IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, BHISHO)

CASE NO: 509/15

In the matter between:

THEMBA WELE — First Applicant

And

ECONOMIC FREEDOM FIGHTERS — First Respondent

EASTERN CAPE PROVINCIAL LEGISLATURE — Second Respondent

SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE — Third Respondent

JUDGMENT

MBENENGE J:

[1] The applicant was, at all times relevant hereto, a member of the Economic Freedom Fighters, a political party cited in these proceedings as the first respondent (otherwise referred to herein after as "the EFF") and, by virtue of his senior status in the political party, one of the two representatives of the EFF at the Eastern Cape Provincial Legislature, the second respondent (the Legislature).

[2] It came to pass, during March 2015, that the applicant was, by letter dated 3 March 2015, received by him on 6 March 2015, informed of a decision that had been taken placing him under temporary suspension with immediate effect "*pending the hearing and finalisation of disciplinary proceedings against [him].*" The suspension was said to be premised upon *"complaints received and involving a number of offences*". Some of these offences are adumbrated in the letter itself, but because nothing, for present purposes, hinges thereon, nothing more of the offences will be said. Nor does anything hinge on the suspension, which was overtaken by the expulsion of the applicant from the EFF. By virtue of section 106 (3) of the Constitution of the Republic of South Africa,[1] the process of removing the applicant as the EFF's representative in the Legislature was set in motion.

[3] The expulsion, which is what I hasten to deal with, in turn culminated in the launch of urgent proceedings on 05 October 2015, with the applicant seeking two kinds of relief. In Part A of his notice of motion, the applicant sought temporary relief effectively preventing the respondents from giving effect to the decision expelling him from the EFF's membership and participation at the legislature, pending the final determination of the relief sought in Part B. In Part B, the applicant is seeking the review and setting aside of the decision expelling him from the EFF (the review application).

[4] On 06 October 2015 the applicant obtained the order he sought under Part A incorporating a rule *nisi.* In so far as relevant hereto, the order reads:

> "1. That a *rule nisi* do hereby issue, calling upon the respondents to appear on 19 October 2015 at 09h30 to show cause why, pending the review proceedings, the following order should not be made:

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1 The section reads:

> "(3) A person loses membership of a provincial legislature if that person—
> (a) ceases to be eligible;
> (b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership; or
> (c) ceases to be a member of the party that nominated that person as a member of the legislature."

1.1 That the first respondent is hereby interdicted and restrained, either through an agent or employee, from terminating the membership of the applicant to both the first and second respondent;

1.2 That the second and third respondents are hereby interdicted and restrained, either through an agent or employee, from terminating membership of the applicant to the second respondent;

1.3. The first respondent is hereby;

(a) order to restore the applicant's membership to it and permit the applicant to take his seat in the Eastern Cape Provincial Legislature,

(b) interdicted from causing and member of the first respondent from being sworn in as a member of the second respondent in substitution of the applicant, and;

(c) interdicted from dressing correspondence, written communications or making statements to the second respondent in substitution of the applicant, and

2. That the contents of paragraphs 1.1 to 1.3 above shall operate as an interim interdict forthwith."[2]

[5] Because the application had been brought *ex parte*, the respondents were also granted leave to anticipate the return day of the rule *nisi* on 24 hours' notice to the applicant. The return day was, however, not anticipated. It is not clear from the papers whether the terms of the interim order were given effect to, or not.

[6] The review application is still pending.

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[2] Order granted by Ndzondo AJ on 06 October 2015.

[7] The mainstay of the applicant's claim is that the decision expelling him from the membership of the first respondent was arrived at without him having been afforded the opportunity of stating his side of the story. More particularly, and whilst acknowledging that he did receive notification of the pending disciplinary proceedings against him, the applicant contends that he never received notification of the place, date and time of the ultimate hearing at which the decision finding him guilty of misconduct and expelling him from the EFF was arrived at.

[8] At another level, the applicant contends that the expulsion has had the effect of preventing him from fulfilling his duties as a member of the second respondent, from executing the mandate of his constituency, and from receiving the concomitant benefits (including remuneration) associated with being a member of the Legislature.

[9] The second and third respondents have elected to abide the decision of the Court. Only the first respondent is resisting the grant of the interim relief being sought. The first respondent (hereinafter also referred to as the respondent) contends that the applicant did receive notification of the relevant hearing, but spurned the opportunity to state his side of the story by absenting himself from such hearing; the fact that the applicant will lose his position in the legislature is a consequence of his lost membership of the EFF, which does not, in and by itself, give rise to irreparable harm; in the event of the applicant being successful in the review proceedings, he will be reinstated to his position and recover any past financial losses incurred; the balance of convenience favours not the applicant.

[10] In his replying affidavit the applicant sought to challenge the authority of Gordich Gardee (the Secretary- General of the EFF), contending that, being an artificial person that can only act through its members and absent proof of authority on the part of Mr Gardee to depose the opposing affidavit for and on behalf of the EFF, the first respondent was not "*properly*" opposing the proceedings. On the authority of *Eskom v Soweto City Council,*[3] I found the contention unnecessary and

[3] 1992 (2) SA 703.

wasteful.[4] Little wonder that Mr Sishuba, who appeared the first respondent, when the matter was being heard was quick to abandon this ill-conceived point.

[11] The facts established in the papers upon which a pronouncement will be made may briefly be summarised as follows:

(a) On 13 March 2015 the National Prosecutor of the EFF (the National Prosecutor) brought charges[5] against the applicant. According to the relevant charge sheet the misconduct hearing would proceed in the applicant's absence, were he not to attend the hearing. This correspondence was served on the applicant by the Sheriff.

(b) The disciplinary hearing was initially set down for 25 March 2015. Notice to that effect was also served on the applicant by the Sheriff. Day before the hearing (24 March 2015), the applicant submitted a medical certificate penned by Dr Jubase and pointing to the applicant as suffering from lower abdominal pain and being "*unfit for work … from 24/03 up to and including 28/03*". Resulting from this state of affairs, the hearing did not take place.

(c) A letter was thereupon written informing the applicant that "*[his] medical certificate [had] been noted*" and that it had been "*decided to postpone the disciplinary hearing against [himself] to the 08th day April 2015 @ 11h00 at the same address communicated to [him]*." The letter was transmitted to the applicant *via* email to "*th[…]@gmail.com*".

4 In the *Eskom* matter (*Ibid*), where an interlocutory application had been delivered under the name and signature of the respondent's attorneys, it was held that, if the attorney had been authorised to bring the application on the respondent's behalf, then the application was that of respondent, irrespective of whether the deponent to the supporting affidavit had also been authorised '*to bring this application close*.' The court held, further, that the deponents evidence could not be ignored because he had not been 'authorised': If the attorney had authority to act on the respondent's behalf, then the attorney was entitled to use any witness who, in his opinion, would advance the respondent's case – a witness may testify even if she has no authority, withdraw or otherwise deal with the application itself. (See also *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA)).

5 In all, six counts of misconduct were preferred against the applicant

(d) 08 April 2015 was subsequently changed at the instance of the National Disciplinary Committee and a fresh date, 20 July 2015, arranged. Another medical certificate signed by Dr Sokupa dated 16 July 2015 and recording that the applicant would be "*fit for duty*" on 1 August 2015 was submitted. For that reason, the matter did not proceed on 20 July 2015.

(e) Meanwhile, on 16 July 2015, the National Prosecutor had transmitted another letter to the applicant, once again *via* "*th[…]@gmial.com*," acknowledging receipt of the applicant's medical certificate on 16 July 2015 and notifying the applicant that the hearing was scheduled for 17 August 2015 at 11:00 am, at the same venue.

(f) On 31 July 2015 another medical certificate, also penned by Dr Sokupa and stating that the applicant was unfit for work between 31 July 2015 and 15 September 2015, was submitted.

(g) The EFF eventually convened the hearing for 21 September 2015. The relevant notification letter also transmitted to the applicant *via* email to "*th[…]@gmail.com*", in part, reads:

> "2. The NDC has taken a decision to grant you a final opportunity to appear before it on Monday 21 September 2015 at 14h00 at the EFF headquarters in Braamfontein, as previously indicated. Should you once again fail to appear, for any reason it will be assumed that you have no intention to do so and the prosecution will make an application for the hearing to proceed in your absence.
>
> 3. Should the application be granted, you are in jeopardy of a finding being made without your version serving before the NDC and/or, if applicable, without taking opportunity to present evidence in mitigation of sentence, if any
>
> 4. This letter is sent to you as a matter of courtesy and fairness in order for you to appreciate the anticipated course of action.

5. Please indicate as soon as possible, but by no later than 14 September 2015, whether or not you will attend the hearing, together with the name, details and membership number of your representative, if any.

6. We await your urgent response."

(i) A follow up letter emphasising that the enquiry would proceed on 21 September 2014 as previously communicated was transmitted by the National Prosecutor to "*th[…]@gmail.com"* on 18 September 2015.

(j) The disciplinary hearing was eventually convened on 21 September 2015. The applicant did not attend. It is common cause that in the morning of the same day another medical certificate booking the applicant off duty from 17 September 2015 to 17 October 2015 was submitted. Having been of the view that the absence was deliberate and merely a stratagem designed to evade the hearing, the National prosecutor successfully applied that the hearing proceed in the applicant's absence. The application was granted.

(k) Witnesses who testified in support of the misconduct charges were called. In the final analysis the applicant was found guilty of misconduct. Deliberations on mitigating and aggravating circumstances followed. A sanction of expulsion from the EFF was imposed.

(l) By letter dated 28 September 2015, the third respondent informed the applicant of his expulsion from the EFF. Attached to the letter was the following correspondence:

- letter dated 27 September 2015 penned by Secretary of the EFF and addressed to the third respondent informing the Speaker's Office that, by reason of his expulsion pursuant to the outcome of a disciplinary hearing, the applicant was no longer a member of the EFF, as also that the outcome of "*a party disciplinary hearing*" and letter had been sent to the applicant;

- letter ostensibly sent to the applicant with address given as "*C 5[…] O[…] G[…], Greenfields East London*" and informing the applicant of his expulsion from the EFF pursuant to the disciplinary hearing of 21 September 2015; and

- the ruling of the National Disciplinary Committee (the NDC) finding the applicant guilty of misconduct and imposing a sanction expelling the applicant from the EFF, dated 26 September 2015, ostensibly confirmed by the Central Command Team of the EFF (the CCT) on 27 September 2015.

[12] Clause 6 of the EFF's Code of Conduct and Revolutionary Discipline (the Code) provides that members facing disciplinary proceedings shall be entitled to be informed of the date and place where the disciplinary hearing is scheduled to take place. Neither the Code nor the Constitution of the EFF prescribes the mode of service of disciplinary proceedings notices and processes. On no less than two occasions, notices were served on the applicant by the Sheriff. On other occasions notices were transmitted to the applicant *per* email. There are also occasions when correspondence was addressed to the applicant's known physical and official addresses. None of the correspondence / notices not served by the Sheriff was sent by registered post.

[13] A further aspect of the case requiring comment relates to the postponement of the disciplinary hearing on dates preceding 21 September 2015. On 25 March 2015 and 20 April 2015, the hearing was postponed at the instance of the applicant. Medical certificates pointing to his unfitness "*for duty*" were "*submitted*" or "*tendered*".

No detail is furnished regarding who, on behalf of the applicant, tendered or submitted the medical certificates or interacted with the National Prosecutor on the relevant occasions. The hearing was postponed at the instance of the NDC of the EFF on one occasion- 08 April 2015. Even though , at some point, the misconduct had been set down for hearing on 17 August 2015, it did not proceed, and there is no evidence of the hearing having convened at all on that day, as indeed the applicant had previously submitted a medical certificate of his being indisposed from 3 July 2015 to 15 September 2015.

[14] Against this background, a determination has to be made regarding whether the applicant is entitled to the interlocutory interdict he is seeking, the requirements to be satisfied being the following:

(a) a *prima facie* right;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief eventually granted;

(c) a balance of convenience in favour of the granting of the interim relief; and

(d) the absence of any other satisfactory remedy.[6]

[15] It is trite law that the right to be set up by an applicant for an interlocutory interdict need not be shown by a balance of probabilities; if it is "*prima facie established though open to some doubts*" that is enough. It should further be highlighted that "*irreparable harm*" has been defined as the loss of property in circumstances where its recovery is impossible or improbable. The court must weigh the prejudice to the applicant[7] if the interim interdict is refused against the prejudice to the respondent if it is granted. It has also been held that in a determination of

6 *Setlogelo v Setlogelo* 1914 AD 221 at 2217;see also *National Treasury v Opposition to Urban Trollip Alliance* 2012 (6) SA 223 (CC) at 235 D-E.

7 *Ndauti v Kgami* 1948 (3) SA 27 (W) at 36-7*; Edrei Investments Ltd (in liquidation) v Dis-Chem Pharmacis (Pty) Ltd* 2012 (2) SA 553 (ECP) at 557 H-I.

whether the balance of convenience favours the granting of interim relief, the court has to consider the prospects of success in the main action and the balance of convenience. The stronger the prospects of success, the less need for the balance of convenience to favour the applicant. The weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant.[8]

[16] The parties do not seem to have locked horns in relation to whether or not there is other satisfactory remedy. In any event, the applicant is on record as having referred the dispute besetting the parties to the National People's Assembly,[9] prior to resorting to the instant proceedings, to no avail.

[17] That leaves this court having to determine three issues namely, whether on the facts of this matter –

(a) the applicant has established a *prima facie* right;

(b) it has been shown that there is a well-grounded apprehension of irreparable harm; and

(c) balance of convenience favours the granting of the iterim interdict sought.

[18] In terms of the EFF's Constitution the applicant, besides being entitled to being informed of the date and place where the disciplinary hearing is scheduled to take place, has the right to be adequately warned of the consequences of his unauthorised failure to appear on the specified date, that the hearing may proceed

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8 *Camps Bay Residents and Ratepayers Association v Augoustides* 2009 (6) SA 190 (WCC) at 195I – 196 A and *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 (6) SA 557 (GSJ) at 564D –F.

9 Clause 25 of the Code reads:

> "The decision the CCT to confirm a suspension or expulsion may, on application by the offender, be placed before the National People's Assembly as a subject of final review/appeal"

without his participation[10] and, upon being found guilty, to lead evidence in mitigation of sentence.[11]

[19] A question presenting itself from the papers, which must be posed and answered, is whether the applicant received notification of the proceedings of 21 September 2015. The applicant denies that he received the email transmitted to "*th[…]@gmail.com"*. He states that in the course of time this email account fell into disuse and that the respondent ought to have utilised his official email address "*tw[…]@eclg.gov.za*", which they are aware of to notify him of the hearing date (21 September 2015).

[20] The respondent has urged me to draw inferences from the conduct of the applicant in submitting a medical certificate on the day of the hearing. The inference is irresistible, argues the respondent, that the only basis for sending that medical certificate was that the applicant was aware that the matter would proceed on that day. In my view, such approach would be overly simplistic. The matter of whether an email has been received by the addressee in this information age ought to be capable of resolution without the drawing of inferences.

[21] In *Jafta v Ezemvelo KZN Wildlife*[12] it was held, based on the provisions of the Electronic Communications and Transactions Act[13], that the critical moment in electronic communication is when the message enters a system outside the control of the sender. Although the ECTA deems a message sent when that happens, it

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10 Clause 8 of the EFF's Constitution.

11 *Ibid* clause 12.

12 [2008] 10 BLLR 954 (LC).

13 25 of 2002. (The ECTA.) Section 23(a) and (b) of the ECTA reads:

> "23 A data message-
> a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;
> b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee".

does not create a presumption; an addressee may deny receipt, but must then adduce sufficient evidence to shift the burden of proof to the sender to demonstrate that the email was in fact received by the addressee.

[22] Absent proof that the applicant received the relevant notice transmitted to "*th[…]@gmail.com*", I am unable to find that the applicant was aware that the hearing would proceed on that day. I am also not in position to reject, out of hand, the applicant's assertion that the email to which the notice was sent fell into disuse. I believe that it would have been a matter of relative ease for the respondent, in seeking to rebut the applicant's version of non-receipt of the email, to engage a technician to investigate and report on whether the email in question was received and downloaded. I venture to take judicial notice of the fact that sent emails may sometimes not be received by the intended recipients due, amongst other things, to the fact that the inbox of the recipient is full and not able to download further messages.

[23] I am accordingly of the view that the applicant has established with the requisite degree (at a *prima facie* level) that the respondent invaded the applicant's right to be afforded the opportunity of being heard prior to it being decided to expel the applicant from the EFF. Because of the lack of information, as already pointed out, it is hard for me to make a pronouncement regarding the degree of strength of the applicant's case in the pending review application. Quite apart from all else, the applicant has elected not to foreshadow other review grounds in his founding papers to assist the court assess the strength of his case.

[24] That, however, does not bring the matter to an end. It is incumbent on the applicant to also establish the two other requisites for the grant of the interlocutory interdict he is seeking.

[25] The applicant claims to be suffering prejudice in that as a bread winner he is not receiving the concomitant benefits derived from his membership of the Legislature. It is not his case that he is the sole bread winner and that he lacks other sources of income. Were he to be reinstated in the final analysis, recovery of lost

income would not be impossible or improbable. For this reason, I am unable to find that the balance of convenience favours the grant of interim relief.

[26] Even if I am wrong in finding that the applicant has not established the requisites for an interlocutory interdict, the court possesses a general and overriding discretion whether to grant or refuse an application for interlocutory relief.[14]

[27] It has been held that failure or undue delay on the part of the applicant to press on with the main action after a rule *nisi* has been obtained may lead to dismissal of the rule.[15] This matter has a curious feature. The applicant approached court on an *ex parte* urgent basis on 5 October 2015, having been informed of the impugned decision on 30 September 2015. He obtained the rule *nisi* subject to these proceedings on 06 October 2015. The respondent's answering affidavit was delivered on 16 October 2015. The replying affidavit was delivered on 4 November 2015. Thereafter, the applicant rested on his laurels, and did nothing to either set down the interlocutory application for hearing or to pursue the review application. The respondent took the initiative to apply for allocation of a hearing date on 20 November 2011. Once 11 February 2016 was allocated by the Registrar as hearing date, the respondent proceeded to issue a notice setting the matter down for hearing on 11 February 2016. The respondent's heads of argument were delivered on 5 February 2016[16] and those of the applicant, out of time, on 09 February 2016, despite the fact that the heads had been drawn by counsel on 3 January 2016. Since obtaining the rule *nisi*, the applicant has not lifted a finger to press on with the review application.

[28] In any event, on the authority of *Fisher v Fisher*,[17] the rule *nisi* granted on 6 October 2015 not having been extended to a particular date lost its validity and

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[14] *Limbada v Dwaka* 1957 (3) SA 60 (N) at 62 B-F; *Compore Knox D' Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 360 A-H.

[15] *Sandell v Jacobs* 1970 (4) SA 630 (SWA) at 635 B-E; *Chopra v Avalon Cinemas SA (Pty) Ltd* 1974 (1) SA 469 (D) 472 E.

[16] In terms of the Practice Directions of the Eastern Cape Division the applicant had to file his heads of argument on 04 February 2016. He only filed them on 09 February 2016.

[17] 1965 (4) SA 644 (W).

lapsed on 20 October 2015, on which day the matter was postponed "*sine die*", without the rule *nisi* having been extended to a particular date, and not subsequently revived.[18] It is a salutary practice for counsel and attorneys appearing to postpone a matter wherein there is an order incorporating a rule *nisi* to bring to the attention of the court the existence of the rule *nisi* to enable the court to extend the rule *nisi* to a specific date – the date to which the matter stands postponed, otherwise the rule simply lapses in an instance such as here, where the parties consented to an order postponing the matter *sine die*.

[29] Even though strictly speaking there is in fact no rule *nisi* to discharge, the application encapsulated in Part A of the notice of motion has to be brought to its logical conclusion, leaving the applicant to consider his position regarding what should become of the review application (part B). The respondent has attained substantial success on this bout. When this court issued the rule *nisi*, it was also ordered that the costs occasioned by the interlocutory application stand over for determination in the review application. The respondent did not feature at that stage. The parties adopted a different approach when the matter was being heard. They each contended that the costs incurred at this stage should follow the result. In any event, that is the proper course to follow.

[30] The respondent pressed for a punitive cost order pointing to mendaciousness on the part of the applicant. I disagree. An explanation, which was acceptable to the court which granted the rule *nisi*, was tendered as to why the proceedings were brought on an *ex-parte* basis. The respondents were, in any event, granted leave to anticipate the return day. The first respondent elected not to do that, but instead to pursue its opposition to the confirmation of the rule *nisi*. Nothing, in the formulation of the replying affidavit, points to mendaciousness on the part of the applicant. On the respondent's own showing, the mainstay of the applicant's case has been that the applicant never received the notice of hearing for 21 September 2015. I have already upheld that version as not being fanciful or untenable. No case has thus been made for a punitive cost order. Nothing was

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18 In the *Fisher* matter it was held that a rule *nisi* is an order of court to which a fixed period of validity has been assigned. Once that period of validity has expired the rule lapses.

Fachieved by the parties' appearance on 20 October 2015, on which date the rule *nisi* lapsed in the hands of both parties, who were legally represented. None of the parties is entitled to a cost order for that day.

[31] In the result, I grant the following order:

1. The application for the grant of the interlocutory interdict encapsulated in Part A of the applicant's notice of motion is dismissed.

2. The applicant shall pay the costs of the application incurred to date.

3. Each party shall pay its own costs for 20 October 2015.

S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for applicant:	Mr M H Sishuba,
Instructed by	S N Jiba Attorneys
	East London
	C/O Potelwa & Co
	King William's Town
Counsel for the first respondent:	Mr T Ngcukaitobi,
Instructed by	Dandala Attorneys
	King Williams' Town
Date heard:	11 February 2016
Date Delivered:	23 February 2016