

SOUTH AFRICA / JUDGMENT

Wellem v Cathcart Residents Association and Another (2665/2014) [2016] ZAECGHC 13 (1 March 2016) [2016] ZAECGHC 13

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula

CASE / FILE NUMBER

2665/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, GRAHAMSTOWN)

CASE

NO: 2665/2014

DATE:

01 MARCH 2016

In

the matter between:

THANDI

WELLEM.....Applicant

And

CATHCART

RESIDENTS

ASSOCIATION.....First

Respondent

KENNETH

SIGIDI.....Second

Respondent

JUDGMENT

Heard on: 27 August 2015

Delivered on: 01 March 2016

MAKAULA J:

A.

Introduction:

[1] The applicant brought an application seeking an order:

“(a) Declaring the expulsion of the applicant on 13 July 2011 by the respondents unlawful;

(b) Reviewing and setting aside the first respondent’s decision to expel the applicant as a Councillor at Amahlathi Municipality and from being a member of the first respondent;

(c) The costs of the application be paid by the respondents, only in the event of opposition.”

[2] The applicant is one of the founder members of the first respondent. He was appointed by the first respondent as the Proportional

Representative (PR) Councillor of the first respondent in the Amahlathi Municipality (the Municipality). The applicant brings this application in his personal capacity.

[3] The first respondent is a voluntary association which is governed by its constitution (CRA Constitution) and registered as a political party with the Independent Electoral Commission (IEC). The first respondent has proportional representation in the council of the Municipality.

[4] The second respondent is the current chairperson and PR Councillor of the first respondent in the Municipality and is being sued herein in his capacity as such.

B.

Background:

[5] The first respondent was formed, amongst other members, by the applicant and the second respondent as a political party on 3

February 2011. It has one PR seat in the council of the Municipality.

[6] The applicant, in May 2011, was appointed as the first PR representative to the council of the Municipality representing the

first respondent.

[7] It transpired that the relationship between the applicant, some members of the first respondent and the second respondent in

particular became sour. The bad relations came to a head in a meeting (the meeting) held by members of the first respondent on 13 May 2011. The status of this meeting remains an issue between the parties. Suffice to say that the outcome and resolutions taken at the meeting pertaining to the applicant are the subject matter of this application.

[8] A resolution was taken at the meeting dismissing the applicant as a member of the first respondent and consequently as a PR councillor representing the first respondent in the Municipality.

[9] A letter dated 15 July 2011 was written by the first respondent to the applicant on 15 July 2011 advising him of his expulsion/exiling

from the first respondent. The contents of this letter as well are a bone of contention between the parties. The letter reads as follows:

“SUBJECT: EXPULSION: BY JOINT DECISION: CARA AND CATHCART RESIDENTS: PUBLIC REPRESENTATIVE: MR. TANDI WELLEM

Herewith be advised that a mandate discharged by Cathcart Resident in a meeting held at Anta Community hall on the 13th of July 2011, demand that you be expelled from a public office as a Councillor at Amahlathi Municipality with immediate effect and simultaneously exiled from CARA.

The reasons cited therein for your expulsion included inter alia that you:

- (a) Maliciously assaulted the fame of your fellow executive member and Chairperson of Cara in public, Mr. Kenneth Sigidi.
- (b) Attempted to physically assault one of your executive member Ms N. Nkwentsha in a public meeting.
- (c) Unceremoniously walked out of the public meeting despite the urging wishes from the residents for you to surrender your rude behaviour and stay for the duration of the meeting.
- (d) Instigated a violent, chaotic and rude situation by using obscene and abusive language, thereby rendered your public figure image a dismal disgrace.
- (e) Disdainfully displayed a glaring reality that you have no regard for people who voted you in to a public office as a Councillor.

The secretary of the organization Mr. Thula Sphango also emulated your insolent behaviour of a walk out impudence, having declared all residents who had attended as nincompoops (“nimuncu bahlali”) thereby leaving the residents with no other option but to appoint an Ad hoc secretary to have the aftermath of chaos religiously minuted.”

[10] On the same day, 15 July 2011, the first respondent wrote a letter to the municipal manager advising him of the decision to expel the applicant. On 22 July 2011 the municipal manager acknowledged receipt of the letter intimating that he had referred it to the Speaker. However, the municipal manager did not take steps to remove the applicant as the PR councillor of the first respondent.

[11] Subsequently, the respondent sought advice from its legal representatives. The legal representatives of the first respondent advised it that the dismissal of the applicant was wrong for want of a disciplinary hearing. It was intimated by the legal representatives that the first respondent should regularise the expulsion of the applicant by holding a disciplinary enquiry so as to give the applicant an opportunity to respond to whatever charges they would prefer against him.

[12] Charges were drafted and a hearing date was set and sent to the applicant. The hearing was scheduled for 20 May 2013. For various reasons which are not relevant herein, the applicant did not attend the hearing. On 20 May 2013 the presiding officer proceeded with the hearing in the absence of the applicant and expelled him as a member of the first respondent. Such order was communicated to the municipal manager per email dated 2 July

2013. Despite this the municipal manager did not take action to remove the applicant. That led to an application before this court which was by heard by Plasket; he delivered judgment on 3 April 2014.

[13] It is necessary to refer to the relevant paragraphs of the judgment because they form part of the dispute between the parties. In the matter before Plasket J, the applicant was the first respondent therein and the first and third respondents were the municipality and the applicant respectively.

[14] The relevant portions of the judgment by Plasket J are the following:

“[4] Only the third respondent opposes the application. He does so on two bases: first, that Mr Kenneth Sigidi, the deponent to the applicant’s founding affidavit, lacks the authority to represent the applicant; and secondly, that he is still a member of the applicant and so is still its representativity in the council.

...

[6] The third respondent stated that he had no knowledge of the passing of the resolution to terminate his membership, as he has already left the meeting when it was passed. Sigidi’s version about the passing of the resolution, supported by the minutes of the meeting (which are attached to his founding affidavit) must be accepted.[1]

[7] He admitted receiving a letter from the ad hoc secretary of the applicant informing him of the termination of his membership and the reasons for that decision. This letter was dated 15 July 2011. On the same day, the first of a number of letters was sent by the applicant to the first respondent to inform him that the third respondent had been 'expelled' from the applicant and requesting that 'declare a vacancy' for the applicant and advised the EC so that Sigidi could be sworn in as the applicant's

proportional representative councillor.

[14] I turn now to the crux of the matter – the effect of the decision, taken on 13 July 2011 and communicated to the third respondent on 15 July 2011, to terminate the third respondent's membership of the applicant. The effect of a decision such as that was dealt with by Rall AJ in *Shunmugam & others v The Newcastle Local Municipality & others*; *The National Democratic Convention v Mathew Shumugan & others*. After finding that decisions taken by political parties to terminate the membership of members were not administrative actions for purposes of the Promotion of Administrative Justice Act 3 of 2000 but exercises of private power by bodies established by agreement, Rall AJ proceeded to say:

'I therefore approach the matter on the basis that the expulsion of the councillors was no different from the expulsion of a member of any other voluntary association. In my opinion, a member of a voluntary association or organisation such as a political party who has been expelled and who both contends that the expulsion was unlawful and wishes to enforce his or her membership rights, must, if the organisation does not concede the unlawfulness of the expulsion, take steps to have the expulsion reviewed and set aside. Such a person is put to and election. If the person, notwithstanding the contention that the expulsion was unlawful, decides not to challenge it, he or she is taken to have accepted the expulsion, and the expulsion will stand notwithstanding the fact that it may not have been lawful. In my opinion the situation is analogous to the one described in the *Oudekraal* case (supra), although not on all fours with it.'

[15] I am in agreement with this statement of the law. In the case referred to by Rall AJ, *Oudekraal Estates (Pty) Ltd v City of Cape Town*, Howie P and Nugent JA explained why it is necessary to approach the issue from the perspective that administrative decisions stand until set aside. They said:

'The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or

ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[16] In my view, these same considerations apply for the same reasons and with equal force to the decisions of voluntary associations. It is not difficult to imagine the chaos that would be caused in organisations ranging from massive trade unions or church bodies to small sporting or cultural clubs if this default setting was otherwise.

[17] The third respondent has done nothing for a few months short of three years to challenge the lawfulness of the termination of his membership of the applicant. He must be taken to have accepted it and, whatever doubts may arise as to the legal pedigree of the decision, it must be accepted as having legally valid consequences until it is set aside.

[19] I make the following order

(a) The first respondent is directed to inform the chief electoral officer of the Electoral Commission of the vacancy on the council of the Amahlathi Municipality on account of the termination of the third respondent's membership of the applicant, and to do so within seven days of the date of this order.

(b) The first and third respondents are directed to pay the applicant's costs." (Emphasis added)

[15] Subsequent to the order granted by Plasket J the applicant on 9 July 2014 launched this application. The applicant was consequently replaced as the PR councillor of the first respondent by the second respondent.

C. Applicant's case:

[16] The applicant assails the resolution to expel him on the basis that it is unconstitutional and unlawful and should be reviewed on the following grounds:

- (a) in terms of paragraph 10 of the CRA Constitution, decisions are taken by a majority vote of members at a bi-monthly or special meeting called for that purposes;
- (b) the meeting held on 13 July 2011 was a community meeting and not a meeting of the members of the first respondent;
- (c) that the meeting was neither a bi-monthly meeting nor a special meeting convened for the purpose of expelling her but was a report back and fundraising meeting of the community;
- (d) a quorum was not formed because only nine members were present on 13 July 2011 in contravention of paragraph 10 of the CRA Constitution and that no voting took place;
- (e) that both Mr Makhazi and Nothekanti Fulela who moved for the motion, in applicant's absence, that the applicant be expelled were not members of the first respondent as contemplated by paragraph 7 of the said constitution as responsible for the management of the affairs of the first respondent in between the bi-monthly meetings; and
- (f) The applicant was not given an opportunity to be heard before the decision to expel him was taken.

[17] Paragraphs 7 and 10 of the CRA Constitution relied upon by the applicant read as follows:

"7. The Paragraph 7 of the Constitution provides that:

The management of the Association shall be undertaken by a democratically elected executive committee of five members comprising a chairperson, vice chairperson, treasurer, secretary and publicity officer selected by a show of hands at an Annual General Meeting called of all members. The original signatories, subject to Clause 9, shall constitute the executive committee until the First Annual General Meeting is convened.

9. Paragraph 10 of the Constitution provides further that:

Cathcart Residents' Association shall take decisions with respect to implementation of objective, aims and strategy and any other activity necessary to carry out its aims and objectives by a majority vote at the bi-monthly meeting or at a special meeting of members called on seven days' notice for that purpose. Twenty Five Members shall constitute a Quorum. The Association may be brought to an end by a majority vote of the members at a meeting called for that purpose."

[18] Mr Nduzulwana, for the applicant, argued that the applicant did not waive his right to review the matter and that there was no undue delay in bringing this application.

D. Respondents' case:

[19] The respondents oppose the application on two grounds:

19.1 That the applicant abandoned/waived his right to challenge his expulsion from the first respondent; and/or

19.2 That the issue of declaratory order sought will have no practical effect.

[20] In amplification, the respondents argue that even though there was no time limit within which to launch this application, the applicant had a duty to bring it within a reasonable time. The respondents' submission is that the applicant launched this application three (3) years after his expulsion. The respondents further contend that even after the applicant had launched this application on 9 July 2014, he further delayed the hearing of the matter because (a) he failed to take steps to ensure that the application was properly before court, (b) that shortly before the application was to be heard on 13 November 2014, applicant on 5 November 2014 filed a notice of removal of the application stating that certain original documents were absent from the court file, (c) the application was on 13 November 2014 postponed sine die and (d) only on 19 March 2015 filed a notice of set down with the Registrar.

[21] The respondents further argue that the applicant's main concern is that he lost his PR seat with the Municipality and not that he had been deprived of membership of the first respondent. A declaratory order that the expulsion of applicant as a member of first respondent be declared unlawful would be of no practical significance because it would not have the effect of restoring applicant as a PR councillor on behalf of the first respondent, so argue the respondents.

E.

Analysis:

[22] In *Shunmugam & Others vs The New Castle Local Municipality & Others; The National Democratic Convention vs Matthew Shunmugam & Others*[2] as referred to by Plasket J in his judgment, Rall AJ said the following:

“[A] member of a voluntary association or organisation such as a political party who has been expelled and who both contends that the expulsion was unlawful and wishes to enforce his/her membership rights, must, if the organisation does not concede the unlawfulness of his expulsion, take steps to have the expulsion reviewed and set aside. Such a person is put to an election. If the person, notwithstanding the contention that the expulsion was unlawful, decides not to challenge it, he or she is taken to have accepted the expulsion, and the expulsion will stand notwithstanding the fact that it may not have been lawful.”[3]

[23] In *Laws vs Rutherford*[4], Innes CJ had the following to say about waiver:

“... I proceed to consider whether, even then, they establish the waiver relied upon. The onus is strictly on appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances.”[5]

[24] Mr Nduzulwana argued that before Plasket J the applicant had insisted that he was still a member of the first respondent and a PR councillor in the Municipality and it is on that basis that he opposed the application. The argument by Mr Nduzulwana in this regard misses what is said by Plasket J in paragraph 6 and 7 above. A resolution was taken at the meeting to expel the applicant and that much is clear from the minutes of that meeting. Undoubtedly so, the applicant was advised of his dismissal as per the letter. Plasket J in his judgment finds that the applicant admitted having received the letter. Even before me there is no contention by the applicant that he did not receive the letter. The applicant in his replying affidavit says:

“I confirm that on 15 July 2011, I received the letter ‘KS5’ informing me of my expulsion.”

[25] The applicant did nothing to challenge his expulsion. The issues raised by the applicant as adumbrated in paragraph 16 above were supposed to have been raised in his challenge (as he should have done) on becoming aware of his expulsion from the first respondent. I would only consider the issues raised in paragraph 16 only if I were to find that the applicant had not waived his rights to challenge his dismissal or has not unduly delayed in bringing this application.

[26] Running the risk of repeating myself, the applicant does not deny having received the letter but challenges the wording of the letter which as the applicant alleges merely ‘exiled’ him from the first respondent. This is despite the heading of the letter which appears on paragraph 9 above that spells out that it was about the expulsion of the applicant from the first respondent. In his heads of argument, Mr Nduzulwana states that the opposition of the order sought by the first respondent in the matter before Plasket J clearly shows that the

applicant 'had not accepted that he had been dismissed' from the first respondent. That much is even clear in the papers before me. What is apparent is that the applicant did nothing about his non-acceptance of his dismissal from the date he received the letter until he launched the current proceedings on 9 July 2014.

- [27] The test for implied waiver is an objective one. Implied waiver is determined on its outward manifestations, it is determined from the perspective of how a reasonable person would view it.[6] In *Road Accident Fund vs Mothupi*[7], Nienaber JA had the following to say:

"Waiver is first and foremost a matter of intention. . .

The test to determine intention to waive has been said to be objective. . .

That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations; secondly, that mental reservations, not communicated, are of no legal consequence; and thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes.. . .

The outward manifestation can consist of words; of some other form of conduct from which the intention to waive is inferred; or even it in action or silence where a duty to act or speak exists.

Because no one is presumed to waive his rights . . . , one, the onus is on the party alleging it and two, clear proof is required of an intention to do so. . . . The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis."[8] (Case citations omitted.)

- [28] As stated above the applicant became aware of his dismissal on 15 July 2011. He became aware of the unlawfulness thereof since that day. From 15 July 2011 until 9 July 2014 the applicant elected not to challenge his dismissal. The intention to waive his rights to challenge his dismissal can be inferred from his knowledge of the unlawfulness of the decision, his assertions and his remaining supine. A reasonable person in the position of the applicant would certainly have taken steps to challenge his dismissal. The submission by Mr Koekemoer, on behalf of the respondents, that the only reason the applicant acted as he did, after the judgment of Plasket J, is because he realised that he was to lose his position as a PR councillor and consequently his salary, is not credible.

- [29] The applicant has not advanced any tangible reasons as to why he failed to act for such a long period. Even those which he proffered are not reasonable in the circumstances of this case.

- [30] The submission by the respondents that the expulsion of the applicant as a member the first respondent be declared unlawful, would be of no practical significance in that it would have no effect in restoring the applicant as a PR councillor, is with respect correct. I say so because as it can be gleaned from the application the applicant complains about his losing his seat as a PR councillor and not the fact that he has been expelled from the first

respondent. Furthermore, the applicant has been substituted as the PR councillor of the first respondent by the second respondent.

[31] Consequently, the application falls to be dismissed.

[32] I make the following order:

1. The application is dismissed with costs.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances:

Applicant: Adv Nduzulwana instructed by

Yokwana Attorneys

87 High Street

GRAHAMSTOWN

Respondent: Adv Koekemoer instructed by

Netteltons Attorneys

118A High Street

[1] The third respondent does not accept, however, that the decision to terminate his membership was lawfully taken.

[2] 2008 (2) All SA 106 (N)

[3] Ibid at para 42.

[4] 1924 (AD) 261.

[5] Ibid at 263.

[6] See Competition Commission vs Arcelormittal SA 2013 (5) SA 538 (SCA) at 549H.

[7] 2000 (4) SA 38 (SCA).

[8] Ibid paras 15-9.

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