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eportable:	YES/NO
Interest to other Judges:	YES/NO
rculate to Magistrates:	YES/NO

Case No.: **866/2022**

In the matter between:

MOKUBELOA TSOAI Applicant

and

MEC COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS (FREE STATE) 1st Respondent

NALA MUNICIPALITY MAYOR 2nd Respondent

ELECTED NALA MUNICIPALITY COUNCILLORS 3rd Respondent

ACTING MUNICIPAL MANAGER 4th Respondent

JUDGMENT BY: I VAN RHYN, J

HEARD ON: 2 JUNE 2022

DELIVERED ON: 7 JUNE 2022

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[1] The applicant, Mr. Mokubeloa Tsoai, a resident of Kgotsong, Bothaville in the Free State Province, launched an application on 28 February 2022 for an order in the following terms:

"(a) That the secondment letter of the fourth respondent be declared invalid, that the acting municipal manager has no authority and as such all her decisions are without basis, in violation of the Act and therefore null and void.

(b) The rule of this court be dispensed with.

(c) Costs of this application if opposed, respondents pay personally.

(d) Further and, or alternative relief as the court deems fit."

[2] The applicant cited the MEC of Cooperative Governance and Traditional Affairs of the Free State Province as the first respondent. The second respondent is cited as the "elected Nala Municipality Mayor", the third respondent as "all elected Municipal councillors serving at Nala Local Municipality in Bothaville". The Acting Municipal Manager is cited as the fourth respondent. The applicant contends that the secondment letter dated 17 February 2020 issued by the first respondent in respect of the fourth respondent is invalid and that the Acting Municipal Manager has no authority to act as such.

[3] The application is opposed by the respondents. In their answering affidavits, the first respondent, represented by the Office of the State Attorney, Bloemfontein and the second, third and fourth respondents, represented by Hill, McHardy& Herbst Attorneys, raised several points *in limine.* The first point concerns the non-joinder of the Municipal Council of the Nala Municipality and the Speaker of the Council as its Chairperson. The second point *in limine* is the non-compliance with Rule 53 of the Uniform Rules of Court. The decision of the first respondent to second the fourth respondent to act as Municipal Manager constitute administrative action. The challenge of invalidity or unlawfulness of the secondment should have been brought by a review application. Several further aspects were also raised by the respondents in their answering affidavits and heads of argument, but due to the fate of the application it is unnecessary to delve into these aspects.

[4] At the hearing of the application the applicant, who appeared in person, and being confronted with the inadequacies of the application, decided to withdraw the application. The applicant did not tender costs. The applicant argued that he, being unemployed is unable to adhere to an order to pay costs. Mr. Louw, counsel on behalf of the second, third and fourth respondents argued that costs should follow the result. The applicant should have realized that the application is fatally flawed and resolved to withdraw the application at an earlier stage, subsequent to receiving the answering affidavits, in which event

unnecessary costs would have been avoided. Mr. Mojaki, counsel on behalf of the first respondent agreed with the submissions made on behalf of the other respondents.

[5] The applicant did not proceed with the relief claimed and, in reality conceded that the application is fatally defective. It is well established that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale.[1] The determination of an appropriate costs order is in the discretion of the court, which discretion is informed by a number of factors in order that such discretion be exercised judiciously. These factors include consideration of the facts of each case, weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties.[2] Mr. Louw argued that the respondents are the successful litigants and should be indemnified for the expenses which they have been put through having been unjustly compelled to oppose the application.

[6] Whenever a decision in regard to costs is separated from the decision on the merits of an application because an order on the merits is no longer applied for, it still does not mean that the decision regarding the costs must be reached in total isolation from the considerations regarding the merits. Where an application is withdrawn by the applicant without a tender regarding costs, the merits of the matter will have to be considered in order to determine who the successful litigant is. As the applicant withdrew his application, he ordinarily should pay the costs of the application. I agree with the submission made by Mr. Louw that, the applicant waited until the commencement of the hearing of the application before withdrawing the matter. By that stage both the court and the respondents had prepared for the hearing of the application on an opposed basis. I am of the view that the application is riddled with numerous deficiencies and that the application had no merit from inception.

[7] **ORDER:**

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[1] Maloney's Eye Properties BK v Bloemfontein Board Nominees BPK 1995 (3) SA 249 at 257 F-G.
[2] Erasmus Superior Court Practice D5 -6.

Consequently, the following order is made:

1. The applicant is ordered to pay the costs of this application.

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VAN RHYN J

On behalf of the Applicant:	MR. M TSOAI
Instructed by:	In person
On behalf of the First Respondent:	ADV. M B MOJAKI
Instructed by:	State Attorney, Bloemfontein
On behalf of the Second, Third and Fourth Respondents:	ADV. M LOUW
Instructed by:	Hill McHardy & Herbst Atorney, Bloemfontein