REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

25/5/18

CASE NO: 4618/2017

IN THE MATTER BETWEEN:

THE THABAZIMBI RESIDENTS ASSOCIATION **APPLICANT**

AND

THE MUNICIPALITY MANAGER (ACTING): THABAZIMBI LOCAL MUNICIPALITY **1ST RESPONDENT**

ELECTORAL COMMISSION **2ND RESPONDENT**

THABAZIMBI LOCAL MUNICIPALITY **3RD RESPONDENT**

MIDAH MOSELANE **4TH RESPONDENT**

MPHO MOLOKO **5TH RESPONDENT**

JUDGMENT

MULLER J:

[1] The applicant is the Thabazimbi Residents Association[1] which is a political party. The fourth and fifth respondents are erstwhile members of the applicant. The applicant obtained two party representation seats in the Thabazimbi Local Municipality, (the third respondent) during the 2016 local government elections. These seats were filled by the fourth and fifth respondents. The applicant instituted disciplinary proceedings against the two respondents. The reason for the disciplinary proceedings is irrelevant for purposes of this judgment. The disciplinary proceedings continued and resulted in the expulsion of fourth and fifth respondents from the applicant with effect from 1 June 2017.

[2] Whilst disciplinary proceedings were pending, the two respondents approached this court for an interdict to refrain the applicant from proceeding with the disciplinary hearing. The application was dismissed with costs on 8 May 2017. No steps, in addition to the application for an interdict, were taken to review and set aside the expulsion.

[3] The first respondent is the acting municipal manager of the third respondent. On 5 June 2017 notice was given to the first respondent that the membership of the fourth and fifth respondents had been terminated. Despite proper notice, the first respondent has failed to notify the chief electoral officer of the electoral commission (second respondent) as he is duty bound to do so in terms of the provisions of Item 18(1)(b) to the Municipal Structures Act.[2] Item 18(1)(a) and (b) of Schedule 1 to the Act reads:

> "(a) If a councillor elected from a party list ceases to hold office, the chief electoral officer must, subject to item 20, declare in writing the person whose name is at the top of the applicable party list to be elected in the vacancy;
>
> (b) Whenever a councillor referred to in paragraph (a) ceases to hold office, the municipal manager concerned must within 7 days after the councillor has ceased to hold office, inform the chief electoral officer accordingly."

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[1] Hereinafter "the TRA".
[2] Act 117 of 1998. Hereinafter "the Act".

[4] The applicant approached this court for an order to compel the first respondent to comply with Item 18(1)(b).

[5] The first and third respondents counsel argued that the decision of first respondent that the two councillors ceased to hold office is administrative in nature and subject to judicial review. It is contended that a municipal manager is required to apply his mind to the question and that due to the ongoing dispute between the fourth and fifth respondents and the applicant, the first respondent was unable to make the necessary decision. And, in addition, it was contended that due to the fact that the fourth respondent, is also the elected mayor, only the council have the authority to remove the mayor.

[6] The argument by counsel appearing on behalf of the fourth and fifth respondents, as I understand it, is that this court must go behind the decision of the disciplinary committee and reconsider the merits and also if there were any irregularities in relation to the proceedings to determine if the decision of the committee was correctly arrived at. It was contended that the relief claimed should be refused if there were irregularities, without disturbing the findings of the committee.[3]

[6] I turn to deal first with the contentions on behalf of the fourth and fifth respondents. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[4] the court explained that consequences which flow from an unlawful decision where there is a second decision which follows upon such first decision has legal implications or consequences. The court held:

> "But the question arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that cannot be simply overlooked."[5]

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[3] Counsel did not rely on a collateral challenge.
[4] 2004 (6) SA 222 (SCA).
[5] Para 26.

In *MEC For Health Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye Lazer Institute*[6] the constitutional court, with reference to and with the approval of the *Oudekraal* decision held:

> "Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when the government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials' decisions? That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective-as the evidence here suggests - government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision.."[7]

[7] Counsel on behalf of applicant relied on *Cathcart Residents Association v Municipal Manager for the Amahlathi Municipality*[8] where it was held that the same considerations apply with equal force to decisions taken by voluntary associations. I agree.

[8] The Act prescribes instances in terms whereof a councillor vacates his/her seat and puts up a system whereby a municipal manager must notify the chief electoral officer should a vacancy occur if a councillor ceases to hold office. This system will be unworkable if councillors and the municipal manager disregard the provisions of section 27 with impunity, which states:

> "A councillor vacates office during a term of office if that councillor-
>
> (a) resigns in writing;
> (b) is no longer qualified to be a councillor;
> (c) was elected from a party list referred to in Schedule 1 or 2 and ceases to be a member of the relevant party;
> (d) ....
> (e) ....
> (f) ...."

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[6] 2014 (3) SA 481 (CC).
[7] Para 64.
[8] 2014 JDR 0797 (ECG) para 14-15. Also *Shunmugam and Others v The Newcastle Local Municipality and Others; The National Democratic Convention v Mathew Shunmugam and* Others [2008] 2 All SA 106 (N).

[9] A municipal manager may not disregard a notice to him/her informing him/her that a decision had been taken by a political party to expel a councillor. Nor may the fourth and fifth respondents, as the councillors concerned, simply disregard a decision taken by the applicant to terminate their membership. The validity of the first decision is of vital importance for their ongoing eligibility to the office of councillors. It forms the foundation for the validity of the subsequent decision by the first respondent to notify the chief electoral officer of the vacancy. The proper enquiry, as stated above, is not whether the initial act is valid but rather whether its validity was a necessary pre-condition for validity of the consequent act.

[10] The respondents must be held to the pain of proper process to set aside decision, even defective. Since Semenya J dismissed the application of the fourth and fifth respondents to halt the disciplinary hearing, no further steps were taken by either of them to set aside the decision by the TRA. The inescapable conclusion is that the decision of the disciplinary committee is valid and final, which is a pre-condition for the validity of the notification by the municipal manager to the chief electoral officer that a vacancy exist, because of the termination of the fourth and fifth respondents membership from the applicant.

[11] Reverting to facts in the present case, it is clear that the initial act of conducting a disciplinary hearing which resulted in the termination of the membership of the fourth and the fifth respondents from the TRA is a necessary pre-condition for the validity of the consequent act of the municipal manager. The factual existence of the first decision is, therefore sufficient for the consequent act to be valid as long as the first decision has not been set aside by a competent court. But before the obligation in terms of Item 18 arises a municipal manager must first satisfy himself/herself that a councillor has vacated office during a term of office in one or more of the circumstances referred to in section 27 of the Act.

[12] The establishment of the aforementioned jurisdictional fact obliges a municipal manager to notify the chief electoral officer that a councillor has ceased to hold office. The municipal manager must however be satisfied that the decision is final in the sense that all internal remedies have been exhausted and that there are no pending proceedings to set the decision of the political party aside. The municipal

manager in compliance with Item 18, acts simply as a *nuntius* to report to the chief electoral officer what has been reported to the municipal manager.

[13] Whether a counsellor has vacated his office in instances where he/she has tendered a written resignation, more often than not, will not present any difficulty to confirm. It is not an uncommon occurrence in South African politics that disputes may arise between a political party on the one hand, and its members on the other, if the membership of a councillor has been terminated by the party. The result of the notification, in terms of Item 18 will no doubt have serious consequences for an incumbent councillor, if the chief electoral officer declares that the next person on the party list is duly appointed in a vacancy which has not arisen or is disputed.

[14] The municipal manager, first of all, has to be satisfied that a vacancy, in fact, exists. Put differently, he/she must notify the chief electoral officer that there is a vacancy once he/she is satisfied that the councillor concerned has ceased to hold office. The municipal manager is exercising public power in terms of Item 18, to the Act. The enquiry which municipal manager must adopt to verify whether the counsellor has vacated office is informal but has to be procedurally fair.

[15] Ordinarily, in the normal course of events, a political party will notify the municipal manager in writing of the fact that a member of the party, and who is a councillor, has ceased to hold office for any of the reasons mentioned in section 27, and that there is a vacancy. The municipal manager cannot question the validity of the decision of a political party. It remains open to him/her to confirm the authenticity of the notification, if the authenticity of the document is in doubt. Once authenticity is verified the municipal manager is obliged to accept the truth of the contents. The written notice to a municipal manager must at least contain specific information that the councillor concerned has exhausted his/her all internal remedies and that no other proceedings have been instituted to upset the decision of the political party nor that notice of such proceedings has been furnished and that all disputes have been finally disposed of between the political party and the councillor.

[16] To make an informed decision the councillor concerned should be afforded the opportunity to respond to the contents of the notification. The *audi alteram partem*

principle is applicable to the municipal manager to give the councillor concerned, who will be detrimentally effected by his/her decision, a fair opportunity to confirm the correctness of the facts stated by the political party.[9]The *audi alteram partem* principle, in the context of what is required from the first respondent, was stated in *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another*:[10]

> "It is clear on the authorities that a person who is entitled to the benefits of the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine and he is not entitled to discovery of documents. But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. For in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him."[11]

[17] Whether or not the decision by the disciplinary committee or the first respondent is reviewable in terms of PAJA, matters little on the facts of this matter, save to state that a refusal or failure by the first respondent to notify the chief electoral officer is in my view reviewable under PAJA.[12]

[18] I do not agree, in conclusion, with the submission by counsel for the first and third respondents' that a different procedure has to be followed all together where the councillor concerned is the mayor. A distinction should be drawn between a mayor appointed in terms of section 48 and an executive mayor appointed in terms of section 55. There is no evidence that the fourth respondent was appointed as the latter. She stated that she is the mayor. Neither she, nor the first respondent, says that the third respondent qualifies, as a Class B municipality, for the appointment of an executive mayor. There is no evidence that third respondent has resolved to appoint her as an executive mayor.

[19] The first respondent states further that the fourth respondent had been appointed in terms section 48 but then asserts that an executive mayor can only be

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[9] s 3 of Act 3 of 2000. Hereinafter "PAJA". Also *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (AD) 231G-H; *Nortje en 'n Ander v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (HHA) para 17-18.
[10] 1980 (3) SA 476 (T).
[11] 486D-F.
[12] Definition of "decision" and s 6(2)(g) of PAJA.

removed in terms of section 58. The evidence of the first respondent with regard to this aspect is confusing and lacks substance. The fourth respondent, in my view was not appointed as an executive mayor in terms of section 55.

[20] Counsel appearing for the first and third respondents, in his heads of argument, relied on *Marais v Democratic Alliance*[13] for the proposition that a mayor cannot be removed from office by the political party to which he/she belongs. The political party in the *Marais* case decided to strip the executive mayor of his mayoral status and of his membership. The court was called upon, in that case, to review those very decisions. It is not what the applicant had done in the present matter. The applicant *in casu* made no decision to remove the fourth respondent as the mayor. That case is, on the facts, distinguishable and of no assistance to the first respondent. In the present case the termination of the membership of the fourth respondent is uncontroversial and is not the subject of review proceedings.

[21] A mayor, appointed in terms of section 48, is first and foremost, a councillor who is a member of the executive committee and as such is subject to the provisions of the Act, like any other councillor. The mayor is a member of the executive committee and presides at the meetings of the executive committee.[14] A member of the executive committee vacates his/ her office when he/she ceases to be councillor.[15] The councillor who has been elected the mayor *inter alia* vacates his/her office when he/she ceases to be a member of the executive committee.[16] The one leads logically to the other. No decision is necessary by the council for removal the mayor, if the mayor ceases to be a member of the executive committee, or ceases to be a councillor. To put it slightly differently, in such a situation, by virtue of the provisions of section 27 read with section 47(1)(c) and 48(4)(c) the councillor concerned as a matter of law, simply vacates his/her office as mayor when he/she ceases to be a

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[13] [2002] 2 All SA 413 (C) para 55.

[14] s 49(1)(a).

[15] s 47(1) states: "A member of an executive committee vacates his office during a term if that member-

(a) resigns as a member of the executive committee;
(b) is removed from office as a member of the executive committee in terms of section 53; or
(c) ceases to be a councillor."

[16] s 48(4) states: "A mayor and deputy mayor is elected for the duration of that person's term as a member of the executive committee, but vacates office during a term if that person-

(a) resigns as mayor or deputy mayor;
(b) is removed from office as a member of the executive committee in terms of section 53; or
(c) ceases to be member of the executive committee."

member of the executive committee because he/she is no longer a councillor, which is a prerequisite to be a member of the executive committee and ultimately, the mayor.

[22] The first respondent, in my view, unreasonably failed to make a decision to notify the chief electoral officer. He had ample time and opportunity to determine whether the fourth and fifth respondents have ceased to be councillors. It is not required of him to conduct an in depth investigation of his own into the merits or demerits of the decision to be satisfied that a councillor has ceased to hold office which was certainly not envisaged by the legislator. He was informed some time ago that the membership of fourth and fifth respondents have been terminated. The fourth and fifth respondents did not take any steps to set aside their expulsion from the applicant. Their expulsion from the party is final. It remains for the first respondent to notify the chief electoral officer of that fact, so that the electoral officer may declare in writing the person whose name is at the top of the applicable party list to be elected in the vacancy.[17]

[23] It is not to the benefit of the council and the community and certainly not in the interest of good governance of the third respondent that there is further delay or continued confusion with regard to the status of the fourth and fifth respondent in the council.

[24] In the premises the application must succeed. I see no reason why the costs should not follow the result.

Order

1. That the first respondent is ordered to, within 5 (FIVE) days of this order, comply with his obligations in terms of Item 18(1)(b) of Schedule 1 to the Local Government: Municipal Structures Act, Act 117 of 1998, by informing the chief electoral officer of the second respondent that:
   (a)Midah Maselane (the fourth respondent) and
   (b)Mpho Maloko (the Fifth respondent)
   had ceased to hold office as councillors of the third Respondent, and declare such vacancies in writing.

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[17] Item 18(1)(a).

2. The first, third, fourth and fifth respondents are ordered to the costs of the application, the one paying the others to be absolved.

G C MULLER

JUDGE OF THE HIGH COURT LIMPOPO DIVISION: POLOKWANE

APPEARANCES

1. COUNSEL FOR APPLICANT	:R Raubeheimer
2. COUNSEL FOR FIRST AND THIRD RESPONDENTS	:L G F Putter SC
3. COUNSEL FOR FOURTH & FIFTH RESPONDENTS	:Q Pelser SC
	:M Molea
4. DATE OF HEARING	:26 March 2018
5. DATE DELIVERED	:25 May 2018