

SOUTH AFRICA / JUDGMENT

United Democratic Movement v Enoch Mgijima Local Municipality and Others (2436/2017) [2017] ZAECGHC 77 (6 July 2017) [2017] ZAECGHC 77

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe

CASE / FILE NUMBER

2436/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: 2436/2017

In

the matter between:

UNITED
DEMOCRATIC
MOVEMENT Applicant
And
ENOCH MGIJIMA LOCAL
MUNICIPALITY First
Respondent
COUNCILLOR L GUNUZA - NKWENTSHA
(Executive
Mayor) Second
Respondent
COUNCILLOR M PETER
(Speaker) Third
Respondent
S NKONKI (Acting Municipal
Manager) Fourth
Respondent

JUDGMENT

BESHE J:

[1] This application was launched by Councillor Mthuthuzeli Hokolo who is a representative of the United Democratic Movement (UDM) in first respondent Municipal Council. An order in inter alia the following terms is sought:

1.1 Interdicting and restraining the Respondents from holding a Special Council Meeting of the First Respondent on the 25 May 2017 or any other date thereafter, for the appointment of a Municipal Manager without following due process as outlined in Regulation 21 of Local Government on Appointment and Conditions of Senior Managers.

1.2 Declaring that the recruitment, selection and appointment process of a Municipal Manager is not in compliance with the abovementioned regulation.

1.3 Ordering that second respondent furnish the Executive Council of first respondent with the confidential selection report in respect of the recruitment, selection and appointment process of the Municipal Manager.

1.4 Ordering second respondent to provide and furnish the Executive Council of first respondent certain reports pertaining to the recruitment / selection of the Municipal Manager.

1.5 Ordering that the recruitment, selection and appointment process of first respondent's Municipal Manager be started de novo.

1.6 Ordering the respondents who oppose this application to pay costs jointly and severally the one paying the other to be absolved.

[2] A rule nisi was issued on more or less the abovementioned terms on the 25 May 2017. The matter serves before me for the purpose of determining whether such rule nisi should be confirmed or discharged.

[3] Mr Hokolo states that he is authorised by the party that he represents in first respondent, the United Democratic Movement, to institute these proceedings.

[4] It is common cause that the first respondent's Municipal Manager's position was declared vacant on the 14 December 2016. As a consequence of which the position was advertised in a number of publications with the closing date for applications being the 20 January 2017.

[5] According to Hokolo, during February 2017 he learnt from a Mr Yalezo that the latter had attended a selection committee meeting for shortlisting of candidates for the vacant position of Municipal Manager. And that this meeting was held in Beacon Bay, East London. Even though this struck him as being unusual, he did not give this much thought at the time or make an issue of it.

[6] Mr Hokolo goes on to state that on 23 May 2017 he received a text message notification of a special council meeting of first respondent that was to be held on the 25 May 2017. No agenda was provided. On the day preceding the said meeting he learnt that the appointment of the Municipal Manager was scheduled to be discussed at that meeting. He contends that due process for the appointment of a Municipal Manager has been flouted in that the necessary steps that are prescribed in the Local Government Municipal Systems Act were not

followed. He details those to be the following:

The Council did not appoint a selection committee which would make recommendations for the appointment of a Municipal Manager.

No monthly reports were tabled by the Mayor regarding the progress in the appointment of a Municipal Manager.

He is not aware of when the process of shortlisting was completed.

No screening of shortlisted candidates was conducted within the period stipulated by Local Government Regulations (Regulation 21).

No recommendation of a second and third suitable candidate was made. Less than 48 hours' notice was given for the special council meeting.

Mr Hokolo contends that the meeting scheduled the 25 May will endorse an improper process.

[7] To support his contention that no selection panel was appointed, Mr Hokolo alleges that during an ordinary council meeting held on the 29 March 2017, one of the parties, the United Front moved a motion by means of which a point was raised that no selection panel was in place. That the minutes of the said meeting do not record that

this assertion was corrected or disputed at the said meeting. In this regard, Mr Hokolo referred the court to a document that is marked "MSH 1" which purports to be minutes of the meeting of the 29 March

2017. Item 08/2017 (IC) thereof reads thus:

NOTICE OF MOTION REGARDING THE APPOINTMENT OF THE MUNICIPAL MANAGER BY
CLLR. L. AMOS AND CLLR. MHLONTLO RESOLVED:

That it be noted that the selection panel for the appointment of the Municipal Manager was not elected on the 11 January 2017 by Council.

The meeting was apparently thereafter closed without any further deliberations.

[8] This application is opposed by the respondents. In opposing the granting of the relief sought, in addition to attacking the merits of the application respondents raise two points in limine. The first one concerns the authority of the deponent to the founding affidavit to do so and also bring this application. Respondents point to the absence of a resolution and or authority from the United Democratic Movement that authorises him to institute these

proceedings. To this end, they refer to the Constitution of the United Democratic Movement where it deals with the powers, duties and activities of a Provincial Executive Committee (PEC) of the United Democratic Movement. Listed under Clause 7.6.10.5 are inter alia the following:

Administer the affairs of the party in the province

- Apply for permission from the NEC (National Executive Committee) to institute and or defend legal action.

In a bid to counter this attack, in reply, a letter from the office of the chairperson, United Democratic Movement Eastern Cape Province is attached. The letter is dated 30 May 2017. The body of the letter reads as follows:

TO WHOM IT MAY CONCERN

The EC Provincial executive committee has resolved that all matters in the local government must be dealt head on and legal means must be explored in the event where the ruling party become intransigent and this includes the matter in Enoch Mgijima and our Councillor Mr Hokolo is our deployee in charge in matters that affects the council

The matter has also directed to our National Office.

Thanking you in anticipation.

Yours faithfully.

The letter is signed on behalf of Mr T Mpulu, Provincial Chairperson.

(Reproduced as is)

[9] Does the abovementioned letter signify that permission was sought from the National Executive Committee of the applicant? Was such permission or authorisation granted? I think not. I am not persuaded that the institution of these proceedings was authorised by the National Executive Council of the applicant. I am not satisfied that Mr Hokolo was authorised to bring this application on behalf of the applicant. He has no locus standi to institute these proceedings as a representative of or on behalf of the applicant. For this reason alone, he stands to be unsuited and the application dismissed.

[10] If however I am wrong in this regard, I will proceed to deal with the second point raised by the respondents –Failure to establish urgency.

[11] Respondents contend that the applicant has failed to establish that the matter was urgent or urgency. They point out that, according to the founding affidavit, Mr Hokolo got wind of the “existence” of a selection panel in February 2017. He states that he did not recall a council meeting

where a selection panel was elected. According to him, this was affirmed or came up again on the 29 March 2017 in a motion during

which it was pointed out that a selection panel had not been appointed. He was in attendance at this meeting. It was only on the

24 May 2017 that he took steps by instituting these proceedings to interdict a meeting that was scheduled for the 25 May 2017. Mr Hokolo does not state what steps he took after what occurred in this regard in February and March 2017. Respondents drew the court’s attention to minutes that purport to be a record of what took place at a first respondent’s Special Council Meeting held on the 31 January 2017. The document records under item 1/2017 (HC) resolutions;

(a)

(b)

(c) That it be noted the Executive Mayor proceed with recruitment process of the Municipal Manager as per resolution adopted by council on 14 December 2016.

(d) That further be noted and accepted that the interviewing panel consists of the Executive Mayor Cllr Lindiwe Gunuza Nkwentsha; CHDM Municipal Manager, Mr Mene and a representative of COGTA as proposed by the Executive Mayor.

[12] Mr Hokolo assails the authenticity of the minutes referred to above, on the basis that they are unsigned as they have not yet been confirmed. It is noteworthy that he does not deny that these resolutions were taken during the meeting of the 31 January 2017. Especially in view of the fact that he is listed as one of those who were in attendance at the said meeting. Noteworthy also is the fact that he does not allege that a selection committee was not appointed but says he does not recall it being appointed. He complains that no monthly reports were tabled regarding the progress in the process of appointing a Municipal Manager. If the vacancy was declared in December 2016, it means no reports were tabled in this regards for the months of January, February, March, April and May. And yet he did nothing about it. At least he does not share with us what steps he took as a result of this failure.

[13] In my view the urgency was self-created by the applicant. Even on this score the application stands to be dismissed. Mr Hokolo cannot use these proceedings to request documents pertaining to the impending appointment of the Municipal Manager without having requested same from first respondent’s officials. He even goes so far as requesting documents and a report on behalf of Executive Council of the first respondent. He does not state that these were requested and such request was refused.

[14] For these reasons, and without venturing into the merits of the application, the rule nisi stands to be discharged.

[15] The rule nisi that was issued on the 25 May 2017 is discharged with costs.

NG BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 8 June 2017

Date Reserved : 8 June 2017

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