IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

REPORTABLE

Case No: 7882/18

In the matter between:

PATRICIA DE LILLE	Applicant
and	
DEMOCRATIC ALLIANCE	First Respondent
CITY MANAGER OF THE CITY OF CAPE TOWN	Second Respondent
CITY OF CAPE TOWN	Third Respondent
INDEPENDENT ELECTORAL COMMISSION	Fourth Respondent

JUDGMENT: 27 JUNE 2018

LE GRANGE J, MANTAME J et SHER J:

Introduction

[1] The Democratic Alliance ("DA") is the current governing political party in the Western Cape. It controls the City of Cape Town ("the City") as it holds the majority seats in its Council ("the Council"). The Applicant, Ms Patricia De Lille ("De Lille") was a member of the DA and the City's Executive Mayor. On 8 May 2018 Mr James Selfe ("Selfe"), a senior functionary in the DA, forwarded a letter to the City's Municipal Manager informing him that De

Lille's membership of the party had ceased with immediate effect and that the Independent Electoral Commission ("IEC") should be advised accordingly. On the same day the Speaker of Council forwarded a letter to De Lille notifying her that she was to vacate her office as Executive Mayor with immediate effect.

[2] The DA relied on the provisions of clause 3.5.1.2[1] of its constitution ("the cessation clause") for its notification of the termination of De Lille's membership. As a matter of law, her alleged loss of membership of the party had a number of important 'knock-on' consequences. To name a few: firstly, in terms[2] of the Local Government: Municipal Structures Act[3] ("the Structures Act") De Lille automatically lost her position as Executive Mayor; secondly, the loss of her mayoral office resulted in a vacancy in Council which required the Speaker and the City Manager to take steps to inform the IEC thereof in order that the necessary democratic process could be put in place to install a replacement Councillor to represent the DA; thirdly, the members of her Mayoral Committee ("Mayco") automatically lost their positions;[4] fourthly, the Deputy Mayor assumed the position of Executive Mayor *ex lege* [5] in an acting capacity until a new Mayor was duly elected; and fifthly, as acting Executive Mayor he/she was required to appoint a new Mayco.[6]

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1 Chapter 3. 5 of the DA's constitution deals with cessation of membership. Clause 3.5.1. 2 thereof provides that: 'a member ceases to be a member of the Party when he or she- publicly declares his or her intention to resign and/or publicly declares his or her resignation from the party'.
[2] Ss 27(c) and 27(f)(i) read with s 59(c).
[3] Act 117 of 1998.
4 S 60(5) of the Structures Act.
[5] *Id,* s 56(6) of the Structures Act.
[6] *Id*, S60(1)(a) of the Structures Act.

[3] The notification that De Lille should immediately vacate her position as Executive Mayor prompted her to launch the instant application as a matter of urgency. She sought an interim order suspending the effect of the aforesaid notification and restoring her to the position she occupied at the time, pending the outcome of a review of the termination of her membership.

[4] On 15 May 2018 Gamble et Samela JJ heard Part A of the application, which was for interim relief, and thereafter ordered that the cessation of her membership would be suspended and would have no force and effect and as such De Lille would be permitted to continue in the office of Executive Mayor, pending the outcome of the review (which was sought in Part B). It was further ordered that the Mayoral Committee as it had been constituted on 8 May 2018, prior to the notification to De Lille, would continue to hold office and by agreement between the parties the IEC was consequently interdicted from filling any vacancy in respect of De Lille's position on the Council.

[5] De Lille was represented by Mr Mpofu SC and Mr de Waal SC, the DA by Mr Rosenberg SC and Messrs Bishop and Khoza while the City and its Manager were initially represented by Mr Breitenbach SC and later by Mr Jamie SC. The City and its Manager indicated that they would abide the decision of the court.

The background

[6] The core background facts underpinning this matter and the related decision by the DA to terminate De Lille's membership are largely not in dispute. These facts have been succinctly summarised in paragraphs [7] – [15] of the judgment of Gamble J in regard to Part A. For the purposes of this judgment we may briefly refer to salient aspects thereof.

[7] De Lille has held the office of Executive Mayor since 2011. She was re-elected to that position by Council after the local government elections in August 2016. According to the papers filed of record De Lille and her principals in the party have been at odds with one other for the better part of approximately 18 months.

[8] The DA has initiated internal disciplinary proceedings against De Lille in respect of a number of alleged irregularities she engaged in whilst she has been in office as Mayor. This has been done on 2 distinct fronts. The one relates to complaints of alleged corruption in the procurement of buses for the City's bus service. The other relates to the alleged irregular appointment of certain senior staff members in the City.

[9] The complaints flow from independent investigations which were conducted by outside agencies and separate disciplinary committees ("DC's")

were set up to deal with these.[7] Both DC's have become bogged down due to a variety of *in limine* points which were raised by De Lille and pre-hearing sparring between the parties.

[10] In February 2018 members of the DA caucus in Council proposed a motion of no confidence in De Lille. The motion failed to attract the requisite majority in Council, by a single vote, which indicates that certain DA councillors voted with the opposition against the motion and in support of De Lille. Following upon that event, and apparently in response to the difficulties being experienced with her, at its Federal Congress on 8 April 2018 the DA adopted an amendment to its constitution by inserting, through clause 6.2.6.3, what the parties termed a "recall clause". The clause provides that if a member of the party who holds executive office (including a mayor) has lost the confidence of his/her caucus the Federal Executive ("FedEX") may, after giving him/her the opportunity to make representations to it, resolve to require such member to resign from office within 48 hours, and a failure to do so will lead to cessation of membership of the party in terms of Cl 3.5.1.10 of its constitution. Prior to moving a motion of no confidence in a member the caucus is required to obtain the consent of the party's FedEx.

[11] Importantly, Cl 3.5.1.10 in turn provides that a member ceases to be such when he/she fails to resign his/her position 'after the procedures set out in cl 6.2.6.3' have been followed.

[7] The former complaint has been referred to the so-called 'Moolman' DC and the latter to the 'Joubert' DC.

[12] On 18 April 2018 FedEx gave permission to its caucus in the City to invoke the recall clause. A further internal motion of no-confidence which was brought within the caucus on 25 April 2018 succeeded with the requisite majority.[8]

[13] The following day 26 April 2018, Selfe, as the Chairperson of FedEx invited De Lille to make written representations by 2 May 2018 as to why she should not resign as Mayor. In response, De Lille requested 'reasons' for the caucus' decision together with the record of its deliberations. Nothwithstanding the request De Lille duly made representations before the stipulated deadline.

[14] She stated, in no uncertain terms, that she regarded the recall clause as being inconsistent with the Constitution and the Structures Act and gave notice that she intended to challenge it through the courts, and her attorneys duly forwarded a draft copy of her proposed application in this regard to the DA's legal representatives.

[15] On considering De Lille's representations and her draft court papers at a meeting which was held between 5-6 May 2018, FedEx resolved to suspended its deliberations in order to obtain legal advice.

[8] A total of 97 councillors voted in favour and 41 against the motion, and 15 councillors abstained, with one spoilt ballot. The voting numbers clearly imply that a number of the party's councillors were not for the motion.

[16] Late on the afternoon of 3 May 2018, before the party had made a determination as to the merits of De Lille's representations in regard to its reliance on the recall clause, a senior member of the DA's Federal Legal Commission ("FLC")[9] hand-delivered a letter to De Lille at her mayoral offices, in which she was informed that according to the DA her membership of the party had come to an end in terms of cl 3.5.1.2 of its constitution ie its cessation clause as a result of a public declaration which De Lille had allegedly made during the course of an interview with one Eusebeius McKaiser on a radio 702 talk-show on 26 April, immediately following the outcome of the DA caucus' motion of no confidence. In terms of the FLC's rules[10] she was given 24 hours to provide 'clear and unequivocal' reasons why her membership had not ceased.

[17] De Lille responded to this demand by timeously filing reasons in which she denied that the cessation clause was of application to the statements she had made during the interview, which she claimed pertained only to a possible expression of an intention to resign as Mayor after she had 'cleared her name' and did not constitute the expression of an intention to resign from the party. She further stated that in the event that the party intended nonetheless to determine that her membership had ceased she intended to challenge the validity of the clause on a number of grounds, including whether she had in fact expressed an unequivocal and unconditional intention

[9] Mr Werner Horn.
[10] Rule 5.

to resign as a member of the party, and whether the clause violated the provisions of the Promotion of Administrative Justice Act[11] ("PAJA") or was implemented in a procedurally unfair manner.

[18] On 6 May Selfe duly referred De Lille's submissions regarding the cessation of her membership to the Chairperson of the FLC, who in turn appointed[12] a panel of 3 members of the FLC who, in terms of the FLC Rules[13] were required to make a determination whether on the papers presented to them, her membership had come to an end. On 6 May the panel found that this was indeed the case, and accordingly recommended that FedEx confirm the cessation and proceed to implement the consequences thereof.

[19] On 7 May the FLC panel's report and recommendations were considered by FedEx which confirmed that De Lille's membership had ceased, and Selfe informed De Lille of the outcome the following day.

The review grounds:

[20] De Lille raised a number of grounds of review. Principal amongst them was a multi-pronged constitutional challenge to the cessation clause on the basis that it allegedly violated a number of her constitutional rights, including her rights to freedom of expression[14] and freedom of association,[15] her right

[11] Act 3 of 2000.
[12] In terms of Rule 6 of the FLC Rules.
[13] Rule 7.
[14] In terms of s 16(1)(a) of the Constitution.
[15] *Id*, s 18.

to participate in the activities of a political party[16] and her right to stand for and to hold public office[17].

[21] The other alternative grounds advanced were formulated as follows: (1)Firstly, the cessation clause was void *ab initio* or was unenforceable for being inconsistent with public policy, infused as it must be with *ubuntu*, good faith, fairness, reasonableness and other applicable constitutional rights, norms and values based on common-law principles and the terms of section 39(2) of the Constitution; (2) The conduct of a political party when it terminates the membership of a member who is a public office- bearer, such as an Executive Mayor, must be viewed through the prism of PAJA, and as a result it was contended that Part C of the FLC Rules were inconsistent with PAJA; (3) the DA did not comply with the procedures laid down in its own constitution when invoking the cessation clause; (4) the DA was precluded from invoking the cessation clause due to the contractual principles of waiver, estoppel and/or the doctrine of election; and lastly the contents of the conversation De Lille had with McKaiser could not be said, on a proper construction thereof to fall within the terms of the cessation clause and could not factually and legally sustain the alleged cessation of her membership.

[22] The DA defended its decision to terminate De Lille's membership. According to it De Lille's position as a councillor and as Executive Mayor was

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[16] *Id*, s 19(1)(b).
[17] *Id*, in terms of s 19(3)(b) read together with the principle of democratic governance, as entrenched in s (1)(d).

dependent upon her membership of the party, which she voluntarily accepted would be regulated by the terms of its constitution and its rules and her membership was dependent upon her continued compliance therewith.

[23] According to the DA the purpose of the cessation clause was to ensure that its members remained loyal to the party and committed to its values. It held the firm view that on an objective assessment of the statements De Lille made during the radio interview, a reasonable listener would have understood that these amounted to a public declaration of an intention to resign from the party, and not an intention to resign from the mayoralty.

[24] The DA contended that the loss of membership occurred *ipso facto* by operation of the cessation clause and the role of the FLC and FedEx was simply to determine whether or not the relevant act(s) had been committed in breach of the said clause, and neither FedEx or the FLC had any true discretionary powers in this regard.

[25] In our view, and for the following reasons, it is unnecessary to deal with all the grounds of review which were advanced by De Lille.

[26] In the first place, in respect of the constitutional challenge to the cessation clause, it is now well accepted in our law that political parties may not adopt constitutions that are inconsistent with the Constitution of the Republic of South Africa because if they do so, their constitutions may be

susceptible to a challenge of constitutional invalidity.[18] The general principle in our law is however that where it is possible to decide any matter whether civil or criminal, without reaching a constitutional issue, that is the course which should ordinarily be adopted.[19] In our view, this matter is no different and was capable of being decided without the need to determine the constitutional issues which were raised.

[27] In regard to the contention that the provisions of PAJA were applicable the argument which was advanced by De Lille's counsel was that the decision to terminate her membership in terms of the cessation clause, amounted to an administrative decision as contemplated by the Act. The basis for this contention was that the power which is exercised by a political party to terminate the membership of someone who also holds public office, as in this instance, constitutes the exercise of a public power or the performance of a public function in terms of an empowering instrument which affects rights, to wit the party's constitution.[20] In support of this argument it was pointed out that by terminating De Lille's membership, a new Executive Mayor and Mayco for Council needed to be installed, which *per se* constituted the exercise of a public power for the benefit or detriment of the citizens of the city.

[28] Whether the conduct of private ie non-governmental entities constitutes the exercise of public power or a public function, such that it may

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[18] *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) at para [74].
[19] *National Coalition for Gay & Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) at para [21].
[20] In terms of s 1 of PAJA.

be said to be administrative action in terms of PAJA thereby rendering it susceptible to 'public law' administrative review, is a controversial issue which has vexed many courts from time to time, both in this country as well as in foreign jurisdictions. For the purposes of this judgment it is not necessary to discuss the conflicting judgments that have been handed down in this regard, nor is it necessary to arrive at a definitive determination as to whether the actions of the DA which are under scrutiny in this matter constitute administrative action.

[29] It will suffice to point out, as was done by the Supreme Court of Appeal in *Calibre Clinical Consultants* [21] that the question of whether or not the conduct of political parties is susceptible to review on the grounds that it constitutes administrative action has 'evoked varying responses'. In this division itself there are what appear to be conflicting judgments- see for example the decisions in *Marais v Democratic Alliance*, [22] *Van Zyl v New National Party & Ors*, [23] *Max v Independent Democrats & Ors* [24] *Henderson v The Democratic Alliance & Ors,* [25] *Noland v The Independent Democrats* [26] and *Andrews v The Democratic Alliance.*[27] We may point out that in *Marais*

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[21] *Calibre Clinical Consultants v NBC for the Road Freight Industry* 2010 (5) SA 457 (SCA) at para [35].
[22] [2002] 2 All SA 424 (C).
[23] [2003] 3 All SA 737 (C).
[24] 2006 (3) SA 112 (C).
[25] An unreported decision handed down by Veldhuizen J on 4 December 2007 in WCD 12540/07.
[26] An unreported decision by Louw et Erasmus JJ on 1 April 2008 in WCD 13275/2007.
[27] An unreported decision by Mansingh AJ on 13 November 2012 in WCD 17833/12 in which she held (at paras [36]-[37]) that a member of the DA who had failed to pay a 'candidate fee' for more than 2 months after being notified to do so and was thus in default of cl 3.5.19 of the party's constitution, lost her membership automatically, and not in terms of any decision or action which was reviewable in terms of PAJA. This was similar to the *ratio* in both *Noland* and *Henderson.*

Hlophe JP and Van Zyl J held that a decision to remove a mayor of a large city (*in casu* Cape Town), did not necessarily constitute the exercise of public power or the performance of a public function in terms of PAJA, and every case had to be decided on its own facts.

[30] As enticing as it may be to enter the fray and as attractive as the arguments which were advanced by De Lille's counsel might be, we are satisfied that this is not the appropriate occasion to attempt, once again, to decide this issue. Our reasons for adopting this stance are as follows. In the first place, the parties were agreed that notwithstanding whether or not the actions by the party were reviewable on the basis that they constituted administrative action in terms of PAJA, which would mean that they would be capable of being assessed on the grounds of whether or not they were reasonable, they were certainly reviewable on the basis of the principle of legality, which requires that the party can only act in terms of its constitution and its rules. At the heart of this matter is the issue of the cessation of the membership of a party member in terms of the DA's Federal constitution and its rules, and in our view whether the party acted in due compliance with such instruments or not clearly falls within the purview of a legality review.

[31] In the second place, inasmuch as the party's constitution provides[28] that the process which is to be followed by the party in the case of the alleged cessation of membership in terms of the cessation clause shall be one

[28] In cl 3.5.3.

determined by the FLC rules, and inasmuch as such rules expressly make provision[29] for a determination as to whether or not a person's membership has ceased to be made by an FLC panel, and for the principles of natural justice to apply to any proceedings before any such panel,[30] the requirements of adherence to the *audi alteram partem* rule and procedural fairness and procedural compliance are in any event applicable and form part of any legality review, and it is thus in our view not necessary to seek to widen the scope of the review by reference to PAJA.

[32] In our view then, the real, crisp issue for determination is whether the DA complied with its Federal constitution and its rules when it decided to invoke the cessation clause.

[33] On the face of it, the fact that the DA's Federal constitution provides that a person ceases to be a member when he or she publicly declares his or her intention to resign from the party is uncontentious and appears to serve the purposes which the DA claimed it sought to give effect to ie to enforce the continued loyalty of its members thereby ensuring the strength and integrity of its membership base. It seems to be obvious that once a member (particularly one who occupies a prominent position of high public authority), publicly announces his/her intention to resign from the party, he/she can no longer be trusted to be unquestioningly faithful to the party's stated mission and its principles and policies as he/she may become a target of recruitment

[29] Rule 7.
[30] Cl 10.5.1 of the DA's constitution.

by opposing political parties, and such a public declaration potentially exposes the party and renders it politically vulnerable. The question in this matter is whether or not the provisions of the cessation clause find application.

The radio interview:

[34] Much debate centred around the interview De Lille had with Mc Kaiser and whether the statements she made during the course thereof fell within the ambit of the cessation clause, in that they constituted the public declaration of an intention to resign from the party as opposed to an intention to resign from the mayoralty. It was common cause that it is only if such declarations amounted to the former, that the further question of whether or not there was proper compliance with the prescribed processes that were to be followed in consequence thereof arose, and it is only in such circumstances that the further alternative grounds of challenge could be considered.

[35] In the circumstances it will be convenient at this juncture to refer to the relevant portions of the transcript of the interview. (To this end the abbreviation EM refers to the interviewer McKaiser and PDL to De Lille, and the emphases below are ours). The interview took place the morning after the 'caucus' no confidence vote had been passed.

[36] The interviewer pointed out to De Lille that, as he understood it, neither the principles of administrative law nor those of labour law applied to the process and thus notions of fairness did not come into play, as it was

commonly accepted that even 'utterly frivolous' reasons for the introduction of such a motion were acceptable in politics. To this De Lille indicated that she intended nonetheless to challenge what had happened as she understood that there were different 'interpretations' of the law. Then followed the following interchange:

> *"[E]M:…. However, let's say the morning after you win the legal case,* ***do you really want to still be part of the DA****?*
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> *POL:* ***No, no, no, no****, I've said this long … many times before, Eusebius. You know, I mean* ***the writing is on the wall that, you know people don't want me for whatever reason****. My task at the moment, and why I am so resolute about fighting on and this is to clear my name……*
>
> *So, really I say to all South Africans that I am prepared to test this and to take it forward but* ***its not because I want to remain there*** *Eusebius. You're right, it will never be the same, not after what I have gone through.*
>
> *But the point is I've also got to protect my integrity, to protect my reputation. And then I know whatever future I want to design for me that this cloud will not be hanging over me. So I want people to see it in that context* ***not that I'm really fighting on just to stay there because I want to be the Mayor of Cape Town..*** *"*

[37] In response, McKaiser attempted to summarise what he understood her to be saying, as follows:

> *"…[E]M: Am I hearing you say the following? And if you can, please take us into your confidence.* ***If I hear you, you are saying, ideally I want to clear my name, Eusebius, that's why I am going to court and if I win this battle, and when I win it because I know I've done nothing wrong, then the morning after I have won the court case then I will resign from the DA.***

To this summary of what he understood to be her position De Lille responded:

> ***"PDL: I will walk away. You summed it up correctly.***
> ***Because really it is not about hanging on to, I'm serving there at the behest of the DA,*** *the DA has gone through a process …and* ***they have put me into that position.*** *I'm not representing my jacket I'm representing the DA and* ***if the DA feels they want to put someone else into that position they are also entitled to do that."***

[38] It was contended that notwithstanding what might appear to have amounted, on the part of De Lille, to the expression of an intention to resign from the party (if one had regard for her express confirmation of what was put to her by McKaiser read in the context of what preceded it), if one had regard for the comments she made immediately thereafter, in relation to serving in 'that position… on behalf of the DA', then it was clear that what she was in fact referring to was an intention to resign as Mayor, or at the very least there had to be some doubt as to whether her statements properly fell within the ambit of the cessation clause.

[39] In response to these submissions counsel for the DA pointed out that after De Lille's comments the interviewer was not content to let the matter go and put what he referred to as a 'bonus question' to her. He asked her whether the EFF would be waiting for her after the 'battle had been won' **and she had 'walked away'**. Her response to this further question was telling:

> "*PDL: A few weeks ago we had the Jazz Festival in Cape Town, I greeted the President Cyril Ramaphosa and the next day* ***I'm going to the ANC****. Then I go to Mama Winnie's memorial, the EFF invited me, and* ***I'm going to the EFF. You know what I would so much like to plan my future, you know I'm also not that young anymore but I cannot do that because***

> ***wherever it is I want to go, I can't go with this cloud over my head, I'm eager to get out of this mess as soon as possible so that I can get on with my life****…"*

[40] The interviewer then concluded the interview by thanking her for her honesty and commenting that she had been 'very clear….not clear as mud' but 'clear, clear, proper clear' - if she won the legal battle she would be **'walking away from the DA'**. It is therefore abundantly clear that as far as the interviewer was concerned, De Lille was talking about leaving the party, and not about her position as Mayor, as she was talking about where she might possibly find herself in the future, outside of the party, once she had left it.

[41] In commenting in their judgment[31] on their understanding of what De Lille said during the interview, Gamble et Samela JJ clearly also understood her declarations to amount to the expression of an intention to resign from the party, and not from the mayoralty:

> *"[W]e are of the view that the McKaiser interview, when considered in its entire context, demonstrates that Ms de Lille's relationship with the DA has all but come to an end. Ms de Lille herself acknowledged that in the interview when she said that "the writing is on the wall." There is the recognition of a long history of disharmony between the parties and Ms de Lille agreed with Mr McKaiser's statement in that interview that she would resign from the DA (and not just as mayor): "The morning after I've won the court case then I will resign from the DA".*

[31] At para [25].

[42] Counsel for De Lille contended that even if we were minded to agree with the Court which heard Part A of the application and were also of the view that what De Lille expressed during the interview amounted to an intention to resign from the party, it did not necessarily follow that the provisions of the cessation clause were applicable. In this regard it was submitted that her declaration was not unequivocal, as it was conditional upon her 'clearing her name' at some indeterminate date in the future, and it was submitted that on a purposive interpretation it could never have been intended that the clause would apply in such circumstances. In response counsel for the DA submitted that although her expressed intention was contingent upon a future event, it nonetheless was clear that it amounted to an unequivocal intention to resign. Put simply, it was only a question of when she would resign, and not if, and there was therefore no good reason why the clause should not find application.

[43] In our view it is not necessary, for the purposes of this judgment, to attempt to resolve which interpretation is the correct one. There is no doubt that in certain instances it would be anomalous or unfair to suggest that the mere expression of an intention to resign from the party on the happening of a future event, would necessarily result in a cessation of membership even before that event had transpired, and at a time when the member's loyalty was beyond reproach. By way of example it is doubtful whether the drafters of the clause envisaged that it should be held to apply at the moment a member were to publicly express an intention to resign from the party when

he/she reached retirement age, or on the happening of an uncertain future event eg when a rival political party won the next elections. In like vein, it may be asked whether in order for the clause to apply, the expression of intent always needs to be unconditional.

[44] As is always the case in matters of interpretation[32] the context in which any statement expressing an intention to resign is made will usually be determinative and there is no need to attempt to make a definitive pronouncement on this issue, at this time. For the purpose of this judgment we have assumed, in favour of the DA, that the jurisdictional pre-requisites which were necessary for the clause to find application, were present.

Cessation of membership:

[45] The fact that the statements which were uttered by De Lille may have amounted to the expression of an intention to resign, within the meaning of cl 3.5.1.2, does not however necessarily lead to the conclusion that her membership ceased, as was submitted by the party, either automatically or otherwise. It was contended by the DA that the cessation clause operated automatically and the function of the FLC panel and FedEx was simply to determine whether the facts which triggered the application of the clause existed, and if this was the case, De Lille's membership ceased retrospectively as a matter of law, to the date when the interview took place.

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32 See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

[46] For the latter proposition reliance was placed on the dictum in *Phenithi v Minister of Education and Others* [33] where the Court concurred with the finding of Van Heerden JA, in *Minster van Onderwys en Kultuur en Andere v Louw.* [34] In the latter case, Louw was a general assistant and in permanent employment at a boarding house of a certain high school in Upington. He failed to report for duty over the period 29 July to 31 August 1992. On 11 September the principal wrote Louw a letter informing him, in essence, that according to the school governing council he had been discharged and that his last day of service was 28 July 1992. The principal relied on a provision, namely s 72 of the then Education Affairs Act (House of Assembly) 70 of 1988 which provided that '*a person – employed in a permanent capacity at a departmental institution and who –(a) is absent from service for a period of more than 30 consecutive days without consent of the Head of Education …shall, unless the minister directs otherwise, be deemed to have been discharged for misconduct."* Following unsuccessful negotiations between the parties Louw instituted application proceedings in the High Court, seeking *inter alia* the setting aside of the decision to terminate his services. Van Heerden JA, in reversing the decision of the High Court said: [35]

> *"The deeming provision [s72(1)] comes into operation if a person in the position of the respondent (i) without the consent of the 'Head of Education' (ii) is absent from his service for more than 30 consecutive days. Whether these requirements have been satisfied is objectively determinable. Should a person allege, for example, that*

[33] 2008 (1) SA 420 SCA para 9.
[34] 1995 (4) SA 383 (A).
[35] At 388G-H.

he had the necessary consent and that allegation is disputed, the factual dispute is justiciable by a court of law. There is then no question of a review of an administrative decision. Indeed, the coming into operation of the deeming provision is not dependent upon any decision. There is thus no room for reliance on the audi - rule which, in its classic formulation, is applicable when an administrative – and discretionary – decision may detrimentally affect the rights, privileges or liberty of a person."

[47] The rules which deal with cessation of membership in terms of Clause 3.5 of the party's constitution are those set out in Part C of the FLC rules. The relevant ones which are applicable in this matter are as follows:

"Rule 2 -As soon as the relevant Provincial Executive or Federal Executive receives prima facie evidence which indicates that a public representative's membership has ceased by virtue of the provisions of s3.5.1 of the Federal Constitution, then this evidence must be referred to the Chairperson of the FLC.

Rule 3- In the instance where a member publicly declares (as contemplated in s3.5.1.2 and s3.5.1.3 of the Federal Constitution) his/her resignation or intention to resign from the Party or intention to join another party or him/her joining another Party, the mere tendering of proof by means of a visual or audio clip from the relevant electronic medium, or a screen shot from the relevant social media platform and /or a copy of a printed letter, report or article in the case of print media constituting such public declaration of his/her resignation or intention to resign from the Party or intention to join or joining another party, shall constitute sufficient proof of such resignation, intention to resign or intention to join or joining another party.

Rule 4 - …….

Rule 5- A letter of cessation, including a sufficient description of the public declaration as set out in paragraph 3 hereof, or, where applicable, including the relevant statements as set out in paragraph 4 hereof, must be served on the affected

member. This letter shall state that the member has twenty- four (24) hours, after having been served with such letter of cessation to provide the Chairperson of the FLC with clear and unequivocal written reasons why his or her membership did not cease.

Rule 6- The Chairperson of the FLC must as soon as possible after receipt of the written reasons contemplated in paragraph 5 hereof, or upon completion of the twenty-four (24) hours as set out in paragraph 5 hereof, present to a panel of the FLC:

6.1 A copy of the public declaration and or statements which allege the cessation of membership; and

6.2 The written response, if any, by the affected member.

Rule 7- Upon receiving the copy of the public declaration and/or statements and the written response by the affected member, the panel must without undue delay make a determination on the papers as presented to it and communicate this determination to the Chairperson of the FLC.

Rule 9 - In the event that a determination is made that the member's membership has ceased, this determination shall be presented to the Federal Executive, which may then confirm the determination of the cessation of the membership of the affected member.

Rule 10 - In the event that a determination is made by the panel, or a resolution is passed by the Federal Executive that the written reasons provided by the affected member sufficiently dispute the facts on which cessation may be based in terms of the Federal Constitution, the matter may be referred to the FLC for a disciplinary hearing, or to follow the process set out in paragraphs 5, 6 and 7 of Part F of these rules."

[48] Unlike the operative provisions in *Pheniti* and *Louw* cessation of membership in terms of the party's rules does not occur automatically in

terms of a deeming provision, and before a public declaration of the intention to resign has legal effect the rules require that there be a determination of the cessation by an FLC panel, which is then confirmed by FedEx. In essence the panel functions almost like a tribunal or court would- it is required to evaluate the contents of the member's public declaration and her response thereto and needs to be satisfied that 1) the declaration constitutes the expression of an intention to resign from the party, as envisaged by the cessation clause and 2) despite this the member has failed to provide clear and unequivocal reasons why his/her membership did not cease. Thereafter, FedEx is required to confirm the determination. And, as we read the rule in this regard FedEx has a wide discretion, which, notwithstanding the contents of rule 10 is not limited to simply deciding whether or not to confirm that the declaration is covered by the cessation clause. The discretion not to confirm the determination by the FLC panel could be exercised on the basis of extraneous considerations, such as whether for example, in the light of the explanation which was tendered by the member and the member's value to the party, it should condone the declaration which he/she made. In the circumstances counsel for the DA was constrained to concede that until such confirmation by FedEx, as a matter of law, cessation of membership does not occur. In the absence of such a finding the membership of an affected member remains extant and does not cease to exist in law.

[49] Our finding that in terms of the party's constitution and its rules, membership does not cease automatically, by operation of law, and is

dependent upon a determination which has to be made to that effect, which must in turn be confirmed in order to become operative, has two further, important consequences. Firstly, it must follow that where there is a material defect in relation to the process ie where a panel is not properly constituted in terms of the party's constitution or rules, then there cannot be a valid determination made that membership has ceased, and secondly, there can be no valid and effective confirmation of such a determination.

The composition of the FLC panel:

[50] According to the constitution the FLC is an important structure within the party. In terms of cl 1.2 it has all the powers necessary to exercise its functions justly and expeditiously. Some of its functions *inter alia* are to interpret the federal, as well as any provincial constitution[36] and to determine any dispute referred to it.[37] The decisions of the FLC in matters other than disciplinary hearings are not subject to an internal appeal and its findings must be implemented by the relevant structures within the party.[38]

[51] The composition of the FLC is prescribed in Chp 11 of the constitution. Clause 11.1.1 (as it read at the time) provided as follows:

> *"The Federal Executive must at its first ordinary meeting after each Federal Congress elect the Chairperson and Deputy Chairperson of the Federal Legal Commission. Thereafter, the Federal Executive shall appoint a panel of ten (10) additional people who are as objective as possible, preferably including one from each province, who,*

[36] Cl 11.2.1.1.
[37] Cl 11.2.1.3.
[38] Cl 10.10.4.

> *together with the Chairperson of the Federal Legal Commission, will make recommendations to the Federal Council for the appointment of the other panel members, consisting of up to twenty (20) members of whom at least fifteen (15) must be legally qualified persons as well as up to ten (10) alternates of whom at least six (6) must be so qualified and must fill any vacancy as it arises."*

[52] According to the minutes of the meeting which was held on 5 June 2015, following upon the party's federal congress, FedEx duly appointed the Chair and Deputy Chair of the FLC. The party's federal leader then expressed a desire to serve on the 'selection panel' which was to make recommendations to the FLC for the appointment of 'the other panel members' and this request was accepted by FedEx. Technically speaking this would mean that the 'selection panel' was improperly constituted, as it would be comprised of an additional member (ie the party's leader) who was not authorised to be on the panel. But, according to the papers filed of record when the 'selection panel' met thereafter the leader was not present and the FedEx chair and the 9 provincial leaders assumed the role of recommending all of the 20 principal and 10 alternate FLC members for appointment by the Federal Council (which in terms of the constitution is a different body), approval for which was seemingly granted by the Council on 25-26 July 2015. It appears that the Chairperson of the FLC and the 9 provincial leaders were not included as members of the FLC in this process of nomination and appointment.

[53] On this issue, the nub of the complaint by De Lille was that the DA's failure to fully comply with clause 11.1 of its own constitution amounted to a fundamental irregularity which rendered the appointment of all its FLC panels flawed, including the one responsible for the recommendation to FedEx that she ceased to be a member of the party. In support of this proposition reliance was placed on the matters of *Crouwcamp v Civic Independent and Others* [39] and *Ramakatsa,* [40] to which we will return.

[54] The DA is *ad idem* that its own constitution must be complied with when it deals with its members and that the relationship between it and its members is contractual in nature. During argument it was advanced by its counsel that the ordinary principles for interpreting contracts apply in this instance and only substantial compliance with the constitution was therefore required. It was further contended that the dictum in *Ramakatsa* that: "*our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party.*" [41] means that a member of a party is entitled to "*demand and obtain*" compliance with the party's constitution but that compliance is determined by the ordinary rules that govern compliance with contractual provisions. To that extent it was submitted that De Lille failed to demonstrate that the party's interpretation of the provisions of its constitution was not business-like or was inconsistent with their purpose; or that the provisions were not substantially complied with, or that the alleged breach of the constitution was material;

[39] (416/2013) [2014] ZASCA 98 (31 July 2014)
[40] Note 18.
[41] *Id* at para [16].

and she failed to demonstrate that she suffered prejudice or disadvantage as a result of any insignificant procedural non-compliance.

[55] As to the composition of the FLC and whether it was properly appointed and constituted the DA submitted that at the time clause 11.1.1, was inelegantly worded and open for more than one interpretation. The first way to read the said clause, according to it, was that the 'selection panel' as a whole was to recommend all 20 principal members and 10 alternates of the FLC, and as their function was thereafter complete they did not 'form part' of the FLC. On the other hand, it could be read that the 'selection panel' constituted the first 10 members of the FLC, and its task was to recommend an additional group of up to 20 principal members and alternates, of which it would form part.

[56] The DA said that it understood the clause to be read in the first way and it appointed members of the FLC panels in 2011 and 2015 in that manner. However, as we have attempted to explain, contrary to this it was also submitted by the party that once the initial 10 members had been appointed the selection panel was complete and the reference in cl 11.1.1 to 'the additional panel members' was to be understood as constituting a reference to a different, additional 'panel'. In the circumstances, so it was contended, the initial 'selection panel' was never intended to be part of the FLC, and De Lille was mistaken in regard to her understanding and interpretation of the said clause. Put simply, it was contended by the DA that

the clause referred to two 'different bodies' ie an initial group of 11 members who would constitute a 'selection panel' (the first 10 referred to in the clause together with the Chairperson of the FLC) and another group of up to 20 members plus alternates who would constitute the FLC. According to Selfe, the original 11 members of the 'selection panel' were considered to serve only to 'identify the members of the FLC' but did not 'themselves' ever serve as members of the FLC.

[57] We found the differing interpretations which were put forward by the DA in regard to the proper meaning to be afforded to the clause, to be strained and confusing. In our view, on a proper reading of the clause and the constitution as a whole there can be no uncertainty or vagueness as to how the FLC should have been constituted. Firstly, at its first ordinary meeting after its federal congress FedEx was required to elect the Chairperson and Deputy Chairperson of the FLC. Thereafter, FedEx was required to appoint a group of 10 further ("additional") persons (who were to be as objective as possible), preferably one from each province, who would form a 'selection panel' together with the FLC Chairperson (and not the Chairperson of FedEx as seems to have been the case). This panel was required to make recommendations to the Federal Council for the appointment of the *other members* of the FLC, comprising up to an additional 20 members (of whom at least 15 of the principal and 6 of the 10 alternates were to be legally qualified persons).

[58] As stated previously, according to the constitution the FLC is an important structure within the Party. It is the body from which members are drawn to serve on disciplinary panels, and panels which must make a determination as to the cessation of a person's membership. To this end it is understandable why the drafters of the constitution would insist that at least 15 of the principal and 6 of the 10 alternate members were to be legally qualified persons. The intention was clearly to create an FLC that would be comprised of mostly legally trained and skilled people and that all the members would be able to bring about an objective and impartial mind to bear on the issues they were to decide upon.

[59] It is abundantly clear that on the DA's own version clause 11.1.1 was not complied with, and such non-compliance was material and not trivial as the party tried to suggest. Not only was the initial FLC 'selection panel' not properly constituted, but the entire FLC itself appears also not to have been properly constituted, in that the 11 members of the 'selection panel' were not considered to be part of it, and never served on it. In our view this must mean that the FLC panel which was appointed to make a determination in respect of the alleged cessation of De Lille's membership, was also improperly constituted, and this much too was in effect conceded by the DA's counsel, when pressed upon the point.

[60] On this point, it was argued on behalf of the DA that assuming there was an 'error' it was merely technical in nature. Moreover, it was submitted

that De Lille was not prejudiced or disadvantaged by it given the fact that she participated in the process. It was further contended that no allegation of bias was made by De Lille toward the FLC and would it be improper to raise technical non-compliance in respect of the clause in order for her to retain her membership.

[61] The DA's argument on the abovementioned point is unpersuasive. In our view the failure not to fully comply with clause 11.1.1 (as it was at the time) cannot be regarded as merely technical in nature. Our Courts have repeatedly held that political parties are constrained to strictly exercise only those powers entrusted to them by their constitution and any conduct falling outside the purview thereof will be *ultra vires* and invalid.

[62] In *Crouwcamp* [42] the central question on appeal was the legality of a meeting purportedly held by the national executive committee ("NEC") of a political party, the Civic Independent. In that matter the Supreme Court of Appeal held as follows:

> *"[16] It is common cause that the Civic as a political party is governed by its Constitution which represents the collective voice of its members. This Constitution spells out clearly when and how members of the Civic's NEC will be appointed and removed from office. It follows therefore that the NEC is constrained to exercise only those powers entrusted to them by Constitution, and, strictly in terms of the Constitution. This is in line with the principle of legality. Any conduct that falls outside the purview of the Constitution is therefore* ultra vires *and invalid.'*

[42] Note 39.

[63] The Court held that a meeting of the NEC which was attended by one of the respondents who had not been properly elected to serve on it, and who thus had no right to participate in it, was not a legitimate and properly constituted meeting, and it therefore could not take any valid decisions on behalf of the party.[43] As a result, a motion which had been passed by the NEC at the instance of the respondent, to remove the appellant as the President of the organization and to expel him from his membership of the party, was not a valid resolution. The SCA consequently held that it followed that all other subsequent decisions which were based on that resolution were also invalid.[44]

[64] In *Ramakatsa,* [45] six members of the African National Congress ("ANC") in the Free State approached the High Court seeking an order declaring invalid a meeting of the Free State Provincial Executive Committee ("the PEC") of the ANC on the basis that irregularities had occurred in the branch processes aimed at electing delegates to a provincial conference. The matter ultimately ended up in the Constitutional Court where[46] the following was held by Yacoob J (for the majority): *"I do not think that the Constitution could have contemplated political parties could act unlawfully. On a broad purposive construction, I would hold that the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution. This means that our Constitution gives*

[43] *Id*, at para [17].
[44] *Id,* at para [19].
[45] Note 18.
[46] At para [16].

every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party."

[65] The FLC within the context of the DA's constitution and body politic is an important structure and it has wide powers. The composition of the FLC must accordingly be within the four corners of the Federal constitution. This is in line with the principle of legality. A failure to do so, certainly falls outside the boundaries of the Federal constitution and, as held in *Crouwcamp* [47] '*any conduct that falls outside the purview of the Constitution is therefore ultra vires and invalid.'* The non–compliance of the said clause having regard to the purpose of it, was material and properly evaluated brings about an irregularity that justifies a ground for review. In our view the fact that De Lille may have somehow participated in some of the processes cannot render an otherwise improperly constituted FLC to be lawful. It follows that on this ground alone the cessation of De Lille's membership cannot stand. But there is in our view a further material reason why the decisions in question are reviewable.

[66] As we have previously pointed out, the DA's constitution further provides that in the event of a case of cessation, and assuming De Lille did publicly declare that she intended to resign from the party, then the process

[47] Note 39.

or processes to be followed were to be further regulated by the Rules of the FLC.[48]

[67] Chp 10 of the DA's constitution in turn provides that the FLC must determine the rules of procedure which may be applicable to it, which may not be in conflict with the Federal constitution.[49] The procedures that are applicable to proceedings of panels are dealt with in Clause 10.5 of the Federal constitution. Clause 10.5.1 provides as follows:

> *"The Rules of Procedure prescribed by the Federal Legal Commission must apply to all proceedings of a panel: Provided that the rules of natural justice must at all times be adhered to. In particular a panel must not make any adverse finding against any person unless:*
>
> *10.5.1.1 the person has been sufficiently informed of every allegation against him or her and has been given the opportunity to rebut the allegations; and*
>
> *10.5.1.2 he or she has been given the opportunity to submit evidence of mitigating factors."*

[68] It is apparent from these peremptory provisions that before making an adverse finding against De Lille, the party was required to give her an opportunity to submit evidence in mitigation, which it is common cause, it did not do. Although ordinarily mitigation only comes into play when penal or disciplinary sanctions can be imposed, cl 10.5.1 extends this to <u>all</u> proceedings of an FLC panel ie not only proceedings in panels conducting disciplinary proceedings, but also those constituted to determine whether a

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[48] Cl 3.5.3: The process to be followed in the case of cessation under this section will be determined by the Rules of the Federal Legal Commission.
[49] Cl 10.1.4.

member's membership has ceased, and it further provides that no panel may make an adverse finding against any member, unless he or she has been given an opportunity to put forward mitigating factors. Although such factors might not necessarily have any bearing on whether or not a member's declaration constituted the expression of an intention to resign within the meaning of the cessation clause and would thus not be relevant to any adverse finding which might be made by a panel in this regard, they certainly would be helpful to the further process of confirmation by FedEx, which involves the exercise of a discretion on its part. It could thus rightly be said that without such mitigating factors, if any, FedEx would not have been able to properly exercise its discretion as to whether or not to confirm the cessation of membership. In this regard there might well be instances where, because of the weight of the mitigating factors which are submitted, FedEx is of the view that it should not confirm the cessation.

[69] In the circumstances in our view the party's failure to comply with the provisions of Cl 10.5.1.2 of its own constitution therefor amounted to a further, material irregularity which vitiates the decision that was arrived at viz that De Lille's membership had ceased to exist.

[70] For these reasons it follows that the relief sought in paragraph 3.1 of the Amended Notice of Motion: Part B, must succeed with costs including the costs that stood over in relation to the application for interim relief in terms of Part A.

[71] In the result the following order is made:

The determination by the First Respondent that the Applicant has ceased to be a member of the DA in terms of clause 3.5.1.2 of its (federal) constitution is declared to be unlawful and invalid and is reviewed and set aside, with costs. Such costs shall include the costs pertaining to the application for interim relief in terms of Part A, and the costs of the employment of two counsel.

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LE GRANGE, J

I agree.

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MANTAME, J

I agree.

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SHER, J