

SOUTH AFRICA / JUDGMENT

Khumalo v Independent Electoral Commission of South Africa (0025/24EC)

[2024] ZAEC 20 (12 June 2024)

[2024] ZAEC 20

COURT
Electoral CourtBEFORE
Modiba, Adams, YacoobCASE / FILE NUMBER
0025/24EC

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FLYNOTES:

CONSTITUTION – Elections – Change of party leader
– Applicant
the former leader of MK Party – Letter sent to Electoral Commission to change leadership to Jacob Zuma – Applicant
alleging that his signature forged – As an expelled member of MK Party, applicant lacks locus standi –
Failed to bring
application within required time period and delay unreasonable –
Court finding that applicant wrote
the letter – Punitive
costs warranted because applicant perjured himself and application frivolous, lack merits and
constitutes abuse of court's
process – Electoral Commission Act 51 of 1996, s 20(1).
IN
THE ELECTORAL COURT OF SOUTH AFRICA
HELD
IN BLOEMFONTEIN
Case
No: 0025/24EC
In

the matter between:	JABULANI KHUMALO Applicant and ELECTORAL COMMISSION OF SOUTH AFRICA First Respondent CHIEF ELECTORAL OFFICER Second Respondent UMKHONTO WESIZWE POLITICAL PARTY Third Respondent JACOB GEDLEYIHLEKISA ZUMA Fourth Respondent Neutral Citation: Khumalo v Electoral Commission of South Africa and Others (0025/2024 EC) [2024] ZAEC 20 (12 June 2024)
Coram:	Modiba J, Adams and Yacoob AJJ
Delivered:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11H30 am on 12 June 2024.
Summary:	Administrative law – legality review – points in limine – whether the Electoral Court's jurisdiction in terms of s 20 (1) of the Electoral Commission Act 51 of 1996 is properly engaged – whether the applicant has locus standi to bring the application – whether the applicant delayed bringing the application and if so, whether the delay may be condoned or overlooked in the interests of justice. Merits – whether Ms Duduzile Zuma-Sambudla forged the applicant's signature in a letter marked JK6, advising the Electoral Commission (the Commission) to change the particulars of Umkhonto Wesizwe Party (MKP) to replace Mr Khumalo with Mr Zuma as its leader – whether, when it acted on the request, the Commission breached regulation 9 of the Regulations for the Registration of Political Parties, 2004 as amended – whether

the award of punitive costs is warranted.

Held:

Jurisdiction – this court’s review jurisdiction in terms of s 20 (1) is engaged. The Commission’s determination that the written notification to update MKP records to reflect Mr Zuma as its leader as set out in JK6 complies with regulation 6 constitutes a reviewable decision as contemplated in s 20(1)(a). The decision relates to an electoral matter because political parties are a primary mechanism through which South African citizens participates in an election.

Held:

Locus standi – as an expelled member of MKP, Mr Khumalo lacks locus standi to seek relief concerning the leadership of MKP.

Held:

Urgency – the applicant failed to bring the application within the 3 days required in terms of s 20(1)(b) of the Commission Act, read with Rule 6 of the Electoral Court Rules. The delay is unreasonable. because it is not fully explained. A proper case for the delay to be condoned or overlooked in the interests of justice is not made.

Held:

Merits – based on the Plascon-Evans rule, Mr Khumalo wrote JK6 advising the Commission to change its records to reflect Mr Zuma as the leader of MKP. The Commission complied with regulation 9 when it acted on this request.

Held:

Costs –the award of punitive costs is warranted because the applicant perjured himself, the application is frivolous, lack merits and constitutes an abuse of the court’s process.

JUDGMENT

Modiba J with Adams and Yacoob AJJ concurring

Introduction

- [1] The applicant, Jabulani Khumalo (Mr Khumalo), seeks an order in terms of which the Electoral Commission’s (the Commission’s)

decision to remove him and record Jacob Gedleyihlekisa Zuma (Mr Zuma), as the president and leader of Umkhonto Wesizwe political

party (MKP), is declared ultra vires, invalid and unlawful and is set aside. In addition, he seeks an order directing the Commission to record him as the president of MKP with immediate effect. He also seeks other ancillary relief.

- [2] He alleges that Ms Duduzile Zuma-Sambudla (Ms Zuma-Sambudla) forged his signature and sent a letter to the Commission requesting it to change MKP's particulars by removing his name and replacing Mr Zuma as the leader for MKP. He submits that, since he did not send the letter to the Commission as required in terms of regulation 9 of the Regulations for the Registration of Political Parties[1] (the regulations), the Commission exceeded its powers when it acted on the request Ms Zuma-Sambudla sent using the alleged fraudulent letter. Ms Zuma-Sambudla is not cited as a respondent in these proceedings.
- [3] The Commission is cited as the first respondent. The Commission's Chief Electoral Officer (CEO) is cited as the second respondent. Both these parties abide the court's decision. For convenience, unless the context suggests otherwise, in this judgment, reference to the Commission includes reference to the CEO.
- [4] According to the Commission, when it changed MKP's particulars, it complied with regulation 9. It made no determination as to who the leader of MKP is. Therefore, it made no reviewable decision. It simply acted on a written request it reasonably believed was from Mr Khumalo. In its view, the issues purely pertain to an internal leadership dispute within MKP over which it lacks jurisdiction. However, to assist this court, the Commission has filed an explanatory affidavit to explain the regulatory framework that applies when a registered political party requires the Commission to change its particulars. It has also set out its version of the facts that relate to the dispute. The court is indebted to the Commission for its assistance.
- [5] Mr Zuma and MKP, cited as the third and fourth respondents respectively, oppose the application. It is convenient to simply refer to them jointly as the respondents. They have raised four points in limine which I describe shortly. They also oppose the application on the merits. They deny the forgery and fraud allegations by Mr Khumalo. They also contend that the Commission made no reviewable decision when it changed the particulars of the leader of MKP.
- [6] The dispute between Mr Khumalo and the respondents is mainly factual in nature. Mr Khumalo contends that, notwithstanding that the disputed facts are material, the dispute is resolvable on the papers. The respondents contend that since a genuine dispute of fact has arisen on the papers, this court ought to prefer their version in line with the seminal Plascon-Evans rule.

- [7] According to the Plascon-Evans rule, in motion proceedings, where a genuine dispute of fact has arisen on the affidavits, a final order may be granted if the undisputed facts, together with the facts alleged by the respondent, justify such an order. In other words, the dispute is determined on the respondent's version. An exception to this rule is when the respondent's denials or version is so far-fetched or clearly untenable that the court is justified in rejecting it on the papers.[2]
- [8] It is important to set out the background facts upfront to place the dispute between the parties in a proper context. I determine the background facts based on the Plascon-Evans rule. Then, I determine the preliminary points. The respondent's points in limine are dispositive of the application. Although, for reasons set out in this judgment, the points in limine stand to be upheld, the judgment traverses the merits for two reasons. Firstly, the merits are relevant for determining whether the delay in bringing the application ought to be condoned in the interests of justice. Secondly, superior courts have urged courts of first instance to determine all the issues to avoid a court of appeal dealing with any issue in the first instance in the event this court's order is taken on appeal.
- [9] I deal with the disputed facts elaborately in the merits section of this judgment, also guided by the Plascon-Evans rule. Lastly, I consider the question of legal costs. An order concludes the judgment.

Background facts

- [10] In June 2023, Mr Khumalo applied to the Commission to register MKP as a political party. The Commission approved the application and duly registered MKP as a political party on 7 September 2023. The deed of foundation Mr Khumalo filed in support for his application to register MKP as a political party reflects him as the party leader. It also reflects him as the contact person for the MKP. It reflects other persons as members of the MKP executive body.
- [11] On 27 February 2024, Mr Khumalo made a written request to the Commission to add new persons as members of MKP's Interim Leadership Core (ILC). These persons include Ms Zuma-Sambudla. On 9 March 2024, the ILC appointed Ms Zuma-Sambudla as its liaison person with the Commission. Mr Khumalo informed the Commission of this development in writing.
- [12] MKP is yet to hold an elective conference where it would appoint its leadership, including its president. Currently, no person including Mr Khumalo and Mr Zuma occupy this position. All persons who currently occupy leadership positions in MKP do so on an interim basis.
- [13] On 9 April 2024, two letters were sent to the Commission on behalf of MKP. The first communicates that Mr Zuma is MKP's presidential candidate for the 29 May 2024 national and provincial election and his photo ought to appear on the ballot paper next to the MKP logo. This letter is attached to Mr Khumalo's founding affidavit marked JK7. The second letter communicates Mr Khumalo's resignation from his position as party leader for MKP. It

requests that Mr Zuma replaces Mr Khumalo in that position. The letter also reiterates the request made in JK7 that Mr Zuma's photo ought to appear on the ballot paper next to the MKP logo as he is MKP's presidential candidate for the 29 May 2024 election. The second letter is attached to Mr Khumalo's

founding affidavit marked JK6. It is convenient to simply refer to these letters as JK6 and JK7 respectively.

[14] JK6 lies at the heart of the factual dispute between the parties. Mr Khumalo contends that he is not its author. He did not sign it. Ms Zuma-Sambudla forged his signature on JK6 and sent it to the Commission by email. Therefore, he did not resign from his position as MKP party leader. He merely requested the Commission to effect the request communicated in JK7. The respondents deny these allegations. They contend that Mr Khumalo signed JK6 at a meeting in which Ms Zuma-Sambudla and several other eyewitnesses were present.

[15] Subsequently, Mr Zuma expelled Mr Khumalo and several other persons from MKP. While it appears from his papers that Mr Khumalo is aggrieved by his expulsion from MKP, he is not challenging that decision in these proceedings.

Points in limine

Jurisdiction

[16] Mr Khumalo contends that this court has jurisdiction in terms of s 20(1)(a). He further contends that this matter engages this court's jurisdiction because it raises the important issue regarding whether the Commission properly performed its function under the Electoral

Commission Act[3] (Commission Act) read with its regulations when it recorded Mr Zuma as the president of MKP. It also implicates his right to form a political party in terms of s 19 of the Constitution. This court, having the status of the High Court, enjoys powers in terms of s 172 of the Constitution to make a just and equitable order when dealing with a constitutional matter.

[17] The respondents contest this court's jurisdiction on four grounds. Firstly, they contend that this court lacks jurisdiction to review and set aside an unidentified alleged decision of the Commission to remove Mr Khumalo as president of MKP. This is the relief Mr Khumalo seeks in prayer 2 of the notice of motion. There is no record of such a decision. Mr Khumalo has not provided the date on which the alleged decision was made. Further, the underlying dispute between Mr Khumalo and the respondents relates

to a leadership dispute within MKP and is not a matter which concerns the Commission.

[18] Secondly, the respondents contend that this court also lacks jurisdiction to order the Commission to record Mr Khumalo as president of MKP. They contend that the Commission has no such powers. This is the relief Mr Khumalo seeks in prayer 3 of the notice of motion.

- [19] Thirdly, Mr Khumalo communicated his resignation to the Commission in writing. The Commission acted on this communication by removing him from its records as the leader for MKP and replacing him with Mr Zuma. The Commission's conduct is lawful and *intra vires*.
- [20] Fourthly, sections 19 and 172 of the Constitution do not find application.
- [21] Lastly, this court lacks jurisdiction to grant pre-emptive relief to circumvent the operation of the law suspending court orders pending an appeal. Further, no grounds thereof have been pleaded to justify the denial of the respondents' right of appeal in terms of section 34 of the Constitution.
- [22] Mr Khumalo expressly brings this application in terms of section 20(1) of the Commission Act. This court derives its jurisdiction from s 20 which sets out its powers and functions. It provides as follows:

"20 Powers, duties and functions of Electoral Court

1.

- (a) The Electoral Court may review any decision of the Commission relating to an electoral matter.
 - (b) Any such review shall be conducted on an urgent basis and be disposed of as expeditiously as possible.
- (2) (a) ...
- (b) ...
- (c) ...

(2A) The Electoral Court may hear and determine any dispute relating to membership, leadership, constitution or founding instruments of a registered party."

- [23] A simple reading of s 20(1)(a) establishes unambiguously that to found jurisdiction in terms of that provision, firstly, the Commission ought to have made a decision. Secondly, the decision must relate to an electoral matter.
- [24] Regulation 9 prescribes the procedure to be followed when a registered political party notifies the Commission of a change in its particulars. It provides as follows:
- "Notification of change in registration particulars*
9. Any change in the particulars furnished in Annexure 1 [application form for registration as political party] must be notified to the Chief Electoral Officer in writing within 30 days after such change by the leader of the party."

- [25] While the Commission made no determination as to who the MKP leader is and did not make a decision to remove Mr Khumalo as the MKP leader or president, it determined whether JK6 complies with regulation 9. It determined that as required by regulation 9, JK6 constitutes written notice by Mr Khumalo as the leader of MKP to change its records to reflect Mr Zuma as its leader. It then changed the details of the leader of MKP as requested. It matters not as both the Commission and the respondents contend that Hoexter classifies this conduct – of changing party records – as a clerical act.[4] The determination by the Commission that written notification of changes to the records of a registered political party complies with regulation 9 is a decision as contemplated in section 20(1)(a). It therefore engages this court's review jurisdiction in terms of that provision.
- [26] Since political parties are a primary mechanism through which South African citizens participate in an election, the decision by the Commission to update the records of MKP relates to an electoral matter. The fact that the change made to MKP records arose from MKP's desire to have Mr Zuma's photo appear on the ballot paper for the 29 May 2024 election supports this view.
- [27] The order Mr Khumalo seeks in prayer 2 is consequential upon the impugned decision being reviewed and set aside. It is therefore incorrect as contended on behalf of the respondents, that this court lacks jurisdiction to order the Commission to record Mr Khumalo as the president of MKP. It has such powers when its jurisdiction is properly engaged and a proper case for such relief is made out. The Commission is ready to implement such an order if it is granted. It made this undertaking in its explanatory affidavit. The undertaking is correctly made.
- [28] The fact that Mr Khumalo has not called on this court to determine any dispute relating to his membership or leadership of MKP or one involving its constitution or founding instruments does not oust this court's jurisdiction. On Mr Khumalo's case as pleaded, he is clearly not engaging this court's jurisdiction in terms of s 20(2A) of the Commission Act.
- [29] Section 172 of the Constitution is repeatedly relied upon in this court by parties to engage the court's jurisdiction.[5] Indeed, this court enjoys powers in terms of s 172 to declare conduct that is inconsistent with the Constitution unconstitutional and to grant consequential relief.
- [30] Section 19 protects the political rights of citizens of South Africa. Mr Khumalo's contention that his right in terms of s19(3) to form a political party is implicated is incorrect. He has been afforded this right. He successfully applied to the Commission for the registration of MKP as a political party. He has a remedy for the relief he seeks in terms of the Commission Act.

- [31] Mr Khumalo contends that if the respondents appeal any order this court may grant in his favour, this court's order would be rendered ineffective, unjust and inequitable because the elections would be held under circumstances where Mr Zuma continues to be the president of MKP. He seeks an order in terms of which the order this court grants in his favour remains effective despite any appeal that the respondents may bring against the order. Section 18(1) of the Superior Courts Act,[6] empowers this court to grant such an order.
- [32] The respondents incorrectly contend that in the absence of a pending appeal, there is no jurisdictional basis for such an order. A pending appeal is not a jurisdictional requirement for such an order.[7]
- [33] Mr Khumalo's request for this order simply fails because the condition on which he seeks the order, namely, the granting of an order in his favour by this court, does not materialise.
- [34] The respondents' intra vires point goes more to the merits of this application. I deal with it under that heading in the merits section of this judgment.
- [35] For reasons set out above, the jurisdiction point in limine falls to be dismissed.

Locus standi

- [36] It is common cause that Mr Khumalo has since been expelled from MKP. He has not challenged his expulsion internally within MKP or in another appropriate forum. The respondents contend that for that reason, his expulsion stands.
- [37] It concerns me that Mr Khumalo did not address these averments in his replying affidavit or heads of argument. During oral argument, his counsel simply submitted that Mr Khumalo has locus standi because this matter implicates his s 19 rights. But, I have already found that Mr Khumalo's cause of action does not implicate his section 19 rights.
- [38] I am persuaded that, as an expelled member of MKP, Mr Khumalo lacks locus standi to bring this application. He is not impugning his expulsion. His expulsion therefore stands. The respondents' reliance on the following dicta in Ramakatsa[8] and Giant Concerts[9] is proper. That former case held as follows:

"[79] Before demonstrating that some of the irregularities raised were established it is necessary to outline the nature of the legal relationship that arises from membership of the ANC. At common law a voluntary association like the ANC is taken to have been created by agreement as it is not a body established by statute. The ANC's constitution together with the audit guidelines and any other rules collectively constitute the terms of the agreement entered into by its members. Thus, the relationship between the party and its members is contractual. It is taken to be a unique contract.

- [80] As in the case of an ordinary contract, if the constitution and the rules of a political party, like the ANC, are breached to the prejudice of certain members, they are entitled to approach a court of law for relief."
- [39] Giant Concerts held thus:

“[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if “the right remedy is sought by the right person in the right proceedings”. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant’s standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.”

[40] Mr Khumalo is an own-interest litigant. He does not raise broader interests of accountability and responsiveness that require investigation or determination on the merits. He is only entitled to the right remedy in the right proceedings. He fails on both scores. Only members of a political party may approach the court for relief for breach of that political party’s constitution. As matters stand, Mr Khumalo is no longer a member of MKP. He does not seek relief in relation to breach of the MKP constitution. He therefore lacks standing to seek relief against the Commission in relation to the leadership of the MKP.

[41] For the above reasons, this point in limine stands to succeed.

Urgency and condonation

[42] Mr Khumalo brings this application on an urgent basis. He formulated the urgency relief in prayer 1 of his notice of motion in line with Uniform Rule 6(12). The urgency he relies on is the provincial and national election scheduled for 29 May 2024. He wanted the matter heard before the election because he intended to make decisions concerning the MKP’s election campaign and related matters prior to the election, otherwise the matter would become moot. He further contended that if this matter is not heard before the election, the election would be held, veiled in an unlawful decision of the Commission, which implicates his constitutional rights. Ostensibly, he contends that if the application was not heard before the 29 May 2024 election, he would have been denied substantive redress in due course.

[43] Regrettably for Mr Khumalo, this court could not accommodate the matter prior to 29 May 2024. It set it down for 31 May 2024. The matter was not heard on that day. It was postponed due to the unavailability of Mr Khumalo’s counsel. It was heard on the following court day being 3 June 2024.

[44] Therefore, on Mr Khumalo’s case as pleaded, the matter has become moot. He has not supplemented his papers to establish why the matter remains urgent.

[45] In *African National Congress v Independent Electoral Commission*,^[10] this court held that urgency in review applications brought before the Electoral Court is a statutory requirement. Therefore, as

contended on behalf of the respondents, urgency is not determined in accordance with the requirements in terms of Uniform Rule 6(12). It is prescribed by s20(1)(b) read with Electoral Court Rules 6 and 10.

- [46] Section 20(1) provides that when brought to the Electoral Court, an application to review any decision of the Commission relating to an electoral matter shall be conducted on an urgent basis and disposed of as expeditiously as possible. Rule 6 of the Electoral Court rules requires that an applicant who has the right to impugn a decision of the Commission must lodge an application with the Secretary of the Electoral Court within 3 days of the decision being made. The Commission must file its answer within 3 days of receipt of the application. In terms of Rule 10, any party who fails to comply with the time frames set out in the rules or directives issued by the Court is effectively barred, unless the court on good cause shown, directs otherwise.
- [47] The principles for determining whether an applicant delayed bringing a review application as set out in Buffalo City Metropolitan Municipality[11] are applicable. For reasons set out below, when the relevant principles are applied to the present facts, Mr Khumalo's delay in bringing the application is unreasonable, and good cause for it has not been shown. A proper case for the delay to be condoned in terms of Electoral Court rule 10 has not been made and overlooking the delay is not in the interest of justice. Therefore, Mr Khumalo is barred from bringing this application.
- [48] As held in Buffalo City Metropolitan Municipality, an enquiry into whether Mr Khumalo delayed bringing the application proceeds in two stages. Firstly, his explanation for the delay is considered. He is required to provide a full explanation that covers the entire period of the delay.
- [49] Mr Khumalo did not bring the application within 3 days of the impugned decision being made. It was made on 10 April 2024. He only brought the application on 26 May 2024.
- [50] In his founding affidavit where the explanation for the delay ought to be set out, none is given. He simply relies on the denial of substantive relief in due course contention dealt with above. In his replying affidavit, he failed to respond to the respondents' point in limine on urgency. He criticised the answering affidavit for inappropriately addressing legal argument.
- [51] During oral argument, his counsel strayed from Mr Khumalo's case as pleaded by explaining the delay from the bar. He contended that Mr Khumalo only became aware of the impugned decision on 5 May 2024. He always intended to impugn the decision. Hence, he approached the Constitutional Court on 10 May 2024 to challenge Mr Zuma's authority to bring proceedings in that court on behalf of MKP. When he failed, he approached this court.

[52] However, as pointed out by counsel for the respondents, Mr Khumalo fails to take this court into his confidence regarding when and how he became aware of the impugned decision. He attached a letter to his founding affidavit marked JK8 (JK8) he sent to Mr Zuma on 5 May 2024, suspending him from MKP pending disciplinary proceedings. On the same date, he addressed a letter to the Commission attached to his founding affidavit marked JK9 (JK9). I quote JK9 in relevant parts:

“REMOVAL OF MR JACOB ZUMA FROM THE LIST OF MEMBERS OF PARLIAMENT OF MK PARTY

“I write to you in my capacity as the President of the Umkhonto Wesizwe Party (MKP). It is to request the immediate removal of Mr Zuma’s name as the face of MKP and president of MKP. I sent a letter to the Commission on 9 April 2024 in which I stated that Mr Zuma would be the face of the party. The letter is attached marked “A”.

“To provide a brief

background:

I formed the MKP in 2023. I registered it with the Electoral Commission on 7 September 2023.

...

7. The MKP has an interim executive committee, of which I am the president. It also has a constitution, a copy of which is attached marked “B”. Mr Zuma is not a member of the executive committee....
 8. On 23 April 2023, I was called into a meeting with several individuals who are not in the national executive committee but have been active in MKP. Mr Zuma announced that I had been removed as the president of the party, and he would hence forth become the president.
 9. During that meeting, a fraudulent letter was prepared for transmission to the Electoral Commission announcing that I would no longer be on the list of candidates and that Mr Zuma be the face and the president of MKP.
 10. I sent a letter to the Electoral Commission, in which I confirmed that that Mr Zuma would be the face of the party. At no stage did I confirm that Mr Zuma would be the president of the party.”
- [53] From JK9, it appears that Mr Khumalo’s version is that he knew of the alleged fraudulent letter on 23 April 2023 when the meeting at which it was doctored occurred. Yet, he only wrote to the Commission on 5 May 2024 requesting that MKPs particulars be changed to reflect that he is the leader of MKP. He fails to state when and how he

became aware that the Commission changed MKP's particulars to reflect Mr Zuma as its leader. He has offered no explanation for the two weeks' delay in advising the Commission of the alleged fraud.

[54] He has also not explained why it took him a further three weeks after 5 May 2024 to bring the application. The fact that he opted to approach the Constitutional Court when it heard oral argument in *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party*[12] is of no moment. That hearing only took place on 10 May 2023, after which there is a further unexplained two weeks' delay. Attempts by his counsel to close these loops from the bar is completely inappropriate as it denies the respondents an opportunity to answer thereto.

[55] The second stage of the enquiry into the reasonableness of the delay is a flexible one. It involves a legal evaluation taking into account a number of factors such as the nature of the impugned decision, the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation, the importance of the issue to be raised, prospects of success, including the possible consequences of setting aside the impugned decision and potential prejudice to affected parties and whether such may be ameliorated by the court's power to grant a just and equitable remedy. The interest of justice is an overriding factor in this enquiry. Some of the relevant factors will require the merits of the review to be traversed.

[56] The enquiry into the reasonableness of the delay stands to fail in respect of most of the above factors. The delay in bringing the application is not fully explained. The delay is therefore unreasonable. For reasons I set out in the next section of the judgment, the application lacks reasonable prospects of success. It is therefore not surprising that the respondents have characterised the application as frivolous, fraudulent, perjurious, ill-advised, misconceived and legally unsustainable and flawed.

[57] For all the above reasons, this point in limine is also upheld.

Merits

[58] Two issues arise for determination on the merits. I set them out below:

- (a) Whether Ms Zuma-Sambudla forged JK6.
- (b) Whether the Commission failed to comply with regulation 9 when it changed the MKP's registered particulars to reflect Mr Zuma as the party leader.

Whether Ms Zuma-Sambudla forged JK6?

[59] As already stated, a genuine dispute of facts arises from the papers in respect of this issue. Mr Khumalo denies that he authored JK6. He alleges that he only authored JK7. He could not have sent JK7 to the Commission on the same day essentially communicating the same thing communicated in JK6. The letterhead used, writing style and formatting on JK6 and JK7 is different. So are the signatures.

[60] According to the respondents, Mr Khumalo signed JK6 at a meeting at in which he and Ms Zuma-Sambudla, together with several other persons, were present. The letter was scanned. Ms Zuma-Sambudla then emailed it to the Commission. Both Ms Zuma-Sambudla and one eyewitness deposed to a confirmatory affidavit confirming these allegations. In his replying affidavit, Mr Khumalo did not respond to the allegations.

[61] Email correspondence exchanged between Mr Khumalo and the Commission reveals that the Commission made it clear to him that only the photo of a party leader may appear on the ballot paper. He still wrote to the Commission, as per JK7, asking it to place Mr

Zuma's photo as the face of MKP on the ballot paper. He subsequently informed the Commission that he does not want to change

the recorded leader for MKP. On being told again that only the recorded leader could appear on the ballot paper, he responded to the Commission that he would sort the issue out. Subsequently, Ms Zuma-Sambudla sent JK6 to the Commission.

[62] It is disconcerting that on his version, Mr Khumalo never reverted to the Commission to resolve the leadership issue to ensure that Mr Zuma's photo is placed on the ballot paper, but accepted, without more, that Mr Zuma's photo did, in fact appear on the ballot paper. He only did so two weeks later, complaining of the alleged fraud perpetrated on dates that do not correspond with the communication sequence between Mr Khumalo and the Commission regarding the use of Mr Zuma's photo on the ballot paper and the date on which Ms Zuma-Sambudla sent JK6 to the Commission.

[63] As contended by the respondents, expert evidence is necessary to prove the allegation that the signature on JK6 is forged. It is inappropriate for counsel for Mr Khumalo to compare the two letters from the bar with reference to the writing style, formatting, letterheads and different signatures. The court places no reliance on these submissions.

[64] As further contended on behalf of the respondents, Mr Khumalo's version is riddled with contradictions. He placed Mr Zuma on cautionary suspension on 5 May 2024. Yet, he alleged in his founding affidavit that Mr Zuma was never a member of MKP. In JK8

Mr Khumalo alleges that the meeting in which JK6 was doctored took place on 23 April 2024. Yet, JK 6 is dated 9 April 2024.

[65] The respondents have put up a version in support of their opposition of Mr Khumalo's application. They do more than simply provide a bare denial. Their version is not far-fetched and is well substantiated. This court can reasonably rely on it. Therefore, based on the Plascon-Evans rule, I accept the respondents' version that Mr Khumalo authored and signed JK6.

Whether the Commission failed to comply with regulation 9 when it changed MKP's leader on its records

[66] It was contended on behalf of Mr Khumalo that when the Commission changed its records by removing Mr Khumalo as party leader for MKP and replaced him with Mr Zuma, it exercised public power. It had to do so in accordance with regulation 9, which requires that changes to the particulars of a registered political party be notified to the Commission by the party leader in writing. By failing to do so, it acted ultra vires by exercising public power beyond that conferred to it by law. Reliance was placed on the ultra vires doctrine as articulated in Fedsure[13] as follows:

“[58] It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.”

[67] Regulation 9 sets out the procedure to be followed when changing the particulars of a registered political party. The Commission accepts that in terms of regulation 9, it may only effect changes to the registered particulars of a registered political party when notified in writing by the leader of the political party. It denies that when it changed MKP’s registered particulars as notified in JK6, it breached regulation 9.

[68] In my view, the Commission did not breach regulation 9 by accepting JK6 as emailed by Ms Zuma-Sambudla. Regulation 9 only requires that changes to the deed of foundation be communicated by the party leader to the Commission in writing. This is what JK6 purports to do. As contended on behalf of the respondents, regulation 9 does not require that only the leader may send written notice of a change to the party’s registered particulars to the Commission. ILC had appointed Ms Zuma-Sambudla as the MKP liaison person with the Commission. As a result of the email trail between Mr Khumalo and the Commission regarding the photo for the ballot paper, Mr Khumalo’s reluctance to change the party leader on the Commission’s records, Mr Khumalo’s insistence that Mr Zuma’s photo be used, the Commission’s insistence that the party leader’s photo should be used and Mr Khumalo’s undertaking to sort the issue out, the Commission acted reasonably by accepting JK6 as sent by Ms Zuma-Sambudla. It had no legal duty to confirm with Mr Khumalo that he was the author of the letter, particularly under these circumstances.

Costs

[69] Ordinarily, to encourage parties to exercise their political rights, this court does not grant costs orders. However, Mr Khumalo’s conduct warrants a departure from this practice.

[70] It is trite that in awarding costs, the court has a discretion to be exercised judicially upon a consideration of all the facts in each case. The exercise of a discretion is a matter of fairness to all parties.[14] When exercising its discretion in respect of costs, the court considers the circumstances of each case, carefully weighing the

issues, the conduct of the parties and any other circumstance that may have a bearing on costs and make an order that is fair between

all the parties.[15]

[71] The application is frivolous and completely devoid of merit. Barring jurisdiction, the points in limine raised by the respondents are dispositive of the application. It is unclear why Mr Khumalo persisted with the application because on his case on urgency, it has become moot. As contended on behalf of the respondents, this application should not have seen the light of day.

[72] But, more seriously, the respondents have demonstrated that Mr Khumalo perjured himself in his affidavits. He alleges that Ms Zuma-Sambudla is not part of the MKP leadership. Yet, on 24 February 2024, he advised the Commission by way of a letter that MKP has appointed the ILC, listing Ms Zuma-Sambudla as one of its members. He denies that Mr Zuma is the president of MKP. Yet, he made that assertion in a media statement to which the respondents referred this court. In his founding affidavit, he states that Mr Zuma is not a member of MKP. Yet, he attached a letter to the same affidavit suspending Mr Zuma from MKP pending disciplinary proceedings.

[73] Although it was contended on his behalf that he always refers to Mr Zuma as the president because he is the former President of South Africa, it is clear from the media statement referenced above that he referred to him as the president of MKP. He denied being the author of JK6. Yet, he signed it in the presence of Ms Zuma-Sambudla and an eyewitness who deposed to a confirmatory affidavit to the respondents' answering affidavit. He failed to respond to these allegations in his replying affidavit.

[74] For all the above reasons, the application also constitutes an abuse of this Court's process and a waste of its judicial economy and the opposing respondents' resources. They have incurred legal costs opposing an application that should not have seen the light of day. It would be unfair to leave the respondents out of pocket under these circumstances. A punitive costs order against Mr Khumalo is the most appropriate way of censuring Mr Khumalo's conduct

and sending a message to the public that making false statements under oath and abuse of this court's process will not be

countenanced.

[75] In the premises, the following order is made.

Order

1. The application is dismissed.
2. The applicant shall pay the third and fourth respondents' costs on the attorney and client scale.

L T MODIBA

JUDGE OF THE ELECTORAL COURT

Appearances

For the applicant:

M Ka Siboto

Instructed by:

Ligege & Associates Inc, Sandton

For the first and second respondents: M De Beer

Instructed by:

Moeti Kanyane Attorneys, Centurion

For the third and fourth respondents: D Mpofu SC with P May

Instructed by:

Zungu Incorporated Attorneys, Sandton

[1] The Regulations for the Registration of Political Parties were published in Gazette No. 25894 on 7 January 2004.

[2] Plascon-Evans Paints Ltd V Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (A) at 634H – 636B.

[3] Act 51 of 1996.

[4] Hoexter, Administrative Law in South Africa, 3rd edition, 2024 at page 249.

[5] African National Congress v Electoral Commission of South Africa and Others [2024] ZAEC 03 is one such case.

[6] Act 10 of 2013. Section 18(1) provides as follows: 18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

[6] Act 10 of 2013. Section 18(1) provides as follows:

18 Suspension of decision pending appeal

- (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- [7] See *Ntlemeza v Helen Suzman Foundation and Another* 2017
- (5) SA 402 (SCA) at paragraphs 31 and 32.
- [8] *Ramakatsa v Magashule* 2012 JDR 2203 (CC); 2013 (2) BCLR 202 (CC).
- [9] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2012 JDR 2298 (CC).
- [10] *African National Congress v Independent Electoral Commission* (001/2024EC)
- [2024] ZAEC 03 (26 March 2024).
- [11] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019
- (4) SA 331 (CC) see paragraphs 43, 48, 52 and 33.
- [12] *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and others* 2024 JDR 2070 (CC).
- [13] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999
- (1) SA 374 (CC) at paragraph 58.
- [14] *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration)* [1998] ZASCA 91; 1999 (1) SA 104 (SCA) at 109A-B.
- [15] See *Erasmus Superior Court Practice* [Service 7, 2018] at D5-6 and all the cases cited there.

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