


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA;
LIMPOPO DIVISION; POLOKWANE.

CASE NO: 475/2023

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE: <u>04 SEPTEMBER 2023</u> <u>AJP SEMENYA M.V</u>	
SIGNATURE:	

In the matter between:

DEMOCRATIC ALLIANCE

: APPLICANT

And

THABAZIMBI LOCAL MUNICIPALITY

: FIRST RESPONDENT

LETSEKA GLADWIN TLOUBATLA

: SECOND RESPONDENT

THE MUNICIPAL MAYOR: JUDITH MOKGAPI

: THIRD RESPONDENT

THABAZIMBI LOCAL MUNICIPALITY

THE SPEAKER: TSHEGOFATSO RAMOAPI

: FOURTH RESPONDENT

THABAZIMBI LOCAL MUNICIPALITY

THE CHIEF FINANCIAL OFFICER:

: FIFTH RESPONDENT

THABAZIMBI LOCAL MUNICIPALITY

In Re:

THABAZIMBI LOCAL MUNICIPALITY	: FIRST APPLICANT
LETSEKA GLADWIN TLOUBATLA	: SECOND APPLICANT
THE MUNICIPAL MAYOR: JUDITH MOKGAPI	: THIRD APPLICANT
THABAZIMBI LOCAL MUNICIPALITY	
THE SPEAKER: TSHEGOFATSO RAMOAPI	: FOURTH APPLICANT
THABAZIMBI LOCAL MUNICIPALITY	
THE CHIEF FINANCIAL OFFICER	: FIFTH APPLICANT
THABAZIMBI LOCAL MUNICIPALITY	

And

ABSA REGIONAL BANK: THABAZIMBI	: FIRST RESPONDENT
LINDOWE MAKAYA	: SECOND RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and publication and release to SAFLII. The date and time for hand-down is deemed to be **4 October 2023 at 10:00**.

SEMENYA AJP:

[1] There are four applications before this court which, though separate, are interrelated. The applications are instituted under case No. 762/2023, 13268/2022, 475/2023 and 13207/2022. All the cases involve the Thabazimbi Local Municipality, either as a respondent or applicant. The issues in all these four applications emanate from the impugned decisions or resolutions passed in a meeting which was held at the municipal council chambers on the **21 October 2022**. Following a case management meeting with all parties involved in these cases, a directive was made to the effect that these cases should be heard separately but on the same date.

[2] The common cause facts in all four cases are as follows. Prior to the events of the **21 October 2022**, one Butana Ben Tlhabadira was the Speaker of the Thabazimbi Municipal Council and has acted as such until that date. In terms of section 37 of the Local Government Municipal Structures Act, 117 of 1998 (the Act), Tlhabadira, as the Speaker of the Municipal Council, had the power to convene council meetings of the Thabazimbi Local Municipality. One such meeting, which was to be a Special Council Meeting was scheduled for the **31 August 2022**. However, this Special Council Meeting was, for undisclosed reasons, adjourned to the **16 September 2022**. On the 16 September the meeting was again adjourned to the **21 October 2022**.

[3] It is common cause that on the **21 October 2022** when the meeting was about to commence, a group of community members gathered at the Municipal Council Chambers in a disorderly or rowdy manner. The said group's intention was to prevent one of the councillors, Kotetsi, from being part of the council meeting. As a result, Tlhabadira summoned members of the South African Police Service (SAPS) to the municipal premises with the hope that they will subdue the group. Unfortunately, members of SAPS did not give any kind of assistance to the councillors.

[4] The disputed facts among the parties in these four applications relates to the events that took place after the police did nothing to control the group. Tlhabadira and Swanepoel, who was the Mayor as at that stage, agree that the Speaker, fearing for the safety of the councillors and all who were part of the meeting, decided to adjourn the meeting and to disperse the councillors. They further agree that all councillors, except those who represented the African National Congress (the ANC) left the meeting. On the other hand, the ANC councillors, though agreeing that a group of people arrived, deny, firstly that the group was posing a threat to the lives of the councillors, and, secondly, that the Speaker adjourned the meeting.

[5] It is not in dispute that the remaining councillors continued with the council meeting in which a resolution to remove Tlhabadira from his position as the Speaker of council and Swanepoel from her position as the mayor were passed. Following the removal of the two councillors, the remaining councillors proceeded to elect the fourth applicant (Ramoabi) in the main application as the Speaker. An acting Municipal Manager was appointed but was later replaced by the second applicant (Tloubatla) was appointed as the Municipal Manager and the third applicant (Mogapi) as the Mayor in subsequent council meetings. (Parties are cited as in the main application). This was the culmination of a series of litigation between the parties.

DA'S INTERVENTION AND ANTICIPATION APPLICATIONS (case number 475/2023).

(The respondents in the intervening application will be referred to as the applicants for the sake of convenience)

[6] The facts which are peculiar to this application (case number 475/2023) are that, pursuant the decisions taken in the meeting of the **21 October 2022**, Lindiwe Makaya, who was the Acting Municipal Manager prior thereto, was removed from that position and was replaced. The person who replaced her was later replaced by the second applicant.

Pursuant to her removal, the applicants approached this court on the **24 January 2023**, *ex parte*, and on an urgent basis, seeking an order in terms of which she is removed from being one of the signatories to the municipal bank account held with the ABSA Bank (second respondent). The basis for the removal of Makaya from her former position, according to the applicants, was the allegations that she was found to be a non- South African citizen by the National Department of State Security in **September 2022**, and was therefore disqualified to hold the position of a Municipal Manager.

[7] This application flows from the granting of an interim order sought by the applicants in the main application. As it appears from the citation of the parties above, the DA was not cited as a party in the main application. Following the granting of the order, the DA launched an urgent application in this court seeking, among others, to intervene in the proceedings and to anticipate the *rule nisi*. It further sought an order in terms of which the *rule nisi* is discharged. The urgent application was struck off the roll and the application had to follow the normal course. The application to intervene is opposed by all applicants in the main application.

[8] The DA's grounds for intervention are firstly that, as at the date of the institution of the application, the DA had already brought a review application in case no. 13268/2022. Secondly, the Thabazimbi Magistrate Court had already interdicted and restrained the applicants from implementing the impugned decisions taken in the meeting of the **21 October 2022**. Thirdly, that the applicants failed to disclose material information that would have persuaded the court to dismiss the *ex parte* application.

[9] The main objection raised by the applicants against the relief sought is that the DA cannot anticipate an order granted in the proceedings in which it was not cited as a party. According to the applicants, the DA ought to have launched the application to intervene as a respondent, supported by a founding affidavit. It should also attach its answering affidavit relating to the main application. It is further stated that the answering affidavit could only be allowed into the proceedings after the court shall have admitted the DA as a party. It was further contended that it cannot be found that the DA has a direct and substantial interest in the application. It is submitted that it is the individual councillors who have that direct interest. It is further submitted that the political parties would only have an indirect interest in the application. The applicants submitted that should it be found that the

DA has direct interest, that would necessitate the joinder of each and every party with a seat in the municipality.

[10] The DA filed a replying affidavit in view of the defence raised by the applicants. During argument, the DA referred this court to the decision in the case of the **Social Justice Coalition and Others v The Minister of Police and Others**¹ in which it was stated that:

“[52] To achieve this objective, the rules of Court facilitate the litigation process that invariably underpins the expression the Right of Access. Erasmus II explains:

“[T]he object of the rules is to secure the inexpensive and expeditious completion of litigation before the Courts: they are not an end in themselves. Consequently, the rules should be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their disputes in a speedy and inexpensive manner as possible. Thus, it has been held that the rules exist for the Court, not the Court for the rules. Formalism in the application of the rules is not encouraged by the courts.”

¹ 2022 (10) BCLR 1267(CC) (19 July 2022)

[11] The DA further relied on **EKE v Parsons**² where it was stated that:

“...Without doubt, rules governing the Court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that Courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interest of justice so dictates, courts may depart from a strict observance of the rules...”

[12] I agree with the DA that the facts which led to this application call for the procedure in terms of which the strict observance of the rules is not adhered to. The allegations that the applicants failed to disclose to the court the information pertaining to the review applications launched by Tlhabadira and the DA, as well as the existence of the interdict granted in the Magistrate Court are not denied. It is the DA’s submission that the applicants breached the very essence or prerequisite of *ex parte* applications, namely, the element of good faith-see **National Director of Public Prosecutions v Basson**³. I agree with the DA that, faced with the applicants’ lack of good faith, it can be safely concluded that the applicants

² 2016 (3) SA 37 (CC)

³ (131/2000) [2001] ZASCA 111.

were motivated by the knowledge that the court would not have granted the order sought. I find that the interests of justice dictates that the matter should be heard on the papers as filed by the DA in spite of their shortcomings.

[13] In addition to the *mala fides* on the part of the applicants, the DA argue that the other ground on which the applicants relied to remove Makaya should not entitle the applicants to the relief sought. According to DA, though it is correct that Makaya is not a South African citizen, she nonetheless qualifies for the position due to her permanent residence status, which she was granted on the **30 October 2008**. The DA has attached a copy of the document from the Department of Home Affairs in support of this argument. It is of note that the applicants failed to dispute the validity of the document.

[14] On the issue of the *locus standi* of the DA, this court was referred to the case of the **Democratic Alliance and Others v Premier for the Province of Gauteng and Others**⁴ where it was stated that:

⁴ (18577/2020) ZAGPPHC 119; (2020 (2) All SA- 793 (GP) 29 April 2020

“In the answering affidavit the point was taken on behalf of the Gauteng EC that the DA does not have standing to bring this application. The basis advanced for this ground of attack is simply that an application of this nature can only be brought by a municipal council or by an individual councillor if they form a quorum. The issue is whether the Applicants have direct or substantial interest in the matter. Clearly, they do, being the political party with a substantial representation in the municipal council and three of its members who are councillors. Our view is that the point raised by Gauteng EC disputing the standing of the DA to institute these proceedings cannot be substantiated in law or fact and must be rejected.”

[15] Similarly, in this case, the DA contends that it has substantive representation in the Thabazimbi Municipality and holds two seats. I agree with the court in the quoted DA case referred to in paragraph [14] above, that the DA cannot be denied access to the court in a case where it has representation in the municipality, more so in the circumstances where the decision to remove its member from the position of the Municipal Mayor is challenged. The applicants’ ground of opposition of lack of *locus standi* is found to be without merit.

[16] There can be no doubt that the information that the applicants failed to disclose was crucial to the determination of the *ex parte* application. The first applicant, as one of the three spheres of Government, is expected to respect the rule of law and to abide the decision of the Magistrate, which is valid until set aside on appeal or review. The applicants were aware of the order granted by the Thabazimbi Magistrate when it instituted the proceedings. The second, third and fourth applicants were not supposed to act in their impugned capacities to replace Makaya and to launch the application to remove her as a signatory to the municipal bank account. I find that the *rule nisi* should be anticipated and discharged based on this and other grounds that I have already dealt with.

[17] On the issue of costs, counsel for the DA argue that the second, third and fourth applicants should be ordered to pay the costs of the anticipation and intervening applications on the basis of the finding that they acted fraudulently. However, I find that such order would not be appropriate. The decision to institute the proceedings was authorised by the council of the first applicant in this case and not by the other applicants in their personal capacity. I however agree that the facts of this case, in particular the fraudulent conduct of the applicants, warrants the costs of the employment of two counsel on a punitive scale.

[18] In the result I make the following order:

- i. The DA is granted leave to intervene in the main application;
- ii. The DA is joined as the third respondent under case number 475/2023;
- iii. The *rule nisi* granted on the 24 January 2023 under the above case number is discharged; and
- iv. the first applicant is ordered to pay the costs of the application on a scale of attorney and client which costs shall include costs occasioned by the employment of two counsel.



M.V SEMENYA
ACTING JUDGE PRESIDENT OF THE
HIGH COURT; LIMPOPO DIVISION

APPEARANCES:

For the applicant (main application): Adv JAL Pretotius & Adv Rossouw

Instructed by: J L Raphiri Attorneys Inc

For the applicant

(intervening application): Adv S G Gouws & Adv Louis
 Francois Taljard

Instructed by: Minde Shapiro and Smith Inc

Date of hearing: 28 July 2023.

Date of delivery: 04 October 2023.