

SOUTH AFRICA / JUDGMENT

Phillips and Others v Olyn and Others (148/2022) [2023] ZANCHC 21 (26 May 2023)

[2023] ZANCHC 21

COURT

Northern Cape High Court, Kimberley

BEFORE

Williams

CASE / FILE NUMBER

148/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTHERN
CAPE DIVISION, KIMBERLEY)

Case

number.: 148/2022

Date heard: 03/02/2023

Date delivered: 26/05/2023

Reportable: Yes/No
Circulate
to Judges: Yes/No
Circulate
to Magistrates: Yes/No
In

the matter between: JOHAN
ANDREW PHILLIPS
1ST APPLICANT
MAURICIA
ESTELL NIMMERHOUDT
2ND APPLICANT
PATRICIA
MOOI
3RD APPLICANT
and
PIET
OLYN
1ST RESPONDENT
SIYATHEMBA
LOCAL MUNICIPALITY
2ND RESPONDENT
ELECTORAL
COMMISSION OF SOUTH AFRICA
3RD RESPONDENT
SIYATHEMBA
COMMUNITY MOVEMENT
4TH RESPONDENT

CORAM: WILLIAMS J

JUDGMENT

WILLIAMS J:

1. The applicants are three of the four proportional representatives of the fourth respondent, Siyathemba Community Movement (SCM) who sit on the Council of the second respondent, the Siyathemba Local Municipality (the Municipality).
2. The relief sought by the applicants herein is the following:
“1. That the first Respondent’s decision to suspend and expel Applicants as members of the fourth Respondent is hereby declared unlawful, invalid and of no force and effect.
2. That the first Respondent’s decision to suspend and expel the Applicants as Council Members of the second Respondent is hereby set aside.
3. That the first Respondent is hereby declared not authorised to conduct disciplinary proceedings under the auspices of the fourth Respondent, is not authorised to act on behalf of the fourth Respondent and/or to act in any manner on behalf of the fourth Respondent.
4. That the first Respondent and anyone acting on his unlawful instructions or in concert with him, is hereby interdicted and restrained from using the name of the fourth Respondent in any manner, form, or forum.

5. That the first Respondent and anyone acting on his unlawful instructions or in concert with him is hereby interdicted and restrained from interrupting, interfering, stopping and disrupting the meetings of the Council, the business and functions of the Council and those of the Mayor's office in the Siyathemba Local Municipality.
6. Directing the first respondent to pay the cost of this application on a punitive scale and directing anyone else who opposes this application to pay the costs.

Background

to this application

3. The SCM held its founding meeting on 26 June 2021 whereat the leadership of the party was elected and interim structures established.
4. On 10 August 2021 the SCM was duly registered with the Independent Electoral Commission (IEC) and could therefore participate in the local government elections.
5. On 1 November 2021 the SCM contested the local government elections and won four of the eleven seats in the council of the Municipality.
6. On 21 November 2021 the SCM held an Interim Structure meeting at which inter alia the verbal resignation of the party's secretary, in the presence of two witnesses earlier that day was discussed and an acting secretary was elected. In this regard the erstwhile secretary, Mr Piet Olyn, who is the first respondent herein, was

replaced with acting secretary Mr Ralph Steenkamp. At this same meeting it was resolved that the leader of the SCM, Mr Johan Andrew Phillips, the first applicant, be the mayoral candidate for the party. On 22 November 2021, Phillips was elected as the mayor of the second respondent.

7. On 2 December 2021 the IEC was duly advised of the resignation of the Olyn and the appointment of Steenkamp as acting secretary and that all communications should be addressed to either Phillips as party leader or to Steenkamp in his absence.
8. On 14 December 2021 a memorandum, purportedly on behalf of the SCM, was delivered to the Municipal Manager of the second respondent

informing, inter alia, that the three applicants have been officially suspended from the SCM and no longer represent its voters and members and that the SCM members will henceforth represent themselves in Council meetings. The memorandum was signed by Olyn as "secretary deployed". Attached to the memorandum were combined notices of suspension (with effect from 13 December 2021) and notices to appear at a disciplinary

hearing (with charge sheets) on 22 December 2021.

9. On 17 December 2021, the Municipal Manager responded to the memorandum and its attachments mentioned above, in writing to the SCM, expressing concerns relating to; (i) whether due process was followed in light of the fact that the applicants have apparently

been suspended before the disciplinary hearing was to be held; and (ii) that conflicting correspondence had been received on 10 December 2021 from the leader of the SCM, Phillips, that Olyn had resigned as party secretary. The Municipality held the view, after consultation with the IEC, and in accordance with the stance of the IEC, that:

“Amendments to party lists have to be communicated by the party directly to the Commission.

The Municipal structure Act does not provide for the recall of councillors; s27 lists the six specific causes of a councillor vacancy.

Should there be an internal party dispute and the Commission receives contradictory instructions, we will not be in a position to process party requests until such disputes are resolved within the party.”

10. Despite the concerns raised by the Municipality about due process, the disciplinary enquiry arranged by Olyn proceeded in the absence of the applicants and on 4 January 2022 the applicants received notices of expulsion signed by Olyn as secretary of the District Management structure of the SCM.
11. It is the applicants’ case that after the acceptance of his resignation, Olyn had no authority to act or communicate on behalf of the SCM. In addition hereto his actions insofar as it related to the disciplinary proceedings against the applicants were contrary to the provisions of the constitution of the SCM to which Olyn was a co-signatory with Phillips. I will revert to the provisions of the SCM constitution in due course.
12. The applicants contend further that the actions of Olyn have sown confusion amongst the community about the leadership of the SCM, that Olyn and his followers have on several occasions attended the mayoral office and venues where Council met to interrupt, interfere and disrupt the business of Council and Phillips’ duties as mayor and to undermine his tenure of office.
13. Despite demand Olyn refused to withdraw the letters of expulsion and he and his followers continued to disrupt the business of Council and the first applicant, hence this application.
14. Olyn in his personal capacity and ostensibly on behalf of the SCM, opposed the application and filed his opposing affidavit on 17 March 2022. A further affidavit was filed by Olyn on 19 May 2022, described in a filing notice as a supplementary affidavit, but the actual affidavit is headed “answering affidavit” and is in fact a new and improved answering affidavit which addresses the averments made in each and every paragraph of the applicants’

founding affidavit. No reason was given for the filing of the second answering affidavit, no leave was obtained for the filing of this affidavit, and needless to say, it being highly prejudicial to the applicants who had prior to its filing filed their replying

affidavit, I disallowed the second answering affidavit.

15. In view of the argument presented by Mr Coetzee SC on behalf of Olyn, I do not intend to deal in much detail with the allegations in the answering affidavit. For purposes of this judgment I need only highlight the following allegations:

15.1 Olyn denied that he had resigned as secretary of the SCM and referred to Phillips' averments in this regard as hearsay.

15.2 He also denied the authenticity of the Interim Structure meeting of 21 November 2021 which accepted his resignation and elected an acting secretary. Olyn in fact questioned the existence of an Interim Structure.

15.3 Olyn denied that he had acted on a frolic of his own in instituting disciplinary proceedings against the applicants and alleged that he had been authorised by the District Management of the SCM, of which he was the secretary, to issue the notices of the proceedings and the memorandum to the Municipal Manager.

15.4 He further denied that due process had not been followed and insisted that the applicants had received notice of the disciplinary proceedings, and that it had been held in accordance with the constitution of the SCM which inter alia allowed the proceedings to be held in the absence of a member and afforded the applicants an automatic right of appeal, which they chose not to exercise.

16. As mentioned herein before, I do not intend to deal in detail with Olyn's answering affidavit, since surprisingly, considering the vigorous opposition mounted – to the extent that a second affidavit had been prepared in defence of his actions – in argument on behalf of Olyn, the case of the applicants, that Olyn had resigned as secretary of the SCM was “accepted” as well as the nullity of the disciplinary proceedings.

17. Mr Coetzee argued that since Olyn had resigned and had no authority to involve himself in disciplinary proceedings, the expulsions were of no consequence and that the application was therefore completely unnecessary.

18. The argument is further that in any event none of the relief sought by the applicants can be granted. In respect of the relief in prayers 1 and 2 of the Notice of Motion the contention is that the decisions by Olyn are of no force and effect and that a nullity

cannot be set aside. In respect of prayer 3 it is contended that it is not necessary for a declaratory order in this regard since Olyn is in any event not authorized to conduct disciplinary proceedings. As far as prayer 4 is concerned the argument is that the relief sought can only be in favour of the SCM and since it is not an applicant and the applicants had brought the application in their personal capacities such relief cannot be granted. Lastly, with regards to prayer 5, the argument is that the applicants have not been authorised by the Municipal Council to seek relief relating to the Council or the Mayor's office.

19. The argument by Mr Coetzee with regards to the relief sought in prayers 1 and 3 of the Notice of Motion is not entirely without merit, regard being had to the concession of invalidity of the disciplinary proceedings. A declaratory order is however a discretionary remedy. In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005(6) SA 205 (SCA) at 213 E-G the court held that the decision whether a declaratory order should be granted entails a two stage approach: firstly, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and secondly if the court is satisfied that such conditions have been proved, it has to exercise its discretion by deciding either to refuse or grant the order sought.
20. The point made is that since neither the Municipality nor the IEC accepted the notices of expulsion with regards to the applicants and had consequently made no changes to the party structure in their records, the positions of the applicants have remained intact and therefore the applicants have no existing, future or contingent right to be protected, therefore the applicants have failed to satisfy the first leg of the enquiry.
21. The pronouncements and actions of Olyn have however been shown, not only on the papers of the applicants, but also that of Olyn, to have caused factions within the SCM and have sown confusion amongst the members and voters as to the leadership of the party. In this respect the applicants do have an interest which needs protection. I have also been informed from the bar by Mr Kunene for the applicants that there are many other matters in this Division relating to the issues traversed in this application and that it is important that this court clarify the positions of the applicants and Olyn vis a vis the SCM. In these circumstances I am of the view that it is also in the interests of justice that the orders sought in prayers 1 and 3 of the Notice of Motion be granted.
22. With regards to prayer 2 of the Notice of Motion, i.e. that Olyn's decision to suspend and expel the applicants as council members be set aside, the situation is somewhat different. The decision to expel the applicants as councillors have not been acted upon by the Municipality as well as the IEC as a result of its invalidity. I may just mention at this point that the IEC, in a letter addressed to Phillips on 19 January 2021, in which Olyn was carbon copied, informed that the IEC only recognises and implements changes to the party structure if they emanate from the registered leader of the party. The decision has had no consequences and the setting aside of such a nullity would have no practical effect.
23. I now turn to the interdictory relief sought. In terms of prayer 4 of the Notice of Motion the applicants seek to interdict "Olyn and anyone acting on his unlawful instructions or in concert with him to be interdicted and restrained from using the name of the fourth respondent in any manner form or forum". As I understand it, Olyn is still a member of the SCM, although he has resigned as secretary. The terms of the interdict sought would place drastic constraints on his freedom of speech and expression. It may well be that the applicants' intention was that Olyn and his followers be prohibited from acting unlawfully in the name of the SCM, but that is not what the paragraph states. Be that as it may, there are other difficulties with this particular interdict sought. The applicants have brought the

application in their personal capacities and not on behalf of the SCM who would be the party entitled to the protection of its name used for unlawful purposes. The applicants personally do not have a direct or substantial interest in the subject matter of the interdict and therefore lack locus standi to apply for the interdict under discussion.

24. The interdict sought in prayer 5 of the Notice of Motion must unfortunately suffer the same fate. It is the Municipality and/or its Council who have a direct or substantial interest in the meetings, business and functions of the Council and the Mayor's

office, not the applicants.

25. In my view the applicants have made out a case only for the declaratory orders sought in prayers 1 and 3 of the Notice of Motion and the only issue left is that of the costs of the application.
26. The applicants seek a punitive costs order against Olyn. The general rule is that costs follow the result. In casu the applicants were only partially successful and the question which needs to be answered is whether the applicants are entitled to their costs despite having obtained only partial success. In other words, whether a departure from the general rule is warranted.
27. There can be no doubt that the wilful and unauthorized actions of Olyn necessitated the bringing of this application. It needs

repeating that Olyn together with Phillips were co-signatories to the constitution of the SCM and that he of all people ought to be well-versed with the provisions of the constitution. Clause 13 of the constitution, which relates to disciplinary proceedings, is quite clear that only the Executive Committee can appoint a Disciplinary Committee to conduct disciplinary proceedings. At the time of the purported disciplinary proceedings against the three applicants a Disciplinary Committee had not even been appointed by the Executive Committee yet. Olyn knew full well that his actions were contrary to the constitution of the SCM, contrary to due process and contrary to the IEC processes and yet persisted with his defence thereof right up to the hearing of the application.

28. In *Michael and Another v Linksfield Park Clinic (PTY) Ltd and Another* 2001(3) SA 1188 (SCA) the Supreme Court of Appeal held at 1203 J as follows:

"It is beyond question that the circumstances of a case may warrant an order, in the exercise for the Court's discretion, depriving a successful party of costs partially or entirely, and even warrant an order requiring the successful party to pay the unsuccessful party's costs – again, partially or entirely."

29. Other instances where the courts have ordered the successful party to pay the costs of proceedings are inter alia Nxumalo and Another v Mavundla and Another 2000(4) SA 349 De CLD, where the first respondent's conduct was the fundamental cause of the litigations (see also the authorities cited therein at p 354 of the judgment) and Berkkowitz v Berkowitz 1956 (3) SA 522 (SR) where the court found the successful party to have been the cause of the futile litigation.
30. Mr Coetzee has argued that Olyn should at the very least not be denied his costs of the day of the hearing, should he be successful. However taking into account the fact that Olyn has not been completely successful in his opposition of the application and the manner in which he conducted himself pre-and post the launching of the application, I find it appropriate that he be ordered to bear the costs of the application on a party and party scale.

The following orders are therefore made;

- a) The first respondent's decision to suspend and expel the applicants as members of the fourth respondent is unlawful, invalid and of no force and effect.
- b) It is declared that the first respondent is not authorised to conduct disciplinary proceedings under the auspices of the fourth respondent, and is not authorised to act in any manner on behalf of the fourth respondent.
- c) The first respondent is to pay the costs of the application.

CC WILLIAMS

JUDGE

For Applicants: Adv. S Kunene Motlhamme Attorneys For 1st Respondent: Adv. W Coetzee SC
Akani Mathansi Attorneys c/o Matlejoane Attorneys

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Prepared on 14 October 2026 · Esheria