IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: CA & R 118/2021

In the matter between:

SIYABULELA MALAWU	**Appellant**
and	
MEC FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, EASTERN CAPE	**First Respondent**
THE MUNICIPAL COUNCIL, AMAHLATHI MUNICIPALITY	**Second Respondent**

JUDGMENT

MBENENGE JP:

Introduction

[1] Item 14 (1) of Schedule 1[1] to the Local Government: Municipal System Act 32 of 2000[2] confers the power on a municipal council to -

> "*(a)* investigate and make a finding on any alleged breach of a provision of [the] Code; or
>
> *(b)* establish a special committee -

[1] The Schedule embodies the Code of Conduct for Councillors and is otherwise referred to herein after as "*the Code*." The Schedule was repealed by section 37 of the Local Government: Municipal Structures Amendment Act 3 of 2021, which came into operation on 01 November 2021, hence the Schedule applies to these proceedings.
[2] The Systems Act.

(i) to investigate and make a finding on any alleged breach of [the] Code; and

(ii) to make appropriate recommendations to the council."

[2] In terms of item 14(2) of the Code, if the council or a special committee finds that a councillor has breached a provision of the Code, the council may -

(a) issue a formal warning to the councillor;

(b) reprimand the councillor;

(c) request the MEC for local government in the province[3] to suspend the councillor for a period ;

(d) fine the councillor; and

(e) request the MEC to remove the councillor from office.

[3] If a municipal council does not conduct an investigation contemplated in item 14(1) and the MEC considers it necessary,[4] she/he may appoint a person or a committee to investigate any alleged breach of the Code and make a recommendation as to the appropriate sanction in terms of item 14(2).

[4] If the MEC is of the opinion that a councillor has breached a provision of the Code and that such breach warrants a suspension or removal from office, the MEC may remove the councillor from office.[5]

[5] At all times relevant to these proceedings, the appellant was a councillor of the second respondent.[6] On 18 March 2020, he was removed from this office pursuant to a decision by the MEC that he had breached certain provisions of the Code.

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[3] The MEC, cited in these proceedings as the first respondent.
[4] Item 14(4) of the Code.
[5] Item 14(6).
[6] The Council of Amahlathi Municipality (otherwise herein after referred to as "*the Council*").

[6] Disgruntled at this, on 20 March 2020, the appellant launched an urgent application before the court below challenging the decision. His quest for an interdict restraining the respondents from removing him from office pending the finalization of proceedings to review the decision was not successful. Eventually, the review application was dismissed on 03 November 2020. The appeal is a sequel to such dismissal and serves before this court with the leave of the Supreme Court of Appeal,[7] the court below having refused such leave.

[7] When the appeal was heard, the appellant's term of office as councillor had expired, and new councillors had been elected.

Factual background

[8] It came to pass that during 2018 and 2019, the appellant faced allegations that he breached the Code in, *inter alia* -

> (a) having been involved in a fight with a member of the public during a council meeting, resulting in a halt of the meeting;
> (b) attacking, with a machete, a member of the public after the meeting had resumed;
> (c) making a mockery, on social media networks, of the intervention by the Executive Council of the Eastern Cape Province to appoint an administrator;
> (d) utilizing the letterhead of the municipal manager of Amahlathi Municipality[8] without having been authorised to do so; and
> (e) failing to attend four consecutive council meetings.

[9] The Council resolved to request its Ethics and Integrity Committee[9] to investigate these allegations. To this end, on 21 November 2019, the appellant received a letter from the Ethics Committee whereby he was required to account for his absence at the meetings. In so doing, the Committee only investigated one of the allegations against the appellant. The appellant was accused of contravening item 3

[7] The SCA.
[8] Amahlathi.
[9] The Ethics Committee.

of the Code requiring that a councillor attend each meeting of the Council and of a committee of which that councillor is a member except when leave of absence is granted or in an instance where the councillor is required to withdraw from the meeting in terms of the Code.

[10] Besides challenging the authority of the Ethics Committee and calling upon it to furnish him with its terms of reference, in his response letter of 24 November 2019, the appellant stated that he had "*advised the Speaker telephonically of* [his] *absence for* (sic) *all meetings*," which he was yet "*to confirm in writing*." Otherwise, in the letter, the appellant expressed concern about the safety of officials and councillors in instances when council meetings had been held at Mlungisi Location. The letter is bereft of any reasons for the appellant's alleged failure to attend meetings of the Council.

[11] It is not in dispute that the Ethics Committee resolved to reprimand the appellant for his failure to attend the meetings.

[12] In his letter dated 20 January 2020, the speaker of the Council advised the MEC of the alleged violations of the Code by the appellant. The letter also mentioned that the appellant's constituency had expressed their dissatisfaction with the appellant's behaviour and demanded his resignation.

[13] On 24 January, the Council endorsed the resolution of the Ethics Committee reprimanding the appellant for failing to attend Council meetings.

[14] According to the papers, on 24 January, the Council also resolved that the Ethics Committee investigate and make recommendations on the alleged breaches of the Code by the appellant.

[15] The terms of reference of the Ethics Committee[10] were-

[10] They are enumerated in a document signed by the Senior Manager: Municipal Administration dated 25 February 2020. None of the allegations made in the terms of reference had been investigated by the Ethics Committee when it resolved to recommend that the appellant be reprimanded.

- “to establish whether Cllr. S. Malawu was one of the leading councillors when Former Mayor, Cllr P. Qaba convened a secret meeting with selected Councillors to present COGTA support plan;

    - to establish whether Cllr S. Malawu was a ring leader in mobilising the councillors who organized themselves as a faction of the Mayor to sabotage and not attend Council Meetings;

    - to establish whether Cllr S. Malawu attacked the member of the public with the machete inside the Council Chambers during the Council Meeting where the Former MEC Xasa was presenting the COGTA support plan;

    - to establish whether Cllr S. Malawu provoked the community members of wards 6,13,14 and 15 by employing only comrades from his ward;

    - to establish whether Cllr S. Malawu organised a meeting at eMjojweni where he was making a list of jobs for unemployed youth in ward 14 even though he was not the Councillor of that ward;

    - to establish whether Cllr S. Malawu was involved in organising a protest to remove the previous TROIKA;

    - to establish whether Cllr S. Malawu tried several times to stop community projects in wards 14 and 15;

    - to establish whether Council Speaker once received a memorandum and petition on the vote of no confidence against ward 13 (Councillor S Malawu) as well as removal of the appellant from office;

    - to establish whether Cllr S. Malawu wrote on social network in ridiculed Dr S Maclean who was an administrator in terms of section 139 (1)(b) in Mahlathi Local Municipality and the appellant rendered the intervention as useless, waste of time and waste of resources, concluding that the intervention made the municipality worse than before;

- to establish whether Cllr S. Malawu on the same communication on social networks alleged that Chief Sandile who is the weep of traditional leaders is corrupt which was viewed as defamatory;

- to establish whether Cllr S. Malawu utilised the letterhead of the municipal manager, to communicate serious municipal issues without being authorised to do so; and

- to establish whether Cllr S. Malawu continued to send threatening messages to the Speaker."

[16] The MEC was informed of the Council's resolution on 27 January. He thereupon wrote to the speaker acknowledging receipt of the letter and proposing time frames within which the investigative process should be finalised.

[17] On 29 January, the MEC addressed a letter to the appellant stating:

> "This office is in receipt of a letter from the Speaker of Amahlathi Local Municipality. The letter is indicating that Council has taken a resolution to investigate the allegations levelled against you.
>
> I have since responded to the letter written by Speaker on behalf of Council and I've requested them to handle this matter with speed as some of the allegations are dating back as far as 2018.
>
> I'm writing this letter to request you to cooperate with this process. This process will give you an opportunity to explain yourself on the allegations levelled against you."

[18] In his response letter dated 17 February, the appellant challenged the MEC's authority to correspond with him. In relevant part, the letter reads:

> "I must bring forth to your attention that you are not following due process; you have no authority to write me a correspondence at this stage. As per the law MEC Nqata, you only come into effect once Council submits a request to your

office to suspend myself and only when it has declared that I Councillor Malawu have indeed breached a provision of the Code of Conduct. . .

Furthermore, on 01 November 2018 MEC Nqata served me with a copy of a letter of suspension coming from the ANC, which was later uplifted. I must highlight that once again you had no authority for such action, consequently not following due process for the second time. . .

In closing, I feel that you MEC Nqata have shown that you have a personal interest in matters concerning myself and your actions . . . amount to interference. You have failed to demonstrate consistency in your office."

[19] Having been of the view that the Council was incapable of handling the investigation against the appellant, the MEC, by way of letter dated 18 February, informed the speaker that he (the MEC) was "*empowered by [item 14 (4) of the Code that governs Council conduct to take over this matter and investigate it by* (sic) [his] *office*" and that, to that end, he would "*send a team to do an investigation and* [he] *would like* [the speaker] *to provide the investigating team with all the relevant information*."

[20] On 28 February, the MEC wrote to the speaker advising him that a task team comprising officials "*from Municipal Administration, Legal Advisory Services and Public Participation Unit* [would] *visit* [Amahlathi] *municipality on Tuesday, 03 March 2020 to conduct an investigation on the alleged breach of the Code* . . . [by the appellant]."[11] There is nothing, from the evidence, to suggest that the terms of reference made applicable to the Ethics Committee were extended to apply to or adopted by the task team. There is also paucity of information regarding whether the MEC provided the task team "*with all the relevant information*" and what the nature and content of such information was.

[21] By letter dated 04 March, the appellant was invited, by the speaker, to avail himself "*as a candidate*" to "*an interview*" that would be conducted by the

[11] The task team.

Department of Cooperative Governance and Traditional Affairs[12] at the Sutterheim Library, on 05 March.

[22] The appellant spurned this invitation, contending that the speaker or the Council, and not the MEC, was empowered to conduct investigations into alleged breaches of the Code against him; he imputed bias on the part of the MEC and minced no words that he would not "*partake in an unlawful process*."[13]

[23] It is not in dispute that on 09 March, the MEC penned a letter to the appellant -

(a) setting out the allegations the appellant was said to be facing;

(b) informing the appellant of the provisions of the Code that he had allegedly breached; and

(c) affording the appellant seven days within which to respond to the allegations and provide reasons why he should not be removed from office.

[24] Despite receipt of the letter on 10 March, the appellant remained supine and proffered no response to the letter.

[25] On 18 March, the MEC removed the appellant from councillorship. The MEC alleges that his decision was informed by a memorandum embodying the report[14] and recommendations[15] of the task team allegedly received on 06 March.

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[12] The Department.

[13] The letter is addressed to the speaker, the MEC, the Chairperson of the Standing Committee and the Senior Manager: Municipal Administration. It is inadvertently dated 17 February, as indeed it served as a response to the letter dated 04 March (and attachments thereto) and to the terms of reference dated 25 February 2020.

[14] According to the memorandum, the appellant was found to have committed serious breaches of the Code, including that he had absented himself without being granted leave therefor by the speaker.

[15] It is recorded in the part of the memorandum embodying the recommendations -

"1. That the report be noted.

2. That the MEC request [the appellants] to appear before the departmental investigating team to present
his side of the story in line with the rules of natural justice.

3. That the Council rescinds its resolution reprimanding the four Councillors for non-attendance of more than
three consecutive council meetings and request the MEC to remove those Councillors."

[26] Even though on the face thereof the memorandum makes provision for the appending of signatures by other functionaries of the Department[16] to signify support for recommendations or the converse thereof, and in the case of the head of the Department whether the recommendations were approved or not, only "*L C Sihunu,*" in his capacity as Acting General Manager: Municipal Governance and Support, appended his signature on the memorandum, on 20 March, after the appellant had been removed from councillorship.

The dispute

[27] The nub of the appellant's case before the court below was that the impugned decision had been arrived at prematurely because the memorandum on which the MEC predicated the decision was, on the face thereof, dated 20 March - which suggests that when the impugned decision was taken the memorandum had not yet been generated. The appellant further contended that he was not afforded the opportunity to make representations prior to the decision being taken.

The findings of the court below

[28] The court below pronounced:

> "In my view, [there] is a genuine and *bona fide* dispute of fact which lies at the core of this application. Having found that a genuine dispute has arisen and in view of the fact that the [appellant] seeks final relief, there is no reason why the factual dispute should not be resolved on the first respondent's version. Namely that **the report was received prior to taking the impugned decision**. Besides, if first respondent had not received the report when he penned the letters to the [appellant] on the 09 March 2020 and 18 March 2020 respectively, how would he have known that [the appellant] did not cooperate with the investigations and therefore did not refute the allegations against him? This in my view lends credence

[16] Namely, S Maqungo (Senior Manager: Legal advisory service); P N Rhoboji (Deputy Director General: Developmental Local Government); G Gumbi – Masilela (Head of Department: Cooperative Governance and Traditional Affairs); and X Nqata (Member of Executive Council, Cooperative Governance and Traditional Affairs).

to first respondent's version that he received a report from the investigation team on the basis of which he took the impugned decision prior to taking the decision." (emphasis added)

[29] In addition, the court below was satisfied that the appellant had been given sufficient notice and invited to make representations prior to the impugned decision being taken, but spurned the opportunity.

Appeal proceedings

[30] It is common cause that after leave to appeal had been granted[17] and the appeal set down for hearing, elections for municipal councils, the country over, were held on 01 November 2021; the current municipal council of Amahlathi was declared elected upon the conclusion of the elections on 01 November 2021; the appellant has not been elected as councillor of Amahlathi.[18]

[31] The appeal is founded principally on the contention that the court *a quo* erred in finding that there was a *bona fide* dispute of fact on whether the first respondent had been in possession of an investigation report on the strength of which she took the impugned decision.

[32] Besides opposing the appeal as lacking merit, the respondents contend that the relief sought is moot between the parties and will have no practical effect or result. The appellant holds the opposite view; because he is a politician and a career councillor, for as long as the impugned judgment is extant, he contends, he is precluded from being considered for nomination in future, and that the impugned decision should, in any event, not be allowed to stand as it effectively breaches the principle of legality.

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[17] The SCA granted leave on 21 May 2021 and the notice of appeal was delivered on 22 June 2021.

[18] Evidence in this regard was placed before this court by way of a notice of application to adduce further evidence filed on 22 February 2022 to which is annexed the first respondent's affidavit embodying the further evidence. The appellant did not oppose the tendering of the evidence, but contended that the issue raised in the appeal was not moot. This resulted in the court issuing a directive calling upon the parties to address the question of an appropriate cost order in the event of the contention on mootness prevailing.

[33] In terms of section 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013,[19] when, at the hearing of an appeal, the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground only. Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.[20]

[34] In light of the aforegoing, the issues to be determined and which are dispositive of this appeal are -

(a) whether the lawfulness or otherwise of the appellant's removal from office has become moot; and

(b) what cost order should be made.

Mootness

[35] Section 16(2)*(a)* corresponds in material respects with its predecessor, section 21A (1) to (3) of the now repealed Supreme Court Act 59 of 1959 so much so that pronouncements on section 21A apply with the changes required by the context to section 16.

[36] The object of section 16(2)*(a)* is founded on the principle that courts of law exists for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon differing contentions.[21]

[37] A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of the law.[22]

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[19] The Act.
[20] Section 16(2) *(a)* (ii) of the Act.
[21] *National Director of Public Prosecutions v Rautenbach* 2005 b(4) SA 603 (SCA) at 610 A - B; Resultant Finance (PTY) Ltd v Head of Department for the Department of Health, KwaZulu-Natal (unreported, SCA case number 62/2019 dated 16 July 2020) at para 26; [2020] JOL 47741 (SCA).
[22] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000(2) SA 1 (CC); 2000(1) BCLR 39 (CC) at n18; also see *Radio Pretoria v Chairperson of the Independent Communications Authority of South Africa and Another* (2005 (1) SA

[38] In support of the contention that, whilst the impugned decision remains extant, he is precluded from nomination as a candidate, the appellant places reliance on a document of the African National Congress headed "*2021 LOCAL GOVERNMENT ELECTIONS ANC RULES: Local Government Candidates Selection,*"[23] item 16 of which provides:

> "Nominees must be screened out if they have been found guilty of any offence that casts doubt on their suitability to represent the ANC, in:
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> (a) an ANC DC,
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> (b) a criminal court,
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> (c) a disciplinary process in government or their employment, or
>
> (d) in a civil judgment. . . "

[39] The appellant's contention that the decision sought will have a practical effect or result flies in the face of section 21(1)(a) of the Local Government: Municipal Structures Act 117 of 1998.[24] The section reads:

> "(1) Every citizen which is qualified to vote for a particular municipal council has the right –
>
> (a) to stand as a candidate in an election for that council, except a person disqualified in terms of section 158(1) (c) of the Constitution . . ."

It is clear from a reading of the section that it confers a right on any voter within a municipality to stand for election.

Moreover and in any event, section 19(3) (b) of the Constitution accords to every citizen the right to stand for public office and, if elected, to hold office. In terms of

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47 (SCA)), where it was held that "[c]*ourts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise* . . ."

[23] The ANC Rules.

[24] The Structure Act.

section 2 of the Constitution, law or conduct inconsistent with the Constitution is invalid. The ANC Rules are an internal document that does not detract from the statutory right created by section 21(1)(a) and the Constitution.

[40] The provisions of section 158(1)(c)[25] have no bearing on the issue that arises in the instant appeal; it is not related to a decision by the MEC to dismiss a councillor from office. The section creates no exception of which the appellant could avail himself.

[41] The ANC Rules pertain to local government elections held in 2021, an event that has come and gone. From a reading of the Rules there is nothing suggestive of the fact that the Rules will apply to future nominations of candidates.

[42] It is so that the mootness of a matter between parties does not necessarily constitute an absolute bar to its justiciability. The court has a discretion to be exercised according to what the interests of justice require. A prerequisite for the existence of the discretion is that any order which this court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.[26] Another compelling factor could be the public importance of an otherwise moot issue.[27]

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[25] The section provides that every citizen who is qualified to vote for a municipal council is eligible to be a member of that council, except anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1) (c), (d) or (e) from being a member of the Assembly.

[26] *Independent Electoral Commission v Langeberg Municipality* (CCT 49/00) [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (07 June 2001); compare *President*, *Ordinary Court-Martial and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC), where Langa DP throws some light on how such discretion ought to be exercised in relation to section 172 (2) of the Constitution. He concludes that the section does not oblige the court to hear proceedings concerning confirmation orders of unconstitutionality of legislative measures which have since been repealed but has a discretion to do so and "*should consider whether any order it may make will have any practical effect either on the parties or on others*"(para 16); also see Chaskalson *et al*, Constitutional Law of South Africa, revision service 2 at 8 – 16, where it is stated:

> ". . . mootness will be a possible bar to relief in constitutional cases where the constitutional issue is not merely moot as between the parties but is also moot relative to the society at large."

[27] *The Director-General Department of Home affairs v Mukhamadiva* [2013] ZACC 47; 2013 JDR 2860 (11); 2014 (3) BCLR 306 (CC) at para 40.

[43] There is no longer any live issue between the parties. A new council, of which the appellant is not a part, has been elected. No purpose would be served by determining whether the removal of the appellant was lawful. Nor is there any practical value in deciding that issue. In spite of the impugned decision, nothing, from a reading of section 21(1)*(a)* of the Structures Act would preclude the appellant from being considered for nomination and possible election as a councillor in due course. The test is whether the judgment or order will have a practical effect or result, not whether it might be of importance in a hypothetical future case.[28]

[44] I am also of the view that this case does not fall in the category of the exceptional instances referred to in paragraph [42] above. To the extent that the appellant seeks to advance a constitutional issue (the principle of legality), the case has no practical effect on others. In this regard, the following remarks by Froneman J in *Notyawa v Makana Municipality and Others*[29] are illuminating:

> "Neither would a determination on the merits of the review have a practical effect on others . . . [t]he finding involves no Constitutional or legal issue that would have an effect on others. It is essentially a factual finding contingent on the particular circumstances relating to the applicant. In the absence of any compelling considerations bearing on the broader public interest there is no basis for this court to exercise its discretion in favour of adjudicating dispute which is moot."

[45] These remarks apply with equal force in this appeal. I agree with Mr *Rorke*, who, together with Ms *Appel* appeared for the respondents, that there are no compelling circumstances that have been pointed to by the appellant that are in the broader public interest as opposed to the narrow interest of the appellant, on the one hand, and the ANC as a political party, on the other. Nor are the issues raised in the

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[28] *Absa Bank Ltd v Van Rensburg* 2014 (4) SA 626 (SCA) at 629 d - e; *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA) at 85b - d; also see *President of the Republic of South Africa v Democratic Alliance* 2020(1) SA 428 (CC) at paras 14 - 16.

[29] (CCT 115/18) [2019] ZACC 43; 2020 (2) BCLR 136 (CC); [2020] 4 BLLR (CC); (2020) 41 ILJ 1669 (CC) (21 November 2019), para 62.

appeal of any public importance. It is also not without significance that there are no statutory interpretation issues arising from the section that was purportedly invoked when the impugned removal from councillorship was made, because the Code has since been repealed.[30]

[46] In all these circumstances, the appeal must fail. There remains the question of costs to consider.

Costs

[47] It is trite law that a decision on costs is in the discretion of the court to be exercised judicially upon the consideration of the facts of each case. Generally, costs are awarded to the party who is substantially successful on appeal. This general principle may be departed from only where there are good grounds or special circumstances for doing so.

[48] In *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another*[31] the approach to be adopted where, as here, mootness is raised in an appeal, was succinctly set out as follows:

> "Where an appeal or proposed appeal has become moot by the time leave to appeal is first sought, it will generally be appropriate to order the appellant or would-be appellant to pay costs, since the proposed appeal was still borne from the onset. Different considerations apply where the appeal or proposed appeal becomes moot at a later time. The appellant or would be appellant

[30] Footnote 1 above. Also, section 21(1A) of the Structures Act (inserted by section 8 of Act 3 of 2001,operative from 01 November 2021) which provides that "[a] *councillor who is removed from office by the MEC . . . in terms of item 16 (7) (b) of the Code of Conduct* [set out in Schedule 7 to the Structures Act] *may not stand as a candidate in an election for any municipal council for a period of two years from the date on which such person was removed from office"* finds no application to this matter; the appellant was not removed in terms of item 16 (7) (b), and section 21 (1A) does not apply retrospectively.

[31] 2018 (4) SA 433 (SCA), para 10; compare *Douglasdale Dairy (Pty) Ltd and Others v Bragge and Another* 2018 (4) SA 425 (SCA), para 28, where the court held that neither party was deserving of a cost order on appeal in an instance were the need for canvasing the merits of an appeal had fallen away due to a change in the circumstances of the case (the death of the responded) and the court had itself requested the parties to file supplementary heads on the issue of costs and *Hugo Networks (Pty) Ltd v Telemax (Pty) Ltd* (A56/21; 89823/19) [2022] ZAGPPHC 300 (06 May 2022), where, on the basis of mootness, the court, having been of the view that the appellant was partially successful, awarded the appellant 50% of the costs occasioned by the appeal.

may consider that the appeal had good merits and that it should not be mulcted in costs for the period up to the date on which the appeal became moot."

[49] In light of the above quoted remarks and subject to what follows hereunder, the costs of the appeal for the period up to the date on which the appeal became moot,[32] ought to be awarded in favour of the respondents.

[50] As already pointed out, the court below found that there was a material and *bona fide* dispute of fact on the papers regarding whether the MEC's decision was premised on the report of the task team. Resulting from this, it invoked the *Plascon Evans* rule[33] and determined the case before it on the version of the respondents. It remains to be seen, however, whether this finding and its result are borne out by the facts of this case.

[51] To begin with, when the MEC did not receive joy from the due process set in motion by the Council, he deemed it appropriate to appoint the task team to investigate the allegations made against the appellant and make recommendations to him.

[52] Whether the MEC ever received the recommendations of the task team before arriving at the impugned decision is shrouded in mystery.

[53] The MEC merely alleges that he received the report of the task team on 06 March, but there is a dearth of information regarding which member of the team gave him the report and the circumstances in which the report was received.[34] None of the members of the task team deposed to affidavits confirming that they compiled any

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[32] A new council was declared elected on 01 November 2021.

[33] This rule is based on *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). Under this rule, where, in motion proceedings, dispute of facts arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order; also see *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55 and *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393(SCA); [2009] 2 AllSA 243 (SCA) (12 January 2009), para 26.

[34] He says:

> "I deny that my decision was taken prematurely. Even though the investigation report was signed on 20 March 2020, it was presented to me by the investigation committee on 06 March 2020."

report. Mr Duna merely confirms having been appointed member of the team but does not say he attended the meeting of 05 March and had complicity in the compilation of the purported report. No averment is made by any of the deponents to affidavits filed in opposition to the application regarding the purported attendance register annexed to the MEC's affidavit. On this score, a reminder about *Swissborough Diamond Mines (Pty) Ltd v The Government of the Republic of South Africa* [35] is apposite. In this case, the court held:

> "Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to it affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."

[54] Mr Sihunu is the only person who appended his signature on the memorandum embodying the purported recommendations of the task team on 20 March, after the appellant had been removed from office. Quite strangely, Mr Sihunu was not even a member of the task team. In *Fisher v Ramahlele*[36] Theron *et* Wallis JJA said:

> "Turning then to the nature of our civil litigation in our adversarial system, it is for the parties, . . . in affidavits . . . , to set out and define the nature of their disputes, and it is for the court to adjudicate upon those issues . . ."

[55] In this case, the salutary rule enunciated in *Fisher*[37] was not heeded by the respondents. We are left to speculate as to what recommendations predicated the MEC's decision.

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[35] 1999 (2) SA 279 (T) at 344 F - G.
[36] 2014 (4) SA 614 (SCA), para 13.
[37] *Supra*.

[56] The argument by counsel for the appellant, Mr *Matotie*, that, upon a proper construction of item 14(4) of the Code, it was incumbent on the MEC to act on the strength of the recommendations of the task team has merit.

A decision arrived at without compliance with a mandatory and material procedure or a condition prescribed by the empowering provision offends the principle of legality and is liable to be set aside in terms of sections 6 (2) (b) and 6 (2) (f) (i) of the Promotion of Administrative Justice Act 3 of 2000.

[57] The respondents did not discharge the evidential burden resting on them to place plausible evidence that the recommendations of the task team had served before the MEC when he took the impugned decision. The respondents' version in this regard is not plausible.

[58] There was, therefore, no evidence controverting the appellant's version that the impugned decision was not preceded by the requisite recommendations. In these circumstances, the question of a dispute of fact did not arise. The court below should, accordingly, have made its finding on this aspect on the version of the appellant.[38] After the MEC had deemed it prudent to appoint the task team, it was not appropriate for him to thereafter investigate and make a decision regarding the guilt or otherwise of the appellant.[39]

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[38] See *Mouton v Park 2000 Development 11 (Pty) Ltd and Others* 2019 (6) SA 105 (WCC), para 85, where it was stated:

> " . . . it is equally well established that where a dispute of fact is not a 'real, genuine or *bona fide'* one the court will be justified in ignoring it and may proceed to find on the applicant's version thereof."

[39] Compare *Van Wyk v Uys NO* [2001] JOL 8976; 2002 (5) SA 92 (C) 99 H-J to 100 A-B, where the court held:

> "Whatever might have been the view of respondent [the MEC] as to the speed with which the council had acted, the evidence reveals that within a month of the complaint having been lodged, the matter was placed before a special meeting of the council. On 13 June 2001 the council appointed its own sub-committee to deal with the complaint. Notwithstanding such action, respondent sought to continue with the Kleynhans investigation and to act on his own.
>
> In my view, such actions cannot be justified in terms of the powers granted to respondent in terms of item 14(4) and (6) of Schedule 1. Respondent should have awaited the recommendation of the council and considered it accordingly. It might have been the case that, if he had been dissatisfied with the basis of such an enquiry and considered, as he stated in his answering affidavit, that the very composition of the sub-committee produced a completely unjustifiable result, he may have been entitled to invoke his powers under section 106 of [the Systems Act]."

[59] Even though the appellant has not been successful in the appeal, he ought, by reason of the case having had good merit, not to be mulcted in costs for the period preceding 21 November 2021.[40] Also, the employment of two counsel was, in my view, wise and reasonable; it was neither extravagant nor over-cautious.[41] The issues of which the court below and this court were seized were fairly complex. On two previous occasions the matter served before the court below[42] the parties to this litigious matter employed two counsel and costs thereof were allowed. It would have been unavailing for the appellant to contend that it was unnecessary, wrong or unfair to require him to bear the costs incurred in the employment of two counsel.

Order

[60] I, therefore, make the following order:

The appeal is dismissed with costs incurred after 01 November 2021, such costs to include those consequent upon the engagement of two counsel.

S M MBENENGE
JUDGE PRESIDENT OF THE HIGH COURT

TOKOTA J:

I agree.

B R TOKOTA
JUDGE OF THE HIGH COURT

NONCEMBU AJ:

I agree.

V P NONCEMBU

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[40] This is the date on which a new council was declared elected. The appeal became moot thereafter.
[41] *Burroughs Machines v Chennine Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) (cited with approval by Dambuza J in *Bouwer v Bouwer and Another* (361/04) [2008] ZAECHC 28 (7 April 2008)).
[42] Parts A and B hearings.

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant : *L Matotie*

Instructed by	:	S R Mhlauli and Associates Mthatha C/o Yokwana Attorneys Makhanda
Counsel for the respondents	:	*S C Rorke* SC (with him *G Appels*)
Instructed by	:	The State Attorney Gqeberha C/o Whitesides Attorneys Makhanda
Heard on	:	25 April 2022
Delivered on	:	31 May 2022