THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 147/2009

In the matter between:

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

and

M S YENGWA
First Respondent
UMVOTI MUNICIPALITY
Second Respondent
P M S NGUBANE
Third Respondent
S V ZONDI
Fourth Respondent
R MAHRAJ
Fifth Respondent
B H DLADLA
Sixth Respondent
H J DLUDLA
Seventh Respondent
M B MBATHA
Eighth Respondent
T M MCHUNU
Ninth Respondent
C N MKHIZE
Tenth Respondent
E N NGCOBO
Eleventh Respondent
S SHANGASE
Twelfth Respondent
E S SHANGE
Thirteenth Respondent
MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT
Fourteenth Respondent

Neutral citation: *MEC KwaZulu-Natal v Yengwa* (147/09)[2010] ZASCA 31 (26 March 2010)
Coram: MTHIYANE, LEWIS, VAN HEERDEN, MHLANTLA JJA and SERITI AJA

Heard: **11 March 2010**
Delivered: **26 March 2010**

Summary: Order ─ High Court made order after substratum of the litigation had fallen away ─ order having no practical effect on the parties ─ order set aside on appeal.

Costs ─ Provincial MEC seeking costs order against councillors for voting contrary to his directions ─ councillors protected from costs when performing local government functions ─ the rule in the *Swartbooi* case and s 28(1)(b) of Act 117 of 1998 applicable.

ORDER

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

The appeal succeeds partially and the following order is made:

1 The order of the court a quo declaring invalid r 38(1) of the Regulations Published in terms of the Local Government Municipal Systems Act 32 of 2000 is set aside.

2 The appellant is ordered to pay the costs of the second to thirteenth respondents.

JUDGMENT

MTHIYANE JA (Lewis, Van Heerden, Mhlantla JJA and Seriti AJA concurring)

[1] This appeal is about costs, in truth much ado about nothing, because if the appellant had brought reason to bear on the matter from the outset, this case would not have come to this court. Section 21A of the Supreme Court Act 59 of 1959 provides that appeals against cost orders alone should be entertained only in exceptional circumstances. (See *Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources & others*;[1] *President, Ordinary Court Martial & others v Freedom of Expression Institute & others*.[2]) But for prayer (a) of the order of the court a quo declaring r 38(1) of the Regulations in terms of the Local Government: Municipal Systems Act 32 of 2000 invalid, we would have struck the appeal from the roll.

[1] 2009 (6) SA 232 (CC); [2009] ZACC 14 para 11.
[2] 1999 (4) SA 682 (CC) para 13.

[2] The litigation giving rise to this appeal has its genesis in the second respondent's council chamber which had to consider an application by the first respondent, Mr M S Yengwa, for the post of Municipal Manager. The post was advertised during February 2007. It was stated as a requirement that the prospective applicant should have 'a recognised B degree in Public Administration, or relevant fields'. This provision was in the job description prescribed by r 38(1) of the Regulations.

[3] Although the first respondent did not have the Bachelor's degree mentioned in r 38(1) the Municipal Council resolved to appoint him, despite the opposition by the appellant, the Member of the KwaZulu-Natal Executive Council for Local Government, Housing and Traditional Affairs, as they considered Yengwa to be appropriately qualified to do the job.

[4] The third to the thirteenth respondents, councillors of the second respondent, voted in favour of the resolution appointing Mr Yengwa despite the fact that the Town Clerk, Mr Pienaar, had, prior to the vote being taken, drawn their attention to the provision of r 38(1) which required the Bachelor's degree qualification.

[5] On 22 May 2007 the appellant brought an application in the KwaZulu-Natal High Court, Pietermaritzburg on an urgent basis seeking an order declaring void and setting aside the resolution taken by the second respondent on 16 April 2007 to appoint Mr Yengwa as its Municipal Manager. The appellant also asked for an order that the third to thirteenth respondents, namely those councillors of the second respondent who successfully voted in favour Mr Yengwa's appointment, pay the costs of the application. In the alternative the appellant asked that the

second respondent pay such costs.

[6] On 25 May 2007, some three days after the institution of the application, it was brought to the appellant's attention, through the second respondent's notice of opposition, that Mr Yengwa, for personal reasons, could not and did not accept his appointment and that the necessity for the main relief sought by appellant had accordingly fallen away. The notice also advised that should the application be withdrawn the second respondent would not seek any costs associated with its opposition but, if not, it would seek an order for the appellant to pay the costs thereof. The notice also advised that as a matter of law and principle the second respondent opposed the costs order sought against the third to thirteenth respondents, its councillors.

[7] Because the second respondent, in its opposition, placed in dispute the constitutional validity of r 38(1), on which the appellant relied for its relief, the fourteenth respondent, the Minister for Provincial and Local Government, was joined as a party. The respondents also filed a Notice of Intention to seek an order in terms of s 172(1) of the Constitution declaring r 38(1) invalid and having it set aside. The fourteenth respondent elected to abide the decision of the court.

[8] Despite the fact that there was no longer a lis between the parties, Mr Yengwa having indicated that he was not taking up the post, the appellant decided to press on with its application and insisted on its costs being paid by the third to thirteenth respondents, alternatively by the second respondent.

[9] The matter came before Van Heerden AJ who, while accepting that

the substratum of the application had fallen away and that the application had in essence developed into a fight about costs, considered himself bound to determine what the 'live' issues were 'at the time the application was launched, irrespective of whether some' of those issues were at that stage only of academic interest.

[10] There is no doubt that in order to decide the question of costs the learned judge would have been entitled to have regard to the merits, but he appears to have gone further than that in the present matter: he ended up making an order declaring r 38(1) invalid and setting it aside, as if there was still a live issue between the parties.

[11] In my view, once the substratum of the application had fallen away it was no longer necessary to make an order declaring r 38(1) constitutionally invalid. The weight of authority is totally against deciding matters which have no practical effect on the parties. As a matter of judicial policy constitutional issues are generally to be considered only if and when it is necessary to do so (*S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Schietekat*;[3] *Uthukela District Municipality & others v President of the RSA & others*;[4] *Independent Electoral Commission v Langeberg Municipality*.[5]) Mr Pillemer for the respondents did submit ─ without any degree of conviction, it must be said ─ that the retention of the order might be of assistance to the second respondent and other similar councils, who would know where they stand in relation to r 38(1), if the order were to remain. Mr Stewart for the appellant joined issue, contending that there was no uncertainty in the regulation. In any event it is not the function of this court to give advice but rather to hand down

[3] 1999 (4) SA 623 (CC) para 27.
[4] 2003 (1) SA 678 (CC) paras 11-17.
[5] 2001 (3) SA 925 (CC) paras 9-14.

decisions on matters which have a practical effect on the parties. The doors of counsel and attorneys are open to those who seek advice and other similar services. In conclusion I consider that the order of invalidity should not have been made and falls to be set aside.

[12] I turn to the question of costs. In the court a quo the appellant's application was dismissed with costs. Although the appellant had throughout persisted in asking that the councillors should pay the costs of suit, on appeal he indicated that a costs order was no longer sought against them personally. But he still asked that each party pay its own costs of the application. Subsequently, however, during the hearing of the appeal Mr Stewart for the appellant received instructions to concede that the councillors were entitled to their costs but in respect of the second respondent, he submitted that both the appellant and the second respondent should each bear their own costs.

[13] In my view the appellant's earlier insistence that the councillors should pay the costs was futile and ill-conceived in the light of the decision in *Swartbooi & others v Brink & others*[6] which laid down that councillors cannot be held personally liable for costs incurred in the performance of their functions as councillors. The appellant would also have been aware of the protection they enjoy under s 28(1)(b) of the Local Government: Municipal Structures Act 117 of 1998 from personal liability for the costs of legal proceedings. It is difficult to understand why the appellant pressed on and insisted on payment of costs in the light of the abovementioned authority on the point. He surely would have had access to legal advice in the matter. I do not see any reason why the appellant should not be ordered to pay the costs of the councillors even

[6] 2006 (1) SA 203 (CC) paras 17-23.

though the appeal is decided substantially in his favour.

[14] As to the second respondent and the appellant one is confronted with a head-to-head contest between two state entities; the costs payable by both are drawn from the public purse. In such a case the court has cautioned that organs of state must 'avoid legal proceedings against one another' and must make every reasonable effort to resolve inter governmental disputes before having recourse to the courts. (See the *Uthukela* case supra.[7]) For that reason it seems that a fair decision would be that each party pay its own costs. In my view, however, such an order would not be appropriate. There is a need for the court to show its disapproval of the conduct of the appellant in brazenly embarking on a futile mission, when the lis between him and the second respondent had fallen away. This information was conveyed to him three days after the application had been launched. The appellant's obduracy led to considerable costs being incurred. There is no reason why this court should not depart from the normal rule, and by way of marking its disapproval of the appellant's conduct, make an order that he should pay the second respondent's costs. Accordingly, that order will issue.

[15] In the result the appeal succeeds partially and the following order is made:

1 The order of the court a quo declaring invalid r 38(1) of the Regulations Published in terms of the Local Government Municipal

[7] Para 13.

Systems Act 32 of 2000 is set aside.

2 The appellant is ordered to pay the costs of the second to thirteenth respondents.

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K K Mthiyane

Judge of Appeal

APPEARANCES

APPELLANT: A M Stewart SC (with him T S I

	Mthembu) Instructed by PKX Attorneys, Pietermaritzburg McIntyre & Van der Post, Bloemfontein
SECOND TO THIRTEENTH RESPONDENTS:	M Pillemer SC Instructed by Kathy James Attorneys, Mayville Honey Attorneys, Bloemfontein
FOURTEENTH RESPONDENT:	Instructed by State Attorney, KwaZulu-Natal State Attorney, Bloemfontein