



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

CASE NO: 2562/2023

In the matter between:

THE MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KWAZULU-NATAL **FIRST APPLICANT**

DR SIYABONGA NTULI **SECOND APPLICANT**

and

MTUBATUBA LOCAL MUNICIPALITY **FIRST RESPONDENT**

MUNICIPAL MANAGER: MTUBATUBA MUNICIPALITY **SECOND RESPONDENT**

SPEAKER: MTUBATUBA LOCAL MUNICIPALITY **THIRD RESPONDENT**

MAYOR: MTUBATUBA LOCAL MUNICIPALITY **FOURTH RESPONDENT**

ORDER

Having read the papers and after hearing counsel, the following order is made:

1. Paragraphs 1 and 2 of the order granted by Mathenjwa AJ on 15 August 2023 are brought into operation and are not suspended pending any application for leave to appeal or an appeal should leave to appeal be granted.

2. The respondents are to pay costs occasioned by their opposition.

JUDGMENT

Date Delivered: 4 September 2023

MASIPA J:

Introduction

[1] This is an application in terms of ss 18(1) and 18(3) of the Superior Courts Act 10 of 2013 ('the Act'). The relief sought by the applicants is to the effect that the judgment of this court of 15 August 2023 shall not be suspended pending the determination of the respondents' application for leave to appeal or appeal against the order.

The parties

[2] The first applicant is the member of the Executive Council for Cooperative Governance and Traditional Affairs for the Province of KwaZulu-Natal ('the MEC'). The second applicant is the ministerial representative appointed by the first applicant in terms of s 139(1)(b) of the Constitution. This section provides for intervention where a municipality is unable to manage its affairs and allows for the placement of such municipality under administration.

[3] The first respondent is a local municipality established in terms of s 155(b) of the Constitution read with ss 11 and 12 of the Local Government: Municipal Structures Act 117 of 1998 and read with ss 3, 4 and 5 of the KwaZulu-Natal Determination of Types of Municipalities Act 7 of 2000. The second respondent is a Municipal Manager of the first respondent. The third and fourth respondents are the Speaker and the Executive Mayor of the first respondent, respectively.

The facts

[4] During or about 13 March 2019, the Provincial Executive Council of KwaZulu-Natal ('the PEC') resolved to intervene in terms of s 139(1)(b) of the Constitution at the first respondent. Consequently, a ministerial representative was appointed. A letter was delivered to the third respondent as the Speaker of the first respondent, officially communicating such decisions.

[5] Following a recommendation of a forensic report in November 2019, the PEC resolved for the intervention to terminate on 31 March 2020. However, on 8 April 2020, the PEC resolved for the intervention to continue for a period of six months up to 31 October 2020 and was further extended to 31 October 2021. All correspondence for the initiation of the intervention were communicated to the first respondent through the third respondent. Notably, none of the correspondence provided details of the appointed ministerial representative.

[6] Prior to the local government elections held on 1 November 2021, the National Department of Cooperative Governance and Traditional Affairs ('COGTA'), National Treasury ('Treasury') and the South African Local Government Association ('SALGA') issued a circular to the effect that interventions in those municipalities which are under administration must continue to operate until the newly declared Municipal Councils demonstrated their abilities and willingness to fulfil the obligations for which the intervention was originally invoked.

[7] Accordingly on 2 February 2022, the first respondent was notified of a resolution by the PEC taken on 26 January 2022 for the intervention to continue subject to a review on or about 30 April 2022. It is unclear as to what transpired from 30 April 2022 to give effect to the resolution. However, the evidence before court is that as at 22 December 2022 Mr Sazi Mbhele, the then ministerial representative, left this position pursuant to his appointment as a Municipal Manager at ILembe. From this, it can be inferred that Mr Mbhele had been appointed as the ministerial representative pursuant to the resolution of the PEC of January 2022. It appears that following Mbhele's departure, the PEC resolved on 30 January 2023, to appoint the second applicant as a ministerial representative.

[8] There is nothing that talks to the intervention between Mbhele's departure and the appointment of the second applicant. According to the respondents, the position was vacant from when Mbhele resigned, until the appointment of the second applicant. A period of just over a month. No communication appears to have been forwarded to the first or third respondents regarding the status of the intervention. Although nothing was advanced for the applicants, the only reasonable conclusion is

that the intervention status remained in place on the basis of the November 2021 circular referred to earlier.

[9] The issue of the further extension of the intervention was discussed and resolved at the PEC meeting of 25 April 2023. While the meeting was held on 25 April 2023, it refers to letters of notification for the extension as having been forwarded to relevant municipalities as at 30 April 2023. Further letters of extension were issued to the second applicant, ending on 30 June 2023 and extended to 31 October 2023. Notably, there appears to have been no communication of the extension to the respondents. The last official communication appears to have been dated 2 February 2022.

[10] The first applicant avers that pursuant to the appointment of the second applicant, attempts were made to facilitate his introduction to the respondents at the offices of the first respondent with no success. There was some response from the third respondent which has not been placed before me.

[11] It is common cause that on 16 February 2023, shortly after the appointment of the second applicant, the respondents launched a review application to set the appointment aside. Clearly apparent from this is that the respondents were aware of this appointment and of the continuation of the intervention. The review application which was launched as an urgent application was struck off from the roll for lack of urgency. The respondents have since not taken further steps to pursue the application. Subsequently, the first applicant endeavoured to assist the second applicant to take up his duties but was unsuccessful because the respondents caused the gates on the premises of the first respondent to be locked. As a result, on 14 March 2023 an urgent application was launched to interdict the respondents from preventing access to the premises of the first respondents.

[12] When the matter was heard, Moodley J granted the following order:

'1. The respondents are called upon to show cause by 24 April 2023 why the following orders should not be made.

- a) That the respondent be and they are hereby interdicted and restrained from preventing the second applicant from taking up his position as ministerial representative at Mtubatuba Local Municipality.
 - b) That the respondents are hereby directed to facilitate the second applicant's appointment as Ministerial representative at Mtubatuba 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.
 - c) That the respondents pay the costs of the application.
2. That paragraph 2, 5 and 6 of the Notice of Motion are granted as final orders save for the reference to the second applicant in paragraph 6.
 3. The cost of the hearing on 14 March 2023 are reserved.'

[13] Although the typed order does not set out the contents of paragraphs 2, 5 and 6 these paragraphs read as follows:

'2. That the respondents be and they are hereby interdicted and restrained from preventing members of the public and officials of the Department of Cooperative Governance and Traditional Affairs from gaining access to the municipal offices from official business and are directed to unlock the main gates during normal operating hours and to do all such things and give such instructions as are necessary to remove vehicular blockages of the entrance to the main gate of the municipal offices.

3....

4....

5. The respondents are interdicted and restrained from causing the entrance gates to the municipal offices being locked during normal operating hours and from creating any obstruction or disturbance that prevents access to the municipality premises or encouraging others to do so.

6. The South African Police Services are requested to comply with reasonable requests that may be addressed to them to assist the second applicant and officials of the Department of Cooperative Governance and Traditional Affairs to exercise the rights conferred in this order.'

[14] Apparent from a reading of the order is that the relief sought, in so far as it is related to the second applicant, was not granted and a rule *nisi* was issued for their determination on the return date. On the return date, Balton J adjourned the matter to the normal opposed roll and advised the parties to approach the Judge President

of the Division for a preferential date once the court papers were complete. The date obtained on the normal opposed roll was 19 February 2024. Once all the papers were delivered the matter was set down for argument on 11 August 2023 and upon hearing the matter, judgment was delivered electronically by Mathenjwa AJ on 15 August 2023. The order granted by Mathenjwa AJ was as set out in paragraph 1(a) to (c) of the order by Moodley J.

[15] Armed with this order, the second applicant was permitted to access the premises of the first respondent. However, on 16 August 2022, the respondents delivered an application for leave to appeal. It is as a result of this application that the applicant approaches this court in the current application.

Analysis

[16] The respondents argued that there was no basis for the applicants to have approached the court on the basis of urgency and that the present application could have been heard when the court dealt with the application for leave to appeal. While they contended that it was practice to do so, they could not substantiate the argument. Section 18 applications are, by their very nature, urgent. This is borne out by the provisions s 18(4) which provides that an appeal must be dealt with on an extremely urgent basis.¹ In view of this and the merits of this case, I am of the view urgency is merited.

[17] As was set out by Sutherland J in *Incubeta Holdings (Pty) Ltd and another v Ellis and another*² the test applicable in ss 18 (1) and (3) applications is as follows:

'It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- First, whether or not "exceptional circumstances" exist; and
- Second, proof on a balance of probabilities by the applicant of –
 - o the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
 - o the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'

¹ See *Trendy Greenies (Pty) Ltd t/a Sorbet George v De Bruyn and Others* (2021) 42 ILJ 1771 (LC) at para 9.

² *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ) para 16.

See also *University of the Free State v Afriforum and Another*,³ *Ntlemeza v Helen Suzman Foundation and Another*,⁴ *Premier for the Province of Gauteng and Others v Democratic Alliance and Others*⁵ and *Knoop NO and Another v Gupta (Execution)*.⁶

[18] In Sutherland J's opinion, 'exceptionality must be fact-specific' and relates to the circumstances which are or may be derived from the actual predicaments in which the given litigants find themselves.⁷ In *S v Liesching and Others*,⁸ it was held at para 39:

'The phrase "exceptional circumstances" is not defined in the Superior Courts Act. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as "ordinary" in one case may be treated as "exceptional" in another.'

[19] In *Knoop NO and Another v Gupta (Execution)*, the court held:

'In the context of s 18(3) the exceptional circumstances must be something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from. It is a deviation from the norm. The exceptional circumstances must arise from the facts and circumstances of the particular case.'

[20] In line with the requirements of s 18(3), the applicants aver that exceptional circumstances exist justifying the granting of the relief they seek by reason of the important oversight function required in relation to the functioning of the first respondent, which function can currently only be performed by the second applicant as the ministerial representative. The second applicant must, in the performance of such functions, approve expenditure of the first respondent amongst other oversight functions. A detailed list of his terms of reference as set out in his appointment letter included preparing and implementing a recovery plan, being a signatory to the first respondent's bank account, acting as a chairperson of the interim finance committee

³ *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) paras 5-6.

⁴ *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) paras 19-22.

⁵ *Premier for the Province of Gauteng and Others v Democratic Alliance and Others* [2021] 1 All SA 60 (SCA) para 9.

⁶ *Knoop NO and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA) para 45.

⁷ *Incubeta Holdings (Pty) Ltd* para 22.

⁸ *S v Liesching and Others* 2019 (4) SA 219 (CC).

to manage and monitor cash flow; ensuring the implementation of financial systems, policies and procedures, implementing governance systems, investigating fraud, maladministration and corruption, implementing remedial action plans regarding negative findings from the Auditor General, managing disciplinary processes of Senior Managers and implementing and enforcing forensic investigation findings.

[21] In view of the conduct of the respondents, the second applicant is prevented from performing his duties which is highly prejudicial to the applicants, the interests of justice and the delivery of service.

[22] The respondents aver that they complied with the order of Moodley J and the premises of the first respondent were opened and accessed by the public since 14 March 2023 with the exception of the second applicant since he had been excluded from the operation of the order. This confirms the applicant's case that the second applicant was prevented from performing his duties in accordance with his appointment and substantiates the basis for the applicants to have approached court as a matter of urgency on 14 March 2023. In its application, the applicant contends that there is a state of lawlessness with the first respondent.

[23] This is disputed by the respondents. The respondents also raise the fact that it is exercising its right to review the first applicant's decision to appoint the second applicant. The respondents have not disputed the applicant's averment that since the review was struck off from the roll for want of urgency, no further steps were taken to pursue it. In any event, it is trite that the launching of a review does not, in the absence of agreement between the parties or a court order, automatically suspend the operation of the impugned decision.

[24] While the applicants aver that the respondents refused to comply with the order before the delivery of the application for leave to appeal and thereafter, the respondents deny this. They contend that despite the delivery of the application for leave to appeal on 16 August 2023, the second applicant attended at the premises of the first respondent on the same day, was allowed to enter and had a meeting with Mr Senzo Masuku. He was back at the premises on 17 August 2023 and met with the third respondent and on 21 August 2023, when he met with Mr Masuku again.

Consequently, the respondents dispute that it had refused to comply with the order and accordingly deny that the balance of convenience favours the granting of the relief.

[25] I agree with the applicants that the balance of convenience supports the second applicant being able to perform his functions as assigned. This is because of the nature and extent of his functions which are crucial not only to the applicants but to the greater community within the first applicant to whom service must be rendered. In view of the functions delegated and to be performed by the second applicant, it is in the interest of justice that the order granted by Mathenjwa AJ is operational. It is noteworthy that the respondents aver that the second applicant attended at the first respondent for the two meetings and not that he was there to perform his duties/functions. The nature and extent of those meetings have not been revealed to the court. Also noteworthy is the fact that the respondents are still pursuing the application for leave to appeal, which while it is their right, demonstrate their unwillingness to be bound by the order. The effect of this is the continued hindering of service delivery. A state of affairs which has been in place since the appointment of the second applicant, approximately eight months ago.

[26] The respondents aver that there are no exceptional circumstances to justify the enforcement of the order pending appeal. This is because on 9 May 2023, it appointed a Chief Financial Officer and advised the first applicant, without any objection. On 2 June 2023 it uploaded its budget for the 2023/24 financial year to the Provincial Treasury portal and received feedback on 3 August 2023. On 9 June 2023 it submitted its approved IDP to the Department of first applicant for assessment, which assessment has not been completed. On 8 August 2023, it submitted its performance agreement to the provincial COGTA, which was acknowledged on 15 August 2023. There was an infrastructure expenditure report issued by the Department of the first applicant and the first respondent is one of the top four municipalities which has the MIG expenditure grant according to norms. On 18 August 2023, the municipal audit and performance committees held meetings with AFS. Over the period January 2023 to 15 August 2023, there were ten meetings of council. This, it was averred, were signs that the first respondent was fully functional or compliant. It managed to do all this without the second applicant.

[27] The applicants aver that the second applicant has statutory duties to perform in the administration of the first respondent subject to s 139(1) of the Constitution. He is prevented from taking up his position and assuming his function with the result that the first respondent cannot function lawfully. He cannot exercise his statutory oversight role which results in ongoing and irreparable harm. In light of the respondents' application for leave to appeal, there is an urgent need for the order to be brought into operation to prevent this harm.

[28] The respondents contend that it had, in the main application before Moodley J, made out a case for the second applicant's misdemeanours, while he was the first respondents Municipal Manager and while he was in Endumeni Municipality, hence Moodley J was persuaded not to grant the order. Those misdemeanours have not been placed before me in the current application. Notably, the court per Mathenjwa J, after considering the issues placed before him deemed it fit that the order be made operational. Also, of importance is the fact that the respondents have not acted on the review application they implemented which would, in my view, be the correct platform to deal with the misdemeanours, if any.

[29] The fact that the respondents have continued to perform these functions without the second applicant's involvement is highly concerning. There was a clear directive to the first respondent by COGTA, Treasury and SALGA to that of the PEC that the first respondent is and remains under intervention/administration. There is no evidence placed before me that the circular was rescinded nor the resolution by the PEC withdrawn. In the absence of these, the respondents were not empowered to have acted as they did. The fact that some of the conduct or documents were received by the office of the first applicant does not justify the respondents conduct. It is a worrying factor that those managing affairs of the first respondent and the well-being of its community are not abiding by the necessary laws and or regulations and have seen it fit to do as they please.

[30] The first applicant continues to pay the second applicant a salary for services which are not performed. Since the second applicant has availed himself to render the services in accordance with his employment contract, the first applicant

continues to and is obligated to pay his salary with no services being received. This is indeed harm which is irreparable.

[31] According to the applicant, there can be no irreparable harm suffered by the respondents if the order was made operational. Indeed, none has been set out by the respondents themselves. If, on the respondents' version, they conformed with the order by allowing the second applicant in the premises, this, after filing their application for leave to appeal, then it clear that they are willing to have the order enforced pending the finalisation of the appeal.

[32] On the facts of this case, I find that the applicants have proved the existence of exceptional circumstances and satisfied the requirements of irreparable harm with no harm to be suffered by the respondents.

[33] On the issue of costs, both parties sought cost orders against the unsuccessful party as is the norm. I see no reason why such an order should not be granted.

Order

[34] Accordingly, the following order is granted:

1. Paragraphs 1 and 2 of the order granted by Mathenjwa AJ on 15 August 2023 are brought into operation and are not suspended pending any application for leave to appeal or an appeal should leave to appeal be granted.
2. The respondents are to pay costs occasioned by their opposition.

Masipa J

APPEARANCE DETAILS:

For the Applicants: Adv. M Pillemer SC

Assisted by: Adv. M Mbonane

Instructed by: TKN Incorporated

For the Respondents: Adv. U Lennard

Assisted by: Adv. N xulu

Instructed by: SM Mbatha Inc.

Matter heard on: 22 August 2023

Judgment delivered on: 4 September 2023