

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

CASE NO: 2022/26790

.....
SIGNATURE

.....
DATE

In the matter between:

MPHO PHALATSE

First Applicant

DEMOCRATIC ALLIANCE

Second Applicant

and

THE SPEAKER OF THE CITY OF JOHANNESBURG

First Respondent

COLLEEN MAKHUBELE

Second Respondent

THE EXECUTIVE MAYOR OF THE CITY OF JOHANNESBURG

Third Respondent

DADA MORERO

Fourth Respondent

THE CITY MANAGER OF THE CITY OF JOHANNESBURG

Fifth Respondent

COUNCIL OF CITY OF JOHANNESBURG

Sixth Respondent

J U D G M E N T

KEIGHTLEY, J:**INTRODUCTION**

*'Plots, true or false, are
necessary things,
To raise up commonwealths
and ruin kings.'*

John Dryden

1. As this case demonstrates, although written at a time when politics were characterised by the struggle for power between the general populace and the king, these lines might as easily be applied to describe the power struggles that have come to define our modern era of local, coalition government.
2. In the case before me, we have no king. But we have the ex-Executive Mayor of our City, Ms Phalatse, who claims that she was unlawfully deposed through a motion of no confidence procedure that was tainted with illegality. She is the first applicant, with her political party, the Democratic Alliance ("DA") being the second applicant. They have approached the court on an urgent basis for review relief.
3. On the opposing side, we have Ms Makhubele, the Speaker who, by virtue of her office, led the process that culminated in Ms Phalatse's de-throning. Ms Makhubele was elected Speaker on 28 September 2022, after the DA Speaker, Mr da Gama, was ousted in a vote of no confidence. She is the first respondent, in her official capacity, and the second respondent in her personal capacity, so joined because the applicants seek a personal costs order against her. The notice of intention to oppose the application was filed on behalf of 'the Respondents', as a group. However, the remaining respondents took no further steps to engage in the proceedings. This means that neither the current Executive Mayor, Mr Morero, who was elected to replace Ms Phalatse, nor the Council have filed affidavits opposing the urgent application.

4. The Speaker denies that there was any plot at play among the coalition parties seeking, and securing, Ms Phalatse's removal. Instead, so she avers, it was Ms Phalatse's own coalition supporters who, through a concerted campaign of subterfuge, which ultimately backfired, must take responsibility for her downfall.
5. And so the scene is laid for a bloody political battle. As Judges we are all too aware of what Davis J described as the:

'... danger in South Africa ... of the politicisation of the judiciary, drawing the judiciary into every and all political disputes as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication.'¹

It is important to appreciate that Davis J's comments were directed at political disputes that lie beyond the scope of adjudication by the courts. It is not uncommon for litigation to come before the courts in matters that, while they may involve politically characterised disputes, nonetheless fall squarely within the scope of a court's adjudicative powers.

6. Stripped of the drama of plots, subterfuge and counter-subterfuge, this is precisely what is before me in this matter: essentially, the simple question is whether the decisions and conduct of the role-players in the motion of no confidence procedure fell within the scope of their lawful powers. If so, the review must fail, regardless of the political affiliations of those who backed, or opposed, the motion. Similarly, if not, the impugned decisions and conduct must be reviewed, and a just and equitable remedy granted by this court. Ultimately, then, the issues before me are constitutional, rather than political in nature, albeit that they arise, and must be considered, in a political context.

BACKGROUND

7. In broad outline, the background facts are as follows. As all the events occurred recently, any reference to dates should be read as being in the year 2022, unless otherwise stated.
8. In terms of a coalition agreement entered into after the last local government elections, the Democratic Alliance was allocated the positions of Speaker of

¹ *Mazibuko N O v Sisulu & Others NNO* 2013 (4) SA 243 (WCC) at 256E-H, quoted in the minority judgment of Jafta J in *Mazibuko v Sisulu & Another NNO* 2013 (6) SA 249 (CC) at para 83

Council and Executive Mayor for the City of Johannesburg. The latter was the position occupied by Ms Phalatse until she was ousted as a result of the events leading up to this urgent application. It appears that trouble reared its head in the paradise of the coalition. The DA Speaker was deposed in a motion of no confidence and Ms Makhubele was elected as the new Speaker on 28 September.

9. At that time there were two motions of no confidence pending in respect of Ms Phalatse, as Executive Mayor. We not need trouble ourselves with the second of these, dated 13 September, as it plays no part in these urgent proceedings. It was an earlier motion of no confidence, dated 17 August, which is critical to the case. When I refer to 'the motion of no confidence' or 'the motion' it is a reference to that of 17 August.
10. As is required by the Standing Rules of Council, it is the Programming Committee ("the PC") that must decide on the Agenda for each Council meeting. It is common cause that the motion of no confidence was put before the PC at its meeting on 23 August for inclusion on the agenda at the next scheduled Council meeting on 29 August. It is also common cause that questions arose at the PC meeting about the admissibility of the motion of no confidence and that it was not included in the agenda for the August Council meeting. There is much dispute about what was decided by the PC about the motion of no confidence at its 23 August meeting, but I leave that discussion for later.
11. The last day of Council's term before the week-long October recess was 30 September. No Council meetings were scheduled for that week. The day after her election as Speaker, Ms Makhubele sprang into action. At 13h25 on 29 September, a Thursday, she gave notice to Councillors of an extraordinary Meeting of Council to be held at 10h00 the following day, 30 September. An agenda was not provided for the meeting at that stage. At 18h06 (and after a rapidly called PC meeting) Councillors were advised by a further notice that they would vote on the motion of no confidence at the meeting scheduled for the following day.
12. Notice of an extraordinary PC meeting, to sit at 16h00 on 29 September, was given to members of that committee at various times on that day. Some were sent Whatsapp messages at 13h09, while others received an email link and invitation

after 16h00. The purpose of the meeting was to set the agenda for the extraordinary meeting the following morning. It is common cause that the PC was not quorate, as only six Councillors were present when decisions were taken. What is deeply disputed, is whether a decision was required to place the motion of no confidence on the agenda or not. I will delve into this dispute in more detail later. For present purposes, it is important to appreciate that the motion was included on the agenda.

13. Ms Phalatse says that she only received notice that a motion of no confidence would be moved against her at the 30 September meeting at 18h05 on 29 September. Acting in her capacity as Executive Mayor, she instructed the City's attorneys to launch an urgent application to set the decision of the PC aside, as well as the two notices calling the extraordinary meeting and to direct that the Council meeting be postponed. An urgent application seeking this relief was launched with the set down date being 10h00 on 30 September, coinciding with the time set for the meeting.
14. It is important to appreciate that the present urgent application is not a simple continuation of that filed on 30 September. I refer to the latter as the first urgent application. The urgent court Judge could not deal with the first urgent application at 10h00, as he was dealing with another matter. In the interim, the Speaker decided not to postpone the start of the Council meeting despite the pending first urgent application. By the time that the urgent court Judge became available to deal with the application, the motion of no confidence had been passed. The relief sought was thus moot.
15. The DA caucus had joined the meeting. However, they viewed the meeting as being unlawful and so they attended, they say 'not to participate in an unlawful meeting, but to indicate to the Speaker that the meeting was unlawful and should not proceed.' For this reason, they did not sign the attendance register because, they say, signing it would have given legitimacy to what the applicants say was 'a patently unlawful meeting'.
16. Two Councillors raised a point of order to the effect that only Councillors who had signed the register should be permitted to speak. It is common cause that the Speaker did not make a ruling on the point of order. However, she did not

recognise any of the DA members, who had not signed the register, when they raised points of order. In addition, it is common cause that the Speaker did not deal with a request by the DA's caucus chairperson for a caucus break. She directed that the motion be tabled, suggesting that there would be a caucus break after the tabling of the motion.

17. Once the motion was tabled and seconded, the Speaker determined that because it had been supported with no opposition, there should be no debate, and she moved to the vote on the motion. The Speaker permitted only those Councillors who had signed the attendance register to vote against the motion. Ultimately, the motion was carried by 139 votes to none. After the outcome was announced, the Speaker permitted a 30-minute caucus break, whereafter the Councillors reconvened for the election of a new Executive Mayor. The Independent Electoral Commission ("IEC") was in attendance and oversaw the election. It subsequently issued a report stating that the election of Mr Morero was free and fair.
18. Save where I have indicated otherwise, the facts broadly outlined above are common cause. It is their legal effect that it is not.

URGENCY

19. The Speaker did not oppose the urgency of the application, although she contended that the urgent court was not the appropriate forum to hear the matter. In view of the nature of the relief sought, and the complexity of the issues, the Speaker's attitude was that it would have been more appropriate for the parties to approach the Deputy Judge President for a special allocation to a designated Judge.
20. The issues raised in the application are of obvious public importance and demand urgent consideration. I am satisfied that the matter is urgent and that the applicants approached the court with an appropriate degree of urgency. The application was instituted on Monday, 3 October, being the first working day after the motion of no confidence was passed, with a set-down date for 11 October. The date was ultimately extended by agreement between the parties to 18 October. The parties managed to file their affidavits and full heads of argument prior to the extended set-down date. The issues were not too complex, nor the

papers too voluminous for the urgent court and it was duly accommodated on the Roll. I am grateful to counsel on both sides for their assistance in this regard.

ADMISSIBILITY OF THE ANSWERING AFFIDAVIT

21. The applicants urged me to refuse to admit the answering affidavit on the basis that it was an abuse of process in that it was filed outside of the agreed timetable without any explanation or application for condonation. Moreover, the applicants contended that it was overly verbose and a poor attempt to push the matter out of the urgent court.
22. It is well established that a party may not disregard the timetable set by an applicant in an urgent application.² If they do, they run the risk of a default judgment being entered against them.³ It is so that the Speaker has provided no explanation for her failure to file her affidavit on time. This placed the applicants under time pressure to file their own replying affidavit timeously. However, in view of the overriding public importance of the issues raised in this dispute, I will not refuse to admit the answering affidavit. As matters stand, and with the extra effort expended by the applicants, the respondents' failure has not derailed the proceedings. I do not believe that it is in the interests of justice to deal with the matter on a default basis.

GROUND OF REVIEW AND RELIEF

23. The applicants impugn four decisions:
 - 23.1. The PC's decision to place the motion of no confidence on the agenda for the 30 September meeting.
 - 23.2. The Speaker's decision to call the 30 September meeting of Council.
 - 23.3. The decision of the Council to adopt the motion of no confidence.
 - 23.4. The subsequent decision of the Council to elect Mr Morero as Executive Mayor.
24. The applicants contend that each of these decisions is unlawful. A successful review of any of the impugned decisions will have the domino effect that the

² *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies* 1972 (1) SA 773 (A) at 782C-E

³ *Magashule v Ramaphose and Others* [2021] 3 All SA 887 (GJ) at para 85

ultimate decision, that is, the election by the Council of Mr Morero as Executive Mayor, falls to be reviewed and set aside.

25. This is because if the first decision, by the PC to place the motion on the agenda, is reviewed and set aside, the motion of no confidence will have not have been lawfully before the Council for adoption or rejection. Ms Phalatse's removal from office as a result of the adoption of the motion by the Council would be unlawful. If the second decision, to call the extraordinary meeting, is reviewed and set aside, it follows that the meeting of 30 September was not lawfully called, and the events that occurred at that meeting were unlawful. If the decision by the Council to adopt the motion is reviewed and set aside, the same result follows: Ms Phalatse will have been unlawfully removed from office. Thus, if, on any of the identified grounds of review, Ms Phalatse was unlawfully removed as Executive Mayor, the consequence will be that there was no lawful vacancy to fill. For this reason, Mr Morero's election to hold that office will be unlawful.

26. Apart from the usual prayer for urgency, the applicants seek an order:

2. Declaring that the decision of the First Respondent (the Speaker), taken on 29 September 2022 to schedule an extraordinary meeting of the Sixth Respondent (the Council) for 30 September 2022 was unlawful, unconstitutional, and invalid.

3. Reviewing and setting aside the decision in paragraph 2.

4. Declaring that the decision of the Programming Committee of the Council, taken on 29 September 2022 to place a motion of no confidence in the First Applicant as the Executive Mayor of the City of Johannesburg on the agenda for the extraordinary council meeting on 30 September 2022 was unlawful, unconstitutional, and invalid.

5. Reviewing and setting aside the decision in paragraph 4. 6.

6. Declaring that the decision of the Council, taken on 30 September 2022, to adopt a motion of no confidence in the First Applicant as the Executive Mayor of the City of Johannesburg, was unlawful, unconstitutional, and invalid.

7. Reviewing and setting aside the decision in paragraph 6. 8.

8. Declaring that the decision of Council, taken on 30 September 2022, to elect the Fourth Respondent as the Executive Mayor of the City of Johannesburg, was unlawful, unconstitutional, and invalid.

9. Reviewing and setting aside the decision in paragraph 8.

10. Declaring that the First Applicant is the Executive Mayor of the City of Johannesburg.

11. Declaring that all decisions taken by the Fourth Respondent as Executive Mayor are unconstitutional, unlawful and invalid, and are reviewed and set aside

12. Directing that the Second Respondent, in her personal capacity, shall pay the costs of the application on an attorney and client scale, including the costs of two counsel.'

27. The parties are agreed that the impugned decisions are not administrative action and thus do not fall to be reviewed under the Promotion of Administrative Justice Act⁴ ("PAJA"). However, as they constitute the exercise of a public power, the decisions are constrained by the principle of legality, and are thus reviewable directly under the Constitution.

The first impugned decision: the PC's decision to place the motion of no confidence on the agenda for the 30 September meeting

28. The applicants seek to review the PC's decision on two bases:

28.1. First, the decision to place the motion of no confidence on the agenda for 30 September is unlawful because the PC was inquorate when that decision was made.

28.2. Second, the PC acted for an ulterior purpose in making its decision.

29. The Standing Rules and Orders of the Legislature of the City of Johannesburg Metropolitan Municipality ("the Rules") accords to the PC the power and obligation to determine the business of the Council. The presiding officer, who is the Speaker, must ensure that all business of the Council is placed on the agenda.⁵

30. Rule 95 deals with the selection of motions. In relevant part, it provides that:

⁴ Act 3 of 2000

⁵ Rule 62

'95(1) Unless the Rules provide otherwise, a motion must be selected by the Programming Committee before it is considered by the Council.

(2) The Programming Committee must consider the selection of the motion for consideration by the Council at its first meeting after the motion was submitted to the Secretary to Council ...'

31. Rule 92 deals with the admissibility of motions:

'A motion is admissible if-

(1) the matter is not pending before a court of law;

(2) it has been submitted within the prescribed time, in accordance with these Rules;

(3) issues raised, or a substantial portion of issues raised are not pending before a section 79 Committee of Council, or any of the spheres of government;

(4) it does not seek Council to adopt an unlawful resolution; and

(5) it is within the jurisdiction and competence of Council.' (My emphasis)

32. It is common cause that although the PC meeting on 29 September was quorate for a brief period of time, only six Councillors were present when it conducted its business. Seven Councillors were required to constitute a quorum. One of the Councillors present, Mr Ngobeni, absented himself, reducing the quorum to six. This was the position when the PC dealt with the motion of no confidence and its placement on the agenda for the following day's meeting.

33. The applicants say that when the PC decided to select the motion of no confidence for the agenda it was inquorate, and thus that decision falls to be reviewed and set aside. The placement of the motion of no confidence on the agenda was unlawful, with the result that it was improperly before the Council and could not lawfully have been adopted.

34. The respondents do not dispute the absence of a quorum at the PC meeting. However, they say that a quorum was not required because the decision to place the motion of no confidence on the agenda of the Council was already taken by the PC when it met on 23 August to consider the agenda for the Council meeting on 29 August.

35. The thrust of the respondents' case on this issue is that the only reason the special motion was not placed on the agenda for the previous council meeting was

because Mr Ngobeni raised a question about whether the motion included an issue that was *sub judice*. Under Rule 92(1) a motion is admissible if, among other things: 'the matter is not pending before a court of law'. Paragraph 1 of the motion of no confidence read:

'Executive Mayor, Councillor Mpho Phalatse failed to disclose to the Council her criminal case related to her alleged corruption in relation to the Field Band Foundation conflict of interest. This lack of disclosure and accountability to Council demonstrate the Executive Mayor, unethical behaviour to account to Council and the people of Johannesburg.'

36. The complaint against Ms Phalatse stemmed from the findings of the Public Protector and were included in a report she had issued. Mr Ngobeni raised the issue of *sub judice* at the 23 August PC meeting. He told the PC that he understood that the leader of his party, Mr Mashaba, had instituted a review application in respect of the relevant Public Protector's report in the High Court in Pretoria. He wondered if this did not make the motion of no confidence *sub judice*.
37. While the legal advisors to the Council had initially told the PC that their assessment of the motion was that it was admissible under Rule 92, Mr Ngobeni's revelation seemed to set the cat amongst the pigeons. Much discussion and debate followed at the 23 August PC meeting. The legal advisors were tasked with making inquiries at the High Court to determine whether the review application had been instituted and its litigation status.
38. The respondents say that the PC decided on 23 August that if, after further investigation, the legal advisors reported to the Speaker (who was chair of the PC) that the application was indeed pending, then the motion would be put before the PC again for consideration. However, if they reported that it was not pending, then there would be no need to place the motion again before the PC for consideration, as it would be admissible *ipso facto* and would be placed on the Council's agenda.
39. In summary, then, the respondents contend that there was already a provisional decision to place the motion on the agenda of the Council, subject only to the legal advisor's confirming that the matter was not *sub judice*. For this reason, they say

it was immaterial that the PC was not quorate at its meeting on 29 September, as no decision was required of the PC on the issue.

40. I was invited by both parties to scrutinise the transcripts of both the PC meeting of 23 August and that of 29 September in order to determine what, indeed, had been the decision of the PC on 23 August as regards the motion of no confidence. Both parties highlighted certain statements made at the meetings and claimed that these supported their respective versions.
41. The applicants pointed to the fact that the Speaker had waited a considerable period of time in order to reach quorum before proceeding with the business of the PC on 29 September. This indicated, they suggested, that the Speaker knew that a quorum was required to place the motion on the agenda, debunking her version that the decision had already been made on 23 August.
42. The respondents on the other hand pointed to affidavits attached to the answering affidavit by the legal advisors concerned, confirming the Speaker's version that the decision to place the motion of no confidence had been made in principle on 23 August. They confirmed in their affidavits that no further decision was necessary by the PC on 29 September, as the motion became automatically admissible once it had been determined that the motion was not *sub judice*.
43. I do not believe that it is necessary for me to engage in the exercise of analysing the transcripts in an effort to determine which version is correct. In the first place, this would be almost an impossible task, given the content of the transcripts: they do not provide much assistance either way. Secondly, in my view, even assuming, without deciding for present purposes, that the Speaker and other members believed that there had been what may be called a provisional acceptance of the motion at 23 August PC meeting, I am not persuaded that such a decision would have had lawful effect.
44. Rule 95 is clear: the PC must 'select' a motion for the agenda of the first meeting of the Council after the motion was submitted. There can be no doubt that the PC did not select the motion of no confidence for the Council's next meeting, being 29 August. At that time, none of the members of the PC had any inkling that an extraordinary meeting would be called for 30 September. They cannot possibly have decided, on 23 August, to select, within the meaning of Rule 95, the motion

for inclusion on the agenda of a meeting about which they had no knowledge at the time of the alleged selection.

45. 'Selection' of a motion for inclusion on the agenda of the Council requires more than a tick-box exercise as to whether proposed agenda items are admissible or not. In other words, admissibility under Rule 92 is a necessary, but not sufficient requirement for selection under Rule 95. If this were not so, then it simply would be left to the legal advisors, and not the PC, to compile the agenda for the next Council meeting.
46. Section 160(8)(b) of the Constitution of the Republic of South Africa, 1996 provides that members of the Council's committees are entitled to participate in a manner that 'is consistent with democracy'. In *Masondo*⁶, the Constitutional Court held that:

'...inclusive deliberation prior to decision-making" is required to give effect to section 160(8) of the Constitution.'
47. Although it seems the PC does not vote to select agenda items, members of the PC must surely be required to apply their minds to the process and must be permitted to have a say before a decision is made on the selection. It follows that the process of 'selection' of an item for the agenda cannot properly and lawfully be undertaken and completed if all the relevant facts at hand are not before the PC.
48. This was the situation that prevailed at the 23 August meeting. The PC simply did not have the relevant facts before it to decide, on 23 August, to select the motion of no confidence for inclusion on the agenda. It could not, without that information, decide in advance, that the motion would be selected for a future, unspecified, meeting of the Council.
49. To complete the process of selection, the motion would have to be put once more before the next PC meeting. The PC, as a committee, would have to consider the information provided by the legal advisors and, after deliberation, make the selection or not. Critically, that selection, in my view, would have to be made by a quorate PC meeting to decide on the agenda for the next meeting of the Council.

⁶ *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) BCLR 128 (CC); 2003 (2) SA 413 (CC)

If quorum was not achieved, the selection simply could not lawfully have been made.

50. For these reasons, therefore, I find that even if PC members thought that they were provisionally selecting the motion of no confidence at the quorate meeting 23 August, they could not lawfully have done so. The PC meeting on 29 September was not quorate. It does not matter that there may have been machinations on the part of opposing coalition parties to break the quorum of that meeting: politics are politics and the law is the law. If there was no quorum, the motion was not lawfully on the agenda.
51. However, even if I am wrong on my conclusion in this regard, there remain other grounds of review to consider, any one of which, if successful, would lead to the same ultimate result.

The second impugned decision: the Speaker's decision to call the meeting

52. The Speaker's decision to call the Extraordinary Meeting of the Council is impugned on two bases:
- 52.1. first, it did not provide reasonable notice; and
- 52.2. second, which is intertwined with the first basis for review, it was taken for an ulterior purpose.
53. In terms of s 29(1) of the Local Government: Municipal Structures Act⁷ ("the Structures Act"), it is the Speaker that decides when and where the Council meets. Under the Rules, ordinary council meetings are held according to the annual year planner.⁸ For ordinary Council meetings, three days' notice is required under the Rules. The notice must set out the business to be considered at the meeting and, where practical, all agenda items.⁹
54. However, the Speaker also has the power to call an extraordinary meeting of the Council to conduct its business outside of the scheduled, ordinary meetings. She must inform all Councillors of her decision to call an extraordinary meeting.¹⁰ Under s 58 of the Structures Act, if it is intended that a motion for the removal of

⁷ Act 117 of 1998

⁸ Rule 15

⁹ Rule 55

¹⁰ Rule 16

an Executive mayor from office is to be tabled, the Speaker is required to give prior notice of such intention.

55. Although the section does not state the notice period required, the applicants contend, and the respondents accept, that the prior notice must be reasonable in the circumstances. The question is whether the notice given by the Speaker on 29 September for a meeting at which the motion of no confidence would be tabled on 30 September was reasonable.
56. In *Ingquza Hill*¹¹, the Supreme Court of Appeal (“SCA”) identified the purpose and importance of the prior notice requirement where the removal of a member of the executive of a municipality is concerned:
- ‘ ... notice is necessary to afford the affected members(s) an opportunity to be aware and to consider the motion before it is tabled for discussion. Additionally, it is to provide council members similarly with an opportunity to engage meaningfully in the ensuing debate before a resolution is taken.’¹²
57. The SCA called in aid the Constitutional Court’s dictum in *Masondo* that:
- ‘In our view it is clear that even if a single councillor was deprived of the right to debate and to participate, because of the absence of notice, the objects of the Constitution and of the (Structures Act) would have been frustrated.’¹³
58. Although the Constitutional Court and the SCA were concerned with cases where no prior notice was given, the same principles must apply where notice is given but the question is whether it was reasonable notice. To meet the Constitutional objectives, the notice period chosen by the Speaker must be such as to afford affected members an opportunity not only to be aware of what is being tabled, but to provide them with the opportunity to engage meaningfully in the forthcoming debate before the proposed resolution is taken.
59. The Free State High Court confirmed this to be the position in *Makume*,¹⁴ when, in a statement endorsed by the SCA in *Ingquza Hill*, it said:

¹¹ *Ingquza Hill Local Municipality and Another v Mdingi* [2021] 3 All SA 332 (SCA)

¹² At para 14

¹³ *Masondo*, above, at para 78

¹⁴ *Makume and another v Northern Free State District Municipality and others* [2003] ZAFSHC 36

‘[I]n the absence of a proper notice of the intended motion there could have been no valid council resolution to carry the... motion. No council resolution can be taken in a vacuum. A municipal council is an assembly of divergent political parties. These various political parties had their say when the executive mayor was enthroned by popular vote. Those various political parties ought to have their say when the executive mayor is dethroned. Logically those various political parties in the local assembly cannot democratically have their say in a meaningful way unless they are timeously notified prior to the relative council meeting by way of a written notice of the intended motion... Any councillor or any political party intending to impeach the executive mayor was legally obliged to timeously inform, not only the mayor, but also each and every member of the municipal council of his or her intention to do so... Certainly it is not enough to say the executive mayor knew beforehand that he was going to be removed. The fact of the matter is that all the councillors irrespective of their political affiliations were also entitled to know.... Respect for law is as important as clean public administration itself. None of the two should be sacrificed on the altar of the other.¹⁵ (My emphasis)

60. The question, then, is whether the 20-hour notice of the extraordinary meeting, without any indication of what business would be conducted, and the 16-hour notice, with the attached motion of no confidence, can be said to have achieved these objectives, and thus to have constituted reasonable, and lawful notice.
61. Considered objectively, it is difficult to conceive of how Ms Phalatse, and other Councillors, could, within the limited time period afforded, have been properly placed to make whatever preparations were necessary to engage meaningfully in the ensuing motion of no confidence that was to be tabled the following morning at 10h00. A motion of no confidence in the Executive Mayor is of the utmost significance to all Councillors and political parties. To afford them a preparation of time of only 16 hours, most of which would be night-time hours, is quite obviously unreasonable. It is inconceivable that Councillors would have been properly placed to engage meaningfully with the motion the following day on such short notice.
62. The Speaker does not identify any extraordinary circumstances that would warrant this *prima facie* unreasonable period of notice. In her answering affidavit she resorted to repeated reference to the ‘inherent urgency’ of motions of no

¹⁵ Makume above, at paras 17-18

confidence. She pointed out that the motion dated from mid-August, and that it could not be left to languish any longer. However, this does not explain why it was necessary to call an extraordinary meeting to consider the motion, let alone on such short notice. The October recess, which was imminent, was only one-week long. There is simply no reason why, even if the Speaker felt the necessity to call an extraordinary meeting to consider the motion, this could not have been done on proper, reasonable notice.

63. The fact that Ms Phalatse was aware, through media reports (referred to in the answering affidavit by the respondents) that the motion could be put before the Council at some stage, did not absolve the Speaker of complying with her constitutional obligation to give reasonable notice to her and to other Councillors. I echo, here, the statement by the court in *Makume*, highlighted in the above extract. It was the Speaker's duty to give reasonable notice that the motion would be tabled and she failed to comply with that duty.
64. The Speaker thus failed to act within the provisions of s 58 of the Structures Act and the Rules. Her decision to call the extraordinary meeting on an unreasonable period of notice was unlawful, and is subject to review under the constitutional principle of legality.
65. Given the extreme haste with which the Speaker acted in calling and setting the date for the meeting, as well as the absence of any real justification for the speed with which she acted, it is difficult to avoid the conclusion that she acted for an ulterior purpose. Having taken over as Speaker from the recently removed DA Speaker, and allegiances within the coalition having shifted, it is reasonable to infer that the Speaker's underlying objective was to cement her coalition allies' advantage by proceeding with undue haste to get the motion of no confidence before the Council.
66. It may all be politics, but where politicians, like the Speaker, assume constitutional and statutory obligations, they must play their politics within the limits of those obligations. Under Rule 18(4), the Speaker is obliged to protect freedom of speech and debate within the Council. Rule 18(6) requires that she must discharge her obligations with integrity and in an impartial way. Absence of

reasonable notice of a motion of no confidence debate fundamentally conflicts with these obligations. It signals that she was motivated by an ulterior purpose.

67. Even if I am wrong in my finding that the Speaker's decision is reviewable on these grounds, it remains for me to consider whether the Council's decision to adopt the motion of no confidence was reviewable.

The third impugned decision: the Council's decision to adopt the motion of no confidence

68. This ground of review rests on the following common cause facts:
- 68.1. The DA Councillors present at the Council meeting on 30 September refused to sign the attendance register.
 - 68.2. The Speaker refused to permit them to speak at the meeting.
 - 68.3. The Speaker refused the DA's request for a caucus break.
 - 68.4. The Speaker refused to permit any Councillor who had not signed the attendance register to vote against the motion of no confidence.
 - 68.5. There was no debate on the motion of no confidence.
 - 68.6. The Speaker decided to proceed with the meeting despite the first urgent application which had been set down for 10h00 on 30 September.
69. Central to the Speaker's conduct is the first fact: the DA Councillors' refusal to sign the attendance register. In essence, what the Speaker says is that it is peremptory for all Councillors to sign the attendance register. This is required under Rule 56:
- 'Every Councillor attending a meeting must sign her/his name in the attendance register which must be made available for this purpose at least 2 hours prior to the commencement of a Council meeting.'
70. According to the Speaker, it is the natural consequence of a failure to sign the attendance register that Councillors cannot be treated as if they are in attendance. While they have a right under s 160(8) of the Constitution to participate in the proceedings of Council, that section recognises that this right may be regulated by legislation. If a Councillor elects not to comply with the pre-requisite of signing the

attendance register, which is peremptory under the rules, then they have chosen to forfeit the right to participate and can have no complaint if the Speaker does not recognise them and does not permit their participation.

71. On this basis, the Speaker says that there was nothing unlawful about her conduct at the meeting of 30 September. She simply held the DA Councillors to their election not to participate by refusing to sign the register. They had no right to address the Council, or to seek a caucus break, or to oppose or vote against the motion of no confidence. Because the motion was unopposed, the Speaker says that under Rule 91(1) a motion that is not opposed 'may not be debated and shall immediately be put to the vote by the Presiding Officer'. Thus, there was nothing unlawful about her decision to put the motion immediately to the vote without debate. As regards the decision to proceed with the meeting despite the pending first urgent application, the Speaker says that she exercised her discretion properly on the basis that the application was academic and moot.
72. The pivot of the Speaker's defence on this ground of review is the interpretation of Rule 56. Specifically, does it mean that a failure to sign the attendance register means that a Councillor is deprived of their rights under the Constitution, the Structures Act and the Rules, to participate in the proceedings?
73. Rule 56 does not say as much. It simply says that Councillors must sign the attendance register. Clearly, a Councillor who refuses to sign would be in breach of the Rules, but this does not obviously have the further consequence that they 'waive', as the respondents put it, their fundamental rights to participate, object, call for a caucus break or vote on a motion. That would be an extreme consequence of a rule which would appear to me to have as its underlying purpose the facilitation of proper record-keeping by the Council.
74. Rule 61 addresses the requirement of record-keeping and obliges the Secretary to Council to submit a return every six months showing the attendance of each councillor at council meetings. The signing of the attendance register has an administrative function. It is understandable that it is of critical importance for record-keeping and as a means of providing proof of attendance should there later be any dispute. However, without a clear indication from the terms of Rule 56, or the broader context of the Rules as a whole, it cannot be elevated to a rule which

has the substantive effect of depriving Councillors of their right to participate in the proceedings of Council.

75. I can find no such direction either in Rule 56 or its context. The SCA in *Ingguta Hills* noted the importance for Councillors of being able to participate in 'meaningful engagement' and debate when notices of no confidence come before a Council. It goes without saying that this facilitates the democratic project, expressly recognised in s 160(8)(b) of the Constitution. After all, Councillors are elected as representatives of the citizenry at the most fundamental tier: local government. It would defeat the democratic project to give Rule 56 the meaning that non-compliance has the consequence that Councillors are prohibited from representing the interests of the electorate in meetings of the Council.
76. Rule 1, which lists the purpose of the Rules, is also consistent with an interpretation of Rule 56 contrary to that proposed by the respondents. Rule 1(2) (c) establishes the principle that:
- 'The Rules are intended to enable the Council to fulfil its constitutional responsibilities. This means that they must-
- ...
- (c) facilitate debate and discussions'
77. The respondents' interpretation of Rule 56 requires that rule to be read in a manner that restricts and limits debate and discussion. The interpretation is in clear conflict with the express purpose of the Rules and with s 160(8) of the Constitution. It cannot be correct.
78. For these reasons, I find that the Speaker was not lawfully permitted to treat DA Councillors as if they had no right to participate in the Council meeting because they had refused to sign the register. This means that she acted unlawfully, and contrary to the prescripts of the Consitution and the Rules in refusing to permit them to speak; in refusing to consider their request for a caucus break; and for refusing to permit them to object to or to vote against the motion of no confidence. It follows that she also acted unlawfully in treating the motion as being unopposed. Her conclusion that it was unopposed, and hence to refuse to permit any debate on the motion, was fatally tainted with illegality through her unlawful refusal to

permit DA Councillors to participate in the proceedings of the Council. Rule 91(2) is of no assistance to the Speaker in these circumstances.

79. As to the contention that the Speaker acted with an ulterior purpose in conducting herself as she did, if one considers her actions as a whole, it is, once again, difficult to avoid agreeing with the contention. As I have already noted, the Speaker has a duty to protect freedom of speech and debate in the Council. She must discharge her responsibilities with integrity and in an impartial way. Rule 66 deals with the rules of debate, and free speech in particular. It places a duty on a Presiding Officer (here the Speaker) to 'ensure that Councillors are allowed to speak and debate freely in the Council subject to these Rules'.
80. The conduct of the Speaker was antithetical to these obligations. She shut down, rather than facilitated free speech and debate. She did so on the pretext that she was permitted to do this because the DA Councillors had not signed the attendance register. However, she refused to rule on a point of order to this effect when it was raised. What is more, once the motion of no confidence had been adopted, she granted the request for a caucus break. The only explanation for this contrary conduct on her part is that her refusal to acknowledge the request for a caucus break earlier by the DA was motivated by her intention to push through the motion of no confidence at all costs, and as speedily as possible, before the first urgent application could be heard.
81. One would expect a Speaker committed to impartiality and integrity, as required by the Rules, to have heeded the call for Councillors to be heard; to have considered their requests properly and to have ruled on the issue, if this was required, before proceeding helter skelter to the finish. Had she so ruled, Councillors would have had the opportunity to reconsider their position on signing the register. Critically, one would expect an impartial Speaker, acting with integrity, to have seriously considered whether it would not have been in the interests of the Council and of the democratic process to postpone the meeting for some hours or days pending the hearing and outcome of the first urgent application. There can be no other conclusion than that the Speaker was motivated by an ulterior purpose.

The fourth impugned decision: the Council's decision to appoint a new Mayor

82. Once it is found that:

- 82.1. the decision to place the motion of no confidence on the agenda for the Council meeting on 30 September was unlawful; or
- 82.2. the decision to call the Council meeting for 30 September was unlawful because of improper notice to Councillors; or
- 82.3. the decision by Council to adopt and carry the motion of no confidence was tainted by illegality because of the Speaker's conduct,

the fourth ground of review, namely the decision to elect the new Executive Mayor, Mr Morero, must succeed.

- 83. This has nothing to do with the IEC's oversight of the election or its report that determined the election to be free and fair. The IEC has no power to rule on the legality of an election. That power resides in the courts. The success of the fourth ground of review follows as an automatic consequence of the illegality of the motion of no confidence itself. If the motion of no confidence was not lawfully before the Council, in a lawfully convened Council meeting, and was not adopted through a lawful Council process, then it could not have had the legal effect of deposing Ms Phalatse as Executive Mayor
- 84. It follows that the office of Executive Mayor did not become vacant. It is only when there is a vacancy in the office of Executive Mayor that the position must be filled.¹⁶ There being no vacancy in the office, the position could not be legally filled by the election of a new Mayor, no matter how free and fair that election may have been.

REMEDY

- 85. For all of the reasons advanced, I find that the applicants have established a case for review in respect of the impugned decisions in terms of the principle of legality. Legality is an aspect of the rule of law which is a founding value of our Constitution.¹⁷ It requires that the exercise of all public power must be lawful. The exercise of public powers outside of the four corners of the relevant authorising legislation is subject to review.¹⁸ Similarly, the holder of a public power must act in

¹⁶ Section 55 of the Structures Act

¹⁷ Section 1(c) of the Constitution

¹⁸ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), paras 27 and 45

good faith and must not misconstrue their powers.¹⁹ An exercise of a public power for an ulterior purpose will thus fall foul of this aspect of the rule of law.

86. Section 172(1)(a) of the Constitution enjoins that a court deciding a constitutional matter within its power 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its invalidity'. Under s 172(1)(b), a court may, in those circumstances, grant any order that is just and equitable. The Constitutional Court has recognised that the default position, following the mandatory finding of invalidity by a court under s 172(1)(a), is that the invalid exercise of public power should be reversed or corrected.²⁰ In other words, the corrective principle generally applies, meaning that the usual remedy following a declaration of invalidity is to set aside the impugned decisions.

87. However, the injunction in s 171(1)(a) of the Constitution is tempered by the wide discretion afforded in s 171(1)(b) to grant any order that is just and equitable. In *Steenkamp*,²¹ the Constitutional Court held that:

'In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. The court is bound only by considerations of justice and equity. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function.'

88. The Court in *Bengwenyama*²² considered how to go about determining a just and equitable remedy:

'I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will

¹⁹ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1, at para 148.

²⁰ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) 2014 (4) SA 179 (CC) para 29

²¹ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), at para 29

²² *Bengwenyama Minerals (Pty) Ltd & Others v Genorah Resources (Pty) Ltd & Others* 2011 (4) SA 113 (CC). Although the Court considered the issue in the context of PAJA, the same principles apply in a legality review.

depend on the kind of challenge presented — direct or collateral, the interests involved and the extent or materiality of the breach in each particular case.’

89. It has been stressed that:

‘The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words, the order must be fair and just within the context of a particular dispute.’²³

90. The relief the applicants seek in their Notice of Motion is founded on the corrective principle. They want an order:

90.1. declaring each impugned decision to be unlawful, unconstitutional and invalid;

90.2. setting them aside;

90.3. further declaring that Ms Phalatse is the Executive Mayor of the City;

90.4. further declaring that all decisions taken by the fourth respondent in his capacity as Executive Mayor are unconstitutional, unlawful and invalid; and

90.5. reviewing and setting the latter decisions aside.

91. The respondents contended strongly that considerations of justice and equity in this particular case dictate a different outcome, one that keeps Mr Morero in office as Executive Mayor and his decisions intact.

92. The foundation for the case advanced by the respondents is what they call the ‘five pillars of subterfuge’ by the DA (and their associates) in the period leading up to and spanning the events in question. Time and space do not permit me to traverse the details of the respondents’ submissions. In brief:

92.1. The respondents accuse the DA’s associate, Mr Ngobeni, of raising what they say was a bogus *sub judice* point in the 23 August PC meeting.

²³ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC), at para 96

- 92.2. They point fingers at the previous, DA speaker, for allegedly deliberately keeping the feedback received from the legal advisors from the PC members.
 - 92.3. The DA, or its associates, are accused of sending or forwarding WhatsApp messages inciting members to break the quorum of the PC meeting.
 - 92.4. Mr Ngobeni is criticised further for his walking out of the PC meeting to break the quorum on 29 September.
 - 92.5. Finally, Ms Phalatse is accused of adopting a strategy to delay the 30 September by setting down the first urgent application for the same time as that of the scheduled meeting.
93. The respondents contend that the applicants did everything possible to delay and defeat the motion of no confidence being put to the vote before the Council. They used subterfuge and resorted to nefarious conduct to achieve their objective. Thus, say the respondents, they did not come to court with clean hands: justice demands that they should not be rewarded by achieving through a court order that which they sought to achieve by subterfuge.
94. The second aspect of the respondents' case on a just and equitable remedy is based on what they say was, and remains, the inevitable outcome of a democratic process. They point out that Ms Phalatse's right under s 19 (3)(b) of the Constitution (the right to stand for public office and, if elected, to hold office) does not give her the right to continue to hold the office of Executive Mayor in the face of an overwhelming vote of no confidence in her. Despite the shortfalls in the decisions leading up to the vote, the respondents say that the motion of no confidence was passed by 139 votes to none. They say that even if all Councillors who did not vote had voted against the motion, it would still have been carried. So, they say, a substantially democratic outcome should not be set aside because of illegalities in the path leading up to it.
95. I do not have to make any findings on the 'five pillars of subterfuge' and whether or not they have merit. It would be a sad day for our constitutional principle of legality if accusations of subterfuge and other political shenanigans, which were never reviewed in a court, were to be recognised as justifying a court's acceptance,

under its s 172(1)(b) power, of the validity of clearly established unlawful and unconstitutional decisions by those exercising political power. The dirty world of politics thrives on accusations and counter-accusations of this sort. Great uncertainty would result if the political game were permitted, through s 172(1)(b), to bleed into, and override the fundamental principle that the unlawful exercise of public power ought not to be permitted to stand.

96. When it comes to the second aspect of the respondents' argument, I simply do not see how it can be contended that a process that was so constitutionally flawed can be considered to have led to a democratic outcome. The test should not be the number of votes in favour of the motion of no confidence. After all, they were cast in the context of a tainted process. Who knows what might have happened if proper notice had been given to Councillors and if they had had sufficient time to do their preparations, or if proper debate had been allowed, or if the Speaker had given due consideration to postponing the meeting in light of the pending first urgent application? The outcome may have been the same. But this is immaterial: a truly democratic outcome requires a democratic and constitutionally sound prior procedure. Unless the procedure was lawful, a party cannot legitimately contend that justice and equity demand recognition of the outcome under s 172(1)(b).
97. The current Executive Mayor, Mr Morero, did not actively oppose the application. Nor did the Council. They did not file any affidavits to assist the court in determining whether, and if so, what uncertainty may arise if the decisions made by Mr Morero in his capacity of Executive Mayor are set aside. The Speaker also did not address this issue by putting any relevant facts before the court. Indeed, it is not known what decisions he may have made, if any.
98. Insofar as there may be specific decisions that have been made by the fourth respondent *ex officio* which, if set aside retrospectively, would have consequences justifying the need for the exercise by a court of its discretion under s 172(1)(b) of the Constitution, my order makes provision for application to be made, on supplemented papers, for such relief.
99. This being the case, I can find no justifiable basis for exercising my discretion so as to refuse to follow the normal corrective principle requiring that the unlawful

decisions, and their consequences be set aside. It was suggested by the respondents that I could consider granting a structural interdict, on the basis that I endorse the present *status quo* with Mr Morero as Executive Mayor, but lay down a timetable and procedure for the motion to be tabled once again before the Council. I can see no reason for doing so. There is a procedure set out in the Rules for motions of no confidence. The plain and simple fact is that the Speaker and the Council failed to follow a lawful process. The outcome of that unlawful process must be reversed.

COSTS AND ORDER

100. The applicants sought an order directing Ms Makhubele, in her personal capacity, to pay their costs on a punitive scale. The motivation for a punitive costs order of this nature was that Ms Makhubele had abused her powers and flouted the rules and law to achieve her political ends. The applicants contended that the ratepayers of the City should not have to pay the legal costs for her conduct.
101. The Constitutional Court has endorsed personal costs orders against public officials acting in a representative capacity in specified circumstances, gross negligence and bad faith being examples.²⁴
102. It may be that in principle, a finding that a public officer has acted with an ulterior motive could constitute bad faith, warranting a personal costs order. However, I am not inclined to follow this path in the present application, or to grant a punitive costs order on the attorney client scale.
103. My fundamental reason is that although constitutional rights are implicated in the matter, and although the Speaker can be said to have disregarded their import in the manner in which she exercised her duties, the parties are all politicians engaged in political battles. They understand the cut and thrust of litigation when the political skirmish becomes litigious.
104. In this case, those skirmishes preceded the court application and no doubt more skirmishes and battles will follow. Under the skin, it is a fight for power between different political parties. In this context, very seldom can one party claim the

²⁴ *Black Sash Trust v Minister of Social Development (Freedom Under Law intervening)* 2017 (9) BCLR 1089 (CC) at paras 5-9; *South African Social Security Agency v Minister of Social Development (Corruption Watch (NPC) as amicus curiae)* 2018 (10) BCLR 1291 (CC)

moral moral ground when it comes to the question of costs. Moreover, the Speaker did not act alone in the decisions she made; undoubtedly, she acted with the support of whichever political associates she is aligned with. The political context of this case in my view renders a personal and punitive costs order inappropriate.

105. I make the following order:

1. The application is urgent as contemplated by Rule 6(12) and the usual forms, manner of service and time periods set out in the Uniform Rules of Court and in the Practice Manual of this court are dispensed with.
2. The decision of the First Respondent taken on 29 September 2022 to schedule an extraordinary meeting of the Sixth Respondent for 30 September 2022 is declared unlawful, unconstitutional and invalid.
3. The decision of the First Respondent referred to in paragraph 2 is reviewed and set aside.
4. The decision of the Programming Committee of the Sixth Respondent taken on 29 September 2022 to place a motion of no confidence in the First Applicant as the Executive Mayor of the City of Johannesburg on the agenda for the extraordinary meeting on 30 September 2022 is declared unlawful, unconstitutional and invalid.
5. The decision of the Programming Committee of the Sixth Respondent referred to in paragraph 4 is reviewed and set aside.
6. The decision taken by the Sixth Respondent on 30 September 2022 to adopt a motion of no confidence in the First Applicant as the Executive Mayor of the City of Johannesburg is declared unlawful, unconstitutional and invalid.
7. The decision taken by the Sixth Respondent referred to in paragraph 6 is reviewed and set aside.
8. The decision taken by the Sixth Respondent on 30 September 2022 to elect the Fourth Respondent as the Executive Mayor of the City of Johannesburg is declared unlawful, unconstitutional and invalid.
9. The decision taken by the Sixth Respondent referred to in paragraph 8 is reviewed and set aside.

10. The First Applicant is declared to be the Executive Mayor of the City of Johannesburg.
11. Subject to paragraph 12, below, all decisions taken by the Fourth Respondent as the Executive Mayor of the City of Johannesburg are declared as unlawful, unconstitutional and invalid and are reviewed and set aside.
12. The order in paragraph 11 is suspended for a period of ten court days. During such period the Fifth Respondent, or other authorised officer, may apply to the High Court, on supplemented papers, for an order in terms of s 172(1)(b)(i) of the Constitution in respect of any specified decision of the Fourth Respondent made between 30 September 2022 and the handing down of this order.
13. The First Respondent is directed to pay the costs of the application, including the costs of two counsel, one being senior counsel.

R.M. KEIGHTLEY
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 October 2022.

APPEARANCES

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	Advocate R. Tshetlo
	Advocate L. Mokgoroane

Instructed by:	Mogaswa & Associates Inc. Attorneys
Date of hearing:	19 October 2022
Date of judgment:	25 October 2022

