

Judge copy



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

Case No: D2225/2023

In the matter between:

SHAMILA SOOKHRAJ

FIRST APPLICANT

DEMOCRATIC ALLIANCE

SECOND APPLICANT

and

THE MUNICIPAL MANAGER OF THE UMDONI

FIRST RESPONDENT

LOCAL MUNICIPALITY

THABISILE NDLELA

SECOND RESPONDENT

THE SPEAKER OF THE COUNCIL OF THE UMDONI

THIRD RESPONDENT

LOCAL MUNICIPALITY

COUNCIL OF THE UMDONI LOCAL MUNICIPALITY

FOURTH RESPONDENT

UMDONI LOCAL MUNICIPALITY

FIFTH RESPONDENT

RAVINAND MAHARAJ

SIXTH RESPONDENT

EXECUTIVE COMMITTEE OF THE COUNCIL OF THE

SEVENTH RESPONDENT

UMDONI LOCAL MUNICIPALITY

THE MAYOR OF THE COUNCIL OF THE UMDONI
LOCAL MUNICIPALITY

EIGHTH RESPONDENT

KWAZULU-NATAL MEC FOR CO-OPERATIVE
GOVERNMENT AND TRADITIONAL AFFAIRS

NINTH RESPONDENT

ORDER

It is ordered that:

1. The decision taken by the first respondent not to implement the appointment by the second applicant of the first applicant to fill the vacancy on the seventh respondent arising from the resignation of erstwhile Councillor Edwin Baptie is declared to be invalid.
2. The Municipal Manager's unlawful decision is reviewed and set aside.
3. It is declared that the appointment by the second applicant of the first applicant to fill the vacancy is valid.
4. The costs of this application, including the costs of two counsel, are to be paid on an attorney and client scale by the second respondent in her personal capacity and jointly and severally by the first, third, fourth, fifth, sixth, seventh and eighth respondents.

JUDGMENT

ZP NKOSI ADJP

Introduction

[1] The applicants brought this matter on an urgent basis to seek an order declaring:

- (a) that the decision by the first respondent, the Municipal Manager of the Umdoni Local Municipality, not to recognise the appointment by the second applicant, the Democratic Alliance (“the DA”) of the first applicant, Councillor Sookhraj, to fill the vacancy on the seventh respondent (“Exco”) is unlawful, and to review and set aside the decision;
- (b) that any decisions taken pursuant to the unlawful decision are null and void; and
- (c) that the appointment by the DA of Councillor Sookhraj to fill the vacancy on the Exco is valid.

[2] The relief sought by the applicants is assailed by the first to eighth respondents upon the basis of a proper interpretation of s 43(2) of the Local Government: Municipal Structures Act¹ (“the Act”). The ninth respondent has not entered the fray.

Background

[3] This matter has its genesis in the results of the 2021 Municipal Elections which were announced by the Electoral Commission of South Africa. Pursuant to the election results (with 37 councillors effectively elected onto council – the African National Congress (ANC) held 17 seats and the DA seven seats) the council of the fourth respondent determined, in a meeting of the council, members of the Exco within 14 days of its election (ANC occupied three seats and the DA two seats). Councillor Edwin Baptie, who had been appointed by the DA as a member of Exco, resigned as a councillor thus creating a vacancy in the council with effect from 29 August 2022.

[4] On 27 July 2022, a by-election was held for Ward 13 of the municipality which was won by the ANC. On 9 November 2022, the DA’s authorised representative advised the Municipal Manager, Speaker of Council and Chief Whip that it had appointed Councillor Sookhraj to fill the vacancy which arose on the Exco.

[5] Instead of implementing the DA’s appointment of Councillor Sookhraj, on 22 February 2023, the council elected Councillor Ravinand Maharaj to fill the vacancy on the

¹ Local Government: Municipal Structures Act 117 of 1998.

Exco. Pursuant thereto, the DA and Councillor Sookhraj approached the court to have the election of Councillor Maharaj to fill the vacancy declared unlawful, which relief was granted, on 24 March 2023, together with ancillary relief for further conduct of this matter, on the further remaining relief sought.

Common cause or undisputed facts

[6] It is common cause that:

- (a) the term of the Executive Committee of the council who assumed office pursuant to declaration by the Electoral Commission of South Africa of the results of the 2021 Municipality Elections is extant;
- (b) Councillor Baptie, who was appointed to the Exco by the DA, resigned as councillor; and
- (c) Councillor Sookhraj was appointed to that vacancy by the authorised representative of the party to which the vacant seat on the Exco was allocated, namely the DA.

Issue(s)

[7] The main issue (others are subsidiary) to be determined in this application is whether the appointment by the DA of Councillor Sookhraj to fill the vacancy on the Exco was valid. The question of what is the effect of that appointment on the purported appointment of Councillor Maharaj has since been resolved in the earlier order which nullified the latter's appointment.

[8] The vexed question still remains, however, as to who has the right to appoint a councillor to fill the vacancy that has occurred. That issue involves no material disputes of fact.

[9] The answer to that question involves a proper interpretation of s 43(2) of the Act.

The legal framework

[10] The award of seats on the Exco to political parties or interests is regulated by a formula prescribed in ss 43(2)(a) to (c) of the Act. In terms of s 43(2)(d) of the Act, the political party or political interest to which seats are allocated to on the Exco must, through an authorised representative, appoint their representatives to occupy such seats.

[11] Section 46 of the Act provides that subject to there being any vacancies, the members of the Exco are determined for a term ending when:

- (a) the type of the municipality has been changed; or
- (b) the next municipal council is declared elected.

It is common cause that neither of these triggering events has occurred and the Exco term is extant.

[12] In terms of s 47 of the Act, a member of the Exco vacates office during a term if that member resigns as a member. It is common cause that erstwhile Councillor Baptie, did so with effect from 29 August 2022. By his resignation, he vacated his office as a member of Exco.

[13] In s 47(2) of the Act, the filling of a vacancy on the Exco is subject to s 43 of the Act. In terms of s 43(2)(e) of the Act, and if there is a vacancy on the Exco, the political party or political interest to which the seat was allocated has the right to appoint a councillor to fill that vacancy.

[14] The correct approach to the interpretation of documents, including legislation like we find in s 43(2)(e) of the Act, was authoritatively restated by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni*.²

[15] This approach requires that the meaning of the words under review should be deduced based on a unitary consideration of:³

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

³ *Ibid* para 18. Also see *Shoprite Checkers (Pty) Ltd v Mafate* [2023] ZASCA 14; 2023 (4) SA 537 (SCA) para 18; *South African Police Service v Public Servants Association* ("SAPS" [2006] ZACC 18; 2007 (3) SA 521 (CC).

- (a) the language used in the relevant clause in the light of the ordinary rules of grammar and syntax;
- (b) the context in which the words in the clause appear; and
- (c) the apparent purpose to which the clause is directed.

Parties' submissions

[16] The applicants submit that:

- (a) the language, context and purpose of s 43(2)(e) of the Act demonstrates that if a vacancy arises on the Exco, the political party to which the seat was allocated is empowered to appoint a councillor to fill that vacancy for the remainder of the council's five-year term;
- (b) that was the Legislature's intention when the section was amended in 2021;
- (c) the DA, which had been allocated the seat, lawfully appointed Councillor Sookhraj to fill the vacancy and thereafter the vacancy was validly filled, as at 9 November 2022; and
- (d) on the uncontested facts, as well as the respondents' own version, the decision to appoint Councillor Maharaj stands to be declared unlawful, *void ab initio* and a nullity, or reviewed and set aside. That it be so, since there was no vacancy to which Councillor Maharaj could have been appointed by the ANC, in January 2023.

[17] On the other hand, the first to eighth respondents ("the respondents") contend that:

- (a) upon a proper interpretation of the provisions of the Act, and in accordance with the formula prescribed in s 43(2)(a) a change in party representation in the council would result in commensurate changes in the allocation of party seats on the Exco (which they refer to as "the proportionality interpretation");
- (b) the relevant provisions of the Act, namely ss 43, 45 and 46 and ss 1(d), 157(2)(b), 160(8)(a) and (b) and 195(1) of the Constitution when read together and in the proper context, make it clear that the textual interpretation preferred by the applicants is inconsistent with the Constitution and falls to be rejected;
- (c) since political parties at a local government level are voted onto a municipal council by members of the public to pursue and ensure delivery of basic services and

pursuant to the provisions of s 43 of the Act, the political parties, in turn, nominate and appoint representatives to the Exco in accordance with the provisions of the Act in pursuance of their mandate, the ANC (as the party with a majority in the council) which has a direct and substantial interest in a judgment and order which purports to interfere with such appointment must be joined in the proceedings together with other political parties before the matter is dealt with on its merits;⁴ and

- (d) the applicants have simply failed to make out a case for the relief sought against the Municipal Manager (to declare as unlawful her decision “not to implement the appointment” of the first applicant by the second applicant to fill the vacancy on the Exco of the council) as they have not, in their founding papers, identified the source of the obligation nor what action she is obliged, or required to take.

Analysis of the applicable legal provisions

[18] The language used in s 43(2)(e) of the Act seems clear. In the event of a vacancy, the authorised representative of the “political party or political interest to which the seat was allocated” is empowered to appoint a councillor to fill that vacancy. There can be no debate on the facts of this matter that the seat in which the vacancy arose was allocated to the DA in 2021.

[19] Section 43(2) was amended in May 2021 by s 20(a) of the Local Government: Municipality Structures Amendment Act.⁵ Previously s 43(2) read as follows:

‘An executive committee must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion they are represented in the council.’

[20] Section 43(2)(e) was introduced by this amendment thereby expressing a plain intention by the Legislature to reserve to a political party a seat that was allocated to it on

⁴ *Khumalo v Wilkins* 1972 (2) SA 470 (N); *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W). Also see Herbstein and Van Winsen: *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 215.

⁵ Local Government: Municipality Structures Amendment Act 3 of 2021.

the Exco for the term of the municipal council. The amended s 43(2) envisages two processes that apply at different times: first, the constitution of the new Exco after local government elections (which is clear from the provisions of s 45(a), which requires the executive committee to be determined within 14 days after the council's election) and thereafter, the filling of any vacancy in that constituted committee by the party to whom the seat was allocated initially. Plainly, there could not be a vacancy when the committee was constituted.

[21] The express wording of the section does not differentiate between circumstances where a vacancy arises on the resignation from the committee or the removal of the councillor from the committee or if someone ceases to be a councillor (and in which case there would inevitably be a by-election). The same process is followed in either of those eventualities – the political party who initially was allocated the seat fills the seat until the next local government elections.

[22] The plain language meaning of 43(2)(e) of the Act is reinforced by the objective of s 43(2) which is to ensure the stable and enduring functioning of the Exco. At the stage a vacancy arises on the Exco, the exercise to be undertaken should not be about the numbers game (the number of seats won by a political party or political interest) to reconfigure the award of seats in the Exco.

[23] The above section must also be interpreted in the context of s 46 which provides that the members of the Exco are determined for a full term of five years. It is clear therefore that the composition of the Exco is not affected if there is a change in the representation of the political parties or interests on the council during the term. The position would not be any different in the event of a vacancy.

[24] It follows that in terms of s 43(2)(e) of the Act, in the event of a vacancy arising on the Exco, the political party or political interest to which the seat was allocated to (at the constitution of the new Exco after local government elections) is empowered, through an authorised representative, to appoint a councillor to fill that vacancy. It is thus my

considered view and finding that the section leaves no room for another interpretation (like the proportionality interpretation as propagated by the respondents) that may probably be attached to the section.

Can s 43(2)(e) of the Act be considered to be inconsistent with ss 160(8)(a) and (b) of the Constitution?

[25] I firmly believe not, considering what the statute itself tells us.⁶ The amendment of the statute was recently passed in Parliament by or with the ANC in majority.

[26] The principle of constitutional subsidiarity requires that the adjudication of “substantive issues is determined with reference to more particular, rather than more general, constitutional norms”.⁷ The Constitutional Court has held that where legislation (such as the present) has been enacted to give effect to the Constitution, “a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard”.⁸

[27] If the Act is inconsistent with ss 160(8)(a) and (b) of the Constitution, then a frontal attack to the constitutionality of that legislation must be brought.⁹ The respondents have not done so in this case. Therefore, unless and until a constitutionality declaration is made, s43(2)(e) must be applied as it stands.

[28] The court cannot ignore the plain wording, context and purpose of s 43(2)(e) because it leads to an allegedly unfair result. It has recently been confirmed in our courts that it is for the Legislature to correct its own drafting and it is not for the courts to substitute the provision with its own wording.¹⁰ In effect the respondents are asking this

⁶ SAPS above fn 3 para 20.

⁷ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5; 2022 (4) SA 1 (CC) para 102.

⁸ *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC) para 51.

⁹ *South African Jewish Board* above fn 7 para 104.

¹⁰ *Du Bruyn NO and Others v Karsten* [2018] ZASCA 143; 2019 (1) SA 403 (SCA) paras 26-28.

court to substitute a conclusion that is inconsistent with the provision of the statute, which would amount to judicial overreach.¹¹

Non-joinder of political parties

[29] The respondents contend that the judgment and order sought cannot be carried into effect without affecting and probably prejudicing the rights of the political parties in the council and the ANC in particular. The respondents further contend that it is no answer for the applicants to argue that they placed the application before all members of the council at a special council meeting as an agenda item as that does not constitute service at all and informal service does not suffice.

[30] The relevant enquiry into a “mis-joinder” of political parties in council is whether any such parties fall into the categories of third parties who should have been joined, as necessary parties, in the proceedings. It is unclear whether this question was ever raised and/or traversed before Nicholson AJ before he issued the earlier order of declaration against the Speaker and the council.

[31] I hold the view that the issue of joinder is not crucial in view of the fact that the declarations sought only implicates and/or triggers the legal issue the court has to decide. The legal issue relates to the exercise of public power and governance in the municipality. The parties who are cited are those who are imbued with exercising that power and responsibility in the implementation of the decisions in council. The third parties or interests not cited are not left out in the cold since they form part of the municipality government and exercise their democratic rights within that sphere of government. They form part of the council that has been cited and do not necessarily have to be joined as individual parties. The order to be made and part of which has already been made should not bind third parties as political parties or interests but should bind the beholders of public power in council.

¹¹ *Du Bruyn* ibid para 27. Also see *Potgieter v Olivier and Another* 2016 (6) SA 272 (GP) para 33.

[32] All third parties in council were evidently aware of the proceedings and could have sought leave to be joined should they have wished to do so. For purposes of this matter, I therefore do not consider them as necessary parties whose rights and interests is deserving to be safeguarded.¹²

No case made against the Municipal Manager

[33] In Part A, prayer 2, of the Notice of Motion, the applicants seek to declare unlawful the decision by the first respondent, the Municipal Manager of the municipality “not to implement the appointment by the second applicant of Councillor Shamila Sookhraj to fill the vacancy on the seventh respondent, the Executive Committee of the Council of the Umdoni Local Municipality arising from the resignation of erstwhile Councillor Edwin Baptie”. The applicants contend this was the “Municipal Manager’s unlawful decision”.

[34] The applicants seek relief against the Municipal Manager on the basis that she is accountable for the overall performance of the municipality’s administration and is expected to be an enforcer of the Constitution in her own right. The applicants have also cited the incumbent of that office in her personal capacity in light of the fact that the applicants seek a personal and punitive costs order against her. The Municipal Manager denies that she had an obligation to act in view of the provisions of ss 43(2)(d) and (e) of the Act.

[35] In terms of ss 55(1) and (2) of the Local Government: Municipal Systems Act¹³ (“the Systems Act”) a Municipal Manager is responsible and accountable, among other duties, for:

- (a) the management of the municipality’s administration in accordance with this Act and other legislation applicable to the municipality (s 55(1)(b));
- (b) advising the political structures and political office bearers of the municipality (s 55(1)(i));

¹² *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) para 11.

¹³ Local Government: Municipal Systems Act 32 of 2000.

- (c) managing communications between the municipality's administration and its political structures and political office bearers (s 55(1)(j));
- (d) carrying out the decisions of the political structures and political office bearers of the municipality (s 55(1)(k));
- (e) the administration and implementation of the municipality's by-laws and other legislation (s 55(1)(l));
- (f) the implementation of national and provincial legislation applicable to the municipality (s 55(1)(p)); and
- (g) as accounting officer of the municipality (s 55(2)).

[36] In the preamble to the Systems Act, it is stated that the "new system of local government requires an efficient, effective and transparent local public administration that conforms to constitutional principles". And further that "there is a need to develop a strong system of local government capable of exercising the functions and powers assigned to it". And in s 195 of the Constitution, the Municipal Manager is enjoined to promote a high standard of professional ethics for which he/she may be held accountable.

[37] In casu, the Municipal Manager failed to give effect to the DA's appointment of the first applicant, with immediate effect, as a member of the Exco. She also did not respond to or acknowledge receipt of the email advising her of the appointment which was sent to her by Councillor Singh, as an authorised DA representative, on 9 November 2022.

[38] The evidence further shows that, on 5 December 2022, Councillor Singh again wrote to the Municipal Manager to remind her of her duty to implement the DA's appointment of the first applicant as a member of Exco. In the email Councillor Singh further pointed out that the failure of the Municipal Manager to give effect to the DA's appointment was prejudicing the DA as well as the affected councillor. The Municipal Manager was also put on notice that she would be held personally responsible for such prejudice.

[39] Despite the above, the Municipal Manager still failed to give effect to the DA's appointment to fill the vacancy. Instead, the Municipal Manager submitted a report dated 25 January 2023, to council to recommend that it adopt a resolution pursuant to the resignation of the erstwhile Councillor Baptie to:

- (a) re-determine the composition of the Exco in light of the result of a by-election for Ward 13 which had been won by the ANC; or
- (b) "simply affect the changes occasioned by the changes in Council".

[40] On the same date, the applicants' attorney wrote to the Municipal Manager to again explain that the Municipal Manager's failure to effect the necessary changes to implement the DA's appointment of the first applicant as a member of Exco was in serious breach of the Act and highly prejudicial to the councillor and the DA. The letter also explained why the claim in the Municipal Manager's report that s 43 of the Act required the Exco to be re-determined to reflect the change in the composition of the council was wrong in law and grossly misleading.

[41] The Municipal Manager again failed to immediately implement the first applicant's appointment as a member of Exco. She also failed to withdraw her report to the council (as requested) which led to the election of Councillor Maharaj to fill the vacancy on the Exco.

[42] The Municipal Manager's conduct does not accord with the applicable law referred to above. Her conduct was blatant and egregious – a clear instance of a deliberate neglect of a constitutional duty. Such conduct is deserving of a personal censure.

The applicants' case for the declaratory and review relief in respect of the unlawful decisions

[43] This court has already declared unlawful the decisions by the Speaker to allow the subject of the filling of the vacancy to be brought before the council and permit votes to be taken on the subject, as well as the decision by the council to appoint Councillor Maharaj to fill the vacancy. The applicants persist with their request in prayers 2 and 4 of

their Notice of Motion for declaratory relief in respect of the unlawful decision by the Municipal Manager not to implement the appointment by the DA of Councillor Sookhraj to fill the vacancy, and for this court to review and set aside this decision.

[44] The applicants' cause of action is founded in the principle of legality.¹⁴ Section 172 (1)(a) of the Constitution provides that the court "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".¹⁵

[45] As demonstrated above, the Municipal Manager exercises public power which is accompanied by constitutional and statutory obligations. For the reasons given above, the unlawful decision of the Municipal Manager violates the constitutional principle of legality and the Constitution. It thus stands to be accordingly declared to be unlawful.

The applicants' case for the declaratory relief in respect of the appointment of Councillor Sookhraj

[46] The applicants seek a declaration that the appointment by the DA of Councillor Sookhraj to fill the vacancy on the Exco is lawful. This court has already upheld the applicants' review against the decisions associated with the election of Councillor Maharaj.

[47] The court is required to engage in a two-stage approach when it considers whether to grant declaratory relief:¹⁶

- (a) first, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and
- (b) second, the court may then exercise its discretion either to refuse or grant the order sought.

¹⁴ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58.

¹⁵ See *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC) para 52.

¹⁶ See *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 18.

[48] The purpose of this relief is to vindicate the DA's right to appoint Councillor Sookhraj to fill the vacancy on the Exco and Councillor Sookhraj's rights to discharge her powers as a member of the Exco. The applicants also seek to guard against unlawful conduct that poses a grave threat to the rule of law. It follows that to the extent required for the grant of the declaratory relief the applicants constitute interested parties.

[49] When deciding whether to exercise its discretion to grant a declaratory order, a court must consider all relevant factors.¹⁷ The relief can generally be employed as a useful tool in the resolution of disputes. Simply put, such orders are designed to provide clarity on disputed issues.¹⁸

[50] There can be no doubt that the declaratory order sought by the applicants is legally deserved and will also lead to greater certainty for all concerned. It is furthermore necessary to safeguard the rule of law. Its effect would also, in line with the holding by the Constitutional Court, be to assist in "clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values".¹⁹

Order

[51] I therefore grant the following order (as contained in the draft order with an amendment in paragraph 1):

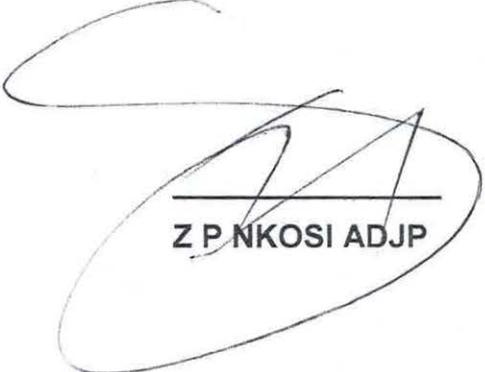
1. The decision taken by the first respondent not to implement the appointment by the second applicant of the first applicant to fill the vacancy on the seventh respondent arising from the resignation of erstwhile Councillor Edwin Baptie is declared to be invalid.
2. The Municipal Manager's unlawful decision is reviewed and set aside.

¹⁷ *Competition Commission v Hosken Consolidated Investments Ltd and Another* [2019] ZACC 2; 2019 (3) SA 1 (CC) para 88; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) para 107.

¹⁸ *Commissioner for the South African Revenue Service v Langolm Farms (Pty) Ltd* [2019] ZASCA 163 para 10.

¹⁹ *Rail Commuters Action Group* above fn 17 para 107.

3. It is declared that the appointment by the second applicant of the first applicant to fill the vacancy is valid.
4. The costs of this application, including the costs of two counsel, are to be paid on an attorney and client scale by the second respondent in her personal capacity and jointly and severally by the first, third, fourth, fifth, sixth, seventh and eighth respondents.



Z P NKOSI ADJP

APPEARANCES

DATE OF HEARING : 27 JULY 2023

DATE JUDGMENT : 15 JANUARY 2024

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