona fides on the part of the third respondent as he acted in a manner which constitutes a departure from his office. His actions were not only ultra vires, but also an attempt to abuse his ostensible powers for an ulterior purpose. His conduct warrants a costs order against him in his personal capacity. The fourth and sixth respondents unfortunately

allowed themselves to be swayed and aligned themselves with his deeds as previously indicated, because they are in his faction group. The interests of justice demands that the rates of the residents of the Ngaka Modiri Molema District Municipality ought not to be expended on what is on the face of it, appears to be litigation involving the Municipality and its employees for personal agendas.

[24] There will be no costs order made against the second, fifth and seventh respondents as they did not oppose this matter. Similarly

there will be no cost order against the first respondent as well because the applicant did not persist in a costs order, and furthermore, succeeded in opposing the costs order to be granted against them.

[25] Consequently the following order is made:-

25.1 The purported resolutions of the first respondent passed on the 16th July 2013 are hereby declared null and void and of no force and effect;

25.2 The appointment of Nomsa Margaret Dube (the fifth respondent) by the Second Respondent as Councillor at the Ngaka Modiri Molema District Council in place of the applicant is hereby set aside;

25.3 The applicant is reinstated as a Councillor of the Ngaka Modiri Molema District Council;

25.4 The office of IEC is directed to amend the party lists accordingly to align it with the terms of this Court Order under sub- paragraph 25.3 above;

25.5 The applicant is hereby reinstated as the Executive Mayor of the Ngaka Modiri Molema District Council;

25.6 The third, fourth and sixth respondents are ordered to pay the costs of this application in their personal capacity jointly and severally, the one paying the others to be absolved;

A M KGOELE

JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPLICANT : Vere Attorneys

C/O Jerry Sithole Attorneys

FOR THE RESPONDENT : Messrs Lizel Venter Attorneys

C/O Botha Coetzer Smith Attorneys

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