

# Political interference

## IN THE SPOTLIGHT ONCE AGAIN

*Taung Local Municipality vs Mofokeng*  
(J536/2011) [2011] ZALCJHB 30 (28 April 2011)

The South African Municipal Workers' Union made allegations of serious financial irregularities and mismanagement of fiduciary duties against the municipal manager of the Greater Taung Local Municipality, Mr Mpho Mofokeng.

In a meeting held on 24 March 2011 and attended by 33 of the municipality's 44 councillors, when the item concerning the allegations was introduced Mr Mofokeng left the meeting to answer a cellphone call. On his return, he handed the phone to the ANC chief whip, who was apparently directed by the caller to request the speaker to postpone the meeting. The chief whip refused, whereupon Mr Mofokeng approached the speaker directly with the request to postpone the meeting. The speaker attempted to do so, but this was resisted by the majority of those present. However, 13 councillors walked out of the meeting, leaving it inquorate. Despite this, the remainder of the councillors continued with the meeting and appointed the ANC's chief whip as acting speaker. A resolution was taken suspending Mr Mofokeng pending the outcome of the investigation and a disciplinary enquiry.

Armed with this resolution, the municipality applied to the Labour Court for an order directing Mr Mofokeng to provide reasons why he should not be ordered to leave its premises, pending the finalisation of the investigation against him or until such time that his suspension was revoked or declared unlawful by a competent forum. The Court granted the order and set a date upon which Mr Mofokeng was expected to provide the said reasons. On the date, Mr Mofokeng raised a 'collateral defence' to the effect that the Court should not permit the municipality to coerce him into complying with an unlawful decision, thereby giving effect to or enforcing that decision. He further argued that the Court should not confirm

the interim order because the resolution upon which the municipality sought to rely was unlawful.

The municipality in turn, relying on the judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA), argued that the decision remained valid and should be enforced because it was never set aside on review by the court. In the words of the Supreme Court:

Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question.

The municipality also contended that Mr Mofokeng, having not taken any steps to have the decision set aside, could not rely on the collateral defence to stop the confirmation of his suspension by the Labour Court. Relying once again on the *Oudekraal* judgment, it argued that unless the decision to suspend Mr Mofokeng was set aside on review, it continued to have force. Mr Mofokeng thus had no right to be on municipal premises so the collateral defence of an unlawful council resolution could not assist him.

Having accepted that the decision to suspend Mr Mofokeng was unlawful, the municipality argued that its unlawfulness arose from a failure to follow the correct procedure in arriving at the decision, and was not a substantive defect.

### The judgment

The Court said that the starting point was to accept that although the resolution to suspend Mr Mofokeng had been unlawful, this did not, as a matter of fact, lead to the conclusion that the resolution and the subsequent actions arising from it should be disregarded. In law the suspension might be invalid in that it was based on an unlawful resolution, but it was valid

to the extent that it had continued to exist unchallenged. In other words, although the resolution was unlawful, it could survive and remain effective if not challenged on review or, as is the present case, a collateral defence was raised to challenge its coercion.

On the issue that the defect in the resolution was procedural and not substantive, the Court held that the fact that the defect was limited to procedure was immaterial in the assessment of its validity and force in law, because it offended against one of the basic principles of our law, namely the rule of law: the rule of law was foundational to any relationship between parties in a constitutional democracy, and the parties to any relationship were required to interact lawfully.

The Court held further that the rule of law in labour matters required an employer, as in the present instance, to take decisions that were authorised by the law in order to comply with the provisions of section 23 of the Constitution, which provides that everyone has the right to fair labour practices.

The Court further held that the manner in which the council resolution in this matter had been taken not only undermined the rule of law, but also fundamentally undermined Mr Mofokeng's constitutional right to fair labour practice. Therefore the fact that the defect was limited to a procedural defect did not detract from the fundamental requirement of compliance with the rule of law. The Court accordingly held that the resolution to suspend Mr Mofokeng was unlawful. The municipality should not have used an unlawful resolution as a basis to institute the proceedings.

## Analysis

This judgment reinforces the principle that officials cannot ignore council resolutions merely because

they believe they are invalid, even though that belief may be correct. The courts cannot condone officials second-guessing council resolutions. If officials believe a resolution to be invalid, they should take steps to have it set aside by a competent forum or ask the council to rescind it; they may not simply ignore it.

By not taking any steps to have the decision set aside, Mr Mofokeng deprived the Court of the opportunity to pronounce on the question of when the quorum rule is applied. The circumstances that gave rise to the quorum dispute occur often. Is the quorum rule applied at the start of the meeting or when important resolutions have to be taken? What happens to a quorum after a walkout? It would be advisable for municipalities to address this issue in their rules and orders.

Most importantly, the Court was also denied an opportunity to pronounce on the legality of political interference in council matters. Are political parties allowed to micromanage the municipal council? In *Vuyo Mlokoti v Amathole District Municipality and Another* (1428/2008) [2008] ZAECHC 184, for example, the Court held that the appointment of a municipal manager by the municipal council was illegal if it was made because of the unauthorised or unwarranted dictates of other persons or bodies (see *LGB 11(1)*, February/March 2009, pp 5–7). The Court characterised the instruction from the ANC regional council to appoint its preferred candidate to the post of municipal manager as 'an usurpation of the powers of the [municipal] council by a political body'.

It would have been instructive in the present case if the Court had been given an opportunity to pronounce on the legality of the instruction given to the speaker by cellphone to postpone the meeting.

