REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number 90/2004
Reportable

In the matter between:

NORTHERN FREE STATE DISTRICT MUNICIPALITY **APPELLANT**

and

VG MATSHAI **RESPONDENT**

CORAM: SCOTT, FARLAM, CLOETE, LEWIS JJA et MAYA AJA

HEARD: 3 MARCH 2005

DELIVERED: 30 MARCH 2005

SUMMARY: Local Government – meetings – power of speaker of district municipal council to adjourn meeting.

JUDGMENT

FARLAM JA

[1] The appellant in this matter, the Northern Free State District Municipality, appeals against a decision delivered on 25 September 2003 in the Free State High Court by Van der Merwe J, with whom Hattingh J concurred, setting aside a decision taken by the appellant's council on 20 May 2003 to remove the respondent from her position as the speaker of the council, confirming that the respondent retained her position and status as speaker in all respects as from 20 May 2003 and ordering the appellant to pay the costs of the application.

[2] A special meeting of the appellant's council was held on 20 May 2003. Item 6 on the agenda was a motion for the removal of the respondent as speaker of the council. According to the motion it was submitted in terms of s 40 of the Local Government: Municipal Structures Act 117 of 1998, read with Rule 87 of the Standard Rules and Orders.

[3] At a stage of the meeting when only items 6 and 7 had not been dealt with, the respondent, as it is put in the minutes,

'suggested and ruled that item 6 which is the first item on the agenda be delayed and discussed at the end'.

It appears further from the minutes that one of the councillors, Councillor JETR Ramokhoase 'challenged [this] ruling and proposed that the sequence of the items on the agenda be maintained' and that another councillor, Councillor GP Mandelstam, 'advised the Speaker that it is not

within her powers to rule over the changes in the sequence of the items on the agenda but it is the Council that has to decide'.

[4] The respondent, who, as has been seen, had ruled that item 6 be discussed after item 7 and at the end of the meeting, then ruled that item 6 not be discussed at the meeting at all. The reasons she advanced are set out as follows in the minutes:

'1. Minutes of special council meeting held on 17 April 2003 were corrected; as a result item 6 should have not formed part of the agenda dated 20 May 2003.

2. The Special Council Meeting (no 5 of 2002/2003) was specifically convened to discuss item 7 and further that she, cllr Matshai, was not consulted about the inclusion of item 6 on this agenda.

3. She did not receive any correspondence from the initiator of the motion, cllr Ramokhoase, with regard to the discussion of this item.

4. She was not given sufficient notice to structure her defence and further that councillors were not given 7 days notice.

5. Since 21 days have passed, she was under the impression that the motion has lapsed.'

(The correction to which she referred in the first of her reasons read as follows:

'The resolution [on item 6] should read … thus:

"That the item on the motion for the removal of speaker in terms of rule 87 of the Standard Rules and Orders be postponed to the special meeting that will be announced in due course."')

[5] The executive mayor replied to the reasons advanced by the

respondent for her ruling, saying that at a meeting held on 13 May 2003 between the respondent, the municipal manager and himself it was agreed that item 6 should form part of the agenda for the council meeting to be held on 20 May 2003.

[6] After further discussion the council resolved that item 7 be discussed first and that, despite the respondent's ruling on item 6, it also be discussed. Item 7 was then postponed to the next special council meeting to be held two days later. After item 7 was discussed the respondent left the council chamber after purporting to adjourn the meeting.

[7] The meeting continued in the absence of the respondent. Councillor Ramokhoase, accompanied by two other councillors, was sent to inform the respondent that the council intended to continue with the discussion of the motion and to give her the opportunity to respond appropriately, whereupon the meeting was adjourned to await the respondent's response. After some time Councillor Ramokhoase returned and reported that the respondent refused to participate in the proceedings and to respond to the motion. The meeting then continued and item 6 was discussed. In terms of Rule 87(9) of the Standard Rules the municipal manager presided as non-voting chairperson.

[8] The motion for the removal of the respondent from her office as speaker was carried unanimously and Councillor GT Hadebe was

elected as speaker for the remainder of the council's term of office.

[9] The respondent then instituted proceedings in the Free State High Court for an order (a) declaring that portion of the meeting which took place after she adjourned it to be null and void, alternatively setting aside the decision to remove her from her position as speaker; (b) confirming her position and status as speaker in all respects, including her salary, powers and benefits; and (c) that the respondents in the court *a quo,* that is to say the present appellant, the municipal manager and the councillors who voted for the resolution removing the respondent as speaker, pay the costs.

[10] In her founding affidavit the respondent stated that she was only notified on 19 May 2003 that the motion for her removal as speaker was to be considered at a special meeting of the council to be held the next day. She denied that a meeting between herself, the executive mayor and the municipal manager took place on 13 May 2003 at which it was decided that item 6 should form part of the agenda of the meeting to be held on 20 May 2003. She indicated that her counsel would address the court on the question as to whether she received the fair hearing to which she was entitled before the decision was taken to remove her as speaker, her attitude being that she had not been given proper notice of allegations against her. She also indicated that it was her contention that she had validly adjourned the meeting before item 6 was discussed and

that the proceedings thereafter were irregular, with the result that the decision then taken was invalid.

[11] All the respondents in the court *a quo,* with one exception, opposed the application. The main affidavit filed in opposition to the application was deposed to by Mr B Molotsi, the municipal manager. In his affidavit the deponent denied that the respondent only received notice of the agenda of the special meeting on 19 May 2003. He confirmed the accuracy of the statement made at the meeting on 20 May by the executive mayor which has been referred to in para 5 above. As the respondent sought an order in the application without resort to oral evidence, the application had to be determined on the basis of the facts set out in Mr Molotsi's affidavit (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E to 635C).

[12] The court *a quo* held that the respondent's ruling that item 6 could not be discussed at the meeting and her action in adjourning the meeting 'even if made *ultra vires* or without good cause' (matters on which Van der Merwe J said that he expressed no opinion) 'could simply not be ignored.' The learned judge continued:

'It is a fundamental principle of our law that no one may take the law in his or her own hands. This is in my view part and parcel of the rule of law, the supremacy of which is reaffirmed in Section 1(c) of the Constitution. To ignore such a ruling and adjournment, amounts in my view to taking the law in own hands. The ruling and the

adjournment stand as official acts until overturned or set aside by a court on review. This is the procedure that could have been taken by anyone aggrieved by the ruling and the adjournment, which was not done.

What in fact happened was that the aforesaid ruling was simply ignored by the decision to nevertheless discuss the matter. The argument that the resolution to continue was taken before adjournment loses sight hereof. Similarly the adjournment was ignored by the continuation of the meeting thereafter. It is rightly not suggested that a new meeting was convened. The respondents therefore, in my view, misconceived their remedy. Whatever the view was of the respondents as I have indicated, the ruling and the adjournment stood as official acts that could not be ignored.

It follows that the decision on 20 May 2003 to remove the applicant on the basis that it took place as I have quoted was invalid and must be set aside.'

[13] I cannot agree that in acting as they did after the respondent purported to adjourn the meeting the members of the council took the law into their own hands. They did nothing of the kind. In ignoring the ruling and adjournment by the respondent and proceeding with the meeting and a consideration of item 6 they undoubtedly acted at their peril, as it were, in that if it were subsequently held that the ruling and adjournment were valid then the decision they took would *ex hypothesi* be invalid.

[14] Mr *Edeling,* who appeared for the respondent, submitted that the respondent's ruling and her action in adjourning the meeting stood and had legal consequences until set aside by a court of law. In support of

this proposition he relied on the recent decision of this Court in *Oudekraal Estates Pty Ltd v City of Cape Town* 2004 (6) SA 222 (SCA), in which it was held (para 26 at 242A-C) that until invalid administrative action is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that cannot simply be overlooked.

[15] I do not think that the principle upheld in the *Oudekraal* case can be applied in this matter. One of the issues in that case was whether the first respondent, the City Council, was entitled to justify its refusal to approve an engineering services plan for a township by relying on what was described as a collateral challenge to the validity of the earlier decision by the Administrator to approve the township. This Court held the council was not entitled to justify its refusal to approve the plan by raising a collateral challenge to the Administrator's approval of the township. It was required to perform its public duty in relation to the proposed plan and could only rely on the alleged invalidity of the township approval once it had succeeded in a direct challenge to set it aside. In paras 29 to 31 (at 243A-244A) reference was made to cases where a prior administrative act forms the basis for a subsequent administrative act. In such a case the subsequent act will be valid, even if the prior act was invalid, unless the legal, as opposed to the factual, existence of the prior act is a precondition to the subsequent act. Considerations of this kind do not arise in the present case. This case

does not concern an attempt to justify a refusal to take action which depends for its validity on the validity of an earlier act which it is now said was invalid.

[16] This is really a converse case: subsequent action was taken and its validity depends not on the validity of the previous action but its invalidity. In such a case, in my view, there is no legal basis for holding that it was not competent for the councillors who believed the adjournment to be invalid, to proceed as if it were; this must obviously be subject to the qualification that if they were wrong, and the adjournment were valid, then their proceedings thereafter would be invalid.

The *Oudekraal* case can also be distinguished from the present case on the basis that the ruling presently under attack is not administrative action such as was under consideration therein. In view of the fact that the point was not fully canvassed in argument before us I shall refrain from elaborating on this aspect of the case.

[17] It follows from what I have said that the court *a quo* erred in granting the order sought by the respondent without deciding on the validity of the purported adjournment by the respondent.

To this question I now turn.

[18] The usual place to look in order to ascertain whether and, if so, in what circumstances the person presiding over a meeting is empowered to adjourn the meeting is the constitution of the body which is holding the

meeting or, if they exist, its standing rules. It is common cause in this case that although the appellant's council informally accepted the Standard Rules and Orders published, in terms of section 148A of the Local Government Ordinance 8 of 1962 of the Province of the Free State, in Provincial Gazette no 140A of 1 December 2000, it did not adopt them as regulations made by it in terms of s 148A(2). It follows that they cannot be regarded as the source of the power which a person presiding over the appellant's council had to adjourn the proceedings. Such adoption is necessary for the rules and orders to acquire legal force in the appellant's area of jurisdiction.

[19] There is also, as far as I am aware, no provision in the Constitution or any national or provincial legislation which deals with the powers of a speaker of a local authority such as the appellant's council to adjourn the proceedings of the council. It follows that the answer to the question as to whether the respondent had the power to adjourn the proceedings of the appellant's council as she purported to do before it began discussing item 6 has to be found in the common law.

[20] The common law on the topic was discussed by Lichtenberg AJ in *Jonker v Ackerman* 1979 (3) 575 (O) in which it was pointed out (at 583A) that such South African decisions as there are rely on English authority. This is not surprising because the English case law contains a number of decisions in which the law on the point is expounded in a

systematic manner which appears to be in accordance with both common sense and justice.

[21] The effect of the English decisions is summarised as follows in *Halsbury's Laws of England* 4 ed (2003 reissue), vol 6, para 148 as follows:

'It is the duty of the chairman of a meeting to preserve order and to ensure that the proceedings are properly conducted, so that the sense of the meeting regarding any relevant question is duly ascertained. He has no authority to terminate the meeting at his own will and pleasure but has an inherent power to adjourn the proceedings in the event of disorder. This power to adjourn must be exercised *bona fide* for the purpose of facilitating and forwarding the business and not for the purpose of procrastination. Such adjournment should be for no longer than is required in the circumstances for the restoration of order.'

[22] The case relied on for the proposition that a chairperson has no authority to terminate the meeting 'at his own will and pleasure' is *National Dwellings Society v Sykes* [1894] 3 Ch 159, which was cited with approval by Gane J in *Neale v Mayor, East London* 1935 EDL 225 at 235 and in *Jonker v Ackerman, supra,* at 583A–H. The *National Dwellings* case, *supra,* concerned an ordinary general meeting of a company at which a resolution was moved that the reports and accounts be received. A counter-resolution was then moved for the substitution of the main resolution of a resolution that a committee of investigation be appointed to ascertain the position of the company. The chairman,

Sykes, ruled this resolution out of order, whereupon the original resolution was put and lost. The chairman then declared the resolution to be lost and said that he dissolved the meeting. He then vacated the chair and left the room, being accompanied by a few shareholders. The shareholders left in the room unanimously elected another chairman and proceeded to pass resolutions. Chitty J held that the meeting had validly continued despite Sykes's attempt to adjourn it. He said (at 162):

'A question of some importance has been mooted in this case, with regard to the powers of the chairman over a meeting. Unquestionably it is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are conducted in a proper manner, and that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting. But, in my opinion, the power which has been contended for is not within the scope of the authority of the chairman – namely to stop the meeting at his own will and pleasure. The meeting is called for the particular purposes of the company. According to the constitution of the company, a certain officer has to preside. He presides with reference to the business which is there to be transacted. In my opinion, he cannot say, after that business has been opened, "I will have no more to do with it; I will not let this meeting proceed; I will stop it; I declare the meeting dissolved, and I leave the chair." In my opinion, that is not within his power. The meeting by itself (and these articles certainly apply to what I have said) can resolve to go on with the business for which it has been convened, and appoint a chairman to conduct the business which the other chairman, forgetful of his duty or violating his duty, has tried to stop because the proceedings have taken a turn which he himself does not like.'

[23] An earlier case on the point, mentioned in *Shackleton on The Law and Practice of Meetings* 8 ed by I Shearman at p 72, is *Stoughton v Reynolds* (1736) Fort 168; 92 ER 804, a decision of the Court of King's Bench. In this case a vestry meeting was held for the election of churchwardens. Before the election was completed the vicar, who was in the chair, adjourned the meeting to the next morning against the wish of many present. Stoughton's supporters stayed behind and elected him. The next morning the vicar and his supporters sat and elected another person as churchwarden whereafter Reynolds, the chancellor of the diocese, declined to admit Stoughton to his office as churchwarden on the ground that another person had been chosen churchwarden. The issue debated at the bar was whether the right to adjourn was vested in the meeting or in the vicar. Lord Hardwicke CJ said (at 170):

'The whole of this case will turn upon the adjournment. At the trial no precedent could be found to satisfy me; and I do not believe any can be found. … I do not find any such opinion [i.e at common law] to vest a power in the person …. If therefore it is not in the vicar, it is said it must be in the church-wardens, but I cannot find it is; and I do not think it can be said to be in any one of them. In whom then can it be, but in the assembly itself? And the right must be in the body ….'

Page J said (at 172):

'Lord Holt was of opinion, that tho' the mayor left the assembly, yet the burgesses must proceed. …'

Lee J said (also at 172):

‘the parson perhaps has a right of sitting from his freehold in the church. But I do not think that can any ways give him greater right or authority than any of the other members of the assembly …’

In the latest English case on the point that I could find, *Byng v London Life Association and Another* [1990] Ch 170 (C.A.), the *National Dwellings* case was cited by Sir Nicolas Browne-Wilkinson VC (at 186B-C) as authority for the proposition that ‘[a] chairman has no general right to adjourn a meeting at his own will and pleasure, there being no circumstance preventing the effective continuation of the proceedings’.

[24] I am satisfied that the common law is as set out in the cases I have cited. Its application to the present case leads to the conclusion that the issue the court *a quo* declined to consider has to be decided in favour of the appellant. The decision by the respondent to adjourn the meeting after the council had already decided that it would discuss item 6 and in the absence of circumstances preventing the effective continuation of business was clearly invalid. The action of the council in proceeding with the meeting, in going on with the business for which it had been convened and in appointing a chairman to conduct the business the respondent attempted to prevent was clearly valid as was the decision to remove the respondent from her position as speaker.

[25] Although the respondent purported to bring these proceedings in her capacity as speaker it is clear that the interest she had was personal

to her. It follows, as her counsel was obliged to concede, that the costs order consequent upon the success of the appeal must be made against her in her personal capacity. The same applies to the costs in the court *a quo.*

[26] The following order is made:

The appeal is allowed with costs, to be paid by the respondent in her personal capacity.

The order granted in the court below is set aside and the following order is substituted therefor:

'The application is dismissed with costs, such costs to be paid by the applicant in her personal capacity.'

……..

IG FARLAM
JUDGE OF APPEAL

CONCUR
SCOTT JA
CLOETE JA
LEWIS JA
MAYA AJA