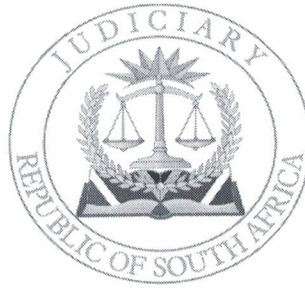




17 Nov 2023



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: UM199/2023

In the matter between:-

THABO APPOLUS	1 st Applicant
CLLR LORATO SETHLAKE	2 nd Applicant
CLLR LEBOGANG JACOBS	3 rd Applicant
CLLR VUYISWA MORAKILE	4 th Applicant
NELSON MONGALE N.O	5 th Applicant

and

NALEDI LOCAL MUNICIPALITY	1 st Respondent
NALEDI LOCAL MUNICIPAL COUNCIL	2 nd Respondent
CLLR PGC GULANE N.O (Speaker)	3 rd Respondent
CLLR J GROEP N.O (Mayor)	4 th Respondent
MR MODISENYANE SEGAPO N.O (Newly appointed Municipal Manager)	5 th Respondent

THE MEC FOR COOPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS NORTH WEST PROVINCE

6th Respondent

SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION (SALAGA)

7th Respondent

PROVINCIAL TREASURY: NORTH WEST
PROVINCE

8th Respondent

This judgment is handed down electronically *via* e-mail to the representatives of the parties, due to the urgent nature thereof. The date of the handing down of the judgment is deemed to be 17 November 2023.

ORDER

The following order is made:

- i) The non-compliance of the Uniform Rules of Court is condoned in terms of Rule 6(12) and the matter is heard on an urgent basis.
- ii) The judgment granted on 19 September 2023 by Reid J is enforced in terms of section 18(3) of the **Superior Courts Act** 10 of 2013 pending the appeal process instituted by the respondents on 29 September 2023.
- iii) The respondents who opposed the application (the 1st to 5th

respondents) is ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved, on a scale of party and party which costs is to include the instruction of two (2) counsel.

**JUDGMENT: URGENT APPLICATION
SECTION 18(3) SUPERIOR COURTS ACT**

FMM REID J

Introduction:

[1] This application has been launched on an urgent basis for the following relief (as paraphrased):

- 1.1. Condoning the non-compliance of the Uniform Rules of Court in terms of Rule 6(12) and finding that the matter is urgent;
- 1.2. That the judgment granted on 19 September 2023 by Reid J be enforced in terms of section 18(3) of the **Superior Courts Act** 10 of 2013 (the Superior Courts Act) pending the appeal process instituted by the respondents on 29 September 2023;

- 1.3. That the respondents who oppose the application pay the costs on an attorney and own client scale which costs is to include the instruction of two (2) counsel.

[2] The judgment granted on 19 September 2023 which is the judgment sought to be enforced in this application, was done under case number UM 53/2023, and will be referred to “the judgment”. Save for one NELSON MONGALE N.O (the former Acting Municipal Manager) who is cited as the 3rd respondent in the proceedings under case number UM 53/2023, the parties in both applications are identical.

[3] In the judgment, the following orders were made:

3.1. That the appointment of the 5th respondent Mr Modisenyane Segapo as Municipal Manager from 10 March 2023 is set aside as invalid and unlawful.

3.2. That the first and second respondents are ordered to re-advertise the position of the Municipal Manager and commence the recruitment process *de novo*.

3.3. That the respondents which opposed the application are ordered to pay the costs of the applicant individually and severally, the one paying the other to be absolved, on a scale as between party and party.

3.4. That the costs are to include the cost of two (2) counsel where so instructed.

[4] The 2nd applicant is the mandated deponent to the founding affidavit. Where I refer to “applicant” in this judgment, I refer to all the applicants collectively. The applicant states that the 5th respondent continued to render his services as Municipal Manager, despite the adverse judgment as set out above. The current position is that the 5th respondent proceeds to render services as the Municipal Manager.

[5] On 29 September 2023 the appeal process, as instituted by the respondents’ *ex lege* suspends the execution of the judgment.

Urgency

[6] The 5th respondent opposed the application in his official capacity as Municipal Manager. He states that he was appointed as such on 10 March 2023 and his appointment is due to terminate after a period of 5 years from the aforesaid date, subject to the provisions of section 57(6)(a) of the **Municipal Systems Act** 32 of 2000, as amended. Due to his position of Municipal Manager, the 5th respondent deposes to the opposing affidavit on behalf of the 1st to 5th respondent, and attaches the confirmatory affidavits of these respondents.

[7] In disputing the urgency of the application, the 5th respondent *inter alia* states:

“15. At the outset, I contend that the applicants have not demonstrated reasons why, even though the judgment and order of judge Reid was communicated to the parties on 19 September 2023, it took the applicants since then (19 September 2023) until October 2023, within which to bring their application in terms of section 18(3) of the Superior Courts Act.”

[8] It is argued on behalf of the applicant that an application in

terms of section 18(3) of the Superior Courts Act could not have been launched prior to the respondents giving notice of their intention to institute an appeal against the judgment.

[9] As mentioned above, the appeal process was instituted by the respondents on 29 September 2023. This application is launched on 17 October 2023 and was argued on 19 October 2023.

[10] The 5th respondent was appointed as Municipal Manager on **10 March 2023**. The applicant enrolled the application under case number UM53/2023 for hearing on **24 March 2023**, on which date it was struck from the roll for lack of urgency as the outcome of the report of the MEC was not received yet. The court held that the application was premature in the absence of the MEC's report indicating whether the appointment of the 5th respondent is supported or not. On **26 April 2023** the MEC indicated that he does not support the appointment of the 5th respondent as Municipal Manager. The application was enrolled to be heard on the normal roll on **27 July 2023** of which the judgment was handed down on **19 September 2023**. The application for leave to appeal has

been instituted on **29 September 2023**. This application is heard approximately three (3) weeks after the application for leave to appeal has been instituted.

[11] I do not agree with the argument advanced on behalf of the 1st to 5th respondents that the application should have been instituted on any earlier date than 29 September 2023. It is only the application for leave to appeal that causes the suspension of the judgment. Prior to an application for leave to appeal, the judgment is enforceable.

[12] In the premise, I find that the matter is urgent and the compliance with the Uniform Rules in relation to periods and service is condoned in terms of Rule 6(12) of the Uniform Rules.

The law

[13] Section 18 of the Superior Courts Act regulates the legislative requirements to determine whether a judgment should be executed or suspended, pending the appeal process.

[14] Section 18 of the Superior Courts Act reads as follows:

“18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and ***unless the court under exceptional circumstances orders otherwise***, the ***operation and execution*** 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***.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), ***if the party who applied to the court to order otherwise***, in addition proves on a balance of probabilities that he or she ***will suffer irreparable harm*** if the court does not so order and that ***the other party will not suffer irreparable harm*** if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1)-(i) the court must immediately record its reasons for doing so;
 (ii) the aggrieved party has an automatic right of appeal to the next highest court;
 (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
 (iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.”

(own emphasis)

[15] The first proverbial “hurdle” for the applicant is to show that exceptional circumstances exist which would justify the court to enforce the judgment pending the appeal process. The second proverbial “hurdle” is that the applicant should prove, on a balance of probabilities, that the applicant will suffer irreparable harm should the judgment *not* be enforced, and thirdly the applicant has to prove that the respondent will *not* suffer irreparable harm if the judgment *is* enforced.

[16] The Supreme Court of Appeal recently illustrated these requirements in the matter of **Knoop N.O and Another v Gupta (Execution)** 2021 (3) SA 135 (SCA) as follows:

*“[2] At common law, unless the court in the exercise of a discretion ordered otherwise, an application for leave to appeal and an appeal pursuant to leave being granted suspended the operation of the order. It was not open to the successful party to execute on, or otherwise act pursuant to, that order. This common-law rule and the power to grant an execution order are now expressly embodied in s 18(1), read with s 18(3), of the **Superior Courts Act 10 of 2013** (the SC Act). The grant of leave to execute is constrained by the requirements that it may only be granted if there are exceptional circumstances; if the applicant will suffer irreparable harm if it is not granted; and if the grant will not cause the respondent to suffer irreparable harm. A further safeguard against the risk of harm being caused by an execution order is the automatic right to an urgent appeal given*

by s 18(4). Pending such an appeal, the statute expressly provides in s 18(4)(iv) that the operation of the suspension order is itself suspended. This case illustrates what can go awry when a court attempts to override that statutory provision..."

(footnotes omitted)

- [17] In as far as the determination of "exceptional circumstances" are concerned, the Supreme Court of Appeal held as follows in the **Knoop** matter:

*"[46] Courts have always eschewed any attempt to lay down a general rule as to what constitutes exceptional circumstances. The reason is that the enquiry is a factual one. There is a helpful summary in **MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas, and Another** 2002 (6) SA 150 (C) at 156E – 157F that has been endorsed both by this court and by the Constitutional Court (see: **S v Liesching and Others** 2019 (4) SA 219 (CC)). In the context of s 18(3) the exceptional circumstances must be something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from. It is a deviation from the norm. The exceptional circumstances must arise from the facts and circumstances of the particular case."*

(some footnotes omitted)

- [18] The above emphasis that the applicant, in order to succeed, is to prove (a) that exceptional circumstances exist to enforce the judgment under appeal (b) that the applicant will suffer

irreparable harm should the judgment not be enforced pending appeal, and (c) that the respondents will not suffer irreparable harm should the judgment be enforced pending appeal. I discuss these requirements individually.

Exceptional circumstances

[19] The reasons for the order and the reasoning on which the judgment was granted, is set out in the judgment under case number UM53/2023. It does not bear repeating herein.

[20] However, in order to provide the necessary context to consider this application to enforce the judgment, it is important to *verbatim* quote the reasons provided by the MEC for Cooperative Governance and Traditional Affairs (the MEC) for not supporting the appointment of the 5th respondent as Municipal Manager.

[21] The finding of the MEC is discussed in paragraph 8 of the judgment and reads as follows:

“8. The finding of the MEC is that the appointment of Segapo as Municipal Manager is not supported on the basis of the following:

- 8.1. *The MEC found procedural and substantive requirements in relation to the appointment of municipal senior managers, submitted as per Regulation 17(4) not to have been complied with.*
- 8.2. *Amongst others, the following issues of non-compliance was highlighted in the MEC's report:*
- 8.2.1. *Interviews were conducted 44 days after the screening process, which is 23 days more than the period that is allowed in terms of Regulation 15(1). Regulation 15(1) that deals with the appointment and conditions of employment of Senior Managers was not complied with.*
- 8.2.2. *The screening report attached to the submission to the MEC was incomplete and there is no letter from the National Department of Cooperative Governance, Human Settlement and Traditional Affairs or evidence from the municipality that the request for security screening and vetting was sent to the National Department of Cooperative Governance, Human Settlement and Traditional Affairs.*
- 8.2.3. *The MIE screening result is dated 1 July 2021 which is prior to the vacancy date of 31 October 2022 and as such irregular.*
- 8.2.4. *The Minutes of the shortlisting process is non-compliant with the requirements in that the minutes attached to the report sent to the MEC did not mention the names of all the shortlisted candidates. The minutes only referred to the re-advertisement of the post.*

- 8.2.5. *The Minutes of the Interview process is non-compliant in that it does not mention the top three candidates and those recommended to undergo competency assessments.*
- 8.2.6. *There was no written confirmation attached by the successful candidate that the does not hold any political office.*
- 8.2.7. *The term of the contract as reflected on the letter of appointment is non-compliant as it exceeds the term of the Council by 4 months.*
- 8.2.8. *The MEC found that the appointment of Segapo is contrary to the provisions of section 54A(3)(b) of the Local Government: Municipal Systems Act 2000*
- 8.2.9. *The MEC concluded that the appointment of Segapo is not supported as Municipal Manager.*

[9] Correspondence followed between the former acting Municipal Manager, the Mayor, the MMC of Finance and Corporate Services and the Whip of Council in which the abovementioned irregularities were highlighted.

[10] No steps were taken to remove Segapo as Municipal Manager, despite his appointment being in conflict with the regulations as highlighted in the report of the MEC."

[22] The issues identified by the MEC allude to no less than seven (7) gross and serious procedural irregularities in the appointment process of the 5th respondent. These identified irregularities cannot be changed or altered as each of the

irregularities are based on specific dates, numbers *etc.* The facts, the events and the dates will remain the same *ad infinitum* and cannot be altered by any amount of legalese proficiency.

[23] Put differently: the best counsel and best legal team cannot change the facts on which the MEC came to the conclusion that the appointment of the 5th respondent as Municipal Manager cannot be endorsed. This has been eloquently stated by Adv C Muza (with Adv NM Mpya) in their heads of argument that “*An appointment which does not comply with the Act and has been rejected by the MEC cannot be salvaged on appeal.*”

[24] I find it curious that the respondents elect to proceed with an appeal against the judgment, whereas no mention is made of any application to review the finding of the MEC. As such, the finding of the MEC remain in force and applicable to the appointment of the 5th respondent as Municipal Manager.

[25] The applicant states that the 5th respondent has committed acts of financial misconduct in circumstances and proceeds

to mention several instances where budgets have been approved and contracts have been entered into by the Municipality. As Municipal Manager the 5th respondent is the accounting officer of the Municipality and empowered to do so by virtue of the position he holds as a public office bearer.

[26] In the judgment that is the subject of the appeal, it is ordered that the position of the Municipal Manager should be re-advertised and that the recruitment process should be commenced with *de novo*. If the position is re-advertised and the recruitment process is commenced with *de novo* the appointment of the Municipal Manager will in all probabilities be made before the finalisation of the appeal. Nothing prevents the 5th respondent to apply for the position, and should he be the successful and best suited candidate for the position, he should be appointed as the Municipal Manager.

[27] As set out in the quoted passage from the judgment, the MEC has identified serious procedural irregularities and the current appointment of the 5th Respondent in the position of Municipal Manager is fraught with irregularities. The appointment process, and the appointment itself is tainted

with the irregularities as identified by the MEC.

[28] The applicant bases the exceptional circumstances on the prejudice suffered by the Municipality, the community and the individual applicants should the judgment not be implemented pending the appeal process. The prejudice is found in that the acts of the Municipal Manager binds the Municipality on a daily basis, and as accounting officer the 5th respondent is in a position to *inter alia* appoint service providers for tenders, approve expenses by the Municipality and approve budgets and expenses. Once these acts have been executed, each act has binding consequences and to undo it would be akin to an attempt to unscramble a scrambled egg.

[29] Having regard to the abovementioned, I find that exceptional circumstances do exist which favours the enforcement of the judgment pending the appeal process. This finding is made on the following basis:

29.1. The nature of the judgment under appeal relates to the appointment of a Municipal Manager of which the MEC

has not supported the appointment. The reasons why the MEC did not support the appointment of the 5th respondent, are factual procedural irregularities that were committed with the appointment of the 5th respondent. The nature of the gross procedural irregularities on which the MEC based the decision to not support the appointment of the MEC, provides exceptional circumstances to favour the enforcement of the judgment pending the appeal process.

- 29.2. The actions of the 5th respondent pending the outcome of the appeal, in that the 5th respondent has extensive powers as Municipal Manager and accounting officer, provides exceptional circumstances which differentiates this application from other applications in terms of section 18(3). This is an appointment in a public office, which office of Municipal Manager is clothed with extensive powers and authority. The consequences of the 5th respondent's actions have an impact on the fiscus of the Municipality, and that impact can cause the Municipality irreparable financial harm.

29.3. The outcome of the enforcement of the judgment would be that the appointment of the 5th respondent is set aside, and the position of Municipal Manager be advertised and commenced with *de novo*. This is an exceptional circumstance as the relief that the 5th respondent is appealing against, is not relief from which he is excluded, but may partake when the appointment process is done *de novo*.

[30] I consequently find that the applicant has proven that exceptional circumstances exist which favours the enforcement of the judgment pending appeal.

Irreparable harm

[31] A proper application of section 18(3) would entail a balance of irreparable harm suffered by the applicant, should the relief not be granted, and the irreparable harm that would be suffered by the respondent in the event that the judgment is enforced pending the outcome of the appeal.

[32] I have dealt extensively with the powers associated with the office of Municipal Manager and refer thereto in determining

whether the applicant would suffer harm, should the judgment not be enforced pending appeal.

[33] Should the judgment not be enforced pending appeal, the continuing of powers that is vested in the position of Municipal Manager, will in all probabilities result in irreparable harm for the Municipality, the community and the members of the public. Every decision that is made by the 5th respondent as Municipal Manager, has an irreversible effect: from the budgets that are approved, to the tenders that are granted.

[34] To the contrary, should the position of Municipal Manager be re-advertised and the recruitment process be done *de novo*, the 5th respondent will not suffer any irreparable harm as he is fully entitled to apply for the position *de novo*. Should the 5th respondent emerge as the most suitable candidate, he would be appointed in the position and no irreparable harm will be suffered.

[35] I consequently find that the applicants have proven on a balance of convenience that they, and other parties such as

the community, will suffer irreparable harm should the judgment not be enforced pending the appeal process. I also find, for the reasons as set out above, that the respondents will not suffer any irreparable harm should the judgment be enforced pending the appeal process.

- [36] In the premise, the applicant has made out a case for the relief as sought in the notice of motion and the application is to be successful.

Cost

- [37] The applicants pray for a penalising cost order being that of attorney and own client scale. A penalising cost order is normally granted where there is some form of *mala fide* present in the conduct of the party against whom it is sought. I do not hold the view that a penalising cost order is justified in the circumstances.

- [38] Both parties requested that the cost should include the cost incurred by two (2) counsel. Having regard to the legal principles, the unique facts and the application of the law to the facts I share the view expressed by counsel that this

application would be justified with a cost order that includes the cost of two (2) counsel.

[39] The normal order is that a successful party is entitled to its costs. I find no reason to deviate from the normal rule and the applicants as successful party should be entitled to their costs.

Order

In the premise I make the following order:

- iv) The non-compliance of the Uniform Rules of Court is condoned in terms of Rule 6(12) and the matter is heard on an urgent basis.
- v) The judgment granted in this Court on 19 September 2023 by Reid J is enforced in terms of section 18(3) of the **Superior Courts Act** 10 of 2013 pending the appeal process instituted by the respondents on 29 September 2023.
- vi) The respondents who opposed the application (the 1st to 5th respondents) is ordered to pay the costs of the application,

jointly and severally, the one paying the other to be absolved,
on a scale of party and party which costs is to include the
instruction of two (2) counsel.



**FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG**

DATE OF HEARING: 19 OCTOBER 2023

DATE OF JUDGMENT: 17 NOVEMBER 2023

APPEARANCES:

FOR THE 1ST TO 5TH APPLICANTS: ADV CZ MUZA
WITH ADV NM MPYA

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