

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.8552/2012

In the matter between:

BONGINKOSI SIPHIWE NGIBA

APPLICANT

and

AFRICAN PEOPLE'S CONVENTION

FIRST RESPONDENT

THE SECRETARY GENERAL –
PASEKA MOSHWADIBA

SECOND RESPONDENT

THE INDEPENDENT ELECTORAL
COMMISSION

THIRD RESPONDENT

THE CITY MANAGER –
ETHEKWINI MUNICIPALITY

FOURTH RESPONDENT

And

CASE NO. 8457/2012

In the matter between:

SLINDILE ANN LUTHULI

APPLICANT

and

AFRICAN PEOPLE'S CONVENTION

FIRST RESPONDENT

THE SECRETARY GENERAL –
PASEKA MOSHWADIBA

SECOND RESPONDENT

THE INDEPENDENT ELECTORAL
COMMISSION

THIRD RESPONDENT

THE CITY MANAGER –
NDWEDWE LOCAL MUNICIPALITY

FOURTH RESPONDENT

J U D G M E N T
Date Delivered : 5 April 2013

S R MULLINS, A J:

[1] This judgment is delivered in two related matters which, although not consolidated, were heard together on 27 March 2013.

[2] The two applicants were, and in consequence of interim relief granted by this Court on 23 August 2012 remain, proportional representation councillors of the eThekweni Municipality, representing The African People's Convention, the first respondent.

[3] In the case of S A Luthuli, the relevant provisions of the order granted read as follows:

"2. *That a rule nisi do issue calling upon the Respondents to show cause if any on the 11th September 2012 at 9:30 a.m. or so soon thereafter as the matter may be heard why an Order should not be granted in the following terms:*

2.1 *That pending the finalization of the Appeal procedure and/or any other legal proceedings instituted or to be instituted by the Applicant against 1st Respondent, the membership of the Applicant with the 1st Respondent be and is hereby re-instated with immediate effect.*

2.2 *That the 1st Respondent's decision as contained in annexure "SL10" to the Applicant's Founding Affidavit to expel the Applicant from and further to revoke the Applicant's membership with the 1st Respondent be uplifted immediately.*

2.3 *That pending the outcome of the appeal, the 1st, 3rd and 4th Respondents be and is hereby interdicted and restrained from swearing in any member representing the 1st Respondent to*

replace the Applicant as Public Representative Councillor of the 1st Respondent.

2.4 That the 1st Respondent be and is hereby directed to furnish to the Applicant within ten (10) days of the granting of the order reasons for its finding in the disciplinary enquiry against the Applicant.

2.5 That the 1st Respondent be ordered to pay the costs of this application.

3. That pending the return date of the rule nisi the relief set forth in paragraph 2.1, 2.2, 2.3 and 2.4 operate as interim relief with immediate effect.”

[4] A similar order was made in the case B S Ngiba save that there were included additional provisions directing the third respondent (the Independent Electoral Commission) to “*remove Trevor Thabani Ngubane as the replacement of the applicant as the first respondent’s public representative councillor in the 4th respondent*” and to “*re-instate the applicant*” as such.

[5] The reference to the applicants as “public representative councillors”, which is the description used in the applicant’s papers, appears to be an erroneous reference to “proportional representation” councillors.

[6] There are numerous disputes of fact on the papers. In brief, however, the background to the applications is as follows.

[7] The applicants had previously been members of a different political party, the Federal African Convention, which merged with the first respondent in December 2010.

[8] In the local government elections of May 2011, the first respondent won two proportional representation seats in the eThekweni Municipal Council. The applicants filled those two seats.

[9] The applicant's appointment as "party representatives" was governed by a "deployment agreement" concluded between the party (the first respondent) and each of the applicants. Apart from listing a number of obligations imposed upon and accepted by the applicants, the deployment agreements recorded the following (quoted verbatim as contained in the document):

"I hereby accept the deployment by my party (African People's Convention / APC) as a Party Representative at eThekweni Municipality and acknowledge and accept that this contract is performance based."

"As this is Party deployment, the African People's Convention (APC) reserves the right to recall me from Council if it is found that I did not live to the spirit of my deployment and hereby pledge my full cooperation with that Party process."

"I commit hereby to be bound by the Constitution of the African People's Convention (APC) and its Disciplinary Code/Rule 22."¹

"I fully understand that the seat/vacancy I occupy in Council is not mine but that of the APC, acquired through the democratic, free and fair elections organised by the Independent Electoral Commission – 5A on the 18 May 2011 and that the APC reserved the right to deploy whoever it deem fit and necessary to advance its political objectives whenever it becomes necessary".

¹ The reference to Rule 22 is to the original (unamended) constitution – "22 - Disciplinary tribunal" in (at page 47 of the indexed papers in case 8552/2012). It is not a reference to Rule 22 of the "amended" Constitution "public representatives" (at page 191) as the amendment is recorded as having occurred in December 2011.

“The Councillor reserves the right to appeal any sanction against him/her”.

[10] The background thereto is very much in dispute, but on 21 May 2012, a letter was addressed to each of the applicants recording (again quoted verbatim and without correction) that *“The 3^d Plannery Session of the 2nd Politburo of the African People’s Convention held on the 20th of May 2012 ... resolved to recall you as the APC councillor. The Politburo in its wisdom decided that the political interest of the APC will be better served by recalling you and deploying, someone else in your post”*. The applicants were instructed to address letters of resignation to the Speaker of the Municipality. The instruction was coupled with the warning that *“failure to write such a letter of resignation to the Speaker of the Municipality and failure to provide my office with a copy thereof by the 31st May 2012 will be viewed as gross subordination for which there will be swift, firm and decisive action.”*

[11] The applicants declined to resign, recording that no grounds for their “recall” existed or were provided. In response, four formal charges were brought against each of the applicants. They were notified of these charges by notice dated 29 June 2012 and the hearing was fixed for 14 July 2012. The disciplinary proceedings proceeded before the Standing Disciplinary Committee of the first respondent. The applicants claim that two of the four charges were withdrawn and that each was required to answer only the remaining two charges. The first and second respondents dispute that any charges were withdrawn and claim that the applicants were found guilty on all counts.

[12] There are disputes as to what occurred at the hearing and as to whether the applicants were afforded an opportunity to argue in mitigation. In any event, the applicants were thereafter notified (by letters dated 24 July 2012) that the Politburo had received a report from the National Disciplinary

Committee and had accepted and endorsed the findings and sanctions. The applicants were informed that they had been found guilty on all charges and the sanction of immediate expulsion, as endorsed and accepted by the Politburo, had been imposed.

[13] The applicants chose to appeal, setting out their reasons in letters dated 8 August 2012. The first and second respondents admit having received the notice of appeal of S A Luthuli, but deny having received the notice of appeal of the B S Ngiba.

[14] The documents in the two appeals are in identical terms. The appeal documents appear to commence from the premise that each appellant was found guilty on each of the four charges. The applicants contend that improper personal motives were behind both the initial instruction that they resign as councillors and the subsequent disciplinary proceedings. The first and second respondents deny this and contend that both were the consequence of improper conduct on the part of the applicants.

[15] The applicants and the first and second respondents are unable to agree even on the terms of the constitution of the first respondent. The applicant contends that the constitution in question is what appears to be the original constitution, whereas the first and second respondents rely on an amended version of that document which is recorded to be the constitution “*as amended at the 1st National People’s Congress held on 16 – 18 December 2011 in Mangaung, Free State*”.

[16] The provisions dealing with disciplinary proceedings and appeals are identical (Rule 22 of the original constitution and Rule 24 of the amended constitution). These provisions include, *inter alia*:

- (1) Provisions for the appointment of a “Standing Disciplinary Committee” appointed by the Central Executive Committee (The “CEC”);
- (2) With particular reference to a penalty of expulsion from the party that “Expulsion shall be imposed only by the CEC acting either on its own initiative or after receiving a fully documented recommendation from the PEC” (i.e. the Provincial Executive Committee);
- (3) That any person found guilty in disciplinary proceedings has the right to appeal to a National Appeals Committee (established by the CEC but comprising members of the Party who are not members of the CEC). An appeal to the National Appeals Committee must be brought within 30 days through the CEC;
- (4) That, should the National Appeals Committee reject an appeal, a further and final appeal to the “Next Congress” is allowed; and
- (5) Of particular significance to this application, a provision recording that “The lodging of an appeal shall not postpone the operation of the penalty”.

[17] The amended constitution relied upon by the first and second respondents contains a provision (in amended Rule 22) not found in the original constitution. It is headed “Public Representatives” and reads:

“22.1 The party shall have the right through its structures to the second and withdraw its members in all spheres of government and all local, national and international institutions it deems necessary to pursue its revolutionary mandate.

22.2 All representatives shall contribute a levy of occupying a position on behalf of the Party that remunerates the incumbent and the (percentage) figure shall be determined by the CEC.

22.3 *The party shall develop a deployment contract that shall be signed by all its representatives.”*

[18] Anticipating their removal as proportional representation councillors of the first respondent, the applicants brought the urgent application seeking relief as was ultimately granted on 23 August 2012.

[19] It is common cause that, pursuant to the interim relief granted, B S Ngiba was restored as a proportional representation councillor representing the first respondent. I was also informed that the first respondent did not provide reasons for the “finding in the disciplinary enquiry” as required by the orders granted on 23 August 2012 unless the answering affidavits are regarded as complying with the order. Finally, I was advised that there has been no progress with regard to the hearing of the appeals.

[20] The matter came before me as the extended return date of the *rule nisi*. The “final” relief sought on confirmation of the *rule nisi* is to apply only pending the determination of other proceedings. The relief will operate only until the determination of the applicants’ appeals to the National Appeal Committee of the first respondent. The order sought did make reference to the relief operating pending the determination of other, unidentified, proceedings, but the applicant’s counsel accepted that the rule could only be confirmed in relation to the identified appeals.

[21] It follows in my view that the “final” relief is itself interim relief because it operates only pending the decision of the Appeal Committee of the first respondent. It accordingly seems to me that, in determining the question is to whether or not the rule should be confirmed, the proper test to apply is that relating to the granting or refusal of interim relief.

[22] What is consequently required of the applicants is that they establish the existence of either a clear right or a *prima facie* right, even if open to some doubt and that the balance of convenience favours the granting of the further relief pending the decision in the appeals. As recently stated by Nugent JA in Minister of Defence v South African National Defence Union 2012 JDR 1507 (SCA) in paragraph [11]:

“It is trite that for an interdict to be granted the applicant must establish (1) that he or she has a clear right and (2) that the right has been or is expected to be infringed and (3) the absence of similar protection by any other ordinary remedy. Where the existence or otherwise of the right has yet to be judicially determined, whether in those proceedings, or in a related action, a court has a discretion meanwhile to grant an interdict maintaining the *status quo* pending the outcome of that determination, if the right relied upon is demonstrated *prima facie*.”

[23] As was further pointed out by Page J in Cambridge Plan AG and Another v Moore and Others 1987 (4) SA 821 (D) (at pages 833 D – 834 B):

“The requirements which an applicant for an interim interdict has to satisfy are well established. They are:

- (a) a *prima facie* right;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is 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.

These factors should not be considered separately or in isolation but in conjunction with one another in order to determine whether the Court should exercise its discretion in favour of the grant of the interim relief sought. (Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T) at 54.)

I propose firstly to consider whether the applicants have succeeded in showing the requisite *prima facie* right in respect of each of the causes of action relied upon. I will then proceed to consider the remaining requirements. I do this, however, purely as a matter of convenience and I have been careful to guard against overlooking the interaction between the various requirements and, in particular, the interaction between the balance of convenience and the strength of the *prima facie* case required. (Olympic Passenger Service (Pty) Ltd H v Ramlagan 1957 (2) SA 382 (D).)

The nature of the *prima facie* right which the applicant is required to establish was laid down in Webster v Mitchell 1948 (1) SA 1186 (W) as modified by Gool v Minister of Justice and

Another1955 (2) SA 682 (C). Including this modification, the approach laid down in Webster v Mitchell (supra at 1189) is as follows:

'In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities: it is sufficient if such right is *prima facie* established, although open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant on these 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 could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respect of prejudice in the grant or refusal of interim relief.'

[24] The rights which the applicants assert, and which will be asserted in the appeals, are their rights to remain members of the first respondent and, in particular, proportional representation councillors of the first respondent in the eThekweni municipality. They contended that they have a good argument to present to the Appeal Tribunal in support of the overturning of the decision of the Standing Disciplinary Committee and the decision of the Politburo to uphold the penalty of expulsion. If the further interim relief which will be afforded by the confirmation of the rule is not granted, they will suffer irreparable harm because they will be removed as councillors before their appeals (which may determine that the penalties of expulsion were not properly imposed) are heard. They contended that the first and second respondents can arrange for the appeals to be heard expeditiously and contend that, in all the circumstances, the balance of convenience favours the extending of the interim relief by confirmation of the rule *nisi*.

[25] The first and second respondents seek the discharge of the rule *nisi* in each case. Their contentions as advanced in argument by Mr Kuboni are, in relation to both matters, that:

- (1) the matter was not urgent and would not have been dealt with as such in August 2012;
- (2) the first respondent has a right to recall its members from public office (in terms of Rule 22 of the amended constitution) and the deployment of the applicants was subject to their performing in accordance with their deployment contracts and, in particular, the constitution which expressly provides that a pending appeal does not suspend the sanction appealed against;
- (3) the court should not afford relief because the applicants have not exhausted their internal remedies as referred to in section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), the internal remedy consisting in the appeals in question.

[26] In relation to the application by B S Ngiba, the first and second respondents contend, in addition, that:

- (1) he had no proprietary interest in retaining membership of the first respondent because he had already been removed as a counsellor and replaced by Mr Ngubane when the application was launched; and
- (2) Mr Ngubane had an interest in the matter requiring that he be formally joined as a respondent.

[27] Before dealing with the various contentions of the first and second respondents, I deal with the question as to whether, on the respondent's version, there has been compliance with the constitution of the first respondent in imposing the penalty of expulsion on the applicants.

[28] In the course of argument I raised the question as to whether the fact that the Politburo had determined that the penalty of expulsion should be imposed did not have the result that no valid expulsion had occurred, given that the CEC was the only body which could impose that penalty. In this regard see Matlholwa v Mahuma and others [2009] 3 All SA 238 (SCA). Mr Kuboni drew my attention to the provisions of the constitution of the first

respondent which (in a different form in each of the original (Rule 10) and amended (Rule 11) versions) provided that the Political Bureau (“the Politburo”) “shall exercise all the powers and functions of the CEC”. Whilst the position is perhaps clearer in the original constitution than it is in the amended version, I accept that a penalty of expulsion could legally be imposed by the Politburo pursuant to disciplinary subrule 7(d).

[29] Ms Sridutt argued that, even if the Politburo could impose the penalty of expulsion, the Disciplinary subrule required that it do so “*acting either on its own initiative or after receiving a fully documented recommendation from the PEC*” and neither was apparently the case. It seems to me that, where the disciplinary proceedings proceed before the Standing Disciplinary Committee on the direction of the CEC (or the Politburo), the latter will be entitled to impose a penalty of expulsion based upon the recommendation of the Disciplinary Committee. Even if it could not be said to be acting “*on its own initiative*” in those circumstances, the power to expel a member following a decision of the Standing Disciplinary Committee must be implied.

[30] I turn to deal with the contentions of the first and second respondents. I deal firstly with the two additional contentions advanced in relation to the application of B S Ngiba.

[31] When the application was launched, Mr Ngiba was apparently not aware of the fact that he had already been replaced as proportional representation councillor by Mr T R Ngubane. That fact emerged in the affidavit of Mr Mamabolo of the Independent Electoral Commission dated 22 August 2012. It appears that, in the light of that evidence, the Court granted an amended *rule nisi* making specific provision for the re-instatement of Mr Ngiba as councillor in the stead of Mr Ngubane.

[32] Whatever complaint may have been advanced at that time with regard to the making of that order without express notice to Mr Ngubane, the order was put into effect. Mr Ngubane was removed as councillor and has subsequently involved himself in the proceedings, deposing to an affidavit in support of the first and second respondent's position. I do not consider that Mr Ngubane's interest is sufficiently direct that his formal joinder in the proceedings is required.

[33] There is clear authority for the proposition that, unless an applicant stands to lose some proprietary interest, a Court should not ordinarily intervene to prevent expulsion from a political party (whether on a permanent or interim basis). See the judgment of Patel DJP (as he then was) in Mcoye and Others vs Inkatha Freedom Party; Magwaza-Msibivsi vs Inkatha Freedom Party 2011 (4) SA298 (KZP) at page 309. Mr Ngiba clearly had a direct proprietary interest owing to the loss of his position as a Municipal Councillor. The fact that the first respondent had moved to have him replaced before his application was brought cannot alter that fact. The application was brought to protect, in part, a clear proprietary interest.

[34] The argument with regard to urgency is misplaced. The Court granted the rule with interim relief and clearly determined that the matter was sufficiently urgent to be dealt with in August 2012. Matters of urgency are no longer relevant to the question as to whether the *rule nisi* should be confirmed.

[35] It is correct that the amended constitution contains a provision entitling the first respondent to "recall" members who serve as public representatives. There is, however, a dispute as to whether the amended constitution is in fact enforced. The overall probabilities would suggest that the constitution was amended in December 2011, but it seems to me that the provision in the amended constitution is not directly relevant. The real issue in the internal appeals is whether the applicants were properly expelled from the party. The

removal of Mr Ngiba as a councillor was expressly on the basis that he had ceased to be a member of the party and consequently ceased also to qualify to remain a proportional representation councillor of the first respondent party.

[36] Approaching the matter on the basis described in Cambridge Plan AG (supra), I conclude:

- (1) The applicants' evidence makes out a case that their expulsion from the party was unjustified and procedurally flawed and that an independent appeal body might well come to that conclusion and that the imposition of the penalty of expulsion ought to be set aside;
- (2) Whilst it is obviously not possible to come to any conclusion as to where the truth lies in relation to the numerous disputes of fact between the parties, it is equally so that I cannot conclude that the applicants' version is open to such "serious doubt" that further interim relief is not appropriate;
- (3) In the absence of some provision preventing the Court from doing so, it ought to grant interim relief to preserve the *status quo* existing immediately prior to the decisions pending the determination of the internal appeals.

[37] I do not consider that Section 7 of PAJA has any relevance to this application. The application is not one for the review of administrative action. In any event, the internal remedy in question is the appeal. The relief sought is to operate pending the determination of that appeal and the appeal itself can obviously not afford that relief.

[38] Mr Kuboni stressed that the constitution (whichever version is relied upon) expressly provides that "*the lodging of an appeal shall not postpone the operation of the penalty*". The submission is that the relationship between the

applicants and the first respondent is contractual (as dealt with in McoyevsInkatha Freedom Party (supra)) and the provision in the constitution precludes the obtaining of the relief sought. On that basis it was contended that the decision in Max v Independent Democrats and others 2006 (3) SA 112 (C) was distinguishable and that reliance thereon would be misplaced.

[39] The provision is expressed in the negative. It plainly excludes any notion that the lodging of an appeal will automatically suspend a penalty imposed by the disciplinary body. It does not, however, provide that the penalty necessarily must be served pending an appeal. The provision does not purport to bind members to an agreement that they will not approach a Court for relief.

[40] As pointed out by Davis J in Max (supra) at pages 120-122, (i) where the matter involves public representation, the issue is not one which is simply contractual, (ii) where the suspension of the effect of a ruling pending an appeal is statutorily excluded, the High Court would still be empowered to grant relief; and (iii) the decision in Dennis v Garment Workers' Union, Cape Peninsula 1955 (3) SA 232 (C) at 238H-239C was determined exclusively on the basis of contractual interpretation.

[41] In all the circumstances, I am persuaded that this court is entitled to afford the applicant's interim relief and that, subject to certain amendments as dealt with below, it is appropriate to confirm the *rule nisi*.

[42] Firstly, the relief should operate pending the final determination of the applicants' appeals to the National Appeals Committee and no further. In my view, should the National Appeals Committee reject the applicants' appeals, any further relief as might be afforded to the applicants will necessarily depend on additional factors and it would not be appropriate for this Court to grant the relief pending the determination unspecified proceedings which may

possibly be brought by the applicants thereafter. One additional factor which prompts me to reach the conclusion which I have is the fact that the first respondent will have had it within its power to ensure that the appeals before the National Appeals Committee of the first respondent were dealt with expeditiously. Presumably it still can do so now.

[43] Secondly, the provisions in subparagraph 2.2 of each of the orders granted are inappropriately phrased, because they are expressed as final orders setting aside the decision of the Standing Disciplinary Committee and the Politburo (referred to therein as that of the first respondent). That was clearly not what was intended. It seems to me that paragraph 2.1 of the rule *nisi* in each case is adequate and that paragraph 2.2 can merely be deleted.

[45] Although the provisions of the order made in 552/2012 (B S Ngiba) relating to the removal of Mr Ngubane and the reinstatement of Mr Ngiba have already been carried out pursuant to the interim relief, it remains appropriate to confirm the rule in that regard.

[46] It seems to me that there is no reason why costs should not follow the result and none of the parties suggested otherwise.

[47] The orders are following the following:

Case number: 8547/2012

The *rule nisi* in paragraph 2 of the order of this Court dated 23 August 2012 is confirmed, in the following terms:

- 1 *That pending the finalization of the Appeal procedure instituted by the Applicant against 1st Respondent, the membership of the*

Applicant with the 1st Respondent be and is hereby re-instated with immediate effect.

- 2 *That pending the outcome of the appeal, the 1st, 3rd and 4th Respondents be and is hereby interdicted and restrained from swearing in any member representing the 1st Respondent to replace the Applicant as Public Representative Councillor of the 1st Respondent.*
- 3 *That the 1st Respondent be and is hereby directed to furnish to the Applicant within ten (10) days of the granting of the order reasons for its finding in the disciplinary enquiry against the Applicant.*
- 4 *That the 1st Respondent be ordered to pay the costs of this application.*

Case number: 8552/2012

The *rule nisi* in paragraph 2 of the order of this Court dated 23 August 2012 is confirmed, in the following terms:

- 1 *That pending the finalization of the Appeal procedure instituted by the Applicant against 1st Respondent, the membership of the Applicant with the 1st Respondent be and is hereby re-instated with immediate effect.*
- 2 *That the 3rd Respondent be directed to forthwith remove Trevor Thabani Ngubane as the replacement of the Applicant as the 1st Respondent's Public Representative Councillor in the Ethekewini Municipality.*

- 3 *The 3RD Respondent is hereafter directed to forthwith re-in-state the Applicant as the 1st Respondent's Public Representative Councillor in the Ethekwini Municipality.*
- 4 *That pending the outcome of the appeal, the 1st, 3rd and 4th Respondents be and is hereby interdicted and restrained from swearing in any member representing the 1st Respondent to replace the Applicant as Public Representative Councillor of the 1st Respondent.*
- 5 *That the 1st Respondent be and is hereby directed to furnish to the Applicant within ten (10) days of the granting of the order reasons for its finding in the disciplinary enquiry against the Applicant.*
- 6 *That the 1st Respondent is ordered to pay the costs of this application.*

S R Mullins, A J

APPEARANCES:**APPLICANT'S COUNSEL:**

Ms DSridutt

Instructed by Aziz and Associates,
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FIRST AND SECOND**RESPONDENTS COUNSEL:**

Mr W S Kuboni

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Date of hearing:

27March 2013.

Date of judgment delivered:

5 April 2013.