

SOUTH AFRICA / JUDGMENT

Kupa v Economic Freedom Fighters and Others (39/2018) [2018] ZAECHGC 126 (7 December 2018) [2018] ZAECHGC 126

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Mnyatheli

CASE / FILE NUMBER

39/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

No. 39/2018

In

the matter between:

AMANDA

KUPA:

Applicant
And
ECONOMIC

FREEDOM FIGHTERS:

First
Respondent
INDEPENDENTELECTORAL
COMMISSION:Second
Respondent
INTSIKA
YETHU

MUNICIPALITY:

Third
Respondent
ZOLEKA

QOTOYI:

Fourth
Respondent

JUDGMENT

MNYATHELI AJ

[1] The Applicant, Amanda Kupa in this matter seeks an Order (“the Order”) in the following terms:

1. Suspending the implementation of the decision of the First Respondent’s CCT[1] confirming her expulsion pending the outcome of her appeal to the National People’s Assembly.
 2. Directing the First Respondent to do all things necessary to reinstate her to her position as its councillor in the Third Respondent Municipality pending the outcome of her appeal to the National People’s Assembly.
 3. Further and / or alternative relief this Honourable Court may deem appropriate; and
 4. Cost of suit by any of the Respondent who oppose the application.
- [2] Only the First Respondent has opposed the application, the other Respondents either not formally entering opposition or simply electing to abide the decision of this court.

Background

- [3] It is common cause that the Applicant was a member of the First Respondent, the latter being a registered political movement within the South African political landscape.
- [4] Due to the parties’ internal wranglings, the Applicant was subjected to disciplinary action by First Respondent in terms of their internal instruments, more particularly what is referred to as the Code of Conduct and Revolutionary Discipline, hereafter simply the “Code”.
- [5] Pursuant to such disciplinary action a decision (“the decision”) was reached by the internal tribunal, a Provincial Disciplinary Committee (PDC), that Applicant be expelled from the First Respondent as a member. The latter decision was confirmed by a structure called Central Command Team, hereinafter referred to as the CCT. This confirmation was undertaken in terms of Clause D. 24 of the Code.[2]
- [6] The Applicant then appealed to the National People’s Assembly hereinafter referred to as (“the Assembly”) in terms of Clause D.25 of the Code[3]. Prior to her appeal Applicant had, before the commencement of her formal disciplinary hearing, made representations by way of a note to the First Respondent’s Head Office. The letter of the representations is entitled “Letter of Appeal” where she says:

“I am Amanda Kupa from Intsikayethu Municipality at Chris Hani region. As I was told to resign, as a councillor of EFF and I didn’t

resign, as I was shocked. I therefore ask the organisation to rethink the decision of suspending me as a member of EFF. I

apologise for not obeying the ruling”. The note is unsigned but is attached as Annex AK1. This commune is not dated.

- [7] Before the Appellant’s appeal was heard by the National People’s Assembly, First Respondent instated the Fourth Respondent to the post of the Applicant, being the Third Respondent as a PR Councillor. Applocantr complains that the action of the First Respondent was premature in that her case had not been finally decided by National People’s Assembly.
- [8] First Respondent maintains that it was within its right to, after confirmation by the CCT, implement the decision and regard the Applicant as having been expelled from itself, and to proceed and fill the vacancy thus created. Hence this application. Applicant, on the other hand believes that her rights in terms of the First Respondent’s very Constitution had not been exhausted.
- [9] Respondent was out of date of filing its Answering Affidavit by about four (4) months and simultaneously with its filing of the Answering Affidavit it applied for condonation for such lateness

The

Issues

- [11] Despite other ancillary issues and technical points raised by and on behalf of the Respondent I have decided for reasons that follow, to confine the decision of this matter on the following two main issues:

11.1 whether Respondent in its application for condonation has given a legally satisfactory application for its late filing of an Answering Affidavit and therefore deserves to be condoned.

11.2 whether the construction placed by the parties, on Clauses D.24 and D.25 respectively is correct. I will start with the first one: condonation

Condonation

[12] In an application for condonation it is of crucial importance that the party that seeks indulgence in the form of condonation must do so in such a way that it takes the court to its confidence. Secondly such party must relate in chronological and clear order all the circumstances that led to the lateness categorically.[4] An application for condonation is not just there for the taking; the applicant must account for each and every pertinent date for failure to file and do so in time.

[13] The principles governing a condonation application have crystalized into the following:

13.1 an applicant for condonation for lateness and non-compliance to the time frames

provided by the rules seeks an indulgence from the court and ought to take the court to its confidence;

13.2 the applicant has to be clear and categorical in terms of the development of events that led to it being in default of the time within which it ought to have complied in filing the appropriate papers concerned in a matter, in date order;

13.3 the application is not a mere formality and condonation is not there for the taking;

13.4 whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case;

13.5 factors that are relevant to the enquiry referred to in 13.4 above, include but are not limited to:-

13.5.1 the nature of the relief sought;

13.5.2 the extent and cause of the delay;

13.5.3 the effect of the delay on the administration of justice and other litigants;

13.5.4 the reasonableness of the explanation for the delay;

13.5.5 the importance of the issue (s) to be raised in the intended matter; and

13.5.6 the prospects of success.

[14] It will have been seen from the above that it is not easy to decide the condonation application without having regard to the entire conspectus of the matter. I have consequently gone through all the papers and considered counsel submissions to place myself in a favourable position to decide whether the application has merit or not.

14.1 The Founding Affidavit of Applicant was signed on 8 January 2018 and commissioned on 9 January 2018;

14.2 In the absence of anything to the contrary it will be found that it was served and filed around that same time;

14.3 The Answering Affidavit in issue was filed exactly four (4) months after the Founding Affidavit of Applicant, on 8 May 2018.

[15] The explanation of the First Respondent is in summary that he was busy as a Provincial Co-ordinator of the First Respondent doing work in other areas of the Province and that First Respondent's lawyers are based in Johannesburg. Hence he could not be able to consult with them in time and file accordingly.

[16] As pointed out elsewhere above an explanation for lateness has to be reasonable and take the court to its confidence, in honest regard for the integrity of the court and the

administration of justice. First respondent's explanation smacks of a pompous and belligerent attitude and is unreasonable. It fails to state categorically and in date order what are the circumstances that led to it being late of filing. What is more: the period of lateness is inordinately long, even taking into account the issue of First Respondent's lawyers being based in Johannesburg. There was more than enough time for First Respondent to have consulted with them. As and for the deponent's statement that he is a Provincial

Co-ordinator and was busy that is unacceptable and shows a callous disregard for the processes of the court and the court itself. I do not believe that the merit of the First Respondent's case is such that one would conclude that it is so strong such that the lateness can be compensated by the merit.

[17] I therefore find that the First Respondent has failed to satisfy the criteria for lateness and has given an unsatisfactory explanation. The application for condonation must fail. It remains to then consider the merits of the Applicant's application, just as if it was undefended.

Merits of the Application

[18] As alluded to hereinabove, the main issue for consideration is what is reflected in the Notice of Motion of the Applicant: as to whether, in the circumstance of the matter it is entitled to the relief that it seeks. The merits of the Applicant's application require a close scrutiny.

[19] As a member of First Respondent, Applicant was entitled to be treated fairly subject to the Code of Conduct and Revolutionary Discipline of First Applicant. As she complies therewith or does not, First Respondent has a duty of fair treatment towards the Applicant, in that it must comply with its own Code, especially when dealing with issues of discipline and afford her all the common law and constitutional rights she ordinarily is entitled to within the context of the First Respondent's constitution. Whilst the courts are reluctant to interfere with internal affairs of any institution, they will insist where there is a Code, on the institution complying therewith when dealing with its members.

[20] No doubt the rules of natural justice, those of audi alteram partem and nemo iudex in sua causa must perforce be observed. Moreso these rules or principles of natural justice have found expression and enunciation in our very Constitution.

[21] Applicant avers in summary, that in terms of the Code it was entitled to the hearing of the National People's Assembly before it could be expelled and that she took steps to invoke that process by firstly making representations as per K1 of the Answering Affidavit and later as per AK 5, entitled "representations against expulsion" on 19 October 2017.

[22] Whilst awaiting the decision of the National People's Assembly to deal with the matter, she was advised by the Speaker of the Third Respondent that the General Secretary of the First Respondent had issued instructions to the Speaker to replace her as a councillor, despite a pending determination and outcome of her appeal. The letter to the Speaker is attached as AK7 and is entitled "replacement of Clr Amanda Kupa".

[23] The relevant part of that letter from First Respondent to Municipal Manager: Mr Siyabulela Koyo says:

'...In so far as your advice that correspondence has been addressed to the Speaker on an appeal to the expulsion, we do not see this as a hindrance to this process.

In our letter dated the 26 October 2017 we addressed this issue extensively, pointing out that any dispute relating to the expulsion is between the councillor and the

political party and has nothing to do with the municipality. In any event we shall await correspondence from the representative of the said councillor and we will

process it if we so wish.

Kindly process this matter expeditiously

Yours Sincerely

CMSR GODRICH GARDEE

SECRETARY GENERAL

[24] Clause D.24 of the Code of conduct and Revolutionary Discipline of the First

Respondent makes it clear that, once a decision to expel has been taken it will not be implemented until it is confirmed by the First Respondent's CCT. This was done

[25] Clause D.25 of the same Code provides that the decision of the CCT to confirm a suspension or expulsion may, on application by the offender be placed before the national People's Assembly as a subject of final review / appeal.

[26] The expulsion of a member of any organisation is a very drastic and significant step. It servers the membership and cuts completely all ties a member has with the organisation. This Clause D.25 seems to afford, not just an offender a final opportunity to be heard, but also affords the organisation itself, the latitude to ensure that it has exhausted all channels before it parts final ways with the offender. It is a 'subject of final review / appeal'.

[27] Logically the subject of final review or appeal would have little or no effect if the offender has already left the organisation, her or his fate having been determined by the CCT. On a circumspect and reasonable or purposive interpretation, Clause D.25

occurring also, as it does as a final Clause of this Disciplinary Chapter of First Respondent's Code, it is intended to be the last phase in the process of expulsion following a disciplinary action, without which the process will not have been completed.

[28] Applicant was entitled to all procedural rights and processes contemplated in the Code for which she signed as member. First Respondent acted prematurely in not affording her a hearing in terms of Clause D.25. There seems to be no other reasonable interpretation.

[29] The application must succeed.

[30] The following Order is made:

30.1 Condonation is refused.

30.2 Application is considered as if unopposed.

30.3 Applicant has made out a proper case for the relief sought

30.4 Order granted as follows:-

30.1 Application granted as prayed in terms of prayers 1, 2 & 3

30.2 First Respondent to pay costs of the application.

M MNYATHELI

ACTING JUDGE OF THE HIGH COURT

Appearances

For the Applicant

Adv Nzuzo Instructed by Zepe & Company Attorneys

Queenstown

For the First Respondent

Adv Mpahlwa Instructed by Nettletons Attorneys

Grahamstown

Matter heard on: 18 October 2018

Judgment

delivered on: 07 December 2018

- [1] This is an acronym for “Central Command Team”
- [2] In terms of Clause D.24 Sentences of suspension and expulsion shall not be executed until the finding has been confirmed by the CCT
- [3] In terms of Clause D.25 The decision of the CCT to confirm a suspension or expulsion may, on application by the offender, be placed before the National People’s Assembly, as a subject of final review/appeal
- [4] See *Unitas Hospital v Van Wyk* [2007] ZACC 24; 2008 (2) SA 472 (CC)

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