

SOUTH AFRICA / JUDGMENT

Mpemba and Another v Lukhanji Municipality and Others (902/2009)

[2009] ZAECHGC 25 (6 May 2009)

[2009] ZAECHGC 25

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Jones

CASE / FILE NUMBER

902/2009

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Source record**FORM A****FILING SHEET FOR****EASTERN CAPE HIGH COURT, GRAHAMSTOWN JUDGMENT****ECJ:****PARTIES:**

SAMUEL
DUNCAN MPEMBA
NOMAZOTHSO
KOPOLO
And
LUKHANJI
MUNICIPALITY AND 3 OTHERS

Registrar:

902/09

Magistrate:

High

Court:

EASTERN
CAPE HIGH COURT, GRAHAMSTOWN
DATE

HEARD:

30/04/09
DATE

DELIVERED:

08/05/09

JUDGE(S):

JONES
J
LEGAL
REPRESENTATIVES –

Appearances: for

the Applicant(s):

ADV: S.H. Cole
for

the Respondent(s):

ADV: T.J.M. Paterson SC
Instructing

attorneys: for

the Applicant(s): NETTELTONS
ATTORNEYS
for

the Respondent(s): WHEELDON
RUSHMERE & COLE
CASE
INFORMATION –
Nature

of proceedings: APPLICATION
– URGENT
THE HIGH COURT OF
SOUTH AFRICA
IN THE EASTERN CAPE
HIGH COURT
GRAHAMSTOWN
CASE NO 902/2009
NOT REPORTABLE
In
the matter between
SAMUEL DUNCAN MPEMBA
1st Applicant
NOMAZOTHSO
KOPOLO
2nd Applicant
And
LUKHANJI
MUNICIPALITY and 3 others
Respondents

SUMMARY:

Application as a matter of urgency
suspending the applicants' expulsion from a political party and
its effect on their appointment
as councillors of the municipal
council pending an application to review and set aside the
expulsion – the expulsion
was done without a hearing as
required by the party's constitution, on the ground that the
applicants had disqualified themselves
as members of the party by
joining a rival political party – the requirements for an
interim interdict pending a review were
established as against the
political party responsible for the expulsion but not as against the
municipality or its officials –
application withdrawn at the
last minute by reason of the last minute rescission of the expulsion
– applicants liable to
pay the costs of the municipality and
the municipal manager.

JUDGMENT

JONES J:

- [1] This is an urgent application by two members of the political party known as the African National Congress (the 'ANC', the Chris Hani region of which is cited as the 3rd respondent) for an interim interdict pending an application to review and set aside a decision by the party to expel them.
- [2] The applicants were members of the ANC and were duly elected and serving representatives of the ANC as municipal councillors on the Lukhanji Municipality, which is the 1st respondent. In a letter dated 23 January 2009 the ANC advised the 1st applicant that he had been summarily suspended from the ANC, and that the disciplinary process would unfold in due course. He was however thereafter expelled from the party without charges being served on him and without a hearing held in his presence. So was the 2nd applicant. They were both formally advised of their expulsion by letters dated 16 February
2009. They both noted appeals, which have not yet been heard. On 25 February 2009 the Lukhanji Municipality's municipal manager (the 2nd respondent) addressed letters to them stating that he had been advised by the 3rd respondent that they
- had been expelled from the ANC. The letter stated further that this meant that in terms of the Local Government: Municipal Structures Act No 58 of 1999 they would forfeit their seats on the municipal council on the date on which a vacancy was declared by the Independent

Electoral Commission (the IEC, which is the 4th respondent). On 23 March 2009 the 2nd respondent wrote to the 4th respondent

advising it that the ANC had reported to him that it had expelled the applicants, and he requested the IEC to declare two vacancies on the municipal council. On 8 April 2009 the 2nd respondent advised the 1st applicant that his seat on the council had become vacant as of 1 April 2009, that his name would be removed as councillor with immediate effect, and that a by-election would be arranged for 6 May 2009.

- [3] Both applicants allege that their expulsion from the ANC and the consequent termination of their term of office as councillors was in violation of their right to fair and just administration action and that they intend to bring proceedings for review. The purpose of this application is to undo the consequences of the expulsion pending the application for review. The 1st and 2nd respondents have opposed. The 4th respondent abides the decision of the court. The 3rd respondent has filed no papers, and has not appeared before me by counsel.
- [4] When the matter was called I was advised by Mr Cole for the applicants of a last minute development. The ANC has through its attorneys advised the applicants that their expulsion had been withdrawn. He handed up confirmatory letters to that effect which were addressed by the regional secretary of the ANC to the

applicants. He also handed up the covering letter from the ANC's attorney which contained the following concluding paragraph: 'We confirm that it shall not be necessary for us to attend court on 30th of April 2009 and that no order shall be made against our client as this matter is settled'. The upshot was that Mr Cole did not ask for substantive relief against any of the respondents. He submitted however that he was entitled to an order for costs against the 3rd respondent (the ANC).

- [5] In view of the contents of the letter from the 3rd respondent's attorneys that no order shall be made against their client, I cannot make a costs order in the absence of the 3rd respondent's attorneys. To put it at its lowest, there is uncertainty about whether or not the attorneys settled all issues between their clients, including the issue of costs, or whether the question of costs was left in the air. At one stage, Mr Cole suggested that, although the applicants had no prayer for this, it would be just and equitable to order the 3rd respondent to pay the costs of the 1st and 2nd respondents as well. All I can do to accommodate the uncertainty about costs is to let that issue stand over for later determination by me if the parties are unable to resolve it.
- [6] There remains the question of the 1st and 2nd respondents' costs. Mr Paterson has asked for a costs order against the applicants. He has a number of arguments to support a conclusion that because no order is sought against his clients they are substantially successful in their opposition, and the applicants should be ordered to pay their costs. In the alternative, there is a prayer for a costs order in their favour against the 3rd respondent. I do not propose dealing with all the points raised by Mr Paterson. It is sufficient if I quote the appropriate

passage from a judgment in a similar application between different parties which I heard on the same date as this application and which also involved expulsion without a hearing and termination of office as a councillor. In that matter, Nomakhaya Fani and 18 others v Buffalo City Municipality and 8 others (EC, Grahamstown, Case No 860/2009) I dealt with the municipality's opposition to the application in the following terms in paragraphs 5 and 7:

- [5] The 1st and 2nd respondents are not able to contribute to the dispute about the propriety of the expulsion. Their opposition to the relief sought in the rule nisi is based on a denial of any wrongful conduct on their part. Whether or not the applicants can succeed against any of the respondents depends on whether they have succeeded in establishing the requisites for an interim interdict.

...

- [7] The attitude of the 1st and 2nd respondents is that there is no prima facie evidence that they have committed a wrongful act in violation of the applicants' rights. Their case is that they have no control over the identity of persons nominated or elected as councillors, and are not responsible for the termination of a councillor's term of office. The representatives of the various political parties on council are determined by the results of elections held by the 4th respondent. These results determine who enters the municipal council, whether by reason of his or her position on the party lists or by reason of the result of an election for a ward which he or she has fought and won. The results are declared by the 4th respondent and are implemented by it and the various political parties. The 1st and 2nd respondents have no say in the matter. Their conduct thereafter is authorized and regulated by statute and the subsidiary legislation promulgated

thereunder.[1] Whatever they did or did not do before and after being notified of the expulsions was in accordance with their statutory obligations, and cannot therefore be unlawful. In this case the applicants took up their places on the council without licence from the municipality. The payment of their remuneration and other service benefits, and the use of office premises and other municipal property followed as a matter of course. Similarly, when the IEC and the ANC notified the municipality that the applicants had ceased to be councillors and that vacancies had been created, they had no say in the matter. The 1st and 2nd respondents were no longer able to pay remuneration to persons who, they were advised, were no longer councillors. They were under an obligation to recover municipal property from persons no longer entitled to possess it. They had no basis for going behind a formally made notification by the 3rd and 4th respondents that the applicants were no longer councillors. They cannot sensibly be called upon to show cause why they did or did not do things which were, in the event, inexorably governed by statute. The result is that the 1st and 2nd respondents' explanation throws considerable doubt upon the right which is the subject-matter of the main action and which the applicants seek to protect by means of interim relief. The violation of that right by the 1st or 2nd respondents is not prima facie established, though open to some doubt; it is open to serious doubt. It seems to me, therefore, that the only relief which can sensibly be granted in respect of their future dealings with the applicants would be a declaratory order that the expulsion of the applicants is to be

regarded as suspended pending the review. Mr Cole has in the alternative applied on behalf of the applicants for modified relief in the form of a declarator. Mr Quinn, who appears for the first three respondents and who is aware that there is no prayer for alternative relief, has pointed out that this is not the case which the 1st and 2nd respondents came to meet, and asks that the application against them should be dismissed with costs. In view of the fact that 1st and 2nd respondents have no interest in the outcome of a review of the ANC's decision to expel the applicants, and in view of the fact that if the applicants are successful on review they will become entitled to remuneration until the lawful termination of their term of office regardless of any order, declaratory or otherwise, against the 1st and 2nd respondents, there seems to me to be no justification for issuing even a declaratory order against them. They would probably not have opposed a declaratory order if that had been all that the applicants asked for. The claims against them are dismissed with costs. I can see no reason why this costs order should not operate against all nineteen applicants jointly and severally, the one paying the others to be absolved.

[7] The same position obtains in this case. The 1st and 2nd respondents have not been shown to have committed a wrongful violation of a right which is prima facie established though open to some doubt. The applicants have failed to prove one of the requisites for an interim interdict. This entitles the 1st and 2nd respondent to an order dismissing the application with costs. In view of my decision to reserve the issue of the applicants' claim for costs against the 3rd respondent, and in view of the 1st and 2nd respondents'

alternative prayer for a costs order against the 3rd respondent, it is expedient to order that the issue of 1st and 2nd respondents' claim for costs against the 3rd respondent should also stand over for later determination by me if the 1st or 2nd respondent desire to pursue it and the matter cannot be resolved by the parties.

[8] There will be the following order:

3. The applicant's are ordered to pay the 1st and 2nd respondents' costs jointly and severally, the one paying the other to be absolved.
4. The issue of the applicants' and the 1st and 2nd respondents' entitlement to a costs order against the 3rd respondent is reserved, and may be set down for hearing by any interested party on 10 days' notice to the other parties.

RJW JONES

Judge of the High Court

6 May 2009

[1] Local Government: Municipal Structures Act No 117 of 1998

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Prepared on 12 October 2026 · Esheria