

REPUBLIC OF SOUTH AFRICA



ELECTORAL COURT, BLOEMFONTEIN

CASE NO: 005/22EC
Not Reportable

In the matter between:

SIYATHEMBA COMMUNITY MOVEMENT (SGB)

Applicant

and

INDEPENDENT ELECTORAL COMMISSION

First Respondent

SIYATHEMBA MUNICIPAL MANAGER

Second Respondent

JOHAN ANDREW PHILLIPS

Third Respondent

MAURICIAL ESTELL NIMMERHOUDT

Fourth Respondent

PATRICIA MOOI

Fifth Respondent

Neutral Citation: *Siyabathemba Community Movement v The IEC and Others* (Case no 005/22 EC) [2022] ZAEC 7 (22 April 2022)

Coram: MBHA JA, MODIBA J and SHONGWE AJ and MS PATHER and PROFESSOR NTLAMA-MAKHANYA (Members)

JUDGMENT

Shongwe AJ (Mbha JA and Modiba J and Ms Pather and Professor Ntlama-Makhanya (members) concurring):

Introduction

[1] This is a review application of the decision of the first respondent, (the Commission) which concluded that the expulsion of the third to fifth respondents constituted a dispute of leadership within the applicant membership not supported by facts and also that it is not in line with the legislative mandate of the Commission.

[2] The applicant, represented by Mr R J Februarie, in his capacity as : the elected chairperson of the applicant, brought this application in which he prayed for an order:

(a) That the Commission be directed to accept that third to fifth respondents' expulsion was consistent with the provisions of the applicant's constitution and was accordingly authorised.

(b) That the conclusion that was reached by the Commission prior to the applicant's submission of the outcome of the disciplinary procedure, that the present dispute between the applicant and the first to fifth respondents constituted a dispute of leadership is not supported by the facts and not in line with the legislative mandate of the Commission and should accordingly be reviewed and set aside.

(c) That the Commission be ordered to implement the applicant's request to amend the proportional representative list and to further update the applicant's details and,

(d) That the applicant is afforded further and/or alternative relief as deemed fit by the above honourable court.

[3] The application is opposed by all the parties save for the Commission which decided to file a notice to abide and an explanatory affidavit. This matter has a rather long history but because of the approach I prefer to take it will not be necessary to deal with all the historical background. However, all the facts and the law will not be ignored when considering the merits. In opposing this application, the second respondent, the Siyathemba Municipal Manager (MM), raised, amongst others, certain points in limine, which are fatal to the applicant's case on their own. First, Mr Februarie does not have locus standi to bring this application or any authority to depose to any affidavit on behalf of the applicant. Second, the applicant misjoined the MM and/ or did not join the Siyathemba Municipality. Third, there is a similar matter involving the same parties

pending in the Northern Cape High Court (Lis' alibi pendens) and lastly, the application lacks urgency. The third to fifth respondents also raised a point in limine of Lis alibi pendens. I will later in this judgment, deal with these points in limine in detail.

The Facts

[4] It is common cause that the applicant is a duly registered political party and participated in the 1 November 2021 local elections. It is also not in dispute that the applicant won ward 2 and obtained three proportional seats. On 20th November 2021 the applicant had its inaugural sitting of the Siyathemba Municipal Management Structure (SMM) which invitation was extended to all members, however, the third to fifth respondents failed to attend nor did they proffer an apology. The third to fifth respondents failed to attend the meeting on 21st November 2021 which was in preparation of the inauguration of the council and also refused to sign a deployment contract which they were duty bound to sign. As a result of their conduct the meeting resolved to expel them from the applicant. The Commission as well as the second respondent were informed of the decision to expel them but were advised by the second respondent that such action can only be taken after the inauguration of the council. Despite not signing the deployment contracts, the third to fifth respondents attended the inauguration of the council and were duly inaugurated as councillors.

[5] On 13th December 2021 the third to fifth respondents were served with a 'NOTICE OF SUSPENSION AND NOTICE TO APPEAR AT A DISCIPLINARY HEARING'. The third to fifth respondents failed to attend the hearing on 22nd December 2021. However, the hearing proceeded in their absence and they were summarily expelled from the applicant. The finding to expel them was however presented to the 'DM secretary' on 28th December.

[6] On 24th November 2021, the applicant launched an urgent application, before the Northern Cape high Court, under case no: 2470/21 wherein it sought an order upholding its decision to expel the third to fifth respondents. On 14th December 2021, the applicant together with its members embarked on a peaceful protest march to the offices of Commission and the second respondent. There they handed over various memoranda including the notice of suspension and disciplinary hearing of the third to fifth respondents. The Commission accepted the memorandum but indicated that it does not involve itself in internal party issues. The second respondent advised the applicant that it will await the outcome of the disciplinary hearing. The third to fifth respondents were served with the expulsion letter on 4th January 2022.

[7] On 19th January 2022 the Commission received a letter from the applicant advising that the third to fifth respondents have been expelled. As expected, the Commission needed the third to fifth respondents to confirm or deny this allegation. The third to fifth respondents responded and denied the allegations and requested the Commission to allow due process to unfold. This response convinced the Commission that there was an internal leadership dispute and therefore it was not within its powers to intervene in terms of Regulation 9 of the Electoral Commission Act 51 of 1996, (the Act) (Regulation 9). As a result the Commission decided that there existed an internal dispute of membership.

Legal Framework

[8] It is common cause that the Commission was established in terms of section 3 of the Act, section 4 deals with the objects of the Commission and section 5 deals with the powers, duties and functions of the Commission. For the Commission to exercise its duties and functions properly, it is best for it to stay away from interfering or meddling in internal affairs of political parties other than those germane to the management of elections. An internal affairs dispute may include, inter alia, a dispute of membership or status of a member's standing in the party.

[9] Upon registration a political party, (in terms of section 15 of the Act), must provide the Commission with its constitution, otherwise known as the Deed of Foundation. This document must contain, inter alia, the particulars of the party leader and the name and address of members constituting the executive body of the party. Regulation 9 provides that 'any change in the particulars furnished in Annexure 1 must be notified to the Chief Electoral Officer in writing within 30 days after such change by the registered leader of the party.' In casu, the third respondent is reflected as the registered party leader. According to the records of the Commission, it has not received any written notification of any change or amendment of the Deed of Foundation from the registered party leader as provided in Regulation 9 of the Regulations.

[10] Section 27 of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) provides for the occurrence of a vacant seat on the municipal council and the procedure to fill that vacant seat. (See item 18 read with item 20 of Schedule 1 of the Structures Act). In my view, the Commission correctly and succinctly sets out the procedure and the chronology of how a political party should go about amending or

altering its registered membership list and its leadership, in paragraphs 35 to 36 of its explanatory affidavit. The said procedure has not been properly followed by the applicant.

[11] It is clear from the correspondence between the Commission and the applicant, including its membership, that there has been conflicting communication. For instance, the third to fifth respondents aver that they have been unlawfully expelled and also that Mr J A Phillips is the registered party leader and not the deponent to the applicant's founding affidavit, (Mr R J Februarie). These averments are confirmed by the second respondent. The third to fifth respondents also contend that the pending case no: 148/22 before Northern Cape High Court deals with the disputes of membership and leadership, it involves the same parties, the same cause of action, therefore, so argues the third to fifth respondents, the outcome of the pending case will be determinative of this application. Hence the point in limine of *Lis alibi pendens*. This matter is similar to the reported case of *Pan Africanist Congress of Azania v Independent Electoral Commission of South Africa and Another* [2016] ZAGPPHC 250 which had similar facts and also suffered the same fate. I may add that it may be so that the applicant had a valid reason in expelling the third to fifth respondents, but it appears as if the applicant did not follow the correct procedure in doing so. The applicant may also have not followed the correct procedure in reporting the vacant seat(s) to the MM and/or the Commission, to enable the Commission to properly amend/alter the party list accordingly.

Points in Limine

[12] The second to the fifth respondents raised the point that Mr R J Februarie does not have locus standi to depose to an affidavit as chairperson of the applicant because the third respondent, Mr Phillips, is the registered leader of the applicant. At no stage did Mr Februarie present a resolution mandating him to act on behalf of the applicant. Even after the point in limine was raised he failed to rectify the position. There is no basis of accepting that he is qualified to represent the applicant. Solely on this point the application is fundamentally flawed and stands to be dismissed. There seem to be no dispute that case no: 148/22 is pending before the Northern Cape high court, which case is between the same parties, and deals with the same cause of action and the same relief. At the time of preparing this judgment this court had not been provided with the outcome of the pending case. I see no reason why I should not declare this application frivolous and vexatious. It is so declared. The issue of misjoinder or nonjoinder is neither here nor there, it will not be necessary to decide it now.

Conclusion

[13] In my view, this application is flawed in all fronts. On the merits, it is clear that there is an internal leadership dispute, which dispute removes it from the realm of the mandate of the Commission. In my view, the Commission does not have the authority to deal with it in terms of the existing legislation. The points in limine raised by the respondents are determinative of this application. The application falls to be dismissed.

[14] In the result the following order is made:

- 1 The application is dismissed.
- 2 There is no order as to costs.

J B Z SHONGWE
ACTING JUDGE
OF THE ELECTORAL COURT

22 April 2022