REPUBLIC OF SOUTH AFRICA

ELECTORAL COURT, BLOEMFONTEIN

Not Reportable
CASE NO: 006/20 IEC

In the matter between:

SIYABULELA MALAWU	Applicant
and	
THE ELECTORAL COMMISSION	First Respondent
THE MEC FOR CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS, EASTERN CAPE	Second Respondent
AMAHLATI LOCAL MUNICIPALITY	Third Respondent
THE MUNICIPAL MANAGER, AMAHLATI LOCAL MUNICIPALITY	Fourth Respondent

Neutral Citation*: Malawu v The Electoral Commission and Others* (Case no 006/20 IEC) [2020] ZAEC 1 (18 November 2020)

Coram: MBHA JP, LAMONT J, SHONGWE AJ, PATHER (ADDITIONAL MEMBER)_

JUDGMENT

LAMONT J (MBHA JP, SHONGWE AJ and PATHER concurring):

INTRODUCTION

[1] On the 9 November 2020 the applicant launched an urgent application against the respondents in this matter. The applicant sought an order directing the respondents to postpone the by-elections scheduled to be held at Amahlati Ward 13, Local Municipality, Stutterheim (the ward) on the 11 November 2020. In the alternative the applicant sought an order that the holding of by elections in that ward be held beyond the 90 day period envisaged in section 25(3)*(d)* of the Local Government Municipal Structures Act 11 of 1999.

[2] The applicant did not cite any of the political parties who had put up candidates for election. The applicant put the respondents on terms to file papers and set the matter down for hearing on 10 November 2020 at 12h00. The first respondent sought an opportunity to file later than the time set by the applicant and in due course an answering affidavit was filed by the first respondent and subsequently there was a replying affidavit filed by the applicant.

[3] On the 11 November 2020 an order was made dismissing the application brought by the applicant. It was indicated that reasons would follow and these are the reasons.

[4] The applicant set out that during 2016 he was elected into office as a councillor representing the ward. His term of office was for a period of five years expiring during 2021. During 2018 and 2019 he was accused of various breaches of the Code of Conduct for councillors. An investigation ensued in terms of the Code of Conduct. During the course of that investigation a further

investigation concerning the applicant's failure to attend three consecutive Council meetings was made. During March 2020 the second respondent wrote a letter to the applicant requesting the applicant to make representations as to why he should not be removed as a councillor. Thereafter the second respondent removed the applicant as a councillor.

[5] The applicant instituted review proceedings in the Grahamstown High Court seeking to set aside the second respondent's decision. It is not apparent from the papers when exactly this application was launched. During the review process the applicant obtained the record of proceedings from which it appeared that the investigation team was not the same as the team that investigated the breaches of the Code of Conduct alleged against the applicant. A report had been prepared and only one member out of five people who are set out as members of the investigative team signed it. The report recommended inter alia that the second respondent should afford the applicant an opportunity to appear before the investigating team and present his version, and that the Council should rescind its resolution reprimanding the applicant for failure to attend more than three consecutive Council meetings.

[6] On 3 November 2020 the High Court dismissed the application. The court held that by reason of the dispute which existed in the papers before it the second respondent's evidence that the report was considered and had been completed by all persons who were to sign must be dealt with on the basis of its evidence and that in any event the applicant had failed to attend more than three consecutive meetings and his removal was mandatory.

[7] The applicant was dissatisfied and on 3 November 2020 he launched an application for leave to appeal. The applicant has not been given leave to appeal and no appeal is pending other than in the form of the application for leave to appeal. The applicant submits that an application for leave to appeal suspends the order. There is no order in favour of the applicant hence there is no order to be suspended. The legal proceedings which have been pursued by the applicant conferred no substantive rights on him.

[8] One of the fundamental bases upon which the applicant alleges the judgment to be flawed is an inference that he drew that as the report was not signed by members whose names were referred to in it, they had not seen and agreed to it. This inference is unfounded. The fact that certain members did not sign the report does not mean that they were not party to it and did not make a recommendation contained in it. The appellant's claim that there is a reasonable prospect of success of the proposed appeal is unfounded. The fundamental reasoning which he presented to the court is flawed.

[9] The applicant claims to have only received notice of the fact that elections were to take place on 11th November 2020 when someone told him about that on 6 November 2020. The applicant claimed the matter to be urgent as, if another person was appointed pursuant to the election he would be unable to be appointed to that position should his appeal succeed.

[10] The first respondent stated that during September 2020 it indicated publicly that the by-election for the ward in question would take place on 11 November 2020. On 9 October 2020 the second respondent officially set the date. In anticipation of the election date polling stations in the wards were opened to allow voters to register to vote, amend the registration details and to verify that the registration details were accurate. On 23 October 2020 an election timetable was published A special targeted communications and education program was set in place in the relevant wards to teach voters about the safety protocols associated with the COVID-19 pandemic and to encourage them to participate. The inference is irresistible that the appellant knew as he was a community leader in his ward of what was taking place by way of preparation for the election and of the election date itself.

[11] The applicant did not cite the political parties whose candidates are standing for election. There are four registered parties who have nominated candidates to contest the by election. They are the African National Congress, the Congress of the People, the Democratic Alliance and the Economic Freedom Fighters. All of these parties have a direct and substantial interest in

the relief sought by the applicant. They are also the persons who would in the ordinary course represent their member, the person standing for election who is directly affected by the proposed relief claimed by the applicant. The failure of the applicant to cite these parties is fatal to the application as materially interested parties have not been cited

[12] The objection of non-joinder may be raised where the point is taken that a party who should be before the court has not been joined or given judicial notice of the proceedings. The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned. (See: *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21. See also *Aquatur (Pty) Ltd v Sacks* 1989 (1) SA 56 (A) at 62A–F; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) paras 64–66.)

[13] A court must raise the issue of non-joinder mero motu if it believes that there are interested parties who should have been joined or given notice of the proceedings, and this can even be done on appeal. (See: *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21; Herbstein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*.)

[14] A party is necessary and is substantially interested if the judgment cannot be sustained and carried into effect without necessarily prejudicing his interest. Clearly, candidates and political parties are parties which are substantially interested in the matter. (See *Rosebank Mall (Pty) Ltd and another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W).)

[15] The decisions of *Morgan and Another v Salisbury Municipality* (1935 AD 167), *Collin v Toffie* (1944 AD 456) and *Home Sites (Pty.) Ltd v Senekal* 1948 (3) SALR 514 (AD) were quoted with apparent approval in *Amalgamated*

Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 656-9. In this case the respondent had appointed an arbitrator to determine a dispute between the appellant and the City Council of Durban and the appellant sought the setting aside of that appointment. At 657 Fagan AJA (as he then was) stated:

'The question of joinder should surely not depend on the nature of the subject-matter of the suit . . . but . . . on the manner in which, and the extent to which, the Court's order may affect the interests of third parties.'

At 661 Fagan AJA said that the City Council had no less an interest than did the appellant. He went on to say that:

'. . . the Council is directly and substantially interested, and that a judgment as prayed . . . cannot be sustained and carried into effect without necessarily prejudicing the interest of the Council.'

In the result it was ordered that judgment stand over until a consent by the Council to be bound by the judgment had been obtained or other directions for the future conduct of the proceedings had been given.

[16] In the present matter the issue of joinder of candidates concerns candidates who must be joined by necessity. The failure to have done so results in the matter being unable to proceed. (See: *Rosebank* supra, para [11]: 'It is important to distinguish between necessary joinder, where the failure to join a party amount[s] to a non-joinder, on the one hand, and joinder as a matter of convenience, *where the joinder of a party [is] permissible and would not give rise to a misjoinder*, on the other hand. In cases of joinder of necessity the Court could, even on appeal, mero motu raise the question of joinder to safeguard the interests of third parties and decline to hear the matter until such joinder has been effected or the Court [is] satisfied that third parties have consented to be bound by the judgment [of the Court] or [have] waived their right to be joined.' (Emphasis added))

[17] Normally there could be a stay and parties can be joined. In the present matter there is no time for joinder to take place as the election is due to take place on 11 November 2020. Hence the effect of non-joinder is that

the applicant must fail in his application as the prejudice to parties who have not been joined cannot be remedied.

[18] The provisions of the Local Government Principal Electoral Act 2000 in s 8(1) provides that the commission may request the second respondent to postpone the voting day if it is satisfied that it is not reasonably possible to conduct a free and fair election on that date. The basis for any postponement is dependent upon it being not reasonably possible to conduct a free and fair election. This is not the basis upon which the applicant approached this court for relief. The basis upon which he approached this court was that his appeal would be rendered academic and of no force and effect if the election proceeded. The applicant in his replying affidavit suggests that he intended this to mean that the election would not be free and fair as it was not fair to him.

[19] The test is not whether or not the election is free and fair to him but whether or not it is freely and fairly held. This involves a consideration not only of the applicant's position but also of all other parties. There can be no such consideration without there being a joinder of the relevant parties to the application and without appropriate facts being presented to the court. This is simply not the applicant's case as made out in the founding affidavit.

[20] The applicant has failed to make out any case entitling him to the relief and the application fell to be dismissed. For that reason this court dismissed the applicant's application with no order as to costs.

LAMONT J

JUDGE OF THE ELECTORAL COURT

18 November 2020