



CASE NO: 2022/26790

MPHO PHALATSE & ANOTHER v THE SPEAKER OF THE CITY OF JOHANNESBURG & 5 OTHERS

SUMMARY

Flynote

review – principle of legality - motion of no confidence – unconstitutional – invalid and unlawful

- [1] The applicants filed an urgent application with the High Court for review of the motion of no confidence that was deposed against the first applicant with claims that the procedure followed was tainted with illegality. The first applicant was ousted as the Executive Mayor of the City of Johannesburg in a process led by the first respondent, the Speaker of the City of Johannesburg.
- [2] The question before the Court was whether the decision and the conduct of the role-players in the motion of no confidence procedure fell within the scope of their lawful powers.
- [3] The applicants' review was based on the following grounds:
- a. The Programming Committee's ("the PC") decision to place the motion of no confidence on the agenda for a meeting of the Council of the City of Johannesburg ("the Council") on 30 September 2022;¹
 - b. The first respondent's decision to call the 30 September meeting of the Council;

¹ In terms of the Standing Rules of Council, it is the Programming Committee's responsibility to decide on the agenda for each Council meeting.

- c. The decision of the Council to adopt the motion of no confidence; and
- d. The subsequent decision of the Council to elect the fourth respondent as Executive Mayor.

[4] The applicants contended each of the above decisions was unlawful and a successful review of any of these decisions would result in a finding that the first applicant was unlawfully removed as Executive Mayor and further, that the decision to appoint the fourth respondent as Executive Mayor was unlawful.

The PC's decision to place the motion of no confidence on the agenda for the 30 September Council meeting

[5] At 13h25 on 29 September, the first respondent gave notice to the councillors of an extraordinary Meeting of Council to be held the following day, 30 September, at 10h00. Additionally, a notice of an extraordinary PC meeting, to sit at 16h00 on 29 September, was given to members of that committee at various times on that day. The purpose of the PC meeting was to set the agenda for the 30 September meeting. Following this rapidly called PC meeting, the councillors were advised at 18h06 that they would vote on the motion of no confidence at the 30 September meeting.

[6] The applicants submitted that the decision of the PC to place the motion of no confidence on the agenda for 30 September was unlawful because the PC was inquorate when the decision was made. The respondents contended that a provisional decision, subject only to the legal advisor's confirmation that the matter was not *sub judice*, to place the motion on the agenda of the Council had already been taken at an earlier PC meeting on 23 August which was quorate. As a result, they submitted that it was immaterial that the PC was inquorate on 29 September as no decision was required from them on the issue.

[7] The Court found that Rule 95 of the Standing Rules and Orders of the Legislature of the City of Johannesburg ("the Rules") dictates that the PC must "select" a motion for the agenda of the first meeting of the Council after the motion is submitted. Given that the PC did not select the motion of no confidence for the Council's next meeting (held on 29 August), and further that the PC were not aware on 23 August that an extraordinary meeting would be called on 30

September, the Court held that the PC could not have lawfully selected the motion for inclusion on the agenda of a future meeting they had no knowledge of. As such, the Court held that the motion was unlawfully placed on the agenda.

The Speaker's decision to call the 30 September meeting of the Council

- [8] The applicants submitted that the first respondent's decision to call the 30 September meeting was unlawful as no reasonable notice was provided and further, that it was taken for an ulterior purpose.
- [9] In terms of the Rules, a three days' notice period is required for ordinary Council meetings. Furthermore, section 58 of the Local Government: Municipal Structures Act ("the Structures Act"),² requires that the first respondent give prior notice of the intention to table a motion for the removal of an Executive Mayor from office. Whilst the section does not state the notice period required, the applicants contended, and the respondents accepted, that the prior notice must be reasonable in the circumstances.
- [10] The applicants were given a 20-hour notice of the extraordinary meeting, without any indication of what business would be conducted. A 16-hour notice was given with the attached notion of no confidence.
- [11] In determining whether these notice periods were reasonable and lawful, the Court considered the cases of *Ingquza Hill*³ and *Masondo*⁴ in which the SCA and CC respectively discussed the purpose and importance of the prior notice requirement. The Court found that, in order to meet constitutional objectives, the notice period chosen by the first respondent must afford the affected members an opportunity not only to be aware of what was being tabled, but to provide them with the opportunity to engage meaningfully in the debate before the resolution is taken. The Court held that it was difficult to conceive how the first applicant and other Councillors could make the necessary preparations to engage meaningfully in the motion of no confidence with the time they were given. Given the significance of the motion of no confidence, the Court found that the 16-hour

² Act 117 of 1998.

³ *Ingquza Hill Local Municipality and Another v Mdingi* [2021] 3 All SA 332 (SCA).

⁴ *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA413 (CC).

preparation time was unreasonable and unlawful and subject to review. Furthermore, the first respondent failed to identify any extraordinary circumstances that would warrant the unreasonable notice period.

- [12] Given the extreme haste with which the first respondent acted in calling and setting the date of the meeting, as well as the absence of any real justification or the speed with which she acted, the Court found that it was difficult to avoid the conclusion that she acted for an ulterior purpose.

The decision of the Council to adopt the motion of no confidence

- [13] At the 30 September Council Meeting, the DA Councillors present refused to sign the attendance register and as a result, the first respondent refused to permit them to speak at the meeting, request a caucus break, or vote in the motion of no confidence. The first respondent submitted that the consequence of the failure to sign the register was that Councillors could not be treated as if they were in attendance.
- [14] The Court held that whilst failure to sign the register would constitute rule-breaking however, it did not have the further consequence of the Councillors waiving their rights under the Constitution, the Structures Act and the Rules, to participate in the proceedings. The Court held that the signing of the register is an administrative function and that the purpose of Rule 56, which requires that Councillors sign the attendance register, is to facilitate proper record-keeping by the Council.
- [15] The Court held that meaningful engagement and debate during motions of no confidence facilitate the democratic project as recognised in section 160(8)(b) of the Constitution. The Court further held that assigning the meaning to Rule 56 that non-compliance has the consequence of prohibiting Councillors from participating in the meetings, would defeat the democratic project.
- [16] The first respondent had further treated the motion as unopposed and refused to permit any debate on the motion. The Court found that since the first respondent had acted unlawfully in failing to permit the DA Councillors from participating in

the proceedings, it followed that it was unlawful to treat the motion as unopposed and to refuse to permit a debate.

The decision of the Council to elect the fourth respondent as Executive Mayor

[17] The Court found that since the decisions to place the motion of no confidence on the agenda; call the Council Meeting; and adopt and carry the motion of no confidence were declared unlawful, it followed that the review of the decision to elect the fourth respondent as Executive Mayor must succeed. The Court held that the office of the Executive Mayor did not become vacant and that the success of this ground of review was an automatic consequence of the illegality of the motion of no confidence itself.

[18] The Court held that the applicants had established a case for review based on the principle of legality and granted the applicants the relief sought of setting aside all the reviewed decisions and declared them unlawful, unconstitutional and invalid.