IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 14159/17P

In the matter between:

MDUNGE NICHOLAS	**APPLICANT**
AND	
UBUHLEBEZWE MUNICIPALITY	**FIRST RESPONDENT**
SPEAKER OF UBUHLEBEZWE MUNICIPALITY (and in his personal Capacity as CZ MNGONYAMA)	**SECOND RESPONDENT**
MUNICIPAL MANAGER UBUHLEBEZWE MUNICIPALITY (and in his personal Capacity as GM SINEKE)	**THIRD RESPONDENT**
MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS-KZN	**FOURTH RESPONDENT**
INDEPENDENT ELECTORAL COMMISSION	**FIFTH RESPONDENT**
E B NGUBO	**SIXTH RESPONDENT**
C N NTABENI	**SEVENTH RESPONDENT**

E T SHOBA	**EIGHTH RESPONDENT**
G J NGUBO	**NINTH RESPONDENT**
B M CALUZA	**TENTH RESPONDENT**
T C DLAMINI	**ELEVENTH RESPONDENT**
H C JILI	**TWELFTH RESPONDENT**
N Z JILI	**THIRTEENTH RESPONDENT**
B M KHUBONI	**FOURTEENTH RESPONDENT**
Z C KHUMALO	**FIFTEENTH RESPONDENT**
V C MKHIZE	**SIXTEENTH RESPONDENT**
P B MPUNGOSE	**SEVENTEENTH RESPONDENT**
S M MSIMANGO	**EIGHTEENTH RESPONDENT**
M C NDLOVU	**NINETEENTH RESPONDENT**
P NDLOVU	**TWENTIETH RESPONDENT**
B R MDULI	**TWENTY-FIRST RESPONDENT**
M C NKOTWANA	**TWENTY-SECOND RESPONDENT**
T B NXUMALO	**TWENTY-THIRD RESPONDENT**
N G RADEBE	**TWENTY-FOURTH RESPONDENT**
Z M SHABALALA	**TWENTY-FIFTH RESPONDENT**
B R ZULU	**TWENTY-SIXTH RESPONDENT**

ORDER

The following order is made:

1. The application is dismissed.

2. The first respondent is to pay the applicant's costs up to and including costs for the 28 March 2018 which costs are to include costs for one counsel.

JUDGMENT

Delivered on:21 January 2019

Masipa J

Background

[1] The applicant in this matter approached court for interim relief set out in part A of Notice of Motion. In terms of part A, the relief sought was as follows:

'1. Dispensing with the forms and service provided for in the Uniform Rules of Court and directing that the application be heard on an urgent basis in terms of Uniform Rule of Court 6(12);

2. Pending the outcome of Part B below, paragraphs 3-9 shall operate as an interim interdict and Court Order;

3. Ordering the first respondent to reinstate me with immediate effect as Ward 9 Councillor with all the benefits and entitlements;

4. Ordering the third respondent not to inform the fifth respondent in terms of s 18(1)(b) of Schedule 1 [Electoral System for Metro and Local Councils] of the Municipal Structures Act 117 of 1998 (the act), as amended, to fill my vacancy;

5. Ordering the fifth respondent not to declare my position as ward 9 Councillor as vacant in terms of s 18(1)(a) in terms of Schedule 1 [Electoral System for Metro and Local Councils] of the Act; and

6. Ordering the second respondent to permit me to carry out my duties and responsibilities as Ward 9 Councillor and participate in all activities of the first respondent.

7. Granting the Applicant leave to supplement his founding papers within (10) Court days from the granting of an order under part A;

8. Granting the Applicant further or alternative relief; and

9. That costs be reserved for determination under Part B save in the event of opposition in which event any party opposes Part B be held jointly and severally liable.'

[2] The application also sought relief in terms of part B of the Notice of Motion which was effectively for the review and setting aside of numerous decisions by the first, second and third respondents and that such decisions be declared unlawful and void.

The relief sought in respect of part B, the review application was as follows:

PART B

1. Setting aside the dismissal of the Applicant as the Ward 9 Councillor as unlawful and invalid;
2. Setting aside the decisions and resolutions of the in-committee meeting of the 16th November 2017, chaired by the second respondent;
3. Setting aside the correspondence of the third respondent dated 7 December 2017 addressed to the Applicant as unlawful and invalid;
4. Declaring the conduct of all Councillors who participated, voted and took a decision to dismiss the Applicant as unlawful and invalid and thereby set aside.
5. Declaring any alleged concurrence granted by the Fourth Respondent to the First Respondent to dismiss me as Ward 9 Councillor as unlawful and invalid and thereby set aside;
6. Ordering all the Councillors who participated and supported an unlawful decision to expel the Applicant as liable for all the legal costs of the urgent application of 20 December 2017 and the main application (review) together with the third respondent, occasioned by the employment of two Counsel;
7. Ordering the Fourth Respondent for her role in granting the First Respondent the alleged unlawful and invalid concurrence to expel the Applicant as liable for the legal costs of this application; and
8. Granting the Applicant further or alternative relief.'

Condonation

[3] The applicant in this matter filed its heads of argument on 8 August 2018 and failed to apply for condonation for the non-compliance with the provisions of Rule 9.4.1 of the Practice Directive for this court.[1]

[4] In terms of the Practice Directive, the applicant was required to deliver its Heads of Argument not less than ten clear court days before the hearing of the matter. The ten clear days ended on 4 August 2018. In view of the late filing of the

[1] Practice Manual of the KwaZulu-Natal Division of the High Court of 2 April 2004, as amended

Heads of Argument the applicant was required to seek the court's indulgence by applying for condonation as provided for in the Practice Directive but failed to do so.

The Rule Nisi

[7] Pursuant to an urgent application which was heard by Chetty J, the rule *nisi* was issued in respect of part A of the relief sought with the return date being 31 January 2018. On 31 January 2018, the rule *nisi* was extended to 26 February 2018 and the parties were directed to exchange affidavits.

The Review

The Facts

[11] The facts in this matter are that the applicant was elected as a ward councillor of ward 9 of the first respondent on 3 August 2016, following the local Government elections which he contested as an independent candidate. The first respondent is a Municipality established in terms of s 12 of the Local Government: Municipal Structures Act, 117 of 1998 ('the Municipal Structures Act'). Save for the fourth and fifth respondents, the respondents are responsible for the management of the first respondent and serve as its executive committee members. The fourth and fifth respondents are cited as interested parties.

himself with a kanga bearing the ANC emblem. Also, that he was seen wearing the 'CR17' T-shirt, which conduct he suggests angered his adversaries who were campaigning for Dr Nkosazana Dlamini Zuma ('NDZ'). He confirmed the Facebook posts which were intended to encourage the ANC members to vote for Mr Ramaphosa as their president.

Further Affidavits

[40] Pursuant to the delivery of the applicant's replying affidavit and without leave of the court, the applicant filed a supplementary affidavit dated 8 May 2018 which he contends was necessitated by the letter of 22 March 2018 from the third respondent seeking to rescind its decision to dismiss him. This conduct was, according to the applicant, not competent since the applicant was legally represented and also that it amounted to a concession that his dismissal had been unlawful from the beginning. He submitted that the fourth and fifth respondents should be absolved from paying costs and that a cost order should be made against the first to third respondents and the sixth to twenty sixth respondents ('the respondents') jointly and severally he one paying the other to be absolved.

'It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him,

must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received…'

[43] In *Standard Bank of SA Ltd v Sewpersadh & another*[8] the court correctly held that a litigant is not allowed to simply take it upon himself to file an additional affidavit. Where a party wishes to file a further affidavit, a formal application for leave to do so must be made. The court ruled that the affidavit fell to be regarded as non-existent.

[44] It is trite that there are three sets of affidavits allowed in proceedings which are dealt with by way of application. Further affidavits may only be filed with leave of the court which will only be granted in special circumstances such as where something new arises from a replying affidavit.[9] In that instance, there must be a satisfactory explanation why the information was not placed before the court in the initial affidavits.[10] A reading of the further affidavits filed make it apparent that there were issues which arose pursuant to the permitted affidavits which called for the filing of further affidavits. While leave of this court was not sought as is required by the provisions of uniform rule 6(5)(e), such affidavits were essential for the proper consideration of the matter since they placed relevant facts before the court. It is therefore in the interest of justice that they be allowed.

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[45] The third respondent as the deponent of the further affidavit filed on behalf of the respondents set out the history of the matter. This included a contention that the rule *nisi* lapsed on 26 February 2018 as it was not extended, with the result that the applicant's protection arising from the interim relief had expired.

the first respondent and the fourth respondent. He averred however that following the meeting a decision was taken by the representatives of the first respondent to

[8] *Standard Bank of SA Ltd v Sewpersadh & another* 2005 (4) SA 148 (C) para 12-13.

rescind its decision to remove the applicant as a councillor. To formalise this, a resolution was taken on 22 March 2018.

[46] The third respondent confirmed the meeting between the representatives of the first respondent and the fourth respondent. He averred however that following the meeting a decision was taken by the representatives of the first respondent to rescind its decision to remove the applicant as a councillor. To formalise this, a resolution was taken on 22 March 2018.

[47] On 22 March 2018 the first respondent's attorneys sent an email to the applicant's attorneys with the proposed settlement that the first respondent withdraws the decision to dismiss the applicant as a ward councillor coupled with a tender to pay the applicant's party and party costs including fees for one counsel. The applicant's attorney undertook to revert to the offer by 23 March 2018. This was prior to the joinder of the sixth to the 26th respondents. The offer was rejected as the parties could not reach agreement on the issue of costs.

[48] The first to the third respondents contended that the matter was resolved as the applicant was effectively re-instated following the rescission of the first respondent's council decision. According to the respondents, an appropriate order finalising the matter should have been taken on 28 March 2018 when the matter was in court.

[49] The third respondent contended that he was erroneously cited as a respondent in his personal capacity since he was not present at the council meeting when the resolution was taken. He contended further that since the essence of one matter, being the dismissal, was reserved, the joinder of the sixth to 26th respondents was unnecessary.

The Issue to be decided

[50] What is apparent in terms of the main issues in this matter is that this court is called upon to determine whether the first respondent's decision to dismiss the

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[9] *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 38I-39B.

[10] Herbstein and Van Winsen *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed (2009) at 435.

applicant should be reviewed and set aside. Another issue is that relating to costs of this application.

Analysis

[51] As set out from the facts above, the applicant seeks this court to review and set aside the decision by the first respondent to dismiss him. It is apparent that the first respondent lacked the requisite authority to dismiss the applicant and that such power vests with the fourth respondent in terms of item 14 of schedule 2 of the Municipal Systems Act.

[52] Consequently, the first respondent's resolution and subsequent conduct to dismiss the applicant was invalid and of no force and effect. However, since this was put into operation with the applicant being removed from office and prevented from performing his functions, it was necessary for him to approach court to seek appropriate relief.

[53] It is evident that following the meeting between the representatives of the first respondent and those of the fourth respondent, some concession was made regarding the wrongfulness of the resolution passed by the first respondent's council and the subsequent conduct of dismissing the applicant. Consequently, the first respondent resolved to rescind the resolution and to reinstate the applicant as ward councillor for ward 9. The applicant suggests that the first respondent's conduct of rescinding the resolution was impractical and of no force since there is no provision for it and it was not sanctioned by the principles of legality.

[54] The applicant relied on *Economic Freedom Fighters and Others v Speaker of the National Assembly*[11] at para 75 where the following was said:

'The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey

[11] *Economic Freedom Fighters v Speaker of the National Assembly & others; Democratic Alliance v Speaker of the National Assembly & others (Corruption Watch (RF) NPC as* amicus curiae) 2016 (5) BCLR 618 (CC).

decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.'

[55] In *Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [12] the court stated that the nature of the mandate the Constitution entrusts to public officials does not require them to be infallible and that the Constitution anticipates imperfection, subject to the corrections and constraints of the law. Therefore administrators cannot without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken as this would amount to self-help. This would allow officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. The result would be confusion and conflict, to the detriment of the administration and the public and would undermine the courts' supervision of the administration.

[56] It is correct that public figures must operate within the rule of law and that unless decisions have been set aside, they must be complied with. It is trite that a municipal council acts through its resolutions. As was stated by Nugent JA in *Manana v King Sabata Dalindyebo Municipality*[13]:

'No doubt a municipal council is entitled to rescind or alter its resolutions. And no doubt an interested party is entitled to challenge its validity on review. But once a resolution is adopted in my view its officials are bound to execute it, whatever view they might have on the merit of the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review.'

[57] When errors are committed by the municipal council, these should be capable of correction by the rescission of such resolution and where necessary, the passing of necessary resolutions. This cannot amount to self-help since a correctly sanctioned administrative process would have been invoked for the correction of such error. It would not be necessary to approach court each time an error is committed and corrected by the municipal council otherwise the courts would be inundated with review applications to deal with resolved issues.

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[12] *Member of the Executive Council for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (5) BCLR 547 (CC) para 88 - 89.

[58] The suggestion by the applicant that once a matter is before court, parties cannot resolve their dispute cannot be correct since this would prevent parties from settling matters out of court adding unnecessary work on the judiciary which is already heavily loaded with work. Parties are in fact encouraged to resolve their own disputes and this can be seen in Rule 37 conferences[14] which amongst others consider whether parties have attempted to settle their disputes. Indeed the first respondent's conduct in rescinding its resolution to dismiss the applicant was competent and in compliance with the rule of law.

[59] Since it was competent for the first respondent to rescind its decision, the basis for the review application fell away. Therefore the only issue remaining before the parties is that of costs. The relief sought by the applicant reviewing and setting aside the resolution is no longer necessary in light of this. This was in fact conceded to by the parties in their Heads of Argument.

Counsel's Costs

[60] The respondents contended that the applicant is only entitled to the costs of one counsel since the matter was not unduly complicated and both counsel representing him were junior having practiced for two years and below. The applicant's conduct of pursuing the matter when the cause had fallen away was said to be a misuse of the court process which ought to be met with a punitive cost order.

[61] It is evident as has been found in this judgment that the decision of the first respondent was invalid[15] since the first respondent's council usurped powers which rest with the fourth respondent. The applicant was therefore operating within the protection of his rights when he approached court for the relief he sought in part B, the review application. This was accepted by the first to third respondents hence the tender for costs which was made prior to the hearing of the joinder application.

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[13] *Manana v King Sabata Dalindyebo Municipality* [2011] 3 All SA 140 (SCA)
[14] Uniform rule 37.
[15] See para 29(a) of Ngqele v King Sabata [2011] 8 BLLR 817 (ECM)

[62] The applicant seeks a punitive costs order to hold the third respondent and the sixth to 26th respondents personally liable for his costs. As set out in the further affidavit filed by these respondents, the third respondent was not present when the decision sought to be reviewed was taken. Consequently, the applicant's contention that the third respondent failed to advise the first respondent's council cannot be sustained. As regards the sixth to 26th respondents, the merits of the case could have been resolved by 28 March 2018 which would have rendered the joinder application nugatory.

1. The application is dismissed.

2. The first respondent is to pay the applicant's costs up to and including costs for the 28 March 2018 which costs are to include costs for one counsel.

Masipa J

DETAILS OF THE HEARING

Date of hearing: 22 August 2018

Date of Judgment: 21 January 2019

Appearances

Counsel for the applicant:	Mr *Sethene*
Instructed by:	Sifiso Chili & Associates
Counsel for the first to third and sixth to 26th respondents:	Ms Bhagwandeen
Instructed by:	Gcolotela & Peter Incorporated