

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2020/00124

In the matter between:

**COUNCIL FOR THE MUNICIPALITY
OF OKAHANDJA**

APPLICANT

and

**THE MINISTER OF URBAN AND
AND RURAL DEVELOPMENT
LINUS //GAROE**

1ST RESPONDENT

2ND RESPONDENT

Neutral Citation: *Council for the Municipality of Okahandja v The Minister of Urban and Rural Development & Another* (HC-MD-CIV-MOT-REV-2020/00124 [2021] NAHCMD 274 (04 June 2021)

CORAM: MILLER AJ

Heard: 11 February 2021

Delivered: 04 June 2021

ORDER

- (1) The application is dismissed.
- (2) Mr Johannes Hindjou is ordered to pay the costs of the first respondent which will include the costs of one instructing and one instructed counsel were employed.

Judgment

MILLER AJ:

[1] The litigation before me stems from a notice published on 16 March 2020 in Government Gazette No. 7146, being notice No. 82 of 2020. The notice reads as follows:

“Under Section 92(2) of the Local Authorities Act¹, I in respect of the Municipal Council of Okahandja –

- (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 with effect from its date of publication of this notice.

Dr. P. Mushelenga

Minister of Urban and Rural Development

10 March 2021”

[2] Before dealing with the merits of the matter, it is necessary to deal with a point *in limine* raised by the first respondent which in my view disposes of the whole matter. The applicant in these proceedings is cited as “The Council for the Municipality of Okahandja.” (The Council). The council is a juristic body in law, and is thus separate

¹ Local Authorities Act No. 23 of 199

from the members of the council. As such the Council can institute or defend proceedings in its own name, if there is a valid resolution to that effect which authorizes the institution of the proceedings or to defend proceedings, as the case may be, and in which it nominates and authorizes the individual who is tasked with the process.

[3] The founding affidavit was deposed to by Mr Johannes Hindjou on 06 May 2020. By that time the deponent had already been suspended as Mayor in terms of the Government Notice No 7146 which was dated 10 March 2020. Mr Hindjou alleges that despite all this he is authorized to represent the applicant in these proceedings. He deals with the matter in the following terms.

'I am a self-employed adult male presently residing at erf 1162, Paul Hindjou Street, Nau-Aib, Okahandja, Republic of Namibia and I am the duly elected chairperson of the council of Okahandja Municipality in terms of s11(1)(a) of the Local Authorities Act, 23 of 1992 (hereinafter "the Act). I was duly elected mayor on 15 February 2019 and automatically became the chairperson of the council in terms of s 11(1)(a) of the Act. Although my term as mayor and chairperson expired on 14 February 2020, I remain acting as mayor and chairperson of the council of Okahandja municipality until such time the new elections are conducted in terms of s11(1)(a) of the Act. These are elections for office bearers to constitute the Management Committee. I am acting on behalf of the Applicant which is a juristic person.

I therefore state that I am duly able and authorized to depose to this affidavit on behalf of the Applicant for all purposes and intend (sic). More specifically, I am duly authorized by the applicant to do all things necessary to have the decision of the First Respondent reviewed and set aside and to have the council reinstated. With the "first Respondent's decision" I am referring to the impugned decision of the First Respondent, pertaining to the suspension of the Applicants the Council of Okahandja Municipality which decision was published in the Government Gazette No. 7146 of 16 March 2020 annexed hereto and marked as "JH 1".'

[4] Mr Peya Mushelenga who deposed to that the answering affidavit filed by the first respondent challenges, amongst other points *in limine*, the authority of Mr Hindjou to institute these proceedings. Mr Mushelenga was the Minister of Urban and Rural Development at the relevant time. He states the following:

'17. I have further observed that these proceedings were instituted in this court on the 7th of May 2020. I point out that, I suspended the members of the municipal council of Okahandja on the 16th of March 2020 and I further confirm that, as of that date of the 16th of March 2020, in divested them of all powers, functions and duties that they initially had in their capacity as members of the aforesaid council. This means that, as from the 16th of March 2020, the aforesaid members of the aforesaid council, do not have any powers to institute any proceedings for and on behalf of the municipal council of Okahandja. I attach hereto-marked PM1 a copy of a government notice number 82 of 2020 published in the Government Gazette number 7146 dated 16 March 2020 where the aforesaid suspension is promulgated.

18. I assert that, having been divested of all the powers that they had in the aforesaid council, the suspended members of the municipal council of Okahandja cannot act on behalf of the municipal council of Okahandja whilst the suspension is still in force. I assert that, the proper procedure should have been to institute these proceedings in their own names and not under the auspices of the municipal council of Okahandja.

19. I point out that, though I suspended the members of the aforesaid council, the council itself has juristic personality in law that is separate from the members of council. On this basis, I assert that, though the members of council were suspended, the council still exists in terms of its own juristic personality. I point out that, when I suspended the members of the municipal council of Okahandja, I exercised the statutory powers prescribed in section 92(2) of the Act. Section 92(2) of the Act is framed as follows:

(2) If a local authority council fails to comply with or to adhere to an instruction under subsection (1), the Minister may be 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 such local authority council are vested in the Minister under paragraph (a).

19.1 I assert that the provisions of section 92(2)(b) specifically refers to the suspension of members of council and not to the suspension of council itself in its juristic personality.

19.2 I further assert that, the powers, duties and functions that were divested were the powers conferred on the municipal council by the Act and those powers now vest in the Minister.

19.3 I assert that, in view of the fact that the Minister is the one that is now vested with the powers of the municipal council, it is only the Minister that can authorize the institution of legal proceedings for an on behalf of the municipal council and in this case the Minister never authorized the institution of the current proceedings.

20. In the light of the aforesaid position, I submit that the current proceedings for and on behalf of the applicant were never authorised by me or the current Minister and the application cannot be heard on the merits on the basis that the institution of the application is unauthorised. I refer to the confirmatory affidavit of the Minister.

21. In the light of my aforesaid submissions, I submit that, this point *in limine* be upheld with costs and those that deposed to the founding and confirmatory affidavits that caused the institution of this application ought to bear the costs of this application.'

[5] In the matter of *Ondongo Traditional Authority v Elifas and Another*² this court cited with approval the remarks of *Watermeyer AJ in Mall (Pty) Ltd vs Merino Ko-operasie Bpk*³ The learned judge in that case reasoned that:

'In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature on the Notice of Motion by an attorney in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorized will be provided by an affidavit made by an official of the company a copy of the resolution, but I do not consider that that form of proof is necessary in every case.'

[6] In *Otjozondjupa Regional Authority vs Ds Ndahafa Aino Cecila Natifindi and Others*⁴ Muller J stated that each case depends on its own facts and the court must

² 2017 (3) NR 709

³ 1957 (2) SA 347 © of 351 (H)

⁴ NALC i/2009 (22 July 2020)

decide whether enough has been placed before it to conclude that it is the applicant who is litigating and not some unauthorized person on its behalf.

[7] When these principles are applied to the facts of the case before me I am satisfied that there never existed any resolution authorising the deponent to the founding affidavit to institute proceedings in its name of the applicant.

[8] It follows inevitably that the Council as applicant, had no *locus standi* to institute the proceedings. Even if I were to accept that for some reason Mr Hindjou retained some residual power as the acting Mayor that fact does not per se authorize him to institute proceedings in the name of the Council.

[9] As far as costs are concerned I see no reason to saddle the applicant with a costs order. The appropriate order to make in the circumstances is that Mr Hindjou must pay in costs of the first respondent.

[10] I make the following order:

- (1) The application is dismissed.
- (2) Mr Johannes Hindjou is ordered to pay the costs of the first respondent which will include the cost of one instructing and one instructed counsel where employed.

K MILLER
Acting Judge

APPEARANCES:

APPLICANT:

Mr Brendell
KISHI-SHAKUMU & CO

1st & 2nd RESPONDENTS:

Mr Khupe
Office of the Government Attorney
Windhoek
Namibia