



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 550/2008

In the matter between:

AFRICAN NATIONAL CONGRESS

Appellant

and

**THE MUNICIPAL MANAGER, GEORGE LOCAL
MUNICIPALITY**

First Respondent

GEORGE LOCAL MUNICIPALITY

Second Respondent

HENRY JOHANNES JONES

Third Respondent

THE DEMOCRATIC ALLIANCE

Fourth Respondent

**THE INDEPENDENT ELECTORAL
COMMISSION**

Fifth Respondent

**THE MINISTER FOR LOCAL GOVERNMENT
AND HOUSING, WESTERN CAPE**

Sixth Respondent

Neutral citation: *African National Congress v The Municipal Manager, George Local Municipality* (550/08) [2009] ZASCA 139 (17 November 2009)

Coram: MPATI P, BRAND, MLAMBO, MAYA JJA, and BOSIELO AJA

Heard: 10 SEPTEMBER 2009

Delivered: 17 NOVEMBER 2009

Summary: Whether a municipal ward councillor's letter of resignation from a municipal council duly delivered to a municipal manager but subsequently withdrawn by its author and returned to him unread constitutes a valid resignation under Section 27(a) of the Local Government: Municipal Structures Act 117 of 1998.

ORDER

On appeal from: Cape High Court (Irish AJ sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

MAYA JA: (MPATI P, BRAND, MLAMBO JJA, BOSIELO AJA concurring)

[1] This appeal turns on whether a municipal councillor's resignation letter, which is delivered to a municipal manager but is subsequently withdrawn by its author and returned to him unread, constitutes a valid resignation for the purposes of s 27(a) of the Local Government: Municipal Structures Act 117 of 1998 ('the Act').

[2] The appellant challenges a refusal by the Cape High Court (Irish AJ) of its application for various forms of relief based on its contention that the seat occupied by the third respondent, Mr Jones, as a ward councillor of the fourth respondent, the Democratic Alliance political party ('the DA'), in the council of the second respondent, George Local Municipality ('the municipality') became vacant consequent to his resignation from the municipality

and as a member of the DA. The appeal is with the leave of the court below.

[3] Despite the substantial conflict which mired the background facts of the matter especially in relation to Jones' motives for resigning and the events surrounding such resignation, those relevant to the central dispute were not in real contention. On an application of the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹ these facts may be summarised as follows. The case arose in the aftermath of the last parliamentary floor crossing² window-period in September 2007. At the time, the DA controlled the municipality, in alliance with various smaller political parties, by a slim majority of 18 seats, one which was held by Jones, whilst the appellant held the remaining 17 seats. It appears that there were tensions within the DA which resulted in some of its members resigning and others being suspended or expelled from the party.

[4] Jones was one of the disenchanting DA members because promises previously made to him on behalf of the party to advance his political career had not materialized. He intended leaving the DA to join the appellant and had submitted the requisite notice to the appellant for filing with the Electoral Commission.³ His imminent departure from the DA would obviously upset the

¹ 1984 (3) 623 (A) 634E-635C.

² The Constitution of the Republic of South Africa Fourth Amendment Act 18 of 2002, which was later repealed by the Constitution Fourteenth Amendment Act and Constitution Fifteenth Amendment Acts of 2008, created the controversial floor crossing system which allowed members of parliament and provincial legislatures and local government councillors during certain periods, subject to specific conditions, to switch their allegiance and take their seats with them from one political party to another.

³ Established by s 181 of the Constitution of the Republic of South Africa, 1996 and the Electoral Commission Act 51 of 1996.

balance of control in the municipality and was, seemingly, a matter of great concern to the relevant parties.

[5] On 26 March 2008, the municipal manager, Mr Africa, found a sealed letter on his desk which his receptionist said she had been told, presumably by its courier, was Jones' resignation as the DA's ward councillor from the municipality's council. According to the municipal manager, he did not read the letter because he had to attend an imminent council budget meeting. He further believed, admittedly erroneously, that the Act entitled him to a seven-day period within which to process the resignation and that the matter was therefore not urgent. Thus, the letter remained unattended until noon on the following day when he received a telephone call from another DA ward councillor, Mr Londt, informing him that Jones had changed his mind about the resignation and would fetch his resignation letter shortly. Indeed, Jones arrived at his office soon thereafter, in Londt's company. He then gave Jones his letter, unopened and unread, in the belief that he was entitled to withdraw his resignation as the resignation had not yet been declared to the Electoral Commission in terms of the relevant law. Jones opened the envelope in his and Londt's presence, identified its contents as his resignation letter and left with it without showing it to him.

[6] At a DA meeting held later that day which the municipal manager attended, Jones produced the letter and informed those present that he had resigned impulsively, actuated by emotional pressure, and regretted the act. In the letter, which according to Jones was prepared for him by Pastor Smart and Inspector Ryk

but was signed by him, he resigned from both the DA as its member and as a municipal council member with immediate effect.⁴ The letter indicated that its copies would be sent to a Mr de Swart, the municipality's executive mayor and the Electoral Commission but, as it turned out, no such copies were sent.

[7] In view of Jones' explanation and express wish to remain a member of the DA, the party meeting resolved not to take the matter further. The manner in which the municipal manager had dealt with the issue drew the ire of the appellant's Southern Cape branch and the provincial minister for Local Government and Housing. On 31 March 2008 Jones wrote another letter to the municipal manager, formally withdrawing his resignation from the municipal council.

[8] In the court below and before us, the appellant contended, principally, that in terms of s 27(a) of the Act Jones' seat became vacant as a matter of law once his letter of resignation was delivered to the municipal manager who was, in any event, aware of the letter's content. It was argued that to deny a resignation by reason of the municipal manager's failure, whether deliberate⁵ or negligent, to read the resignation letter would jeopardise certainty of practice in municipalities. Further, this could expose municipal managers to the risk of political interference to protect an

⁴ The original text was in Afrikaans and read:

'Geagte Heer

Re: BEDANKING AS RAADSLID

Hiermee dien ek my bedanking in as raadslid van die George Stadsraad en Demokratiese Alliansie met onmiddellike effek.'

⁵ The *bona fides* of the municipal manager, a high-ranking DA member, in failing to read the letter, allowing Jones to retrieve it and subsequently joining forces with Jones in defending the application, was a matter of great contention for the appellant. So was Jones' sudden appointment to the mayoral committee on 31 March 2008.

incumbent majority which might have appointed them to the position as in the present case, so the argument went. Another contention advanced on the appellant's behalf was that Jones' membership of the DA simultaneously ceased with the delivery of the resignation letter by virtue of clause 3.5.1.3 of its federal constitution which proclaims cessation of membership when 'a member declares his or her resignation or intention to resign from the party or intention to join another party'.⁶

[9] The relief sought by the appellant was thus aimed at compelling the municipal manager to acknowledge that Jones had resigned from the municipal council and to declare a by-election to fill the council seat supposedly left vacant by such resignation in accordance with s 25(1)(d) and (3) of the Act.⁷ Its basis was that the municipal manager's acquiescence in Jones' withdrawal of his resignation by returning his resignation letter to him and his failure to declare a vacancy so that a by-election to fill Jones' seat could be called, conduct which the appellant contended was unlawful, constituted administrative actions reviewable under s 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000.

[10] The court below dismissed the application on the finding that the resignation letter would have to be read by its intended

⁶ The appellant's initial reliance on clause 3.5.1.1 of the DA's Constitution, which provides for the termination of membership when the member submits his or her written resignation from the party, was abandoned in view of the DA's denial of receiving Jones' resignation.

⁷ These provisions of s 25 respectively provide:

'(1)(d) A by-election must be held if a vacancy in a ward occurs.

...

(3)(d) The municipal manager of the municipality concerned, after consulting the Electoral Commission, must, by notice in a local newspaper, call and set a date for the by-election, which must be held within 90 days of the date on which the vacancy occurred.'

recipient to become effective, which did not occur. The appellant's reliance on the provisions of the DA's federal constitution also did not find favour with the court. In its view, Jones had not declared his resignation as contemplated by such provisions. Nor could the appellant seek declaratory relief regarding Jones' membership of the DA as it was a private, contractual issue between Jones and that party.

[11] Section 27 governs a councillor's vacation of office and, in subsec (a), decrees that '[a] councillor vacates office during a term of office if that councillor resigns in writing'. A resignation must be effective immediately or from a specified date. Being a unilateral legal act, it does not need to be accepted by the intended recipient to be so effective.⁸ But, it must be unequivocally communicated to the other party to be effective, unless there is a contrary stipulation.⁹ The provisions of s 27(a) require more: that the notice of resignation should be communicated in writing. The reason for that, in my view, is not far to seek and it is to provide certainty.

[12] As observed by the court below, a ward councillor's vacation of office from a municipal council has serious implications of public significance for a local authority as it impacts various statutory provisions relating to quora and composition and requisition of meetings. For example, s 160(3) of the Constitution (and s 30(1) and (2) of the Act) requires a majority of municipal council members to be present at a council meeting before a vote can be

⁸ *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) 954A-B.

⁹ *Schuurman v Davey* 1908 TS 664; *Jaffer v Falante* 1959 (4) SA 360 (C) at 362F-363E; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) paras 28 and 29.

taken on any matter and a determination of questions before such council by majority vote. In terms of s 160(4), the council may not pass a by-law without notice to all councillors. Furthermore, a municipality is bound by strict statutory imperatives when a vacancy does occur. As indicated above, s 25 of the Act prescribes that a by-election be held, within strict time frames, and enjoins the municipal manager, after consultation with the Electoral Commission, to set that process in motion. Thus, a set composition of a municipal council's membership is critical for its effective and orderly functioning and such composition must be readily ascertainable at all times.

[13] The questions which then arise in this matter are whether Jones resigned as a municipal councillor and, if he did, whether the municipality was advised of such resignation. That he expressed the intention to resign was not disputed, correctly so in my view. What was contested was whether or not such intention was communicated or conveyed to the mind of the municipality. It was argued for the appellant that mere delivery of the resignation letter at the municipal manager's office sufficed and that in this case the municipal manager was, moreover, aware of the contents of the letter. On the other hand, the respondents contended that the appellant's first hurdle was that the proper party upon whom the notice should have been served was the Speaker of the council as its chairperson, not the municipal manager. It was argued further that even if the municipal manager was the proper recipient, he had to read the notice to be informed of the resignation for purposes of s 27(a).

[14] Regarding the question of a proper recipient, the legislature has not identified the party within the municipal council upon whom the resignation notice must be served to be effective. It seems to me that there may well be a strong case for the submission that the municipal manager is such a party considering the functions and powers of this functionary who is the administrative and accounting head of a municipality.¹⁰ These duties include managing communications between the municipality's administration and its political structures and political office bearers. It is the municipal manager who is statutorily tasked to attend the immediate consequences of a councillor's vacancy. In addition, notification of a councillor's resignation has historically been given to the municipal manager's counterpart, the town clerk, under the Act's predecessor, the Municipal Ordinance 20 of 1974 (the Ordinance),¹¹ which previously regulated municipalities. According to the affidavits, this practice seems to have carried over to the Act's tenure, to resignations recently preceding Jones'. But, regardless of these strong indicators, I will assume without deciding that here the municipal manager upon whom notice of the resignation was served was indeed the proper recipient of such notice.

[15] What meaning to ascribe to the term 'communicate' in the present context? The *Shorter Oxford English Dictionary* defines it to mean 'the imparting, conveying or exchange of ideas, knowledge, etc. (whether by speech, writing, or signs)'. Dealing with a matter involving a legal act analogous to a resignation, a

¹⁰ Section 82 of the Act and s 55(1) of the Local Government: Municipal Systems Act 32 of 2000.

¹¹ Section 26(1)(b).

cancellation of a lease agreement, in *Swart v Vosloo*,¹² this court held that absent an agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party to bring such cancellation into effect.¹³ I see no reason why this principle should not apply with equal force to a resignation which is also a cancellation of a contract.

[16] That said, a written communication can, in my opinion, effectively be conveyed to its recipient's mind only by its reading. Here, the municipal manager did not read the resignation letter. The fact that he may have been told what it purportedly contained is completely irrelevant. Furthermore, it must, in my view, be considered that the Ordinance similarly made provision for the vacation of a councillor's office and provided for a vacancy in the office of a councillor when, inter alia, 'his written resignation [was] received in the office of the town clerk'.¹⁴ Mere receipt of the resignation notice therefore sufficed for purposes of these provisions. Notably, s 27(a) is worded differently and says nothing at all about receipt. I find this a significant departure which must have been deliberate on the part of the legislature. In my view, the legislature would have stated expressly as it did in the Ordinance that receipt of a resignation notice by a municipal council suffices for a councillor's resignation to take effect if that was its intention.

[17] I conclude, therefore, that it was imperative for the municipal manager to read Jones's letter for his resignation to come into

¹² 1965 (1) SA 100 (A) at 105G.

¹³ See also *Miller and Miller v Dickinson* 1971 (3) SA 581(A) at 581H-588A; *Noble v Laubscher* 1905 TS 125 at 126.

¹⁴ Section 26(1)(b).

effect. Whilst one may have some sympathy with the appellant's fears of possible manipulation of such official in the manner suggested above, there is no indication at all in the papers that the municipal manager refused or failed to read the letter for any reason other than the plausible ones he proffered ie that he had other pressing municipal business to attend and thought he had ample time within which to process it. This finding, in my opinion, dispenses with the need to consider whether or not the municipal manager had the authority to allow the withdrawal of the resignation letter (as there was no actual resignation from the municipal council) and whether Jones resigned from the DA. The appeal must accordingly fail.

[18] In the result the appeal is dismissed with costs.

MML MAYA
Judge of Appeal

APPEARANCES:

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