THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 523 & 548/2016

In the matter between:

TLHALEFI ANDRIES MASHAMAITE	**FIRST APPELLANT**
L D LANGA	**SECOND APPELLANT**
N S MONTANE	**THIRD APPELLANT**
M A TSEBE	**FOURTH APPELLANT**
M R LEBELO	**FIFTH APPELLANT**
VAALTYN KEKANA	**SIXTH APPELLANT**
SANNY TLHAKU	**SEVENTH APPELLANT**
SAMUELA MATHEBULA	**EIGHTH APPELLANT**
LESIBA JACOB MASHALA	**NINTH APPELLANT**
LESIBA JACKSON MATHEBATHE	**TENTH APPELLANT**
RAMASELA LINAH MAHLAELA	**ELEVENTH APPELLANT**
MOKGAETI FRANCINAH MUTSHIMYA	**TWELFTH APPELLANT**
RAMOKONE MINKY MOLEKOA	**THIRTEENTH APPELLANT**
DAVID MAGONGOA	**FOURTEENTH APPELLANT**
LESETJA CHARLES KGANYAGO	**FIFTEENTH APPELLANT**
MONICCA SENOAMADI	**SIXTEENTH APPELLANT**
ERNEST RANTHUPA	**SEVENTEENTH APPELLANT**
NELSON NGWETJANA	**EIGTHTEENTH APPELLANT**

NAKEDI MABULA	**NINETEENTH APPELLANT**
NELLY MONENE	**TWENTIETH APPELLANT**
LESIBA JAIRUS LEBELO	**TWENTY-FIRST APPELLANT**
L G LEGODI	**TWENTY-SECOND APPELLANT**
EMILY MANGANYE	**TWENTY-THIRD APPELLANT**
LEBOGANG BRENDA MOKGOTHO	**TWENTY-FOURTH APPELLANT**
MAPHUTHI RAHAB LEBELO	**TWENTY-FIFTH APPELLANT**
MAMMA MILOANA	**TWENTY-SIXTH APPELLANT**
ENOCK MANAMELA	**TWENTY-SEVENTH APPELLANT**
LAWRENCE SOMO	**TWENTY-EIGHT APPELLANT**
RAISIBE ANDRINA MATSEMELA	**TWENTY-NINETH APPELLANT**
ZUNAID SURTEE	**THIRTIETH APPELLANT**
MANKOPANE MICHAEL RAPATSA	**THIRTY-FIRST APPELLANT**
MALESELA FRANS MOKWELE	**THIRTY-SECOND APPELLANT**
LESETJA PHILLEMON ERIC GWANGWA	**THIRTY-THIRD APPELLANT**
MAHLODI JOSEPHINE MADIBA	**THIRTY-FOURTH APPELLANT**
MADIBANA CATHY LENTSOANE	**THIRTY-FIFTH APPELLANT**
MAPULA SHIRLEY TEFU	**THIRTY-SIXTH APPELLANT**
MANKALE SOLOMON MOLABA	**THIRTY-SEVENTH APPELLANT**

and

MOGALAKWENA LOCAL MUNICIPALITY	**FIRST RESPONDENT**
SHELLA WILLIAM KEKANA	**SECOND RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FOR COGHSTA, LIMPOPO	**THIRD RESPONDENT**

And

MEMBER OF THE EXECUTIVE COUNCIL FOR COGHSTA, LIMPOPO	**FIRST APPELLANT**
MOGALAKWENA LOCAL MUNICIPALITY	**SECOND APPELLANT**

and

SHELLA WILLIAM KEKANA	**FIRST RESPONDENT**
THAPELO MATLALA	**SECOND RESPONDENT**
TLHALEFI ANDRIES MASHAMAITE	**THIRD RESPONDENT**
L D LANGA	**FOURTH RESPONDENT**
N S MONTANE	**FIFTH RESPONDENT**
M A TSEBE	**SIXTH RESPONDENT**
M R LEBELO	**SEVENTH RESPONDENT**
VAALTYN KEKANA	**EIGHTH RESPONDENT**
SANNY TLHAKU	**NINTH RESPONDENT**
SAMUEL MATHEBULA	**TENTH RESPONDENT**
LESIBA JACOB MASHALA	**ELEVENTH RESPONDENT**
LESIBA JACKSON MATHEBATHE	**TWELTH RESPONDENT**
RAMASELA LINAH MAHLAELA	**THIRTEENTH RESPONDENT**
MOKGAETI FRANCINAH MUTSHIMYA	**FOURTEENTH RESPONDENT**
RAMOKONE MINKY MOLEKOA	**FIFTHTEENTH RESPONDENT**
DAVID MAGONGOA	**SIXTEENTH RESPONDENT**
LESETJA CHARLES KGANYAGO	**SEVENTEENTH RESPONDENT**
MONICCA SENOAMADI	**EIGHTEENTH RESPONDENT**
ERNEST RANTHUPA	**NINETEENTH RESPONDENT**
NELSON NGWETJANA	**TWENTIETH RESPONDENT**
NAKEDI MABULA	**TWENTY-FIRST RESPONDENT**

NELLY MONENE	**TWENTY-SECOND RESPONDENT**
LESIBA JAIRUS LEBELO	**TWENTY-THIRD RESPONDENT**
LG LEGODI	**TWENTY-FOURTH RESPONDENT**
EMILY MANGANYE	**TWENTY-FIFTH RESPONDENT**
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MAPULA SHIRLEY TEFU	**THIRTY-EIGHTH RESPONDENT**
MANKALE SOLOMON MOLABA	**THIRTY-NINETH RESPONDENT**
P P SELEPE	**FORTIETH RESPONDENT**

Neutral citation: *Mashamaite & others v Mogalakwena Local Municipality & others* (523 /2016) and *MEC, Limpopo & another v Kekana & others* (548/2016) [2017] ZASCA 43 (30 March 2017)

Coram: Maya AP, Theron and Dambuza JJA and Fourie and Schippers AJJA

Heard: 28 February 2017

Delivered: 30 March 2017

Summary: *Res Judicata* : the same cause, between the same parties for the same relief : the court a quo was precluded from granting a substantive order of reinstatement.

Motion proceedings : an applicant must, in the founding papers, disclose facts that would make out a case for the relief sought : the relief granted by the court a quo was inconsistent with the facts and averments contained in the papers : relief improperly granted.

Employee on suspension : an employee who is suspended does not have authority to act on behalf of an employer during the period of suspension, unless called upon to perform duties during that period.

Section 16(1)*(a)(*i) of the Superior Courts Act 10 of 2013 : mootness : circumstances have altered to such an extent that part of the judgment has become moot : order will have no practical effect.

Contempt of court : respondents failing to establish that the MEC acted wilfully and mala fide in failing to comply with a court order : not entitled to a declarator.

Costs order : discretionary and not lightly interfered with on appeal : absence of grounds on which a court, acting reasonably, could have made the order : appeal court entitled to interfere.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hiemstra AJ sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following:

'(a) The application is dismissed.

(b) The second applicant is directed to pay the costs of the application including the costs of two counsel.

(c) The second applicant is directed to pay the costs reserved on 23 December 2014.'

JUDGMENT

Theron JA (Maya AP, Dambuza JA, Fourie and Schippers AJJA concurring):

Introduction

[1] This appeal concerns the affairs of the first respondent, the Mogalakwena Local Municipality, Limpopo (the municipality) and what has in effect become a power struggle between the municipality, its councillors and the municipal manager.

Background

[2] Mr Kekana, (Kekana) (second respondent in Case No 523/2016), was previously the municipal manager of the municipality. The subject matter of this appeal is an urgent application (Case No 89657/14) launched on 19 December 2014 by Kekana, with the municipality as co-applicant against the appellants, in which he sought certain interdictory relief, pending the finalisation of review proceedings. In that application, the first appellant, the Member of the Executive Council of the Limpopo Province responsible for the Department of Co-operative Governance Human Settlements and Traditional Affairs (the MEC), was cited as the first respondent. The second to thirty-seventh appellants (the appellants) were councillors of the municipality at the time.

[3] In Part A of the urgent application, Kekana sought an order, inter alia, (i) interdicting Mr Lebelo (Lebelo) (fifth appellant in Case No 523/2016) from convening meetings of the council; (ii) interdicting the appellants from executing certain resolutions adopted by the council; (iii) interdicting Mr Mashamaite (Mashamaite), (first appellant in Case No 523/2016) the then mayor, from performing any acts as mayor of the municipality; (iv) interdicting all councillors of the municipality from giving instructions to officials unless authorised by legislation; (v) interdicting Mr Selepe (Selepe) (fortieth respondent in Case No 548/2016) from performing any functions as acting municipal manager and (vi) declaring that he, Kekana, was the municipal manager of the municipality. He also sought a rule nisi calling upon the MEC to show cause why she should not be held in contempt of an order issued by Tuchten J under Case No 35248/2014 on 17 June 2014. In Part B of the application (the review) Kekana sought the review and setting aside of, inter alia, the decision taken by the MEC to convene a special

council meeting on 6 November 2014, resolutions taken by the council on 6 November 2014 and 4 December 2014 and the decision to appoint Selepe as acting municipal manager.

[4] It was common cause that at the time Kekana launched the application, he was on suspension pending a disciplinary enquiry, having been placed on suspension by the council on 4 December 2014. Part A of the application was heard on 23 December 2014. The court a quo (Ismail J), did not grant interim relief and that portion of the matter was adjourned sine die. The review continued in the ordinary course.

[5] In the meanwhile the municipality proceeded with the disciplinary enquiry against Kekana. He was found guilty of gross misconduct and dismissed by the municipality on 31 March 2015. On 20 April 2015, Kekana launched an urgent application in the Gauteng Division, Pretoria, challenging his suspension, the disciplinary proceedings and his dismissal. On 1 June 2015, the urgent application was dismissed on the ground that that court did not have jurisdiction to entertain the matter. Hughes J found that the Labour Court had jurisdiction to 'adjudicate the dispute as asserted' by Kekana.

[6] Kekana then approached the Labour Court, seeking an order reviewing and setting aside the decision of the council to dismiss him and seeking reinstatement. The Labour Court (Baloyi AJ) reserved judgment. While judgment in the Labour Court was pending, the review application was heard in the court a quo on 3 and 4 February 2016. Judgment in respect of the review application was also reserved. On 26 February 2016, the Labour Court dismissed the application with costs. An application for leave to appeal against such dismissal is pending before the Labour

Court. On 1 April 2016, the court a quo (Hiemstra AJ) granted an order declaring that the MEC was in contempt of the order granted by Tuchten J, reinstating Kekana as municipal manager, declaring the meetings held on 6 November and 4 December 2014 unlawful and setting aside all decisions and resolutions taken by the council at these meetings. It is against this order that the appellants appeal, with the leave of the court a quo.[1]

[7] It is necessary, prior to dealing with the issues in this matter, to set out the history of the relationship between Kekana and the appellants. During the course of 2014 and 2015, Kekana had brought multiple applications on behalf of the municipality against various council members, including the appellants.

[8] Kekana asserted the conflict between him and Mashamaite arose in 2013 and was caused by his resistance to bow to pressure from Mashamaite and his supporters to engage in corrupt activities and unauthorised and irregular spending of the municipality's funds. According to Kekana, Mashamaite and his supporters had, on 12 July 2013, orchestrated his removal as municipal manager. He was however reinstated as municipal manager on 11 October 2013. It would appear that Kekana was instrumental in the decision of the council to appoint forensic investigators, KPMG, to investigate alleged irregularities by Mashamaite and certain other council members. The investigation found that Mashamaite had abused the mayor's discretionary fund and he was subsequently removed from office as mayor on 17 April 2014. Twenty three councillors who had supported

[1] There were two cases on appeal before us. In case number 523/2016 the appellants are the 37 former council members of the municipality, the municipality is the first respondent, Kekana the second respondent and the MEC the third respondent. In case number 548/2016 the MEC is the first appellant, the municipality the second appellant and Kekana a respondent together with the 37 former council members. Both cases are appeals against the judgment and order of Hiemstra AJ. They were argued as one composite matter and that is how it will be dealt with in this judgment.

Kekana and had, on 11 October 2013, voted for his reinstatement as municipal manager, were subjected to disciplinary proceedings and expelled from the ANC on 21 September 2014. The Speaker and Mayor were among those dismissed, leaving the municipality without these functionaries.

[9] In his founding affidavit, Kekana explained that he had, on 4 November 2014 brought an urgent application under Case number 80496/2014 to remove the South African Police Service (SAPS) and the appellants from the premises of the municipality which they had violently invaded and occupied during the afternoon of 3 November 2014.

[10] By notice dated 4 November 2014, the MEC invited councillors of the municipality to a special council meeting to be held on 6 November 2014. It was at this meeting that Lebelo was elected as Speaker and Mashamaite re-elected as Mayor. Kekana alleged that as from 6 November 2014, there were two factions, each claiming to be the legitimate council of the municipality with the one faction allegedly under the leadership of Mashamaite and Lebelo.

[11] Kekana stated that a number of councillors had, on 24 November 2014, and with the assistance of members of the SAPS, violently invaded the municipal premises, which resulted in him bringing an urgent ex parte application on 26 November 2014. After hearing oral evidence Preller J granted an order directing that the SAPS, Mashamaite and the other respondents in that matter, immediately vacate the municipal premises.

[12] It was common cause that Lebelo, in his capacity as Speaker, had, on 4 December 2014, convened a meeting of the council and it was at this meeting that

the council adopted a resolution to suspend Kekana. Kekana alleged that the purported council led by Mashamaite and Lebelo had adopted resolutions with far reaching consequences for the municipality. According to Kekana, this had led to the shutdown of ordinary municipal services as well as the financial department of the municipality. He alleged that the main purpose of the December 2014 application was to restore the municipality to a functional state.

Issues

[13] It is against this backdrop that the following issues must be decided:

- Was the court a quo precluded from granting the relief of reinstatement on the basis of the doctrine of *res judicata*?
- Did Kekana have authority to institute proceedings on behalf of the municipality?
- Are some of the orders appealed against moot?
- Was it established that the MEC's non-compliance with the order granted by Tuchten J was wilful and mala fide?
- Was the court a quo justified in directing that the appellants pay the reserved costs of the hearing on 23 December 2014?

Was the court a quo precluded from granting the relief of reinstatement on the basis of the doctrine of res judicata?

[14] It was contended on behalf of the appellants that having regard to the doctrine of *res judicata*, it was not competent for the court a quo to have granted the relief of reinstatement when the same relief had previously been sought by Kekana before Hughes J and dismissed with costs.

[15] *Res judicata* is the Latin term for 'a matter adjudged' and is the legal doctrine that bars continued litigation for the same cause, between the same parties and where the same thing is demanded.[2] The underlying rationale of the doctrine of *res judicata* is to give effect to the finality of judgments[3] and an 'avoidance of a multiplicity of litigation or conflicting judicial decisions on the same issue or issues'.[4]

[16] The court a quo justified its pronouncement on the issue of reinstatement as follows:

'[59] On 13 May 2015 the 2nd applicant brought an urgent application against the Municipality, the MEC, Mr P.P. Selepe, the newly appointed Acting Municipal Manager, and other interested parties in this court under case number 28113/15. He sought to have his suspension and the disciplinary proceedings against him set aside. The matter came before Hughes J. She dismissed the application on the grounds that the High Court lacked jurisdiction in the matter. She found that only the Labour Court had such jurisdiction. The 2nd applicant then instituted proceedings in the Labour Court where judgment is still pending.

[60] In my respectful opinion the judgment of Hughes J on this score is clearly wrong.'

[17] On the facts, both the definitional requirements of the *res judicata* doctrine and its justification are met. The cause of action was the same. The dispute before Hughes J primarily concerned Kekana's suspension and the disciplinary proceedings against him. The parties were the same, namely, Kekana, the municipality and the MEC. The relief sought was the setting aside of his suspension and dismissal.

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[2] See generally *Molaudzi* v *S* (2015) ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) para 11. *Royal Sechaba Holdings (Pty) Ltd* v *Coote and another* [2014] ZASCA 85; (2014) 3 All SA 431 (SCA); 2014 (5) SA 562 (SCA).
[3] *Molaudz*i para 16.
[4] *Royal Sechaba* para 21.

[18] The logic of the doctrine is an avoidance of a multiplicity of proceedings, with its consequent risk of producing conflicting outcomes on the same subject matter. The rationale for the doctrine was defeated by the approach taken by the court a quo. The court a quo concluded that Hughes J was 'clearly wrong' and that it could as a result disregard her judgment. In doing so, it created the very problem which the operation of the doctrine seeks to avoid – a multiplicity of litigation with conflicting judgments on the same issues.

[19] In any event, the court a quo, consisting of a single judge, had no jurisdiction to sit as an appeal court in respect of the order of Hughes J and, in effect, set it aside. It is clear from the passage of the judgment quoted in paragraph 16 above, that the court a quo was aware that Kekana had instituted proceedings in the Labour Court challenging his suspension and dismissal and that these proceedings were pending in that court. It is difficult to understand how the judge, with full knowledge of the pending litigation in the Labour Court, could nevertheless order that Kekana be reinstated. In the circumstances, the court a quo erred in granting a substantive order of reinstatement.

[20] Furthermore, and as already mentioned, at the time Kekana launched the application, he was on suspension. He had, in the application, sought the setting aside of his suspension and had set out the facts in support of this relief.

[21] It is trite that an applicant in motion proceedings must, in the founding papers, disclose facts that would make out a case for the relief sought, and sufficiently inform the other party of the case it was required to meet.

[22] Kekana could not, when he launched the application, have demonstrated circumstances justifying an order for reinstatement as he had not yet been dismissed. It was further common cause that the relief of reinstatement had not been sought by Kekana or argued on his behalf in the court a quo. The relief granted by the court a quo was inconsistent with the facts and averments contained in the papers and did not accord with the relief sought in the notice of motion. In my view, a case for reinstatement was not made out in the papers. Such relief was improperly granted.

Did Kekana have authority to institute proceedings on behalf of the municipality?

[23] The appellants have both in the court a quo and on appeal, challenged the authority of Kekana to cite the municipality as a co-applicant in the December 2014 application. In his founding affidavit, Kekana alleged that as municipal manager, he was the Head of Administration of the municipal council and its accounting officer and as such responsible for the safety of the employees of the municipality and for ensuring that the municipality provided services to the public and conducted its business in an orderly fashion. He relied on a resolution adopted by the council on 21 July 2014 which authorised the municipal manager to seek legal advice, approach an appropriate legal forum and do whatever may be necessary 'to protect the interests of the municipality'.

[24] An employee who is on suspension does not perform her usual duties. Feetham J in *Gladstone v Thornton's Garage*[5] put the matter thus:

'When an employee is "suspended" it appears to me that apart from any express instructions he must hold himself available to perform his duties if called upon; though for the time being he is debarred from doing his work.'

[5] 1929 TPD 119.

It must follow that an employee who is suspended does not have authority to act on behalf of an employer during the period of suspension, unless called upon to perform duties during that period.

[25] The resolution on which Kekana relied authorised the municipal manager to take legal steps to protect the interests of the municipality. He was suspended from his position as the municipal manager at the time he instituted these proceedings and as a result of his suspension, was debarred from performing any duties as municipal manager.

[26] During January 2015, the municipality filed a notice withdrawing as a party to the proceedings. In its judgment, the court a quo recorded that whether or not the municipality was a party to the proceedings was an issue in the proceedings. Although it did not make a clear pronouncement on this issue, a reading of the judgment as a whole suggests that it found that the municipality was a party to the proceedings. It is evident from the following extract of the judgment that the judge did not consider the notice of withdrawal to be valid:

'On 25 January 2015 the impugned council *purported* to withdraw the Municipality as an applicant in this matter'. [Emphasis added.]

On appeal, Mr Dreyer, informed the court that he appeared on behalf of both Kekana and the municipality.

[27] In any event, the municipality was a necessary party to these proceedings and had to be before court as it had a direct and substantial interest in any order

that might issue.[6] In the circumstances, and for the purposes of this judgment, it is accepted that the municipality was before court in these proceedings.

Are some of the orders appealed against moot?

[28] In terms of paragraphs 6 and 7 of the order of the court a quo, the resolutions taken at the meetings of 6 November and 4 December 2014 relating to the election of Lebelo and Mashamaite as Speaker and Mayor of the council, respectively, the election of the new executive committee of the council and the suspension of Kekana, were declared unlawful and set aside. These issues have become moot, mainly in consequence of the local government elections that were held in August 2016. It was common cause that Lebelo ceased to be the Speaker and a new Speaker had been elected and that a new Mayor had been elected in the place of Mashamaite. A new executive committee has also been constituted. Furthermore, the decision to suspend Kekana has become academic as it was subsequently overtaken by his dismissal on 31 March 2015.

[29] Section 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 is relevant and reads:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

The Constitutional Court has stated that 'a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'[7]

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[6] *Golden Dividend 339 (Pty) Ltd & another v Absa Bank Limited* (569/2015) [2016] ZASCA 78 (30 May 2016) para 10.

[7] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) see fn 18 therein.

[30] Having regard to the facts in this matter, I am of the view that paragraphs 6 and 7 of the order granted by the court a quo will have no 'practical effect or result' within the meaning of s 16(2)(*a*)(i) of the Superior Courts Act. This is a case in point where, after judgment in the court a quo, circumstances have altered to such an extent that part of the judgment has become moot.[8]

[31] It is apposite to mention at this stage that the respondents steadfastly defended this relief and persisted in the contention that it was not moot. This will be relevant when determining the question of costs.

Was it established that the MEC's non-compliance with the order granted by Tuchten J was wilful and mala fide?

[32] Para 1.1.2 of the order granted by Tuchten J on 17 June 2014 interdicted the (then) MEC from:

'interfering in any way whatsoever with the ability or right of the council of the applicant, its municipal manager or any of its officials to exercise powers or perform functions vested in them under the Constitution or any other applicable legislation'.

[33] Kekana alleged that the MEC, in calling the SAPS to the municipal premises, convening the council meeting of 6 November 2014 and appointing Selepe as acting municipal manager, violated the order of 17 June 2014. In respect of the first indictment regarding the SAPS, Kekana relied on a radio interview in which the MEC had said:

'I believe the Council has the power, if he [Kekana] continues to close them out that is why you have seen the police there on Monday. *The police were sent by the MEC*, because the councillors were feeling pain because people who were expelled were in offices and they went to report a

[8] *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford & others* (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA) para 22.

case of trespassing and the police went there and removed them, and even now council will take a resolution if he [Kekana] continues to stop them from entering the municipality'. (Emphasis added.)

[34] The MEC has alleged that she had seconded Selepe to the municipality as its acting manager 'upon request by [the] council of the [municipality] through a resolution that was properly adopted by that council to that effect'. She relied on the provisions of s 54A(6)(*a*) of the Local Government: Municipal Systems Act, 32 of 2000 (the Systems Act) which provides that a municipal council may request the MEC for local government to second a person, 'to act in the advertised position' as municipal manager, until such time as a suitable candidate has been appointed.

[35] As previously mentioned, the MEC had, on 6 November 2014, convened a meeting of councillors of the municipality. In her affidavit the MEC explained that she had received a written request from 36 council members that she convene a special meeting, in terms of s 29(2) of the Local Government : Municipal Structures Act 117 of 1998 (the Structures Act), for the purpose of electing a Speaker and a Mayor as these posts were vacant following the expulsion of the 23 councillors.

[36] The MEC made the following averments as to why she convened a special meeting of the council:

'17. . . . The second applicant is aware that 23 ANC councillors had been expelled by the ANC and by virtue of their expulsion they ceased to be members of council . . . Among the 23 expelled councillors, both the Mayor and the Speaker were expelled. This means that the municipality was left without a Speaker and an Executive Mayor. The meeting could not be convened by the Speaker because there was no Speaker. The meeting could not be convened by the Municipal

Manager ("Kekana") because he did not recognize the PR Councillors who were appointed and he flatly refused to convene any meeting . . .

18. As I have pointed out above, the second applicant made it abundantly clear that he was not going to call any meeting because he did not recognize the new councillors. In the absence of the Municipal Manager and the Speaker I am authorized by the Structures Act to convene such meeting in order to ensure that the municipality is able to get on with the business of the municipality of service [delivery by] ensuring that both the Speaker and the Mayor are elected. It would have been a serious dereliction of duty on my part if I elected to do nothing and allow the municipality to be held to ransom by the second applicant.

…

21.1 I confirm that the second applicant's attorneys addressed a letter to me . . . [The letter recorded that the proposed meeting would be unlawful and in violation of the interdict granted by Tuchten J on 17 June 2014 restraining the MEC from interfering with the affairs of the municipality.] It is clear from the reading of the said letter that the second applicant's attorneys have no understanding whatsoever of the provisions of the Structures Act nor do they appreciate the statutory obligation imposed on me as the Member of the Executive Council. The contents of the said letter were clearly misguided and wrong.'

[37] The court a quo made an order that:

'1 The first respondent is declared to be in contempt of the order granted by His Lordship Mr Justice Tuchten under case number 35248/2014 on 17 June 2014.

2 The first respondent is incarcerated for a period of 60 days.

3 The order contained in paragraph 2 above is suspended for a period of five years on condition that the first respondent does not unlawfully interfere with the affairs of the Mogalakwena Local Municipality during the period of suspension. This order applies to any successor to the MEC.'

[38] In granting this order, the court a quo reasoned:

‘63. As appears from the above, the MEC has thereafter, in alliance with Mashamaite and his supporters, imperiously interfered in the affairs of the council. Amongst others, she was instrumental in the violent invasion of the council offices on 3 November 2014 and 24 November 2014; she invited councillors to a special council meeting to be held on 6 November 2014 at the request of a contrived majority of councillors; she unlawfully convened the meeting of 6 November 2014 and she appointed the 40th respondent as acting municipal manager without any statutory authority to do so.

64. Counsel for the MEC, Mr Mokhari SC, pretended to be utterly perplexed about the basis upon which it is alleged that the MEC had been in contempt of the order. His perplexity is curious. The order is unambiguous. The MEC had been interdicted from interfering in the affairs of the municipality. Despite the order she blatantly continued to interfere in the most high-handed manner’.

[39] I consider now whether the requirements for the grant of the order had been satisfied. It has been held, with the advent of the Constitution, that the principles of contempt must accord with constitutional dictates.[9] One of these dictates is that the order must be served on or brought to the attention of interested persons.[10] The failure to notify interested parties of an order granted against them violates all precepts of fairness and what can be considered just in a constitutional democracy.

[40] The first difficulty in this matter and one recognised by the court a quo, is that there was uncertainty as to which MEC was before court when the order of Tuchten J was issued. This is apparent from the following paragraph of the judgment:

‘I cannot determine from the papers who exactly the MEC was from time to time during the events that are the subject matter of these proceedings. In the earlier stages the MEC was Mr Kgetjepe and in the later stages it was Ms M.G. Makhurupetje’.

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[9] *Pheko & others v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) para 33.
[10] *Ibid*, para 32.

Counsel for the respondents conceded that the order was not made against the current MEC, but her predecessor. There was a feeble attempt to evade the consequences of this concession by contending that the order was made against the office of the MEC. A reading of the order puts paid to this contention.

[41] The prejudice to the MEC was real and significant. The order granted by Tuchten J, which was not served on her, had set in motion a process that could lead to her incarceration in circumstances where she may not have been aware of the details of the order and the obligations it placed on her.

[42] Kekana did not prove that the order was served on the MEC. In any event, the Constitutional Court has held that it would suffice if the order was brought to the notice of the alleged contemnor as against personal service, stating that:

'When a court order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable'.[11]

Kekana's attorneys did bring the existence of the order to the attention of the MEC in a letter to her dated 6 November 2016, advising her that she had no authority to call the scheduled meeting and reminding her of the order granted by Tuchten J. In any event and having regard to my finding below about the requirements of wilfulness and mala fides, it is not necessary to decide whether the order and the details thereof, had been brought to the attention of the MEC with sufficient particularity.

[43] An applicant in civil contempt proceedings must prove the requisites of contempt, namely, (a) the existence of a court order; (b) service or notice thereof;

[11] *Pheko*, para 47.

(c) non-compliance with the terms of the order; and (d) wilfulness and mala fides beyond reasonable doubt.[12] This Court has held that the breach or non-compliance must have been committed 'deliberately and mala fide'.[13]

[44] Once an applicant has proved the required elements of contempt, the respondent bears an evidential burden in relation to wilfulness and mala fides. The respondent must produce evidence that establishes a reasonable doubt as to whether the non-compliance was wilful and mala fide, failing which contempt will have been established beyond a reasonable doubt.[14] Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd*,[15] explained the nature of the test in determining whether the breach was committed 'deliberately and mala fide':

'. . . A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

These requirements – that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.' (Footnotes omitted.)

[45] There was no evidence to support a finding by the court a quo that the MEC had 'imperiously interfered in the affairs of the council' and that she had been 'instrumental in the violent invasion of the council offices'. This was incorrect and

[12] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 30; *Compensation Solutions (Pty) Ltd v Compensation Commissioner* (072/2015) [2016] ZASCA 59; (2016) 37 ILJ 1625 (SCA) para 15.
[13] *Fakie* para 9; *Jayiya v Member of the Executivee Council for Welfare, Eastern Cape & another* 2004 (2) SA 611 (SCA) paras 18 and 19.
[14] *Fakie* para 42.
[15] Ibid, paras 9 and 10.

is not borne out by the record. It is clear from her explanation that the MEC had 'sent' police to the municipality because she believed that Kekana had unlawfully prevented newly elected councillors from gaining access to the municipality.

[46] Section 54A(6)(*a*) of the Systems Act does authorise the MEC, at the request of the municipality, to second a person to act as municipal manager, but the section seems to suggest that the secondment can only be made once the post has been advertised. This was not a point that was argued before us.

[47] It is accepted that the MEC did not have the power to convene the meeting. In terms of s 29(1) of the Structures Act the Speaker of a municipality has authority to call meetings of the council, but a majority of the councillors may, in writing, request that the Speaker convene a meeting. In terms of s 29(2) the municipal manager, and in her absence, a person designated by the MEC for local government in the province, must, within 14 days after the council has been declared elected, call the first meeting of the council.

[48] The decision of the MEC to convene the meeting of 6 November 2014 must be considered in context. This was not a new council recently elected, but an existing council where a substantial number of councillors had been replaced pursuant to their expulsion from the party that had nominated them to the council. The duty to convene a council meeting under s 29 would have ordinarily fallen on the Speaker, who was one of the expelled councillors. According to the MEC, Kekana refused to call a meeting. The MEC believed she had authority to call the meeting and in fact considered it her duty to ensure that a meeting was called to elect a Speaker and a Mayor and restore functionality to the municipality. The defence of the MEC is that she believed that she acted within her legitimate role of

overseeing the affairs of the municipality and if it is found that she was in breach of the order granted by Tuchten J, then such breach was not wilful or mala fide. The MEC's version must be carefully scrutinised. It should be rejected on the papers only if it is far-fetched or clearly untenable.[16]

[49] In light of the explanation proffered by the MEC, her decisions to second Selepe as acting municipal manager, convene the council meeting of 6 November 2014 and her role in reporting the matter to the police, cannot be construed as a deliberate and intentional desire to show disrespect to the court by not complying with its order. It thus cannot be said that her non-compliance with the order was wilful and mala fide. The contempt order against her ought not to have been granted as all the requirements for the grant of this relief had not been met.

Was the court a quo justified in directing that the appellants pay the costs reserved at the hearing of 23 December 2014?

[50] At the hearing of the urgent application on 23 December 2014, the court dismissed certain prayers contained in Part A of the notice of motion and adjourned part of the application sine die. In addition, it refused to grant interim relief and struck the matter from the roll due to lack of urgency. It reserved the question of costs for later determination.

[51] The court a quo ordered that the appellants were to be responsible for the costs reserved on 23 December 2014. It gave no reasons for this order.

[16] *Plascon-Evans Paints Ltd* v *Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 653 C-D; *Els v Weideman* 2011 (2) SA 125 (SCA) paras 52-54.

[52] In awarding costs the court exercises a judicial discretion with which a court of appeal will not readily or lightly interfere. The power of interference is limited to instances of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order under scrutiny.[17] The latter applies in this matter.

[53] Kekana was not successful in obtaining relief from the court on 23 December 2014. He had approached the court, seeking urgent relief. The matter was struck off the roll and prosecuted in the normal course. In addition to that, certain relief that he had sought, was dismissed. There was no reasonable basis for the court a quo to grant an order directing that the appellants pay the costs reserved on 23 December 2014.

[54] For these reasons, the following order is granted:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following:

‘(a) The application is dismissed.

(b) The second applicant is directed to pay the costs of the application including the costs of two counsel.

(c) The second applicant is directed to pay the costs reserved on 23 December 2014.’

LV Theron
Judge of Appeal

[17] *Attorney General, Eastern Cape v Blom & others* 1988 (4) SA 645 (A) 670D-E; *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd & others* 2006 (4) SA 458 (SCA) para 50.

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