

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

CASE NO: 2283/09

In the matter between:

**THE FEDERAL CONGRESS (FEDCON)
MATTHEW SHUNMUGAM
GIJIMANI ALFRED MNCUBE
THEMBESILE MARY MARGARET PHIRI**

**First Applicant
Second Applicant
Third Applicant
Fourth Applicant**

And

**LOUIS MBEKI NGWENYA
CYPRIAN ZIPHO NGOBESE
NHLANHLA MTHABELA
PHAKAMANI MCHUNU
THE ELECTORAL COMMISSION OF
SOUTH AFRICA
CHIEF ELECTORAL OFFICER
NEWCASTLE MUNICIPALITY
THE MUNICIPAL MANAGER, NEWCASTLE
AMAJUBA DISTRICT MUNICIPALITY
THE MEMBER OF THE EXECUTIVE COUNCIL
OF KWAZULU-NATAL
BHEKILANGA ALISON DLAMINI**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent

Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent

Tenth Respondent
Eleventh Respondent**

J U D G M E N T delivered on

MADONDO J:

Introduction

[1] Initially the applicants had sought relief in the following terms:

“1.1. An order directing that Bhekilanga Alison Dlamini is joined in these proceedings as the Eleventh Respondent.

1.2. That the Second and Third Applicant’s purported expulsion from the First Applicant is hereby set aside and they are declared to have remained as Councillors of the Seventh Respondent’s Council.

1.3. That the Fourth Applicant’s purported expulsion from the First Applicant is hereby set aside and she is declared to have remained a Councillor of the Ninth Respondent’s Council.

1.4. It is declared that the Fifth Respondent’s purported replacement of the Third Applicant by the Third Respondent as a Councillor of the Seventh Respondent was unlawful and invalid and is hereby set aside.

1.5. It is declared that the Fifth Respondent’s purported replacement of the Fourth Applicant by the Eleventh Respondent as a Councillor of the Ninth Respondent was unlawful and invalid and is hereby set aside.

1.6. The Seventh, Eighth and Ninth Respondents are directed to take such steps as may be necessary to recognise the status of the Second, Third and Fourth Applicants as Councillors of the Seventh and Ninth Respondents, respectively.

1.7. An order directing the First to Fourth Respondents, jointly and severally, to pay the costs of the application.”

[2] When the matter came before me on 15 June 2009 and after listening to argument it became evident that the said Bhekilanga Alison Dlamini had an interest in the outcome of the proceedings. It is for that reason that I, on that date, made an order joining him in the proceedings as the Eleventh Respondent.

[3] At the conclusion of argument on 15 June 2009 Mr Salmon, who appeared for the applicants, applied for an amendment of the Notice of Motion the effect of which would be to seek a relief setting aside the purported expulsion of the First Applicant under paragraph 3 of the Notice of Motion.

[4] After listening to argument I reserved Judgment on the issue and, having carefully considered the matter, I have concluded that, in applying for the said amendment, the applicants did not act *mala fide* and further that the proposed amendment will not cause any injustice and prejudice to the Respondents (see *Davonian Shipping Limited vs MV Luis (Yeoman Shipping Co. Ltd. intervening)* 1994(2) SA 363(C) 369 F-1) It is for those reasons that I have decided, as I hereby do, to grant the said amendment. The Notice of Motion will therefore, for the purpose of the present Judgment, now read as follows:-

- 4.1 That the second and third applicants' purported expulsion from the first applicant is hereby set aside and they are declared to have remained as Councillors of the seventh respondent's council.
- 4.2 That the fourth applicant's purported expulsion from the first applicant is hereby set aside and she is declared to have remained a Councillor of the ninth respondent's council.
- 4.3 It is declared that the fifth respondent's purported replacement of the third applicant by the third respondent as a councillor of the seventh respondent was unlawful and invalid and is hereby set aside.

- 4.4 It is declared that the fifth respondent's purported replacement of the fourth applicant by the eleventh respondent as a Councillor of the ninth respondent was lawful and invalid and is hereby set aside.
- 4.5 The seventh, eighth and ninth respondents are directed to take such steps as may be necessary to recognised the status of the second, third and fourth applicants as Councillors of the seventh and ninth respondent, respectively.
- 4.6 An order directing the first to fourth respondents, jointly and severally, to pay the costs of the application.

Parties

[5] The First Applicant is the Federal Congress (Fedcon) a political party duly registered as such in terms of Section 15 of the Electoral Commission Act, 51 of 1996, Constitution of which is lodged with the Independent Electoral Commission, and having its principal place of business at Shop Number 11, H & R Centre, 7 Voortrekker Street, Newcastle, KwaZulu-Natal.

[6] The Second Applicant is Mathew Shunmugan, a major male Ward 3 councillor in the Newcastle Local Council, KwaZulu-Natal, elected into that position by way of ward elections held in terms of the Local Government: Municipal Structures Act, No.117 of 1998 (Municipal Structures Act),and the chairman of the First Applicant's Interim Executive Committee.

[7] The Third Applicant is Gijimani Alfred Mncube, a major male representative of the First Applicant in the Council of the Newcastle Local Municipality and the national organiser of First Applicant.

[8] The Fourth Applicant is Thembisile Mary Margaret Phiri, a major female representative of the First Applicant in the Council of Amajuba District Municipality, residing at 17 Patak Street, Dannhauser, KwaZulu-Natal.

[9] The Fifth Applicant is Thenjiwe Veronica Buthelezi; a major female representative of the First Applicant in the Council of the Ninth Respondent.

[10] The Sixth Applicant is Chuan Yi Liu, a major male PR councillor representing the First Applicant in Municipal Council of the Ninth Respondent.

[11] The First Respondent is Louis Mbeki Ngwenya, a major businessman and the Secretary-General of the First Applicant of 7 Drive, Dundee, KwaZulu-Natal. The Second Respondent is Cyprial Zipho Ngobese, a major male councillor and the Deputy Secretary –General of the First Applicant, residing at Nquthu, KwaZulu-Natal. The Third Respondent is Nhlanhla Mthabela, a major male residing at 23 Mental Street, Newcastle; The Fourth Respondent is Phakamani Mchunu, a major male residing at Newcastle.

[12] The Fifth Respondent is The Electoral Commission of South Africa, established in terms of section 181 (1) of the Constitution of the Republic of South Africa (the Constitution) read with section 3 of the Electoral Commission Act, 51 of 1996 and having head office in KwaZulu-Natal at Westville Civic Centre, William Lester Drive, Westville, KwaZulu-Natal. Cited herein by the virtue of the functions it fulfils in Municipal Election in terms of Structures Act.

[13] The Sixth Respondent is The Chief Electoral Officer, appointed by Fifth Respondent in terms of section 12 of the Electoral Commission Act and whose head office in KwaZulu-Natal is situate at the same address as that of Fifth Respondent.

[14] The Seventh Respondent is The Newcastle Municipality, a local Municipality established in terms of section 12 of the Structures Act, and having its offices at Civic Centre Murchison Street, Newcastle, KwaZulu-Natal. The Eighth Respondent is The Municipal Manager of Seventh Respondent and whose place of employment is at the same address as that of Seventh Respondent.

[15] The Ninth Respondent is The Amajuba District Municipality, established in terms of section 12 of Municipal Structures Act, and having its offices at Amajuba Building, Main Street, Section 1, Madadeni, Newcastle, KwaZulu-Natal.

[16] The Tenth Respondent is a member of the Executive Council of KwaZulu-Natal responsible for Local Government whose offices are situate at FNB House Redlands Estate, Pietermaritzburg, KwaZulu Natal. The Eleventh Respondent is Bhekilanga Alison Dlamini, a major male residing at House 3849, Osizweni, Newcastle.

Factual Background

[17] The underlying facts in this matter are the following. As a result of a split that occurred in the First Applicant arising from a decision of the First Applicant's National Management Committee (Manco), and endorsed by the membership of the party at its general meeting, it was decided that the First Applicant withdraw from the alliance with the Inkatha Freedom Party (IFP) and that it should form partnership with other parties which it was felt were sincere about their relationship with the First Applicant (the party). It was decided that it would be in the best interest of the party to withdraw from the alliance with the IFP as it was felt that no real political benefits accrued to the party from that alliance.

[18] The Second to Fourth Applicants supported the move but the First Respondent and the minority section of the party led by him opposed it. The First Respondent was a member of Manco and the Secretary –General of the party. The Second to the Fourth Applicants were perceived as intending to sever the party's ties with the IFP in order to form a partnership with the African National Congress (ANC). It was feared that the party would, by so doing, contravene an alliance agreement it had with the Multiparty Government in the municipalities that oppose the ANC. In order to prevent that from occurring, the applicants were expelled from the party.

[19] The First Applicant, (Fedcon), has its origin in the National Democratic Convention (Nadeco) which, in turn, was an offshoot of the IFP. During March 2006 Nadeco contested municipal elections and won a number of seats on various municipalities, including the Seventh and Ninth Respondents. The Second to Sixth Applicants were elected as councillors on the Nadeco ticket: The Second Applicant was elected as a councillor of Seventh Respondent in ward 3. The Third and Sixth Applicants were elected on a proportional representation (PR) as councillors of the Seventh Respondent. The Fourth and Fifth Applicants were elected as PR councillors on the council of Ninth Respondent.

[20] Fedcon was established in the lead-up to a floor crossing window period, in September 2007. During the floor crossing window period a number of Nadeco councillors, including the Second to Sixth Applicants, crossed the floor and joined Fedcon. On 30 September 2007 an interim executive committee was elected at Fedcon general meeting to perform the duties of a Federal Executive Council until permanent office bearers were elected at the National Conference. On 6 October 2007, a constitution of Fedcon was adopted. Since Fedcon had not yet had a formal conference as contemplated by its constitution, Manco was elected

to do a day to day running of the party. The Second and Third Applicants and the First and Second Respondents were members of Manco.

[21] At the time when Fedcon was established, the then existing Nadeco structures namely; Newcastle Constituency and the Amajuba District Committee, switched to Fedcon and functioned as the organs of Fedcon. Since all the districts of Fedcon had not held conferences, the then existing Nadeco structures continued to function as executive committees. In terms of the constitution of Fedcon (party constitution) each district was to be divided into constituencies and committees of which were to be elected after every three years at the Constituency Annual General Meeting. Since no Fedcon constituency committee was ever elected in terms of the party constitution, Nadeco constituency committees continued to function as Fedcon structures.

[22] The disciplinary functions of the party were, in terms of the Constitution, reserved for the Constituency Disciplinary Committees, District Disciplinary Committees, Provincial Disciplinary Committees, a National Disciplinary Committee and a National Appeal Committee.

[23] Conflicts within Fedcon resulted in a spate of purported expulsions of its members and a plethora of Court applications. The first to be expelled were the Third and Fourth Applicants. According to the First Respondent, on 27 October 2008, he attended the residence of the Third Applicant where he personally served upon him a notice advising him of his expulsion from the party. On the same date and at the Fourth Applicant's residence situate in Paddock Street, Dannhauser, the First Respondent further states, he served a minute upon the Fourth Applicant notifying her of her expulsion from the party. Secondly, regarding the Second Applicant's expulsion from the party, a notice to that effect

was, according to the First Respondent, handed over to him at his funeral parlour at Newcastle.

[24] All the aforesaid three Applicants deny that the said notices of expulsion were ever served upon them, their version being that those notices were shown to them by third parties at various occasions.

[25] In any event, it would appear that certain people accepted that those Applicants had been lawfully expelled from the party, as it would appear that the provisions of Item 1 of Schedule 6B of the Constitution were invoked and the Third and Fourth Applicants (who had been nominated by the party) ceased to be members of the Seventh and Ninth Respondents respectively, and, in their places, the Third and Eleventh Respondents were purportedly nominated by the First and second Respondents to fill the positions of those Applicants on the respective Councils.

[26] The position of the Second Applicant was, however, different in that in his case, he had been nominated by the party as a candidate during the ward elections and had, during those elections, been elected to represent the party in the Seventh Respondent. In his case, the provisions of section 25(3) of Municipal Structures Act would have to kick in, which provide:-

“The municipal manager of the municipality concerned, after consulting the Electoral Commission, must by notice in the local newspaper call and set a date for the by-election , which must be held within 90 days of the date –

- (a) ...
- (b) ...
- (c) ... or

- (d) On which the vacancy occurred if subsection 1(d) applies.”

[27] The foregoing accordingly constitutes a synopsis of the facts against the background of which the Applicants launched the present application.

Issues

[28] The issues to be determined by the Court in this matter are accordingly the following:-

- 28.1 Whether the purported expulsions of the applicants from the party were effected by a structure or structures which were constitutionally empowered to do so;
- 28.2 If so, whether that structure or those structures were properly constituted at the time when they purported to expel the applicants;
- 28.3 If the answers to both of the above mentioned enquiries are in the affirmative, did that structure or those structures follow a proper procedure when they purported to expel the applicants.

[29] On the first issue, the First Respondent declares that the constitutionally mandated structures of the party were responsible for the expulsion of the applicants from the party, a version which is vehemently denied by the applicants.

[30] It has already been pointed out in this Judgment that, in terms of the party constitution, the disciplinary functions of the party, including the powers of expulsion, were reserved for the party's Constituency Disciplinary Committees, the party's District Disciplinary Committees, the party's Provincial Disciplinary Committees, the party's National Disciplinary Committee and the party's National Appeal Committee. I have perused and carefully considered copies of the letters of expulsion which were allegedly served by the First Respondent upon the three

applicants and what struck me as being unusual is the fact that nowhere in these letters is it stated that those applicants had been expelled by members of any of those structures. Besides, the perusal of these letters will reveal that two of them were signed by the First Respondent and that the third one by the Second Respondent. Again, one would have expected such important letters to be written under a signature of a member, preferably a Chairman or even a Secretary, of any of the structures concerned.

[31] Furthermore, if indeed those structures had sat and taken a decision or decisions to expel the applicants from the party, one would reasonably have expected for the record of that meeting or meetings to be in existence in the form of minutes which would be annexed unto First Respondent's answering affidavit. However, no such record or records have been brought to the attention of the Court. Considering the high positions occupied by the first Respondent in the First Applicant, the claims that he has been barred from entering the First Applicant's offices are so untenable as to be susceptible to rejection as being false beyond all doubt as it is evidenced in the confirmatory affidavit of the office assistant in the Head office of the First Applicant which has been filed on record in this matter.

[32] In any event, in case no 14831/08 and in paragraph 22 of Second Applicant's founding affidavit the said applicant declares that, upon perusing the minutes of the meetings held by the Executive Council of the First Applicant, he had established that no formal disciplinary enquiry was ever held in respect of Alfred Mncube, Phiri and/or the Second Applicant himself. In his answering affidavit, and in sub-paragraph 10.10 thereof, the First Respondent admits these allegations.

[33] What is also bound to attract criticisms at the First Respondent's case on this issue is a statement which he made under oath in connection with the issue under discussion and which he later recanted.

[34] In case number 14831/08, he deposes to an answering affidavit in which he, *inter alia*, declares that the body which had expelled the Second Applicant from the party was the Manco of the party. The truthfulness of this allegation was confirmed by the Second Respondent in his confirmatory affidavit filed in those proceedings. It was only after **Marnewick AJ** (who presided in those proceedings) had found that Manco did not have the powers to expel a member from the party that, in his answering affidavit in the present proceedings, the First Respondent conceded that, indeed, Manco had no such powers, claiming that, when he had earlier said so under oath, he had made an error, without giving an explanation as to how he could have made such an inexplicable error.

[35] In view of the aforesaid factors, it would appear that the First Respondent's version on the issue is not only farfetched but it also untenable, which follows that, the applicants' contention that they were not expelled from the party by the Constitutionally Mandated Structures, is inherently credible and should be preferred (*Plascon-Evens Paints v Van Riebeeck Paints 1984(3) SA 623 (AD) at 635 A-B*). The dispute of fact on the issue should accordingly be resolved in applicants' favour and I am therefore not satisfied that the purported expulsions of the applicants from the party were effected by any of the structures which are empowered by the Constitution to do so.

[36] Strictly speaking, having decided the first issue in favour of the applicants, it is not necessary to deal with the rest of the issues. However, for the sake of

clarity and definiteness, perhaps, it would be advisable to deal with those issues as well.

[37] In terms of the party Constitution, a Constituency Disciplinary Committee shall consist of the Chairperson, Secretary and three members from the Constituency appointed at a Constituency Committee meeting. The same applies to the membership of a District Disciplinary Committee which should also have a Chairperson, a Secretary and three members from the District appointed at a District Committee Meeting.

[38] The Constitution further decrees that it will be mandatory to constitute the Disciplinary Committees according to the above-mentioned provisions of the Constitution but that should one or two members be absent on any day of the hearing, such absence would not invalidate the proceedings provided that the decisions taken at such a hearing are adopted by at least two thirds majority of the entire membership. However, upon proper construction this qualification only deals with the situation where the disciplinary committee is composed of the requisite 5 members.

[39] Nevertheless, in paragraph 39 of his supplementary answering affidavit the First Respondent has deposed that each of the relevant Committees which had taken a decision to expel the applicants comprised of only four members. By his own admission, therefore, these structures were not properly constituted. In *Woods v East London Municipality 1974(4) SA 541 (E) 550A*, the resolution was taken by the councillors at a meeting which was not properly constituted by

reason of the absence of a quorum, and such resolution was held to be invalid and of no force and effect.

[40] Furthermore, Mr Malevu who is alleged by the First Respondent to have formed part of the committee that had taken a decision to expel the Fourth Applicant, has not only denied this allegation but has gone on to confirm that, at all material times, he was not a competent member of the said committee.

[41] Moving to the third issue, the First Applicant, through its functionaries, had a duty to act fairly towards the Second, Third and Fourth Applicants, in particular, the First Applicant ought to have given those three applicants notices of hearings, to have afforded them an opportunity to be heard, including the right to cross-examine witnesses called on behalf of the First Applicant, to call witnesses to testify in their defence, to mitigate on sanction, if found guilty, and to be informed of the outcome of the hearing. According to the three applicants they were not afforded any of those rights while the First Respondent states that all three applicants were served with notices of the respective disciplinary enquiries approximately seven days before the hearing of those enquiries. Notwithstanding, the said service, the First Respondent continues to state, the applicants failed to attend the enquires.

[42] According to the First Respondent, none of the members of the relevant structures effected the said services. He contends that he himself served such a notice upon the Second Applicant, the Third Applicant was served by the Third Respondent while the Fourth Respondent served this notice upon the Fourth Applicant.

[43] It is evident that the issue of the service of the notices suffers from the same handicap as the issue of the letters of expulsion referred to in paragraph 27 hereof and it is therefore for the reasons given under paragraph 28 hereof that I also resolve the dispute on this issue in favour of the three applicants and find that the notices calling upon them to attend the disciplinary enquires were not served upon them. In *Buffalo Municipality v Gauss and Another* [2006] 2 All SA 11 (SCA) at 14, it was held that before a functionary makes a decision which prejudicial affects an individual in his liberty or property or the existing rights the latter has the right to be heard before the decision is taken. In *Traube and Other v Administrator, Transvaal and other* 1989(1) SA 397 (WLD) at 403D, the Court held that if a person is wrongly denied a hearing in a case where he should have been given one, no matter how strong the case against him, the denial of the hearing is a fatal irregularity. See also *President of Bophuthoswana and Another v Sifuloro* 1994 (4) SA 96 (BAD) 103G. The principles of National Justice have also been held to find application in the disciplinary action invoked by a political party against its members. See *Diko v Mbongoza and Others* 2006 (3)SA 126(C) and *Max v Independent Democrats and Others* 2006(3) SA 112(C) at 18D.

[44] What now remains is the order I should make in this matter. However, before doing so, it is essential that the conduct of the parties, particularly that of the respondents, in this matter should be investigated.

[45] Clearly right from the outset the First Respondent intended that he was desirous to oppose the application and, indeed, thereafter, proceeded to do so at all levels until final conclusion.

[46] When the First Respondent filed his first and his supplementary answering affidavits, he made it clear that he was doing so in his personal capacity and also on behalf of the Second to the Fourth Respondents. In the case of the supplementary answering affidavit he added that he was also doing so on behalf of the Eleventh Respondent.

[47] That he was doing so on behalf of the Third, Fourth and Eleventh Respondents was confirmed by those respondents who filed their separate confirmatory affidavits to that effect.

[48] It is therefore evident that these respondents, together with the First Respondent, took steps to oppose the application. Indeed, when Mr Crampton argued the matter before me, he informed the Court that he was doing so by representing the First to Fourth Respondents and the Eleventh Respondent.

[49] The position of the Second Respondent is, however, not clear. Though in his answering affidavit the First Respondent had intimated that he was deposing upon the same on behalf of the Second Respondent, there is no evidence on record that the latter ever confirmed that fact. Instead, on 7 March 2009, the Second Respondent filed an affidavit in the present proceedings the relevant portion of which reads as follows:-

“I wish to give concern that I withdraw as a respondent in this case. The reason for that I bide myself with the ruling of the Court. I also want to mention that in my opinion the

reinstatement of membership and members of the party is of the good solution of the impulse within the party.”

[50] At that stage of the proceedings the Second Respondent was therefore not opposing the application.

[51] The same remarks made in the First Respondent’s supplementary Answering affidavit was never confirmed by the Second Respondent. Instead, he filed an affidavit confirming the correctness of the allegations contained in the First Applicant’s supplementary affidavit. Again, in a separate affidavit deposed to on 1 June 2009 and filed on 2 June 2009, he makes it clear that he was an unwilling participant in the activities of the First Respondent, which were apparently designed to unseat the applicants.

[52] At the commencement of the proceedings on 15 June 2009 and in response to Mr Salmon’s submission that the Second Respondent supported the applicants in this matter, Mr Crampton handed up what purported to be a power of attorney purportedly signed by that respondent giving Mr Crampton’s instructing attorneys authority.

“I, the undersigned, CYPRIAN ZIPHO NGOBESE hereby authorise HIRESEN GOVENDER and/or any one of the individual directors of Venn, Nemeth & Hart Inc., attorneys, or their successors-in-title, to act as my attorneys and to do all things necessary on my behalf in opposing the application instituted under case number 2283/09 in the Pietermaritzburg High Court.”

[53] The contents of the said document appears to me to be at variance with the attitude which hitherto had been displayed by the said respondent in the proceedings which attitude clearly revealed that he did not oppose the application.

Order

In the circumstances the order I therefore make is as follows:-

1. That the Second and Third Applicants' purported expulsion from the First Applicant is hereby set aside and they are declared to have remained as Councillors of the Seventh Respondent's Council.
2. That the Fourth Applicant's purported expulsion from the First applicant is hereby set aside and she is declared to have remained a Councillor of the Ninth Respondent's Council.
3. It is declared that the Fifth Respondent's purported replacement of the Fourth Applicant by the Eleventh Respondent as a councillor of the Ninth Respondent was unlawful and invalid and is hereby set aside.
4. The Seventh, Eighth and Ninth Respondents are directed to take such steps as may be necessary to recognise the status of the Second, Third and Fourth Applicants as councillors of the seventh and Ninth Respondents, respectively.

5. An order directing the First, Third, Fourth and Eleventh Respondents jointly and severally, to pay the costs of the application, save that, in the case of the Eleventh Respondent he is only responsible for the applicants' costs incurred as from and including the date when respondents supplementary answering affidavit was filed.

Date reserved on: 15 June 2009

Date delivered on: 25 September 2009

Counsel for Applicant: Adv Salmon

Instructed by Ngubane Wills Inc.

Counsel for Respondent: Adv Crampton

Instructed by Venn Nemeth & Hart Inc