

REPUBLIC OF SOUTH AFRICA



ELECTORAL COURT, BLOEMFONTEIN

CASE NO: 007/14

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. <u>✓</u>
13/05/2015	
DATE	SIGNATURE

In the application between:

MEC CO-OPERATIVE GOVERNANCE, HUMAN
SETTLEMENTS AND TRADITIONAL AFFAIRS,
NORTHERN CAPE

Applicant

and

INDEPENDENT ELECTORAL COMMISSION

First Respondent

THE MAYOR: DANNY JONAS

Second Respondent

THEMBELIHLÉ LOCAL MUNICIPALITY

Third Respondent

MUNICIPAL MANAGER: THEMBELIHLÉ

LOCAL MUNICIPALITY

Fourth Respondent

SUMMARY: Electoral law – interpretation of s 27(f)(ii) of the Local Government: Municipal Structures Act 117 of 1998 as amended – whether a candidate's name appearing on a party list makes him, *ipso iure*, a member of that political party – this court found that it does not follow – membership is a voluntary choice a person makes.

JUDGMENT

SHONGWE JA, (Moshidi J and Ms Pather concurring)

[1] This is an application for the review and setting aside of a decision of the Electoral Commission (the EC) which declined a request by the applicant, the MEC for Co-operative Governance, Human Settlements and Traditional Affairs, Northern Cape (the MEC) to hold and manage a by-election in Ward 1 of the Thembelihle Local Municipality.

[2] The MEC sought a declaratory order that a vacancy had occurred in Ward 1 of the Thembelihle Local Municipality in terms of s 27(f)(ii) of the Local Government: Municipal Structures Act 117 of 1998 as amended (the Structures Act).

[3] I wish to set out from the onset, the facts that led to the request to hold and manage a by-election in Ward 1. The second respondent ('Councillor Jonas') is a duly elected councillor and a duly elected Mayor of Thembelihle Local Municipality. In April 2014 the MEC became aware that Councillor Jonas' name appeared on a candidate list of a political party – the Economic Freedom Fighters (the EFF).

[4] The MEC requested the municipal manager to call and set aside a date or dates for a by-election in Ward 1 in terms of s 25(3) of the Structures Act which provides that the municipal manager, must, after consultation with the EC, by notice in a local newspaper call and set a date for the by-election if a vacancy occurs. The MEC was obviously of the view that a vacancy had occurred by virtue of Councillor Jonas' name appearing on the candidate list of the EFF. This view was formed because the MEC read s 27(f)(ii) of the Structures Act to mean that Councillor Jonas had vacated his office.

[5] Section 27(f)(ii) reads as follows:

'27 Vacation of office:

A councillor vacates office during a term of office if that councillor-

- (a) resigns in writing;
- (b) is no longer qualified to be a councillor;
- (c) was elected from a party list referred to in Schedule 1 or 2 and ceases to be a member of the relevant party;
- (d) contravenes a provision of the Code of Conduct for Councillors set out in Schedule 1 of the Local Government: Municipal Systems Act, 2000, and is removed from office in terms of the Code;
- (e) is a representative of a local council in a district council and ceases to be a member of the local council which appointed that councillor to the district council or is replaced by the local council as its representative in the district council; or
- (f) was elected to represent a ward and who-

- (i) was nominated by a party as a candidate in the ward election and ceases to be a member of that party; or
- (ii) was not nominated by a party as a candidate in the ward election and becomes a member of a party.'

[6] The municipal manager neglected or failed to act in terms of the request by the MEC. The MEC decided to act in terms of s 25(4) of the Structures Act which entitles him, after consulting the EC, to call and set aside a date for the by-election, which must be held within 90 days of the applicable date. However, the EC responded by stating that on the facts presented to it no vacancy had arisen and therefore it was not in a position to acquiesce to the request. The EC required proof or information supporting the contention that Councillor Jonas had indeed joined a political party.

[7] It is clear that the MEC and the EC had two diametrically opposed views on the understanding and interpretation of s 27(f)(ii) of the Structures Act. Put differently they could not agree whether or not a vacancy had arisen. Hence the EC was not prepared to call and manage a by-election. The MEC took the view that the EC's refusal to manage a by-election constituted an unlawful administrative action/decision, which entitled him to approach this court to review and set aside the said decision.

[8] The review application came before this court on 16 January 2015 for hearing. The applicant's counsel requested a postponement because she came to know, for the first time on that day, of the existence of a newspaper

article which purported to be an interview held by Councillor Jonas which, it was argued, contained an admission by Councillor Jonas that he had become a member of the EFF. The application was opposed, however, this court granted the postponement allowing the applicant an opportunity to prepare a substantive application in terms of Rule 6(5)(e) of the rules of this court. Further supplementary supporting and opposing affidavits were filed introducing further evidence including the aforesaid newspaper article.

[9] On 9 April 2015 during the hearing of this matter it transpired that both the EC's and the second respondent's counsel were not opposing the introduction of the newspaper article. Counsel for the applicant also indicated that she was abandoning the evidence regarding the pictures found on social media, namely Facebook, of Councillor Jonas wearing what appeared to be the EFF uniform. The concessions were noted and the introduction of the further evidence was allowed.

[10] During the discussions between the MEC, EC and Councillor Jonas' attorneys, as early as 30 May 2014, Councillor Jonas' attorneys conceded that he had been approached by leaders of the EFF to have his name on their candidate list of both the provincial and national parliament because of his experience and expertise, to which Councillor Jonas agreed. However in the said correspondence, it was categorically denied that Councillor Jonas was ever a member of the EFF and or any other political party. An affidavit by Councillor Jonas was attached to the said correspondence which contained, inter alia, a denial of ever being a member of the EFF and a further sentence

that reads: 'I realised, and it was confirmed to me that you need not be a member of the EFF to represent them in Parliament or legislature, as was the case with members of SOPA and others who appeared on their list'.

[11] The central question to be adjudicated upon is whether Councillor Jonas had become a member of the EFF, a political party. If it is proved that he became a member then in terms of s 27(f)(ii) a vacancy shall have occurred and Councillor Jonas will have to vacate his office, consequently the application will have to succeed. However, if the applicant fails to prove his membership, the application stands to be dismissed.

[12] Political rights and related matters are governed by s 19 of the Constitution of the Republic of South Africa Act 108 of 1996. It provides, *inter alia*, that every citizen is free to make a political choice, which includes the right to participate in the activities of, or recruit members for a political party – to stand for public office and, if elected to hold office. It is all about choice – no person can or should be deemed to be a member of a political party. Therefore the applicant's contention that Councillor Jonas had become a member of EFF by operation of law cannot be correct. Membership of a party cannot be acquired involuntarily. An offer and acceptance must take place.

[13] In my view this matter is not about the correct interpretation of section 27(f)(ii) – the parties, including the applicant, are *ad idem* on what s 27(f)(ii) means – that once a councillor is elected to represent a ward, not having

been nominated by a political party as a candidate – what is usually referred to as an independent candidate – he/she must vacate his/her office if he/she becomes a member of a political party during the term of his/her office. Therefore whether the councillor has become a member of a political party requires a factual investigation resulting in a factual conclusion. It is not a matter of law.

[14] Section 27 of the Electoral Act 73 of 1998 deals with the submission of lists of candidates. It requires registered political parties intending to contest an election to nominate candidates – it does not talk of members – whether or not the candidates nominated are members of that political party, is for the party itself to resolve. Every political party has rules and regulations and in most cases it has a constitution determining who may be a member and who qualifies to be nominated as a candidate. The simplest manner for the applicant to determine whether Councillor Jonas had become a member of the EFF was to approach the EFF and request a confirmation of his membership or the lack thereof. This was not done.

[15] The fact that Councillor Jonas' name appeared on the candidate list of the EFF did not make him a member – however it made him a candidate as required by law. I agree with Mr Mpofu SC, for Councillor Jonas, that the words member, candidate or supporter are not synonymous. For one to become a member of a political party, which is indeed a voluntary association, one makes a choice to join as a member and thereafter applies for membership – it will be for the political party to decide whether or not to

accept or reject the application. Councillor Jonas has confirmed on affidavit that he was not a member of the EFF.

[16] As a second leg of its contention, the applicant argued that Councillor Jonas admitted to a journalist to have joined a political party. This was denied by Councillor Jonas. For the applicant to succeed in this respect the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd (Pty) 1984 (3) SA 623 (A)* at 634F-G must be taken into consideration. Van Wyk J in *Stellenbosch Farmers' Winery Ltd v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234 (C)* at 235E-G said:

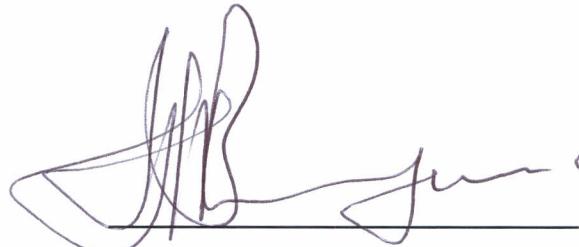
'[W]here there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order ... Where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted.'

Councillor Jonas on separate occasions denied having become a member of the EFF as indicated in paragraph 10 above. This court based on the general rule in *Plascon-Evans* has no choice but to reject the applicant's version of events and accept Councillor Jonas' version.

[17] The applicant contended that by virtue of Councillor Jonas' name appearing as a candidate on the EFF's list that, *ipso iure*, made him a member of the EFF. I have concluded and logic also fortifies my conclusion that choice is fundamental for membership to exist. In my view the applicant

failed to prove that Councillor Jonas became a member of the EFF therefore it cannot be said that a vacancy arose which entitled the applicant to request the EC to manage a by-election in Ward 1 of the Thembelihle Local Municipality. The refusal by the EC was justified, reasonable and lawful in the circumstances. The application stands to fail in its entirety.

[18] In the result the application is dismissed.

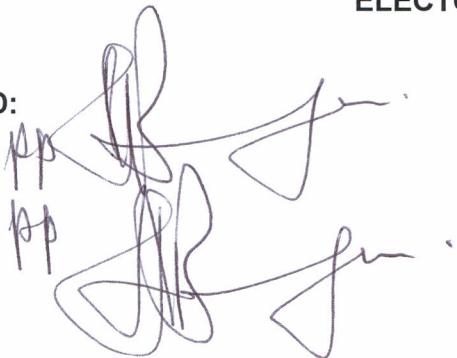


**JUDGE J B Z SHONGWE
CHAIRPERSON OF THE
ELECTORAL COURT**

CONCURRED:

Moshidi J

Ms Pather



SUBMISSIONS

APPLICANT: LSN Thomas SC
TK Manyase

FIRST RESPONDENT MTK Moerane SC
L Gcabashe

SECOND RESPONDENT DC Mpofu SC

DATE OF HEARING: *09 April 2015*

DATE OF ORDER:

DATE OF JUDGMENT: *13 May 2015*