IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 633/2018

Date heard: 29th January 2019
Date delivered: 28th February 2019

In the matter between:

WALTER SISULU LOCAL MUNICIPALITY	**APPLICANT**
And	
THEMBINKOSI MAWONGA	**1ST RESPONDENT**
THE MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, EASTERN CAPE N.O.	**2ND RESPONDENT**

JUDGMENT

RENQE, AJ

[1] The Applicant approached this court on an urgent basis seeking an order to enforce the operation of judgment granted by the Honourable Mr Justice Lowe, on 8 November 2018, in particular paragraph 99.2[1]. Secondly, interdicting and restraining the First Respondent from entering the Applicant's premises purporting to exercise the function of Municipal Manager.

---

[1] **99.2 of the court order** reads : "However this notwithstanding the Second Respondent's counter application succeeds, the appointment of Applicant as First Respondent's Municipal Manager on 20 July 2017 (and subsequent contract) is set aside as being null and void for want of compliance with Section 54(A)4 **of the** Local Government: Municipal Systems Act 32 of 2000."

[2] The First Respondent was appointed on a five (5) year contract as a Municipal Manager for Gariep Local Municipality. The contract commenced on 1 August 2007 until 31 July 2012.On 24April 2012 a resolution was taken to review the First Respondent's contract for further five (5) years from 1August 2012 until 31July 2017. Gariep Local Municipality was later amalgamated with Walter Sisulu Municipality.

[3] Before the expiry of five years and on 28 July 2017, the First Respondent's contract was further extended to another five (5) year period with effect from 1 August 2017 to 31 July 2021.On 29 December 2017 the Applicant sought to rescind the First Respondent's appointment. On 10 January 2018, the First Respondent was informed that the decision to extend his contract did not comply with s 54A[2] of the Municipal Systems Act 32 of 2000 (MSA); read with

---

[2] "**54A. Appointment of municipal managers and acting municipal managers**

(1) The municipal council must appoint-

(a) a municipal manager as head of the administration of the municipality; or

(b) An acting municipal manager under circumstances and for a period as prescribed.

(2) A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.

(2A) (a) A person appointed in terms of subsection (1) *(b)* may not be appointed to act for a period that exceeds three months.

(b) A municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph *(a)*, for a further period that does not exceed three months.

(3) A decision to appoint a person as municipal manager, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if-

(a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or

(b) The appointment was otherwise made in contravention of this Act.

regulation 7, 9, 10 of the Regulations relating to appointments and conditions of employment of Senior Managers 2014 (The Regulations). The First Respondent was informed that his employment had been terminated.

[4] The First Respondent launched an application for a review and setting aside of the decision of the council which rescinded, a resolution which was adopted on 20 July 2017[3]. Soon thereafter a counter-application was brought for an order declaring the First Respondent's appointment unlawful and invalid for being in contravention with the provisions of the MSA. The matter served before the Honourable Mr Justice Lowe and the decision to extend the First Respondent's appointment was set aside.

[5] Pursuant thereto, and on 29 November 2018 the First Respondent sought leave to appeal the Honourable Mr Justice Lowe's decision, which was refused. Consequently, the First Respondent petitioned the Supreme Court of Appeal for leave to appeal. The outcome of this petition is currently pending.

---

(4) If the post of municipal manager becomes vacant, the municipality must-

(a) advertise the post nationally to attract a pool of candidates nationwide; and

(b) Select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.

(5) The municipality must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.

(6) (a) The municipality may request the MEC for local government to second a suitable person, on such conditions as prescribed, to act in the advertised position until such time as a suitable candidate has been appointed.

[3] 20 July 2017 resolution extended the first respondent contract employment.

URGENCY

[6] The Applicant launched this present application on urgent basis. Although the First Respondent opposed the urgency on the basis that it was self-created, he later conceded on the date of the hearing that the matter was indeed urgent. The issue of whether or not a matter should be enrolled for urgency and heard as an urgent application is governed by the provisions of Rule 6(12) of the Uniform Rules of Court. The aforementioned sub rule allows the court or judge in urgent application to dispense with the form and service provided for in the rules and dispose the matter in accordance with procedures which are as far as practicable in terms of the rules. The rule provides that in an affidavit in support of an urgent application, the Applicant shall set forth explicitly the circumstances on which he relies which render the matter urgent and the reason why he claims that he cannot be afforded substantial redress at a hearing in due course.

[7] The question of whether a matter is sufficiently urgent to be enrolled and heard as a matter of urgency is underpinned by the issue of absence of substantial redress in an application in due course.

[8] In this matter the application for a leave to appeal was refused on 29 November 2018. On 20 January 2019, the First Respondent sent a letter to the Applicant confirming that he had officially assumed duties as a Municipal Manager, and that he intended to report for duty on 21 or 22 January 2019. The First Respondent was asked in a letter dated 21 January 2019 to withdraw his threat, failing which the First Respondent will launch an urgent application. It was pointed out to the First Respondent that the Applicant had appointed another new Municipal Manager and accordingly, the First Respondent would have no

duties to perform. On 22 January 2019, the First Respondent entered the office of the Applicant and called a meeting and addressed the staff members.

[9] In *casu*, there has not been any delay in instituting the proceedings. The Applicant instituted the proceedings immediately after the First Respondent resumed his duties as a Municipal Manager. It is my view that the actions of the First Respondent were not foreseeable until 20 January 2019, when the First Respondent sent a letter to the applicant. These proceedings were launched immediately after the threat was executed. It is therefore my view that, in the normal course, the applicant would not have been afforded substantial redress and therefore the matter qualified to be enrolled and heard as urgent application.

MERITS:

[10] The general rule is that launching of an appeal, including an application for leave to appeal suspends the operation of a judgment until appeal or any step preliminary thereto is finalised. Section 18 of the Superior Courts Act 10 of 2013 permits courts to enforce the operation of judgments pending appeals. Section 18, provides that:

> *"(1) subject to subsection (2) and (3) , and unless the court under exceptional circumstances orders otherwise, the operation of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal".*

[11] The test is twofold: The requirements are, firstly, whether or not "exceptional circumstances" exist and secondly, proof on a balance of probabilities by the Applicant of (i) the presence of irreparable harm to the Applicant, who wants to put into operation and execute the order; (ii) the absence of irreparable harm to the Respondent, who seek leave to appeal[4].

[12] As to what constitutes 'exceptional circumstances", as contemplated in subsection1, Thring J in ***MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and another* 2002 (6) SA 150 (C) at 156I-157C**, summarised the meaning of the phrase as follows[5]:

'What does emerge from an examination of the authorities, however, seems to me to be the following:

1. *What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "seldsaam", "uitsonderlik", or "in hoë mate ongewoon.*

2. *To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*

3. *Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their*

[4]Superior Court Practice Volume 1 A2-64
[5]Superior Court Practice Volume 1 A2-66

existence or otherwise is a matter of fact which the Court must decide accordingly.

4. *Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*

5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.*"

[13] Sutherland J in ***Incubeta Holdings (Pty) Ltd v Ellis and another*** **2014 (3) SA 189 (GJ)** at held at para [19] that:

> *it is important to appreciate that Thring J was not addressing the phrase in s18 of the SC Act but in the provision of s5(a)(iv) of the Admiralty Regulation Act 105 of 1983, which confers a power upon a competent court to direct an examination of various things in order to procure evidence.*

[14] He went further and held at para [22]

"Necessarily, in my view, exceptionality must be fact specific. The circumstances which are or may be exceptional must be derived from the actual predicaments in which the given litigants find themselves. I am not of the view that one can be sure that any true novelty has been invented by s18 by the use of the phrase.

[15] Turning to the circumstances of this matter, the Applicant submitted that; (i) it had already appointed a new Municipal Manager in accordance with the requirements of the MSA; (ii) the appointment was made on the basis that MSA limits the appointment of the Acting Municipal Manager to a period of three months; (iii) should the First Respondent be permitted to assume duties, the Applicant will be required to pay him a full salary while he performs no duties. This will amount to fruitless and wasteful expenditure.

[16] The Applicant further contended that; (i) the First Respondent would only suffer loss of income, to which he was not entitled; (ii) should the First Respondent's appeal succeed, he would be able to recover his financial loss to the extent that he is able to prove it. It was further contended that, prior to launching his application, the First Respondent instituted proceedings in the Labour Court for unfair dismissal, which were later withdrawn. This led to an inordinate delay in finalising the matter.

[17] In reply the First Respondent submitted that, the Applicant went ahead and appointed a new Municipal Manager fully knowing that there was a pending legal dispute between the parties. The Applicant was fully alive to the risks of

this new appointment. Furthermore, the Applicant failed to demonstrate that there are any exceptional circumstances or any presence of irreparable harm facing the Applicant. Relying on s 32(1) (d) of the Municipal Finance Management Act 56 of 2003, the First Respondent submitted that, this section allows for fruitless expenditure, such as expenditure incurred in appointing and paying a municipal manager, who should never have been appointed. Therefore there was no irreparable harm to the applicant. The First Respondent contended that he suffered and continues to suffer severe financial distress. His home was on the verge of being sold on public auction.

[18] As stated in paragraph [11] *supra*, in order for the Applicant to succeed, he must, amongst others, establish the existence of exceptional circumstances. It is clear from authority that what is considered to be exceptional is something that is out of the ordinary, unusual, or uncommon. The court held in ***Joubert, Olof Abraham v Joubert, Kantika***[6] at para [28]

> *"It is not necessary for any one factor to be exceptional. If the circumstances of the parties, considered in their totality, and considered in conjunction with the possible harm that either party may suffer, are exceptional, then the Court may grant an order in terms of s18. The potential harm that either party may suffer or may not suffer would, as a matter of logic, have a bearing on whether exceptional circumstances exist. The nature of the relief sought may also be relevant to the consideration process".*

[6]Unreported judgment of Swanepoel AJ (Tolmay J and Janse van Niewenhuizen J concurring) Gauteng Division , Pretoria, Case number A 367/2018, date of judgment : 10 December 2018

[19] In *casu,* the Applicant submitted that; (i) it had appointed a new Municipal Manager in terms of s 54A of the MSA; (ii) Section 54A of the MSA does not allow an appointment of an acting Municipal Manager for a period exceeding three months. Therefore the disputed position could not be left vacant; (iii) the extension of the First Respondent's contract was set aside on the basis that it contravened the provisions of s 54A; (iv) the Applicant has already paid the First Respondent, whose appointment was unlawful, a salary and this expenditure is unlikely to be recouped.

[20] It should be appreciated that if the court order of the Honourable Mr Justice Lowe is implemented the Applicant will find itself having two Municipal Managers, performing the same functions and having the same powers. Clearly this will be disruptive and hamper service delivery. A situation which, in my view, cannot be allowed. This will not only be unusual or out of the ordinary, but against our legislation, which only makes provisions for one accounting officer. The Applicant made it clear that, it currently does not have a budget for salaries of two municipal managers. According to the Applicant; (i) the First Respondent also addressed a letter on the Applicant's letter head and signed as a Municipal Manager, whilst there was a newly appointed Municipal Manager; (ii) On 22 January 2019, the first respondent occupied the office of the newly appointed Municipal Manager. He convened a meeting to address the staff, thereby undermining the authority of the current Municipal Manager. He even went as far as locking the current Municipal Manager's office and installed his own personal lock in order to block any access. Taking the above factors into consideration, it is my view that a sufficient degree of exceptionality to justify

the relief sought has been demonstrated. Furthermore, the Applicant would indeed suffer irreparable harm if the operation of the order is not suspended. The First Respondent will only suffer loss of earnings, which in my view, if he succeeds on appeal, can be recovered and the quantum is feasible to compute, including the loss of interest.

[21] In view of the approach that I have adopted, I do not deem it necessary to deal with prospects of success as an issue for consideration in deciding whether or not to grant the exceptional relief. The Applicant also sought a prohibitory interdict relief, to preserve the status quo. This relief is aimed at interdicting the First Respondent from entering the Applicant's premises or purporting to exercise the function of Municipal Manager until the appeal has been finalised.

[22] I am satisfied that the applicant has made out a case for the relief sought. In the circumstances, it is ordered that:

(i) The operation of the order by the Honourable Mr Justice Lowe in paragraph 99.2 of his judgment dated 8 November 2018, which set aside the First Respondent's appointment as Municipal Manager is not suspended pending the outcome of the First Respondent's proposed appeal to the Supreme Court of Appeal;

(ii) Pending the outcome of the aforesaid appeal, the First Respondent is interdicted and restrained from entering the Applicant's premises or in

any manner purporting to exercise the functions of Municipal Manager or laying claim to the said office until the aforesaid appeal is finalised.

(iii) That the First Respondent pays the costs of this application.

F.Y. RENQE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant:	Advocate Beyleveldt (S.C.)
Instructed by:	Wheeldon Rushmere & Cole
	119 High Street
	GRAHAMSTOWN
	(Ref. B Brody/Glyn/S)

Counsel for the First Respondent:	Advocate Cole
Instructed by:	Netteltons Attorneys
	118A High Street
	GRAHAMSTOWN
	(Ref. Mr. Marabini/Chantal)