

NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK REASONS FOR JUDGMENT

Case No: A457/2013

In the matter between:

VINCENT KAHUA

FIRST APPLICANT

ALBERTUS NARUSEB

SECOND APPLICANT

CHRISTIAAN NANUSEB

THIRD APPLICANT

KRETENCIA GARISES

FOURTH APPLICANT

and

THE MINISTER OF REGIONAL AND LOCAL GOVERNMENT, HOUSING AND

RURAL DEVELOPMENT

FIRST RESPONDENT

LINUS //GAROEGB

SECOND RESPONDENT

Neutral citation: *Kahua v Minister of Regional and Local Government Housing and Rural Development (A457-2013)* [2014] NAHCMD 1 (3 January 2014)

)**Coram:** VAN NIEKERK J

Heard: 30 December 2013

Delivered: 3 January 2014

REASONS FOR JUDGMENT

VAN NIEKERK J:

[1] In this matter I made an order on 3 January 2014 for which I now provide reasons. This application was brought on an urgent basis and set down for hearing on 30 December 2013. The first applicant is the mayor of the Omaruru town council. The second applicant is the deputy mayor, while the other applicants are ordinary councillors of the said town council. There are three other councillors of the town council who are not joined in these proceedings.

[2] Apart from condonation for their non-compliance with the rules of this Court and further and/or alternative relief, the applicants seek the following relief:

'2. An Order:

- 2.1 Declaring Government Notice 326 published on 16 December 2013 to be of no legal force or effect;
- 2.2 Directing the 1st Respondent to restore and re-vest the Applicants with such powers, functions, rights and obligations as prescribed in Part V of the Local Authorities Act of 1992;
- 2.3 Without derogating from the generality of the relief set out in paragraph 2.2 above, that the 1st Respondent be directed to forthwith restore the *status quo ante*.
- 2.4 That the costs of the Application be paid by the Respondent (*sic*) should they oppose this Application, such costs to be on

an Attorney-and-own-client scale and to include those consequent upon the employment by the Applicants of two Counsel.'

[3] The application is opposed by the first respondent, who raises certain preliminary points of law. These include that the application is not urgent and that the applicants lack *locus standi*. The Court, with the agreement of counsel for both sides, directed that argument be heard only on these two aspects.

[4] The complaint by the applicants is directed at Government Notice 326, the relevant part of which reads as follows:

'SUSPENSION FROM OFFICE OF MEMBERS OF MUNICIPAL COUNCIL OF OMARURU:
LOCAL AUTHORITIES ACT, 1992

Under section 92 of the Local Authorities Act, 1992 (Act No. 23 of 1992), I hereby in respect of the Municipal Council of Omaruru, with effect from the date of publication of this notice in the *Gazette* -

- (a) Declare that all the powers , duties and functions of the Council vest in me; and
- (b) Suspend all the members of the Council from office.'

[5] In order to understand the substance of the applicants' complaint, it is necessary to have regard to section 92 of the Local Authorities Act, 1992 (Act 23 of 1992) ('the Act'), which reads as follows:

'92 Failure by local authority councils to exercise or perform its powers, duties and functions

- (1) If, in the case of a local authority council other than the municipal council of a municipality referred to in Part I of Schedule 1, the Minister is satisfied-
 - (a) that a local authority council is unable to exercise the powers and perform the duties and functions by law conferred and imposed on such council;
- (b) on account of a report by the Auditor-General after conducting an ordinary audit or conducting an audit at the request of the Minister-
 - (i) that the local authority council is unable to meet its financial commitments; or

- (ii) that no proper control is exercised over the assets and liabilities of the local authority council; or
- (c) that the local authority council does not comply with the requirements of section 14(1)^ in relation to the holding of meetings,

the Minister may by notice in writing, after having given such local authority council an opportunity to submit representations to him or her, instruct such local authority council to take such steps in order to rectify the issues concerned, within the period of time and in accordance with any details and directives, as specified in the notice.

- (2) If a local authority council fails to comply with or to adhere to an instruction under subsection (1), the Minister may by notice in the Gazette-
 - (a) declare that all the powers, duties and functions of the local authority council, or any thereof as specified in the notice, shall be vested in the Minister; and
 - (b) remove or suspend the members of such local authority council from office, if all the powers, duties and functions of the local authority council are vested in the Minister under paragraph (a).
- (3) The Minister may declare at any time by notice in the Gazette, after consultation with the local authority council concerned, such local authority council to be re-vested, with effect from a date specified in the notice, with the powers, duties and functions which in terms of a notice under subsection (2) were vested in the Minister.
 - (4) A notice under subsection (2) shall provide for an election of members of such local authority council to be held on a date specified in the notice, which date shall not be later than three months after the date of publication of the notice, but if a general election for members of local authority councils is to be held within six months after the date of the notice concerned, the election provided for in the notice shall not be held. If the members of a local authority council have been removed or suspended under subsection (2)(b), the Ministerial shall have, and may exercise and perform, the powers, duties and functions conferred or imposed upon the local authority council by law; and
 - (b) may authorise in writing any other person to exercise or perform any of those powers, duties and functions, subject to the directions and control of the Minister,until the election contemplated in subsection (4) has taken place.
 - (5) If an election is to be held by virtue of the provisions of subsection (4),

such election shall be deemed to be an election of members of the first local authority council of a newly established local authority area.

- (6) A local authority council elected at an election referred to in subsection (6) shall be deemed, for the purposes of sections 11(2)(a), 14(1)(a) and 21(2)(a), to be a new local authority council.'

[6] It is not necessary for purposes of deciding the points *in limine* to set out the factual averments by the applicants in great detail. By way of summary it may be stated that their case is that the first respondent sent a team of ministerial staff members to Omaruru to investigate certain irregularities which had allegedly occurred at the municipality. A report was drawn up. In spite of indications by the first respondent at various stages that he or his staff would be meeting with the town council about the report, no meeting materialized. In the report certain recommendations are made. In the covering letter accompanying the report, the first respondent expresses the sincere hope that these recommendations 'will be adhered to'.

[7] At the end of August 2013 the first respondent sent another letter to the town council in which he invited the town council to a meeting to be held on 6 September 2013. He also required of the council, at this meeting, to make written 'presentations' to him about the recommendations in the report and about certain new issues that came about after the investigation was conducted. The council responded in writing that it was awaiting input from the management committee and would be unable to make the required written response by 6 September. The first respondent thereupon declined to meet with the council.

On 22 November 2013 the town council provided written 'feedback' to the first respondent.

[8] On 9 December 2013 the first respondent directed a written invitation to the town council to attend a meeting to be addressed by the first respondent at the council chamber on 16 December 2013. The applicants received this invitation only on 16 December 2013. The meeting turned out to be a press conference at which the first respondent's deputy read out a press release, in which it was, *inter alia*, stated that the recommendations by the ministerial investigation team were not implemented 'regardless of our efforts to impress upon the council to do so'; that the first respondent thereupon decided to suspend the members of the town council in terms of section 92 of the Act without remuneration; and to vest all the powers, duties and functions of the council in the first respondent; and that the

first respondent authorised the second respondent to exercise all these powers, duties and functions on behalf of the first respondent. Reference was also made to Government Notice 326 published on the same day.

[9] The applicants point out that the first respondent did not specifically state whether he was 'satisfied' as contemplated in section 92(1)(a), (b) or (c) of the Act. They speculate that he possibly acted under section 92(1)(a), but point out that he did not comply in all respects with this section before he invoked section 92(2) by declaring the town council divested of all its powers, duties and functions and by suspending all its members. As such, the applicants allege, the first respondent acted illegally and the Government Notice should be declared to be of no force or effect.

Locus standi

[10] Mr *Namandje*, who appeared with Mr *Nkiwane* on behalf of the first respondent, submitted in heads of argument that the actions of the first respondent under section 92 of the Act are aimed at the town council. The act of suspending the members under section 92(2)(b), he further submitted, is simply part of the action taken in respect of the town council under section 92(2)(a) and follows automatically and peremptorily from the declaration in terms of section 92(1)(a) that all the powers, duties and functions of the town council shall be vested in the first respondent. Counsel further submitted that the applicants should not have brought the application in their own capacity. He further submitted that it is the town council itself that has standing to impugn the action of the first respondent.

[11] To this argument the stance taken by the applicants in their heads of argument drawn by Mr Kurz and confirmed by Mr *Hinda*, who appeared on their behalf, is that the applicants had no choice but to approach the Court in their capacities as members of the town council as the council has been divested of its powers and all its members suspended.

[12] Mr *Namandje* submitted that nothing stopped the councillors to call a meeting to discuss the matter. He pointed to the fact that the applicants constitute the majority of the council and would presumably have been able to take a majority decision to launch this

application in the event that the remaining three councillors, who are members of the ruling party, did not support the decision.

[13] I do not agree with the stance taken by the applicants. The merits of the application is essentially based on the premise that the first respondent acted illegally and as such contrary to Article 18 of the Constitution and furthermore, that the very notice whereby the council was divested of all its powers, duties and functions and whereby its members were suspended is a nullity. The issue of the council's *locus standi* must, as a matter of logic, be considered on the assumption that the first respondent's notice was indeed a nullity. (*Uffindell t/a Aloe Hunting Safaris v Government of Namibia* 2009 (2) NR 670 (HC) at 682E-F). The council, which is a juristic person in its own name, (see section 6(3) of the Act) is clearly an aggrieved person who may take legal action to remedy the illegality.

[14] Mr *Hinda* submitted that the council would practically not have been able to meet, because notice of meetings are to be given by the town clerk on instruction of the chairperson of the council, and because the council was divested of all its powers, the town clerk would not have executed any instruction by the chairperson. However, the applicants make no mention of any such practical difficulties or of any attempts they had made in this regard.

[15] Counsel for the first respondent pointed to the fact that the applicants in several instances pleaded the case for the council, which they were not entitled to do. It is indeed so that the founding affidavit is not scrupulous in always distinguishing between the town council and the applicants as its members. At times the applicants refer to the council and themselves interchangeably as if they are the same persona, which clearly they are not.

[16] However, I do not agree with counsel for the first respondent that all the references to 'the Council' highlighted by counsel in their heads or argument fall in this category. It seems to me that to some extent, at least, the fate of the council and its members are inextricably linked and that, in as much as the suspension of the applicants can only follow upon a declaration that all the powers, duties and functions of the council shall be vested in the first respondent, the applicants were entitled to refer to various actions and decisions taken by the council.

[17] This being said, I do agree that the statement in paragraph 14.2 of the founding affidavit that the first respondent 'failed to exercise the option to instruct the Applicants by notice in writing to take such steps in order to rectify issues, within the period of time in accordance with any details and directions as the 1st Respondent may specify' clearly confuses the applicants with the council. The same can be said of the reference to 'the Applicants' and 'the Applicant' in paragraph 14.3 and paragraphs 20.1 to 20.5. Furthermore, in attempting to make out a case for urgency, several of the grounds advanced by the applicants are grounds which apply to the council and not to them as members, which reinforces the impression that the applicants did not launch this application with a clear view as to their standing and the basis upon which it is brought. Lastly, the applicants can clearly never be entitled to the relief claimed in prayer 2.2. Although this issue was discussed between the Court and counsel for the first respondent, the applicants did not move any amendment to substitute the word 'Applicants' with the word 'council'. The Court also *mero motu* posed the question whether the applicants do not have standing on the basis that they have been suspended without remuneration. However, during argument on behalf of the applicants I was left with the impression that the applicants are not relying on this aspect as counsel submitted that if this was really the issue the first respondent would have raised objections also on this score.

[18] In considering the issue of standing it must be borne in mind that the applicants bear the onus to make the necessary averments to prove their standing in the founding papers (*Coin Security Namibia (Pty) Ltd v Jacobs* 1996 NR 279 (HC); *Grobbelaar v Council of the Municipality of Walvis Bay* 2007 (1) NR 259 (HC) paras [34] and [35]). In my view the applicants blow hot and cold in the founding affidavit. They do not make clear averments to assert their standing or from which their standing may be inferred as a matter of law. They confuse themselves with the council. They claim relief to which only the council is, in principle, entitled. The Court should not ignore the case for standing which they make out by making out a different case for them. I should not be misunderstood that my finding is that they do not have standing. Rather, it seems to me that the applicants do not satisfactorily show that they do have standing on the basis that they say they do.

Urgency

[19] As this point was also argued, I wish to state briefly why I think the matter is not urgent.

[20] As I have stated before, the applicants mainly rely on factors that really concern the council as a body. The applicants allege that the continuing illegality of the first respondent's action has a massive impact on the governance of the council. They point to various service delivery projects in which the individual applicants were involved and allege that these are likely to come to an abrupt halt as the second respondent does not have full knowledge of these projects. I think this is inherently quite unlikely as the fulltime employees of the municipality should be able to assist the second respondent. There is also no reason why he cannot call on the applicants to share any necessary information with him to keep the projects rolling.

[21] Apart from this, the applicants mention briefly in passing that the fact that they have been suspended without pay adversely affects them. However, this fact in itself does not render the matter urgent.

[22] They mention that the election contemplated in section 92(4) will most likely be held before the application can be finalized in the normal course. However, the first respondent has not as yet provided for any such election.

[23] The applicants mention that their suspension adversely affects them in their representative capacity as elected office bearers. However, once again, this in itself does not render the application urgent.

The order

[24] For the above mentioned reasons the following order was made:

1. The applicants have not satisfactorily shown that they have *locus standi* to bring the application.

2. The application is not urgent.

The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

'K van Niekerk Judge

APPEARANCE

For the applicants:

Adv G Hinda SC

Instr. by Merorua & Associates

For the first respondent:

Mr S Namandje

(and with him) Mr S Nkiwane Instr. by

the Government-Attorney