

SOUTH AFRICA / JUDGMENT

# De Lille v Democratic Alliance and Others

## (7882/18) [2018] ZAWCHC 57 (15 May 2018)

[2018] ZAWCHC 57

### COURT

Western Cape High Court, Cape Town

### BEFORE

Gamble, Samela

### CASE / FILE NUMBER

7882/18

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE

NO: 7882/18

Reportable

In

the matter between:

PATRICIA  
DE  
LILLE Applicant  
and  
DEMOCRATIC  
ALLIANCE First  
Respondent  
CITY  
MANAGER OF THE CITY OF CAPE TOWN Second  
Respondent  
THE  
CITY OF CAPE  
TOWN Third  
Respondent  
INDEPENDENT  
ELECTORAL COMMISSION Fourth  
Respondent

**JUDGMENT**

DELIVERED ON TUESDAY 15 MAY 2018

GAMBLE, J:

**INTRODUCTION**

[1] At 7.52am on Tuesday 8 May 2018, the City of Cape Town lost the services of its executive mayor. This occurred outside of the ordinary democratic process: not because she had failed to survive a vote of no confidence, nor because she had lost the support of the majority of her party caucus in council nor because she had resigned her office. Rather, the applicant (“Ms. de Lille”) was informed in an email from a senior functionary (“Mr. Selfe”) of the first respondent (“the DA”) that her membership of that political party (which holds the majority in the Council of the City) had been terminated with immediate effect in terms of the provisions of clause 3.5.1.2 of the party’s constitution. I shall revert to that clause presently but point out at this stage that, for the avoidance of confusion, we refer to the party’s constitution as “the DA constitution” and the Constitution of the Republic of South Africa, 1996 simply as “the Constitution”.

[2] The effect of Ms. de Lille’s loss of membership of the DA had various consequences (both statutory and otherwise) of which I name just a few. Firstly, in terms of sections 27(c) and 27(f)(i) read with section 59(c) the Local Government: Municipal Structures Act, 117 of 1998 (“the Structures Act”), an executive mayor automatically loses her position as such when she cease to be a member of her party. Secondly, the loss of mayoral office results in a vacancy in Council which requires the Speaker of

Council and the second respondent (“the City Manager”) to take steps to inform the fourth respondent (“the IEC”) of the vacancy in order that the necessary democratic process can be put in place to install a new member of Council representing the DA. Thirdly, all members of the executive mayor’s council (“Mayco”) automatically lose their positions as such in terms of s60(5) of the Structures Act. Fourthly, the deputy mayor automatically assumes the position of executive mayor in terms of s56(6) of the Structures Act and s/he then holds office until a new mayor is duly elected. Fifthly, the acting mayor must appoint a new Mayco under s 60(1)(a) of the Structures Act.

[3] It seems as if the Speaker and the City Manager acted with considerable alacrity. The latter informed the IEC of the vacancy at 8.33 am and by 9.30 am the Speaker caused a letter to be hand-delivered to Ms. de Lille by a member of her VIP staff. She was at that stage on her way to see her counsel Mr. de Waal. Both the Speaker and the City Manager say in these papers that they acted

bona fide and for purposes of this application we accept those assertions.

- [4] The present application by Ms. de Lille for interim relief was issued around lunchtime on the same day and the papers delivered to the chambers of the Presiding Judge shortly thereafter. The application seeks to interdict the IEC from advertising the vacancy in Council as a consequence of Ms. de Lille's loss of membership of the DA, and further to reinstate Ms. de Lille into the office of executive mayor together with the existing Mayco, all of this pending an application to review her loss of membership.
- [5] The application was set down for hearing at 10.00 am on Friday 11 May 2018 in the Fast Track of the Motion Court. A tight timetable was set for the filing of papers with which the parties complied and at the direction of the Judge President it was heard by 2 judges. In addition, the Judge President directed that the review application should be heard by a Full Bench of 3 judges on Friday 25 May 2018. The parties were informed hereof shortly before the hearing on Friday 11 May 2018. At that hearing Ms. de Lille was

represented by Mr. Mpofu SC who led Mr. de Waal, the DA by Mr. Rosenberg SC with Messers Bishop and Khoza while the City and its

Manager were represented by Mr. Breitenbach SC. The City and its Manager indicated that they would abide the decision of the court.

- [6] We are indebted to the legal representatives on all sides for their comprehensive written and oral submissions which were all prepared under significant time constraints. These have assisted us in coming to an urgent interim ruling which we consider is necessary in light of the circumstances which we shall allude to hereunder. As this judgment is delivered under similar pressing time constraints we will refer to only certain authorities and reserve the right to amplify this judgment later if the need arises.

#### RELEVANT FACTUAL BACKGROUND

- [7] Ms. de Lille has been a member of the DA since 2010. She has held the office of executive mayor since 2011, most recently having been elected to that position by the Council of the City after the local government elections of August 2016. The papers reflect that Ms. de Lille and her principals in the party have been at odds with each other for quite some time. Mr. de Waal suggested that this may have been as long as 18 months but certainly it seems to be for at least 6 months.
- [8] The DA has initiated internal disciplinary proceedings against Ms. de Lille on 2 distinct fronts. One complaint relates to allegations of corruption in the procurement of buses for the City's bus service and the other to the irregular appointment of certain senior staff members in the City. Both complaints arise from independent investigations conducted by outside agencies and separate disciplinary committees ("DC's") have been set up. The former complaint has been referred to the Moolman DC and the latter to the Joubert DC. Both DC's have become bogged down, as Mr. de Waal put it "in thick sand", as the parties engaged in pre-hearing sparring.

- [9] On 15 February 2018, certain of the DA councillors proposed a motion of no confidence in Ms. de Lille. This motion failed to attract the requisite majority in Council and evidently failed by a single vote. This implies that some DA councillors must have voted, together with the opposition, against the motion and in support of Ms. de Lille. Following upon that event, and seemingly in response to the difficulties being experienced with Ms. de Lille, at its Federal Congress on 8 April 2018 the DA adopted an amendment to its constitution by inserting, through clause 6.2.6.3, what the parties have termed a “recall clause”. That clause is to the effect that –

*“..If...a mayor... has lost the confidence of... her caucus, the Federal Executive may, after giving...her the opportunity to make representations to it, resolved to require... her to resign from... her office within 48 hours. Failure by that member to resign will lead to the cessation of membership of the Party in terms of section 3.5.1.10.”*

Clause 3.5.1.10 in turn provides that a member of the DA ceases to be such a member when she fails to resign her position after the procedures set out in clause 6.2.6.3 have been followed.

- [10] On 18 April 2018 the DA’s Federal Executive (“FedEx”) gave permission to its caucus in the City of Cape Town to invoke the “recall clause”. An internal motion of no-confidence within the caucus was brought on Wednesday, 25 April 2018 and this succeeded with 97 councillors voting in favour thereof, 41 voting against the motion and 15 councillors abstaining. There was one spoilt ballot. This implies that 56 DA councillors did not support the motion.
- [11] The following day, 26 April 2018, Mr. Selfe wrote to Ms. de Lille inviting her to make written representations by 2 May 2018 to FedEx as to why she should not resign as Mayor of the City. Ms. de Lille responded by asking for certain documents (which were not forthcoming) but she nevertheless made representations before the stipulated deadline. Ms. de Lille says that she regards the recall clause as inconsistent with the Constitution and the Structures Act and gave the DA notice of her intention to challenge

the clause and its implementation through the courts.

- [12] When FedEx met over the weekend of 5-6 May 2018 to deal with her representations regarding the recall clause, Ms. de Lille’s attorneys sent the DA a copy of her draft court papers relating to the challenge to the recall clause. FedEx thereupon suspended its deliberations to seek legal advice in relation to the points raised by Ms. de Lille’s court papers.
- [13] Late in the afternoon of Thursday 3 May 2018, a senior member of the DA’s Legal Committee (Mr. Horn) hand delivered a letter to Ms. de Lille at the mayoral offices. In that letter Ms. de Lille was given 24 hours to respond to the party’s reliance at that stage on clause 3.5.1.2 of the DA constitution. The parties have termed this the “cessation clause” and it reads as follows –

*“... A member ceases to be a member of the Party when... she... publicly declares...her intention to resign and/or publicly declares... her resignation from the Party.”*

In support of this notification to its member the DA relied upon a radio interview given by Ms. de Lille to Mr. Eusebius McKaiser on 26 April 2018, immediately following the success of the caucus vote of no confidence. We shall return to the content of this interview shortly.

[14] Ms. de Lille responded to this demand and timeously filed her response, pointing out that she would challenge the cessation clause on a number of bases, including whether she in fact declared an unequivocal intention to resign as a member of the Party as well as other procedural and substantive attacks on the cessation clause. Ms. de Lille’s submissions regarding the cessation clause were referred to a 3 person panel of the DA’s Legal Committee which, on Sunday 6 May 2018 found that –

*“...De Lille’s membership has ceased by virtue of s3.5.1.2 of the Federal Constitution and it is accordingly recommended to the Federal Executive that cessation of the membership be confirmed and all consequences thereof implemented.”*

[15] That recommendation was considered by FedEx on Monday 7 May 2018. After consideration of the report of the panel, confirmation of the cessation of membership by FedEx was conveyed to Ms. de Lille by Mr. Selfe in the email of 8 May 2018 referred to at the commencement of this judgment.

#### THE RELATIONSHIP BETWEEN THE PARTIES

[16] The relationship between a political party and its members is governed by the principles applicable to voluntary associations. It is essentially contractual in nature and will be governed by the party’s constitution which fixes the terms and conditions of association. In subscribing to membership of the party the member agrees to abide by the terms of the constitution. Where a member indicates an intention no longer to be bound by those terms and conditions, her conduct is akin to a repudiation of the contract

and the consequences thereof will arise from the relevant terms of the party’s constitution.

[17] In *Barkhuizen v Napier* 2007(5) SA 323 (CC) the Constitutional Court held that that the courts are bound to hold parties to their contract but the court went on to say that where issues of public policy are raised in relation to the terms of a contract, those issues are to be interpreted through the prism of the Constitution. Such an approach might, upon proper analysis of Ms. de Lille’s case, be held to apply to the DA’s constitution and to that extent there might be constitutional issues at play in this matter which raise questions of legality and the like.

[18] Further, in *Ramakatsa and others v Magashule and Others* 2013

(2) BCLR 202 (CC) at [16] the Constitutional Court held that our constitution gives members of political parties “the right to exact compliance with the constitution of a political party by the leadership of that party.” Accordingly, where a litigant complains that the party has not

properly applied its constitution towards a member, or that there are clauses in the party's constitution which are inconsistent with the Constitution of the Republic, the litigation also raises constitutional issues. If that is the case, the present litigation may ultimately find its way to the Constitutional Court.

- [19] We understand Ms. de Lille to base her case on 4 broad categories. Firstly, she says that the DA has misinterpreted her remarks to Mr. McKaiser as evincing an unequivocal intention to resign from the party. Ms. de Lille claims that she only indicated an intention to resign as executive mayor and not a party member, and then only conditionally.
- [20] Secondly, Ms. de Lille raises a substantial challenge to the DA's decision to confirm the cessation and complains that in resorting to the provisions of clause 3.5.1.2 the DA has effectively applied double standards and has treated her differently from other members who have made similar remarks in the past.
- [21] Thirdly, Ms. de Lille attacks the constitutionality of both the cessation and recall clauses. And, finally, she has detailed a series of technical points (as Mr. de Waal called them) where she says the DA has not properly applied its constitution towards her and, on this score, she relies on Ramakatsa as a further cause of action in relation to the alleged violation of her constitutional rights. These claims are in relation to questions of procedural non-compliance with the DA constitution as well as allegations of unlawful delegation of authority to the party's decision-makers

#### APPLICATION FOR AN INTERDICT PENDENTE LITE

- [22] Ms. de Lille has asked this court in part A of her notice of motion to grant her temporary relief pending the decision of the reviewing court in determining the relief sought in Part B of the notice of motion. The reviewing court will commence sitting next Friday 25 May 2018 and will decide the case along different lines to those which we must consider in relation to the part A relief. We must therefore be cautious not to trench in this application upon the jurisdiction of the reviewing court. See *National Treasury and others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at [31]
- [23] The test for the grant of an interim interdict is by now well established. An applicant has to satisfy the court of the existence of the following criteria –
- (a) A prima facie right, which may in the circumstances be open to some doubt;
  - (b) An apprehension of irreparable harm if the interim interdict is not granted;
  - (c) That the balance of convenience is in favour of the granting of interim relief; and
  - (d) The absence of any other remedy.

See Erasmus, *Superior Court Practice*, (2nd ed) Vol 2 at D6-16A.

[24] These requirements are not to be considered in isolation but by weighing them up in conjunction with each other. So for example, where the prima facie right relied upon is weak but there are strong considerations in relation to harm and/or the balance of convenience a court might consider granting temporary relief. In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) the Appellate Division stressed that a court looks at the affidavits as a whole, evaluates the interrelation of the various

considerations and gives a decision which is flexible and practical if the circumstances so demand.

[25] Turning to the prima facie right relied upon for review, we are of the view that the McKaiser interview, when considered in its entire context, demonstrates that Ms. de Lille's relationship with the DA has all but come to an end. Ms. de Lille herself acknowledged that in the interview when she said that "the writing is on the wall." There is the recognition of a long history of disharmony between the parties and Ms. de Lille agreed with Mr. McKaiser's statement in that interview that she would resign from the DA (and not just as mayor): "The morning after I've won the court case then I will resign from the DA". That intention is confirmed in these papers where Ms. de Lille says, not that she is insistent on staying in the DA to serve its

constituents, but rather to clear her name through the disciplinary process that the party has initiated against her. Her denial of an intention to resign in the long term is therefore not tenable at this stage and her prima facie right in this regard is, in our view, not strong.

[26] On the other hand, we are of the view that Ms. de Lille has made out a prima facie case for her attack on the manner in which FedEx approached her utterances to Mr. McKaiser, both at a procedural and substantive level in the other categories we referred to earlier. Approaching the matter on the basis of *Ramakatsa* we cannot say at this stage that Ms. de Lille's claim to non-compliance by the DA with its constitution (the so-called

technical points) nor the application of the cessation clause do not raise constitutional issues which warrant consideration by the reviewing court. In the circumstances, we are bound to conclude at this stage that Ms. de Lille has established the requisite prima facie basis for approaching the reviewing court.

[27] As far as harm is concerned, we do not perceive irreparable harm to Ms. de Lille in her personal capacity. Her loss of income, status and freedom of association with the political party of her choice are all capable of being addressed later if the reviewing court finds in her favour. We are, however, genuinely concerned about the harm which her loss of office has for the people she is supposed to serve as the executive mayor of Cape Town. In our view, this factor needs warrants serious consideration in relation to the balance of convenience.

[28] The City has lost the services of its first citizen and of the members of Mayco, all of whom have been automatically removed from office through the application of the cessation clause. In his brief submissions to us Mr. Breitenbach highlighted the importance of stabilizing Mayco. He noted that while the deputy mayor, who has in the interim acceded to the office of mayor in a caretaker capacity, has the right to appoint a new Mayco, he had as of Friday afternoon not done so. Evidently the acting mayor was awaiting the outcome of this application before taking any further steps.

[29] During argument we asked Mr. Rosenberg whether the DA was prepared to give an undertaking that the existing Mayco would not be replaced pending the determination of the review. Counsel was unable to obtain such an undertaking and informed us that the DA considered that this would be an improper interference with the acting mayor's prerogative under the Structures Act. This stance is difficult to understand given that the deputy mayor is from the DA, would ordinarily be subject to its discipline and obliged to

carry out the directions of his political principals. Rather, it suggests that the acting mayor may well be intent upon replacing some or all the members of Mayco. That poses the further question whether the invocation of the cessation clause was actually intended to remove Mayco together with the mayor or whether this is just collateral damage. Fortunately we are not required to determine that issue at this stage.

[30] In considering the balance of convenience then we take into account that if Ms. de Lille is successful before the reviewing court she might be reinstated and would then be entitled to appoint her own Mayco, possibly including members of her original executive team or others. One would then have another change of executive members of the City's political leadership - a veritable case of musical chairs in the mayoral parlour.

[31] Such a state of affairs cannot be in the interests of the governance of the City and its citizens. The members of Mayco fulfill important statutory and executive functions and it is desirable that there be stability in this regard while the legal process around the effective removal of Ms. de Lille from office is resolved. Mr. Breitenbach referred us to the finalization of the

City's budget which must be tabled shortly and of course there is the question of management of the City's ongoing water crisis. There are also important decisions which crop up on an almost daily basis around planning approvals and the persistent problems around land invasions, to name just a few.

[32] While the reviewing court is to hear this matter next week, it is possible that that court might reserve judgment in light of the complexity of the constitutional and other issues raised. Furthermore, we take note of the fact that both Ms. de Lille and the DA are not shy to litigate, as this matter and the history of their respective litigation clashes with political opponents, organs of State and the like reflect in our law reports. It is therefore not inconceivable that there may be further proceedings such as appeals beyond the determination by the reviewing court.

- [33] And all the while, the functioning of the City's top management will have to endure the prospect of the City's political structures being tinkered with. Such chopping and changing in Mayco is not to the benefit of the City and this in our view is a critical factor in considering the balance of convenience in this matter.
- [34] As undesirable as it may be in light of the bruising allegations and counter allegations which have been made in these proceedings, preservation of the status quo as it existed immediately before Ms. de Lille was informed of the decision of FedEx last Tuesday morning is in our view the only reasonable alternative in the prevailing circumstances. The DA will know this only too well after its protracted litigation with the former Chief Operating Officer of the national broadcaster in which it sought to preserve the status quo. See *Democratic Alliance v South African Broadcasting Corporation and Others* 2015
- (1) SA 551 (C). There is, in our view, no practical way to achieve this outcome other than to grant the relief sought by Ms. de Lille in para 1.1 of the draft order handed up by Mr. Mpofo.
- [35] It goes without saying that in asking for her party membership to be guaranteed pendent lite, Ms. de Lille impliedly warrants that she will continue to serve all of the people of Cape Town on behalf of the DA and in accordance with its policies. She must further be taken to warrant that she will subject herself to party discipline in the interim and that she recognizes that the party is entitled to enforce such discipline against her by acting lawfully in accordance with the provisions of its constitution.

## COSTS

- [36] Both parties sought an award of costs in the event of their arguments being upheld. It is not, in our view, inappropriate in the circumstances for the costs of these proceedings to be determined by the reviewing court. That court will ultimately be in the best position to evaluate the strength of the party's cases and to rule on costs accordingly. See *EMS Belting Co of SA (Pty) Ltd v Lloyd* 1983
- (1) SA 641 (E) at 644B.

## ORDER OF COURT

In the circumstances it is ordered that -

A. Pending the hearing of Part B of this application the notice of first respondent's Federal Executive to the effect that the applicant has ceased to be a member of First Respondent is suspended and will have no force and effect and the effect thereof is that the applicant shall remain in office as Executive Mayor of the Third Respondent and the Mayoral Committee, as it was constituted on 8 May 2018, will continue to function.

B. The costs of this application will stand over for determination by the court hearing the Part B relief.

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GAMBLE, J

I AGREE:

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SAMELA, J

For applicant – Advv Dali Mpofu SC and H.J.de Waal

Instructed by: John Riley Inc. (021-7977116)

For first respondent – Advv Sean P. Rosenberg SC, Michael Bishop and S.Khoza

Instructed by: Minde Shapiro & Smith (021-9189000)

For second and third respondents – Adv. Andrew M.Breitenbach SC

Instructed by: MHI Attorneys (021-9108408)

No appearance for 4th respondent

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Prepared on 14 October 2026 · Esheria