IN THE HIGH COURT OF ESWATINI

<u>JUDGMENT</u>

Case No. 1904/19

Reportable

In the matter between:

SIKHATSI DLAMINI **APPLICANT**

AND

THE MAYOR: CITY COUNCIL OF MBABANE AND THIRTEEN OTHERS **RESPONDENTS**

Neutral citation: *Sikhatsi Dlamini vs The Mayor: City Council of Mbabane & 13 Others* [*1904/19] [2020] SZHC 47 (25th March, 2020)*

Coram: Mabuza P.J, Mamba J and Fakudze J.

Heard: 25th February, 2020

Delivered: 25th March, 2020

Summary: *Municipal Law – Applicant, a Councillor at Mbabane City Council, challenges removal from council for owing rates – alleges that he should have been given a hearing before removal – Section 10(1) (h) of the Urban Government Act, 1969 read together with Section 11 should be construed to include the right of the affected Councillor to be heard in accordance with Section 21 and 33 of the Constitution – Respondent alleges that the Section in the law under which the Applicant was removed is self-activating in that once you fail to comply, you cease to be a Councillor – in other words you become disqualified by operation of law –*

Held the removal of the Applicant as a Councillor is by operation of law – it is not an administrative decision – Sections 21 and 33 of the Constitution need not be complied with – Applicant therefore not entitled to administrative justice in that he should be heard before being removed.

Held further that each party shall bear its own costs.

JUDGMENT

BACKGROUND

[1] Initially, the Applicant sought a declaration that Section 10(1)(h) of the Urban Government Act, 1969 read together with Section 11, is unconstitutional. There was another prayer that Section 116 of the same Act should be so declared. This was under a certificate of urgency.

[2] During argument, the Applicant stated that his gripe was that the decision to declare a vacancy in the Ward he represents should have been taken after notice has been given and his right to a fair hearing has been respected. The court should confine itself to this issue as this offends one's right to be heard before a decision is taken.

[3] The Applicant is a councillor at the Respondent Municipality and the owner of immovable property situate in Mbabane urban area, described as Lot 657 situate at Mahwalala, Mbabane. On the 10th October, 2019, the said property owed rates in the sum of E2.130.15 (Two Thousand Emalangeni One Hundred and Thirty Fifteen Cents). The rates owed led to the removal of the Applicant, who then instituted the present proceedings in the High Court.

THE PARTIES' CONTENTION

The Applicant

[4] The Applicant's argument or contention is that the applicability of Section 10(1)(h) read together with Section 11 of the Urban Government Act, 1969

should not be read to exclude the right of an affected councillor to be heard. Notwithstanding the Respondents' argument that these Sections are by operation of law, there is need for the right to fair hearing to be observed. This right is enshrined in Sections 21 and 33 of the Constitution of Swaziland Act, 2005.

[5] The Applicant further contends that at the time the decision for his removal and declaration of a vacancy was made, he owed the rates to the tune of E2,130.15 (Two Thousand One Hundred and Thirty Emalangeni Fifteen Cents). However, the removal and declaration of the vacancy should have been taken after the Applicant had been given notice.

[6] The Applicant further contends that the right to administrative justice was noted by Her Ladyship Mabuza A.J. in **Bhutana Dlamini and Another V Minister of Housing and Urban Development & Another, Civil Case No. 27/07**, where it was said:

> *"He (Minister) has to look at Section 33 (1) and (2) of the Constitution which deals with the right to administrative justice and satisfy himself that this Section either does not apply or if it does, he has to apply it first. Once he has satisfied the tenets of the rule of law which are that the exercise of power by public officials should have legality and be rational, it is only then that he exercises the power vested in him in Section 107/1969."*

[7] With respect to the First Respondent's defence that in declaring the vacancy, it did not exercise administrative power, but implemented objectively ascertainable facts, the Applicant says that by all standards of statutory interpretation, the First Respondent was exercising administrative power. It is the Applicant's contention that there is nothing in either Section 10 or 11 of the Act that makes it possible to suggest that the First Respondent acted within the powers therein. There is nothing to show that the exercise of power under the Sections excluded fair hearing and administrative justice.

The Respondents

[8] The Respondents' contend that Section 10(1)(h) of the Urban Government Act, 1969 provides that a person shall be disqualified from being elected or appointed or from continuing in office as a Councillor where he is in default of payment of any rates charges or other debts due to the Council for a period exceeding three months after same having become due. It is part of a series of provisions that are contained in the Urban Government Act, 1969 that deal with eligibility of a Councillor as well as the threshold requirements for them to remain in office.

[9] In view of the fact that Councillors are public representatives who are responsible for development and maintenance of council policies, they are required to lead by example and actually uphold all laws and policies. The Respondents contend that it is an undeniable fact that the due date for rates within the First Respondent's time frame was the 30th June, 2019. The three months period referred in Section 10(1)(h) therefore ran from that date and

lapsed at the end of September, 2019. Once the three months period has lapsed, the Applicant by operation of law became disqualified to hold the position of councillor. Consequently the Respondents thereafter acted in terms of Section 11(1)(c) and declared the position of councillor for Ward 4, which the Applicant occupied, vacant. This was by operation of law.

[10] The Respondents contend that the disqualification under Section 10 comes into effect within four days of the occurrence of the cause of disqualification. The Chairman of the Council notifies the member of the disqualification and thereafter declare the position held by the member vacant. The Act does not require that the member be called upon to show cause or oblige Council to take any other procedural step before the statute is given effect. So the Constitutional provisions on the right to hearing have no role in such situations.

[11] The Respondents finally submit that the notification and/or declaration of a casual vacancy in terms of Section 11 does not amount to an exercise of discretionary power and administrative action. When the Chairman of the Council makes a declaration in terms of Section 11, it is not a consequence of an exercise of any discretionary power. He is not applying his mind to any set of facts.

THE APPLICABLE LAW

[12] In **John Roland Rudd V Rex Criminal Appeal Case No. 26/2012**, His Lordship M.C.B. Maphalala J.A. stated the right to fair hearing as follows:

> *"The court a quo was obliged to hear the appellant before cancelling his bail and discharging the surety in accordance with the principle of natural justice, the audi alteram partem; literally it means "hear the other party. It is implicit in this principle that no person shall be condemned, punished or have any of his legal right compromised by a court of law without being heard."*

[13] In the English case of **Doody V Secretary of state for the Home Department and Others Appeal [1993] 3 ALL E. R. 92**, Lord Mustill observed as follows:

> *"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken with a view to procuring its modification, or both."*

[14] **C. Hoexter, The New Constitutional and Administrative Law (Vol 2, 2002)** at 31 states as follows:

> *"An administrative act is probably best defined as one that implements or gives effect to a policy, a piece of legislation or*

an adjudicative decision. This is the operational side of the state: since policies, laws and judgments are not self-executing, they have to be put into operation by public authorities responsible for administering them."

[15] It was in **Sikhatsi Dlamini and Others V Minister for Housing and Urban Development and Others, High Court Civil Case No. 1356/08** where His Lordship Maphalala S. B. said:

> *"[39] In this regard I agree with the legal principle that the failure to grant a hearing is so serious that a court will intervene where a decision was taken without affording a hearing. In this regard I find the dictum in the **Appeal Court Case of Swaziland Federation of Trade Unions V President of the Industrial Court** (Supra) apposite.*
>
> *[40] Furthermore, this country is governed by a relatively new constitutional dispensation introducing novel imperatives and therefore it is of paramount importance that whatever action is performed by administrators it is mirrored against the standard set by the Constitution."*

[16] In **Frans V Goot Brakrivierse Municipalitent en andere 1998(2) SA 770**, the Applicant had contended that his removal without him making representation violated his right against fair administrative action and in the

alternative the provisions of the regulations were unconstitutional. At page 778, the court stated as follows:

"There is no need to argue; this article deals specifically and exclusively with administrative action, which is not present in the present case. The termination of the applicant's term of office did not occur as a result of some administrative action in the form of a decision or the exercise of a discretion, but merely of legal means due to the objectively ascertainable fact of the (sic) overdue payment of his municipal accounts for a period exceeding three months. If A proves that such a fact is incorrect, it goes without saying that the Applicant could contest the termination of his term of service. However, where the fact cannot be disputed, he cannot rely on any constitutional right to attack the fairness of such legal effect. The principle of audi alteram partem does not then apply at all."

[17] Likewise in **Minister Van Onderwys en Kultuur en Andere V Louw 1995 (4) S.A. 383 (A)** it was established that an administrative action was not in existence:

"The assessment becomes effective if a person such as the respondent (i) is absent from the service for more than 30 consecutive days without the consent of the Head of Education. Whether these requirements are satisfied is objectively ascertainable. If for example a person argues that he did, for example, have the necessary consent, and it is disputed, the factual dispute may be

settled by a court. There is then no question of a review of an administrative decision. In fact, whether there is the entry into force or not does not depend on any decision. Therefore, there is no scope for invoking the audi alteram rule that applies in its classic formulation when an administrative – and discretionary – ruling can adversely affect a person's rights and privileges or freedoms."

COURT'S ANALYSIS

[18] The issue that begs for determination is whether the invocation of Section 10(1) (h) of the Urban Government Act, 1969 was an administrative decision or not. If it was an administrative decision, then the audi alteram rule should have been adhered to. If it was not, then the need for same to be adhered to was not necessary. It is worth noting that Sections 21 and 33 of the Constitution only come into play where an administrative decision has been taken.

[19] The Applicant's argument is that Section 10(1)(h) requires that before same is put into effect, an affected person must be heard because the right to be heard is enshrined in the Constitution. The Respondents argue to the contrary when they say that this Section comes into play where an administrative decision has been taken or some discretionary power has been exercised. In this instance, there was no decision taken by virtue of the fact that the Applicant was disqualified as a result of failing to comply with a nornative standard stipulated in the law. The whole act was "by operation of law." All that the Chairman did was merely communicating a

consequence in which the Respondents took legal action. It only declared a casual vacancy premised on the disqualification.

[20] This court is inclined to agree with the Respondents' contention that Section 10 (1)(h) of the Urban Government Act, 1969 has laid down one of the requirements that must be met for one to continue to be a Councillor. It is this court's view that the termination of the applicant's term of office did not occur as a result of some administrative decision or the exercise of a discretion. It was merely a legal means to an objectively ascertainable fact which is that there were rates owing beyond the stipulated period. The Applicant cannot dispute this fact in that it speaks for itself. It would have been otherwise if the Applicant had produced payment of rates and notwithstanding such proof, the Respondents went ahead and declared a vacancy. Authority for the proposition by this court is the **Frans and the Louw cases** (Supra).

[21] Further authority for the above proposition is found in the case of **Siboniso Clement Dlamini V The Chief Justice of Swaziland (1148/2019) [2019] SZHC 208 (8th November, 2019)** where the full bench stated as follows at paragraph 54:

> *"54. From the above cases, it is undoubtedly clear that the audi alteram partem principle is not a hard and fast maxim. The cases lay out the proposition that the court must scrutinise the category of function discharged. If the decision maker was not discharging an administrative function, then the court should decline to find that he was subjected to this maxim."*

[22] It is this court's considered view that the test in determining the invocation of the principle of *audi alteram parterm* is whether an administrative decision was taken or whether there was the exercise of discretion. A set of facts is presented before a functionary and the functionary must examine, evaluate and reach a conclusion which is arrived at through the assessment of those facts which includes a process of value judgment.

[23] It is also this court's considered view that once the three months mentioned in Section 10(1)(h) expires, by operation of law, the Applicant becomes disqualified to hold the position of Councillor. For completeness sake, Section 10(1)(h) should be quoted verbatim. It says "subject to sub-section (2) and (3), a person shall be disqualified from being elected or appointed or <u>from continuing in office as a Councillor</u> if he is in default of payment of any rates and charges or other debts due to the council for a period exceeding 3 months after same shall have become due." It was in **Solomon Nxumalo V Mbabane City Council, High Court Case No. 2931/1999** and **Douglas Thula Masuku V Mbabane City Council High Court Case No. 2932/1999** where the court emphasised that an act in violation of Section 10 of the Urban Government Act, 1969 is unlawful and cannot even be validated by a council resolution. The court said that such invalidation is impossible.

[24] In light of all that has been said above, the Applicant's case is dismissed and each party shall bear its own costs.

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FAKUDZE J.

I agree

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MABUZA P.J.

I agree

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MAMBA J.

Applicant: T.R. Maseko

Respondents: Z. D. Jele