IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 16166/2010

DATE: 8 NOVEMBER 2010

In the matter between:

OVERBERG DISTRICT MUNICIPALITY

AND VARIOUS OTHERS Applicants

and

PREMIER OF THE WESTERN CAPE &

THREE OTHERS Respondents

J U D G M E N T

Application for leave to appeal and

for leave to execute judgment

BOZALEK, J:

The applicants in this application for leave to appeal were the respondents in an application for urgent relief brought by the Overberg District Municipality and its sitting councillors, following its dissolution by the third respondent with effect from 16 July 2010, the appointment of an administrator and the

approval of a temporary budget. The relief sought included the reinstatement of the councillors and the municipal council. I shall refer to the parties as they were in the main application.

On 12 October, the Court found in favour of the applicants and made an order effectively reinstating the Council, the councillors and affording them a 10 week period within which to pass a budget for the municipality but leaving the temporary budget passed by the third respondent partially extant, so as to avoid a budgetary vacuum. A notice of appeal was filed the following day thereby suspending the effect of the Court's order. The applicants oppose the granting of leave to appeal and have in addition brought an application in terms of Rule 49(11) for the implementation of the Court's order pending the outcome of any appeal.

The leave to appeal application:

The written application for leave to appeal cites numerous errors of reasoning and omissions on the part of the Court in arriving at its conclusion. No point is served in attempting to address these criticisms since the Court gave a comprehensive and reasoned judgment. The simple and basic question is whether there are reasonable prospects of another court finding that the correct interpretation of section 139(4) of the Constitution is that once a municipality has failed to approve a

budget by the statutory deadline, the provincial executive is obliged to dissolve the Council, appoint an administrator and approve a temporary budget or whether it can take other steps short of these in order to resolve the problem.

In the course of his lengthy argument in seeking leave, Mr Heunis quoted further academic writing which supports his interpretation of the section as mandating the dissolution of a defaulting council. Somewhat surprisingly, he did not rely on this additional authority at the original hearing. Be that as it may it cannot be disputed that the interpretation for which he contends enjoys support amongst certain academic commentators. I am mindful of the fact, furthermore, that the correct interpretation of section 139(4) is, potentially at least, a matter of some importance to those engaged in the field of local government administration and is a question which may well arise in different circumstances in future.

Thus, although I am satisfied with the correctness of the decision given in this matter, I do not consider that there are no reasonable prospects that another court may arrive at a different conclusion. The parties were *ad idem* that any appeal should be heard by the SCA and the circumstances of the matter are such that that court would be the appropriate forum for any appeal. I do have a concern that, in view of the

nationwide municipal elections which will take place by mid 2011, unless the appeal is heard before then, this appeal may well become moot. This concern is, however, no reason to refuse leave to appeal, particularly since the respondents have indicated that they intend to petition for an expedited hearing.

Leave to implement the Court's Order:

I turn to the application to implement the order of the Court pending the outcome of any appeal. The relevant background is that the existing, directly or indirectly elected 20 person council will continue to hold office until approximately May or June 2011 when national municipal elections will be held. To clarify, they will continue to hold office if the order to the application to implement the order is granted. If the application is not granted, the Overberg District Municipality will be administered until then by the administrator appointed by the respondents. He is accountable to the respondents alone. Democratic governance of the municipality will be suspended whilst all 20 councillors, including 11 of the applicants in the main application, will be divested of their positions, responsibilities and powers as well as the salaries and allowances which accrue to them by virtue of the positions which they hold. It does appear, however, that only four of the applicants, those directly elected to the Council, will entirely lose their incomes, the balance of the applicant

councillors, being members of local municipal councils, are designated by those municipal councils to represent them on the Overberg District Municipal Council. To those four councillors must be added another four, from the opposition so to speak, who are also directly elected and will lose their income. Although there was mention in the original application of the IEC holding fresh elections within 60 days of the dissolution of the Council, according to all parties this is no longer a prospect.

The overall onus in an application for leave to execute a judgment, pending an appeal, rests on the applicant, i.e. the applicants in the main application in this case. See South Cape Corporation (Pty) Limited v Engineering Management Services Limited 1997(3) SALR 534 (A), where the approach to be adopted by a Court was set out by Corbett, JA as he then was as follows at page 545c-g:

> "The Court to which an application for leave to execute is made, has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised ... This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgements ... In exercising this discretion, the

Court should, in my view, determine what is just and equitable in all the circumstances and, in doing so, would normally have regard, *inter alia,* to the following factors:

1. the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
2. the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
3. the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous of vexatious or has been noted not with a *bona fide* intention of seeking to reverse the judgment, but for some indirect purpose, for example to gain time or to harass the other party; and
4. where there is potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience as the case may be."

I am prepared to accept that the respondents' appeal is neither frivolous nor vexatious and has some prospects of success,

although not that a successful result is virtually inevitable, as Mr Heunis seemed at times to contend.

The question then is what is the irreparable harm or prejudice which the appellant will suffer if leave to execute is granted. Mr Heunis could point to no substantive prejudice in this regard, save that should the appeal be successful, then the Overberg District Municipality would have been run in accordance with a budget which, for at least part of the period between now and mid 2011 when elections are held, would be *prima facie* invalid and would have to be revisited by a new council and ratified. Of course, if leave to implement is not granted and the appeal is unsuccessful, then the Overberg District Municipality would have been administered in terms of a budget which would also be *prima facie* invalid and would have to be ratified in due course. The balance of Mr Heunis' arguments in regard to prejudice similarly rest upon the assumption that the appeal will be successful. There is no suggestion of any other substantive prejudice to the respondents.

The terms of the court order made on 12 October allows, and by implication requires, the Council to pass a budget for the remainder of the financial year within a stipulated period of 10 weeks. There is no suggestion that the Council, will not now

or cannot, take this step nor is it suggested that the Council will not henceforth properly administer the affairs of the Municipality.

In the event that the applicants might again fail to fulfil their responsibilities in terms of the Constitution or the applicable legislation, the provincial executive retains its powers of intervention in the affairs of the Municipality in terms of section 139 of the Constitution or other relevant legislation.

On the other hand, if leave to implement is not granted, there is substantial prejudice to the applicants. Apart from losing their elected or designated positions as councillors and the remuneration attendant thereon, the applicants will carry the stigma of representatives divested of their office for having failed to fulfil their responsibilities. If any appeal process is not completed by mid-2011, they will carry this stigma into any election which they may see fit to contest. There is moreover prejudice of another type which in my view is just as material, if not more material, namely the fact that democratic processes will be suspended in the Overberg District Municipality until mid 2011. This is prejudice which cannot be repaired if the appeal proves to be unsuccessful.

Taking these factors into account, I consider that the

applicants have established that the balance of convenience favours them and that if leave to implement is not granted, they will, on balance, suffer undue hardship. Accordingly, in my view, in the particular circumstances of this matter it would be just and equitable to grant the application for leave to implement the Court's order of 12 October 2010. Notwithstanding the applicants' success in the Rule 49(11) application, I propose to make the costs therein costs in the overall matter. For these reasons the following order is made:

1. The respondents are granted leave to appeal to the Supreme Court of Appeal against the decision of this Court dated 12 October 2010 on the grounds set out in their notice of application for leave to appeal dated 13 October 2010.

2. Pending the outcome of such appeal, or any further appeal, the order of this Court dated 12 October 2010 may be implemented.

3. The costs of the application for leave to appeal and the Rule 49(11) application shall stand over for determination in the appeal.

BOZALEK, J

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