IN THE HIGH COURT OF SOUTH AFRICA
NATAL PROVINCIAL DIVISION

CASE NO : 8641/08

MABHUTANA ELPHUS KHOZA	**Applicant**
versus	
THE PREMIER OF KWAZULU-NATAL	**First Respondent**
MEC FOR LOCAL GOVERNMENT	**Second Respondent**
WILFRED MUZI MKHIZE N.O.	**Third Respondent**
EDWARD MVUSENI NGUBANE N.O.	**Fourth Respondent**
THE ELECTORAL COMMISSION	**Fifth Respondent**
THE MUNICIPALITY MANAGER, EMADLANGENI MUNICIPALITY	**Sixth Respondent**
EMADLANGENI MUNICIPALITY	**Seventh Respondent**

RESERVED JUDGMENT

Delivered on 15 July 2008

NTSHANGASE, J

1) In this matter the applicant has sought an order in the following terms:-

"1. This matter is to be heard as a matter of urgency and the forms and notice periods provided for in the Rules are dispensed with.

2. Pending finalization of the application for the Second Order Prayed :

2.1 The fifth and sixth respondents are interdicted from taking any further steps to hold a by-election in Ward 4 of the Emadlangeni Municipality.

2.2 The decision by the Executive Council of KwaZulu-Natal on 14 May 2008 to remove the applicant from office as a councilor of the Emadlangeni Municipality is suspended.

2.3 The decision of the Executive Council of KwaZulu-Natal on 22 August 2007 to suspend the applicant as a councilor of the Emadlageni Municipality is suspended.

3. The application for the Second Order Prayed is adjourned sine die.

4. The first and second respondents and any other respondents who oppose this application are ordered to pay the costs jointly and

severally.

5. Further or alternative relief."

2) At the commencement of proceedings Mr Rall who appeared for the applicant indicated it to be common cause between the parties that the issue of suspension had fallen away as it had been overtaken this year by the applicant's removal from office as a councilor, and that therefore the relief in prayer 2.3 of the notice of motion was no longer sought.

3) At this stage I mention that only the second respondent has filed an answering affidavit in opposition to the application.

4) Proceedings are afoot which pertain to what is referred to in paragraph 3 of the notice of motion as the Second Order Prayed, to review and set aside –

"1.1 the decision by the Executive Council of KwaZulu-Natal on 22 August 2007 to suspend the applicant as a councilor of the Emadlangeni Municipality;

1.2 the appointment by the Executive Council of a committee under chairmanship of the third and fourth respondents to investigate allegations against the applicant;

1.3 the findings of the committee chaired by the third and fourth respondents in terms of which the applicant was found guilty on two counts, and the committee's recommendation that the applicant be removed from office as a councillor of the Emadlangeni Municipality;

1.4 the decision of the Executive Council of KwaZulu-Natal on 14 May 2008 to adopt and implement those findings and to remove the applicant from office as a councilor of the Emadlangeni Municipality;

2. The first and second respondents, together with any other respondents who oppose this application are ordered to pay the costs jointly and severally;

3. further or alternative relief."

URGENCY AND PEREMPTION

5) The second respondent raised the issue of urgency and pointed to an unjustifiable delay by the applicant in instituting these proceedings. Mr Singh who appeared for the respondents referred to a number of authorities, including *Hultzer v Standard Bank of South Africa (Pty) Ltd* [1] and others which I find to be apposite where a delay has in fact

1 (1999) B BLLR 809 (C)

occurred. In that regard there can be no reasonable argument, in my view, that the applicant would have been hard pressed to justify the delay in instituting the present proceedings to set aside his suspension on 22 August 2007. The issue in regard to his suspension has been abandoned by the applicant. He argued that the applicant had lost entitlement to bring the application on the principle of peremption following his participation in proceedings of the special committee established to investigate allegations of breaches of the code of conduct against him. The issue of peremption was raised when the applicant challenged the intervention by the Executive Council of KwaZulu-Natal ("EXCO") in terms of section 139(1)(b) of the Constitution to appoint a special committee to make findings on allegations against him and any other councilor arising from a special investigation report into allegations of mismanagement maladministration, fraud and corruption at Utrecht Municipality, dated 14 May 2007. In terms of that intervention he was suspended as well. A letter from the second respondent dated 15 May 2008 was addressed to the applicant to inform him of the decision of the EXCO on the outcome of the disciplinary hearing by the special committee chaired by third and fourth respondents. The letter told him that he was found guilty on the "charges" he faced and that the special committee had resolved that he be removed from office. This was placed before the EXCO on 14 May 2008 "and they resolved to adopt and implement the findings of the Independent Special Committee." According to applicant he received the letter some two weeks after it

had been written, although he had heard about its contents over the radio on 16 May 2008 and made enquiries and eventually obtained a copy of the letter. After receipt of the letter he consulted his attorney who briefed counsel on 25 May 2008. In his affidavit applicant states that on the advice of counsel a letter was sent by applicant's attorneys to the second respondent to "request certain details of the findings made against (him) and the sanction imposed on (him)." When no response had been received by 17 June 2008 Attorney Shabalala telephoned an official in the second respondent's department and spoke to a Mr Lionel Pienaar who expressed surprise as, to his knowledge, no letter had been received. A copy was provided to Mr Pienaar on 17 June 2008. A response on behalf of the second respondent was received on 19 June 2008 and "(he) subsequently established that the second respondent had determined, in terms of section 25(3) of the Structures Act that a by-election in Ward 4 would be held on 16 July 2008." The present application was launched on 20 June 2008.

6) I find that the applicant reasonably required the information solicited in his attorney's letter dated 30 May 2008 particularly the information on sanction as he had not seen the recommendation on sanction. He received the outstanding part of the recommendation on sanction when the answering affidavit was perused for him to file his reply. I find also that the application was launched without undue delay in relation to the relief as presently sought in prayers 2.1 and 2.2 of the

notice of motion. Evidently the matter was urgent given the imminence of the by-election set for 16 July 2008.

7) Mr Singh argued that the issue regarding section 139(1)(b) of the Constitution should have been raised in an application that should have been brought shortly after August 2007. He also argued that the applicant was told 10 months ago of the decision to intervene under section 139(1)(b) and that it is not open to him to say now the second respondent should never have intervened under those provisions. Mr Singh also advanced the argument that the applicant acquiesced on the principle of peremption in the decision to appoint the Special Committee and in the conduct of the inquiry proceedings which followed, and by his failure to take steps to set aside the inquiry itself.

8) I find that what happened some 10 months before the outcome resides in a province separate from that in which the outcome does. It is severable and separate from the outcome. The applicant is quite entitled to challenge his removal from office independently of the challenge to the intervention to establish and the actual establishment of the inquiry. There can be no reason to fault the applicant for failure to bring an application to set aside the inquiry itself when it was well within his legitimate expectation that the inquiry might be concluded in his favour and without prejudice to him. He was clearly entitled to await the outcome and, if such outcome be prejudicial, to consider appropriate action with due regard to the nature of such prejudice.

Participation in such circumstances does not, in my view, *per se,* constitute acquiescence. Peremption on the basis of any purported acquiescence in respect of the validity of the inquiry, an issue not raised in the answering affidavit for the applicant to deal with, cannot properly be open to the respondents to rely on. There are no factual allegations to support it. The applicant is entitled to seek interim relief pending review.

9) In finding the applicant guilty on counts 2 and 3A the committee stated :

"We therefore find that the respondent is guilty on count 2 in that he unlawfully allocated sites to the community of Groenvlei which sites are in the region of 15 to 20 in contravention of the MEC'S directive made on 18 August 2005.

With regard to count 3A we find that the respondent is guilty of making a false claim for the meeting held on the 28th of January 2005 which meeting was the Afled meeting in respect of which he made a claim of R254.07 on the 31st January 2005."

BASIS OF RELIEF CLAIMED

10) The applicant's case is based on the illegality of the inquiry as well as the merits of the inquiry. In regard to the illegality the applicant

contends that the EXCO had no right to intervene in terms of section 139(1)(b) of the Constitution. If the EXCO had no such right it will follow that the inquiry was invalid and so also the recommendations which issued therefrom.

11) Section 139(1)(a) and (b) of the Constitution provides :

"139(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation including –

(a)issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations.

(b)Assuming responsibility for the relevant obligation in that municipality to the extent necessary to –

i) maintain essential national standards or meet established minimum standards for the rendering of a service;

ii) prevent that municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole;

or

iii) maintain economic unity."

12) I deal now with the various contentions of the applicant with reference to section 139(1)(b) :

12.1 It is contended on behalf of the applicant that the letter, annexure "MK1" to the applicant's founding affidavit makes no mention of the executive obligation not fulfilled by the municipality. Indeed no mention is made of any failure to fulfil any obligations; nor is there mention of services which were detrimentally affected.

12.2 It is also contended by the applicant that there were no executive obligations whether in terms of the Constitution or any other legislation which the municipality was not fulfilling to justify the investigation into allegations against him or other persons in relation to the provisions of section 139(1)(b), a fact borne out by the charges against him investigated by the third and fourth respondents. The second respondent's response to this is that the complaints concerning the applicant related to alleged breaches of the Code and had required the council to take steps provided for in Item 14(1) of the Code. The charges faced by the applicant were as follows :-

"CHARGE 2 (IRREGULAR CONDUCT)

Contravention of items 2 and 5 read with item 14 of schedule one of the Municipal Systems Act 32 of 2000, and read further with the Constitution of the Republic of South Africa 1996 chapter 2 section 26 ( ) (3), and also read with the directive of the MEC for Local Government made on 18 August 2005, and noted on 31 October 2005.

In that you :

1. *During 2006 allocated 15 sites in Groenvlei to persons in contravention of the MEC's directive made on 18 August 2005.*

2. *These sites are on a farm that belongs to Public Works.*

3. *The aforesaid conduct is irregular.*

CHARGE 3A (FINANCIAL MISCONDUCT)

Contravention of the following legislation :

1. *Items two of schedule 1 read with item 14 of the Municipal Systems Act 31 of 2000.*

2. Section 32(1) of the Municipal Finance Management Act no 56 of 2003.

3. The Utrecht Municipality's Travelling and Subsistence Re-imbursement Policy as approved and adopted under council resolution number A 52/2004 (a);

In that you fraudulently claimed overpayment for subsistence and travel on the following occasions :

(a)	*12 September 2005*	*R1 509-60*	
(b)	*12 September 2005*	*R 736-40*	
	(c)	*15 September 2005*	*R 977-40*
	(d)	*20 September 2005*	*R 977-40*
	(e)	*31 January 2005*	*R 189-07*
TOTAL		*R4 389.89"*	

12.3 What item 14 of schedule 1 to the Municipal Systems Act 32 of 2000 ("Municipal Systems Act") provides includes the empowerment of the municipal council to investigate and make findings on any alleged breach of the code of conduct in relation to a councillor or to appoint a special committee to do so. It also provides for sanctions and the procedure on appeal to the MEC for Local Government ("MEC"), and the powers of the MEC in regard to appeals. It also provides that the MEC

may appoint a person or a committee to investigate any alleged breach of a provision of the code and to make recommendations on whether the councillor should be suspended or removed from office. It also provides for suspension or removal from office by the MEC where warranted if he be of opinion that the councillor has breached a provision of the code.

12.4 What is clear in regard to Item 14(4) is the empowerment of the MEC to appoint a person or committee under these provisions to investigate alleged breaches of a provision of the code. What is also clear is the power of the MEC under item 14(6) to suspend or to remove from office, where warranted, a councillor if he be of opinion that such councillor has breached the provision of the code.

12.5 It is also clear from Item 14(1) that a municipal council has a discretion as opposed to an obligation in terms whereof it –

may -

(a) investigate and make a finding on any alleged breach of a provision of the code; or

(b) establish a special committee to investigate and make a finding on any alleged breach of this code; and

(c)to make appropriate recommendations to the council.

12.6 Now when one views the purpose of the intervention with reference to the charges the irrelevance of the provisions of section 139(1) is clearly apparent. As has been indicated the charges against the applicant are that during 2006 he allocated 15 sites on a farm that belongs to Public Works in Groenvlei to persons in contravention of the MEC's directive made on 18 August 2005 and that in contravention of item 2 of schedule 1 read with item 14 of the Municipal Systems Act and section 32(1) of the Municipal Finance Management Act and the Utrecht Municipality's travelling and subsistence re-imbursement policy he fraudulently claimed overpayment for subsistence. Now the intervention of section 139(1) is not to occur for purposes of charges. The allocation of sites is not even indicated to have occurred in a capacity germaine to municipal functions and there is no indication as to what impact it had on the maintenance of essential and minimum standards for "the rendering of a service" as envisaged by section 139(1)(b)(i) of the Constitution. The charges and the "convictions" have absolutely no relevance to the "rendering of a service" which makes the intervention in terms of section 139(1) to be at complete variance with the objectives of intervention which include :

"(b) assuming responsibility for the relevant obligation to the extent necessary to :

(i)maintain essential national standards or to meet established minimum standards for the rendering of a service;

(ii)prevent the municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii)maintain economic unity…."

12.6 Mr Singh referred to *Latib v Administrator of the Transvaal* [2] to make the point that if a law confers a power to make a decision, the mere fact that an incorrect law was relied upon for the exercise of the power does not invalidate the decision as long as there is some other law that would provide the power to make a decision. I do not agree that this will be of assistance to one to whom is presented a reference to a law so divorced from what is intended for his attention for purposes of charges he faces. But Mr Singh also advanced argument which tended to justify reference to section 139(1) in this matter. He referred to various provisions of the Municipal Systems Act as well as the

2 1969 (3) SA 186 (T)

Constitution to show the objects of Local Government in the context of "rendering of a service" as referred to in section 139(1)(b). He rendered a somewhat wide meaning of "rendering of a service" which, in my view, assigned an interpretation of it which is divorced from what the simple language of the legislature in section 139(1) sought to say, as when he quoted section 195(1) which does no more than set out the basic values and principles governing public administration - all in an effort to give meaning to "rendering of a service" as appears in section 139(1) of the Constitution. It was to show, as I understood it, that the second respondent stepped in to intervene by reason of the municipality's abdication of its responsibilities and which caused him to proceed with reference to section 139(1) of the Constitution, against the applicant and others. Not only was there reference to section 139(1)(b) in the letter which informed the applicant of his suspension and of the intention to "charge" him and others, these provisions were referred to also in the letter which notified him of his removal from office, as a councillor. Mr Rall submitted, properly in my view, that section 139(1)(b) was not aimed at disciplinary inquiries. Section 139(1)(b) authorizes, to a limited extent, intervention by one tier of government in another which is not delivering service to expected standards, to ensure that it does so. The provisions are not available to be invoked with reference to past acts, as it was to applicant's acts of 2006. In

my view the applicant is correct in stating –

> "….that there were in fact no executive functions, whether in terms of the Constitution or any other legislation which the municipality was not fulfilling which would have justified either the investigation into allegations against me (or the other persons) or my suspension" with reference to section 139(1)(b). It appears to me that the intervention was unlawful.

THE MERITS

13) The applicant faced and was "convicted" on a strange charge on count 2 in that "(d)uring 2006 (he) allocated 15 sites in Groenvlei to persons in contravention of the MEC's directive made on 18 August 2005." The competence of such a 'charge' and a 'conviction' thereon would depend on an acceptance that any such decree had the force of law. I do not find that it does have such binding force. The record at pages 41 and 42 of the bundle of documents shows the incompetent effort to present a "ministerial resolution" in a letter from "the Director : Northern Region" and another from "Manager : Engineering Services" co.signed by the "Municipal Manager" whose areas of work is not even reflected. The procedural flaws are so material that they, in my view, would vitiate the findings in proceedings in which they occurred.

14) On Count 3A the applicant faced 'charges' of fraudulent claims for

payment of subsistence and travel allowance involving R1509,62 and R736.40 in respect of 12 September 2005, R977.40 in respect of 15 September 2005, R977.40 in respect of 20 September 2005 and R254.07 in respect of 31 January 2005. He was found guilty on his claims for R254.07. Although it was contended that the witnesses who testified against him had a motive to falsely implicate him, Mr Rall conceded that there was direct evidence that he was not at the meeting to qualify for payment and that there was corroboration also that he did not fill in the attendance register on that day. There is no reason to doubt that he was properly found guilty of what the special committee properly described as a serious offence.

15) It is necessary to deal with the sanctions imposed on the two counts. Mr Rall argued that there exists prospects that the sanctions may, on review, be found to be harsh and that the recommendations of the special committee as accepted by the EXCO may have been improperly influenced by misconstruing the relationship between the applicant and the MEC as evident from the special committee's following remark :

> "The respondent has committed a serious conduct of insubordination in that he defied his employer in the most flagrant ways." I agree with Mr Rall's submission.

16) There is another aspect which merits attention in regard to the sanction. The provisions of schedule 1 to the Local Government :

Municipal Systems Act 32 of 2000 including item 14 (6) denote the **MEC alone** to be the person to apply his mind ultimately to the issue of the sanction and to resolve as to the sanction to be imposed. Annexure "MK8" to applicant's founding affidavit addressed to the applicant however reflects the following:

"After you were given an opportunity to present evidence on sanction the chairperson resolved that given the evidence, the nature of the charges that you were found guilty of, your standing and in the interest of the local community, they resolved that you should be removed from office. This was placed before the Executive Council of the Province of KwaZulu-Natal on Wednesday, 14 May 2008, and they resolved to adopt and implement the findings of the Independent Special Committee.

In the circumstances you are notified that you are being removed from office as a councillor with immediate effect."

17) The Special Committee had also recommended that the applicant be removed from office "with immediate effect."

18) Item 14(6) of the Code of Conduct for councillors demands the **opinion of the MEC.** It is not wrong for others to express their opinions to him, but ultimately he is the only person **to resolve** on the sanction to be imposed.

18.1Item 14(6) reads :

"If the MEC is of the ***opinion*** *that the councilor has breached a provision of this code* ***and that such contravention warrants a suspension or removal from office****, the MEC may -*

(a).....
(b)remove the councillor from office"

The MEC expressed no opinion and did not in this case remove the applicant.

19) The fifth and sixth respondents have filed no opposition. They abide the decision of the court.

20) In the light of the foregoing I am persuaded that the applicant has established a clear right and having considered the prospects of success on review which, in my view are, in this matter fairly strong,

as well as the balance of convenience and the absence of any other ordinary remedy, the applicant is entitled to the relief sought.

ORDER

I accordingly make the following order :

1. Pending finalization of the application for the second order prayed.

(i) The fifth and sixth respondents are interdicted from taking any further steps to hold a by-election in Ward 4 of the Emadlangeni Municipality;

(ii) The decision by the Executive Council of KwaZulu-Natal on 14 May 2008 to remove the applicant from office as a councillor of the Emadlangeni Municipality is suspended;

(iii) The application for the Second Order Prayed is adjourned sine die;

(iv) The second respondent is ordered to pay the costs.

_____

NTSHANGASE J

Date of Judgment	:	15 July 2008
Date of Hearing	:	10 July 2008
Counsel for Applicants	:	Advocate Adrian Rall
Instructed by	:	Singa Shabalala Attorneys Applicant's Attorneys

58 Scott Street
NEWCASTLE

Counsel for Respondents	:	Advocate N Singh
Instructed by	:	PKX Attorneys Respondents Attorneys 2 Princess Stsreet PIETERMARITZBURG