

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

Case Number

1284/2023

Date Heard: 12 May

2023

Date Delivered: 12 May

2023

In the matter between:

RETIEF ODENDAAL, EXECUTIVE MAYOR OF THE
NELSON MANDELA METROPOLITAN MUNICIPALITY

First

Applicant

DEMOCRATIC ALLIANCE

Second

Applicant

and

SPEAKER OF THE NELSON MANDELA
METROPOLITAN MUNICIPALITY COUNCIL

First

Respondent

CITY MANAGER OF THE NELSON MANDELA BAY METROPOLITAN MUNICIPALITY Respondent	Second
AFRICAN NATIONAL CONGRESS Respondent	Third
ECONOMIC FREEDOM FIGHTERS Respondent	Fourth
NORTHERN ALLIANCE Respondent	Fifth
AFRICAN CHRISTIAN DEMOCRATIC PARTY Respondent	Six
FREEDOM FRONT PLUS Respondent	Seventh
DEFENDERS OF THE PEOPLE Respondent	Eight
PATRIOTIC ALLIANCE Respondent	Ninth
ABANTU INTEGRITY MOVEMENT Respondent	Eleventh
UNITED DEMOCRATIC MOVEMENT Respondent	Eleventh

AFRICAN INDEPENDENCE CONGRESS
Respondent

Twelfth

GOOD
Respondent

Thirteenth

PAN AFRICANIST CONGRESS OF AZANIA
Respondent

Fourteenth

JUDGMENT ON COSTS

Introduction

[1] On Friday, 5 May 2023 the applicants requested the duty judge, Gwala AJ, to issue a directive allowing for the enrolment of an urgent application (“the application”) for hearing at 8:00 on Monday, 8 May 2023, in terms of which they sought the following relief:

- 1.1. reviewing and setting aside the decision taken by the first respondent that any motions of no-confidence in the Executive Mayor, the Deputy Executive Mayor, the Speaker, or the Chief Whip (“the functionaries”) of the Nelson Mandela Bay Metropolitan Municipality (“the municipality”) may be considered at the special meeting of the council of the municipality, scheduled for 09:00 on Monday, 8 May 2023 (“the meeting”);

1.2. interdicting the first respondent from permitting any motion of no-confidence in the functionaries to be considered at the meeting;

1.3. ordering the first respondent to pay the costs of the application, including the costs attendant on the employment of two counsel, where so employed.

[2] The duty judge duly authorised the enrolment of the application in respect of the relief foreshadowed in paragraphs 1.2 and 1.3, above.

[3] After the directive, the following transpired over the weekend of 6 and 7 May 2023:

3.1. the second respondent (the municipality) delivered a notice of its intention to abide the application;

3.2. the first respondent gave notice of his intention to oppose the application and contemporaneously delivered an opposing affidavit;

3.3. the applicants filed an affidavit in reply to the first respondent's opposing affidavit.

[4] On Monday, 8 May 2023 I was approached in Chambers by counsel for the applicants, the first respondent and the fifth respondent. Counsel for the fifth respondent handed me an affidavit described in

the accompanying filing notice as an explanatory affidavit. I was further advised that the meeting had been cancelled.

[5] Later, during the morning of 8 May 2023 I was provided with a letter emanating from the office of the first respondent confirming that the meeting had been cancelled. The first respondent was given an opportunity to respond to the affidavit of the fifth respondent and for the latter to reply to the response, if so advised. The matter stood down until Friday, 12 May 2023 for the parties to consider their positions and to approach me as to the further conduct of the matter, given that the urgency which had originally attached to the matter had dissipated due to the cancellation of the meeting.

[6] On Thursday, 11 May 2023 the first respondent delivered a notice in terms of which he withdrew his opposition to the application. I was advised by the legal representatives of the applicant that they would, in the circumstances, at the hearing on Friday, 12 May 2023, ask that I direct the first respondent to pay the costs of the application. It is to that aspect which this judgment relates.

Summary of the grounds on which the application was brought

[7] In terms of section 29(1) of the Local Government: Municipal Structures Act, 117 of 1998, the speaker of a municipal council decides when and where the council meets. If, however, a majority of the councillors requests the speaker in writing to convene a

Council meeting, the speaker must convene a meeting at a time set out in the request.

- [8] Concomitantly rule 4.2 of the rules of order of the municipality (“the rules”) provides that if a majority of the councillors or the Executive Mayor request the Speaker in writing to convene a special council meeting, the Speaker must convene a meeting at a time set out in the request. Such a meeting shall not take place before the expiry of five business days after the date of the request.
- [9] These provisions are directed solely at the convening of a meeting but are silent on how motions are placed on the agenda for the requested meeting. Thus, the rules must apply in this regard. The rules, unambiguously, provide that any motion must be signed and dated by a counsellor and must be moved by that counsellor. In terms of rule 25.1 the notice of intention to introduce a motion or question must be submitted in writing, signed, and dated by the counsellor submitting the motion and must contain the motion or question to be submitted at the meeting and must be delivered to the Speaker at least 10 clear business days before the date of the meeting at which it is intended to be introduced or asked.
- [10] The rules are clear - for a motion to be validly before the council of the municipality, it must be signed and dated by the counsellor submitting the motion.

[11] The request for the meeting, in this case, in summary, describes its purpose as being a meeting to deal with motions of no-confidence in the functionaries. The request then purports to substantiate the removal from office of the Executive Mayor and the Deputy Executive Mayor. It contains no motivation in respect of the other functionaries.

[12] Crucially, while the request for the meeting describes its purpose, no motion of no-confidence in the functionaries, complying with the rules, accompanied the request and no motion of no-confidence, complying with the rules was separately submitted by any councillor.

[13] Thus, while the request for the meeting may have been valid because, on the face of it, the request was supported by a majority of councillors, there was no valid motion accompanying the request which could be considered at the meeting.

[14] On 3 May 2023 the attorneys for the applicants wrote to the first respondent demanding confirmation by 4 May 2023 that the meeting would not proceed and that if the meeting did indeed proceed that the suggested motions of no-confidence would not be debated and voted on because they had not been submitted in proper form in terms of the rules. The first respondent ignored this letter. A media advisory issued by the municipality on 5 May 2023 stated that the meeting would proceed on 8 May 2023.

[15] Further, on Friday, 5 May 2023 the second respondent provided the first respondent with a copy of a legal opinion the second respondent had obtained on receipt of the abovementioned demand made on behalf of the applicants. This opinion confirmed the view adopted by the applicants' attorneys to the effect that there was no valid motion that could be entertained at the meeting.

[16] Despite this opinion being provided to the first respondent, he gave no indication that the meeting would not proceed. In fact, it is common knowledge that in *The Herald* newspaper of Monday, 8 May 2023 the first respondent was quoted as saying that the meeting would proceed.

[17] Against this background the applicants contend that they were constrained to launch and persist with the application.

Summary of the first respondent's grounds of opposition to the application

[18] The first respondent opposed the application on three main grounds, contending in essence that:

18.1. the applicants had not satisfied the requirements for a final interdict;

18.2. the application was not urgent; and

18.3. it was for him and/or the council of the municipality to decide whether the meeting could proceed and if there was a valid motion before it for decision.

[19] The ground of opposition set out in paragraph 18.3 above is not lucidly dealt with in the first respondent's opposing affidavit and it is difficult, if not impossible to discern a cogent defence to the application from the content of the affidavit. The first respondent, in his affidavit, concludes his contentions with the statement that "*I am of the view that this application is presumptuous and preclusive (sic) of the position and it should not be allowed but be dismissed and sent back to the office of the Council for proper internal processes which are still pending.*" Exactly what these internal processes would entail is not explained.

Did the applicants make out a case for the relief they sought

[20] This matter was clearly of sufficient urgency to warrant my immediate attention.

[21] The first respondent contended that the matter was not urgent because the circular convening the meeting was sent out on 24 April 2023. The applicants had waited until 5 May to launch the application. This contention misses the point. The applicants approached the application on the basis that the meeting had been validly convened. Their bone of contention was that by 3 May 2023

no valid motion (i.e., a motion which complied with the rules) had been produced for consideration at the meeting.

[22] The first respondent's failure to respond to the applicants' demand of 3 May 2023 and the objective indications that the meeting was to proceed in the absence of a valid motion self-evidently established urgency.

[23] I am also satisfied that the applicant had satisfied the requirements of a final interdict, as:

23.1. the council of the municipality must conduct its business lawfully. In the absence of a valid motion complying with the rules the meeting could not proceed and any "motions" passed at the meeting would be unlawful. In such circumstances any interested party would have a clear right to stop the meeting from proceeding;

23.2. a reasonable apprehension of irreparable harm was present in this case, given that:

23.2.1. the first respondent had ignored the applicants' demand and the applicants could therefore expect that he intended to allow the "motions" referred to in the notice convening the meeting to be discussed and decided upon at the meeting;

23.2.2. the first applicant was lawfully elected to the office of Executive Mayor of the municipality. If he were to be unseated as the result of an invalid motion being passed at the meeting, he would have been unlawfully deprived of his position. A review of the decision to oust him would not temporarily reinstate him and the municipality and indeed the citizens of Nelson Mandela Bay would be at the mercy of an unlawfully elected Executive Mayor. Accordingly, the apprehension of irreparable harm was manifestly present;

23.3. there was no alternative remedy available to the applicants, as the application was directed at preventing the council of the municipality from unlawfully considering "motions" of no-confidence in circumstances where they were no motions complying with the rules before it. A review later could not immediately remedy that illegality as the unlawful conduct would already have occurred. By the time a review was heard further actions would have followed, pursuant to the initial unlawful action. The subsequent actions of an unlawfully elected Executive Mayor would be equally unlawful. Obviously, this situation would be unconscionable, as the Executive Mayor of the municipality is required daily to take numerous decisions and fulfil numerous functions in the

execution of his duties. Interdictory relief was the only basis on which this potential irreparable harm could be addressed.

[24] The contention that it was for the first respondent or the council of the municipality to decide at the meeting whether the meeting could entertain motions of no-confidence in the functionaries needs only to be stated to be rejected. The meeting could only proceed on the basis of a motion or motions which complied with the rules, i.e., lawful motions. There were no such motions. Thus, the meeting would have been unlawful, and any "motions" adopted at the meeting would be equally unlawful and therefore void.

[25] It is the duty of the first respondent to apply the rules impartially. He may not act contrary to those rules, nor may the council do so. Any action by the first respondent or the council allowing the consideration of invalid and unlawful motions would be contrary to the rules and would also be unlawful. The council cannot by way of a majority decision make an action which is contrary to the rules, and therefore unlawful, valid. If a decision is unlawful, it is invalid and void.

[26] It is only a court which can decide on the lawfulness and therefore the validity of actions in the nature of the "motions" which the first respondent sought to place before the council of the municipality at the meeting.

[27] Therefore, I conclude that the applicants would have been entitled to the interdictory relief set out in prayer 3 of the notice of motion.

The costs of the application

[28] As I have concluded that the applicant would have been entitled to the interdictory relief they applied for the first respondent must be directed to pay the costs of the application.

[29] Apart from the normal rule that a successful party is entitled to costs I am fortified in this view by the following factors:

- 29.1. the first respondent ignored the applicants' demand in which the correct legal position was clearly enunciated;
- 29.2. similarly, he ignored the legal opinion obtained by the second respondent, which also set out the legal position correctly;
- 29.3. he was prepared to act contrary to the rules and failed to apply the rules impartially and rather sought to further a political agenda.

Order

[30] Thus, I make the following order:

The first respondent is directed to pay the costs of the application, such costs to include the costs attendant on the employment of two counsel, where so employed.

**OH RONAASEN
ACTING JUDGE OF THE HIGH COURT**

Appearance:

Counsel for Applicant:

Adv N Mullins SC

Instructed by:
Smith Inc.

Minde Schapiro &

Counsel for 5th Respondent:

Adv AN Masiza

Instructed by:

Nkonhla Attorneys
c/o Siyila Attorneys