



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Not Reportable

Case no: 0038/24EC

In the matter between:

SABELO SITHOLE

APPLICANT

and

ELECTORAL COMMISSION OF SOUTH AFRICA

FIRST RESPONDENT

ABANTU BATHO CONGRESS

SECOND RESPONDENT

Neutral Citation: *Sabelo Sithole v Electoral Commission of South Africa and Others* (0038/2024EC) [2024] ZAEC 30 (19 November 2024)

Coram: Modiba J and Steyn AJ and Professor Phooko (Additional Member)

Heard: Decided in chambers on the papers

Delivered: 19 November 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.

Summary: Application by applicant for declaratory relief to compel Electoral Commission – to recognise and register him as lawful leader of a

registered party – application pending before another court – held application frivolous and vexatious – non-joinder and non-service on intervening party points *in limine* upheld – intervening party has a direct and substantial interest in the subject-matter of the litigation – application dismissed with punitive costs.

ORDER

1. The application is dismissed with costs on an attorney and client scale.
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JUDGMENT

Professor Phooko (Modiba J and Steyn AJ concurring):

Introduction

[1] I must indicate from the onset that the evidence presented before this Court is sketchy, and difficult to grasp. No attempts whatsoever were made to assist this Court to have a full picture of the entire events including several ongoing disputes between the parties that are pending before other forums. What is apparent is that the applicant is jumping from one court to another with the same issue. Whether this is right or wrong, the facts of this case will provide answers.

[2] There appears to be an emerging and unpleasant norm of internal party strife that concerns leadership disputes within registered political parties. This case is no different from those that this Court has had to deal with in the current year, 2024.¹ Abantu Batho Congress (ABC), a registered political party that was formed on 8 January 2020 finds itself faced with a leadership skirmish. On one hand, Mr. Bhungu Mgenzeni Gwala (Mr. Gwala) asserts that he is the lawfully elected leader of ABC. On the other, Mr. Philani Godfrey Mavundla (the intervening party) insists that he is the legitimate leader of ABC.

[3] On 30 October 2023 and 23 November 2023 respectively, ABC through its Secretary General sent a letter to the Electoral Commission (the Commission) requesting it to amend its records to reflect the alleged newly elected President, Mr.

¹ See for example, *Februarie and Others v Phillips and Others* (009/2023EC) [2024] ZAEC 2 (22 February 2024), and *Khumalo v Independent Electoral Commission of South Africa* (0025/24EC) [2024] ZAEC 20 (12 June 2024).

Gwala. However, the Commission declined to do so on the basis that it does not enter into issues related to party disputes. The Commission's refusal to update its records prompted the applicant to lodge this application on 31 July 2024.

The relief sought

[4] The relief sought by the applicant is as follows:

- (a) To remove Mr Philani Godfrey Mavundla from being:-
 - i. President and Party Leader for Abantu Batho Congress.
 - ii. Contact person for Abantu Batho Congress as well as Listing Officer for ABC.
- (b) The Respondent pay costs if he opposes this Application unsuccessfully.
- (c) Further and/or alternative relief.

The issues

[5] The issues to be determined by this Court are if regard is had to the Constitution of ABC, (i) who is the legitimate leader of ABC, (ii) whether the Commission should be ordered to amend its records so as to reflect a legitimate leader of ABC, (iii) whether the non-joinder and absence of service points *in limine* raised by the intervening party are good in law, (iv) and whether the intervening party should have been joined in the proceedings.

The Law

[6] The Constitution of ABC, which was adopted on 10 and 11 April 2021 is regarded by the members of the party as the founding document of the party. It spells out the structures and responsibilities for its members. In *Ramakatsa and Others v Magashule*, the Constitutional Court held that "*The constitutions of political parties are the instruments which facilitate and regulate participation by members in the activities of a political party*".²

[7] It is therefore clear that the Constitution of ABC governs the party's operational issues including the election of members to various structures including leadership

² *Ramakatsa and Others v Magashule* 2013 (2) BCLR 202 (CC) at para 73.

positions. The clauses that follow are relevant and applicable for the purposes of addressing the issues before this Court. They are reproduced verbatim from the Constitution. Clause 12.2 states that:

‘... in the “absence of a National Executive Committee through contestation, court-directive or any other plausible reason, there is to be provision for an Interim National Executive Committee”

[8] Clause 12.2.2 also provides that in the “absence of the National Elective Conference the National Executive Committee is the superior decision-making body”.

[9] It is against the minutes of the Elective National Assembly and the Constitution in which the issue of leadership dispute ought to be considered and resolved. I now turn to consider the submissions of the parties and the evidence before this Court.

Submissions

[10] The applicant’s main submissions are that there was an Elective National Assembly held on 23 September 2023 wherein Mr. Gwala was elected as the new President of ABC. Consequently, the intervening party was replaced as the party leader.

[11] The applicant further contended that the intervening party was expelled from ABC on 6 November 2023 for various reasons including a failure to pay membership fees. The expulsion emanates from the outcome of a disciplinary hearing against him whose outcome was communicated to him on 17 November 2023.

[12] The applicant avers that the intervening party was not joined as a party to these proceedings because communication was effected to an official email address of ABC namely, abanticongress50@gmail.com which has always been used to communicate with him and his attorneys of record. According to the applicant, there was no need to personally effect service on the intervening party as he was expelled.

[13] The intervening party raises points *in limine* to the effect that the application was not served on him and *lis alibi pendens*.

[14] The intervening party avers that the applicant's membership with ABC was terminated on 27 October 2023. In addition, the intervening party contends that the applicant has never challenged his expulsion from ABC. Consequently, the applicant is not representing ABC.

[15] Furthermore, the intervening party contends that he challenged his expulsion in the Pietermaritzburg High Court and obtained relief in his favour. The effect of the relief is that it halted the applicant's processes of removing him as a party leader and/or expelling him from ABC.

Analysis

[16] Without going into comprehensive details or determining who is the legitimate party leader of ABC, a glimpse of an information before this Court reveals that the intervening party was expelled from ABC via a disciplinary hearing.

[17] Following the intervening party's expulsion, he approached the Pietermaritzburg High Court where he successfully challenged his expulsion. The intervening party obtained an interim order on 20 September 2023 with a return date of 30 October 2023. It was not clear before this Court about what transpired on the return date. Consequently, this Court issued directives requesting both parties to file supplementary affidavits about the status of various applications and review applications that are pending before the Pietermaritzburg High Court.

[18] On 28 October 2024, the applicant filed a supplementary affidavit with an update on various cases. The relevant case for the present purposes is Case No: 13942/23 wherein the applicant states that the matter involving ABC leadership or expulsion dispute was postponed *sine die* for settlement negotiations, but nothing occurred thereafter.

[19] On 4 November 2024, the intervening party also filed a supplementary affidavit with updates on several cases. The relevant case is the same matter bearing Case No: 13942/23. The intervening party has furnished a Court Order under Case No: 13942/23 which is dated 22 October 2024 from the Pietermaritzburg High Court. The Court Order in part reads that "the matter be and is hereby adjourned *sine die*" and

that the *rule nisi* is “hereby extended until confirmed or discharged”. The order effectively puts the expulsion of the intervening party on hold.

[20] It is apparent from both parties that there is no dispute that Case No: 13942/23 is pending before the Pietermaritzburg High Court, which case is between the same parties, and deals with the leadership or expulsion that is before us. This Court in *Siyathemba Community Movement v The IEC and Others*³ was faced with a similar situation wherein the applicant instituted an application whilst another one was pending before another court. There, Shongwe JA (as he was then) declared the “application frivolous and vexatious”.⁴ I see no reason why I should not do the same here because the applicant has been economical with the truth about this matter. Even when invited by this Court to provide details about pending cases elsewhere, he merely writes summaries that are favourable to his case and for reasons only known to him, fails to furnish this Court with existing court orders. This is nothing but vexatious litigation. The intervening party’s point *in limine* in this regard is upheld.

[21] The relief applied for by the applicant in this application seeks to change the leadership structure of ABC. The relief prayed for herein will affect and is of interest to the intervening party and its other members. However, none of them have been cited in these proceedings. It was held in *Absa Bank Ltd v Naude N O and Others*⁵ that the test for non-joinder is:

‘Whether a party has a direct and substantial interest in the subject-matter of the litigation which may prejudice the party that has not been joined...’

[22] The applicant requires this Court to grant an order against a party who is going to be adversely affected by the decision but without giving that party an opportunity to present his case. In my view, the intervening party ought to have been joined in these proceedings and other party members.⁶ The relief sought will in no doubt affect the intervening party and other members. The non-joinder point is also upheld.

³ *Siyathemba Community Movement v The IEC and Others* 005/22 EC [2022] ZAEC 7.

⁴ *Ibid* at para 12.

⁵ *Absa Bank Ltd v Naude N O and Others* 2016 (6) SA 540 (SCA) at para 10.

⁶ *Februarie and Others v Phillips and Others* (009/2023EC) [2024] ZAEC at para 26.

[23] The contents of the Court Order in Case No: 13942/23 speaks for themselves. All the processes that purport to expel the intervening party from ABC have been put on hold until the *rule nisi* has been confirmed or discharged. Consequently, the issue concerning the expulsion of the former leader of ABC, and the updating of records of the Commission are before another forum. The principle of *lis pendens* was explained by Wallis J in *Caesarstone Sdocot-Yam v World of Marble and Granite 2000 CC and others* where he said that the doctrine of *lis pendens*:

‘Is that there should be a limit to the extent to which the same issue is ligated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk they may reach different conclusions.’

[24] In light of the foregoing, it is therefore essential that the pending matter under Case No: 13942/23 before the Pietermaritzburg High Court be allowed to run its course until finalization.⁷

[25] The status of the intervening party as a party leader has far reaching implications and cannot be taken lightly in the context of this case. The basis for this is that the Constitution of ABC *inter alia* bestows upon the intervening party the power to expel any member from ABC.⁸

Costs

[26] As a general rule, costs orders are not imposed upon a losing party in electoral matters unless such party’s conduct has been vexatious, frivolous or abusive of the court processes.⁹ However, in *Van Wyk v Millington*¹⁰ the court was clear in that a court may “award attorney and client costs against a party” if there were “very strong reasons” to do so. This is one of those cases where the applicant’s conduct justifies a punitive cost order because whilst aware that the matter was pending before another court, he opted to institute the present case. In addition, he never provided

⁷ 2013 (6) SA 499 (SCA) at para 2.

⁸ See clause 12.2.5.11 of the Constitution.

⁹ *Arise Afrika Arise (AAAR) v Electoral Commission of South Africa* (008/2023 EC) [2024] ZAEC 1 at para 31.

¹⁰ *Van Wyk v Millington* 1948 (1) 1205 (C) at 1215.

the court about the case before the Pietermaritzburg High Court until asked to do so but still provided sketchy details. The intervening party, through his attorneys, went all out to get the necessary court orders. The applicant's conduct is inexcusable. In my view, given the aforesaid facts, this application cannot be regarded as a *bona fide* application.

[27] In the circumstances, I award costs on an attorney and client scale against the applicant for having caused the intervening party to incur costs in defend this frivolous and vexatious application.

Order

[28] In the result, I make the following order:

1. The application is dismissed with costs on an attorney and client scale.

PROFESSOR MR PHOOKO
Additional Member of the Electoral Court

APPEARANCES

Attorneys for applicant:

In person

Attorneys for respondent:

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