



**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 24615/2015

In the matter between:

NATIONAL PEOPLES PARTY

Applicant

And

MUNICIPAL MANAGER:

WITZENBERG MUNICIPALITY

First Respondent

INDEPENDENT ELECTORAL COMMISSION

Second Respondent

MARK ANTHONY MENTOR

Third Respondent

JUDGMENT DELIVERED ON 24 MARCH 2016

BOQWANA, J

Introduction

[1] The applicant ('the NPP') seeks an order declaring that the third respondent is not a member of the NPP and accordingly not a councillor of the Witzenberg Municipality ('the Municipality'); alternatively a directive that the first respondent inform the second respondent that a vacancy exists in respect of the seat occupied

by the third respondent as envisaged by Item 18 (1) (b) of Schedule 1 of the Local Government: Municipal Structures Act 117 of 1998 ('the Act').

[2] The NPP contends that the third respondent has never been its member and was never entitled to fill its seat on the Council of the Municipality ('the Council') or if he became a member of the NPP, that such membership seized automatically in terms of clause 12.8.2 of the NPP constitution because the third respondent was a member of other political parties. Accordingly, so the NNP contends, the NPP seat on the Council of the Municipality is vacant.

[3] The NPP also submits that under normal circumstances this vacancy would have been filled by the second respondent ('the IEC') based on the NPP's party list for the Municipality in terms of Items 18 (1) (a) and 20 of the Act. The NPP further contends that it has been unable to fill the vacant seat because the Municipal Manager of the Municipality, David Nasson ('The Municipal Manager') has refused to inform the IEC that a vacancy exists as he is obliged to do in terms of Item 18 (1) (b) of Schedule 1 of the Act. Because of the Municipal Managers actions, the IEC takes the view that it cannot act to fill the vacancy.

[4] It is for that reason that the NPP has approached this Court for a declaratory order. The application is opposed only by the third respondent. The applicant was represented by Mr D Borgström whilst the third respondent appeared in person having indicated that he was not able to procure legal representation due to lack of funds.

Facts

[5] The NPP was led by one Badih Chaaban ('Chaaban') as its president until on or about 4 November 2015 when he resigned. He also represented the NPP in the Council as its councillor and resigned from this position on 08 November 2015. After his resignation as party president, his daughter Wesaal Lee Chaaban ('Ms Chaaban') who is a deponent to the founding affidavit took over.

[6] During the first week of November 2015, Chaaban met with the third respondent and one André Jacobs ('Jacobs') at his house in Hout Bay to discuss the politics of the Municipality. At this meeting it was agreed that the third respondent would replace Chaaban as a Councillor for the NPP. It is common cause that the third respondent was not a member of the NPP at that stage. According to Chaaban, the idea was that the third respondent would advance the cause of the NPP and that of the Nationalist Coloured Party ('NCP') of which Jacobs was a leader. The NPP alleges that the third respondent had previously approached Chaaban in 2013 to become a councillor.

[7] According to the third respondent he was handed a party membership form by Chaaban at his house in Hout Bay (presumably at the meeting where they agreed that he would take over from Chaaban as a councillor), which he signed immediately. It is not clear from the answering affidavit what happened with this membership form after signing it.

[8] The third respondent further alleges that Chaaban sent to him an appendix 4 IEC form *via* email.

[9] The NPP disputes that the third respondent ever signed a membership form to join the party. It also disputes that a membership form was given to him by Chaaban and that he was sent an IEC appendix 4 Form as he alleges. The third respondent alleges that Chaaban indicated that Jacobs will do the further paperwork.

[10] A nomination form dated 6 November 2015, was apparently sent to the IEC for the replacement of Chaaban by the third respondent. This appears to have been signed by Jacobs as the duly authorised representative of the NPP.

[11] According to Chaaban, Jacobs was only tasked with ensuring that the third respondent became a member of the NPP. It is further alleged by the NPP that Jacobs was not authorised to sign the nomination form on behalf of the Party. It asserts that only Chaaban was a duly authorised signatory at that time.

[12] The NPP regards the placing of the third respondent on the party's IEC list as a mistake which was done by Jacobs without checking whether the third respondent was in fact a member of the party before doing so. It alleges that when Chaaban discovered that the mistake had occurred, he immediately contacted the third respondent on or about 16 November 2015 and requested a meeting with him. The third respondent avoided meeting with him and brought up excuses such as that his vehicle had broken down or that he had no money. He also did not answer Chaaban's phone calls.

[13] The third respondent alleges that on 23 November 2015, he received an SMS from Jacobs that he must deposit R10 000 in the NPP's bank account. He informed Jacobs that he would not be able to pay that amount of money as he only received two weeks' worth of salary. He was then called by Chaaban who requested that they meet in Cape Town. They met at the Engen Garage where Chaaban insulted him and said he must pay R13 000, or he would fire him from his position as a councillor of his political party. Chabaan further told him that if he wanted to stay on as a councillor up to January 2016, he must pay him R22 000. He alleges that from then on Chaaban used foul language and threatened him *via* whatsapp messages. He proceeded to lay charges against Chaaban with the SAPS as a result of these.

[14] Chabaan denies that he tried to extract money from the third respondent. According to him, the third respondent had indicated that he was prepared to resign. He alleges that the third respondent informed him that he did not receive all his salary due to his arrears with the Municipality for electricity. This meant that he did not even want to make the compulsory contribution to the NPP. The NPP alleges many political parties require compulsory contributions from their councillors.

[15] On 1 December 2015 Chaaban informed the Municipal Manager *via* email that it had come to his knowledge that the third respondent was not a member of the NPP nor had he applied for membership yet. Chaaban requested the Municipal

Manager to declare a vacancy as a result of this discovery. The Municipal Manager refused to do so alleging that Chaaban had resigned from politics and as a leader of the NPP. He further required that the issue be raised on the letterhead of the NPP.

[16] It appears that the third respondent resigned from the Council during December 2015 as evidenced by a letter he signed and addressed to the Municipality. He however withdrew that resignation by means of a letter dated 9 December 2015. Both letters are attached to the replying affidavit as annexures.

[17] The issue of his resignation and the withdrawal thereof is further confirmed by statements made by one Christiaan Klaren and Luigi De Klerk to the police on 28 January 2016 and attached to the replying affidavit. The third respondent confirmed from the bar that he had indeed resigned, but that he withdrew his resignation because of the insults he received from Chaaban, which is essentially in conformity with the police statements of the aforementioned individuals.

[18] A letter dated 02 December 2015 was sent on a letterhead by Ms Chaaban, the current President of the NPP to the Municipal Manager requesting him to declare a vacancy due to the fact that the third respondent was neither a member of, nor a councillor for the party. No response was received from him. Ms Chabaan accordingly instructed attorneys to write to him.

[19] On 11 December 2015, the NPP's attorney called the Municipal Manager to ascertain why he had not declared the vacancy. It appears from the attorney's letter addressed to the Municipal Manager that the stance adopted by the Municipal Manager was that the third respondent could only lose his right to fill the position of a councillor if he ceases to be a member of the NPP. According to him that did not apply if the third respondent had never been a member of the NPP.

[20] The NPP's attorney also wrote to the IEC but was advised that it could not act until it was informed by the Municipal Manager of the vacancy.

Member of other political parties

[21] Chaaban claims that the third respondent and Jacobs had neither supported the NPP nor the NCP. He in fact remained a leader of his own party which is called Democratic Association of Witzenberg Independence ('DAWI'). The NPP attached a print-out from the IEC'S website reflecting the third respondent as a contact person for this DAWI Party.

[22] It is not clear whether the website print out is a reflection of current information. In the circumstances, it would not be fair to regard what is reflected on the website as being a true reflection of the current state of affairs in regard to the third respondent's association with the DAWI Party.

[23] The NPP further alleges that the third respondent remained a member of another party, namely the Voice of Independents Party ('VIP'). The third respondent alleges that Chaaban knew that he was a member of the VIP when he approached him. He also states that he resigned from the VIP. He however does not mention when he did so.

[24] The NPP has attached to its replying affidavit an affidavit from one John Veschini ('Veschini') who claims to be a leader of that party. Veschini alleges that the third respondent was a member of the VIP at all relevant times i.e. during the period of November 2015 to date. He attached to his affidavit an annual membership subscription form dated 25 September 2015, allegedly belonging to the third respondent and documents showing that the third respondent was on the VIP's party list of candidates as at September and October 2015, to confirm these allegations. According to Veschini the third respondent has not resigned from the VIP as he claims in his answering affidavit. He alleges further that, according to the VIP's constitution, the resignation must be in writing and be submitted to him as the leader of the party. He has received no such resignation from the third respondent. He further confirms to having had sight of the chain of emails attached to the founding affidavit which show that the third respondent was still a member of the VIP and confirms that those email exchanges took place between him and

the third respondent. This according to him, is a further indication that the third respondent is a member of the VIP. He refers to a particular email dated 4 November 2015, where it is alleged that the third respondent would be declared '*Deputy Leaser (sic) and Chairperson of a newly formed Executive*' [of the VIP].

Application to strike out

[25] The NPP seeks the Court to strike out certain paragraphs of the third respondent's answering affidavit in terms of Rule 30A. The basis thereof is that their attorneys delivered a Notice in terms of Rule 35(12) requesting the third respondent to produce for inspection the following documents referred to in his opposing affidavit: the party's membership form, appendix 4 IEC Form and an email from Chaaban mentioned in paragraph 5.4 of the affidavit; a copy of an SMS from Jacobs that he must deposit R10 000 to the party's account mentioned in 5.8 thereof as well as his resignation from the VIP referred to in paragraph 5.19 of the affidavit.

[26] None of these documents were made available for inspection as per the aforementioned notice sent in terms of Rule 35(12). Clarity of about these documents was given to the third respondent but he still did not reply to the notice. The NPP therefore seeks the striking out of paragraphs 5.4, 5.8 and 5.19 of the third respondent's answering affidavit.

The legal basis for the application

[27] The NPP contends that the third respondent has never been a member of NPP and even if he was, he was, at all relevant times also a member of another political party which it submits is not allowed in terms of clause 12.8.2 of the NPP's constitution. By virtue of being a member of another political party, it is submitted, he ceased to be a member of NPP and accordingly cannot represent the NPP as a councillor in the Council. The NPP relies on several provisions of the Act as well as its constitution and that of the VIP to advance its case.

[28] Firstly, it alleges that in terms of both the party's constitution and s 27 (c) of the Act only NPP members can represent the party as councillors. It is perhaps worth starting with s 22 (1) of the Act which provides as follows:

‘22 Election of metropolitan and local councils

(1) The council of a metropolitan or local municipality consists of councillors elected in accordance with Schedule 1 –

(a) by voters registered on that municipality's segment of the national common voters roll, to proportionally represent the parties that contested the election in that municipality;

(b) by voters registered on that municipality's segment of the national common voters roll in the respective wards in that municipality, to directly represent the wards.’

[29] In terms of Item 10 (1) of Schedule 1, *‘[a] list of candidates may be submitted only by a party’*. Section 27(c) then states that:

‘27 Vacation of office

A councillor vacates office during a term of office if that councillor -

...

(c) was elected from a party list referred to in Schedule 1 or 2 and ceases to be a member of the relevant party...’ (Underlined for emphasis)

[30] It follows from the above provisions that a councillor becomes a councillor by virtue of being elected from a party list to represent the party that contested the elections. If he or she ceases to be a member of the relevant party, he or she vacates office.

[31] Once a councillor ceases to hold office then Item 18 (1) (b) of the Act provides that:

‘(1) (a) If a councillor elected from a party list ceases to hold office, the chief electoral officer must, subject to item 20, declare in writing the person

whose name is at the top of the applicable party list to be elected in the vacancy.

(b) Whenever a councillor referred to in paragraph (a) ceases to hold office, the municipal manager concerned must within seven days after the councillor has ceased to hold office, inform the chief electoral officer accordingly.

- (2) Where a party list has become exhausted, item 17, adjusted as may contextually be necessary, applies to the supplementation of the list, and if the party fails to supplement its list, or if the party has ceased to exist, the vacancy must remain unfilled.’ (Underlined for emphasis)

[32] The question is whether the Municipal Manager is correct in the reasoning he reportedly adopted which is that the Act only called upon him to declare a vacancy only in the event of a councillor ‘ceasing’ to be a member of a party (i.e. in an instance where a person was a member of a party in the first place) as opposed to a situation where a councillor had never been a member of the party concerned.

[33] In *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 CC, Mhlantla AJ held as follows at para 18 ‘...it is well established that the statutes must be interpreted with due regard to their purpose and within their context.’ The words in the statute ‘should be read in light of the subject-matter with which they are concerned, and ...it is only when that is done that one can arrive at the true intention of the Legislature.’¹

[34] Looking at the provisions of the Act I have referred to above, the occupation of a seat as a councillor is tied to one being a member of a party from whose list he or she was elected. In other words councillorship begins and continues on the basis of party membership. In my view, even though the word ‘ceases’ in the Act refers to a situation of a person who was a member of a party and ceased to be one, it cannot be said that a person who was mistakenly placed on a party list or

¹ *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914 D-E

nominated by a party as a councillor without being a member of that party or was fraudulently placed on the list would remain a councillor on the basis that he or she did not cease to be a member of that party but rather was never its member in the first place.

[35] A purposive approach should be adopted in my view. The provisions of the Act should be viewed in a wider sense with the purpose of the statute in mind which links councillorship to party membership. Even if the provisions of the Act that I have been referred to do not specifically mention vacation of a seat by a councillor in a situation of a person who was never a member of a political party, that he or she purports to represent, it cannot be said that that vacancy was properly filled.

[36] It has been held that courts should ‘*prefer interpretation of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can reasonably be ascribed to the section.*’²

[37] In view of the Act, if a person is not a member of the party from whose party list he or she was elected, that person can no longer be a councillor. An interpretation contrary to that would not be in conformity with the objects of the Act and its particular provisions. Therefore, it could not have been the intention of the legislature to allow persons who had no ties with a political party they purport to represent to remain holding a seat as a councillor on the basis that they did not cease to be a member as contemplated by the Act, but rather had never been members of that party, which means as the consequence the position they sit in could not be declared vacant. That interpretation, in my view, would lead to absurdity and would not be consistent with objects and the spirit of the Act. It accordingly follows that the interpretation ascribed to the Municipal Manager is too narrow and unreasonable, in my view.

[38] It is always open, however, for the aggrieved party to challenge the issue of the alleged non-membership if he or she holds a different view.

² See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 22

Is the third respondent a member of the NPP?

[39] It is trite that ‘*If the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.*’³

[40] The court must assess the alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily resolved without the aid of oral evidence. If this is not done, the respondent might be able to raise fictitious disputes of fact and thus delay the hearing of the matter to the prejudice of the applicant. It has been held that the Court must take ‘a robust, common sense approach to a dispute on motion, and not hesitate to decide an issue because it may be difficult to do so’.⁴

[41] In this instance, I am of the view that the robust approach should be followed. None of the parties requested that a dispute of fact be referred for oral evidence. Having considered the issue and being alive to the fact that the third respondent was not legally represented, I am of the view that *viva voce* evidence, if called for, would not have disturbed the balance of probabilities appearing from the affidavits.

[42] The third respondent alleges that he was a member of the NPP by virtue of a membership form he was given by Chaaban at his home which he immediately signed. He does not state what he did with this form after signing it. Moreover, and more importantly, he did not respond to the Notice in terms of Rule 35(12) by producing the alleged form and other requested documents, or by stating that he was not in possession thereof or, who was. It is difficult to draw an inference in his favour that the form must have been given back to Chaaban. The third respondent attempted to explain what he did with the form from the bar which was unhelpful.

³ *Erasmus Superior Court Practice*, Second Edition, Van Loggerberg, Volume 2 at D1- 69 to 70

⁴ *Erasmus Superior Court Practice*, supra at D1 – 73 to 74

[43] The NPP's allegation that the third respondent was not its member is supported by one of the whatsapp messages attached to the supplementary opposing affidavit, which the third respondent alleges were sent to him by Chaaban. In that relevant message Chaaban states the following:

‘Copy me the resignation letter you gave to the mm apparently u resigned on 15 January 2016????

We agreed that we solve the problem by u resigning the next day???

U not a member mark!!! It is a problem you are a councillor for the npp but u not a member!!! How does this work?? Did u join npp?? When? I never saw your membership card, if u have joined send me your application form to check again!!!???

I thought you were gonna join us? But u...’ (Underlined for emphasis)

[44] This message supports the version of the NPP that the third respondent was not a member of the NPP. This version is also supported by an email and letter sent to the Municipal Manager by Chaaban and Ms Chaaban on 01 and 02 December 2015 respectively stating that the third respondent was not a member, which was not too long after he was made a councillor for the NPP. Furthermore, there is also no indication that the third respondent paid any membership or subscription fee as stipulated in clause 11.5 of the NPP constitution, which would have strengthen his case that he was indeed a member.

[45] For those reasons, I have to accept the NNP's version that the third respondent was not a member of the NNP and reject his as being implausible. There is also no indication that he ever joined the NPP as a member. The allegation that the he met with Chaaban and signed a membership form is not sufficient proof of membership. The NPP has a constitution that governs it, which provides for how membership is acquired. For those reasons it is not necessary to deal with the application to strike out.

Was the third respondent a member of another political Party?

[46] The NPP contends that even if the third respondent were found to be a member of the NPP, he was a member of other political parties, which is prohibited by clause 12.8.2 of its constitution. The relevant clause reads as follows:

‘12.8 A member ceases to be a member of the NPP when he/she:

12.8.2 Canvasses other members of the NPP to resign from the NPP or join another Party.

12.8.3 A member, who ceases to be a member of the NPP loses all privileges of Party membership and if that member is a public representative, he/she also loses the office which he/she occupies by virtue of his/her membership with immediate effect. ...’ (Underline for emphasis)

[47] The meaning of clause 12.8.2 that the NPP is relying on is not as straight forward as it is suggested. That clause is ambiguously framed. It is capable of two meanings. On the one hand it could be read to mean that a member ceases to be a member if he or she canvasses other members to resign or [to] join another party. The emphasis being on ‘*canvassing other members*’. It can also be read to mean that a member ceases to be a member if he or she....joins[s] another party, although [s] is missing from that sentence, which can be explained as being clumsily drafted.

[48] The third respondent does not dispute the allegation that he could not belong to another political party whilst being a member of NPP. He therefore does not challenge the meaning ascribed to clause 12.8.2 by the NPP. He simply alleges that Chaaban had known that he was a VIP member when he approached him. He also alleges that he resigned from the VIP. He neither states the period of his resignation nor does he provide any evidence in support of this allegation in order to rebut the evidence provided by the NPP on this issue. I have no reason not to accept the NPP’s version that a member of the NPP is not permitted to join another political party.

[49] If one accepts that a person who belongs to another political party ceases to be a member he or she also loses all membership privileges and any office he held as a public representative in terms of clause 12.8.3.

[50] The evidence shows that the third respondent became a councillor of the NPP, when he was already a member of the VIP. He continued as a member of the VIP even after he was a councillor for the NPP. He was still on the VIP party list when he was serving as councillor on behalf of the NNP. This is not only evidenced by Veschini's affidavit that the third respondent never resigned as the VIP member, emails some of which were written to the third respondent in December 2015, also indicate that he was involved in the affairs of VIP. On 09 December 2015, he was sent an email by Veschini informing him of his appointment as an interim Chairperson of the Regional Executive and Deputy Leader of the VIP.

[51] The effect of clause 12.8.2 of the NPP's constitution is that membership ceases automatically. Accepting the construction that membership ceases upon joining another party, it is doubtful that dual membership is allowed even if the third respondent were to state that he did not join another party but was a member of the VIP before he joined the NPP, which was known to Chaaban. The consequence would still be the same in that the constitution seeks to prohibit NPP members from being members of other political parties.

[52] In consequence thereof I agree with Mr Borgström's proposition that no formal decision preceded by a hearing was required before membership was terminated.⁵ In *Henderson v The Democratic Alliance* supra at para [9], in a case where the constitution of the Democratic Alliance stated that a person's membership *ipso facto* ceased upon his or her conviction, it was held that upon conviction there was no decision to end the applicant's membership of the first

⁵ See *Noland v Independent Democrats*, unreported judgment case number 13275/07, delivered on 1 April 2008, per Louw J (Erasmus J concurring) at para 26; *Henderson v The Democratic Alliance* unreported case no. 12540/07 dated 7 December 2007 per Veldhuizen J ; *Andrews v The Democratic Alliance* Case No. 17633/12, unreported judgment by Mansingh AJ

respondent. In *Noland v Independent Democrats* supra at para [26], Louw J held that ‘*On the construction of the constitution, she had, by joining another party, automatically terminated her membership, the applicant ceased to be a member of the ID before the end of Friday 31 August 2007.*’

[53] Whilst I accept the NPP’s version that a member of the NPP cannot be a member of another political party as per clause 12.8.2, it is strange that Jacobs who was allegedly a leader of another party (i.e. the NCP) was involved in the affairs of the NPP and even tasked with ensuring that the third respondent became its member. He even went on to sign a form nominating the third respondent as a councillor with the IEC. This appears to be in conflict with clause 12.8.2. That is however not the issue before me at this stage.

[54] Another issue that is apparent from the papers is that the third respondent resigned as a councillor. It is not clear whether his resignation was effected and his later withdrawal accepted. If his resignation was effected he would have lost his membership to the Council. The circumstances of his resignation and withdrawal and their acceptance thereof, if any, are not very clear from the papers. One can therefore not speculate on this issue without clear detail.

[55] Nevertheless, I am satisfied for reasons outlined above that the third respondent is not entitled to occupy the seat as a councillor representing the NPP in the Council.

[56] In passing, I must mention a worrying observation about the manner in which the councillorship was given to the third respondent, a non-member of the party, by a person who was about to resign as president of the party without consulting with the relevant members of his party. It is also unsettling to observe his continuing engagement with the third respondent in a manner he did when he was no longer the leader of the party.

[57] Having said that the function of this Court was to determine whether the third respondent is entitled to hold the councillor’s position as he contends he is. If he was not, he could not continue to occupy the seat of a councillor on behalf of

the NPP. I have found that he is not a member, and as a consequence of that the Municipal Manager is bound to inform the chief electoral officer as such in terms of Item 18(1) (b) of Schedule 1 of the Act.

[58] I thought long and hard about the issue of costs. The third respondent was nominated as councillor after a meeting with Chaaban. He is a current incumbent of the position at the Council and his opposition of this application was not unfounded. He was not legally represented on this matter, allegedly due to lack of funds and expressed his financial situation. It would not be just, in my view, to award costs against the third respondent in these circumstances, having taken into account, the nature of the case, the circumstances of opposition and other relevant factors I have already referred to.

[59] In the result, I make the following order:

1. The third respondent is declared not to be a member of the applicant and accordingly not a councillor of the Witzenberg Municipality.
2. There is no order as to costs.

N P BOQWANA

Judge of the High Court

APPEARANCES

FOR THE APPLICANT: Adv. D Borgström

INSTRUCTED BY: Brian Lutzno, Kraus & Associates

FOR THE THIRD RESPONDENT: In Person