

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

CASE NO : 6512/2011

In the matter between:

THE INKATHA FREEDOM PARTY	First Applicant
MBANGISENI SHADRACH YENGWA	Second Applicant
DUDU NONHLANHLA ZONDI	Third Applicant
IGNATIUS NYOKA	Fourth Applicant
VILOSHENE PILLAY	Fifth Applicant
SILAM VINCENT ZONDI	Sixth Applicant
RAJENDRAPARSAD MAHARAJ	Seventh Applicant
MTHULISENI LEANERD SHEZI	Eighth Applicant
EMMANUEL NKOSIKAYISE MNCUBE	Ninth Applicant
MBONGISENI RICHARD DLAMINI	Tenth Applicant

and

THE AFRICAN NATIONAL CONGRESS	First Respondent
THE NATIONAL FREEDOM PARTY	Second Respondent
THE DEMOCRATIC ALLIANCE	Third Respondent
THE UMVOTI MUNICIPALITY	Fourth Respondent
AHMED MOHAMED SHAIK	Fifth Respondent
PHILANI GODFREY MAVUNDLA	Sixth Respondent
SIKHUMBUZO ENOCK MNGIMA	Seventh Respondent
PAMELA THANDAZILE ZUMA	Eighth Respondent
BONGANI EUGENE MLONDO	Ninth Respondent
ZANDILE CHRISTINA NGEMA	Tenth Respondent
BETHUEL GCINA DLADLA	Eleventh Respondent
SIBONGISENI ANTHONY NZAMA	Twelfth Respondent
KHULEKANI LINDOKUHLE CHONCO	Thirteenth Respondent
NQOBILA SIPHIWAYINKOSI VICTORY MAPHANGA	Fourteenth Respondent
ZAMOKWAKHE WILSON XABA	Fifteenth Respondent

ENOCH SIBONGISENI SHANGE
PAUL RICHARDS BUSS

Sixteenth Respondent
Seventeenth Respondent

J U D G M E N T

K PILLAY J

[1] This application is a sequel to an application by the Tenth Applicant wherein an order was sought declaring the decision of the Council of the Fourth Respondent at its meeting held on 31 May 2011 to appoint an *“Executive Committee consisting of two members of the African National Congress and only one member of the Inkatha Freedom Party”* unconstitutional and invalid and declaring that all decisions made by the Executive Committee from 31 May 2011 to date of application as null and void. I will refer to the parties as they were in the main application.

[2] The Fourth Respondent opposed the application and on 21 July 2011 demanded security from the Applicants. The Applicants opposed the notice demanding security for costs. This opposition then gave rise to the present application.

[3] The principal basis on which security is sought is as follows:

- (a) The main application is vexatious;
- (b) The First Applicant has serious financial problems and that it is highly unlikely that it will pay the Fourth Respondent’s costs should it be ordered to do so.

- (c) The procedure laid down in Rule 53 of the Uniform Rules should have been followed:

[4] The Applicants dispute the above.

[5] In dealing with the first issue, it is so that this Court has an inherent jurisdiction to prevent a vexatious action as being an abuse of the process of Court by ordering the vexatious litigant to furnish security for costs. *Western Assurance Co v Caldwell's Trustee* ¹

[6] In *Ecker v Dean* ² the court set out the basis for the granting of an order as follows:

‘..... Notwithstanding dicta to the contrary, it seems to me that the correct principle underlying these decisions is that every application for security must be decided on the merits of the particular case before the Court, bearing in mind that the basis of granting an order for security is that action is reckless and vexatious.’

[7] In clarifying the question of the merits as propounded in decisions before *Ecker v Dean*, Eksteen AJ in *Israel v Burger* ³ said the following:

‘When the learned Judge refers to the ‘merits of the particular case before the Court’ I take it he is referring to the merits of the application to compel security to be furnished, and not to the merits of the action instituted by the insolvent.’

¹ 1918 AD 262 at 274

² 1938 AD 102 at 110

³ 1961 (1) SA 827 (0) at 830 C-D

[8] At the same time this Court is mindful of the provisions of Section 34 of the Constitution that allows everyone the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or tribunal, which right may be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. It is not easy, in these applications, to attempt to resolve the dispute between the parties. For as was stated in *Zietsman v Electronic Media Network Ltd & Others* ⁴ at paragraph 21 *Streicher JA* said:

“I am not suggesting that a Court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party’s prospects of success would depend on the nature of dispute in each case”.

[9] In fact in *Commissioner, South African Revenue Service and Another v East Coast* ⁵ *McCall J*, refused to access the merits of the case. He had the following to say:

“There is therefore, ample authority for the proposition that in deciding whether to order that a plaintiff, or applicant, company should be ordered to furnish security for the costs of the proceedings, the merits of the dispute are irrelevant and the Court cannot and should not enquire into them or express any opinion on the prospects of success, save, possibly, if it is apparent that the Plaintiff’s action is not bona fide or is ‘vexatious’ or ‘hopeless’. See Kuper J in Beaton’s case supra at 440. See also Fourie v Ratefo 1972(1) SA 252 (0) at 256 B – D and Agro Drip (Pty) Ltd v Fedgen Insurance Co Ltd 1998 (1) SA 182 (W) at 187. The reasons for the Court’s refusal to enter into the merits are obvious. Where the proceedings brought by the company are by way of action, there will be no evidence before the Court to enable it to assess the merits of the claim and the defence. Where the proceedings are by way of application, there may be disputes of fact

⁴ 2008(4) SA 1 (SCA)

⁵ 2000(4) SA 533 (D)

which cannot be resolved on the papers. I do not believe, therefore, that the reference in the Shepstone & Wylie case supra to 'all the relevant features' was intended to extend the enquiry to the merits of the dispute. See also Alexander v Jokl and Others 1948(3) SA 269 (W) at 281 on the question of relevance."

[10] In order to be classified as vexatious, the action must be obviously unsustainable ⁶ *Argus Printing & Publishing Co Ltd v Anastassiades*.

[11] In *Fitchet v Fitchet* ⁷ the Court held that:

"It may well be that, in applications for security for costs, the test should be somewhat different. Where, in an application for dismissal of an action, the Court without hearing evidence on the merits will require moral certainty alone that the action is unsustainable, in an application for security for costs the merits test should be somewhat less stringent, and other factors, which are irrelevant in a dismissal application, should be taken into account. I am therefore in respectful agreement with the statement of Klopper J in Davidson's Bakery (Pty) Ltd v Burger 1961(1) SA 589 (O) at 593E, viz:

'Myns insiens is die meriete van eiser se aksie nie altyd deurslaggewend nie, maar slegs 'n factor wat in oorweging geneem moet word. Daar kan gevalle wees waar die Hof sekuriesteitstelling sal verleen al word did slegs bevind dat die kanse van welslae op die aksie alleen twyfelagtig is sonder dat dit gesê kan word dat dit geen vooruitsigte van sukses inhou nie.'

[12] It is the Fourth Respondent's contention that the decision of the Council of the Fourth Respondent is consistent with the provisions of Section 43(1) of the Municipal Structures Act, No 117 of 1998 (Municipal Structures Act) in that the Executive Committee consists of one member of the African National Congress, one member of the National Freedom Party and one member of the Inkatha Freedom Party.

⁶ 1954(1) SA 72 (W) 73 A-H

⁷ 1987(1) 450 @ 454 E-C-D

[13] Rajendraparsad Maharaj, who is the deponent to the Answering Affidavit and who asserts that he is duly authorised to depose to the affidavit on behalf of all the Applicants states that the parties were all represented in the council at the relevant time and that the councillors are aware that the Inkatha Freedom Party proposed that the Executive Committee consist of four members – two from the African National Congress and two from the Inkatha Freedom Party. He denies that the Inkatha Freedom Party failed to propose a four member Executive Committee at the council. However, any such failure would at most have a bearing on costs and not affect the validity of their cause of action.

[14] In this regard the Applicants contend that the decision of the Council is neither consistent with the provisions of Section 43(2) nor Section 43(3) of the Municipal Structures Act, and whether or not these allegations are supported by the minutes does not affect their cause of action, as the Municipality is bound to follow the prescripts of the statute.

[15] Section 43 of the Structures Act provides:

“Composition of Executive Committees

- (1) *If the Council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government, provided that no more than 20 per cent of the councillors or 10 councillors, whichever is the least, are elected. An executive committee may not have less than three members.*
- (2) *An executive committee must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion they are represented in the council.*

- (3) *A municipal council may determine any alternative mechanism for the election of an executive committee, provided it complies with Section 160(8) of the Constitution.” (our emphasis)*

[16] I have perused the main application. Therein the Applicants assert that a Municipality which has an Executive Committee must either constitute it so that its members represent the parties and interests in substantially the same proportion as they are represented in the Council or it may determine an alternative mechanism which ensures that the parties are fairly represented.

[17] The Applicants submits that the Respondents have set about constituting an Executive Committee which does not comply with a system of proportional representation as provided for in Section 43(2) of the Act, neither did the Council purport to determine an alternative mechanism which would allow the parties and interests reflected within the Council to be fairly represented in accordance with the provisions of Section 43(3) of the Structures Act.

[18] The Fourth Respondent focuses his submissions only on the interpretation of Section 43(1). No reference is made to Sections 43(2) or 43(3) of the Act. The Court hearing the main application will be in a better position to make that determination once all the facts are placed before it. In my opinion, the Fourth Respondent has not demonstrated that the applicants case is obviously unsustainable.

[19] Therefore turning to the second issue viz that it is unlikely that the Applicants have the means to pay an adverse costs order,

all that the Respondents have put up is a newspaper article wherein Inkatha Freedom party leader Dr Mangosuthu Buthelezi, allegedly told delegates at a conference, that the Inkatha Freedom Party was cash strapped.

[20] An Applicant for security must, in order to discharge the onus, it bears, adduce facts on which the Court can conclude that there is reason to believe that the Plaintiff will be unable to satisfy an adverse costs order.

[21] The Fourth Respondent did not seek to have the newspaper article admitted in terms of Section 3 of the Law of Evidence Amendment Act 45 of 1988 (the Act).

[22] Section 3 of the aforementioned Act provides:

“3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings.*
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
- (c) the court, having regard to –*
 - (i) the nature of the proceedings;*
 - (ii) the nature of the evidence;*
 - (iii) the purpose for which the evidence is tendered;*
 - (iv) the probative value of the evidence;*
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
 - (vi) any prejudice to a party which the admission of such evidence might entail; and*

- (vii) *any other factor which should in the opinion of the court be taken into account.*

Is of the opinion that such evidence should be admitted in the interests of justice.

- (2) *The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.”*

[23] The Applicants have placed it in dispute by alleging it is hearsay.

[24] Without facts, it is difficult to arrive at a decision in favour of the Fourth Respondent on this issue.

[25] That said there is thus no evidence before me to suggest that the Applicants do not have funds to satisfy an adverse court order. The Applicants submit, that they have the wherewithal to satisfy an adverse costs order, by virtue of the fact that they are councillors. This is not disputed. A cost order of R300 000.00, would amount to R30 000.00 per individual applicant.

[26] The Applicants are in fact not immune from liability for a costs order as they are not protected by Section 28 of the Structures Act as the application is one that has been submitted to this Court and not to the council or any of its committees. This section provides:

’28. Privileges and immunities - (1) Provincial legislation in terms of section 161 of the Constitution must provide at least –

- (a) *that councillors have freedom of speech in a municipal council and in its committees, subject to the relevant council's rules and orders as envisaged in section 160 (6) of the Constitution; and*
- (b) *that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for –*
 - (i) *anything that they have said in, produced before or submitted to the council or any of its committees; or*
 - (ii) *anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees.*
- (2) *Until provincial legislation contemplated in subsection (1) has been enacted the privileges referred to in paragraphs (a) and (b) of subsection (1) will apply to all municipal councils in the province concerned.'*

[27] A further issue raised by the Respondents is that since the order sought by the Applicants is in effect a review of the decision of the Council of the Fourth Respondent, that the procedure laid down in Rule 53 of the Uniform Rules of Court should have been followed.

[28] The Applicants counter this by stating that Rule 53 only applies to proceedings to bring under review the decision or proceedings of any inferior Court and of any tribunal, board or officer performing judicial, quasi judicial or administration functions.

[29] The Applicants assert that the Fourth Respondent does not fall under any one of these categories. In addition, it is contended that the application does not pertain to administrative, judicial or quasi judicial actions, but declaratory relief concerning the legality of a resolution passed by a legislative body.

[30] The decision which they seek to have set aside is the result of a vote; accordingly there are no reasons to be obtained. The Applicants are also in possession of the record of the Councils deliberations.

[31] However, even if the decision were to be considered an administrative decision, a failure to follow Rule 53 in reviewing a decision of an administrative organ is not per se irregular as the rule exists primarily in the interests of an Applicant, who may choose to waive it. In this case they chose to bring the application in accordance with the procedure prescribed by Rule 6.

[32] I am therefore unable to find that the Fourth Respondent has succeeded in making out a case for the relief sought.

[33] The application for security is accordingly dismissed with costs, including costs consequent upon the employment of two counsels.

K PILLAY J

Date of Judgment : 9 May 2012

Applicants Counsels : Advocate R J Seggie SC
Advocate A L Christison

Instructed by : J Leslie Smith & Company
Applicant's Attorneys
332 Jabu Ndlovu
(Formerly Loop Street)
Pietermaritzburg
Ref : W Smith/tm/MAT 15225

4th Respondent's Counsel : Advocate T V Norman
Advocate W S Kuboni

Instructed by : Garlicke & Bousfield Inc
4th Respondent's attorneys
La Lucia Ridge Office Estate
c/o Ngcobo Poyo & Diedricks Inc
190 Hoosen Haffejee Street
Pietermaritzburg
Ref : Thoba Poyo-Dlwathi/nelly