

SOUTH AFRICA / JUDGMENT

Democratic Alliance and Others v Premier for the Province of Gauteng and Others

(18577/20) [2020] ZAGPPHC 813 (10 June 2020)

[2020] ZAGPPHC 813

COURT

North Gauteng High Court, Pretoria

BEFORE

D Mlambo, S Potterill, N Ranchod

CASE / FILE NUMBER

18577/20

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE
NO: 18577/20

REPORTABLE:

YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO
REVISED.
10/6/2020
In

the matter between:

DEMOCRATIC
ALLIANCE
First Applicant
RANDALL
MERVYN WILLIAMS
Second Applicant
CHRISTO
MAURITZ VAN DEN HEEVER
Third Applicant
ZWELIBANZI
CHARLES KHUMALO
Fourth Applicant
And
THE
PREMIER FOR THE PROVINCE OF GAUTENG

First Respondent
THE
EXECUTIVE COUNCIL FOR THE PROVINCE
OF
GAUTENG
Second Respondent
MINISTER
FOR CO-OPERATIVE GOVERNANCE
AND
TRADITIONAL
AFFAIRS
Third Respondent
CHAIRPERSON
OF THE NATIONAL COUNCIL
OF
PROVINCES
Fourth Respondent
MEC
FOR CO-OPERATIVE GOVERNANCE
AND
TRADITIONAL AFFAIRS, GAUTENG
Fifth Respondent
CITY
OF TSHWANE METROPOLITAN
MUNICIPALITY
Sixth Respondent
AFRICAN
NATIONAL CONGRESS
Seventh Respondent
ECONOMIC
FREEDOM FIGHTERS
Eighth Respondent
CONGRESS
OF THE PEOPLE
Ninth Respondent
AFRICAN
CHRISTIAN DEMOCRATIC PARTY
Tenth Respondent
PAN
AFRICANIST CONGRESS OF AZANIA
Eleventh Respondent
FREEDOM
FRONT PLUS
Twelfth Respondent
ALL
TSHWANE COUNCILLORS WHO ARE
MEMBERS
OF THE ANC
Thirteenth Respondent
MEMBERS
OF THE EFF

Fourteenth Respondent
THE
REMAINING TSHWANE COUNCILLORS
Fifteenth
Respondent
SPEAKER
OF THE GAUTENG PROVINCIAL
LEGISLATURE
Sixteenth Respondent
ELECTORAL
COMMISSION
Seventeenth Respondent
PAUL
NAWA
Eighteenth Respondent
SOUTH
AFRICAN MUNICIPAL AND
ALLIED
WORKERS UNION
Nineteenth Respondent

JUDGMENT

THE COURT:

Introduction

- [1] The four applicants (collectively referred to as 'the DA'), launched the present application in terms of sub-sections (1) and (3) of section 18 of the Superior Courts Act 10 of 2013 (the Act) [1]. They seek an order that, pending the outcome of the applications for leave to appeal or appeals by the first, second, fifth, eighth and fourteenth respondents (or any future application for leave to appeal or appeal by any other respondent), paragraphs 2 to 5 of the order made by this court on 29 April 2020 remain in operation and are to be given effect.
- [2] This legal saga has its origins in the decision taken on 4 March 2020, in terms of which, the Gauteng Executive Council decided in terms of section 139(1)(c) of the Constitution, to dissolve the Tshwane Municipal Council (the Dissolution Decision) and appointed an administrator to run the City.
- [3] On 29 April 2020, in the main application in which the Dissolution Decision was challenged, this Court granted an order in the following terms. It:
- 3.1 Reviewed and set aside the dissolution decision;
- 3.2 Directed the ANC and EFF councilors to attend and remain in attendance at all council meetings unless they had a lawful reason to

be absent;

3.3 Suspended the order until five days after Level 5 of the nationwide lockdown due to the Covid-19 pandemic was lifted; and

3.4 Directed that the dissolution decision would have no impact on the entitlement of councilors to receive their salaries and benefits.

[4] Level 5 of the lockdown ended on 30 April 2020. As a result, the order was due to come into effect on 8 May 2020.

[5] On 8 May 2020, the eighth respondent (The Economic Freedom Fighters) (the EFF) and the fourteenth respondent (All Tshwane Councilors who are members of the EFF) launched a conditional application for leave

to appeal to the Supreme Court of Appeal (the SCA) pending the application for direct appeal to the Constitutional Court. On the

same day, they applied for leave to appeal the judgment directly with the Constitutional Court. These parties never opposed the main application.

[6] On 12 May 2020 the first, second, and fifth respondents (collectively, 'the GEC') also made a conditional application for leave to appeal to the SCA pending application for direct appeal to the Constitutional Court.

[7] The DA submits that the effect of the applications for leave to appeal and any appeals is that until they are finally disposed of, the order of this court in the main application is suspended. It further submits that the duly elected councilors of the City will remain out of office and the (unelected) Administrator appointed by the GEC will continue to run the City.

[8] The DA submits that given the realities of prosecuting even an urgent appeal in the Constitutional Court, this state of affairs is likely to endure until, at the very earliest, September 2020 and likely much longer.[2]

[9] The administrator (Mr Paul Nawa) had not been appointed as such when the main application was heard, hence he was not a party to it. In this application before us, he has been cited as the eighteenth respondent because says the DA, he arguably has an interest in it. Indeed, Mr Nawa has made certain submissions in an affidavit, in this application, which we will refer to later herein.

[10] The South African Municipal and Allied Workers Union (SAAMWU) was admitted as an intervening party as the nineteenth respondent without there having been any opposition thereto. It opposes this application.

The Law

[11] In an application in terms of section 18(3) the applicant is required to demonstrate that:

11.1 There are exceptional circumstances, which justify the execution of this Court's order pending the determination of the application for leave to appeal;

11.2 The applicants will suffer irreparable harm if the order is not put into execution pending the appeal; and

11.3 The respondents will not suffer irreparable harm if the order is put into execution pending the appeal.

11.4 A court is also required to take into account the respondents' prospects of success on appeal.
[3]

[12] In Incubeta Holdings[4] it was held that there is a two-stage test for applications in terms of section 18. First, whether or not 'exceptional circumstances' exist, and second, proof on a balance of probabilities by the applicant of the presence of irreparable harm to it if the order is not put into operation and executed, and the absence of irreparable harm to the respondent who seeks leave to appeal.[5] The SCA endorsed this two-stage approach in UFS v Afriforum.[6]

[13] It is important to note that section 18 requires an analysis of the particular facts of each case. In UFS v Afriforum the SCA held:

"Whether or not 'exceptional circumstances' are present, must necessarily depend on the particular facts of each case. In Incubeta Holdings at para 22 Sutherland J put it as follows:

'Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be "exceptional" must be derived from the actual predicaments in which the given litigants find themselves.'

[i]n evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation."

The present case

Exceptional circumstances

[14] The facts of the present case are unique in that pending the applications for leave to appeal and any appeals an administrator will continue to control the City for a period well beyond the 90 days provided for in the Constitution.[7] This is the result of the postponement, by the Electoral Court, of the elections that must follow the dissolution decision, to 1 September 2020, due to the restrictions imposed as a result of the COVID 19 pandemic outbreak in this country.

[15] In Johannesburg Metropolitan Municipality[8] the Constitutional Court, while holding that section 139 of the Constitution does permit intervention by the provincial government in the municipal sphere, went on to state:

"The scope of intervention by one sphere in the affairs of another is highly circumscribed [T]he national and provincial spheres are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures."

- [16] Counsel for the GEC, Mr Ngcukaitobi SC, strenuously argued that the DA has not shown exceptional circumstances justifying the section 18(3) interim relief that it seeks, nor irreparable harm to it. He argued that any irreparable harm would be to the citizens of the City, were we to grant the relief sought.
- [17] None of the respondents persuasively addressed the crisp issue about whether the administrator could continue in his role as such beyond 90 days. Their stance was that it was clear from the report filed by the administrator that he had achieved much since his appointment especially on the issues that council was unable to deliver, which they contend necessitated the dissolution decision.
- [18] In the present case, the 90 day period will lapse, at the latest, on 10 June 2020. We were informed subsequent to the hearing of argument regarding this application, that the Constitutional Court is 'contemplating' hearing the application for direct access by the GEC and the EFF in September 2020. The uncontested effect of this is that the administrator will continue in office for well beyond the 90 days that the Constitution envisages.
- [19] In terms of subsection (1) of section 159 of the Constitution, the term of office of a Municipal Council may be no more than five years as determined by national legislation. In terms of subsection (2) an election must be held within 90 days of the date of expiry of its term. The case of Mhlophe[9] is instructive. It concerned the obligation of the Independent Electoral Commission (the IEC) to provide the missing addresses of several thousands of voters on the voters' roll. The term of the Municipal Councils in office at the time was to end on 16 August 2016. The IEC asserted that it would be impossible to update the voters' roll before the August 2016 elections and the respondents also conceded that fact. However, Mogoeng, CJ, for the majority, stated that:
- '[126] Our Constitution limits the term of municipal councils to no more than five years...
- [127] [T]he Constitution does not provide for the extension of this term of five years. Every constitutionally permissible solution must thus be explored to avert a looming constitutional crisis that could result from the unconstitutional elongation of terms of office.'

The Court then went on to provide a solution to the problem that did not involve elongating the terms of office of the councilors.

- [20] Whilst the DA argued, reliant on the Mhlope case, that similarly, here the term of office of the administrator should not be extended, the respondents contended otherwise without pointing us to any supporting authority. In our view, similarly, the term of office of the administrator cannot be elongated beyond the 90 days where the Constitution does not provide for such extension. If it were, it would be unlawful, and constitute irreparable harm - which is expanded upon below.
- [21] We hold that exceptional circumstances are present justifying the relief sought. Ordinary cases regarding section 18(3) do not involve situations that breach peremptory provisions of the Constitution. This extension of the administrator's term arises from the postponement of the local government elections to September as well as the period it will take to finalise the direct appeals to the Constitutional Court. This is so for the reason that keeping the administrator in office for longer than the mandatory 90 day period, goes against the constitutional scheme of preventing one sphere of government from interfering longer than it should in the affairs of another. This will be the case if the administrator remains in control of the City for longer than 90 days allowed in the Constitution. This amounts to exceptional circumstances in that the effect thereof is to keep duly elected councilors, the majority of whom are from the DA, out of doing what the Constitution envisages, to run the affairs of the City in keeping with the wishes of the Tshwane voters. The respondents argue that the Constitution mandates dissolution decisions as well as the appointment of administrators. What is not correct is that the Constitution permits keeping an administrator in office for longer than 90 days.

Irreparable harm

- [22] As stated earlier, s18(3) provides that the applicant (the DA) must, also, prove on a balance of probabilities that it will suffer irreparable harm if the order is not granted and that the other party (the GEC) will not suffer irreparable harm if the order is granted.
- [23] The DA contends that there would be irreparable harm not only to it as the applicant, but also to the citizens of the City in that an unelected administrator will (unlawfully) continue to control the municipality until elections are held.[10]
- [24] The GEC, the EFF, and the administrator say there is nothing unlawful about the administrator remaining in office beyond 90 days because it is provided for in the Constitution for situations where a Municipal Council is dissolved. SAAMWU says it has had fruitful discussions with the administrator relating to issues concerning its members and is of the view that the administrator should remain in office until elections are held.
- [25] It is so that the Constitution provides for an administrator to exercise certain designated powers. However, such powers are subject to certain constraints. As has already been indicated earlier, those powers may only be exercised within the strict 90 day period.
- [26] The preamble to the Constitution provides that the Constitution is adopted to, inter alia,:

'Lay the foundations for a democratic and open society in which government is based on the will of the people...."

[27] Section 1 of the Constitution provides that South Africa is a democratic state founded on, inter alia, the following values:

....

'(d) Universal adult suffrage, a national, common voters roll, regular elections and multiparty system of democratic government, to ensure accountability, responsiveness, and openness.'

[28] Section 152(1)(a) of the Constitution provides that one of the objects of local government is to provide a democratic and accountable government for local communities.

[29] In Mogalakwena[11] it was stated:

'Local government provides a forum for local-community participation in matters entrusted to municipalities. The members of municipal councils are democratically elected by those they serve. A municipal government provides for grassroots democracy. It follows from this application of the democratic principle that the choices made by voters at the municipal level must be respected, as they must in relation to voters' choices at the provincial and national levels',

[30] The running of the City by an unelected administrator is the very antithesis of these values. It is hardly surprising then, that the Constitution does not provide, as we said, for the elongation of the administrator's term of office beyond 90 days.

[31] Before the dissolution of the Municipal Council, the councilors were all its duly elected members, including those of the DA.

[32] The citizens of the City have a fundamental constitutional right to be governed by those they elected. The denial of this right for longer than the constitutionally permitted 90 days would, in our view, constitute irreparable harm.

[33] If this application is granted, the councilors duly elected by the citizens of Tshwane in 2016 will be allowed to resume their rightful constitutional role, powers, and responsibilities. The rights of the voters and the autonomy of the local government will be preserved.

[34] However, if this application is refused, an unelected administrator will remain in place, accountable only to the GEC that appointed him and for a period far beyond that envisaged in the Constitution. It cannot be overlooked that the provincial government is controlled by a party that did not win the city of Tshwane municipal elections in 2016.

[35] We therefore find that Irreparable harm has been established by the DA, not only to itself but also to the citizens of the City.

[36] In terms of section 159(2), an election must be held within 90 days of the date that the Council was dissolved. As stated earlier, the Electoral Court has granted an extension for elections to be held by not later than 120 days of its order dated 4 May 2020 - but subject to any further extension that may be granted on application by the IEC. It is not certain, due to the national lockdown as a result of the Covid 19 pandemic, when elections will be held in the City. This

means that the 90 days would probably be extended even further.

[37] If elections are held before the appeals are finally determined and the appeals are subsequently dismissed, the results of those elections will be invalid. They will be a nullity because their legality depends on the legality of the dissolution decision. It would also mean that the voters of Tshwane will have gone to the polls and the IEC will have incurred the massive expense of conducting municipality-wide by-elections in circumstances where the outcome of those by-elections is of no force and effect.

[38] If elections are not held before the appeals are finally determined the effect will be to extend the term of the unelected Administrator and his reign over the City for an indeterminate period well beyond the 90 days provided for in the Constitution and maybe far longer. For the whole of that time, the nominee of the ANC-governed Gauteng Province will exercise total control over the City without any democratic oversight or accountability by the citizens of Tshwane.

[39] Neither of these situations is tenable or consistent with the constitutional scheme and it seems to us that the only way to resolve this difficulty is to grant the section 18(3) relief.

[40] However, several further points deserve a brief consideration.

The non-payment of councilors' salaries

[41] In support of the section 18(3) application, the DA also relied on the administrator's decision not to pay the elected councilors their salaries from May 2020 onwards pending the outcome of the appeals. However, during oral submissions, Mr. Budlender SC submitted that that issue recedes into the background as it does not, of itself, constitute an exceptional circumstance. In our view, the concession was correctly made.

The actions taken by the administrator.

[42] The GEC and SAMWU submit that the administrator is carrying out his duties very well. An affidavit from the administrator setting out what actions he has taken to date was filed in support of the GEC's opposition to this application.

[43] The DA says the administrator seeks to paint himself as a model official - intent on acting lawfully and serving the citizens of the City. It sets out several what it says are considerable reasons to doubt this self-portrayal. It is our considered view that we need not deal with this issue. Whether he is a model official or not is irrelevant if his appointment, as we have found, is unlawful beyond the 90 days.

Will there be irreparable harm to the respondents?

[44] There is no serious suggestion in any of the answering affidavits, in the heads of arguments of the GEC and the EFF, nor seriously contended during oral submissions, that any of the respondents will suffer irreparable harm if the operation of the order in the main application is put into effect.

[45] The GEC merely states that reinstating the council will result in instability and that a hung council will again ensue. However, this court cannot assume that the mandamus order compelling the ANC and EFF councilors to attend - and stay in attendance at Council meetings unless they have a lawful excuse for not doing so - will be ignored. Besides, the DA says whatever the wishes of the national leaderships of the ANC and the EFF, it appears that councillors themselves now want to attend meetings.

[46] The DA also stated that pursuant to this Court's judgment, on 3 May 2020 all the chief whips of the political parties in the Council met and agreed that they will attend Council meetings but no formal resolution to this effect was recorded. However, the GEC objected to the fact that it was only raised in the replying affidavit and urged us not to consider it. We agree. Nevertheless, that does not negate the fact that, as we found in the main judgment, councilors are

statutorily bound to attend council meetings. It therefore cannot constitute irreparable harm to the respondents. It is also important

to note that the administrator has appointed a person in the key position of Municipal Manager, which the Municipal Council was unable to do because meetings could not take place or were disrupted by EFF and ANC councilors. That appointment will remain in place when the administrator's term ends.

[47] The EFF contends that it risks being in contempt of court if it does not remain in attendance at Council meetings. In other words, putting the order into effect will cause it irreparable harm. The EFF and its councilors did not oppose the mandamus relief granted by this court - in effect abiding the order sought by the DA in the main application. Having made that election, they are bound by it and cannot now complain that putting the mandamus into effect would cause irreparable harm to it.

The prospects of success of the appeals

[48] The applications for leave to appeal by the GEC and the EFF (as well as, it seems, the ANC) are still pending. In those circumstances, it would, in our view, be premature to make a finding in that regard - more so because they have sought direct access to the Constitutional Court, which will no doubt consider the prospects of success of an

appeal in deciding whether to grant direct access to it.

[49] In all the circumstances the following order is made:

1. The forms and service provided for in the Rules of Court are dispensed with and the matter is heard as an urgent application in terms of Rule 6(12) of the Rules of this Court.
2. The SAAMWU is admitted as a respondent in this application.
3. Pending the outcome of the applications for leave to appeal or appeals by the first, second, fifth, eighth and fourteenth respondents (or any future application for leave to appeal or appeal by any other respondent), paragraphs 2 to 5 of the order made by this Court on 29 April 2020 remain in operation and are to be given effect.
4. The first, second, fifth, eighth, fourteenth and nineteenth respondents are ordered to pay the costs of this application jointly and severally. The one paying the other to be absolved.

D MLAMBO, JP

JUDGE PRESIDENT OF THE GAUTENG HIGH COURT

S POTTERILL, ADJP

ACTING JUDGE PRESIDENT OF THE GAUTENG HIGH COURT

N RANCHOD, J

JUDGE OF THE HIGH COURT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and will be released to SAFLII.

The date and time for hand-down is deemed to be 10h00 on 10 June 2020.

Appearances:

Appearance for Applicants:

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Adv N Ferreira

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[1] Ss18(1) and (3) provide: "18. Suspension of decision pending appeal. (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application

for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. ... (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders"

- [1] Ss18(1) and (3) provide: "18. Suspension of decision pending appeal. (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

...

- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders"

- [2] This court was informed by the DA's attorneys in an email dated 29 May 2020 that the Chief Justice has issued directions on 28 May 2020 that the Constitutional Court 'is contemplating setting this matter down for hearing in September 2020.'

- [3] University of the Free State v Afriforum and Another 2018 (3) SA 428 (SCA).

- [4] Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GJ).

- [5] Incubeta, para 16.

- [6] At paras 9 - 10 and also Ntlemeza v Helen Suzman Foundation and Another 2017 (5) SA 402 (SCA) paras 35 - 36.

- [7] The relevant part of section 159(2) of the Constitution of the Republic of South Africa, 1996 (as amended) provides: '(2) if a Municipal Council is dissolved in terms of national legislation,...an election must be held within 90 days of the

date that Council was dissolved...(Emphasis added).

- [7] The relevant part of section 159(2) of the Constitution of the Republic of South Africa, 1996 (as amended) provides:

'(2) if a Municipal Council is dissolved in terms of national legislation,...an election must be held within 90 days of the

date that Council was dissolved...(Emphasis added).

- [8] Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 (6) SA 182 (CC) at para 44.

[9] Electoral Commission v Mhlophe 2016 (5) SA 1 (CC).

[10] The IEC successfully applied to the Electoral Court for the elections to be postponed to 1 September 2020 due to the Covid-19

national lockdown currently in force which makes it virtually impossible to hold elections.

[11] Municipality v Provincial Executive Council, Limpopo 2016 (4) SA 99 (GP) at para 29.

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