

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 590/2009

In the matter between:

THE MEMBER OF THE KWAZULU-NATAL
EXECUTIVE COUNCIL FOR LOCAL
GOVERNMENT, HOUSING AND
TRADITIONAL AFFAIRS

Appellant

and

AMAJUBA DISTRICT MUNICIPALITY
Respondent

First

INKATHA FREEDOM PARTY
Respondent

Second

AFRICAN NATIONAL CONGRESS
Third Respondent

DEMOCRATIC ALLIANCE
Respondent

Fourth

THE FEDERAL CONGRESS (FEDCON)
Respondent

Fifth

ROYAL LOYAL PROGRESS PARTY
Respondent

Sixth

THE ELECTORAL COMMISSION OF
SOUTH AFRICA
Respondent

Seventh

Neutral citation: *The Member of the KwaZulu-Natal Executive Council for Local Government, Housing and Traditional Affairs v Amajuba District Municipality* (590/2009) [2010] ZASCA 111 (20 September 2010).

Coram: Mpati P, Cloete, Heher, Ponnann and Leach JJA

Heard: 26 August 2010

Delivered: 20 September 2010

Summary: Local authorities – election of members to the executive committee of a district municipality in terms of s 43(1) of the Local

Government: Municipal Structures Act 117 of 1998 – election to be decided by way of a majority vote of the members of the municipal council.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Hollis AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

LEACH JA (Mpati P, Cloete, Heher, Ponnann JJA concurring):

[1] This appeal arises from a political squabble in the council of the first respondent, the Amajuba District Municipality, a 'district municipality' as defined in s 1 of the Local Government: Municipal Structures Act 117 of 1998 ('the Act') surrounding the removal of two councillors from its executive committee and the council's refusal to re-elect the same two councillors to the executive committee to fill the vacancies caused by their removal. This led to the MEC for Local Government, Housing and Traditional Affairs (at the time Mr M Mabuyakhulu, the brother to one of the removed councillors) applying to the High Court, Pietermaritzburg for a declaratory order which, if granted, would oblige the council to accept the two councillors back onto the executive committee. Any inference of nepotism on his part caused by his action has been dissipated by the problem in this case not being unique to the first respondent and his successors in office having persisted with the proceedings in order to obtain guidance from the court. In any event, the application was dismissed and, with the leave of the court a quo, the appellant (the current MEC) appeals now to this court against that decision.

[2] Every municipality must have a council¹ that is obliged, inter alia, to strive to achieve the objectives detailed in s 152 of the Constitution, and to review the needs of the community it serves, its priorities to meet those needs and its mechanisms for doing so.² There are 25 councillors in the first respondent's council, 15 appointed by local municipalities and ten elected by voters. The councillors are members of different political parties, namely, the second, third, fourth, fifth and sixth respondents in this appeal, although at all material times, most were either members of the second respondent, the Inkatha Freedom Party ('the IFP') or the African National Congress ('the ANC'), the third respondent. Every municipality must also have a chairperson, called 'the speaker', elected from among the municipal councillors, either at the council's first sitting after an election or when necessary to fill a vacancy.³

[3] The first respondent operates under a 'collective executive system' as envisaged by the Act and as mandated by the Determination of Types of Municipality Act 7 of 2000 (KZN). This entails it having an executive committee with various functions and powers.⁴ Section 43 of the Act further provides:

'(1) If the council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government, provided that no more than 20 per cent of the councillors or 10 councillors, whichever is the least, are elected. An executive committee may not have less than three members.

(2) 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.

(3) A municipal council may determine any alternative mechanism for the election of an executive committee, provided it complies with section 160(8) of the Constitution.⁵

[4] The first respondent's executive committee was established on 3 April

1 Section 18(1) of the Act.

2 Section 19 of the Act.

3 Section 36(1) and (2) of the Act.

4 Set out in s 44 of the Act.

5 Section 43(3) ensures compliance with s 160(8)(a) of the Constitution which provides that members of a municipal council are entitled to participate in the proceedings its committees in a manner that 'allows parties and interests reflected within the Council to be fairly represented'.

2006 at the municipal council's inaugural meeting. To give effect to the imperative contained in s 43(2) of the Act, it comprised five members: two from the ANC, two from the IFP and one representing a minority party. Councillors DB Mabuyakhulu and JCN Khumalo of the ANC were elected both to the committee and as mayor and deputy-mayor,⁶ respectively, while councillor AT Zwane, another ANC member, was elected speaker of the council.⁷

[5] At the time of this meeting, and for some time thereafter, the ANC, together with the support of a minority party with whom it formed a coalition, held a majority in the council. However, in the fickleness of politics the minority party later left the ANC in the lurch and allied itself to the IFP which, with its support, then held a majority in the council. The majority promptly called for a council meeting with the view of removing the ANC councillors from the posts of mayor, deputy-mayor and speaker. Presumably in an attempt to retain those posts in ANC hands, the speaker turned a deaf ear to this request and, eventually, an application to compel the holding of a council meeting was brought in the Pietermaritzburg High Court. In a vain attempt to delay the inevitable, the executive committee opposed the application. It is undisputed that councillors Mabuyakhulu and Khumalo (the mayor and his deputy) were the guiding hands behind this opposition which was funded from the municipality's coffers. Unfortunately for them, the application succeeded, a council meeting was held and, in due course, both they and the speaker were removed from office and replaced.

[6] The council then proceeded to hold an investigation into the possible waste of municipal funds by the council's opposition to the application and, on 13 February 2008, acting under s 53(1) of the Act,⁸ it removed councillors

6 Section 48(1) of the Act requires the municipal council to elect a member of its executive committee as the mayor and, if the MEC for local government of the province so approves, another member of the executive committee as the deputy mayor.

7 Section 36 of the Act obliges every municipal council to have a chairperson, to be called 'the speaker'. It is not a requirement that the speaker be a member of the executive committee.

8 'A municipal council may, by resolution remove from office one or more or all of the members of its executive committee. Prior

Mabuyakhulu and Khumalo from the executive committee. Although they remained members of the council, they were neither disciplined nor sanctioned (under item 14(2) of schedule 1 to the Local Government: Municipal Systems Act 32 of 2000 steps may be taken against councillors who breach the code of conduct which, inter alia, may result in their suspension or removal from office – although the council may not suspend or remove them: that may only be done by the MEC⁹). Moreover, no steps were taken to recover the wasteful expenditure from them under the Municipal Finance Management Act 56 of 2003.

[7] Section 53(3) of the Act provides for members of an executive committee who are removed from office to be replaced by way of an election 'subject to section 43'. The effect of this is that the ANC was entitled to have two councillors elected to fill the vacancies created by the removal of councillors Mabuyakhulu and Khumalo in order to reflect the proportional representation of the parties in the council. Obdurately, the ANC caucus in the council nominated councillors Mabuyakhulu and Khumalo once again for election to fill those vacancies. The majority of the council refused to elect them and the ANC councillors, in turn, refused to put up any other candidates for election. This resulted in a state of deadlock but, as the three remaining members of the executive committee constituted a quorum, the executive committee continued about its work – albeit without ANC representation.

[8] Faced with this situation, the MEC adopted the position that the council had enjoyed no right to refuse to approve whoever the ANC nominated to the executive committee. When the council refused to back down the MEC, relying upon s 139(1) of the Constitution which authorises a provincial executive to intervene when a municipality 'cannot or does not fulfil an executive obligation in terms of the Constitution or legislation', proposed a resolution to the provincial executive council of KwaZulu-Natal that either an administrator be appointed to run an election aimed at the installation of the ANC's nominees as members of the executive committee of the first respondent's council or, alternatively, that the first respondent's council be dissolved and fresh elections held with the first respondent's functions being performed by the administrator until a new council was established.

notice of an intention to move a motion for the removal of members must be given.'

9 Item 14(6) of schedule 1 to Act 32 of 2000.

[9] The MEC's proposal was accepted by the provincial executive council on 26 June 2008. Faced with this, the first respondent launched an application in the Pietermaritzburg High Court challenging the provincial executive's power to intervene in its affairs. As a result, on 14 July 2008 a rule nisi returnable on 15 August 2008 was issued calling upon the premier of the province of KwaZulu-Natal and certain other parties to show cause why the resolution of the executive council should not be declared invalid and why the provincial executive should not be interdicted from intervening in the council's affairs as it had resolved to do.

[10] Section 139(2) of the Constitution provides that if a provincial executive intervenes in a municipality's affairs, it is to give written notice of the intervention to the national minister responsible for local government affairs. The national executive disapproved of the provincial executive's intervention which thus came to naught and the interdict was never argued to finality. Presumably, the rule nisi lapsed with the effluxion of time.

[11] Notwithstanding this, the ANC councillors in the first respondent's council persisted in their refusal to nominate anyone except councillors Mabuyakhulu and Khumalo to fill the two vacancies on the executive committee. At a council meeting on 23 March 2009, a secret ballot was held in respect of the seat on the executive committee reserved for a minority party which was to be filled by a councillor from either the Democratic Alliance (the fourth respondent) or the Federated Congress (the fifth respondent) who had an equal entitlement to it. After this election had been held, the ANC was again afforded the opportunity to nominate two of its councillors to sit on the executive committee. Once more, an ANC councillor submitted the names of councillors Mabuyakhulu and Khumalo, this time subject to a condition that they be appointed with effect from 1 May 2008. Whether this condition vitiated the validity of the nomination is not necessary to consider for purposes of this judgment. What is of importance is that once the nomination had been made, a councillor representing the Democratic Alliance stated that the council's resolution on the removal of those councillors from the executive committee still stood and that, in those circumstances, the nomination was not acceptable. Although it is not disputed that the majority of the full council voted in favour of this view, it has never been contended by any party to these

proceedings that the ANC was not entitled to nominate the two councillors concerned and, in truth, the events of this meeting amount to no more than a refusal to elect those whom the ANC had nominated (as was correctly accepted by counsel for the appellant).

[12] It was in these circumstances that the MEC again decided to intervene. This he did on 7 April 2009 by launching the proceedings presently on appeal by way of a notice of motion seeking, inter alia, the following relief:

'2.1 THAT it be and is hereby declared that in terms of Section 43 of the Local Government: Municipal Structures Act No. 117 of 1998 read with Section 160 of the Constitution:-

2.1.1 each party or interest to be represented on the Executive Committee of a Municipal Council is entitled to be represented pro rata to its representation in the Municipal Council;

2.1.2 each party or interest aforesaid is entitled to choose and nominate any sitting Municipal Councillor to be elected to the Executive Committee;

2.1.3 a Municipal Council is obliged to accept and elect those sitting Municipal Councillors chosen and nominated by the party or interest as aforesaid.

2.2 THAT the refusal by the Municipal Council of First Respondent to accept the two nominated candidates from Third Respondent for election to the Executive Committee of First Respondent at its meeting held at Madadeni on Monday 23rd March 2009 be and is hereby declared to be unlawful.

2.3 THAT Third Respondent is entitled to nominate for election any two sitting Municipal Councillors of First Respondent of its choice to the two positions reserved for Third Respondent on the Executive Committee and the Municipal Council is thereupon obliged to elect them to the Executive Committee.'

[13] Paragraph 2.1.1 of the notice of motion is, effectively, a restatement of the provisions of s 43(2) of the Act and relates to an issue about which there has never been a dispute. In these circumstances declaratory relief in those terms is unnecessary and was not sought by appellant's counsel. Similarly, the relief set out in paragraph 2.1.2 of the notice of motion is also unnecessary as there has never been a dispute as to the entitlement of any party or interest represented in the municipal council to nominate a councillor for election to the executive committee. Paragraph 2.2, which was formulated in the light of what occurred at the meeting of 23 March 2009, is also unnecessary as essentially all that occurred at that meeting was a refusal to elect. Counsel for the appellant therefore correctly confined his argument to the relief set out in paragraphs 2.1.3 and 2.3 in the notice of motion which, essentially, amounts to the same thing viz that the ANC was entitled to nominate any two of its municipal councillors in the first respondent for the two

vacancies on the executive committee, including those councillors whose removal had caused the vacancies in the first place, and that the council was thereupon obliged to accept such persons onto that committee.

[14] In advancing this contention, the appellant placed particular emphasis on s 160(8) of the Constitution which provides both that parties and interests reflected within the municipal council are to be 'fairly represented'¹⁰ and that members of a municipal council 'are entitled to participate in its proceedings and those of its committees in a manner that . . . is consistent with democracy'.¹¹ As was stressed in *Democratic Alliance & another v Masondo NO & another*,¹² these provisions are designed to ensure that minority parties can meaningfully participate in the deliberative processes of municipal councils and its committees. This objective the legislature clearly sought to achieve in s 43(2) of the Act by providing for proportional representation in the executive committee of the parties and interests represented in the council.

[15] The appellant argued that s 43(1) of the Act, which requires a municipal council to 'elect' councillors onto its executive committee, is to be interpreted in the light of these constitutional values and that, in doing so, democracy can only be given its full voice if the word 'elect' in that section is not given the narrow sense of a decision taken by way of a majority vote, as to do so could result in a majority of the council, in effect, deciding for a minority party who was to represent it in the committee and denying it its representative of choice. This, so the argument went, was anti-democratic and led to unfair representation in the executive committee – and could, for example, lead to a minority party's most competent councillors being excluded from participation in a council's executive processes. Consequently, the word 'elect' should be interpreted widely to connote 'select' in the sense that the council is obliged to accept the councillor put forward by a party entitled to have a councillor in the executive committee. Accordingly, so the argument continued, as the two

10 Section 160(8)(a) of the Constitution.

11 Section 160(8)(b) of the Constitution.

12 2003 (2) SA 413 (CC) para [18].

councillors concerned had not been sanctioned by removal from the municipal council, they were in the same position as all other sitting councillors and were to be 'elected' in the wide sense if nominated by the ANC for the two vacant posts.

[16] The immediate difficulty that I have with this argument is that it appears to fly in the face of the Constitution itself, s 160(1)(c) of which provides for a municipal council to 'elect an executive committee' subject to national legislation (which in the present case is clearly the Act). All questions concerning the passing of by-laws, the approval of budgets, the imposition of rates and other taxes, levies and duties, and the raising of loans, are to be determined by a decision taken by a municipal council with the supporting vote of the majority of its members.¹³ Section 160(3)(c) goes on to provide that all other questions before a municipal council – which includes the election of an executive committee – are to be 'decided by a majority of the votes cast'. The appellant's suggestion that the Act should be interpreted to mean that a municipal council was obliged to accept a decision taken by another on who should be a member of its executive committee, is wholly inconsistent with this constitutional requirement.

[17] Moreover, in my view, a requirement that the members of the executive committee of a municipal council be elected by a majority of the members of that council does not do violence to democracy or the underlying values of the Constitution. An essential element of democracy is that effect be given to the will of the majority. This was emphasised by the Constitutional Court in *Masondo*. The issue in that case was whether mayoral committees established under s 60 of the Act are 'committees of municipal councils' as contemplated by s 160(8) of the Constitution. The majority concluded that they were not whereas O'Regan J in a minority judgment concluded otherwise. Writing for the majority, Langa DCJ stated that democratic and accountable government for local communities¹⁴ 'involves ensuring that the will of the majority prevails and also that the views of the minority are

¹³ Section 160(2) as read with s 160(3)(a) of the Constitution.

¹⁴ The first objective of local government laid down by s 152 of the Constitution.

considered'¹⁵ – the latter being achieved by members of the executive committee being 'representative of minority parties and interests'.¹⁶ O'Regan J expressed a similar view. Although differing from the majority in regard to its applicability to mayoral committees, she observed that s 160(8) of the Constitution entitled councillors in municipal councils to participate in the proceedings of the council and its committees subject to parties and interests being fairly represented therein and that the principle of fair representation 'remains subject to democracy (which implies that the majority must always be able to determine decisions)'.¹⁷ She continued:¹⁸

'Moreover, s 160(8)(b) is clear that the principle of fair representation is always subject to democracy and the will of the majority. Members of the mayoral committee must therefore submit to that principle, as must all councillors. The principle established by s 160(8) is a principle which requires inclusive deliberation prior to decision-making to enrich the qualities of our democracy. It does not subvert the principle of democracy itself' (emphasis added).

[18] Under s 151(2) of the Constitution, the executive authority of the municipality vests in its council. The first respondent has a 'collective executive system' as referred to in the Act and s 43(2) of the Act, which mandates the proportional representation of the parties and interests in the municipal council in the membership of its executive committee which exercises the council's executive authority. This advances the values of a multi-party system of democratic government in accordance with one of the founding values enshrined in s 1 of the Constitution. But it is the participation of minority parties in the executive committee which does so, not the participation of any particular individual. The selection of the persons to act on that committee has been entrusted to the municipal council, and it is clear from both the majority and minority judgments in *Masondo* that a system whereby a majority vote of councillors is used to determine the members of a municipal executive committee is in no way undemocratic. It allows a minority party to put forward its candidates and its views to be heard and considered as to their suitability to be elected. It also ensures that the will of the majority shall prevail: and that is the hallmark of democracy. On the other hand, the same cannot be said of the interpretation put forward by the appellant viz. that the majority of a municipal council is obliged to accept the views of a minority on a crucial issue such as the suitability of a person to be entrusted with the conduct of the executive functions of a municipality.

[19] Another major difficulty I have with the appellant's argument is that it does violence to the language used by the legislature. While the ambit of interpretation is to give effect to the object or purpose of the legislation under

15 At para 17.

16 At para 31.

17 Para 61.

18 Para 78.

consideration, in doing so the words used must be given their ordinary grammatical meaning unless to do so would lead to an absurdity that the legislature could not have contemplated. This court has previously observed that ‘it is not the function of the court to do violence to the language of a statute and impose its views on what the policy or object of the measure should be’.¹⁹ And although a court must always be mindful of the values on which the Constitution is based and which it seeks to advance, if the language in a statutory enactment ‘is ignored in favour of a general resort to “values” the result is not interpretation but divination’.²⁰

[20] The interpretation that the appellant seeks to place upon s 43(1) cannot be reconciled with the ordinary grammatical meaning of the words used by the legislature. It provides that ‘. . . if the council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government’. Not only do the words ‘elect’ (used in the section) and ‘select’ (advanced by the appellant) both have as their ordinary accepted meaning a connotation of choice (and in that regard the appellant’s argument is but a play on words) but, most importantly, the section vests the choice of members of the executive committee in the municipal council and not in a party or interest represented in that council. Furthermore, s 45 of the Act requires this election to take place at a meeting of the council. The obligatory rubber stamping of an earlier decision taken by a party as to who should represent it on the executive committee, as the appellant argued should occur (for which the legislature could simply have provided if that had been its intention), can hardly be construed as an election by the council at a council meeting. The interpretation which the appellant wishes to place on s 43(1) is more than just strained. It simply is not what the words of the section, given their ordinary grammatical meaning, connote. A court has no power to legislate, and it would require a rewriting of the section to convey what, in the appellant’s view, the legislature ought to have provided.

[21] Significantly, appellant’s counsel conceded that at times there might have to be an election in what he called the ‘narrow sense’, involving a decision taken by a majority vote of members of the executive committee. This would of course occur when, for example, two parties in a council had an equal claim to an available seat on the committee (as indeed occurred on 23 March 2009 when the council voted on whether the fourth or fifth respondent’s candidate should be elected to the committee, as already mentioned). It would also be necessary if a party nominated more candidates than the number of seats to which it is entitled; and while that may be unlikely to occur, it cannot be excluded. Other examples spring readily to mind. The

19 Per Schutz JA in *Standard Bank Investment Corporation Ltd v Competition Commissioner & others; Liberty Life Association of Africa Ltd v Competition Commissioner & others* 2000 (2) SA 797 (SCA) para 16.

20 Per Kentridge JA in *S v Zuma and others* 1995 (1) SA 642 (CC) para 18.

fact remains that in certain circumstances there clearly will have to be an election of members of the executive council by way of a majority vote. The legislature can hardly be presumed to have intended the word 'elect' in that sense to apply only in certain circumstances and not in others, particularly when it failed to specify in what circumstances there was to be an election or, as argued by the appellant, a mere nomination of committee members.

[22] It is also not without significance that the legislature used the word 'elect' in the sense of a decision by a majority vote elsewhere in the Act. Thus a municipal council is required by s 36 to elect its speaker and by s 48 to elect its mayor and deputy by way of a majority vote in the manner set out in schedule 3. It may reasonably be inferred that the legislature used the same word in the same sense throughout the same enactment, particularly in relation to similar matters. There is no reason to think that, in using the word 'elect' in relation to the election of members of the executive committee in s 43(1), it intended it to bear another, wholly different meaning in relation to the election of other municipal office bearers.

[23] Finally, that the ultimate choice of who should be on the executive committee vests in the council, and not in a party or interest represented in the council, is reinforced by s 53(1) of the Act which provides for the removal of a member of the executive committee by way of council resolution after notice of such a resolution has been given. This provides a clear indication that the legislature intended the council to determine whether any particular person should be on its executive committee. If a minority party could merely override the majority of a municipal council by re-nominating a councillor removed from the executive committee, not only would it have the absurd result of negating the power extended to the council under s 53(1) of the Act but it would nullify the council's constitutional and democratic right to determine who should be on that committee.

[24] In the light of all these considerations, it is clear that the council was vested with the choice to determine who should be on its executive committee, and that the members of that committee are to be appointed by way of a majority vote. The word 'elect' in s 43(1) of the Act is to be ascribed that meaning rather than that which the appellant puts forward. The court a quo correctly determined the issue against the appellant, and the appeal must fail.

[25] The appeal is dismissed with costs.

L E LEACH
JUDGE OF APPEAL

