

SOUTH AFRICA / JUDGMENT

Simelane v Independent Electoral Commission and Others (1375/21P)

[2021] ZAKZPHC 70 (15 June 2021)

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COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mossop AJ

CASE / FILE NUMBER

1375/21P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: 1375/21P

In

the matter between:

SIYABONGA
EDMUND
SIMELANE APPLICANT
and
INDEPENDENT
ELECTORAL COMMISSION FIRST
RESPONDENT
ECONOMIC FREEDOM
FIGHTERS SECOND
RESPONDENT
NEWCASTLE LOCAL
MUNICIPALITY THIRD
RESPONDENT
MENZIWA JETROS

NTSHANGASE FOURTH
RESPONDENT
ORDER
The

following order is granted:

1. Condonation
is granted to the applicant and the second respondent for the late delivery of
their respective practice notes and heads of argument;
2. The
application is dismissed with costs.

JUDGMENT

Mossop AJ:

Introduction

[1] The applicant is a member of the second respondent, the Economic Freedom Fighters. I shall refer to the second respondent by its acronym, 'EFF'. This application involves the applicant's elevation from being a member of the EFF to being an EFF councillor on the council of the Newcastle Local Municipality (the council). The applicant claims that his appointment was proper, legitimate and complete whereas the EFF claims that it was occasioned as a result of multiple mistakes, was never formalised and has been overtaken by events in that the fourth respondent now fills the position on the council to which the applicant argues that he is entitled.

Legal representation and participation

[2] When the matter was called, I had the pleasure of hearing argument from Mr Xulu, who appeared for the applicant, and Mr Ramogale, who appeared for the EFF. They are both thanked for their extremely helpful submissions. None of the other respondents have involved themselves in the matter. There is a letter from the first respondent which indicates that it will abide the decision of this court provided that it is not required to pay costs on the scale as between attorney and own client. I remain uncertain as to whether this conditional undertaking to abide was accepted by the applicant despite seeking clarity on the issue from Mr Xulu. The third respondent has delivered a notice to abide. The fourth respondent does not participate in the matter.

Condonation

[3] Before dealing with the merits of the matter, it is necessary to mention the late filing of practice notes and heads of argument by both the applicant and the EFF. Condonation was formally sought by both parties for this. While it is undesirable that these documents are not delivered in accordance with the time limits prescribed by the practice directives of this division, I granted both applications as no real inconvenience was occasioned to the court

by this failure. Neither application shall attract a cost order. I turn now to consider the merits of the application.

The creation of a vacancy

- [4] Prior to 19 October 2020, one of the EFF's councillors on the council was a gentleman by the name of Musa Shadrack Thwala (Mr Thwala). As a result of disciplinary proceedings being taken against Mr Thwala by the EFF, a decision was taken by the EFF to expel him from that party on 15 July 2020. He thereafter appealed against this decision and on 19 October 2020 his appeal was finally dealt with and was dismissed. As a consequence, a vacancy arose on the council that needed to be filled by a candidate nominated by the EFF arising out of the proportional representation system in place.

The applicant puts himself forward as a candidate

- [5] The applicant is a member of the EFF and contends that he was approached by his party to fill the vacancy created by Mr Thwala's

expulsion. He agreed to make himself available. He accordingly completed a document accepting his nomination (the nomination document). The nomination document is dated 20 November 2020 and indicates that it was completed in respect of regional elections to be held on 3 August 2016. I was advised by Mr Xulu that this is because that is the date upon which the last local elections were held, and the applicant's nomination was in respect of a vacancy on the council elected on that date. However, given the events that occurred on 18 November 2020, referred to hereafter, there is reason to doubt whether the nomination document was completed by the applicant at the behest of the EFF.

The applicant is nominated as a candidate

- [6] On 18 November 2020, two days before the completion of the nomination document, the EFF, via its secretary general, Mr Marshall Dlamini, wrote to the first respondent, who I shall also refer to by its acronym, namely 'IEC'. In that letter, the IEC was informed that Mr Thwala had been expelled from the EFF. The letter went on to state that:

'We therefore inform the Municipal Manager and the Electoral Commission that he is being replaced by Siyabonga Edmund Simelane. . .'

'Siyabonga Edmund Simelane', is of course, the applicant. Below the sentence in the letter identifying the applicant as the successor to Mr Thwala was a table containing the identity numbers, first names and surnames of five EFF candidates. The applicant's name was at the top of the table. The fourth respondent's name did not appear on the table. I shall refer to this document as 'the first letter'.

The error and the recalling of the applicant as a candidate

[7] Having dispatched the first letter, the EFF immediately realised that it had made an error. The applicant was not the person entitled to be nominated to fill the vacant position. As a consequence, on the same day that it sent the first letter, 18 November 2020, the EFF again wrote to the IEC, stating that:

‘The Economic Freedom Fighters hereby recalls Siyabonga Edmund Simelane, ID number [...], who was a Ward 29 councillor candidate at Newcastle Local Municipality in the original list gazetted on the 3rd of August 2016 EFF with immediate effect.

We hereby request that a declaration of the vacancy remains open until the organisation advises on who should fill the vacancy.’

I shall refer to this letter as ‘the second letter’.

[8] Between the dispatch and receipt of the first letter and the dispatch and receipt of the second letter, the IEC took no steps to fill the vacancy left by the expulsion of Mr Thwala from the EFF and made no announcements concerning the appointment of the applicant as his successor.

The declaration of the applicant as a councillor

[9] However, on 7 December 2020, the IEC’s Manager: Voter Registration and Party Liaison, Mr B Heuvel (Mr Heuvel), wrote to the municipal manager of the Newcastle Local Municipality. In that letter, Mr Heuvel advised that the applicant was the candidate at the top of the party list for the EFF and had consequently been declared elected to the Newcastle Local Municipality as prescribed in terms of item 18 of Schedule 1 of the Municipal Structures Act (the Act).[1] The IEC appears to have entirely overlooked the contents of the second letter.

The EFF’s request to the applicant to resign

[10] When the EFF discovered what had occurred, it wrote to the applicant on 12 January 2021. In that letter it was pointed out that the EFF had corrected itself and had nominated the fourth respondent as the replacement for Mr Thwala as ‘he obtained more votes in 2016 Local Government Elections’. The applicant was requested to:

‘... write a letter to the municipal manager and resign as a public representative of the EFF so that the municipal manager can declare vacancy (sic).’

The applicant’s response to the request for his resignation

[11] The applicant responded in writing to the EFF’s letter on 28 January 2021 and indicated that it was a well-known fact that the two persons ahead of him on the party list had withdrawn their candidature and that as a consequence he was then requested by the EFF to fill the vacancy. According to him, he accepted the invitation without hesitation. To his credit, he indicated further that the upper structures of the EFF should assist him in preparing the letter of resignation that he was being called upon to sign, and that he would sign it provided that it was lawful to do so and that it complied with the EFF’s policy. It appears that

the necessary letter was not drafted by the EFF and the applicant consequently did not resign.

The IEC's explanation

[12] On 19 February 2021, the IEC, again represented by Mr Heuvel, wrote a letter to the municipal manager of the Newcastle Local Municipality.

Mr Heuvel attempted in this letter to summarise the facts of the matter and explain the confusion that had arisen. Mr Heuvel acknowledged the appointment of the applicant as a councillor in terms of the IEC's letter of 7 December 2020. Mr Heuvel's letter also made mention of the second letter recalling the nomination of the applicant by the EFF. Mr Heuvel went on to say:

'3. The Electoral Commission acted in good faith by filling the vacancy on the 7 December 2020 as notified, however, an error was made from our side by using a candidate list that was initially submitted with Mr Simelane on top of the list but later withdrawn by the party with a letter dated 18 November 2020 as explained above.

4. The error is hereby regretted as it has created confusion with two letters of appointment processed to fill the vacancy.
5. The second letter appointing Menziwa Jetros Ntshangase, ID No. [...] was submitted to correct the error of the first appointment.
6. Please be advised that the appointment of Siyabonga Edmund Simelane, ID No. [...] in the first instance is retracted with immediate effect.
7. Further note that Menziwa Jetros Ntshangase, ID No. [...], being the preferred candidate for the Economic Freedom Fighters (EFF) to replace the outgoing councillor, has been declared elected to the Newcastle Local Municipality.'

The bringing of review proceedings

[13] In his response to the EFF's letter instructing him to resign, the applicant tellingly stated:

'I do not have any portfolio in this municipality, for me to resign from, and the reasons to resign have not been made known to me.

Neither the EFF nor Newcastle Municipality manager had informed me that I am a councilor (sic) hence I find it foolish to resign from a position that I do not hold.'

It might be assumed therefrom that the applicant would comply with the request made of him. That was not to be, however. Rather than go quietly into the night as he appears to have been urged to do by the EFF, the applicant now found himself emboldened. The ultimate manifestation of this was the launching of a review application in which the applicant seeks:

- (a) the review of the decision taken on 19 February 2021 by the IEC to retract his declaration as the EFF's councillor; and

(b) confirmation of the declaration of himself on 7 December 2020 as the EFF's councillor.

The review application was instituted on 1 March 2021 but has not yet been finalised.

The relief claimed in this application

[14] In this application, the applicant seeks a rule nisi in the following terms:

'3.1 That pending the final determination of the application for judicial review instituted by the Applicant on 01 March 2021 in this court, under case number: (sic) the declaration made by the First Respondent on 19 February 2021 that the Fourth Respondent is declared as a duly elected councillor of the Third Respondent, be and is hereby suspended;

3.2 That pending the final determination of the application for judicial review instituted by the Applicant in this court on 01 March 2021 under case number 1494/2021 the Applicant be allowed to continue serving as a Councillor representing the Second Respondent at the Newcastle Local Municipality;

4. That the relief prayed for in paragraph 3(1) and 3(2) to operate as an interim relief with immediate effect from the date this order is granted.

5. That the First Respondent be ordered to pay the costs of this application at the scale of the attorney and own client.'

Interim interdicts

[15] An interim interdict is by definition:

"a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination."

The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim

interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements,

the status quo should be preserved or restored pending the decision of the main dispute.'

[16] The requirements for an interim interdict are trite and can be briefly summarised as follows: a prima facie right even though open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted; that the balance of convenience

favours the granting of an interim interdict; and the lack of another satisfactory or adequate remedy in the circumstances.[3]

The test for the existence of a prima facie right

[17] In *Simon NO v Air Operations of Europe AB*[4] the test for a prima facie right was formulated in this fashion:

‘The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered

and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.’

A prima facie right

[18] The establishment of a prima facie right is the first and most important hurdle an applicant claiming interim interdictory relief must overcome. The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court.[5] The existence of contradictions and inconsistencies in the facts disclosed by an applicant does not preclude a court from finding that a prima facie right, as opposed to a clear right, has been established. A temporary interdict can be granted even if the right

is open to some doubt. It is only if there is serious doubt cast on the

facts

alleged by the applicant that a court must refuse the interim relief.

[19] In his founding affidavit, the applicant identified the right that is at issue as being his right to fair administrative action. In the review application, he contends that he was treated unfairly by the IEC when it removed him as a councillor and appointed the fourth respondent in his stead.

[20] The applicant has clearly established that he was initially timeously nominated by the EFF to be the successor to Mr Thwala. So much so was explicitly stated in the first letter. The contents of the first letter have not been denied by the EFF nor can it be: it was the author of that letter. Had that been the last letter written in this saga then, in my view, the applicant would have gone a long way towards establishing the right that he claims. But it was not the last letter written. It was followed by the second letter which recalled the applicant as a candidate.

[21] Acknowledging the importance of establishing a right, Mr Xulu submitted, firstly, that the applicant had a constitutional right to stand for public office and, if elected, to hold office.[6] That is undoubtedly correct. But that is not the issue in dispute in this matter. The applicant is not being deprived of the right to seek or hold elected office. The issue is whether the applicant was properly nominated and appointed. Secondly, Mr Xulu drew attention to the provisions of item 20 of Schedule 1 to the Act (item 20). Mr Xulu referenced this item to establish that the nomination of the applicant and his completion of the nomination

document was within the window period mentioned in item 20. I previously mentioned that it was to be doubted whether the nomination document was completed at the insistence of the EFF. This is because by the date that it was completed, 20 November 2020, the EFF had already informed the IEC that the applicant had been recalled from its list. There can be no reason why the EFF would in those circumstances prevail upon the applicant to complete the nomination document as it was no longer its intention to nominate him. It seems more probable to me that this was done unilaterally by the applicant in order to strengthen his case. Mr Xulu conceded that the applicant was not aware of the existence of the second letter until this application was launched.

[22] In my view, the true significance of item 20, in the context of this matter, is something different to that contended for by the

applicant. Item 20 provides that:

‘(1) 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, the party concerned may supplement, change or increase its list by not 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 expiry of the 21 day period.

(2) If a party supplements, changes or increases its list in terms of subitem (1) it must provide the chief electoral officer with an amended list.’

[23] It is evident from item 20 that political parties are entitled to supplement or change their list of nominated candidates at any time. There is, however, a proviso to this general statement. If a councillor elected according to a party list leaves office, the party has a limited period of 21 days to change its list. Mr Thwala was a councillor elected according to a party list. The vacancy created by his expulsion was declared by the IEC to exist on 18 November 2020. In putting forward the names of five candidates in the first letter on 18 November 2020, the EFF was accordingly clearly within the time limit of 21 days imposed by the the Act. It consequently follows that the EFF was still within the prescribed time period when later the same day it recalled the name of the applicant from the list of candidates. The list was thereby changed during the prescribed period. Ex facie item 20, there is no restriction on how many times a list can be changed. The EFF was entitled to change the list of candidates as many times as it wanted, including changing it twice on the same day, during the window of opportunity prescribed by the Act. When this proposition was put to Mr Xulu he could not gainsay it.

[24] On the facts pleaded by the applicant and further considering those facts that cannot be denied, it appears to me to be improbable that the applicant will obtain final relief in the review proceedings.

[25] The EFF submitted that the second letter was a game changer. Its effect was to correct the error caused by the first letter and to remove the applicant as a candidate for appointment. As a consequence, the EFF submitted that the applicant had no right to be appointed once the IEC received the second letter. The fact that he was later appointed because of an admitted oversight on the part of the IEC did not suddenly endow him with a right entitling him to the relief that he seeks. Mr Ramogale submitted that the applicant had not established the existence of a prima facie. I agree with that submission and I find that to be the case. This finding dispenses with the need to consider the other requirements for the grant of an interim interdict and the application must fail on this basis alone.

Urgency

[26] Finally, I turn to consider the question of urgency. Van Wyk J, in *Juta and Company Ltd v Legal and Financial Publishing Company (Pty) Ltd*

[7] said that:

‘ . . . an application for an interdict pendente lite . . . from its very nature, requires the maximum expedition on the part of an applicant’.

The applicant was instructed to resign by the EFF on 12 January 2021. He knew at that date that his appointment as councillor was under challenge. This application was brought as a matter of urgency on 2 March 2021. Why nothing was done by the applicant between these two dates is unexplained in the founding affidavit. But for the decision reached in this matter, I would have been inclined to refuse the application for want of urgency.

Conclusion

[27] I therefore grant the following order:

Mossop AJ

APPEARANCES

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Date of Hearing: 9

June 2021

Date of Judgment: 15

June 2021

[1] Local Government: Municipal Structures Act 117 of 1998.

[2] National Gambling Board v Premier, Kwa-Zulu Natal, and others

[2001] ZACC 8; 2002 (2) SA 715 (CC) para 49.

[3] Director-General, Department of Home Affairs and another v Islam and others

[2018] ZASCA 48 para 14.

[4] Simon NO v Air Operations of Europe AB and others

[1998] ZASCA 79; 1999 (1) SA 217 (SCA) at 228G-H.

[5] Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and another 1973

(3) SA 685 (A) 691C.

[6] The right exists in section 19(3)(b) of the Constitution.

[7] Juta and Company Ltd v Legal and Financial Publishing Company (Pty) Ltd 1969 (4) SA 443 (C) at 445F.

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