



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

Case No:

13181/2022

In the matter between:

PHILANI GODFREY MAVUNDLA

APPLICANT

and

**THE SPEAKER OF THE ETHEKWINI
MUNICIPALITY MUNICIPAL COUNCIL**

FIRST RESPONDENT

**ETHEKWINI MUNICIPALITY: MUNICIPAL COUNCIL
RESPONDENT**

SECOND

**CHIEF WHIP: OF THE ETHEKWINI
MUNICIPALITY (MUNICIPAL COUNCIL)**

THIRD RESPONDENT

ETHEKWINI MUNICIPALITY

FOURTH RESPONDENT

MUNICIPAL MANAGER, ETHEKWINI MUNICIPALITY

FIFTH RESPONDENT

AFRICAN NATIONAL CONGRESS

SIXTH RESPONDENT

THEMBUBUHLE NTULI

SEVENTH RESPONDENT

ORDER

The following order shall issue:

1. The application for interim relief is dismissed.
2. The issue of costs is to stand over for determination with the review application.

JUDGMENT

Delivered on: 30 December 2022

Masipa J:

[1] On 12 December 2022, the applicant became aware of an urgent notice of motion for an agenda item to be placed before a meeting of the second respondent. Arising from this, an urgent application was brought to court by the applicant on the same day and a rule nisi was granted by ZP Nkosi J (Nkosi J), with 3 February 2023 as the return date. The terms of the rule nisi were as follows:

1. That the rule nisi is hereby issued calling upon the respondents and any other interested party to show cause, if any, as to why on 3 February 2023 at 09h30 or so soon thereafter as counsel maybe heard, an order along the following terms should not be made final:
 - 1.1 It is declared that the applicant is, in terms of Section 43 of the Structures Act 117 of 1998, a member of the fourth respondents Executive Committee of the eThekweni Municipal Council for a period ending when the next Local Government elections are declared or until such time as the fourth respondent's municipal council is changed, whichever occurs first;
 - 1.2 It is declared that the applicant shall remain the Deputy Mayor of the eThekweni Municipality of the Municipal Council until he resigns as Mayor or Deputy Mayor; or is removed from office as a member of the executive committee in terms of section 53; or ceases to be a member of the executive committee.
 - 1.3 The first, second, third and sixth respondents are interdicted and restrained from considering, deliberating and/or taking any decision at a Municipal Council meeting, to remove the applicant from the position of member of the fourth respondents Executive Council and Deputy Mayor of the eThekweni Municipality without complying with the provisions of section 48(4)(b) and 53(1) of the Structures Act and item 18 and 22 of the fourth respondent's

rules of order By-Law 2014, published in the Provincial Gazette 1185 of 11 July 2014 (“the Rules of Order”).

- 1.4 Any of the respondents opposing this application be and is/are directed to pay the applicant’s costs, jointly and severally, one paying the others to be absolved such costs to include the costs consequent upon the employment of 2 counsel, including senior counsel.
- 1.5 Further and/or alternative relief.
2. Paragraph 1.3 above shall operate as an interim interdict above with interim effect pending the finalisation of this application.’

Paragraph 1.3 of the order of Nkosi J (the order) appears to be contentious in the present application.

[2] Subsequent to the granting of the order, the applicant approached the court again on 15 December 2022 on the basis of urgency, seeking inter alia relief that the first respondent be held in contempt of court arising from an order by Nkosi J on 12 December 2022 and, reviewing and setting aside the decision taken by the first to third respondents on 13 December 2022 which resulted in his removal as a member of the fourth respondent’s executive committee (EXCO) and its deputy mayor (the positions). The applicant sought relief for the removal of the seventh respondent from its ten member EXCO which relief was withdrawn during argument and will accordingly not be dealt with in the judgment.

[3] On 15 December 2022, an adjournment was granted to 23 December 2022 to allow for the exchange of affidavits. The matter was accordingly argued as an opposed matter on 23 December 2022 where interim relief was sought to interdict and restrain the first and second respondents from implementing the decision to remove him and for his reinstatement to the positions mentioned in paragraph 2 above.

[4] The applicant was removed from the positions following a meeting of the members of the second respondent on 13 December 2022. The first respondent is the speaker of the second respondent and is by virtue of his position designated to receive notices of motion for agenda items to be discussed at the meetings of the second respondent. In the ordinary course of things, a notice of motion must be received by the first respondent at least ten days prior to the meeting as set out in

rule 18(4) of the Ethekewini Metropolitan Municipality Order By-Law 2014 (the Rules). The applicant's matter relates to an urgent notice of motion which is regulated by rule 22 of the Rules.

[5] The applicant contends that the effect of the order was that the first respondent could not proceed with the agenda item relating to his removal from the positions and that any such conduct constituted non-compliance with the order. He contends further that the first respondent breached the order when he issued a notice for the meeting at 18h00 on 12 December 2022 for the motion to be discussed at 10h00 the following day. The motion was tabled on 13 December 2022 and following votes, the applicant was removed from his positions.

[6] The test for the granting of interim interdicts is trite. The applicant contends that in removing him from the two positions his rights guaranteed by s 19(3)(b) and s 160(8) of the Constitution, 1996 were infringed. The respondents conceded that the applicant has the rights as contended. They limited the issues for determination to whether he has established a breach of such rights to entitle him to the relief sought. Accordingly, that the applicant had a prima facie right was not in dispute.

[7] The applicant, relying on *Ingquza Hill Local Municipality and another v Mdingi* [2021] 3 All SA 332 (SCA) para 13, argued that there had to be inclusive deliberation prior to a decision to remove a member of the executive council to give effect to s 160(8) of the Constitution. His case was that there was non-compliance with rule 22(1A) of the Rules prior to the motion for his removal being placed on the agenda. Secondly, that there was non-compliance with s 53(1) of the Local Government: Municipal Structures Act 117 of 1998 (the MSA) which required that a proper notice of motion be given to councillors prior to the issue being considered.

[8] The applicant contended that in terms of rule 22(1A), prior to placing an urgent motion on the agenda, the first respondent must 24 hours prior to scheduling a meeting, take into account five factors being:

'(a) whether the subject matter of the request is of such a serious nature that it requires immediate attention;

- (b) whether the subject matter of the request relates to a specific matter of recent occurrence;
- (c) whether the request is confined to one subject matter;
- (d) whether the request can be dealt with by some other means in the near future; and
- (e) whether the request concerns a matter for which the Council may be held responsible.'

[9] It was argued that the first respondent failed to show compliance with rule 22 (1A), and accordingly, that this court should accept that there was non-compliance with the relevant rule. Additionally, that the first respondent did not set out any other factor(s) he took into account in placing the urgent motion on the agenda.

[10] The applicant therefore contended that the first respondent's decision falls to be reviewed and set aside in terms of s 6(2)(f) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in that the decision was not rationally connected to either the purpose of rule 22(1A) or the information before the first respondent. He contended that the second respondent's conduct was aimed at circumventing the order by Nkosi J and was irrational.

[11] The respondents contended that the first respondent stated under oath that he considered the factors set out in rule 22(1A) and concluded that the motion was confined to one issue, being the removal of the applicant from the positions. Also, that this was pursuant to a recent occurrence of a serious nature which requires immediate attention. It was argued that the court should therefore accept that the first respondent complied with the provisions of rule 22(1A).

[12] Although the first respondent has not set out in detail how he considered the factors set out in rule 22(1A), I accept for purposes of determining the interim relief sought that he did so. This is because he received the motion in compliance with rule 22 and, eight hours later, issued the notice for the meeting to be held 16 hours later. The first Respondent states in the answering affidavit that he considered the motion together with the motivation submitted by Councillor Yolanda Young (Councillor Young). I am of the view that he had sufficient time to consider the factors set out in rule 22(1A).

[13] I disagree with the applicant that the first respondent's conduct in issuing the notice of the meeting was orchestrated to by-pass the order by Nkosi J. It is common cause that when the urgent application was heard on 12 December 2022, the first respondent had received the notice of motion together with the motivation from Councillor Young. His actions which followed thereafter were a natural progression in the process of the fourth respondent's rules, that being that the notice of agenda/meeting is the next step after a consideration of the notice of motion.

[14] As regards s 53(1) of the MSA, two aspects were raised, the first being whether issue estoppel applies by virtue of Nkosi J's judgment, it being contended that the issue was determined on 12 December 2022. Section 53(1) provides that: 'A municipal council may, by resolution remove from office one or more or all the members of its executive committee. Prior notice of an intention to move a motion for the removal of members must be given.'

and secondly, the merits relating to the issuing of prior notice.

[15] The applicant contended that in determining whether there was compliance with s 53(1) of the MSA, Nkosi J found that no meaningful notice could have been given after the granting of his judgment. Further, that efforts by the first respondent to place the motion on the agenda of the second respondent's meeting to make the decision on 13 December 2022 that would accord with the compliance of the stated law. The applicant therefore contends that arguments to the contrary are struck by issue estoppel as this was the same issue between the same parties when Nkosi J made his findings.

[16] The respondents contended that contrary to the 24 hour notice provided in rule 22(1), no time frame has been set under s53(1) for the giving of prior notice. The chronology of the motion was that notice was given to all council members on 12 December 2022. The court per Nkosi J was called upon to determine whether such conduct would amount to reasonable notice when it was determined that the first respondent should comply with s 53(1) of the MSA.

[17] According to the respondents, what was before Nkosi J was the applicant's fear that the first and second respondents would move for his removal from the positions without complying with the notice requirement as envisaged in s 53(1) of the MSA and rules 18 and 22 of the Rules.

[18] As was set out in *Inguza* para 14, it is common cause that prior notice has to be given to all members of the second respondent to afford them opportunity to be aware and consider the motion before it is tabled for discussion and, to provide an opportunity to engage meaningfully in the debate before a resolution is taken.

[19] Nkosi J found that since compliance with s53(1) of the MSA had not occurred when the matter came before him and the motion was likely to serve at a meeting scheduled for 13 December 2022, it was unlikely that prior notice could be given. He found further that the non-compliance with not accord with the law set in *Inguza*.

[20] The respondents argued that Nkosi J was dealing with the provisions of prior notice as set out in s 53(1) of the MSA. The respondents argued further that Nkosi J went no further than to express doubt that the notice of motion would be given before the convening of the meeting and that if no prior notice was given, then the provisions of s 53(1) would not be complied with. I agree with the respondents' argument in this regard and am of the view that the issue of what a reasonable notice would be in relation to s 53(1) was never addressed by him accordingly. The respondents' conduct is therefore not struck by issue estoppel.

[21] According to the applicant, for him to have been lawfully removed from the executive council, there had to be lawful prior notice as envisaged by s 53(1) of the MSA. It was submitted that the requirement of prior notice as envisaged in *Inguza* was one which afforded the applicant opportunity to be aware of the motion to be moved, afforded the applicant and councillors opportunity to consider the motion before it was tabled for discussions and which provided all council members with opportunity to engage '*meaningfully in the ensuing debate*' before a resolution is taken. (my emphasis).

[22] Relying on *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 13, the applicant was submitted that the purpose of statutory prior notice required that an affected party be afforded opportunity to investigate claims brought, consider them and make a decision on such claims. It was submitted that a similar rationale applies in respect of all statutory notification provisions. I disagree with this submission since prior notice as envisaged by s 113(1) of the Defence Act 44 of 1957, which *Mohlomi* considered related to instances where one intended instituting legal action and prior notice was required to afford the other side opportunity to investigate the possible claim and to deal with it accordingly. It was also aimed at securing relevant information which may be used in a subsequent action if the matter is not settled while notice in terms of s 53(1) of the MSA relates informing members of the council of the notice of motion and allowing them time to prepare their engagement at the meeting.

[23] The applicant submitted further that in the present case, the fourth respondent's councillors were only afforded the morning of 13 December 2022 to grapple with the motivation and the motion. This submission cannot be correct since notice was given at 18h00 on 12 December 2022, 16 hours prior to the meeting.

[24] The notice of the meeting was criticised as not allowing for meaningful engagement since it was said not to highlight any specificity of actual direct transgressions to motivate for the applicant's removal. Having sought further information from the motivation, which was not provided, the applicant contends that he could not meaningfully debate with other councillors on his removal. The contended non-compliance with s 53(1) rendered the applicant's removal reviewable on the principle of legality. This contention raised by the applicant could have been raised at the commencement of the said meeting to be considered by members present and a decision taken on that issue.

[25] The respondents contended that in the applicant's letter of 13 December 2022, no complaint of prejudice was raised in regard to insufficient notice. Also, that 198 members were present at the meeting of 13 December 2022 and none took issue with the notice given. The matter was discussed at length and the motion

passed by a considerable margin. The issue of insufficient notice being given was only raised by the applicant in the papers for the present application.

[26] In *Ingquza*, the court observed that the wording in s 53(1) was similar to that in s58 of the MSA dealing with the removal of the executive mayor. In *Democratic Alliance v Matika and others* 2019 (1) SA 214 (NCK) para 43, the court stated as follows:

‘As far as national legislation is concerned, we are of the view that the provisions of s 58 of the MSA are indeed intended to facilitate and achieve the objects in the Constitution, for the simple reason that the democratic right to participate, as intended in the Constitution, cannot be exercised by a member or councillor if he/she is unaware of the fact that the meeting is going to take place.’

[27] What is required is that the notice of motion be served with the notice of the meeting prior to the scheduled meeting. As was said in *Democratic Alliance and another v Masondo NO and another* 2003 (2) SA 413 (CC) para 78, prior notice is intended to allow inclusive deliberation prior to decision-making to give effect of s 160(8) of the Constitution. The question is therefore whether prior notice given by the first respondent satisfied this requirement.

[28] In *Makume and another v Northern Free State District Municipality and others* [2003] ZAFSHC 36, [2003] ZAFSHC 15 (21 August 2003) [also reported in [2007] JOL 21038 (O) para 17 dealing with s 58 of the MSA, it was stated that:

‘. . .in the absence of a proper notice of the intended motion there could have been no valid council resolution to carry the non-existent 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 for the removal of the executive mayor from office. . .The council meeting can only deliberate on items properly placed on the agenda. . . 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. . .It is clear and

obvious that what was done here was done in violation of the duty owed to the mayor and the duty owed to the council at large.' (my emphasis).

[29] Whether timeous notice was given is determined from the provision for urgent motions. If notice for an urgent motion can be given at least 24 hours before the scheduled meeting, then the notice for the meeting as envisaged by s 53(1) of the MSA, will follow thereafter. This means that the notice would be given less than 24 hours before the meeting. The applicant has not challenged the provisions of rule 22(1A). Accordingly, the 24-hour period remains. Having received the notice within 16 hours, none of the councillors including the applicant complained about the sufficiency of time.

[30] Unlike in *Makume*, prior notice of the meeting was issued and taking from the undisputed evidence of the respondents, parties were enabled to discuss and engage each other on the motion lengthily and thereafter vote on the item. Had the issue of the sufficiency of the notice been raised, this would not have occurred, and the motion would probably have been removed or adjourned.

[31] The respondents contend that the first respondent complied with the provisions of s 53(1). The applicant failed to establish that his right to due process in giving notice of the motion has been infringed. I am of the view that the requirements set out in *Masondo* have been satisfied and therefore agree with the respondents.

[32] As regards the balance of convenience, it was contended that the applicant has strong prospects of success in obtaining final relief. Accordingly, that even a temporary removal from his position would constitute prejudice. Conversely, it was contended that no prejudice would be suffered by the second respondent if interim relief is granted since this would cure the improper constitution of the first respondent. The respondents contend that the balance of convenience favours the refusal of interim relief due to the fact that the applicant states in his founding papers that he controls 75% of the municipal budget and is responsible for water and sanitation which is operating in a crisis mode to the prejudice of rate payers. Accordingly, the prejudice to be suffered by the respondents if interim order is granted far outweighs that of the applicant.

[33] The applicant contended that his unlawful removal and continued enforcement constitute a breach of his rights provided in s 19(3) and s 160(8) of the Constitution. Also, that such conduct constitutes irreparable harm which can only be remedied by interim relief. While it is conceded that the applicant is likely to suffer harm if interim relief is not granted, it was submitted that the applicant was not a proportional representative member and that the African National Congress took one of its seats and allocated it to the applicant's political party Abantu Batho Congress. While the applicant is concerned that his political ambitions would be compromised, the respondents argue that the harm they are likely to suffer would outweigh since it impacts on the issue of service delivery.

[34] On the issue of alternative remedy, the respondents submitted that the parties have agreed that the matter be expedited, which means that the review application will be heard much sooner and mitigate any prejudice to either of the parties.

[35] It was submitted by the respondents that costs should be awarded in respect of two senior counsel. I am of the view that the issue of costs can and should be determined with the costs for the review application and will accordingly not rule on the issue.

Order

[36] In the circumstances, I make the following order:

1. The application for interim relief is dismissed.
2. The issue of costs is to stand over for determination with the review application.

Masipa J

DETAILS OF THE HEARING:**Appearances**

For the Applicant :

Instructed by :

For the Respondents :

Instructed by :

Matter heard : 23 December 2022

Date of Judgment : 30 December 2022