In the High Court of South Africa

KwaZulu-Natal Division, Pietermaritzburg

Case No : 10304/13

In the matter between :

The Member of the Executive Council for KwaZulu-Natal of the Department of Co-operative Governance and Traditional Affairs	Applicant

and

Inkatha Freedom Party	First Respondent
Vusumuzi Joseph Mthembu	Second Respondent
Abaqulusi Municipal Council	Third Respondent
Executive Committee, Abaqulusi Municipal Council	Fourth Respondent
P N Khaba N.O.	Fifth Respondent
M P Mtshali N.O.	Sixth Respondent
National Freedom Party, Abaqulusi	Seventh Respondent
Democratic Alliance, Abaqulusi	Eighth Respondent
African National Congress, Abaqulusi	Ninth Respondent
Tandolwethu Manda	Tenth Respondent

Judgment

Lopes J

[1] Prior to setting out the question I am required to determine in this application, it is helpful to set out the history of the dispute thus far :

(a) it became necessary for the Abaqulusi Municipal Council ('the Council') (the third respondent in this application) to appoint a new municipal manager;

(b) applications were received and on the 16th October 2012, an interview panel shortlisted various candidates including, Vusumuzi Joseph Mthembu ('Dr Mthembu') (the second respondent in this application) ;

(c) on the 7th November 2012 the executive committee of the Abaqulusi Municipal Council (the 'Executive Committee') (the fourth respondent in this application) resolved to recommend to the Council the appointment of Dr Mthembu as the municipal manager;

(d) although suggestions were made that Dr Mthembu had misrepresented his credentials in applying for the post of municipal manager, on the 4th December 2012 the Council adopted the recommendation of the Executive Committee to appoint Dr Mthembu as the municipal manager. On the 6th December 2012 the mayor of the Council, P N Khaba, ('the Mayor') (the fifth respondent in this application) notified the Member of the Executive Council for KwaZulu-Natal of the Department of Co-operative Governance and

Traditional Affairs ('the MEC') (the applicant in this application) of the Council's resolution to appoint Dr Mthembu as the municipal manager;

(e) despite a response by the Mayor that she had noted that the reference checks on the credentials put up by Dr Mthembu revealed that he had misrepresented his position, on the 5th March 2013 and at an adjourned special Council meeting, the appointment of Dr Mthembu as municipal manager was confirmed, with the direction that he was to assume duties with immediate effect on the 6th March 2013. It was also recorded at that Council meeting that the Executive Committee would discuss the conditions of service and the employment contract of Dr Mthembu and finalise the process by noon on the 7th March 2013;

(f) the Executive Committee and the Mayor did not, however, ensure the finalisation of Dr Mthembu's conditions of service and employment contract including his salary package as per the minutes of the Council meeting of the 5th March 2013. The Inkatha Freedom Party (the first respondent in this application) and Dr Mthembu accordingly sought a mandamus from this court ordering the Executive Committee and the Mayor to implement the resolution of the 4th December 2012 as confirmed in the subsequent resolution of the 5th March 2013, for the appointment of Dr Mthembu as municipal manager for the Abaqulusi Municipality;

(g) that application came before Ntshangase J and on the 30th August 2013 he granted an order in terms of which the Executive Committee and the Mayor were ordered to implement the resolutions of the Council of the 4th December 2012 and the 5th March 2013;

(h) the order provided that the Executive Committee and the Mayor were to do all things necessary to install Dr Mthembu as municipal manager and to that end were required, in terms of s 57 of the Local Government : Municipal Systems Act, 2000 ('the Municipal Systems Act') :

(aa) to negotiate Dr Mthembu's employment contract and salary package within five days of the date of the order;

(bb) to negotiate Dr Mthembu's performance contract within sixty days of the date of his appointment;

(i) on the 2nd September 2013 six councillors of the Council requested the Mayor to call a meeting to deal with the order of Ntshangase J and the appointment of Dr Mthembu as municipal manager. The Mayor set that meeting down for the 5th September 2013;

(j) on the 4th September 2013 those councillors met (in the absence of the Mayor, and without her knowledge) and took a decision to appoint Dr Mthembu as municipal manager;

(k) on the same day, a matter of hours later, an attorney for the Department of Co-operative Governance and Traditional Affairs notified the parties of the MEC's intention to apply for leave to appeal against the decision of Ntshangase J. A notice of application for leave to appeal was delivered to all parties on that day.

[2] Despite the MEC's notice of application to apply for leave the appeal, the Inkatha Freedom Party and Dr Mthembu have taken the view that the appointment of Dr Mthembu as municipal manager of the Abaqulusi municipality pursuant to the meeting of the 4th September 2013 is to stand, and that any possible appeal by the

MEC has become perempted. That attitude has precipitated this application in which the MEC seeks :

(a) an interdict restraining all the cited respondents from giving effect to the appointment of Dr Mthembu as the municipal manager of the Abaqualusi municipality.;

(b) an order that any employment contract or salary package in respect thereof, or any performance contract, or any appointment of Dr Mthembu, be suspended pending the final determination of the MEC's appeal processes,

(c) an order declaring that the application for leave to appeal delivered by the MEC suspends the effect and implementation of the judgment of Ntshangase J, and that all purported compliance with that court order prior to delivery of the notice of application for leave to appeal is declared to be invalid and a nullity;

(d) that the meeting of the executive committee of the 4th September 2013 is declared to be illegal and of no force and effect in law and all resolutions passed thereat to be declared invalid.

[3] This application came before Poyo-Dlwati AJ who, on the 1st October 2013, granted a rule as sought by the MEC, together with interim relief effectively interdicting and restraining the respondents from giving any effect to the appointment of Dr Mthembu as municipal manager.I am now required to consider whether that order should be made final.

[4] Mr *Phillips* who appeared for the first and second respondents together with Ms *Pudifin-Jones* submitted the following defences to the confirmation of the rule :

(a) the right of the MEC to appeal the decision of Ntshangase J had become perempted;

(b) this court should scrutinise carefully the reasons why the MEC wishes to appeal the judgment of Ntshangase J, because the only order made directly in respect of her was a costs order occasioned by her decision to oppose that application. In this regard it is important to look at what such an appeal, even if successful, could achieve;

(c) because the MEC was motivated by reasons which go beyond the exercise of her oversight powers granted in terms of the Constitution, 1996 she should be directed to pay the costs in her capacity as MEC, and in addition a rule nisi should issue calling upon her to show cause why she should not be personally liable de bonispropriis to pay those costs.

[5] Mr *Phillips* submitted that the only thing which becomes suspended by the noting of the application for leave to appeal is the threat of a judicial sanction for the failure by Dr Mthembu to carry out his duties. To consider this, it is necessary to examine the terms of the order granted by Ntshangase J. The first part of his order required that the Executive Committee and the Mayor implement the resolution of the Council of the 4th December 2012 as confirmed in the meeting of the 5th March 2013. The second part of the order required that the Executive Committee and the Mayor do all things necessary to appoint Dr Mthembu as municipal manager by negotiating his employment contract and salary package within five days and by negotiating his performance contract within sixty days of the date of his appointment.

Both these functions were to be performed in terms of the provisions of the Municipal Systems Act.

[6] The judgment of Ntshangase J does not call into question the resolutions of the 4th December 2012 and the 5th March 2013. Indeed it affirms those resolutions. The consequence of noting an appeal therefore is, in respect of the first part of the order, to suspend the order of Ntshangase J to implement the resolutions.

[7] The second part of the order does not only deal with the threat of a judicial sanction for the failure to carry out the order. It directs the Executive Committee and the Mayor to negotiate Dr Mthembu's employment contract and salary package within five days of the order. The effect of a suspension of the second part of the order by way of the noting of the application for leave to appeal would therefore mean that the Executive Committee and the Mayor could not negotiate with Dr Mthembu in order to determine his employment contract and salary package. The same applies with regard to the negotiations between the Executive Committee and the Mayor on the one hand, and Dr Mthembu on the other, for Dr Mthembu's performance contract.

[8] It is important to note that, in terms of s 57(1) of the Municipal Systems Act :

'(1) A person to be appointed as the municipal manager of a municipality … may be appointed to that position only –

(a) in terms of a written employment contract with the municipality complying with the provisions of this section; and

(b) subject to a separate performance agreement concluded annually as provided for in subsection (2).'

(my underlining)

[9] The order of Ntshangase J required the appointment of Dr Mthembu in terms of subsec 57(1)(a). Although the Council may have resolved to appoint Dr Mthembu, until the provisions of subsec 57(1)(a) were complied with, he was not appointed municipal manager. This only happened on the 4th September 2013.

[10] There can be no suggestion then that the order of Ntshangase J only had the effect of a threat of judicial sanction. The order directed that the parties conclude the contract of employment. It is clear from the papers that the MEC, in the exercise of her oversight function in terms of s 139(1)(b) of the Constitution, seeks to prevent the appointment of Dr Mthembu as municipal manager. This is on the basis that his application contained false information, and in terms of the relevant Human Resources Municipal Policy manual, he is disqualified from being so appointed.

[11] In my view the effect of the noting of an appeal in the normal course would have been to prevent the Executive Committee and the Mayor from acting as they were ordered to do by Ntshangase J.

[12] With regard to the fact that by the time the appeal was noted by the MEC the judgment had been executed in that a contract of employment had been concluded with Dr Mthembu, I understand the submission of Mr *Phillips* to be that because the order of Ntshangase J had been executed, the noting of the application for leave to appeal leaves nothing to be suspended (save perhaps costs) and accordingly there is nothing to be interdicted by this court. Whilst the order of Ntshangase J gave a very limited time period within which the second part of the order was to be carried out by the Executive Committee and the Mayor, that in no way abrogated the time limits which are set down for the noting of an application for leave to appeal. Indeed, even if the MEC had taken the full period of fifteen days to which she was entitled in terms of Rule 49(1)(b) of the Uniform Rules, that cannot in my view affect the situation.

[13] Were it to be a correct submission that an appeal can become perempted because execution takes place prior to the lodging of an application for leave to appeal, the legal process of an appeal would develop into a race where the prospective appellant could be precluded from appealing simply because the successful litigant sought to execute on the judgment promptly, and prior to the noting of the application for leave to appeal.

[14] Had the Executive Committee and the Mayor wished to implement the order of Ntshangase J, their wisest course of conduct, once they were aware of an intention to apply for leave to appeal, was to apply for leave to execute the order in terms of Rule 49(11) of the Uniform Rules. That Rule provides :

‘(11) Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.’

[15] This is more particularly so in circumstances where the Executive Committee and the Mayor must have anticipated that the MEC would appeal the decision of Ntshangase J. Indeed, a letter was addressed to the attorneys for theAbaqulusi municipality on the 4th September 2013 notifying them of the intention to apply for leave to appeal which was filed on the same day. Instead they adopted the attitude that the installation of Dr Mthembu stood.

[16] In the matter of *Betlane v Shirley Court CC* 2011 (1) SA 388 (CC) a writ of execution for the ejectment of a tenant from premises was executed after an application for leave to appeal was delivered. The Constitutional Court found that the execution of the order was unlawful and that the writ was unlawful and fell to be set aside.In my view it cannot matter (save, perhaps, for the question of costs) whether the execution of the order takes place before or after the noting of the application for leave to appeal, provided that is done in accordance with the Rules of Court.

[17] The effect of noting an appeal was set out by Hurt J in *Besselaar v Registrar, Durban and Coast Local Division, and others* 2002 (1) SA 191 (D) at 197 F – G where the learned judge stated :

'The noting of an appeal by the State would have suspended the operation of the judgment of Squires J. Thereafter, and until the judgment was confirmed, varied or set aside

"…no results [could] flow from that judgment which would place [Sadler] in a position different from that which [he] enjoyed immediately before judgment was given.

The judgment, until set aside or varied, remains the same judgment but … it does not, once an appeal is noted, have any effect which would change the *status quo ante?*

Per Williamson AJ (as he then was in *Alexander v Jokl and Others* 1948 (3) SA 269 (W) at 278 and 279"'

[18] Mr *Phillips* referred me to the matter of *Qoboshiyane NO and others v Avusa Publishing (Pty) Ltd and others* 2013 (3) SA 315 (SCA) where Wallis JA dealt with the principle that a party who unequivocally conveys an intention to be bound by a judgment abandons any right of appeal. He recorded that the principle can be traced back to the judgment of Innes CJ in *Dabner v South African Railways and Harbours* 1920 AD 583 at 594 where the learned Chief Justice stated :

'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.'

[19] Mr *Phillips* submitted that in this regard the persons at whom the order of Ntshangase J was directed – the Executive Committee and the Council – had

emphatically accepted the judgment. In those circumstances they had complied with the test laid out in *Dabner*, and no appeal could lie against the order of Ntshangase J.

[20] This may be correct insofar as it relates to the Council and the Executive Committee,both having now changed the stance they adopted before Ntshangase J. However, it is clear that their decisions do not bind the MEC who, for the reasons I give, was affected by the judgment to a far greater degree than a mere question of costs. There can be no suggestion that she 'indubitably and necessarily' gave the impression that she did not intend to attack the judgment. Indeed, the contrary is the case.

[21] With regard to the second point that this court should carefully scrutinise the basis upon which the MEC wishes to appeal the judgment of Ntshangase J because she is only directly affected by a costs order, that submission grossly understates the effect of the order. The MEC has an oversight function to perform with regard to the appointment of Dr Mthembu. Where she acts in accordance with that oversight function and attempts to prevent the appointment of Dr Mthembu, and a court then orders the Executive Committee and the Mayor to conclude the contract of employment and salary of Dr Mthembu, the right of the MEC to appeal relates to far more than a simple question of costs. Whatever her legal reasons may be, she has exercised a right granted to her in terms of the law, and has done so timeously. Her reasons fall to be scrutinised by the court hearing the application for leave to appeal. In this regard it is important to note that the Abaqulusimunicipality is under the

administration of the MEC and Mr Manda, as representative of the provincial executive committee. The very appointment which the MEC challenges requires the confirmation of Mr Manda, which has not yet been granted.

[22] Mr *Phillips* pointed to the lack of any legal steps taken by the MEC as indicative of her acceptance of the appointment of Dr Mthembu prior to, and after the hearing before Ntshangase J. In this regard he relied upon the authority in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) for the submission that until legally set aside, the appointment is valid and cannot be ignored. Mr *Dickson*SC, who appeared for the applicant,pointed to the correspondence between the parties revealed in the matter before Ntshangase J to demonstrate the MEC's ongoing opposition of, and resistance to, the appointment of Dr Mthembu. Even though the MEC initiated no legal steps, she opposed the installation of Dr Mthembu as municipal manager prior to, and during the proceedings before Ntshangase J and does so now by way of wanting to appeal his decision.

[23] Taking into account the rule under the common law and the provisions of Rule 49(11), it is clear that the execution of the order of Ntshangase J by the Executive Committee and the Mayor can have no validity. I see no legal barrier to the grant of the order requested in prayers 2.1 to 2.3 of the MEC's notice of motion. With regard to the relief sought in prayer 2.4 of the MEC's notice of motion, I do not believe that it is necessary or desirable in determining the outcome of this application to decide on

the validity of the meeting of the 4th September 2013. Its effect is undone by the order in prayer 2.3.

[24] The MEC has satisfied the necessary requisites for a temporary interdict and the balance of convenience favours the grant of the order I intend to make. There can be no prejudice to the continued operation of the municipal function where an acting municipal manager is in place, and has been for some time. I have also considered the prejudice to Dr Mthembu who finds himself in an unemployed position. I have also considered the submission made by Mr *Phillips* that in a democratic process the majority of those elected to make the decisions for the Abaqulusimunicipality must prevail. Those submissions however, overlook the nature of the relief sought in this application which essentially deals with the right to have the operation of the order of Ntshangase J suspended pending the outcome of the leave to appeal process. A further consideration in favour of the order sought is the benefit to the public if the MEC is allowed to complete her oversight function.

[25] Mr *Phillips* also referred me to the matter of *Constantinides v Jockey Club of South Africa* 1954 (3) SA 35 (C) which dealt with an application for the suspension of the execution of a judgment pending a decision on appeal. In my view that matter is distinguishable from the circumstances of the present matter because the appeal of Constantinides against the decision of the Jockey Club to suspend him from being able to train race horses, was a decision which the court held would severely prejudice the Jockey Club if the coming into operation of the decision was delayed. The point was made that any loss suffered by Constantinides in that case was

recoverable by way of damages if it turned out that the Jockey Club decision was wrong. That differs from the circumstances of the present matter.

[26] With regard to the question of costs, there is no reason why the costs in this matter should not follow the result. Indeed, given the level of the litigation between the parties in this matter, and after reading the papers, one is left with a deep-seated suspicion that the Executive Committee and certain members of the Council thought that they would gain an advantage by acting with the utmost expedition in executing the first and second parts of the order of Ntshangase J. The 'five days' in the order of Ntshangase J referred to five court days, and it would have been prudent in litigation of this nature were the Abaqulusimunicipality's attorney to have enquired from the MEC's attorney whether or not the order was to be appealed. Failing a response to that or an indication to the contrary, it may have been reasonable to proceed with the execution of the order towards the end of the first week after the order was granted. The attitude of the municipality demonstrated a strong desire to place form above substance.

[27] In all the circumstances I make the following order :

(a) The rule nisi granted in terms of prayers 2.1 to 2.3 inclusive of the prayers to the notice of motion dated 10th September 2013 is confirmed.

(b) The rule nisi granted in terms of prayer 2.4 of the prayers to the notice of motion dated 10th September 2013 is discharged.

(c) The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the applicant's costs of this application, such costs to include those consequent upon the employment of senior counsel.

Date of hearing : 7th November 2013

Date of judgment :13th November 2013

Counsel for the Applicant : A J Dickson SC (instructed byNgubane Wills Inc).

Counsel for the Respondents : D Phillips, with him Ms S Pudifin-Jones (instructed byLourens de Klerk Attorneys).