

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 16105/2022

In the matter between:

KANNALAND MUNICIPALITY

Applicant

and

**ELECTORAL COMMISSION FOR SOUTH AFRICA
MEC FOR LOCAL GOVERNMENT, ENVIRONMENTAL
AFFAIRS AND DEVELOPMENT PLANNING,
WESTERN CAPE PROVINCE
KANNALAND INDEPENDENCE PARTY**

First Respondent

Second Respondent

Third Respondent

Coram: Justice J Cloete

Heard: 6 and 7 October 2022

Delivered electronically: 13 October 2022

JUDGMENT

CLOETE J:

Introduction

[1] This matter came before me in the “fast lane” of motion court and was argued over two days in between the other matters on my roll. *Mr Magardie* appeared for the applicant, *Ms Norton SC* together with *Mr Nacerodien* for the second respondent and *Ms Foster* for the third respondent (the first respondent abides). I am indebted to them for their comprehensive heads of argument and submissions made.

[2] The relief sought by the applicant (“municipality”) is comprised of two parts. Part A is for certain interdictory relief pending the determination of Part B, which is for the review and setting aside of the decision of the second respondent (“MEC”) taken on 20 September 2022 (“the impugned decision”) in terms of item 18(1)(c) of schedule 1 of the Structures Act,¹ to inform the first respondent (“EC”) that a vacancy had arisen on the Kannaland Municipal Council as a result of its Speaker, Mr Rodge Albertus (“Albertus”) ceasing to hold office.

[3] It is Part A which I am required to determine, and the revised relief sought in this Part (in terms of a draft order handed up at the conclusion of argument) is essentially that: (a) the matter be entertained as one of urgency; (b) the EC is interdicted from acting upon the impugned decision; and (c) Albertus is to ‘*remain in office*’ as a councillor and Speaker unless lawfully removed therefrom in terms of the Structures Act.

Relevant factual background

[4] Albertus was a member of the third respondent (“KIP”) until it terminated his membership on 29 July 2022. The reasons for that termination are not relevant for present purposes (although they will no doubt feature when Part B is heard) since the municipality has not taken any steps to impugn that decision and it stands until set aside.²

[5] On the same date the duly authorised representative of KIP informed the municipality’s acting manager, Mr Ian Avontuur (“MM”) of the termination of such membership and requested the MM to declare a vacancy on the council, since this is the automatic consequence of a termination of membership. This request was repeated on 2 and 12 August 2022. The reasons for these repeated requests and the MM’s refusal to accede to them are also not relevant at this stage, save to the extent that the municipality relies upon them to bolster its case to establish a *prima facie* right to interim interdictory relief. I deal with this below.

[6] On 9 September 2022 the MEC informed the MM of the apparent vacancy and requested him to confirm that he would notify the EC in terms of item 18(1)(b) of

¹ Local Government: Municipal Structures Act 117 of 1998.

² *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para [26].

schedule 1 of the Structures Act. On 12 September 2022 the municipality's attorneys advised the MEC that he was *'not entitled to proceed to declare a vacancy as it will be ultra vires as it lies beyond the authority and powers of the MEC in terms of the [Structures] Act to perform'*.

[7] On 20 September 2022 the MEC took the impugned decision and the current application was launched on 23 September 2022 for hearing on 28 September 2022. On that date Erasmus J granted an order with a timetable for the filing of further papers and interdicting the EC from acting *'on the basis of the vacancy notified by the second respondent on 20 September 2022...'* pending the determination of Part A.

In limine defences

[8] KIP contends that the application is not urgent. The MEC, while agreeing in principle, is however of the view that Part A should be determined expeditiously in circumstances where the business of the council has effectively been brought to a halt since as a fact the Speaker's position is currently vacant. To my mind there is merit in the MEC's approach and while I have reservations that it was reasonable for the municipality to rush to court on 2 court days' notice, the issue of urgency has effectively been overtaken by the order of Erasmus J.

[9] KIP also submits that Mr Peter Rooi ("Rooi") should have been joined as a party in his capacity as President of KIP and the member who, it is common cause, is to fill the vacant seat on the council. As such, it is submitted, he has a direct and substantial interest in the outcome. In the notice of motion (before the relief in Part A was revised) the municipality indeed sought (at prayer 2.2) an interdict restraining the EC from declaring Rooi *'and/or any other member'* of KIP whose name appears on its party list from being elected on the council. This was removed from the revised relief in which it is now sought that an interdict be granted for Albertus to *'remain in office'*.

[10] However during argument it nonetheless appears to have been accepted by *Mr Magardie* that Albertus is no longer in office as a result of KIP's decision which is not impugned, at least in this part of the relief, and thus for purposes of

determination of Part A the non-joinder of Rooi has been rendered somewhat superfluous, although it remains open to KIP to raise this in relation to Part B.

[11] Both the MEC and KIP contend that the municipality lacks *locus standi*. The *locus* relied upon by the MM in the founding affidavit is tucked away in paragraph 79 as follows:

‘...I respectfully submit that the Municipality has at the very least a prima facie if not a clear right to expect the MEC to lawfully exercise the power to declare a vacancy on a municipal council and in accordance with the right to lawful, reasonable and procedurally fair administrative action in terms of section 33 of the Constitution. Section 41(1)(g) of the Constitution also requires the MEC to perform his functions in a manner which does not encroach on the functional and institutional integrity of a municipality in the local sphere of government. In terms of section 151(4) of the Constitution, the MEC may also not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.’³

[12] However the MEC points out, correctly in my view, that the municipality has not shown any right or interest that will be directly affected if the EC were to fill the position vacated by Albertus pending the determination of Part B. It should be of no consequence to the municipality which individual represents KIP on the council, or who occupies the position of Speaker. Put differently, the filling of the vacancy by the EC will not impede the municipality’s ability to exercise its powers and perform its functions – quite the contrary.

[13] In *Tulip Diamonds*⁴ the Constitutional Court made clear what an applicant must establish in order to prove own-interest standing, namely that *‘its interests or potential interests are directly affected by the alleged unlawfulness of the actions taken...’*. Both elements, i.e. interest and direct affect, must be shown. The municipality’s interest (or right, *prima facie* or clear) to lawful, reasonable and procedurally fair administrative action is, to my mind, relevant to the Part B relief. The same applies to the s 41(1)(g) and s 151(4) considerations. But what that

³ Repeated in similar terms in para 9 of the replying affidavit.

⁴ *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 (10) BCLR 1180 (CC) at para [31].

interest does not do is translate into the municipality being directly affected by the EC filling the vacancy in the interim, and it is on this basis that the municipality lacks *locus standi* for purposes of the interdictory relief sought in Part A.

[14] The last defence raised *in limine* is KIP's assertion that the MM lacks authority to represent the municipality in these proceedings. In the founding affidavit the MM contented himself with the bald allegation that he was authorised to bring the application and depose to the affidavit on the municipality's behalf. It was only in the replying affidavit that the MM sought to establish his authority by reference to the council's system of delegations of authority ("system"), together with a confirmatory affidavit by the executive mayor, Mr Nicolaas Valentyn ("Valentyn") in which he stated that in terms of the delegations/powers afforded to him '*the Applicant*' (not the MM himself) has been duly authorised and has been so authorised from the outset.

[15] Valentyn has conflated the MM's authority to represent the municipality with the municipality's authority itself, and accordingly this does not assist the MM. The latter also relies on two delegations, namely L.4.01 and L.3.01. In terms of L.4.01 the council (not the executive mayor) confers on the MM the power to '*authorise the obtaining of interdicts and other court orders against any person or body in order to compel or prevent him/her/it to act in accordance with or in conflict with statutory provisions*'. In terms of delegation L.3.01 the council confers on the executive mayor (not the MM) the power to '*decide to institute legal proceedings against other organs of State in order to enforce the municipality's rights, where all reasonable steps in terms of the principles of co-operative government have failed*'.

[16] There is nothing on the papers to indicate that "person" or "body" bear particular definitions for purposes of the system. However as pointed out by KIP – and no mention was made of this by the municipality in its papers – in terms of delegation L.3.02 the council only confers on the MM the power to '*institute or authorise the institution of legal action against any person or body, excluding organs of State...*' (my emphasis). It thus seems clear that the executive mayor is not authorised by the system to delegate his authority to the MM for the purpose of seeking an interdict against an organ of state such as the EC, and to the extent that he purported to do so such delegation was incompetent. Moreover, the MM does not assert that he has self-standing authority, but only that he has been '*authorised*', and

he does not allege that the council itself has authorised him, but rather the executive mayor. I am thus compelled to conclude that, at least for purposes of determination of Part A, and leaving aside the dispute about whether or not reasonable steps have been taken in terms of the principle of co-operative governance and failed,⁵ the MM has not established that he has the requisite authority.

Whether requirements for interim interdictory relief met

[17] I deal with these on the assumption that I may be incorrect in my findings on the defences raised *in limine*.⁶ It is trite that an applicant for an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c) that the balance of convenience favours the grant of the interdict; and (d) that there is no other remedy available.⁷ In addition, where the interdict, if granted, will restrain the exercise of a statutory power, there must be both exceptional circumstances and a strong case made out for the relief.⁸

[18] The right upon which the municipality relies has already been set out in that portion of this judgment in which I deal with its *locus standi*. In a nutshell the municipality contends that the MEC's notification to the EC was made unlawfully and irrationally, since the MM was obliged to satisfy himself that Albertus' termination of membership of KIP was valid and lawful. Because the MM, after obtaining input from Albertus, formed the view that such termination was unlawful, he was entitled to refuse to notify the EC of the vacancy and accordingly the MEC was not permitted to thereafter take that step.

⁵ In terms of s 45 of the Intergovernmental Relations Framework Act 13 of 2005 which provides that: '*No government or organ of State may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this chapter were unsuccessful*'.

⁶ *Spilhaus Property v MTN* 2019 (4) SA 406 (CC) at para [44]; and to the extent that – and without expressing any view – the interim order to be made may be appealable: *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (CCT 39/21) [2022] ZACC 34 (22 September 2022) at para [43].

⁷ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para [41], referring to *Setlogelo v Setlogelo* 1914 AD 221 and *Webster v Mitchell* 1948 (1) SA 1186 (W).

⁸ *OUTA (supra)* at paras [43] to [45], referring to *Gool v Minister of Justice and Another* 1955 (2) SA 683 (C).

[19] Item 18 of schedule 1 of the Structures Act, since its amendment with effect from 1 November 2021, provides in relevant part as follows:

*‘19. **Filling of vacancies.**—(1) (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 14 days after the councillor has ceased to hold office, inform the chief electoral officer accordingly.

(c) If the municipal manager of the municipality concerned does not inform the chief electoral officer of the vacancy referred to in paragraph (a), the MEC for local government in the province, must inform the chief electoral officer of the vacancy within 14 days where the municipal manager does not...’

[item 20 is not relevant for present purposes]

[20] On the papers as they stand, the issues for determination in Part B will centre around the proper interpretation of these provisions as well as certain other relevant sections of the Structures Act. But I am not persuaded that the municipality has established a *prima facie* right, albeit open to some doubt, to interim interdictory relief for the following reasons. First, objectively Albertus has ceased to hold office and there is no attack on the KIP decision to terminate his membership before me. Second, on its plain and unambiguous wording, the MM is statutorily bound to inform the EC of that objective fact within 14 days thereof. Whatever his reasons, and irrespective of their validity or otherwise, it is common cause that he did not do so.

[21] Third, given the MM’s failure or refusal, the MEC in turn became statutorily bound to fulfil this obligation which, it is also common cause, he did timeously. I accept, as pointed out by the municipality, that prior to the amendments to the

Structures Act⁹ it provided only for the MM to notify the EC of a vacancy within 7 (not 14) days, and that item 18(1)(c) was introduced by the amendment. However I do not see how these advance the contention that the municipality has a right to the relief sought in Part A, since even though there is authority for the proposition that before such notification is given by the MM he must make an *'informed decision'* that a vacancy in fact exists,¹⁰ in terms of item 18(1)(c) the only jurisdictional fact which must be present for the MEC to notify the EC is that *'...the municipal manager concerned does not inform the chief electoral officer of the vacancy...'* (my emphasis).

[22] Put differently, and at least on the face of it, there is no obligation on the MEC to first satisfy himself that the MM has made an *'informed decision'* or otherwise, and to the extent that the municipality suggests that in exercising this statutory function the MEC acts in some sort of review or appeal capacity, this is not supported by the wording of item 18 itself.

[23] Turning now to the second requirement, namely a reasonable apprehension of imminent and irreparable harm, which is an objective test. The municipality contends that unless Albertus can preside as Speaker during meetings it will suffer irreparable harm. However in the next breath it alleges that the *'uncertainty'* over the position of *'Speaker and Councillor Albertus'* on the council has led to it becoming increasingly ineffective since some council members do not recognise the legitimacy of his *'occupying the position'*. It therefore seems that, on the municipality's version, the so-called uncertainty pertains specifically to Albertus himself.

[24] But if the vacancy is filled, this uncertainty will no longer exist and the council can immediately resume its business pending determination of Part B. Allied to this is the fact that a refusal to grant the interim interdict will not affect the position of Speaker nor the composition of the council, unlike the position in *De Lille*.¹¹ The municipality also suggests that the interests of justice, legal certainty and good administration will be served by the grant of the interim interdict, so that the

⁹ Local Government: Municipal Structures Amendment Act 3 of 2021 read with Proclamation 37 of 2021 (GG 45305 of 11 October 2021).

¹⁰ *Thabazimbi Residence Association v Municipality Manager (Acting): Thabazimbi Local Municipality and Others* [2019] JOL 41153 (LP) at paras [14] to [16].

¹¹ *De Lille v Democratic Alliance and Others* (7882/18) [2018] ZAWCHC 57 (15 May 2018).

proverbial egg does not have to be unscrambled if the item 18(1)(c) notification is subsequently set aside when Part B is heard. This of course pertains to any decisions taken by the council in the interim.

[25] But given the failure to attack KIP's decision to terminate Albertus' membership, the factual position is that he has already ceased to hold office, and I do not see how, even if the municipality succeeds in Part B, there will be anything to "unscramble". This is also because a majority of the council has the power to elect a new Speaker at any time. I am therefore also unable to agree with the municipality's assertion that the grounds put forward by it constitute "exceptional circumstances" for purposes of restraining the exercise of a statutory power or, perhaps more appropriately in the circumstances, a statutory duty imposed on the EC in terms of item 18(1)(a).

[26] As far as the third requirement is concerned, namely the balance of convenience, the municipality asserts that this lies in maintaining the '*current status quo*'. However the status quo is that Albertus has already ceased to hold office and unless the position is filled without further delay the prevailing situation will undoubtedly cause considerable harm to the proper functioning of the council as well as those residents which the municipality is duty bound to serve. The municipality did not deal at all with the fourth requirement, i.e. no other available remedy, and I leave it there.

[27] As far as costs are concerned there is no reason why they should not follow the result. In particular I am persuaded, as submitted by *Ms Norton*, that the MEC was reasonable in appointing two counsel given the nature and extent of the issues raised on extremely short notice. Lastly, the draft order handed up by *Mr Magardie* at the conclusion of argument included provision for the parties to approach the Judge President for further directives to facilitate an expedited hearing of Part B. I do not intend making such an order since this is something which lies entirely in the discretion of the Judge President, although the parties may approach him for this purpose should they so agree.

[28] **The following order is made:**

- 1. Part A of the application is dismissed.**

2. The applicant shall pay the second and third respondents' costs in respect of Part A on the scale as between party and party as taxed or agreed and including the costs of two counsel where employed.

J I CLOETE

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