



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1110/2019

In the matter between:

INGQUZA HILL LOCAL MUNICIPALITY FIRST APPELLANT

BAMBEZAKHE GOYA SECOND APPELLANT

and

JONGINTABA MDINGI RESPONDENT

Neutral citation: *Ingquza Hill Local Municipality & Another v Jongintaba Mdingi* (Case no 1110/2019) [2021] ZASCA 75 (10 June 2021)

Coram: PETSE DP and ZONDI and DLODLO JJA and LEDWABA and
MABINDLA-BOQWANA AJJA

Heard: 11 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 10 June 2021.

Summary: Local Government: Municipal Structures Act 117 of 1998 – removal of a member of the executive committee as a mayor – prescripts of s 53(1) not complied with.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Brooks J, sitting as the court of first instance):

The appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

JUDGMENT

Mabindla-Boqwana AJA (Petse DP and Zondi and Dlodlo JJA and Ledwaba AJA concurring):

[1] This appeal concerns the removal of the respondent, Mr Jongintaba Mdingi (Mr Mdingi), who was a member of the executive committee of the first appellant, Ingquza Hill Local Municipality (the Municipality), as its mayor pursuant to a resolution adopted by the Municipal Council (the Council) ostensibly acting in terms of s 53(1) of the Local Government: Municipal Structures Act 117 of 1998 (the Act) on 23 January 2019.

[2] The procedures relating to the functioning and operations of municipal councils derive from s 160 of the Constitution,¹ which states, among others,

¹ Constitution of the Republic of South Africa, 1996.

that '[a] Municipal Council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality'.²

Further, in terms of s 160(8):

'Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that –

- (a) allows parties and interests reflected within the Council to be fairly represented;
- (b) is consistent with democracy; and
- (c) may be regulated by national legislation.'

[3] The Local Government: Municipal Structures Act 117 of 1998 (the Act) is the national legislation contemplated in s 160(8)(c) of the Constitution that regulates the functioning of municipal councils. In terms of s 18 of the Act, each municipality must have a municipal council, which must meet at least quarterly (ss 18(1) and (2)). Only those municipalities which qualify in terms of s 42 can establish executive committees. Members of an executive committee are elected from among members of a municipal council at a meeting that must be held within 14 days after the council's election (s 45(a)).

[4] A member of the executive committee vacates office in terms of s 47 of the Act, which states:

'(1) A member of the executive committee vacates office during a term if that member –

- (a) resigns as a member of the executive committee;
- (b) *is removed from office as a member of the executive committee in terms of section 53;*

or

- (c) ceases to be a councillor.

(2) The filling of a vacancy in an executive committee is subject to section 43.' (My emphasis.)

² Section 160(1).

[5] Section 53, referred to in s 47(1)(b), provides thus:

‘(1) A municipal council may, *by resolution* remove from office one or more or all the members of its executive committee. *Prior notice of an intention to move a motion for the removal of members must be given.*’ (My emphasis.)

[6] The election of mayors is governed by s 48 of the Act. That section stipulates:

‘(1) The municipal council must elect a member of its executive committee as the mayor and, if the MEC for local government in the province so approves, another member of the executive committee as the deputy mayor, of the municipality.

(2) The election of a mayor and deputy mayor takes place when the executive committee is elected or when it is necessary to fill a vacancy.

(3) The procedure set out in Schedule 3 applies to the election of a mayor and deputy mayor.

(4) A mayor and deputy mayor is elected for the duration of that person’s term as a member of the executive committee, but vacates office during a term if that person –

(a) resigns as mayor or deputy mayor;

(b) *is removed from office as a member of the executive committee in terms of section 53;*

or

(c) *ceases to be a member of the executive committee.*’ (My emphasis.)

[7] Of fundamental importance from this section is that the mayor is elected from members of the executive committee (s 48(1)) and vacates office when he or she resigns; is removed from office as a member of the executive committee in terms of s 53; or ceases to be a member of the executive committee (s 48(4)).

[8] This must be contrasted, importantly, with the situation that pertains to the election and removal of *executive* mayors. Certain types of municipalities

may elect *executive* mayors, and if a qualifying municipality chooses to have an executive mayor, Part 2 of Chapter 4 applies (s 54). An executive mayor may be removed from office in accordance with s 58, which states that ‘[a] municipal council, by resolution may remove its executive mayor or deputy executive mayor from office. Prior notice of an intention to move a motion for the removal of the executive mayor or deputy executive mayor must be given’. No similar provision exists in as far as ordinary mayors are concerned.

[9] An interesting observation though, is that the wording of s 58 as regards the removal of an executive mayor is similar to that in s 53(1) pertaining to the removal of an executive committee member. While the Act is silent as to the removal of a mayor other than an executive mayor, it does explicitly state in s 48(4) that the mayor must vacate his or her office upon being removed as a member of the executive committee in terms of s 53(1), or upon ceasing to be a member of the executive committee.

[10] Section 53(1) makes it obligatory that prior notice of the intention to move a motion for the removal of a member of the executive committee be given. The section does not confine the giving of prior notice to a member or those members of the executive committee who are the subject of the proposed removal. In my view, a proper reading of the section should entail giving notice to all members of the municipal council.

[11] The importance of giving notice to members of the council was underscored in *Democratic Alliance v Matika and Others*,³ a matter that dealt with a removal of the executive mayor. The court there held:

‘As far as national legislation is concerned, we are of the view that the provisions of section 58 of the MSA are indeed intended to facilitate and achieve the objects in the Constitution, for the simple reason that the democratic right to participate, as intended in the Constitution, cannot be exercised by a member or councillor if he/she is unaware of the fact that the meeting is going to take place.

...

... In the present case, however, the complete failure to give notice to Mr Matika and any of the other councillors had in our view frustrated the object that decisions must be taken in circumstances where all members of a council had been given the opportunity to participate and to debate before voting takes place and a decision is reached.’

[12] The court further referred to *Makume and Another v Northern Free State District Municipality and Others*,⁴ in which it was stated:

‘[I]n the absence of a proper notice of the intended motion there could have been no valid council resolution to carry the ... motion. No council resolution can be taken in a vacuum. A municipal council is an assembly of divergent political parties. These various political parties had their say when the executive mayor was enthroned by popular vote. Those various political parties ought to have their say when the executive mayor is dethroned. Logically those various political parties in the local assembly cannot democratically have their say in a meaningful way unless they are timeously notified prior to the relative council meeting by way of a written notice of the intended motion ... Any councillor or any political party intending to impeach the executive mayor was legally obliged to timeously inform, not only the mayor, but also each and every member of the municipal council of his or her intention to do so. ... Certainly it is not enough to say the executive mayor knew beforehand that he was going to be removed. The fact of the matter

³ *Democratic Alliance v Matika and Others* [2018] ZANCHC 55; 2019 (1) SA 214 (NCK) paras 43 and 45.

⁴ *Makume and Another v Northern Free State District Municipality and Others* [2003] ZAFSHC 36; [2003] ZAFSHC 15 (FB).

is that all the councillors irrespective of their political affiliations were also entitled to know. . . . Respect for law is as important as clean public administration itself. None of the two should be sacrificed on the altar of the other.’⁵

[13] Finally, the court in *Matika* referred to the decision of the Constitutional Court in *Democratic Alliance and Another v Masondo NO and Another*,⁶ which held that ‘inclusive deliberation prior to decision-making’ is required to give effect to s 160(8) of the Constitution. It then concluded that ‘[i]n our view it is clear that even if a single councillor was deprived of the right to debate and to participate, because of the absence of notice, the objects of the Constitution and of the MSA would have been frustrated’.⁷

[14] Therefore, notice is necessary to afford the affected member(s) an opportunity to be aware and to consider the motion before it is tabled for discussion. Additionally, it is to provide council members similarly with an opportunity to engage meaningfully in the ensuing debate before a resolution is taken.

[15] I now turn to the facts of this case. Mr Mdingi was elected as the mayor on 3 August 2016. He was removed from his position following a resolution taken by the Council on 23 January 2019. The events leading to his removal started on 14 December 2018 when the Municipality convened an emergency council meeting to deal with various issues. One of the issues discussed was an investigation report dated 29 October 2018, prepared by the Department of

⁵ *Makume* paras 17 and 18.

⁶ *Democratic Alliance and Another v Masondo NO and Another* [2002] ZACC 28; 2003 (2) BCLR 128; 2003 (2) SA 413 (CC) para 78.

⁷ *Matika* para 46.

Cooperative Governance and Traditional Affairs (COGTA), relating to alleged acts of misconduct involving maladministration by the municipal manager, in which COGTA recommended his precautionary suspension.

[16] In his founding affidavit, Mr Mdingi alleged that after making a presentation in relation to matters that were on the agenda he and other councillors left the meeting. He was informed by those who remained behind that as the speaker was about to declare the meeting closed, one of the councillors, Mr Simthembile Mtshazo, intervened on a point of exigency stating that he wanted to introduce the issue of Mr Mdingi's removal as the mayor. It was agreed that the meeting be closed and the matter be dealt with in the next council meeting of 2019.

[17] The Municipality denied that Mr Mdingi had left the meeting when the motion was raised. It was alleged on its behalf that after the presentation of the COGTA investigation report by Mr Mdingi, the meeting was adjourned for an hour to allow him an opportunity to obtain further documents for consideration by the councillors. It was at this time that a motion for his removal was fashioned by Mr Mtshazo, who presented it to some councillors for support. The motion was prompted by the fact that Mr Mdingi had failed to implement a council resolution adopted on 14 June 2018 directing him to write a letter to the municipal manager concerning the Municipality's intention to suspend him. According to the Municipality, COGTA's recommendation was exactly the same as its earlier resolution which Mr Mdingi had failed to implement.

[18] It was alleged that Mr Mdingi's failure to implement the council's resolutions led to a breakdown of trust between Mr Mdingi and the Municipality. According to the Municipality, the meeting resumed after it had adjourned momentarily and the notice to move a motion of no confidence in Mr Mdingi was introduced as an exigency motion right at the tail end. The fact that Mr Mdingi was present when the motion was raised, was confirmed by the Speaker and the Chief Whip. In this regard, the version of the Municipality, as the respondent in the review application, cannot, on the Plascon-Evans rule,⁸ be rejected on the papers. The Municipality contends that this motion was in terms of the Standing Rule 25.1 and in compliance with s 53 of the Act. We have not been favoured with a copy of the Standing Rule, in any event, the rule as alleged could never trump statutory provisions.

[19] The motion drafted by Mr Mtshazo on 14 December 2018 read as follows:

‘COUNCIL MEETING SCHEDULED FOR FRIDAY THE 14TH DECEMBER 2018.

EXIGENT MOTION

4.2 Honourable Councillor **SIMTHEMBILE HOPEWELL MTSHAZO** moved an exigent motion for the removal of the Mayor Mr Mdingi from office in terms of 25.1 of the Council Standing Orders.

IN SUPPORT OF THE MOTION

1. There has been allegations of misconduct and/or maladministration in the Municipality by the Municipal Manager as we all know them which resulted into Court Judgment against the Municipality for rebuilding houses at Lusikisiki and the costs orders following that to cite the few;

⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

2. Following those allegations the Mayor had been given strict instructions by the Council on **14 June 2018** to implement. Notwithstanding the clear instruction from the Council the Mayor has failed to comply and to carry [out] the Council's mandate.

Madam Speaker these are very serious allegations which needed drastic intervention by our Council.

In order for the Council Madam Speaker to take steps to address these gross serious allegations of gross maladministration and/or misconduct the Council needs to have a Mayor that they would trust and would obey the Council's resolutions.

The only way Madam Speaker for Council to have such a person or Mayor is to remove the incumbent Mayor Mr Mdingi.

The Council Madam Speaker I propose that the Council should today.

(a) Take a resolution that it intends to remove the Mayor subject to following due and relevant provisions of the law [*ie MSA 117 of 1998 SECTION 53(1)*]⁹ governing the removal of the Mayor *ie that the Mayor today be given notice that the Council intends to move a motion for his removal from office on a date this Council would agree on or fix.*

That is the exigent motion Madam Speaker.

[Mr Mtshazo's signature appears here]

MR SIMTHEMBILE HOPEWELL MTSHAZO

Honourable Councilor **THANDEKA NDZUMO**

Madam Speaker I second the motion and request that it be adopted.

[Mr Ndzumo's signature appears here]

THANDEKA NDZUMO' (Original bold face and underlining.) (My emphasis in italics.)

[20] On 23 January 2019, the Municipality convened another emergency meeting where Mr Mtshazo's motion of exigency was discussed. A resolution

⁹ The inscription 'i.e. MSA 117 of 1998 SECTION 53(1)' was inserted in manuscript, while the entire document is otherwise typed. A typed version of the insertion is indicated at the bottom of the document with an asterisk (*).

to remove the respondent from the position of Mayor was taken by a majority vote. The second appellant, Mr Bambezakhe Goya, who is now deceased, was elected to be the Mayor in place of Mr Mdingi in terms of s 48(2) of the Act.

[21] It appears from the draft minutes of the meeting of 23 January 2019, attached as an annexure to the founding affidavit, that a motion to refer the matter to an ad hoc committee for investigation was raised. Twenty councillors voted in favour of the establishment of the committee, while 39 voted that the Mayor be removed. The Municipality attached a different set of minutes to its answering affidavit, which was signed on 6 February 2019. Conspicuously missing from these minutes is the part about the establishment of an ad hoc committee. The minutes record:

‘39 voted that the Mayor Councillor Mdingi to be removed as a member of the Executive Committee and a Mayor of Ingquza Hill Local Municipality. 20 Councillors voted against. Honourable Councillors Mabasa, Ndziba and Gwegwe abstained.

The Council resolved to:

- Remove Honourable Councillor Mdingi as a member of the Executive Committee and Mayor of Ingquza Hill Local Municipality in terms of section 53 of the Municipal Structures Act of No. 117 of 1998.’

[22] There is no indication whether these minutes were adopted at a subsequent council meeting. This notwithstanding, it is odd that the minutes that were signed on a date after the institution of the review proceedings differ markedly from those attached to the founding affidavit on an important aspect which was the subject of the review application. I take it no higher than to state that this appears strange.

[23] Aggrieved by what transpired at the meeting of 23 January 2019, Mr Mdingi took the Municipality's decision on review to the Eastern Cape Division of the High Court, Mthatha (the high court) by way of an urgent application for the setting aside of the decision to remove him and the subsequent decision to elect the deceased as his replacement. His grounds for review were that no investigation was undertaken by the Municipality of the allegations of misconduct against him, no charges were put to him, and he was neither informed of his rights nor given an opportunity to make a presentation of his case, let alone an adequate opportunity to do so. The Municipality submitted that it relied on s 53(1) of the Act as well as Rule 25.1 of its Standing Orders and Rules. As already indicated, the reference to s 53(1) was inserted in the typed motion in handwriting. In reaction to the Municipality's reliance on s 53(1), Mr Mdingi alleged that he had not been served with any notice to remove him as a member of the executive committee, nor was any sent to the councillors. He further stated that evidence showed that he in fact had implemented the decision of the Council that he was accused of having defied.

[24] The review application served before Brooks J, who set aside the aforesaid decisions of the Municipality, holding that 'no motion was ever placed before the [Municipality] in which [Mr Mdingi]'s removal as the Member of the Executive Committee was sought, nor can the present notice ever be transformed into such a notice by simple reference to the relevant provisions of Section 53(1) of the Act'. Secondly, the learned judge found that 'the need for there to be prior notice appears to have been completely overlooked as the motion itself morphed into a dismissal process at the meeting on the 23 January 2019'. Finally, referring to the *audi alteram partem*

principle, the learned judge stated that ‘where a decision may be made which is adverse to a person, such a person should be given an opportunity to participate fully in the process’. Subsequently, the learned judge granted leave to appeal his decision to this Court. The issue whether the high court erred in its decision to review and set aside the Municipality’s decisions takes centre stage in this appeal.

[25] Section 53(1) does not detail what the notice should entail other than to state that it should be given. Seemingly, this should depend on the nature of the motion sought to be moved. Mr Mtshazo’s motion was detailed. Counsel for the respondent argued that because Mr Mdingi was removed for detailed non-compliance with a decision of the Council, the notice would have to, as of necessity, contain such information or make reference to the supporting information contained in the motion.

[26] When the motion for Mr Mdingi’s removal – for his alleged failure to implement the resolution of the Municipality, relating to the conduct of the municipal manager – was introduced on 14 December 2018, it was suggested by the mover of the proposed motion, Mr Mtshazo, that Mr Mdingi be given notice for the intended motion on the same day (14 December 2018) and be informed of the motion that would be moved on a date still to be arranged.

[27] It is common cause that no actual notice was given to Mr Mdingi and the councillors after the meeting of 14 December 2018. What followed was the council meeting of 23 January 2019. We have not been provided with the agenda of that meeting. But what appears on the draft minutes is that the issue of the motion regarding Mr Mdingi’s intended removal was not on the agenda.

It appears from the minutes of that meeting that one of the councillors, Councillor Jiba (seconded by Councillor Nkungu) requested the addition of two items on the agenda to be recorded as ‘5.1.3 Removal of the Mayor; 5.1.4 Election of the Mayor’.

[28] Thus, even if it were to be argued that the agenda would have served as ‘prior notice’, the item pertaining to Mr Mdingi’s intended removal was not on the agenda as reflected by the minutes. To illustrate further that councillors were not served with the requisite notice, it is recorded that another councillor, Councillor Mngqinelwa ‘wanted to know the reasons for the removal of the Mayor’.

[29] Actions of the Council must be consistent with the Constitution and the law. It is for that reason that s 53(1) requires prior notice, not just to the member who is the subject of an intended motion, but to all the councillors. This is to enable them to take an informed decision. Counsel for the Municipality submitted that the written motion of 14 December 2018 by Mr Mtshazo served as adequate notice, because Mr Mdingi admitted that he had sight of it. Firstly, it is not clear whether Mr Mtshazo’s intended motion was made a resolution on 14 December 2018, as we were not favoured with a copy of the minutes of that meeting. Secondly, the Municipality has admitted that Mr Mdingi was not given a notice in compliance with Mr Mtshazo’s suggestion. Thirdly, it is clear that the notice setting out the date, time, place and reasons for the motion was not afforded to all the councillors. Fourthly, if the submission by the Municipality was to be accepted that the actual notice is inconsequential as long as a member is aware of the intended motion to remove him or her, this would frustrate the objects and purpose of s 53(1) of

the Act read with s 160(8) of the Constitution, as all the councillors must be given an opportunity to participate in council meetings. Furthermore, it may be possible that those members who were absent at the meeting of 23 January 2019 would not have known that a motion to remove Mr Mdingi was to be moved, as it was raised by way of an additional item at the meeting itself. Even those councillors who voted in favour of the motion against the respondent did not have the benefit of prior notice.

[30] One further issue that bears mentioning is that the motion was said to have been moved in terms of s 53(1). It was however couched not as a notice to remove Mr Mdingi as a member of the executive committee, but as the mayor. Section 53(1) relates to the removal of executive committee members. While it is so that a mayor would have to vacate office once removed as a member of the executive council, as stated in s 48(4), if reliance is placed on s 53(1), however, then the motion must be unequivocal that it is for the removal of an incumbent as a member of the executive committee. I take note that the resolution appearing on the version of the minutes produced by the Municipality, signed on a date after the review application, refers to the removal of Mr Mdingi as both a member of the executive committee and as the mayor. This does not change the fact that Mr Mtshazo's proposed motion, coupled with the added item on the agenda, did not refer to the suggested removal of Mr Mdingi as a member of the executive committee. It also does not change the fact that no notice was given to Mr Mdingi and other councillors prior to this resolution being taken. Reference to removal as a mayor, as opposed to as a member of the executive committee, cannot be taken as inconsequential. This is for the reason that the nature of the motion

and the reasons thereof may differ, in which event, councillors ought to know what they are dealing with.

[31] Accordingly, the high court was correct in reaching the conclusion that it did. When all is said and done the order that it granted is unassailable. The fact that one of the reasons it gave was that there should have been a fully-fledged inquiry against the respondent does not, in the context of the facts of this case, avail the Municipality. It is further not necessary to enter into a debate as to whether or not the grounds for removal were established, or whether a court can interfere with a municipal council's decision on the basis of irrationality.

[32] It remains to express the Court's gratitude to Mr N Snellenburg SC, who together with Mr P T Masihleho appeared as amici curiae, for their valuable submissions in this matter which were of considerable help to the Court. The amici were appointed because heads of argument had not been filed on behalf of Mr Mdingi and the matter was ripe for hearing. The President of this Court took it upon herself to approach the Bloemfontein Society of Advocates to appoint one of their members to assist the Court. Heads of argument for Mr Mdingi were filed only a few days before the hearing of the matter with an application for condonation, which the Court granted.

[33] In the result the following order is made:

The appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

N P MABINDLA-BOQWANA
ACTING JUDGE OF APPEAL

APPEARANCES

For the appellants: T Masuku SC (with him L Matoti and V Kunju)
(heads of argument drafted by T Masuku SC with
L Matoti and L R Brauns)

Instructed by: Jolwana Mgidlana Inc., Mthatha
Maduba Attorneys Inc., Bloemfontein

For the respondent: V Notshe SC (with him A Bodlani)

Instructed by: M T Mlola Attorneys, Mthatha
Makubalo Attorneys, Bloemfontein

Amici curiae: N Snellenburg SC (with him P T Masihleho)