



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Not Reportable

Case no: 0019/24EC

In the matter between:

**INDEPENDENT SOUTH AFRICAN NATIONAL
CIVIC ORGANISATION**

APPLICANT

And

BAKOENA STEPHANIE RAMOSIE

FIRST RESPONDENT

ELECTORAL COMMISSION OF SOUTH AFRICA

SECOND RESPONDENT

Neutral citation: *Independent South African National Civic Organisation v Ramosie and Another* (0019/24EC) [2024] ZAEC 18 (14 May 2024)

Coram: ZONDI JA and ADAMS and STEYN AJJ and PROFESSOR NTLAMA-MAKHANYA and PROFESSOR PHOOKO (Additional members)

Heard: 14 May 2024

Delivered: 04 June 2024 – This judgment was handed down electronically by circulation to the parties' representatives via email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 04 June 2024.

Summary: Review in terms of s 20 of the Electoral Commission Act 51 of 1996 read with rule 6 of the Electoral Court Rules – application is late – not accompanied by affidavit to explain lateness – application dismissed.

ORDER

The application is dismissed and each party to pay its own costs.

JUDGMENT

Zondi JA (Adams and Steyn AJJ and Professor Ntlama-Makhanya and Professor Phooko (Additional members) concurring):

[1] The substance of this review concerns the leadership of the applicant, Independent South African National Civic Organization (ISANCO) and more particularly, who should be named as its leader and the contact person. Although ISANCO was established on 28 November 2020 it has been bedevilled by leadership disputes resulting in the formation of two main factions; one led by the first respondent, Mr Bakoena Stephanie Ramosie (Mr Ramosie) and another by Dr Zukile Luyenge (Dr Luyenge). When ISANCO was established, Dr Luyenge was elected as its President and contact person and Mr Ramosie as its Secretary-General. The dispute about leadership has been a cause of litigation in the Free State and Eastern Cape Divisions of the High Court. It is not clear who the rightful President of ISANCO is. Mr Sonwabile Mzuvukile Ndabambi (Mr Ndabambi), the deponent to the founding affidavit, alleges that he is the Secretary General of ISANCO and that Dr Luyenge, and not Mr Ramosie, is the President of ISANCO.

[2] Mr Ndabambi alleges that the special conference at which Mr Ramosie was allegedly elected did not take place. A faction belonging to Dr Luyenge obtained an interdict from the Eastern Cape Division of the High Court, Mthatha, prohibiting Mr Ramosie's faction from holding the conference. Mr Ndabambi alleges that Mr Ramosie was expelled from the party on 22 March 2023 and was removed as a councillor representing the party at Matjhabeng Local Municipality. Mr Ramosie persists that he is still the leader of ISANCO. His claim to leadership is founded on the special

conference outcome at which he was duly elected. He alleges that the conference had already concluded its business by the time that the Dr Luyenge faction tried to prevent it from being held.

[3] The dispute about leadership has created an administrative headache for the second respondent, the Electoral Commission (the Commission). It is required in terms of the Electoral Commission Act 51 of 1996 read with the Regulations for the Registration of Political Parties 2004 to keep and maintain its record relating to the particulars of the registered political parties. The ongoing leadership dispute in ISANCO has made it difficult for the Commission to determine who the rightful leader of ISANCO is and the litany of litigation that has taken place between the two factions has not assisted in resolving the dispute. The Commission has been guided by the court orders in determining who at any given time is the rightful leader.

[4] On 27 July 2023 Mr Ramosie sought and obtained from the Free State High Court an order (Reinders J) directing the Commission to update its records so as to reflect him as ISANCO leader and the contact person. ISANCO, in an application in which Dr Luyenge was a deponent and purporting to be its rightful leader, applied for rescission of Reinders J's order. The high court (Van Zyl J) issued a provisional order in the form of *rule nisi* calling upon Mr Ramosie to show cause on a return day why Reinders J's order should not be rescinded. The provisional order was discharged on 5 February 2024 by Molitsoane J. Molitsoane J gave the following reasons for the order:

'The evidence as contemplated in the affidavit of the respondent appears to be that Luyenge was expelled as a member of the applicant. In my view, the sentiments of the Court in Makhandia as well as the correspondence confirming the expulsion ends suspicion that Luyenge is no longer a member of the applicant. In the absence of a contrary view to the answering affidavit, I must accept evidence as contended by the respondent. The decision to expel him has not been reviewed and set aside. I accordingly cannot find that he is properly authorised in these proceedings. This application cannot succeed'.

[5] On 8 February 2024 ISANCO filed an application for leave to appeal against Molitsoane J's order. Dr Luyenge deposed to the affidavit in support of the application for leave to appeal. That application has not been prosecuted.

[6] On 26 February 2024 the Commission purporting to implement the order of Molitsoane J replaced Dr Luyenge as a leader and contact person of ISANCO and in his stead, appointed Mr Ramosie as ISANCO leader and as its contact person. Pursuant to this order, on 26 February 2024 the Commission addressed a letter to both Mr Ramosie and Dr Luyenge informing them as follows:

- '1 The above subject matter and previous communications bear reference.
- 2 The Commission has had an opportunity to consider the judgment handed down on 5 February 2024, and without repeating what has been communicated in previous communications, this letter will simply address the effects of the handed down judgment, in the Bloemfontein High Court under case number: 3583/2022;
 - 2.1 on 27 July 2023 ISANCO (Dr Ramosie) obtained an order in the Free State Division (Reinders J) directing the Commission to:
 - 2.1.1 effect the changes relating to the party leader and contact person in line with the submission submitted notifying the Commission of the changes in the registration particulars; and
 - 2.1.2 advise ISANCO as led by Dr Ramosie that the changes have been effected in line with Regulation 9 of the Regulations for the Registration of Political Parties as submitted in the letter dated 20 June 2023.
 - 2.2 On 11 August 2023 ISANCO (Dr Luyenge) obtained an order (Van Zyl J), by way of rule nisi, in the form of an interim interdict rescinding the order of Reinders J interdicting the Commission from removing him as the president and contact person. The matter was finally heard on 2 December 2023.
 - 2.3 On 5 February 2024 judgment was handed down and Molitsoane J in his judgment discharged the rule nisi issued of 11 August 2023.
- 3 The direct consequence of the above judgment is that the order of Reinders J of 27 July 2023 remains extant and is so to be effected by the Commission as directed therein.
- 4 We trust that you find the above to be in order.'

[7] Aggrieved by the Commission's decision, ISANCO, on 7 March 2024 brought an urgent application in the Eastern Cape Division of the High Court, Mthatha for the review and setting aside of the Commission's decision. Judge Rusi heard the application and made the following order:

- '1. The decision of the IEC removing the name of the applicant's candidate, Dr Zukile Luyenge from the applicant's party list, which decision was communicated by the IEC in its letter dated 26 February 2024, is hereby reviewed and set-aside.

2. The IEC is directed to amend its records by re-instating the name of Dr Zukile Luyenge as the leader and contact person of the applicant with immediate effect.
3. Pending the final determination of the ***Rule Nisi*** issued by **Ntsepe AJ on 08 June 2023**, the respondent is hereby interdicted and restrained from:
 - (a) interfering with the affairs of the applicant and from acting in any manner by which he purports to be the president of the applicant; and
 - (b) Is hereby ordered to remove his photographs/ pictures from any of the applicant's media of communication by which he represents himself to be the president of the applicant.
4. The first respondent shall pay the costs of this application in his personal capacity.'

[8] On the same day Mr Ramosie appealed against Rusi J's order. Acting on the strength of Rusi J's order on 8 March 2024, ISANCO submitted to the Commission a list of candidates it had nominated in terms of s 27 of the Electoral Act to contest the election. That list included Dr Luyenge's name. At the same time a faction of ISANCO members led by Mr Ramosie submitted its own list of candidates which contained Mr Ramosie's name to contest the election and asked the Commission to appoint Mr Ramosie as a leader and the contact person of ISANCO. The Commission rejected the list submitted by the faction led by Dr Luyenge and accepted that which was submitted by Mr Ramosie's faction.

[9] The Commission did so on the basis that Mr Ramosie had appealed against Rusi J's order. The Commission reasoned that the effect of the appeal was to suspend the operation of Rusi J's order until the appeal was finalised and to reinstate the order granted by Reinders J on 27 July 2023 which directed the Commission to record Mr Ramosie as a leader and the contact person of ISANCO.

[10] As a result of the Commission's refusal to record Dr Luyenge as a leader and contact person of ISANCO, Mr Ndabambi purporting to act on behalf of ISANCO as its secretary general brought an application on 3 April 2024 in which, among others, the following relief was sought:

- (a) Declaring that the decision of the Electoral Commission in removing the name of Dr Luyenge as the leader and contact person of ISANCO and replacing it with that of Dr Ramosie be reviewed and set aside as being null and void *ab initio*;

- (b) directing the Electoral Commission to amend its record by reinstating Dr Luyenge as the leader and contact person of ISANCO;
- (c) interdicting Dr Ramosie from interfering in the affairs of ISANCO pending finalization of the application; directing the Electoral Commission to remove Dr Ramosie's pictures and preventing him in any manner to act as the president of ISANCO.

[11] The application is based on the principle of legality. It is contended on behalf of ISANCO that the Commission acted unlawfully in refusing to implement Rusi J's order. Mr Ramosie opposes the review application on the grounds that Dr Luyenge and Mr Ndabambi lack authority to bring this application on behalf of ISANCO. He alleges that Dr Luyenge is not the member of ISANCO as he was expelled from ISANCO on 29 December 2021. Mr Ramosie alleges further that there is no proof that Mr Ndabambi was authorised by ISANCO National Working Committee (NWC) to bring the application on behalf of ISANCO.

[12] Mr Ramosie denies that Mr Ndabambi is a member of ISANCO. Mr Ramosie avers that in terms of clause 13 of ISANCO Constitution the NWC must appoint a person to sign legal processes on behalf of ISANCO. He says a special meeting should have been convened by the NWC for the purpose of passing the resolution authorizing Mr Ndabambi to represent ISANCO and this was done.

[13] I find that ISANCO authorised the institution of these proceedings and that its NWC appointed Mr Ndabambi to sign the relevant legal processes on its behalf. I say this because there is a resolution attached to the founding affidavit confirming that on 10 March 2024 the ISANCO NWC resolved that Ndabambi be 'mandated to take all legal steps to challenge the decision of IEC in replacing Dr Zukile Luyenge with Bakoena Stephen Ramosie.' In the circumstance, Mr Ramosie's contention that the institution of these proceedings is not authorised should be rejected.

[14] The Commission does not oppose the application on the merits. It abides the court decision. Its opposition is based on three grounds. First, the Commission denies that the application is urgent. Secondly, the Commission contends that the application is late and finally, it raises *lis pendens* defence, that is to say, the subject matter of the application is already pending between the same parties in other courts and that the

present proceedings should be stayed until those proceedings are finalised. In light of the conclusion I have reached below on the delay point it is not necessary to consider the *lis pendens* point. In any event ISANCO concedes in the replying affidavit that there are similarities between this application and that which is still in the Free State High Court. It has undertaken to withdraw the Free State High Court matter.

[15] The Commission's contention that the application lacks urgency has no merit and should be rejected. Electoral matters are by their nature urgent and should be dealt with expeditiously.

[16] A further point taken by the Commission is that the application is late as it was brought outside the period stipulated in the rules of this Court. The Commission alleges that the decision which is sought to be reviewed was taken on 26 February 2024 and the application for the review and setting aside of that decision was only brought on 3 April 2024, long after the three days stipulated in rule 6 had expired.

[17] In terms of s 20(1) of the Electoral Commission Act the Electoral Court may review any decision of the Commission relating to an electoral matter and it requires the Electoral Court to conduct any such review on an urgent basis and to dispose it as expeditiously as possible. The section does not stipulate the period within which the review must be brought. This is dealt with in rule 6 (1) of the Rules of this Court. It provides that any party who is entitled to and wants to take a decision of the Commission on review must lodge a comprehensive written submission with the secretary within three days after the decision has been made. In terms of rule 10 failure to comply with the prescribed time limits or directives of this Court will, by the mere fact thereof, result in a party being barred, unless the court, on good cause shown, directs otherwise.

[18] In response ISANCO submitted that the application was brought timeously. It argued that Dr Luyenge only became aware of the Commission's decision on 26 March 2024 when he noticed from the list of candidates published by the Commission that his name had been removed. To substantiate its argument, ISANCO stated that the decision was made shortly before the Easter weekend of 29 March 2024 to 1 April 2024 which he submitted were not court days. It was accordingly submitted on behalf

of ISANCO that the three-day period provided for in rule 6 did not start running until 2 April 2024. ISANCO maintained that the clock started ticking from 2 April 2024 which is the date on which the application was brought.

[19] This contention must be rejected for the simple reason that it is clear from the resolution passed by ISANCO NWC on 10 March 2024 that Mr Ndabambi was under no illusion as to the date of the decision. The resolution unambiguously stipulates 8 March 2024 as the date on which Dr Luyenge's name was removed from the records in possession of the Commission. I therefore find that the date of the decision is 8 March, and not 26 March as ISANCO wants this Court to believe. The application is late and should have been accompanied by a condonation application to explain the reasons for the delay so as to enable the Court to consider whether or not it should in the exercise its discretion overlook the delay which in my view is unreasonable.

[20] In the alternative counsel submitted that this being a review based on the principle of legality it is not subject to any time limit. All that is required, he argued, is that it must be brought within a reasonable time. He submitted that it was not necessary in this case to bring a condonation application as the review was brought within a reasonable time. He relied on *Khumalo and Another v MEC for Education: Kwa Zulu Natal*¹ and *Buffalo City Metropolitan Municipality v ASLA*² in support of the proposition that a review based on the principle of legality is not subject to any time limit and that the court should not be prevented by procedural obstacles to look into the challenge of an impugned decision.

[21] The Constitutional Court in *Khumalo* was concerned with promotions of the two employees which the MEC had sought to have set aside on the ground that they had been made irregularly. The MEC's application was unreasonably late and was not accompanied by an application to condone the lateness. One of the issues before the court was whether the court should review and set aside the promotions notwithstanding the MEC's delay in bringing the application. This was a self-review application based on the principle of legality.

¹ *Khumalo and Another v MEC for Education: Kwa Zulu Natal* 2014 (5) SA 579 (CC).

² *Buffalo City Metropolitan Municipality v ASLA* 2019 (4) SAA 331(CC).

[22] In other words, the MEC was seeking to redress her unlawful decisions to appoint the two employees who were improperly promoted. At para 45 the Constitutional Court answered the question referred to above as follows:

‘In the previous section it was explained that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia by seeking the redress of their departments’ unlawful decisions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court’s discretion to overlook a delay.’

[23] In *Buffalo City*, also a case involving a self-review by the functionary, the Court endorsed the approach adopted in *Khumalo* in applying the standard to be applied in assessing the delay. It had this to say at para 48:

‘Legality review, on the other hand, has no similar fixed period. This Court in *Khumalo* endorsed the test enunciated by the Supreme Court of Appeal in Gqwetha for assessing undue delay in bringing a legality review application (Khumalo test). Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question becomes whether the Court’s discretion should nevertheless be exercised to overlook the delay to entertain the application.’

[24] This present review is brought in terms of s 20(1) of the Electoral Commission Act read with rule 6(1) for which a specific period is stipulated. A failure to bring the application within the period prescribed by the rule may be condoned by the Court on good cause shown. The Constitutional Court in *Khumalo* made it clear that the fact that in the self-review case based on the principle of legality a court should be slow to allow procedural obstacles to prevent it from looking into the challenge, does not mean that Constitution has dispensed with the basic requirement that review proceedings are to be brought without undue delay. The application is late and there is no application to explain the delay and why the delay should be overlooked. This matter is about leadership dispute and who should be nominated and be placed on a list of candidates to stand in for election. Applications relating to leadership disputes should be brought timeously and without delay. This requirement is important for two reasons.

First, the Commission must know who the rightful leader of the party is to enable it to prepare for the election and secondly, the voters should know who the leader of the party is they want to vote for. The application should be dismissed.

Costs

[25] As regards costs, in general in this Court an unsuccessful party ought not to be ordered to pay costs. But this is not an inflexible rule, and it can be departed from where there are strong reasons justifying such departure such as in instances where the litigation is frivolous or vexatious. There is no suggestion in this case that the application is frivolous or vexatious and that being the case each party should pay its own costs.

Order

[26] The application is dismissed and each party to pay its own costs.

D H ZONDI

CHAIRPERSON OF THE ELECTORAL COURT

Appearances

For the applicant:

D Mpofu and P May

Instructed by:

Madokwe Incorporated, East London

For first respondent:

A Kleingeld

Instructed by:

Kleingeld Attorneys, Bloemfontein

For second respondent:

M Kanyane

Instructed by:

Moeti Kanyane Incorporated, Centurion