

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION: MTHATHA**

CASE NO: 1383/2012

In the matter between:

**THE SPEAKER, MNQUMA LOCAL
MUNICIPALITY**

APPLICANT

And

**MUNICIPAL MANAGER – MNQUMA
LOCAL MUNICIPALITY**

1ST RESPONDENT

EXECUTIVE MAYOR- MNQUMA

LOCAL MUNICIPALITY

2ND RESPONDENT

MNQUMA LOCAL MUNICIPAL COUNCIL

3RD RESPONDENT

**THE MEC FOR LOCAL GOVERNMENT,
HOUSING AND TRADITIONAL AFFAIRS,
EASTERN CAPE**

4TH RESPONDENT

JUDGMENT

PAKADE ADJP:

[1] As apparent from the Notice of Motion, this litigation concerns a dispute between the Speaker, on the one hand and the Municipal Manager and the Executive Mayor on the other, of Mnquma Local Municipality.

[2] The Applicant seeks an urgent review and setting aside of the entire proceedings and resolutions of the Third Respondent's Council meetings which were held on the 30 March 2012 and on 29 May 2012, respectively. He also seeks an interdict restraining the implementation of the resolutions and/or anything emanating from the meetings held in the aforesaid dates. He sought an interim interdict on these two reliefs pending the final determination of the application.

[3] On the 29 June 2012, Dawood J granted a rule nisi, together with an interim relief, returnable on the 26 July 2012. The interim relief was preceded by a hearing in which full argument was presented by counsel who represented the parties.

[4] The Municipal Manager and the Executive Mayor had been sued in their official capacities.

[5] The Third Respondent was joined because it is the proceedings and the resolutions of its meetings that are sought to be impugned. The Fourth Respondent was joined as a party that might have an interest in the relief sought since it is the functionary of the Government which controls the functioning of the municipalities in the Eastern Cape. Otherwise there is no relief sought against the Fourth Respondent and consequently is not opposing the application.

[6] The First, Second and Third Respondents deposed to answering affidavits in opposition of the applicant's averments in her founding papers and the relief sought in the notice of motion .

[7] On the 23rd August 2012 the Applicant instituted contempt of court proceedings against the First, Second and Third Respondents alleging that they had contemptuously failed to comply with the order issued by Dawood J on the 29 June 2012. That application is opposed only by the First and Second Respondents, the main answering affidavit, duly confirmed by the First Respondent having been deposed to by the Second Respondent.

[8] The substantive defense raised in the answering affidavit is that the interdict has no practical effect and cannot be implemented in its present formulation because it required the Respondents not to implement or confirm the resolutions of the 30 March 2012 and 29 May 2012 in the respondents' meeting of 29 June 2012 or in any subsequent Council meeting. The stance adopted by the Respondents in their opposition is that the Third Respondent does not intend to adopt, confirm or implement any previous resolutions by way of further resolution. They contend that the resolutions of 30 March 2012 and 29 May 2012 are not affected by the interdict and so they remain valid.

[9] On 20 September 2012 the Executive Mayor of Mngquma Local Municipality brought an application ,on an urgent basis, in his official capacity together with the Municipal Manager, in his personal capacity

under case no: 2010/2012, seeking a declarator declaring Mr Ngamela Pakade a Municipal Manager of Mnquma Local Municipality pending the determination of case no: 1383/2012 (the main application) including interlocutory, incidental and associated applications under the same case number .They also sought a declarator against Mr Mxolisi Waxa declaring him not to be the municipal manager of Mnquma Local Municipality pending the determination of case no: 1383/2012 and its associated application. The last relief they seek is the interdict restraining the Respondent (Speaker) from interfering with, impeding or obstructing the municipal manager of Mnquma Local Municipality in the exercise of his duties as such.

[10] In the application brought by the Mayor and Ngamela Pakade under case no: 2010/2012 , the Speaker and Mxolisi Waxa are cited as First and Second Respondents ,respectively, and the MEC for Local Government Housing and Traditional Affairs , as the Third Respondent. The Council of Mnquma Local Municipality has not been joined in these proceedings. The application is opposed by the First and Second respondents and have deposed to an answering affidavit to that effect.

[11] In her opposition of the relief sought in the 2010/2012 application, the Speaker raised four points in *limine*, being lack of *locu standi* of the Executive Mayor and Municipal Manager by reason of the interim order *and resolution of the 18 September 2012*; lack of urgency; lack of power of attorney against Mpeto and Associates Attorneys constituting lack of authority to represent the respondents in the main application and inappropriateness of the relief sought. She sought, on these points, to have

the application dismissed and the rule nisi in the main application under case no: 1383/2012 confirmed with punitive costs against the Mayor, to be paid by him *debonis propriis* .

[12] On 02 October 2012, the Speaker, the Municipality and the Acting Municipal Manager, instituted another application in this Court seeking an order restraining Mr Ngamela Pakade, Ms Ndileka Boya and Mr Mzimasi Mtolo from removing office documents of the Mngquma Municipality from the offices of the Director: Corporate Services, Director: Community Services and from the Municipal Manager's office .The allegation against these Respondents is that on 20 September 2012 (two days after the resolution of the 18 September 2012 was issued) these Respondents removed crucial office documents from the Municipal offices aforesaid for the purpose of frustrating investigation that was going to be conducted by the Municipality on allegations of fraud and maladministration against the deposed municipal manager , Mr Ngamela Pakade . The application is opposed and the main answering affidavit was deposed to by Mr Ngamela Pakade, still expressly asserting himself to be the Municipal Manager of that Municipality.

[13] While all these applications are before me by reason of their having been consolidated, the only issue that is pertinent for decision at this stage is the points in *limine* raised under the 2010/2012 application .Both counsel, Mr Zilwa and Mr Quinn SC, who represent the Applicant and the Respondents, respectively, are *ad idem* that the points in *limine* are dispositive of both applications brought under case no's: 2010/2012 and 1383/2012 if they are sustained. Accordingly it was agreed by both counsel

that I should first entertain argument on the points in *limine* and decide thereon before hearing the main application, should it be necessary to hear it. I now first set out the points in *limine* in detail before analysing and applying the law to them.

Locu standi in judicio of the 1st Applicant

[14] Mr Zilwa submitted that although the First Applicant in the 2010/2012 application is suing in his official capacity as the Executive Mayor of Mngquma Local Municipality, he has not referred to any Council resolution from the said Municipality showing that he was authorized to bring this application. If no Council resolution exists, the First Applicant has omitted to state where he derives his authority to institute these proceedings. By reason hereof, the First Applicant lacks the authority to institute the application in his official capacity. Secondly, the Mngquma Local Municipality Council took a resolution on 18 September 2012 that ‘the Council immediately revokes delegation 28 of the delegation document to the Executive Mayor and further delegates the Speaker to deal with all administrative and legal implications flowing from the outcome of the resolution’. That resolution is valid as it has not been set aside, so goes the submission of Mr Zilwa. He cited **Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others**¹ as authority for his proposition. I agree that it is trite law that an invalid administrative action is valid until it is set aside. As at the time of the hearing of this matter on the 9th October 2012 and 16 October 2012 this portion of the Council resolution had not been set aside and is therefore valid.

¹ 2004(6) SA 222 (SCA) at para[26]

The second point in *limine* which relates to lack of urgency in the matter has not been pursued in the hearing. I can therefore safely assume that it has been abandoned by Mr Zilwa.

Power of attorney

[15] The authority of the instructing attorneys of record, Mpeto and Associates, was placed in question by virtue of the various correspondence received by the Applicant's Attorneys of record. That correspondence is comprised of a letter dated 18 September 2012 wherein the Mmquma Local Municipality had stated that the mandate of attorneys Mpeto and Associates to act on behalf of Mmquma Local Municipality was terminated with immediate effect. Therefore, so goes the averment and submission of counsel, Mpeto and Associates Attorneys had no authority to bring the 2010/2012 application and to continue opposing the main application under case no: 1383/2012. The mandate of Mpeto and Associates was terminated by Council resolution of 18 September 2012 and conveyed to those Attorneys on the same day.

Relief sought

[16] The First and Second Applicants are seeking an order declaring the Second Applicant to be the municipal manager of Mmquma Local Municipality pending determination of the application under case no: 1383/2012. An interim relief was obtained under case no: 1383/2012 setting aside the resolution taken by the Mmquma Local Municipality. This

resolution contained an interdict against resolution that the employment contract of the Second Applicant would be extended upon its expiry. The employment contract of the Second Applicant came to an end on 30 March 2012. The Mquma Local Municipality resolved on 18 September 2012 that they are withdrawing their opposition under case no: 1383/2012 and that the interim relief may be made final on 27 September 2012. By virtue of the Court Order aforesaid and the Council Resolution dated 18 September 2012, the Second Applicant's employment agreement came to an end and was not extended by Council. In the premises, the relief sought in the present application to declare the Second Applicant to be the Municipal Manager pending the final determination of the action in case no: 1383/2012 is not appropriate, considering that the Mquma Local Municipality has withdrawn its opposition and in essence consented in the confirmation of the rule *nisi* with interim relief that was granted. On this basis the Speaker contends that the application brought by the First and Second Respondents falls to be dismissed with costs on the scale as between attorney and client.

[17] Although the points in *limine* were raised by the Speaker in her answering affidavit to the First and Second Respondents' application, the First and Second Respondents have not responded to them in their replying affidavit. All they contented themselves with was a submission from their counsel, Mr Quinn, that no foundation or basis had been laid for the points in *limine* to be raised and argued. This, however, became patently clear that the submission that there was no basis laid for the points in *limine* to be raised was flawed and as already observed above, the applicant had adequately flashed a red light to the Respondents about them.

[18] Mr Quinn insisted though that the authority of Mpeto and Associates had not been properly challenged in terms of Rule 7 of the Uniform Rules of the High Court which requires that a substantive application be made on 10 days notice to the other party. The second submission of Mr Quinn is that there is a dispute of fact based on the legality of the Council proceedings of the 18 September 2012 which renders them challengeable in the 2010/2012 application brought by the Mayor and Mr Ngamela Pakade to enable the Local Municipality to function. He submitted that the parties, other than the municipality are entitled to be heard in their personal capacities. This submission refers to Mr Ngamela Pakade who is bringing the 2010/2012 application in his personal capacity. The relief sought by the Mayor seeks to validate the resolution of 18 September 2012. Lastly, in developing his counter submission to the submission on the validity of the resolution of 18 September 2012 Mr Quinn submitted that the Oudekraal case is no authority for that proposition. I do not agree that the Oudekraal case is no authority to the presumed validity of the resolution of the 18 September 2012. As already said in paragraph [15] above the contrary is true.

[19] The genesis of this litigation is Council Resolutions of the 30 March 2012 and 29 May 2012 respectively. As already alluded to in paragraph [2] above, the Speaker obtained an interim Order setting them aside and restraining their implementation. The resolutions of the 30 March 2012 are, inter-alia, that the Speaker should be suspended and that the contract of employment of the Municipal Manager be extended for six months. As already said above, these resolutions were set aside by the Court Order of 29 June 2012. The consequence of the setting aside of these resolutions is that the Speaker was still in office legally as such and the incumbent of the office

of the Municipal Manager had ceased to be the Municipal Manager hence the appointment of an acting Municipal Manager. This is what in essence is the order of the court which the Mngoma Local Municipality resolved on the 18 September 2012 to abide by and execute. This Council Resolution can be captured in the following terms:

"RESOLVED THAT:

The Council executes the Court Order of the 29 June 2012 with immediate effect as there is no counter order that has been granted in lieu of the existing ones.

The Speaker is hereby mandated to sign the termination letters and acting appointment letters, and further mandated to inform the Security personnel to remove the Municipal Manager from office after he handed back all Council assets in his possession.

The Council immediately revokes delegation 28 of the delegation document to the Executive Mayor and further delegates the Speaker to deal with all administrative and legal implications flowing from the outcome of the resolutions.

Councillors further resolved to appoint the Acting Municipal Manager, and that:-

Mr Mxolisi Waxa be appointed as Acting Municipal Manager with immediate effect for a period of 3 months."

[20] As already said above on the same day of the Resolution, the Speaker addressed a letter to Mpeto & Associates informing them that Mngoma

Local Municipal Council was no longer opposing the main application and that their services were terminated. For the sake of completeness, I need to reproduce the Speaker's letter to these Attorneys. It reads as follows:

“RE: HIGH COURT CASE/ SPEAKER MNQUMA MUNICIPALITY VS THE MUNICIPAL MANAGER MNQUMA LOCAL MUNICIPALITY AND TWO OTHERS CASE NO: 1383/2012.

Please be informed that the Mmquma Local Municipal Council on the 18th September 2012 resolved not to further defend the above-mentioned case but to abide by and execute the Rule Nisi handed down by the High Court on the 29th June 2012.

Please be further informed that your services as Council's Attorney [including any Advocate briefed] for defense of this case has been terminated with immediate effect ".

[21] On the 19th September 2012, the Speaker informed Mr Ngamela Pakade that he had been relieved of his duties as Municipal Manager by Council Resolution SC/12/006,6.1 and called upon him to vacate his office with immediate effect. On the 20 September 2012, Mpeto & Associates instituted the 2010/2012 proceedings seeking an order declaring Mr Pakade a Municipal Manager of the Mmquma Local Municipality pending the final determination of the main application under case no.1383/2012 and an order declaring Mr Mxolisi Waxa not a Municipal Manager. The notice of motion cited the Mayor as the First Applicant and Mr Ngamela Pakade, as the Second Applicant. The Mayor brought the application and asserted himself

in his founding affidavit to be “the Executive Mayor of Mquma Local Municipality”. He brought the application on behalf of the Municipality to ensure its smooth operation.

[22] The persons who may approach the court are, in terms of section 38 of the Constitution of the Republic of South Africa Act 108 of 1996 – (a) Anyone person acting in their own interest; (b) Anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members. The First Applicant does not feature in any of these categories. He is not affected by the removal of Mr Ngamela Pakade as Municipal Manager of Mquma Local Municipality because he is no longer the Mayor of that Municipality.

[23] As Mr Zilwa has submitted, the executive mayor omitted to mention that he had been duly authorized by the Mquma Local Municipal Council to institute the proceedings on its behalf and has also not produced Council Resolution to Court notwithstanding that he had been pertinently challenged to produce it. That challenge, as alluded to in paragraph [14] above, had not been responded to by “the Executive Mayor”.

[24] In **Merlin Gerin (Pty) Ltd v All Current and Drief Centre (Pty) Ltd**², the applicant’s director, who signed the founding affidavit, had not been authorized to do so. The Respondents objected to the director’s lack of authority. Thereafter the applicant’s board of directors ratified the act of the

² 1994(1) SA 659 (C)

director. Dealing with this issue, Conradie J stated as follows at page 660 F-G:

“For the enforcement of this right, the respondent has only one remedy, to move for dismissal of the application. Moving for dismissal is not itself a right, but a remedy for the right not to be unfairly proceeded against.

And applicant now has two options. If he had no authority to begin with he would attempt to defeat the remedy (dismissal of his application) by obtaining authority by way of ratification and by putting proof of that before the court. Or he might put better proof of pre-existing authority before the court. Once the applicant has done this, he will be bound by an order for costs against him. In this way, ratification would not harm but benefit the respondent, and so would be unequivocal proof of pre-existing authority.”

Accordingly the court held that ratification saved the application. The First Applicant remained supine and did nothing to remedy his lack of authority.

As a matter of fact and by necessary implication, the Executive Mayor conceded in the replying affidavit that before the Resolution of the 18 September 2012 he had authority to represent the Mngquma Municipality and had none after that resolution. The concession is properly made because it is inconceivable that the Mngquma Local Municipality would revoke delegation 28 of the delegation document to the mayor but simultaneously authorize him to litigate on its behalf. Nothing further to be said on this point than that the executive mayor had no authority to bring the proceedings under case no. 2010/2012. Without further ado, his application falls to be dismissed with punitive costs on an attorney and client scale to be paid by him in his personal capacity.

[25] Similarly in **Contralesa v Minister for Local Government, Eastern Cape**³, the authority of the deponent to institute motion proceedings against the applicant, a voluntary association, was challenged. In his founding affidavit, in support of the application, Chief Gwadiso stated that he is a Traditional Leader and secretary general of the applicant in the Eastern Cape Province. He described the applicant as being the voluntary association of Traditional Leaders in the Province having its office at Mthatha. He stated that he was duly mandated by the Applicant to depose to this affidavit on its behalf. I note that the Executive Mayor in the present application has not stated that he is deposing on behalf of Mquma Local Municipality. Chief Gwadiso also stated that on 11 August 1995, the National Executive Committee of the applicant held a meeting in Johannesburg and endorsed the decision of the applicant to take the respondents to court. However, no copy of the resolution or endorsement was made available to the court, notwithstanding the request having been made by the respondent to that effect. In his judgment, Pickering J reaffirmed the thrite principle that a voluntary association is required to set out in its founding affidavit the requisite to institute the proceedings. It is therefore safe to say that the law is settled on the point that a person instituting motion proceedings on behalf of a company or a voluntary association or municipality or an artificial person must establish his authority to do so in his founding affidavit failing which the defect can be ratified with retrospective effect if the deponent to the founding affidavit was indeed acting on its behalf and not on his own frolic (**Smith v KwaNongqubela town Council**)⁴.

³ 1996(2) SA 892 (TKSC)

⁴ 1999(4) SA 947(SCA)

[26] I must herein after set out in a summary form, the defence raised by the respondents. It is that:

- (i) the interdict has no practical effect and cannot be implemented as Third Respondent does not intend to adopt, confirm or implement any previous resolutions by way of further resolutions;
- (ii) the resolutions of the 30 March 2012 and 29 May 2012 are valid because they are not affected by the interdict;
- (iii) the challenge to the authority of Mpeto and Associates is flawed as it did not comply with rule 7 of the Uniform Rules of Court, and
- (iv) the resolution of the 18 September 2012 is invalid. I now deal with the defences *seriatim*.

Interdict has no practical effect and cannot be implemented

[27] The essence of the complaint is that the interdict has no legal effect. I do not agree with this contention. The interdict withdraws or curtails the right of Mr Ngamela Pakade to have his contract of employment renewed or extended. By withdrawing delegation 28 of the document assigning this responsibility to the executive Mayor, the interdict withdrew or curtailed the right of the executive mayor to perform his functions as such. I am of the respectful view that this defence cannot be sustained.

Challenge to the authority of Mpeto and Associates - Rule 7 of the Uniform Rules

[28] Indeed the remedy of a Respondent who wishes to challenge an authority of a person allegedly acting on behalf of the purported applicant is provided for in rule 7 (1).⁵ The rule provides that “...the authority of any one acting on behalf of a party may within ten days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereupon such person may no longer act unless he satisfied the court that he is authorized so to act and to enable him to do so, the court may postpone the hearing of the action or application”

[29] When the challenge was raised as a point in *limine*, the hearing of the application was adjourned to a later date to enable the Applicants and Mpeto and associates to either produce authority to court or present argument in that respect. They did not produce authority but instead presented argument.

[30] The rule does not specify any procedure for challenging the authority of a party to institute proceedings. Mr Quinn, however, submitted that ‘good cause’ shown means that a substantive application has to be made within ten days challenging the authority of the party. It does not seem to me that this submission is entirely correct as good cause may be shown by a party challenging another’s authority by way of an affidavit and, as in *casu*, by

⁵ Eskom v Soweto City Council 1992 (2)SA 703 (WLD); Unlawful Occupiers, School site v City of Johannesburg 2005 (4) SA 199(SCA)

raising it as a point *in limine*. Once that is done and the affidavit is served to the other party, sufficient notice has, in my view, been given.

[31] In **Unlawful Occupiers, School site v City of Johannesburg** case , supra, the challenge to authority appeared in the applicant's founding affidavit when the applicant asserted that he was authorized to bring the application which the respondent denied in his answering affidavit. Brand JA held that a party who wishes to raise an issue of authority should not adopt the procedure by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This means, in my view, that challenge to authority can be raised in a variety of ways but must be raised directly either by way of notice accompanied by evidence or without evidence; in the defendant's plea or special plea; or in interlocutory application such as an application for summary judgment or in an application for rescission of summary judgment or even orally at the trial.⁶

[32] To Mr Quinn's further submission that the authority of Mpeto and Associates was not challenged properly as it had not been challenged by the Speaker in her earlier affidavit in the main application, I can adopt no more than what Jansen J said in **South African Allied Workers Union v De Klerk and Another NO**⁷ that:

"The power of attorney contemplated in Rule 7(1) is a power to take certain formal procedural steps, namely, to issue process and to sign court documentation such as summons or notice of motion on behalf

⁶ Erasmus: Superior court practice B1-60

⁷ 1990(3) SA 425 (E) at 437

of a litigant. It does not contemplate a general authority by one person to another to represent him in legal proceedings, There is a clear distinction between an attorney being mandated in the form required by Rule 7 to issue formal court process and the general authority of one litigant to act in all respects on behalf of others.”

[33] As already said above, the resolution of Council terminating the mandate of Mpeto and Associates was issued on the 18 September 2012 and communicated to them on the same day. The main application had by order of Court issued on 13 September 2012 adjourned for hearing on 27 September 2012. On the 27 September 2012 the Respondents were still represented by Counsel when the main application and other applications were adjourned for hearing on 9 October 2012 and 16 October 2012. As at the 27 September 2012 the mandate of Mpeto and Associates had been terminated and had no authority to represent the Respondent beyond that date in the main application and 2010/2012 application. The effect of Council Resolution of 18 September 2012 is that the representation of the Respondents in these applications on the 09 October 2012 and 16 October 2012 was not authorised as Mpeto and Associates were no longer Attorneys representing the Respondents. Having so decided, it is not necessary to consider further submissions of Counsel on this point. The Mnquma Local Municipality withdrew its defence and conceded to the confirmation of the interim order of the 29 June 2012.

[34] This brings me to the *locu standi* of Mr Ngamela Pakade in the 2010/2012 application. The renewal or the extension of his contract of employment was interdicted by Court on the 29 June 2012 and by Council

Resolution of the 18 September 2012. The relief sought by the Speaker in the main application is no longer being opposed by Mquma Municipal Council which had also withdrawn its mandate to its Attorneys of record (Mpeto and Associates). Without further ado once again the Rule Nisi together with the interim relief in the main application stands to be confirmed with costs. Common logic dictates that after the Municipal Council had withdrawn its mandate on its Attorneys, the matter ended there and there could never have been justification for the matter to proceed beyond the 27 September 2012.

[35] In the circumstances, I make the following order:

1. That the Rule Nisi granted by this Court on the 29 June 2012 is confirmed with costs.
2. That the 2010/2012 application is dismissed with costs on an Attorney and Client scale and such costs to be paid by Baba Mntuwoxolo Ganjana in his personal capacity.

LP Pakade

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

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Heard on : 09 October 2012
16 October 2012

Delivered on : 18 January 2013