

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

9174/2008

DATE:

25 JULY 2008

5 In the matter between:

ISAK JAKOBUS ROBERT CLOETE

Applicant

And

INDEPENDENT DEMOCRATS

First Respondent

MUNICIPAL MANAGER FOR THE

Second Respondent

10 SALDANHA BAY MUNICIPALITY

INDEPENDENT ELECTORAL

Third Respondent

COMMISSION

J U D G M E N T

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DAVIS, J:

[1] This is an application for review of a decision taken by
 20 the disciplinary tribunal of first respondent on 21 April
 2008 in terms of which applicant's membership of first
 respondent was terminated. It is useful at the outset to
 set out the chronology which has preceded argument
 heard by this Court today.

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[2] On 18 March 2008 a decision was made by first respondent to terminate applicant's membership pending the outcome of a disciplinary hearing. On 20 March 2008 an urgent review application was launched by applicant (case number 5072/2008) which application was settled between the parties on the basis that applicant was reinstated, pending a disciplinary hearing. It appears that applicant had adopted the approach that expulsion could not take place prior to a fair hearing. Because first respondent had "jumped the gun", the review application was conceded and first respondent was compelled to hold a proper and fair disciplinary hearing to decide the future status of applicant within the organisation of first respondent.

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[3] On 11 April 2008 the disciplinary hearing commenced. Significantly, it was postponed to 16 April 2008 because applicant required a further opportunity to prepare. On 16 April 2008 the disciplinary hearing took place and was then concluded. On 21 April 2008 a disciplinary tribunal decision was handed down. It was decided to terminate the membership of applicant. Against this decision applicant lodged an appeal on 5 May 2008. On 8 May 2008 the appeal committee handed down its decision, which again was not in favour of the applicant.

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[4] On 26 May 2008, applicant launched an urgent application (case number 8306/2008) for reinstatement pending an urgent review application. On 8 June 2008 that review application was launched by applicant under case number 9174/2008.

[5] Mr Caiger, who appeared on behalf of the applicant, contended that there were a series of grounds which justified the application so brought. In his view, the disciplinary process was "a farce and was engineered to get rid of the applicant". In support thereof, he submitted that the hearing proceeded without counsel being given the documentation timeously. The attorney for applicant was given 30 minutes to read and prepare the documentation as a consequence of which he withdrew from the proceedings.

[6] Mr Caiger described the hearing as conducted "very much like a forced march". The applicant was refused a postponement as the chair insisted that the matter continue throughout the evening and that it was particularly disconcerting that proceedings went 'way into the night' in order for it to be concluded. Further complaints were lodged by Mr Caiger with regard to the

manner in which a bundle of documentation was provided to applicant.

[7] In evaluating this submission, there are two issues that
5 need to be canvassed. In order to draw the inference that first respondent had acted vindictively in seeking to terminate applicant's membership, Mr Caiger contended that, in the first place, applicant had been expelled prior to a proper hearing. However, the first application was in
10 effect successful. It is important to examine the hearing that took place, pursuant to which the decision was taken which is the subject of this review, that is a second hearing which, commenced on 11 April 2008.

15 [8] At that stage, applicant remained a member of first respondent. The question arises as to whether the second hearing, that is the one that commenced on 11 April 2008, can be considered to be "a farce". It is significant that in the answering affidavit deposed to by
20 Mr Haniff Hoossen on behalf of respondent, the following description is provided with regard to the hearing which commenced on 11 April 2008 and, in particular, to the averments of applicant as employed by Mr Caiger in justification for his argument that an unfair hearing had
25 taken place, actuated by either or both malice or

vindictiveness. The relevant passages of this affidavit read:

5 “On 11 April 2008 applicant was represented by Mr Erleigh. On that date a ruling was made to the effect that the commencement of the hearing be postponed for a period of 30 minutes during which I handed to Mr Erleigh all of the relevant documentation in the matter and supplied him with all of the particulars requested by him, including
10 detailed witness statements by all of first respondent’s witnesses.

 I deny that the Chairperson ruled that any “request for particulars” should not be responded to. On the contrary, he ruled that the commencement of the
15 hearing be postponed for the specific purpose of providing applicant with all of the documentation and particulars requested by him. I further deny that the documentation handed to Mr Erleigh on 11 April 2008 constituted “a thick bundle of poorly
20 photocopied documents”.

 After the documentation was handed to Mr Erleigh, he withdrew from the proceedings and applicant asked for the commencement of the hearing to be further postponed. The Chairperson then ruled that
25 the commencement of the hearing be further

postponed to 16 April 2008, on which date applicant was represented by Advocate Caiger who did not raise any complaint with regard to any alleged failure to supply him with any further documentation and/or particulars.

I accordingly submit that applicant was granted every opportunity to familiarise himself with the case against him and to properly consult with an attorney and advocate prior to the commencement of the hearing and prior to applicant being requested to enter a plea to the charges against him".

[9] Although applicant deposed to a replying affidavit, there was nothing in that affidavit which, in any way, indicated to this Court that it should not adopt the usual approach in matters of this kind, that is, in general take the facts (common cause fact's) applicant's affidavit as admitted by respondent together with the facts alleged by respondent (Plascon Evans LTD v Van Riebeeck Paint (Pty) Ltd 1984 (3) SA G23 (A) at 634-635). I am, therefore, satisfied that there is absolutely no merit in the argument that the hearing was not procedurally fair, on the available evidence.

[10] Matters of this kind are inherently urgent. They are urgent because these are disputes which involve political processes. The party concerned is anxious to ensure that it can preserve the integrity of its own caucus. In the event that it considers that it has “a rogue councillor” within its midst, it is entitled to pursue the matter with all due speed, given, of course, the constraint that fairness must be followed. Fairness is a flexible concept and in this particular context it appears to me that in the light of these facts, there is nothing to suggest that an adequate period of time was not granted to the applicant to place his case before the tribunal.

[11] I turn therefore to deal with the merits of the decision.

From the charge sheet it appears that applicant was charged as follows:

“1. Charge 1 – that you contravened sections 110.4.1.6 and 110.16 of the Code of Conduct in that you failed to fulfil your monthly financial obligations to the party and in so doing are found in arrears of such obligation for a period in excess of three months.

2. Charge 2 – that you contravened sections 110.6.1, 111.1.2. and 111.10 of the Code of Conduct in that you failed to adhere to a

written request dated 25 January 2008 by the party's Western Cape provincial leader to withdraw from a Council meeting in the Saldanha Bay Municipality. That you further attended the said Council meeting and voted against an agreed party caucus position at the said meeting.

3. Charge 3 – that you contravened section 111.1.3 and 111.1.8 of the Code of Conduct in that your conduct as a public representative of the party brought the party into disrepute in that you were accused in the public press of conduct unbecoming of a party member in good standing.

4. Charge 4 – that you contravened sections 110.6.1, 111.1.2 and 111.1.3 of the Code of Conduct in that you failed to adhere to a verbal instruction from the party's West Coast PEC member to attend a Council meeting of the Saldanha Bay Municipality on 14 March 2008. That you, notwithstanding the aforementioned instructions, "disappeared" 15 minutes before the said Council meeting resulting that the planned restructuring of the

Municipality could not take place and further causing major embarrassment to the party”.

I shall deal briefly with each of these charges but in order to do so it is perhaps relevant to at least cite the reasons given by the tribunal as to why it found that the applicant was guilty of all four charges.

[12] In relation to charge 1 it said:

“Die partye se getuienis hierin is verskaf deur mnr.

R Lentit wat die DV daarop gewys het dat die respondent ’n getroue bydraer van sy 10% bydraes was vanaf Maart 2006 tot September 2007 toe hy raadslid by die Weskus Distrik Munisipaliteit was.

Na respondent se herontplooiing vanaf Oktober

2007 tot op hede van Saldanha Baai Munisipaliteit het respondent se 10% bydraes opgehou en eers nadat respondent in Januarie 2008 deur die party leier oor die aangeleentheid aangespreek is het die *ad hoc* betalings gevolg. Ek vind respondent se beweer hierin dat hy aangeleentheid met die Munisipale Bestuurder van Saldanha Baai Munisipaliteit opgeneem het as hoogs onwaarskynlik. Respondent het erken dat hy sy aanvanklike 10% bydraes vrywillig aan die party gemaak het en dat hy by Weskus

Distriksmunisipaliteit geweeet het hoe die prosedure met die betaalkantoor gewerk het. Sy verduideliking dat hy nie geweet het waar die betaalkantoor Saldanha Baai Munisipaliteit was nie word ook verwerp. Uit die getuienis gelei blyk dat die respondent nie aanvanklik op Lentit se besoeke om sy agterstallige gelde te vereffen gereageer het en eers iets om die kwessie gedoen nadat die partyleier self hom daaroor aangespreek het.”

10 Mr Caiger conceded that applicant had not complied with his obligations to pay the necessary sums. His argument however was that the contravention in terms of the charge required respondent to show that applicant had fallen in arrears with this obligation for a period in excess of three months. Mr Caiger submitted that there
15 was no evidence to this effect.

[13] However, an examination of the disciplinary hearing indicates in the evidence of Lentit that, indeed, applicant had failed to pay the necessary amounts for far longer than three months. Therefore, given any evidence to the contrary, there was no basis to conclude that applicant had put up an adequate defence to the charge in question, namely that although he was in arrears, he had
20 not been in arrears for three months.

[14] Insofar as charge 2 is concerned, the tribunal found as follows:

5 “Die respondent se verweer hou weer in dat hy die bogemelde brief as ’n versoek eerder as ’n opdrag interpreteer het word verwerp. Die respondent se erkenning dat hy die LEC se kookus posisie gevolg het, eerder as skriftelik opdrag van sy provinsiale partyleier is met respek ’n rookskerm om substansie aan sy verkeerde optrede te probeer verleen. Die partye het hierin uitgewys dat die LEC geen bevoegdhede ingevolge die partye se Grondwet het om opdragte aan die party se openbare verteenwoordigers te gee nie. Respondent het aan die DV uitgewys dat hy goed vertrouwd was met die inhoud van die party se Grondwet en nie geweet het

10 hy kon nie sy mandate vanaf die LEC verkry nie.”

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In attacking this particular finding, Mr Caiger submitted that this particular charge had been dealt with before by the party leader Ms de Lille and that Ms de Lille had in effect decided that this particular charge should not be further pursued. Further, that the various parties should continue in their organisational relationship. Significantly, however, this particular averment was hotly denied in the answering affidavit. It also appears from

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the evidence of Jordaan at the disciplinary hearing that the matter was left open rather than being decided by the party leader. The relevant passages read thus:

“En is ek reg as ek sê dat jy geen dissiplinêre verhoor in die gesig staar afhange van wat die party besluit. Ja, maar toe nou toe ek meen dit was al Januarie se besigheid nou was u gelukkig om hierdie verklaring af te lê? Ja, is daar enige iets vir u gesê aangaande die verklaring se aflê? Nee meneer. Hoekom dit nodig is en hoekom jy dit moet doen? Nee. Is dit korrek dat Mev De Lille gesê het dat julle nie geskors sal word vir die 25ste Januarie se vergadering nie, daar is gesê u nie geskors sal word nie. Sy het daar gesit, ekskuus dat ek my vinger wys, maar sy het daar gesit waar Tant Sarah sit, sy het die skorsingspapiere opgetel toe het sy gesê maar hier sit ek met julle. Skorsing papier maar sy sit dit toe neer en sy gee die LEC mandaat dat hulle moet gaan uitvind. Watse mandaat? Hulle moet gaan na die strukture toe om te gaan luister, na die branches toe om te gaan luister.”

[15] It appears that the decision, on the evidence, was that further investigation was necessary. Therefore, there is no justification for the argument raised by applicant that

this matter had effectively been settled and placed in a 'cupboard' and then removed three months later in order to trump up a justification for the dismissal of applicant.

5 [16] The third charge raises questions of the private life of applicant as published in "Die Son". Frankly I am not going to deal with this charge. It may have merit but any person who takes "Die Son" seriously needs to consider their judgment in earnest and the taste that they adopt in
10 reading newspapers, of which "Die Son" sadly can hardly be classified as belonging to this a category of publication.

[17] I therefore turn to the fourth charge which of course is
15 the one Mr Engela submitted "broke the camel's back". Mr Caiger submits that with regard to this charge, applicant put up a credible defence to the effect that his client (applicant) was ill, could not attend the meeting. After having arrived he felt so ill that he could not
20 continue, and left the meeting only because of his illness and not because of any attempt to prevent a vote taking place which would have been favourable to respondent.

[18] Respondent's position is reflected in the findings of the
25 disciplinary hearing in which the following is stated:

“Respondent se verweer dat hy voor die vergadering siekerig gevoel het moet op die volgende redes bevraagteken word.

(1) Dat hy versuim het om 'n verdere doktersertifikaat voor te lê dat hy ongeskik was om die belangrik vergadering van 14 Maart 2008 by te woon.

(2) Respondent as hy so siek was soos hy beweer nie by sy nuwe kollasie vennote verskoning aangeteken het nie.

(3) Dat hy wel in staat was om dokter toe te loop en van die vergadering af weg te loop gegewe dat hy aangevoer het dat hy dronk in sy kop gevoel het (die redelik mens sou aanvaar dat hy onder sodanige omstandighede van vervoer gebruik sou maak).

(4) Dat getuies getuig het dat Mnr J De Wee vooraf bewus was van respondent se optrede hierin.

(5) Dat respondent getuig het dat hy pas voor die vergadering 'n dringende oproep ontvang het dat hy na die elektro meganikus moes gaan wat aan sy motor gewerk het (en dat hy verkies het om op sodanige oproep te reageer ten spyte daarvan dat hy van die

belangrikheid van hier voorgemelde vergadering bewus was).

(6) Dat respondent later getuig het dat hy so siek gevoel het dat hy nie gehoor het dat Mnr S Claassen hom tuis kom soek het nie (wat 'n onwaarskynlike toename in sy beweerde siektoestand impliseer binne 'n kort tyd, vandat hy die teetrollie in die raadsaal gestoot het."

10 Significantly, the relevant evidence provided by Jordaan which Mr Caiger sought to employ to the benefit of applicant, supports the finding of the tribunal. I shall merely read a short extract there from:

15 "Isak Cloete sal sê dat hy die hele tyd met julle local executive caucus gewerk het, die een by Saldanha het gedoen wat hulle gesê het hy moet doen, u weet daarvan u sal nie daarmee stry nie. As hy sou sê dan het hy dan so gedoen. En toe jy 20 hom gebel het op die 14de toe het hy gesê hy is by die dokter en hy het gesê dat hy so bietjie dronk in die kop is en so aan en hy het trollie ingestoot nie op 'n skinkbord gedra nie, met die tee koffie. Daai stoot, ja, nou is u bewus daarvan dat jy het geweet hy is siek? Nee ek het nie vooraf geweet hy is siek 25 nie. U het gesê hy is dokter toe, u het gesê hy is

dronk in die kop. Die eerste keer toe ek hom bel, ja, toe sê hy dat hy is by die dokter nadat hy teruggekom het. Toe sê hy dat hy is so bietjie dronk in die kop. Ja met ander woorde hy gaan sê dat hy siek was en dat hy na die Speaker toe was en hy het verskoning gevra om nie daardie vergadering by te woon nie. Nou wat ek van u wil weet hoekom is almal so verbaas toe niemand hom kom vind nie, want hy het vir u gesê hy voel nie lekker nie, en hy is dronk in die kop, hy was dokter toe. Het u nie vir die ander gesê miskien is hy siek en hy is huis toe? Nee, ek het gesê hy is dronk in die kop en hy was by die dokter.”

There is nothing in this evidence to suggest that Jordaan considered that the applicant was so ill at the time that he was compelled to withdraw from the meeting. Furthermore, the absence of any medical certificate provided by applicant to support his particular version is a significant factor which a tribunal was entitled to take into account in coming to the conclusion to which it arrived.

[19] In short, if the various charges which were laid against the applicant are annalysed, each was upheld after a careful analysis in which there is a sufficiently rational

link between the evidence placed before the tribunal and the charges which so brought. This case is of course a review. As Mr Engela correctly noted, it is not an appeal. It is a case where, in effect one asks the question whether this is a decision to which a reasonable decision-maker could have come on the basis of the factual matrix so provided to the decision-maker. In order to show the question must be answered in favour of the applicant, it behoves applicant to raise arguments based on evidence to justify the application which he has brought. Neither on the evidence nor on the papers put up to this court by applicant, can any such justification on the basis of the evidence be found so as to grant the application as is sought.

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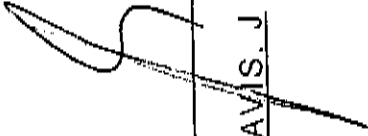
[20] A further question arises: This matter has taken a long time to come before this Court. On Monday of this week applicant, which had launched the application, asked for a further postponement because he contended that he had only managed to raise the funds for his defence two days prior to the hearing. Mr Caiger strenuously argued that it would be highly unfair for this Court to impose a punitive costs order on the applicant, particularly in that in un-contradicted evidence the applicant had stated on oath that he had only raised the funds two days before. I

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am not in a position to reject this particular contention, the strenuous objections of the respondent notwithstanding.

5 [21] For these reasons therefore:

1. The application is dismissed with costs.
2. The wasted costs of the postponement of 21 July 2008 will be paid by applicant.



DAVIS. J