



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: D2562/2023

In the matter between:

**THE MEC FOR CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS, KWAZULU-NATAL
DR SIYABONGA NTULI**

**FIRST APPLICANT
SECOND APPLICANT**

and

**MTUBATUBA LOCAL MUNICIPALITY
MUNICIPAL MANAGER: MTUBATUBA MUNICIPALITY
SPEAKER: MTUBATUBA MUNICIPALITY
MAYOR: MTUBATUBA MUNICIPALITY**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

ORDER

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 15 August 2023 (Tuesday) at 09:30am

In the premises, the following order is made:

1. The respondents are hereby interdicted and restrained from preventing the second applicant from taking up his position as ministerial representative at the Mtubatuba Local Municipality.

2. The respondents are hereby directed to facilitate the second applicant's appointment as ministerial representative at the Municipality by providing him with access to the offices used by the ministerial representative and all necessary facilities and by co-operating with the second applicant to enable him to fulfil his statutory duties at the Municipality.
3. No order as to costs.

JUDGMENT

Mathenjwa AJ

Introduction

[1] This is an application for interdict restraining the respondents from preventing members of the public and officials of the Department of Co-operative Governance and Traditional Affairs gaining access to Mtubatuba Local Municipality (the Municipality) offices for official business and further restraining and interdicting the respondents from preventing the second applicant from taking up his position as ministerial representative at the Municipality.

Parties

[2] The first applicant is the MEC for Co-operative Governance and Traditional Affairs, KwaZulu-Natal responsible for local government in the province of KwaZulu-Natal.

[3] The second applicant is Dr Siyabonga Robsen Ntuli who has been appointed as the ministerial representative at the Municipality pursuant to intervention in terms of s 139(1)(b) of the Constitution.

[4] The first respondent is Mtubatuba Local Municipality which has its administrative offices at Lot 105 Nkosi Mtubatuba Road, Mtubatuba KwaZulu-Natal.

[5] The second respondent is Thamsanqa Vincent Xulu who is cited in his capacity as the Municipal Manager of the Municipality. The third respondent is Sibongile Jullie Shezi who is cited in her capacity as the Speaker of the Municipality. The fourth respondent is Mandla Zungu who is cited in his capacity as the Executive Mayor of the Municipality.

Factual background

[6] On 13 March 2019 the Provincial Executive Council of KwaZulu-Natal resolved to intervene at the Mtubatuba Municipality in terms of s 139(1)(b) of the Constitution. The intervention has been extended on various occasions and is still in force. Subsequent to the intervention a ministerial representative was appointed at the Municipality for the period of the intervention. On 1 February 2023 the previous MEC for Co-operative Governance and Traditional Affairs, KwaZulu-Natal, appointed the second applicant as ministerial representative at the Municipality. The appointment of the second applicant has since been continuously extended by the first applicant.

[7] The respondents opposed the appointment of the second applicant as a ministerial representative at the Municipality. Reasons advanced for their opposition relate to certain allegations against the second applicant which they contend would render him disqualified to be a ministerial representative at that Municipality. The applicants dispute those allegations and persisted with the appointment of the second applicant. Thus, there is disagreement between the applicants and the respondents over the appointment of the second applicant. Subsequently, on 27 February 2023 when officials from the first applicant's department arrived at the Municipality for purposes of introducing the second applicant as ministerial representative, they found the main gate to the entrance and all buildings at the Municipality locked. On 28 February 2023 again, the second applicant arrived to assume duties as ministerial representatives at the Municipality, but he was prevented from doing so because the entrance gate to the Municipality was locked. Furthermore other councillors of the Municipality and general members of the public were locked outside and could not

access the Municipality premises. That gave rise to the current dispute that led to the applicants launching this application.

[8] On 14 March 2023 the matter came before Moodley J and an order was issued interdicting the respondents from causing the entrance gates to the Municipality offices being blocked during normal operating office hours and requesting the South African Police Services to come to the assistance of the second applicant and officials of the first applicant's department to exercise the rights conferred in the order. Furthermore, the learned judge issued a rule nisi calling upon the respondents to show cause why they should not be restrained and interdicted from preventing the second applicant from taking up his position as ministerial representative at the Municipality.

[9] It appears from the respondents' opposing papers that their opposition to the application before me is mainly based on their contention that the appointment of the second applicant lacks rationality and offends the rule of law. It further appears that the respondents have launched a court application challenging the appointment of the second applicant, and that application is pending before another court. Therefore, I do not express any view on that matter which is pending before another court.

[10] The issue for determination in this application is whether or not the prevention of the second applicant from assuming his duties as ministerial representative in terms of his appointment by the first applicant at the Municipality is unlawful, and whether the respondents should be restrained and interdicted from preventing the second applicant from assuming his duties at that Municipality

Application for postponement

[11] At the commencement of the hearing Ms *Lennard* for the first to fourth respondents made a substantial application for postponement of the matter. Reasons advanced being that the senior counsel who is seized with the matter was not available and will return to the country on 23 August 2023. Mr *Moerane SC* for the applicants opposed the postponement. He referred this court to its judgment in *Nongoma Local Municipality and Others v MEC for Cooperative Governance and Traditional Affairs*

(KwaZulu- Natal) and Others,¹ where in a similar situation the court refused postponement for a similar reason being that the senior counsel seized with the matter was abroad. Mr Moerane further highlighted that there are currently about 50 senior counsels practicing in this Division, therefore, the respondents could have engaged one of the senior counsels available in the absence of their usual senior counsel. I have had regard to the fact that on 23 May 2023 directives were issued for the parties to file their heads of argument, and they complied accordingly. According to the respondents' attorneys, the respondents learned on 1 August 2023 that the matter was set down for hearing on 11 August 2023, but still did not make arrangements for the appointment of another senior counsel. The reasons advanced for seeking the adjournment are not satisfactory and the application for adjournment is refused.

Parties' submissions

[12] Mr Moerane submitted that the second to fourth respondents have acted unlawfully in preventing the second applicant from taking up office at the Municipality and discharging his duties as ministerial representative and the applicants are entitled to the interdict and mandamus they seek. The conduct of the respondents to take the law into their hands, the argument went, amounts to self-help. In support of his argument the court was referred to the Constitutional Court judgment of *Ngqukumba v Minister of Safety and Security and Others*² where it was held that self-help is repugnant to the values upon which our constitution is founded. With regard to the respondents' contention that the applicants have not made a reasonable effort to resolve the matter before launching this application, he submitted that Chapter 4 of the Intergovernmental Relations Framework Act³ (IGRFA) which prescribes settlement of intergovernmental disputes amongst organs of state does not apply in the present matter because the Municipality is under intervention in terms of s 139 of the Constitution. Alternatively, the argument went, based on the nature of the present matter the applicants were entitled to approach the court for resolution of the matter.

¹ *Nongoma Local Municipality and Others v MEC for Cooperative Governance and Traditional Affairs (KwaZulu-Natal) and Others* (846/2023P) [2023] ZAKZPHC 73 (3 July 2023).

² *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC); 2014 (7) BCLR 788 (CC) para 21.

³ Intergovernmental Relations Framework Act 13 of 2005.

[13] Ms Lennard submitted that the duty imposed upon organs of state involved in intergovernmental disputes to make every effort to avoid litigation is applicable to the present matter. The applicants failed, the argument went, to make reasonable efforts to resolve the dispute before launching this application and this court should refuse to hear this application. Furthermore, it was argued, the applicants in their affidavits averred that the appointment of the second applicant would expire on 23 April 2023, and the applicant's counsel in their heads of argument had averred that the second applicant's appointment was extended, was still in force and the letter of extension was attached to their practice notes, but such letter was not attached to the practice notes. It was further submitted that the second applicant's appointment had expired, the applicants no longer have prima facie rights and the application should be dismissed.

[14] In response, the applicants' counsel requested to hand into court the letters extending the second applicant's appointment which were omitted from the applicants practice notes. I allowed the handing into court of the letters showing that the appointment of the second applicant was extended and still in force. Reasons being that the issue of extension of the second applicant's appointment was raised by the applicants in their heads of argument, but they omitted to attach those letters. In response to the applicants' heads, the respondents' submitted their heads of argument, but did not raise the omission of the second applicant's letters of appointment to the applicants' practice notes nor the expiry of the second applicant's appointment. The issues regarding the omission of the letters of appointment and expiry of the second applicant's appointment was raised for the first time by the respondents' counsel at the hearing of this matter. It is accepted that counsel was entitled to raise the issue because it arose from the applicant's own case. Under these circumstances I considered it fair to allow the applicants to hand in the letters that they omitted to attach in their practice notes. It is now clear that the appointment of the second applicant was extended and is still in force.

Analysis

[15] As pointed out in paragraph 9 above the issues regarding the suitability of the second applicant to be appointed as a ministerial representative at the Municipality is

not before this court, it is pending before another court. Furthermore, there is no longer any uncertainty regarding the expiry of the second applicant's appointment since the letters extending his appointment clarifies the issue that his appointment is still in force. This then brings me to the respondents' contention that the applicants had failed to comply with the constitutional duty imposed on organs of state to make every effort to resolve intergovernmental dispute before resorting to court.

[16] Section 41(3) of the Constitution directs an organ of state involved in an intergovernmental dispute to make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purposes and to exhaust all available remedies before approaching a court to resolve the dispute. Chapter 4 of the IGRFA makes provision for mechanisms and procedures for settlement of intergovernmental disputes between organs of state. Section 39 of the IGRFA provides that the provisions of Chapter 4 of the IRFA does not apply to disputes concerning an intervention in terms of ss 100 or 139 of the Constitution. Therefore it is not in dispute that the provisions of Chapter 4 of IGRFA is not applicable to the present matter because the dispute relates to a s 139 intervention.

[17] It is appropriate to have regard to the nature of the dispute in the present matter which relates to taking the law into one's own hands in preventing the second applicant from performing his duty in terms of his appointment as ministerial representative at the Municipality. Taking the law into one's hands offends the rule of law,⁴ which is one of the founding values of our constitutional democracy.⁵ The principle of taking the law in to one's own hands and self-help is inimical to a society founded on the rule of law and principles of democracy.⁶ Reasons being that the practice of self-help does not only create disorder, chaos and vigilantes in society, but is likely to put at risk or even lead to the death of innocent people . In the present matter innocent members of the public were prevented from accessing the Municipality premises and consequently from accessing services because the entrance to the office was blocked.

⁴ *Chief Lesapoo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 22.

⁵ Section 1 (c) of the Constitution.

⁶ *Chief Lesapo* above fn 4 para 11.

The conduct of taking the law into their hands and preventing the second applicant from taking up his appointment at the Municipality is unlawful and the respondents should be restrained and interdicted accordingly.

Costs

[18] The applicants submitted that the second to fourth respondents should bear the costs of this application because they associated themselves with the conduct of those people who blocked the entrance to, and prevented the second applicant from assuming duties at the Municipality premises. The respondents submitted that the issue of costs should be reserved for determination together with the review application pending before another court because by then the court would have formed a clear picture regarding the conduct of the litigants in this litigation. In determining the issue of costs I have had regard to the conduct of the parties involved in the litigation.⁷ The papers before court show that that people who were wearing t-shirts of a political party were blocking the entrance and prevented the second applicant from entering the Municipality. The second to fourth respondents are cited in their capacities as office bearers of the Municipality without attributing any role played by them in blocking the entrance to the Municipality. With regard to reservation of costs for determination by the court adjudicating the review application, in my view it may not be appropriate for that court to determine the issue of costs for a matter heard by another court. I am not convinced that the conduct of the second to fourth respondents in this litigation justifies that they personally bear the costs of this application. Further, in my view, it is not desirable to order the Municipality to bear costs, in an instance such as the present, where the conduct of blocking the entrance and preventing the second applicant from taking up his appointment is attributed to people wearing colours of a political party, whose role to the Municipality is not determinable.

Order

[19] In the premises, the following order is made:

⁷ *Catling and Another v Constat NO and Another* (2647/2016) [2016] ZAGPJHC 350 (17 September 2019) para 39.

1. The respondents are hereby interdicted and restrained from preventing the second applicant from taking up his position as ministerial representative at the Mtubatuba Local Municipality.
2. The respondents are hereby directed to facilitate the second applicant's appointment as ministerial representative at the Municipality by providing him with access to the offices used by the ministerial representative and all necessary facilities and by co-operating with the second applicant to enable him to fulfil his statutory duties at the Municipality.
3. No order as to costs.

MATHENJWA AJ

Date of hearing: 11 August 2023

Date of judgment: 15 August 2023

Appearances:

For the applicants:

Adv Moerane SC

Assisted by:

Adv M Mabonane

Instructed by:

Tembe Kheswa Nxumalo Inc.

Durban

For the respondents:

Adv. U Lennard

Assisted by:

Adv N Xulu

Instructed by:

SM Mbatha Inc.

Durban