

SOUTH AFRICA / JUDGMENT

# Mxube and Others v The Electoral Commission of South Africa and Others

## (0012/23EC) [2024] ZAEC 15 (13 May 2024)

[2024] ZAEC 15

## COURT

Electoral Court

## BEFORE

Zondi JA, Shongwe AJ, Adams AJ, Ntlama-Makhanya, Phooko

## CASE / FILE NUMBER

0012/23EC

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THE ELECTORAL  
COURT OF SOUTH AFRICA  
BLOEMFONTEIN  
Not  
Reportable  
Case  
no: 0012/23EC

## In the matter between:

LUNGILE  
PACIFIST REGINALD MXUBE  
First Applicant  
PHILLIP  
MACHANICK  
Second Applicant  
KUNGEKA  
GAYNOR MACHANICK  
Third Applicant  
ERIC  
JONATHAN WALTON  
Fourth Applicant  
MARGARET  
JANE BRADSHAW  
Fifth Applicant  
and  
ELECTORAL  
COMMISSION OF SA  
First Respondent  
MAKANA

LOCAL MUNICIPALITY  
Second Respondent  
SPEAKER  
OF MAKANA LOCAL MUNICIPALITY  
Third Respondent  
NOSIGQIBO  
SOXUJWA  
Fourth Respondent  
AYANDA  
KOTA  
Fifth Respondent  
LUNGISA  
SIXABA  
Sixth Respondent  
THANDISIZWE  
MATEBESE  
Seventh Respondent  
AMANDA  
DEKE  
Eighth Respondent  
ZONWABELE  
MANTLA  
Ninth Respondent  
MILO  
GEELBOOI  
Tenth Respondent  
MAHLUBANDILE  
KHUHLANE  
Eleventh Respondent  
MAKANA  
CITIZENS FRONT  
Twelfth Respondent  
PUMELO MAXWELL KATE N  
O,  
AS MUNICIPAL MANAGER  
OF THE  
THE  
MAKANA MUNICIPALITY  
Thirteenth Respondent  
Neutral  
Citation: Mxube and Others v The Electoral  
Commission of South Africa and Others (0012/23EC) [2024] ZAEC 15  
(13 May 2024)

Coram: Zondi JA, Shongwe and Adams AJJ and Professors  
Ntlama-Makhanya and Phooko (Additional  
Members)

Heard: Application decided on the papers

|                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|----------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Delivered:     | 13 May 2024 – This judgment was handed down electronically by circulation to the parties' representatives via email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 13 May 2024.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Summary:       | <p>Section 20(2A) of the Electoral Commission Act 51 of 1996 – application by members of political party for declaratory and interdictory relief – ‘dispute [between opposing factions] relating to membership, leadership, Constitution or founding instruments of a registered party’ – Court’s jurisdiction engaged.</p> <p>Lawfully elected Councillors unlawfully ousted from political party and from Municipal Council by some respondents – undisputed that the actions of the respondents in ousting applicants from the party and their PR seats on the Municipal Council were irregular and non-compliant with the constitutional prescripts of the organisation – unlawful expulsions reviewed and set aside – applicants reinstated.</p> <p>ORDER</p> <p>(1)</p> <p>The following decisions by the fourth and the fifth respondents, purportedly on behalf of the twelfth respondent, Makana Citizens Front (MCF), be and are hereby reviewed</p> |
| and set aside: | <p>(a)</p> <p>The decision to convene and to conduct a disciplinary hearing against the applicants on 14 February 2022;</p> <p>(b)</p> <p>The decision taken by the sixth respondent at the hearing on 14 February 2022 to expel the applicants from the twelfth respondent.</p> <p>(c)</p> <p>The decision to declare vacancies in relation to the MCF PR Councillor positions in the Makana Municipal Council and to address a letter to the Makana Municipal Council, advising accordingly;</p> <p>(d)</p> <p>The decision to submit an updated PR Councillor list of MCF, purporting to replace the PR list gazetted prior to 1 November 2021 with such,</p> <p>(2)</p> <p>The decision to declare vacancies in Council in respect of the PR Councillor positions awarded to the MCF,</p>                                                                                                                                                                  |

be and is hereby reviewed  
and set aside.

(3)

The removal of the names of the applicants  
from the MCF's PR Councillor Candidates list, the declaration  
that the first to  
fifth applicants cease to hold office in the Makana  
Municipal Council, the placement of the names of the sixth to tenth  
respondents  
at the top of the said list, and the appointment of the  
sixth to tenth respondents to the Makana Municipal Council, be and  
hereby  
are reviewed and set aside;

(4)

The first applicant is declared to be the  
duly elected leader of MCF and the Electoral Commission is ordered to  
amend its records  
to reflect the foregoing.

(5)

The second applicant is declared to be the  
main contact person for MCF with the Electoral Commission and the  
Electoral Commission  
is ordered to amend its records to reflect the  
aforegoing.

(6)

The Electoral Commission shall restore and  
reinstate the PR Councillor Candidates list Gazetted prior to the 1  
November 2021 elections.

(7)

The membership in MCF of the first to the  
fifth applicants be and is hereby restored.

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## JUDGMENT

Adams AJ (Zondi JA, Shongwe AJ and Professors Ntlama-Makhanya and Phooko (Additional Members) concurring):

[1] The twelfth respondent, Makana Citizens' Front (MCF) is a registered political party, founded on 16 June 2021. Shortly after it was established, it was registered with the first respondent, the Electoral Commission of South Africa (the Commission). MCF's

revised 'Deed of Foundation and Constitution' was formally adopted by its founding members at a meeting on 20 August

2021. On 21 October 2021 the Deed of Foundation and Constitution was signed by inter alia the first applicant (Mr Mxube), as the chairperson, and it was thereafter registered with the Electoral Commission during that month. The first to the fifth applicants are founding members of MCF, which was brought into existence specifically to contest the local

government elections in the Makana Local Municipality during November of that year (2021). To that end, MCF registered with the Commission their list of candidates for Ward and Proportional Representation (PR) councillors. At the top of their PR Councillors list were the first to the fifth applicants.

- [2] In terms of and pursuant to the Constitution of MCF, Mr Mxube was elected as its interim chairman at the meeting of the founding members on 20 August 2021, as well as the Convenor and the Head of its Election Campaign. The interim executive / management committee was also elected at this meeting. It is not without significance that also present at this meeting were the fourth respondent (Mr Soxujwa) and the fifth respondent (Mr Kota), who are clearly important characters in the dispute in this matter. It was at this meeting where the Councillor Candidates lists were agreed upon and finalised.
- [3] In the local government elections on 1 November 2021, MCF won five PR Councillor seats on the twenty-seven seat Council of the Makana Municipal Council. Those five positions were to be filled by the first to fifth applicants in accordance with a valid PR Councillor list filed by MCF with the Commission prior to the elections.
- [4] As the saying goes, so far, so good. The problems started shortly after the elections, when, out of the blue, Mr Kota claimed that the applicants had manipulated the PR Councillor Candidates list and disavowed the interim management committee of MCF, which had been duly nominated and elected at the meeting on 20 August 2021.
- [5] On 17 November 2021, Mr Kota and the sixth respondent (Mr Sixaba) unlawfully convened a meeting of MCF. At this meeting Mr Sixaba proposed that the applicants be removed from the second respondent, the Makana Municipal Council (MMC) and that a letter be addressed to the thirteenth respondent (the Municipal Manager), requesting him to remove the applicants as PR Councillors of the MMC. It is not disputed that the said meeting was irregular, unlawful and in contravention of the express prescripts of the constitution of MCF. In that regard, paragraph 9(j) and (k) of the MCF's Deed of Foundation & Constitution sets out the procedure to be followed when disciplinary proceedings are to be instituted as follows:

'9(j) Members of the Executive / Management Committee (apart from elected public representatives) may be removed by a two thirds majority of the Executive / Management Committee, including elected public representatives, who are present at a duly constituted meeting and on a motivated motion presented at least fourteen days prior to such meeting.

- (k) An elected public representative may be removed following a process initiated by a motivated motion supported by the signatures of a minimum of 100 registered voters of the public representative's constituents. This motion must be reviewed by the MCF Management Committee. A two third majority of the MCF Management committee is required to convene a disciplinary committee that will hear the case for removal.'

- [6] None of these peremptory procedures provided for in the MCF's Constitution were complied with by Messrs Kota and Sixaba when they purported to remove the applicants from their positions in the party and from their positions as PR Councillors. Moreover, when the applicants' legal representatives in correspondence to these respondents pointed out to them that their actions were unlawful, they did not once dispute such allegations. It therefore bears emphasising that Messrs Kota and Sixaba's purported expulsion from the party of the applicants was unlawful and the meeting convened by them for that purpose flew in the face of these express provisions of the Constitution of the MCF.
- [7] The same can be said of the subsequent conduct on the part of Messrs Kota and Sixaba and their faction, who, without cause, were able to convince the MMC to remove the applicants as Councillors and replace them with the sixth to tenth respondents. During January 2022, Mr Kota deposed to an affidavit, claiming that he is the leader of MCF. This claim flew in the face of the documents that were in possession of the Commission, which confirmed that, according to their records, the leadership was the interim management committee as per the documents filed off record and which reflected Mr Mxube as the leader.
- [8] The unlawful conduct on the part of the fourth and fifth respondents culminated in them convening disciplinary hearings in which they purported to charge all of the applicants with misconduct supposedly for having acted in contravention of the resolutions taken at the MCF's alleged duly constituted special general meeting held on 17 November
2021. The disciplinary hearings were convened for 14 February 2022. The applicants did not attend the hearings as they did not recognise the authority of Mr Kota and his cohorts to discipline them. In their absence, the applicants were found guilty of the charges against them and expelled from MCF.
- [9] By all accounts and having regard to the provisions of the MCF's Deed of Foundation and Constitution, the disciplinary hearings were irregular and non-compliant with the constitutional prescripts of the organisation. Those proceedings were procedurally and substantially fatally flawed and should be set aside.
- [10] Following the applicants' expulsion from MCF, the fourth and fifth respondents advised the MMC that their membership of the said organisation had been terminated. They therefore called for the removal of the applicants as MCF's PR Councillors on the MMC. Armed with the documentation from the fourth and the fifth respondents, the MMC obliged and, after consultation with the

Commission, removed the applicants as Councillors and replaced them with the sixth to tenth respondents. On 12 April 2022 the Commission

sent a letter to the Municipal Manager of the MMC, informing the MMC that the sixth to tenth respondent have been declared elected to the MMC and that the applicants have been replaced as councillors and that they (the applicants) ceased to hold office in the municipality.

[11] The applicants brought the present application in terms of s 20(2A)[1] of the Electoral Commission Act[2], in which they seek the following relief: -

‘1. That, insofar as it might be necessary that the:

1.1. Applicant's failure to comply with the forms and service provided for in the Rules of Court be condoned and that the application be dealt with as an urgent application in terms of Rule 11 of the Rules of the above Honourable Court;

1.2. Applicant's failure to comply with the time periods provided for in Rule 6(1) of the rules of the above Honourable Court be condoned in terms of Rule 10 of the said rules;

2. The decisions of the twelfth respondent, led by the fourth and fifth respondent:

2.1. To call and hold a disciplinary hearing against the applicants on 14 February 2022;

2.2. The outcome by the sixth respondent of the hearing on 14 February 2022;

2.3. To address a letter to the second and third respondents to declare a vacancy in the Makana Municipality Council;

2.4. To submit an updated PR List, after the PR list gazetted prior to 1 November 2021,

be and are hereby reviewed and set aside.

3. The decision of the thirteenth respondent to declare a vacancy in Council in respect of the twelfth respondent be and is hereby reviewed and set aside.

4. That the first respondent's decisions:

4.1. To remove the names of the first to fifth applicants' names from the twelfth respondent's PR Councillors list;

4.2. To declare that the first to fifth applicants cease to hold office in the second respondent;

4.3. To place the sixth to tenth respondents' names at the top of the twelfth respondent's PR Councillors List; and

4.4. To declare that the sixth to tenth respondents are elected to the second respondents;

be and hereby are reviewed and set aside;

5 That it is declared:

5.1. That the first applicant is the duly elected leader of the twelfth respondent.

5.2. That the second applicant is the main contact person for the twelfth respondent.

5.3. That the first respondent is ordered to restore the PR list Gazetted prior to the 1 November 2021 elections.

6. That the twelfth respondent be ordered to restore the membership of the first to fifth applicants.
  7. That the first respondent amends its records to reflect the first applicant as the leader of the twelfth respondent.
  8. That the twelfth respondent amends its records to reflect the first applicant as the party leader.
  9. That the second respondent is to pay the first to fifth applicants full back pay with interest within 14 days from date of delivery of this order.
  10. That both the first and second respondents file a report with the registrar of the court showing compliance with the order within 30 days from the date of delivery of this judgement.
  11. That the Applicants be granted leave to supplement their affidavits.
  12. That such further and/or alternative relief as the Honourable Court may deem fit be awarded to the Applicant's.'
- [12] The Commission has indicated that it shall abide the decision of the court. It has nevertheless filed an explanatory affidavit in which it takes issue with the fact that the applicants accuse it of having acted mala fide. The Commission also disputes the claims by the applicants that it took certain 'decisions', such as to remove the names of the first to fifth applicants from the twelfth respondent's PR Councillors list and declaring that the first to fifth applicants cease to hold office in the second respondent. These are not decisions taken by it, so the Commission contends, but they are simply consequences which flowed ex lege from certain facts, notably the advices received from the MMC that the applicants' positions as Councillors had been terminated.
- [13] I agree with the Commission's submission and the concerns it raised in its explanatory affidavit are valid. They should and will be addressed by appropriate wording of the orders.
- [14] The second, third and thirteenth respondents (collectively 'the MMC') have adopted a similar stance in that they filed explanatory affidavits and indicated that they will abide the judgment and the order of the court. They nevertheless objected vociferously to the order asked for in prayer 9 of the notice of motion, relating to the back payment of remuneration of the applicants. They contend that the municipality can ill-afford to pay such a claim. They also contend that, if ordered to pay 'back-pay', the MMC would effectively be paying double for the same expenses.
- [15] I agree with the MMC. My view is that those 'damages' probably resulted from the delay in bringing this application to court. The applicants were expelled from the MCF during April 2022. It was incumbent on them to launch this application at the very least when they were booted out of the organisation. For that reason, I would be disinclined to order payment of the back-pay to the applicants. A claim for such an order is, in any event, better dealt with in

an action for damages in which all related issues, including the quantum of such damages and exactly who is liable for the loss, can be fully ventilated.

[16] Most importantly, and this requires particular emphasis, the fourth and fifth respondents, against whom serious allegations of impropriety are levelled by the applicants, are not opposing the application. They have filed no opposing papers, which means that the allegations by the applicants in relation to the events during 2021 preceding the elections in November 2021, are uncontested and unchallenged. The narrative by the applicants and their exposition of the events form the basis of the findings in this matter. The same applies to the sixth to the tenth respondents, who are alleged to have been on the receiving end of undue benefits in that they jumped the queue and leap-frogged themselves onto the MMC. They too are not opposing the applicants' application, nor have they filed opposing papers. From their quiescence I infer acquiescence. The application was duly served on all of these respondents on 18 December 2023 and there is therefore no reason why they shouldn't be opposing the relief claimed by the applicants in this application, unless off course the respondents accept the sustainability of the applicants' cause of action.

[17] For all of these reasons, the relief sought by the applicants should granted in its amended form as discussed above.

#### Costs

[18] The award of costs is a matter which is within the discretion of the court considering the issue of costs. This discretion must be exercised judicially having regard to all the relevant considerations. One such consideration is the principle that in general in this Court an unsuccessful party ought not to be ordered to pay costs. But this is not an inflexible rule, and it can be departed from where there are strong reasons justifying such departure such as in instances where the litigation is frivolous or vexatious.

[19] I can think of no reason why the foregoing general rule should be departed from. There should accordingly be no order as to costs.

#### Order

[20] In the result, the following order is made: -

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L R ADAMS

Acting Judge of the Electoral Court

Bloemfontein

#### APPEARANCES

For the applicants: L P R Mxube (in Person)

For the First Respondent: No appearance

For the Second, Third and

Thirteenth Respondents: Gray Moodliar Attorneys, Gqebrha

For the other Respondents: No appearance

[1] Section 20(2A) provides that: ‘The Electoral Court may hear and determine any dispute relating to membership, leadership, Constitution or founding instruments of a registered party.’

[2] Electoral Commission Act 51 of 1996.

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