

SOUTH AFRICA / JUDGMENT

Sibanda and Others Sterkspruit Civic Association (2522/2017) [2017] ZAECHMHC 26 (25 July 2017) [2017] ZAECHMHC 26

COURT

Eastern Cape High Court, Mthatha

BEFORE

Majiki

CASE / FILE NUMBER

2522/2017

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE LOCAL DIVISION, MTHATHA)

CASE

NO. : 2522/2017

Date

reserved : 22 June 2017

Date

delivered : 25 July 2017

In

the matter between:

SITHEMBILE
JOHANNES
SIBANDA First
Applicant
MNINIKHAYA
JEREMIAH MADIKANE Second
Applicant
LAMLANI
MEHLOMAKHULU Third
Applicant
LEBOHANG
SETSEPANE Fourth
Applicant
SAZI
GUNGQA Fifth

Applicant
SAKHUMZI
MAQALA Sixth
Applicant
CHUMILE
DADA Seventh
Applicant
MTHETHELELI
PATRICK
MNISI Eight
Applicant
MOEKETSI
TWOBOY
SEHLOHO Ninth
Applicant
MZWANELE
MGIDLANA Tenth
Applicant
MTUVUMILE
NDODA Eleventh
Applicant
WISEMAN
ANDISIWE
MKANGALA Twelfth
Applicant
MADISEMA
CHRISTINA
KIBE Thirteenth
Applicant
And
STERKSPRUIT
CIVIC
ASSOCIATION First
Respondent
MCEBISI
NTIKELELO
MGOJO Second
Respondent
NOKUZOLA
PHAMA Third
Respondent
MTHETHUNJANI
YILIWE Fourth
Respondent
ALICE
DYANI Fifth
Respondent
NONZUKISO
MASUPA Sixth
Respondent
KOKI

SHIBANE Seventh
Respondent
NDUNA
STUURMAN Eighth
Respondent
KHANYISA
MAQUNGO Ninth
Respondent
NONCEDO
MAKAKA Tenth
Respondent
BONGIWE
NDZABA Eleventh
Respondent
PHEKO
METHOLA Twelfth
Respondent
MADODA
MVULA Thirteenth
Respondent
THETHANI
THEMBILE MKHASAKHASA Fourteenth
Respondent
JACKSON
MCEBISI
MDOLOMBA Fifteenth
Respondent
NOSIDIMA
ROZANA Sixteenth
Respondent
MELISIZWE
KAFILÉ Seventeenth
Respondent
THE
INDEPENDENT ELECTORAL
COMMISSION Eighteenth
Respondent
SPEAKER,
SENQU LOCAL MUNICIPALITY Nineteenth
Respondent

JUDGMENT

MAJIKI J:

- [1] The applicants describe themselves as members of a duly registered political party known as Sterkspruit Civic Organisation (SCA) which is the first respondent herein. They are aggrieved by a recommendation for their dismissal taken at a hearing by the disciplinary committee of the (SCA), communicated to them on 16 May 2017 and accepted and acted upon by SCA. According to them the said committee was unlawfully appointed by an unlawfully constituted structure referred to as the executive committee of SCA. The application has been instigated by the conduct of the first to seventeenth respondents (herein referred to as the respondents) of terminating the applicants' membership of the SCA. The applicants say the said conduct was made in disregard of the constitution of the SCA. Furthermore, they were not afforded an opportunity to be heard before such a decision which affects them adversely was taken.
- [2] The applicants in Part A seek an order by way of urgency, restraining and interdicting the respondents from giving effect to a resolution taken on 24 May 2017, removing the names of the sixth, eighth, ninth, eleventh, twelfth and thirteen applicants from the candidates' gazetted election list kept by the eighteenth respondent. Further restraining and interdicting the eighteenth respondent from giving effect to the same resolution. Further restraining the nineteenth respondent from declaring vacancies consequent to the same resolution. Further they seek an order reinstating the applicants' membership of the first respondent on terms no less favourable than those which were applicable to the applicants before the said resolution was taken.
- [3] In part B they seek an order declaring the resolution of 24 May invalid and unlawful. Further declaring the resolution taken by the respondents terminating their membership invalid and unlawful. Further declaring the dissolution of the inaugural executive committee consequent to an unlawful resolution taken by the respondents on 4 September 2016 and or 15 February 2017 as invalid and unlawful. Further declaring appointment of the members of the executive committee of SCA invalid, unlawful and of no force and effect. Further declaring the recommendations of the task team tabled in a meeting of 15 February 2017 recommending the removal from office of inaugural executive committee invalid and of no force and effect. Further declaring the resolutions taken by the respondents in a meeting of 21 March 2017 amending and adopting the constitution of the SCA invalid and unlawful.
- [4] Orders sought in Part C envisage that upon the success of the declaration orders in Part B the court should grant the applicants

an order directing the inaugural committee upon reinstatement, to craft a road map convening an elective conference and other ancillary reliefs.

[5] The application is opposed. The fourth respondent deposed to an affidavit on behalf of the respondents, except the eighteenth and nineteenth respondents, reference to the respondents therefore in this judgment refers to all respondents except the eighteenth and nineteenth respondents. The respondents have attacked the bringing up of the application by the applicants by way of urgency. According to the respondents the applicants' problems according to their version started in September 2016. The disciplinary committee's (DC) decision whose implementation is sought to be interdicted was communicated to the applicants on 16 May 2017. Everything else happened as a sequel to that decision. Some prayers sought by way of interim relief relate to conduct and or decisions that occurred in March, April and June 2017. There has been no explanation by the applicants for their non-action at that stage.

[6] The respondents state that in part B the applicants seek to have their expulsion and its effects, decisions of 15 February, 3,4,21 March and 24 May 2017 set aside. They created their own urgency. Their actions do not suggest that they

appreciated that they were pursuing an urgent application. They knew of the elective conference as early as 15 February 2015.

The conference went ahead with their knowledge on 3 and 4 March

2017. Their attorney's letter of 2 March 2017 seeking to have the setting of the conference withdrawn was not responded to, there is no explanation why they did not act by then, even though they had already secured the services of an attorney.

[7] It is common cause that the applicants were members of SCA, at least up to the time of their dismissal, that is being challenged in these proceedings. The SCA is founded on a constitution as a voluntary association. It was founded on 12 December 2012. It was subsequently registered with the eighteenth respondent as a political party, for purposes of contesting for elections.

[8] It is also common cause that since December 2012 when the SCA was formed, it operated on a constitution. It had an inaugural

executive structure which was to function until an elective conference was held; Sakhumzi Maqale was not the inaugural secretary but Sipho Nkwali was; the fifth and Sixth applicants were deputy chairperson and deputy secretary respectively. The

copy of the constitution annexed as "SJ2" contains all the functions of the SCA's inaugural executive committee. The constitution was amended. What is in dispute is whether it was amended and adopted on 21 March 2017 and

backdated to 12 December 2016 or it was never adopted. It is also common cause that after promulgation of election results for local government elections which were held on 3 August 2016, there was a move to have the party list of candidates originally submitted to the eighteenth respondent changed.

- [9] The meeting of 1 September 2016 was adjourned in the midst of chaos. It seems as if this is when things started to disintegrate in the SCA. The parties have differing versions mainly about what happened after this period. However, the applicants were charged with various transgressions, a DC hearing sat in their absence on 10 April 2017. On 16 May 2017 they were advised in writing that the DC expelled them from SCA. On 24 May 2017 the executive of the SCA resolved to withdraw the applicants who were serving as councillors in the nineteenth respondent.

Urgency

- [10] Even though things did not go smoothly in the SCA since September 2016, the DC sat and made a decision to have them expelled on 10 April 2017 and same was communicated to them on 16 May 2017, the applicants insist that their cause of action in these proceedings

arose on 24 May 2017. On 24 May 2017 the executive committee took a decision to remove the applicants who were serving as

councillors from the 19th respondent and have them replaced. On 25 May 2017 they sought legal advice on the matter. On 25 May 2017 a letter of demand was sent to the respondents demanding that the said decision be withdrawn by 16h00 on 25 May 2017. On 29 and 30 May 2017 the applicants held consultations with their legal representatives for the moving of the urgent application. On 27 and 28 April it was a weekend and the said legal representative was already committed in having to attend certain pre-arranged funerals. On 1 June the certificate of urgency was sent to the judge for a directive. On 13 June the matter was in court, the parties agreed to timelines regulating the further conduct of the matter. The matter was finally heard on 22 June 2017.

- [11] On the respondents' version itself, the DC recommended to the SCA. The meeting of 24 May 2017 was for a report back on the outcome of the hearing of the DC and for sequel decisions to be taken, if any, the report was accepted and sequel decisions were taken. Indeed the letters of 16 May 2017 communicated that the DC had expelled the respondents from SCA. However, I may well accept that the DC, being a committee, the applicants correctly so, knew or were advised that the said committee could only recommend. This the respondents appear to confirm to be the position. The applicants therefore could only launch the action challenging the decision adverse to them, once a decision was taken by the body that supposedly had powers to do so. In my view, despite the fact that there was a lot of discord in SCA, that only constituted a build up to the actual actionable decision. In the circumstances, I agree with the applicants that there was no unreasonable delay from the expiry of dies in the letter of demand at 16h00 on 25 May 2017 and 1 June 2017 when the certificate of urgency was sent to the judge. Thereafter, at least up to the time of issue of the papers on 7 June 2017, the applicants were acting in terms of the judge's directive of 2 June 2017 which directed them to issue and serve the papers on or before 7 June 2017 and enrol the matter for hearing on 13 June 2017.

Parties' Versions

[12] According to the applicants the copy of the constitution annexed as "SJ1" is an incomplete copy of the constitution on the basis of which SCA was operating on. SJ2 is the constitution which was irregularly and unlawfully amended on 21 March 2017 and backdated to 12 December 2012. If it was the one signed on 12 December 2012, it could not bear the signature of the second respondent who was not SCA's secretary at the time. The second respondent was only unlawfully appointed into the executive of the SCA on 21 March 2017.

[13] Despite its being incomplete, SJ1 was written in December 2012 but was not adopted, it however sets out the fundamental principles,

legal standing, manner of acquisition of membership, leadership, term of office of office bearers, functions of various layers of management and office bearers of SCA. It became supreme law of all decisions taken by SCA or its individual constituent members. A copy of a complete constitution had been requested without success from the respondents. On 21 March 2017 the respondents unlawfully amended and adopted another constitution of the SCA, annexed as SJ2. Though this is denied by Kgosi Letsewa the applicants say he was present when the constitution was fraudulently amended. Despite that, SJ2 does set out some of the duties and functions of executive committee.

[14] The SCA had no formal structures, it operated with an inaugural executive structure that was agreed on, soon after it was formed.

Such structure would operate until an elective conference was held. The general and special meetings of SCA were to be convened by the chairperson upon mandate of executive committee. The secretary would then be instructed by the chairperson to call the required meeting. Membership of SCA constitutes of individual members and stakeholders, who are represented by two members of each stakeholder in all meetings of the executive committee.

[15] The constitution makes no provision for termination of membership or dispute resolution measures. The applicants had a legitimate expectation that they would be members of SCA for life or until they relinquished their membership. From 4 September 2016 the affairs of SCA started to be handled in a casual manner in violation of the constitution and SCA started to show cracks.

[16] Before the 3rd August 2016 municipal elections SCA registered with eighteenth respondent. It won 8 seats in Senqu local municipality and 1 seat in Joe Gqabi district municipality. A copy of the gazetted party list of 20 candidates was submitted to the eighteenth

respondent in terms of the municipal electoral Act 27/2000. The first 8 candidates who made it into the nineteenth respondent were called by the nineteenth respondent for the swearing in. Before they could be sworn in, the second, fourth and seventh respondents started to intimidate the candidates not to attend the swearing in. The fifth and thirteenth applicants refused and went ahead with the swearing in. The ninth applicant and one Nonkosi Mpoloki withdrew from the process, thereupon the eleventh and the twelfth respondents, who were number nine and

number ten in the party list filled such vacancies and became councillors in the nineteenth respondent. This was the intention of the second respondent, to replace the candidates with their preferred candidates. In reality the problems were caused by the fact that there was no deployment committee; there were less won seats than candidates in the party list and that the executive could not agree on the method of deployment. The second respondent wanted to impose the deployment in total disregard of the candidate's potential, votes in favour of that candidate and the existing party list. The applicants insisted that the list be adhered to.

[17] The executive committee became embroiled in conflicts, the relationship degenerated between the applicants and the respondents.

On 1 September 2016 a meeting of SCA's constituent structures was convened by the second respondent without mandate of the

executive committee. In that meeting he fictiously complained about organisational disunity which he said resulted in threats

against his life. He suppressed debate by other executive members and the meeting became chaotic. He unilaterally

adjourned the meeting after he saw that he was losing the ground. No date was set for next meeting. On 4 September he called another meeting without giving notice to the applicants, however some of the applicants heard of the meeting, including the fifth applicant, those applicants then attended the meeting.

[18] In the said meeting the second respondent unilaterally declared that the SCA had no leadership and that a task team would be formed. His supporters tasked him to look for people who would constitute the said task team, the fifth respondent and another volunteered to assist him in the search. The second respondent impromptu announced that the executive was suspended until the task team completed its assignment. No specific assignment was agreed to at that stage. However, most members suggested that professionals from relevant backgrounds and experience assist SCA and constitute the task team. The terms of reference of the task team would be agreed to upon the identification of members who would constitute the task team.

[19] Volunteers who were to look for members of the task team became the task team. On 15 February 2017 the task team recommended what the second respondent had already pronounced, that the executive of SCA be suspended. The meeting of 15 February 2017 was chaired by the second respondent, who under normal circumstances ought to have stepped down with the rest of executive members, that executive being implicated in the conflict that was supposedly the subject of investigation by the task team. It recommended further that an interim executive be elected to organise an elective conference in two weeks. The recommendations were accepted and implemented without debate and an interim executive committee was appointed.

- [20] On 2 March 2017 the applicants heard that a meeting was scheduled, suspected to be for the purpose of electing an executive committee. Neither a notice was given for the meeting nor was its agenda circulated. On 2 March applicants' legal representative sent a letter of demand to the respondents, essentially demanding that the sitting of the said meeting be withdrawn and some documents, including the constitution. The stakeholders also held a meeting on that day and resolved that the elective conference should not take place on 3 March 2017, instead a consultative conference should be held to seek to unite the members of the organisation. However, this was not heeded to and the elective meeting went ahead.
- [21] On 4 April 2017 the applicants were called to appear in a DC hearing on 10 April 2017. They were charged with charges including bringing SCA into disrepute and participating in organised factional activities that seek to threaten organisational operations and unity. Their legal representative addressed a letter to the respondents advising that charges were vague and embarrassing; that the applicants were unable to prepare their defence therefrom and that the charges must be withdrawn. The legal representatives also requested the SCA's code of conduct and discipline. The letters from the legal representatives are attached to the founding affidavit. The secretary who preferred the charges had no authority to do so, nonetheless the applicants deny the allegations that were levelled against them. They could not attend the hearing because they had to attend a criminal trial in the magistrate court on charges concocted against some of them and others were to be witnesses. On 16 May 2017 they received a letter signed by the fourth respondent advising that they were found guilty and were expelled from SCA by the DC. Further that they may appeal the findings and sanction to the central leadership of the executive committee of SCA within 7 days of the receipt of the letter through the chairperson. The findings went beyond the charges that were preferred against them. The constitution does not regulate expulsion of members and how such would be effected. It would be impossible to appeal a decision of an unlawfully constituted body.
- [22] On 25 May 2017 the applicant's attorneys addressed a letter to the respondents tabulating irregularities in the conduct of the respondents in the SCA. A demand was made specifically that the applicants' expulsions and their removal from the 19th respondent be withdrawn. No response was forthcoming hence the present application. Subsequently, the second respondent wrote to the nineteenth respondent and confirmed instructions that the names of these applicants who were in the council be withdrawn from the nineteenth respondent. This would cause irreparable harm to those councillors who were removed in the nineteenth respondent. They would lose their salaries, forfeit their benefits like medical aid. They together with their dependants would suffer immensely, without the councillors' respective income the education of their children would be affected, they would be without food and one of them would have to stall his wedding plans.
- [23] Their reputation would be impaired and their political careers would be permanently destroyed. The situation could exacerbate

tension in an already political volatile environment in the town of Sterkspruit. The balance of convenience favours the applicants, the respondents have nothing to suffer if they are refrained from perpetuating their conduct. The applicants have no other remedy available to the applicants other than to approach court for the relief sought.

- [24] The respondents on the other hand deny that SJ1 is the constitution of SCA. According to them SJ2 has always been the constitution of SCA, it was adopted on 21 December 2012 and not 21 March 2017. It has neither been fraudulent nor unlawful, up to the time of its due amendment. Kgosi Letsewa disputes being present in any occasion when the constitution was amended and backdated. They also deny that the fourth respondent was unlawfully appointed, he was elected in a conference held on 3 to 4 March 2017. The respondents were aware of the fact that the conference would be held as early as 15 February 2017. The power to convene and preside over meetings always vested with SCA chairperson.
- [25] The executive committee is drawn from the members of SCA who become members in their own right, including Kgosi Letsewa. Its existence is derived directly from the constitution. There is no member who is in SCA as representing a stakeholder. Any meeting of a stakeholder or its resolutions has no constitutional value in SCA. SCA consults stakeholders with a view of soliciting the stakeholders' views on issues of local government within SCA's local and district municipality's area of activity. The applicants were members in the SCA until their expulsion. On 1 September 2016 SCA held its meeting and not constituent structures' meeting. Their membership was terminated lawfully. None of the respondents had been sowing discord within SCA in breach of the SCA democratic principles and its constitution.
- [26] The respondents deny that they suppressed expression of anyone's views, intimidated or threatened members. In SCA there has been ability to tolerate and embrace divergent views of its members. They deny any fraudulent actions by the respondents. The respondents aver that such allegations are intended to insult. The reference to criminal offences and charges is irrelevant in these proceedings. There was nothing wrong with the chairperson reporting threats and danger to his person to the SCA general membership.
- [27] They deny ever receiving any request for information, and state that once same is received in prescribed form it would be provided.

The disciplinary process is provided for in SCA's constitution, as a measure of dispute resolution since the adoption of SJ2 in

2012. It affords a member who is alleged to have committed certain violations an opportunity to be heard together with a right of appeal against a decision of the disciplinary committee. The respondents never induced the applicants' illegitimate and unreasonable expectations of never to have their membership terminated. Such expectations are inconsistent with the constitution's provisions of a disciplinary process, such process may lead to suspension. The DC complied with the constitution and rules of natural justice, it was not arbitrary. The applicants were called to attend the hearing, they were given sufficient opportunity within

which to prepare for and attend the hearing. They never sought hearing particulars or a postponement of the hearing. The hearing continued in their absence because they made its proceeding in their presence

impossible. From the time of their expulsion the applicants have no rights. They have not appealed against the decision.

- [28] The respondents deny that the party list of candidates to be deployed at Senqu municipality, originally submitted with the eighteenth respondent, were changed at the instance of the executive but same was resolved in a general meeting. Even the nature and extent of changes were also agreed upon by the members and not the executive. After the meeting of 1 September 2016 was adjourned following its degeneration to a point where no meaningful debate was possible, the meeting of 4 September 2016 was called. It was published and the applicants attended it. All the resolutions including, that the stepping down of the executive and that the second respondent should continue in order to obviate any potential interference with the work of the task team and that the task team be formed were made in that meeting.
- [29] The task team was constituted, it did its work and gave a report of its recommendations to a general meeting on 15 February 2017 which was properly constituted. The agenda and notice of the meeting were sufficiently, reasonably and adequately given and that the meeting would deal with the recommendations of the task team. All subsequent decisions including, that the inaugural executive elected in 2014 be dissolved, new executive with the objective mainly, to organise elective conference were taken following the task team's resolution. The meeting was chaired by the second respondent, he was constitutionally entitled to do so and was never requested to recuse himself. The date of elective conference was announced at the said meeting. The inaugural executive was dissolved on 4 September, there were no parallel executive structures.
- [30] With regard to the charges against the applicants, they were clear and no further particularity was requested and withheld. The letter from the applicants' legal representative was written on behalf of the first applicant. It referred to ten others who were not named, the said eleven people referred thereto did not include all the applicants before court. In the respondents' view such issues could be better be dealt with in a request for hearing particulars. The criminal charges were not concocted. The fact that the date of the hearing was made to co-incide with a court hearing is an afterthought, and is in fact untrue. In all previous interactions prior these proceedings it was never raised.
- [31] In reply the applicants state that the second respondent had no authority to fiddle with the affairs of SCA. SCA is a product of stakeholders, the stakeholders gave birth to its constitution. Second and fifth applicants were deputy and

chairperson of rate payer's association (a stakeholder) and were made chairperson and deputy chairperson of SCA respectively, so was Zolile Njumbunxa and etc. They were deployed by stakeholders. On 19 August 2017 it was the day of swearing in of candidates into Senqu municipality, the respondents threatened candidates because they wanted to leg frog their favourites.

[32] SJ2 is a document that was doctored on 21 March 2017. Even though some parts of it are correct, SCA has no code of conduct to regulate what constitute an offence and what sanctions are to be imposed. Illegal actions are incapable of being corrected in an appeal, the body constituting the appeal forum is also illegal itself and could be of no value to the applicants. The respondents had no power to dismiss or discipline, they are products of illegal meetings. The meeting of 4 September 2017 was a meeting of village structures it could not validly make decisions on behalf of SCA. The inaugural executive could not be disbanded in that meeting.

Issue

[33] Despite the fact that SJ5 and SJ19 (letter from applicant's attorneys) were not written on behalf of all the applicants they all have a direct and substantial interest in the welfare and good governance of SCA as its members.

[34] The issues for this application are whether the following decisions purportedly taken by the SCA or respondents are lawful:

- The dissolution of inaugural executive on 15 February 2017 and the appointment of new members of the executive committee of SCA consequent to a meeting of 3 and 4 March 2017;
- the expulsion of the applicants;
- the removal of the names of the sixth, eighth, ninth, eleventh, twelfth and thirteenth applicants from the gazetted election list kept by the eighteenth respondents;

and all consequential, all decisions taken following the above.

Furthermore, whether the applicants' membership can be re-instated on terms not less favourable than those which they had before their purported dismissals. Furthermore, in the event of the success of the application for declaratory orders, whether certain directions can be ordered which are directed at certain operational matters of the SCA.

Waiver of right of action for decisions from 4 September to 15 May 2017

[35] It is submitted on behalf of the respondent that from September 2016 to 15 May 2017 they were aware that a number of decisions were taken in the SCA. They allowed those decisions to be taken without challenging them. This in my view supports the contention made elsewhere by the respondents, challenging the actions before their expulsion would have no practical effect for the applicants. This would be with the exception of the few who served in SCA executive committee. Those could challenge the dissolution of the inaugural executive.

I therefore I agree with the applicants that, absent a decision for their expulsion by SCA, there would have been no purpose to challenge the preceding actions of the respondents.

Lawfulness of expulsion of the applicants

[36] It appears that the parties are in agreement that the decision to dismiss a member from a political party does not constitute an administrative action in terms of Promotion of Administrative Justice Act 3 of 2000. They are private decisions of voluntary associations.

That relates to the following decisions:

4 September 2016 - suspension of SCA leadership until the task team completed its assignment.

15 February 2017 - acceptance of recommendations of the task team,

including the one disbanding the executive committee and appointing interim executive

3-4 March 2017 - Elections of the executive committee at the elective

conference

21 March 2017 - Resolution to amend SJ2

10 April 2017 - Sitting and findings of the DC.

[37] According to the respondents none of these constitute their cause of action. Their cause of action arose on 24 May 2016. Even though on 16 May 2017 they were advised that the disciplinary committee expelled them, the actionable conduct only came into being on 24 May 2017 when the recommendations of the DC to expel the applicants was taken by SCA. In the respondents' version itself, the outcome of the disciplinary hearing still had to be presented to SCA for it to make sequel decisions, the report was then accepted and sequel decisions including, one of expelling the applicants were taken.

[38] SCA is governed by its constitution; if for a moment I am to accept that SJ2 is the governing instrument, it is silent about expulsion. Clause 19 which makes provision for disciplinary committee and appeal board provides:

“Sterkspruit Civic Association shall establish sub committees which will be disciplinary committee and appeal board. The disciplinary committee shall be established and made up of three (3) members elected from among the members of the executive committee. The disciplinary committee shall be chaired by the deputy chairperson.

The appeal board shall also be made of three (3) members elected from among the executive committee. The appeal board shall be chaired by the chairperson of the association.”

[39] The closest clause that implies termination is clause 17, which provides for dissolution of the association which may be voted for by 2/3 of members present and voting at a meeting convened to consider the dissolution of the association.

[40] The letters of 16 May 2017 suggest that the DC expelled the respondents. The respondents aver that the outcome of the

disciplinary hearing was subject to acceptance and sequel decision being taken by SCA. Whichever way one looks at it, there is no body to which the constitution of SCA confers the power to expel member of SCA. In *Matlholwa v Mahuma and Others*

[2009] 3 AllSA 238 (SCA) at paragraph 11 it was confirmed that the power to expel a member may be exercised only by a body in which such power has been vested by the constitution expressly or by clear and unambiguous implication, failing which the purported expulsion will be ultra vires the constitution and void. Consequently, the DC or SCA had no power to expel the respondents.

[41] The applicants cannot be expected to resort to or first exhaust internal remedies in the circumstances of this case. The constitution neither provides for termination of membership/expulsion nor does it provide for an appeal against such. The letters of 16 May 2017 themselves can never assist the respondents in the contention that the applicants were advised of the right to appeal. Those letters refer to the appellants to a non-constitutional body for lodging an appeal, “the central leadership of the executive committee”. Such would be lodged via the chairperson.

[42] I may add that even the very set up of the bodies provided for in clause 19 of SJ2 may need reconsideration. The discharge of most functions in SCA seemingly centre around the executive committee. One would find that such members (executive) were

not immune from being part of the problems that became the subject of complaints referred to the DC and later supposedly, to the appeal board. Where possible, members of such bodies ought not to be entirely drawn from the executive committee. For example, among the internal conflicts which are attested to by all the parties herein, is involvement of the second respondent. He is accused, by the applicants, of running his own show in the affairs of the SCA, the respondents on the other hand concede that, he referred a complaint about threats and danger to his person to the general membership. In those circumstances his involvement in disciplinary structures worse a channel through whom the appeal is to be lodged may have a perception that the processes may be tainted and render them untrustworthy to some members, especially those against whom adverse decisions are taken. The second respondent has for long, been too much of a main actor, for comfort in SCA. He served in the inaugural executive, when it was asked to stand down he was the only member who remained, he serves in the current executive and still has to chair the appeal board.

[43] Re-instatement of the applicants in Senqu Municipality

The submission on behalf of the respondents in this regard is that the sixth, eighth, ninth, eleventh, twelfth and thirteenth applicants

cannot be returned to SCA's party list by way of a court order. They lost their positions in the council of Senqu Municipality by operation of the law, following their expulsion. Even if their membership with SCA were to be re-instated, such re-instatement would not entitle them to re-instatement as councillors or have an effect of undoing the vacancies that existed

upon their expulsion in Senqu Municipality by virtue of the provisions of sections 27 (c) of Local Government Structures Act No. 117 of 1998 (the Structures Act). Reinstatement of previously lost membership is not a recognised procedure.

[44] Section 27(c) of the Structures Act provide:

"A councillor vacates office during a term of office if that councillor was elected from a party list referred to in schedule 1 or 2".

Schedule 1 provides:

"a party may supplement, change or increase its list at any time, provided that if a councillor elected according to a party list, ceases to hold office"

Schedule 2 provides

"If a party supplements, changes or increases its list in terms of sub-item (1) it must provide the chief electoral officer with an amended list."

[45] From the papers the process, as averred by the applicants, is up to the stage when letters were written to the applicant and the nineteenth respondent, advising that SCA was withdrawing their service in Senqu municipality as SCA's representatives because of membership that has been terminated. The letter to the nineteenth respondent also contains the following

"We therefore urge your office to promptly follow appropriate procedures".

There is no indication of what either the nineteenth respondent or SCA did as at the time the matter came to court. Schedule 1 and 2 poses the obligation of what is required to be done, after a councillor ceased to hold office, upon the party. The party may supplement change or increase its list by no later than 21 days after the councillor has ceased to hold office. The vacancy must be filled as soon as the party in question has supplemented, changed or increased its list but not later than 14 days after the expiry of the 21 day period.

[46] So far what is certain is the communication that the affected councillors ceased to be members of SCA and therefore they were being withdrawn as councillors. If they have not ceased to be members of SCA, with their expulsion having been set aside, what would be the basis for them to remain out of office. Their removal from council is a consequence of their expulsion, why then the said consequence cannot be undone. In *Nomakhaya Fani and 18 Others and Buffalo City Municipality and Eighteen Others*, (860/2009) [2009] ZAECGHC26 the application for an interim interdict to undo the effects of the applicants' expulsion from the ANC pending review was successful. Once it was found that the applicants established that

their expulsion prima facie violated their right to fair and just administrative action, amongst others, it was ordered that the ANC be directed to allow the affected applicants to continue to perform their duties as councillors of Buffalo City Municipality (BCM); that the ANC take all necessary steps to advise the BCM that the expulsion of affected councillors was suspended and would not take effect, and that they were regarded as properly elected councillors of BCM until their term of office is lawfully terminated and that no vacancies exist on the BCM's council by reason of their expulsion which was suspended.

Remaining Relief Sought

- [47] With regard to the remaining reliefs sought by the applicants, they cannot succeed. Those relate to prayers 2.7, 2.8, 2.9, 2.10, 2.11, 2.12, 2.13 and 2.14. Even though it is common cause that SCA functioning was not smooth since September 2016. The principle in *Plascon Evans Paints Ltd v Van Riebeck Paints Ltd* 1984
- (3) SA 620 when resolving disputes in application matters, is that the relief should be granted only if facts stated by the respondents together with the admitted facts in the applicants affidavits, justify the order. I would also grant the relief sought if the facts averred by the respondents were untenable or farfetched. I am unable to find that the version of the respondents is untenable or is farfetched when it relates to what happened in SCA which led to the sitting of the DC. This so even after I have considered that they neglected to supply a copy of the constitution or furnish the requested further particulars to

the charges in DC hearing, having rejected their version that same were never sought or could better be sought in hearing particulars.

- [48] I accept that at some stage it was not possible for the applicants to challenge things internally, however, with their membership restored, they have a door opened to seek to resolve issues internally within SCA. They have not been able to succeed with regard to issue relating to dissolution inaugural executive, appointment of new exco, task team and its recommendations and resolutions taken on the basis of those recommendations within SCA in these proceedings, in the light of the dispute of facts. All prayers incidental to these issues will therefore not be granted.
- [49] As regards requisities of an interdict in relation to prayers 2.1, 2.2 and 2.3 I am satisfied that the applicants have established a clear right and have succeeded to have their expulsions and their effect reviewed and set aside. It is also clear that their expulsion and in respect of some, their removal from Senqu Municipality was an injury that actually followed. Finally, there was no other alternate remedy available to them. The respondents submitted that the applicants had a remedy in the appeal. I have already addressed the issues relating to why the DC decision has to be set aside and that no appeal would ensure in the circumstances of this case.

Costs

[50] The applicants are substantially successful in their application. I find no basis why costs should not follow the result.

In the result the following order is made:

1. The respondents are hereby restrained and interdicted from removing the names
2. of sixth, eighth, ninth, eleventh, twelfth and thirteenth respondents from the candidates' gazetted election list kept by the eighteenth respondent.
3. The eighteenth respondent is hereby restrained and interdicted from giving effect to the resolution expelling the applicants from the SCA and Senqu municipality.
4. The nineteenth respondent is hereby restrained and interdicted from declaring vacancies in Senqu Municipality consequent to the resolution of 24 May 2017 expelling the applicants.
5. The applicants are hereby reinstated as members of the first respondent on terms that are no less favourable than those which were applicable to the applicants before the decision to expel them on 24 May 2017.
6. The resolution of 24 May 2017 removing the sixth, ninth, eleventh and thirteenth applicants from the gazetted election candidate list kept by the eighteenth respondent is declared unlawful.
7. The resolution taken by the respondents communicated on 16 May 2017, terminating applicants' membership with the first respondent is declared unlawful and invalid.
8. Prayers in paragraphs 2.7 to 2.14 are hereby dismissed.
9. The first to seventeenth respondents are hereby ordered to pay the costs of the application.

B MAJIKI

JUDGE OF THE HIGH COURT

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