


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 070799/2023

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<div style="display: flex; justify-content: space-between;"><div> SIGNATURE</div><div>14/2/2025 DATE</div></div>	

ACTION SA

Applicant

and

THE CITY OF TSHWANE
METROPOLITAN MUNICIPALITY

First Respondent

THE SPEAKER OF COUNCIL OF THE CITY
OF TSHWANE

Second Respondent

MNCEDI NDZWANANA

Third Respondent

THE MUNICIPAL MANAGER OF THE
CITY OF TSHWANE

Fourth Respondent

COUNCIL OF THE CITY OF TSHWANE

Fifth Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL OF
COOPOERATIVE, GOVERNANCE AND
TRADITIONAL AFFAIRS, GAUTENG PROVINCE

Sixth Respondent

THE AFRICAN NATIONAL CONGRESS

Seventh Respondent

THE ECONOMIC FREEDOM FIGHTERS	Eight Respondent
CONGRESS OF THE PEOPLE	Ninth Respondent
AFRICAN DEMOCRATIC MOVEMENT	Tenth Respondent
AFRICAN INDEPENDENT CONGRESS	Eleventh Respondent
AFRICAN TRANSFORMATION MOVEMENT	Twelfth Respondent
DEFENDERS OF THE PEOPLE	Thirteenth Respondent
GOOD	Fourteenth Respondent
PATROTIC ALLIANCE	Fifteenth Respondent
PAN-AFRICAN CONGRESS	Sixteenth Respondent
THE REPUBLICAN CONFERENCE	Seventeenth Respondent
DEMOCRATIC ALLIANCE	Eighteenth Respondent
FREEDOM FRONT PLUS	Nineteenth Respondent
INKATHA FREEDOM PARTY	Twentieth Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Twenty-First Respondent

This Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 14 February 2025.

JUDGEMENT

MALI J

1. This application to review and set aside the third respondent's decision taken in his capacity as the Speaker of the first respondent originates from

the urgent motion court. In the urgent court the application to interdict the second respondent to chair the Special Council Meeting was dismissed. The second respondent is the Speaker, and the third respondent is Mr Mncedi Ndzwanana who occupies the position or office of the Speaker of the first respondent. He is cited in his personal capacity because the applicant seeks punitive cost orders against him. The second and third respondents will be referred herein as the Speaker.

2. THE PARTIES

- 2.1. The applicant is Action SA, is a duly registered political party in accordance with section 15 of the Electoral Act, with 19 representative Councillors on the Council of the City of Tshwane.
- 2.2. The first respondent is the City of Tshwane established in terms of section 12 of the Structures Act. The second respondent is the Speaker in the City of Tshwane in his official capacity. The third respondent is Mr. Mncedi Ndzwanana in his personal capacity being the person who occupies the position of the Speaker.
- 2.3. The fourth respondent is the City Manager. The City Manager is accountable for the overall performance of the City's administration and is expected to be an enforcer of the Constitution in his own right.
- 2.4. The fifth respondent is the Council, whose members are elected in terms of section 157 of the Constitution. The sixth respondent is the Member of the Executive Council of Cooperative,

Governance and Traditional Affairs of the Gauteng Province, cited in light of any interest they have in this matter.

- 2.5. The seventh respondent is the African National Congress, a registered political party with 75 representative Councilors on the Council. The eighth respondent is the Economic Freedom Fighters, a registered political party with 23 representative Councilors on the Council.
- 2.6. The ninth respondent is the Congress of the People, a registered political party with 1 representative Councilor on the Council. The tenth respondent is the African Democratic Movement, a registered political party with 1 representative Councilor on the Council.
- 2.7. The eleventh respondent is the African Independent Congress, a registered political party with 1 representative Councilor on the Council. The twelfth respondent is the African Transformation Movement, a registered political party with 1 representative Councilor on the Council.
- 2.8. The thirteenth respondent is the Defenders of the People, a registered political party with 1 representative Councilor on the Council. The fourteenth respondent is GOOD, a registered political party with 1 representative Councilor on the Council.
- 2.9. The fifteenth respondent is the Patriotic Alliance, a registered political party with 1 representative Councilor on the Council. The sixteenth respondent is the Pan- African Congress, a registered political party with 1 representative Councilor on the Council.

- 2.10. The seventeenth respondent is the Republican Conference, a registered political party with 1 representative Councillor on the Council. The eighteenth respondent is the Democratic Alliance, a registered political party with 69 representative Councillors on the Council of the City of Tshwane.
- 2.11. The nineteenth respondent is Freedom Front Plus, a registered political party with 17 representative Councilors on the Council. The twentieth respondent is the Inkatha Freedom Party, a registered political party with 1 representative Councilor on the Council. The twenty-first respondent is the African Christian Democratic Party, a registered political party with 2 representative Councilors on the Council.
3. The application is only opposed by the second and third respondents. The eight respondents initially opposed the application but later withdrew the opposition a week prior to the hearing of this application.
4. The decisions impugned are (i) the decision of the Speaker to chair the Council meeting on 23 April 2023, (ii) to disallow the urgent motion of no confidence against him as a Speaker and (iii) to adjourn the Council meeting.
5. The decision decried by the applicant is that the Speaker of the first respondent did not place on the agenda the Special Council motion of no confidence in himself and to adjourn the Special Council meeting. The applicant's case is that he was supposed to have recused himself upon

being aware of the agenda because of the perceived impartiality. He continued to act as a Speaker on the motion whilst conflicted and proceeded to disallow the motion of no confidence in himself as the speaker.

6. The attendant order sought is to review and set aside the impugned decisions, as well as an order declaring the impugned decisions unconstitutional and invalid in their entirety.
7. The applicant persists with the application in the same terms of the urgent court proceedings of 19 July 2023, as follows:

7.1 That the decisions taken by the third respondent, in his capacity as the Speaker, during the Special Council Meeting held on Wednesday, 12 April 2023 to disallow an urgent motion of no confidence in himself as the Speaker; and adjourn the Special Council Meeting (collectively, "the impugned decisions") be:

7.1.1 reviewed and set aside;

7.1.2 be declared as unconstitutional and invalid in their entirety.

7.2 That the impugned decisions be substituted with the following order:

7.2.1 the Special Council Meeting postponed to 10h00 on the day that is two business days from the date of this Court's order;

7.2.2 the third respondent is prohibited from chairing, adjourning and/or interfering, whether directly or indirectly, with the functioning of the Special Council Meeting;

7.2.3 the City Manager, or, if the City Manager is not available, a person designated by the MEC, must preside over the election of an acting Speaker at the Special Council Meeting; and

7.2.4 the Speaker elected at the Special Council Meeting must take all reasonable steps to ensure that the motion of no confidence in the Speaker is considered and decided by Council during the meeting.

7.3 That the decision taken by the third respondent, in his capacity as the Speaker, during the Special Council Meeting held on Thursday, 29 June 2023 to disallow an urgent motion of no confidence in himself as the Speaker; and adjourn the Special Council Meeting, be reviewed and set aside, and declared unconstitutional and invalid in its entirety.

7.4 The costs of this application, including the costs of two counsel on an attorney and client scale, are to be paid by the third respondent in his personal capacity if he opposes it, and/or jointly and severally by any further respondents opposing it.

7.5 Further and/or alternate relief.

THE MEETING OF 12 APRIL 2023

8. As at the date of the hearing of this application the applicant was still awaiting reasons for the dismissal of the application in the urgent court. The applicant's case is that on 31 March 2023 the Speaker was requested by a majority of Councilors in terms of section 29 (1) of the Structures Act as he

was obligated to call a Special Council Meeting “SCM” for Wednesday 12 April 2023.

9. Section 29 [1] of the Municipal Systems Act... provides as follows:

*“Meetings of municipal councils (1) The speaker of a municipal council decides when and where the council meets subject to section 18(2), but if a **majority of the councillors** requests the speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request. (1A) If the speaker or acting speaker refuses to call a meeting of the council as requested in terms of subsection (1), the municipal manager, or in the absence or refusal by the municipal manager, a person designated by the MEC for local government in the province, may call and chair the meeting.*

(2) The municipal manager of a municipality or, in the absence of the municipal manager, a person designated by the MEC for local government in the province, must call the first meeting of the council of that municipality within 14 days after the council has been declared elected or, if it is a district council, after all the members to be appointed by local councils, have been appointed. “ [own emphasis]

10. The Speaker does not dispute that on 31 March 2023 he was served with a notice calling for a motion of no confidence against the Speaker, the motion to be heard on 12 April 2023. It is the Speaker’s case that the notice did not comply with the provisions of section 29(1) because the number forming majority was not met, as the purported signatures for other members were falsified. According to the Speaker the “signatures were doctored.” The

court is invited to examine Annexures SPK 2 and SPK 3 in order to determine that the signatures appearing thereto are “doctored signatures”.

11. The court’s attention is drawn to the respective signatures of Francois Smith and GE Breytenbach both of the Democratic Alliance (DA). The issue is that their signatures do not look the same when compared from other documents annexed in this application. This submission is not supported by expert evidence to determine the authenticity of signatures and why the signatures are different in comparison.
12. This court has no jurisdiction to make decisions questioning technical issues, without the assistance of the experts. The court cannot by simply looking at the signatures conclude that the signatures are authentic or not. The annexures are of no assistance to the court; therefore, the submission cannot stand.
13. A further argument advanced on behalf the applicant is that the Speaker acted unlawfully by chairing the meeting on 12 April 2023, whilst there was a pending urgent interdict application on 11 April 2023. According to the applicant the application was dismissed without any reasons proffered. The importance of the application of 11 April 2023 is that the Speaker under oath stated that he would not act unlawfully, thereby committing not to chair the meeting on 12 April 2023. So, by taking a decision to chair the meeting on 12 April 2023 he reneged on his oath to the Court.

14. On the applicant's version the application was dismissed, it is not known why the court considered dismissing the application. The applicant's case is that the Speaker stated under oath, that "*I undertake to the above Honorable Court to act lawfully in the upcoming special council meeting.*"...
15. From the above the applicant's case is that the Speaker was in contempt of what he stated under oath. There is no legal basis to single out what the second respondent said under oath in a dismissed application and use it for future purposes. What the second respondent said under oath was/ is part of the entire dismissed case. Contempt applies to the Court Order, not to the averments, in particular here, averments were made on a dismissed application.
16. What is considered to be unlawful by the applicant is that the Speaker should have recused himself because he was conflicted. The Speaker had material interest and amongst other reasons, that it was impossible for the Speaker to be impartial and be seen as impartial.
17. To the above, the Speaker's Counsel refers the court to *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹. The case dealt with recusal of Judges. In paragraph 40 of the judgment the following is stated:

¹ (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999)

"The nature of the judicial office

[40] In applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often-difficult task of fairly determining where the truth may lie in a welter of contradictory evidence. This consideration was put as follows by Cory J in R. v. S. (R.D.): "Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. . . This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias."

18. In this application the Speaker is not a Judge and his position is far from being akin to that of a Judge. The calling of the SCM directly impacts his personal position in the office of the first respondent. It is understood that the possibility of being removed from the position of a Speaker is attached to his personal employment status, with attendant power and benefits.
19. In *Minister of Safety and Security v Jongwa*² the court held *"An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias."* From the grounds submitted by the applicant as above, the court is satisfied that there are substantial grounds for the applicant's apprehension of bias.

² (73/2011) [2013] ZAECHGHC 23; 2013 (3) SA 455 (ECG); 2013 (2) SACR 197 (ECG) (14 March 2013)

20. Although the SCM of 12 April 2023 was not interdicted by any court of law, nevertheless the chairing of same should not have occurred because of apprehension of bias. What remains is whether his decision to not table the notice of motion of no confidence against himself as the Speaker is reviewable and needs to be set aside.
21. The applicant advanced six grounds for the review of the impugned decisions. Amongst them are (i) Bias (ii) irrelevant considerations (iii) irrationality. A single ground will suffice to have the impugned decision/s reviewed and set aside.
22. The reasons advanced by the Speaker behind disallowing the motion of no confidence is that he applied Rule 19 (1) (b) of the Council Rules. Rule 19 (1) (b) provides:
- “19. Disallowed motions and proposals during Council meetings*
- The Speaker must disallow a motion or proposal if-*
- (1) In his or her opinion, the motion or proposal-*
-*
- (b) advances arguments, expresses opinion, or contains unnecessary factual, incriminating, disparaging or improper suggestions;”*
23. The submission made on behalf of the Speaker is that because the notice for the meeting was flawed on the basis of the “doctored signatures” resulting in lack of majority his ability to assess the appropriateness of the request for purposes of Rule 19 (1) was impeded. There was no need to for

the Speaker to table the motion at all since the notice did not meet the requirements (section 29 above). I have already pronounced on the issue of allegedly flawed notice because of suspect signatures.

24. The Speaker also decried that the notice of the Coalition carried an instruction that the motion of no confidence vote be done by the show of hands. Section 19(1)(b) does not at all engage the issue of Notice and neither engages the procedure. The speaker does not aver how the motion advances/advanced arguments, expresses opinion or contains unnecessary factual, incriminating, disparaging or improper suggestions. From the above the reasons for disallowing the motion of no confidence invoking the provisions of Section 19(1)(b) are indiscernible.

The meeting of 29 June 2023

25. The averment made pertaining to the date of 29 June 2023 is found in paragraph 157 of the founding affidavit, and it is as follows:

“Ndzwanana has either retracted nor apologized for his previous unlawful conduct and, without this Court’s intervention, is likely to again attempt to continue to block any attempts to remove him as the Speaker unlawfully. He has again recently done so, on the 29th of June 2023, as will be dealt with below.”

26. The Speaker’s submission is that he disallowed the motion as well in terms of Rule 19(4) because its subject-matter and the non-resolved signatures issue was dealt with in 3 previous Council meetings. Rule 19(4) provides

that *“the Speaker must disallow a motion or proposal if the motion or proposal is one which the Council has “already dealt with” within the three previous Council Meetings: provided that, if the motion or proposal in the opinion of Council justifies further investigation it is referred to the Executive Manager.”*

27. One of the three council meetings referred to by the Speaker is the SCM of 12 April 2023. As a similar order is sought for 12 April and 29 June 2023, the Speaker was not supposed to preside over the meeting of 29 June 2023, in the similar fashion of 12 April 2023. I have already found against the submission of the Speaker pertaining the meeting of 12 April 2003.
28. Section 6(2)(f)(i)-(ii) of the Promotion of Administrative Justice Act³ (PAJA) provides that *“the court or tribunal has the power to judicially review an administrative action if the action itself contravenes a law or is not authorized by the empowering provision; or is not rationally connected to the purpose for which it was taken; the purpose of the empowering provision; the information before the administrator; or the reasons given for it by the administrator”*.
29. The decisions taken by the Speaker were taken in terms of Rules 19(1)(b) and 19(4) of the Council Rules. The provision of these Rules are stated above, reading and simply understanding of the provisions does not at all accord with the decisions taken. Therefore, the decisions not to table a

³ Act 3 of 2000.

notice of motion is found not be rationally connected to the purpose which it was taken. In the result it is susceptible to review.

Interdict

30. The applicant seeks a final interdict. The requirements of final interdict are (i) clear right (ii) injury committed or reasonably apprehended and (iii) absence of similar protection by any other remedy.
31. Section 151(3) of the Constitution of the Republic of South Africa, 1996⁴ confers upon the first respondent the right to govern, on its own initiative, the local government affairs of its community within the legal parameters.
32. The applicant as a member of the Council relies on the right established by section 160(8)(b) of the Constitution.⁵ The right pertains that the members of the council (the first respondent) are entitled to participate in its proceedings in a manner that is consistent with democracy amongst others.
33. As determined above, the decision of the Speaker is irrational, due to the proceedings that were not consistent with democracy. Irrationality alone renders the process undemocratic. Furthermore, the applicant acted within the parameters of section 40 of the Local Government Municipal Structures

⁴ (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

⁵ (8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that— ... (b) is consistent with democracy...

Act⁶ authorizing the removal of the Speaker by resolution. The applicant has successfully established that as a member of the first respondent it is entitled to participate in a democratic process.

34. The Speaker's refusal to recuse himself and further taking irrational decisions is a definite harm and injury to the successful running of the first respondent. The applicant's apprehension of harm is successfully founded.
35. The applicant has no other remedy, except to invoke the provisions of section 40 of the Act⁷; "*A municipal council by resolution may remove its speaker from office. Prior notice of an intention to move a motion for the removal of the speaker must be given.*" The entire matter is about the unsuccessful efforts of the applicant to invoke the provisions of section 40.
36. As seen above, the efforts came to naught on the instance of the Speaker. It is concluded that the applicant has no other similar remedy in the circumstances. Having regard to the above, the application is successful.

SUBSTITUTION

37. The applicant seeks a substitution order. Amongst other grounds it advances is that it may be unfair to ask the applicant to resubmit itself to the Speaker's jurisdiction as remittal will lead to a foregone conclusion.

⁶ 117 of 1998

⁷ Above (6)

38. PAJA seeks to give effect to the constitutional right of just administrative action and empowers courts in judicial review proceedings to make a just and equitable order, substituting or varying the administrative action or correcting a defect resulting from the administrative action only in exceptional circumstances.
39. In the case of *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*⁸, the following is stated:

"[54] If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances, bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence." –

"[42] The administrative review context of section 8(1) of PAJA and the wording under subsection (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy. Remittal is still almost always the prudent and proper course.

[43] In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts

⁸ (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015)

ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.” –

“[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.” –

“[49] Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator’s discretion and “it would merely be a waste of time to order the [administrator] to reconsider the matter”. ”

40. This application has all the hallmarks of the foregone conclusion. As evidenced above, at least in two turns the Speaker has easily employed irrelevant Rules. There will be nothing to stop him from applying the same tactics if the matter is remitted to the Speaker.
41. From the Speaker's flawed reasons for not entertaining the motions it seems that remitting the decisions to the Speaker will be a waste of time. It is pressing that the first respondent is properly governed for the benefit of innocent communities. I have not found that the Speaker is the cause for improper governance, but blocking the meetings meant to engage in his manner of governance has been more than enough delay.
42. In considering the substitution, sections 36(3) and 41 of the Structures Act are instructive provides as follows:
- "36(3) The municipal manager of the municipality or if the municipal manager is not available. a person designated by the MEC for local government in the province, presides over the election of a speaker."*
- "41. If the speaker of a municipal council is absent or not available to perform the functions of speaker, or during a vacancy. the council must elect another councillor to act as speaker."*
43. In conclusion the applicant has made a successful case for decisions of the Speaker to be reviewable, set aside and found to be unconstitutional. Furthermore, the applicant has magnificently persuaded this court for the order of substitution.

COSTS

44. The applicant's argument is that the third respondent is cited in his personal capacity for the sole purpose of mulcting him with punitive costs at personal level. The third respondent was at all times acting in his official capacity as the Speaker. There is nothing suggesting that the Speaker acted outside the strictures of his office. For the above reasons the decision to visit the Speaker with punitive costs at a personal level is refused.

ORDER

1. The decision taken by Third Respondent, in his capacity as the Speaker, during the Special Council Meeting held on Wednesday, 12 April 2023 to disallow an urgent motion of no confidence in himself as the Speaker, and adjourn the Special Council Meeting (collectively, "the impugned decisions") is hereby set aside and declared unconstitutional and invalid in its entirety.

2. The impugned decisions be substituted with the following order:

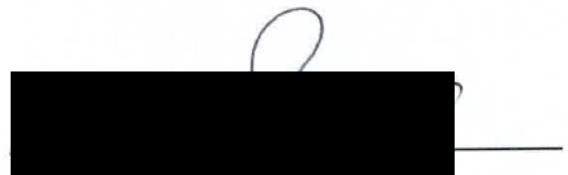
2.1. the Third Respondent is prohibited from chairing, adjourning and/or interfering, whether directly or indirectly, with the functioning of the Special Council Meeting;

2.2. the City Manager, or, if the City Manager is not available, a person designated by the Member of the Executive Council, must preside over the election of an acting Speaker at the Special Council Meeting; and

2.3. the acting Speaker elected at the Special Council Meeting must take all reasonable steps to ensure that the motion of no confidence in the Speaker is considered and decided by Council during the meeting.

3. The decision by the Third Respondent, in his capacity as the Speaker, during the Special Council Meeting held on Thursday, 29 July 2023 to disallow an urgent motion of no confidence in himself as the Speaker; and adjourn the Special Council Meeting is hereby set aside and declared unconstitutional and invalid in its entirety.

4. The costs of this application, including the costs of two counsel on an attorney and client scale, are to be paid by the Second Respondent.


N.P. MALI
JUDGE OF THE HIGH COURT

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