



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

**Case number: 17099/21**

**Before: The Hon. Mr Acting Justice Montzinger**

**Hearing: 15 October 2021**

**Judgment: 19 October 2021**

In the matter between:

**ECONOMIC FREEDOM FIGHTERS**

Applicant

and

**CITY OF CAPE TOWN**

First Respondent

**ELECTORAL COMMISSION OF SOUTH AFRICA**

Second Respondent

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**JUDGMENT**

**(DELIVERED ELECTRONICALLY BY E-MAIL ON TUESDAY 19 OCTOBER 2021)**

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**MONTZINGER AJ:**

[1] The EFF approached this Court seeking an interim interdict to prevent the City of Cape Town (“the City”) from enforcing its By-Law and removing the EFF’s banners. The EFF, a political party, claims that these banners are used to campaign for the imminent local government elections. The By-Law regulates outdoor advertising and signage and it is the City’s view that the banners contravene the By-Law. The EFF sought urgent interim protection while also launching an attack on the constitutionality of the By-law.

[2] This Court finds that the EFF is entitled to urgent protection of its right it has established pending the determination of its constitutional challenge. An order giving effect to EFF’s protection is recorded at the end of this judgment. The reasons for the order follows.

### **EFF’s need for interim relief**

[3] While campaigning for the imminent local government elections the EFF hung various banners on poles and bridges around the City of Cape Town. These banners are ostensibly 3m<sup>2</sup> in size, red in colour, contains a picture of the EFF’s leader and contains a message: “VOTE EFF”.

[4] On 1 October 2021 Ms Overmeyer on behalf of the City, by e-mail, informed the EFF that the banners were hung in violation of the City’s poster rules. The EFF was requested to remove the banners by Sunday 3 October 2021. The poster rules referred to by Ms Overmeyer was the City’s “*Rules for Posters during voter registration, general election, and by election processes, 2021*” (“the 2021 poster rules”). These

rules are enacted and only applies during an official election, which commences when an election is declared. Ordinarily and outside of an official election period the standard '*Outdoor Advertising and Signage By-law rules and fees*' are applicable.

[5] It is apparent that the 2021 poster rules only caters for posters and not banners. Ms Overmeyer's reliance on the 2021 poster rules is in the context that during an election (national or local) political parties can only put up posters. For that purpose a special dispensation is implemented in the form of the 2021 poster rules referred to in her e-mail. No party is allowed to hang banners, unless in connection with an event that relates to the elections.

[6] The EFF did not abide with the City's request and on 4 October 2021 Ms Evans, also on behalf of the City, recorded the basis of its complaint and objection to the EFF's banners as follows:

"...The approved election rules that are distributed each year to all political parties specifically provide for **posters** to be erected during the election period and not banners and to date all political parties have been abiding by these rules. The display of banners on City light poles for political parties to encourage the public to "vote for" a particular political party **are not permitted on the City light poles.**

Schedule 10 of the Outdoor Advertising and Signage By-law relates to the display of banners in the City of Cape Town but are only permitted for **functions** or **events** and does not make provision for electioneering purposes. The official POSTER rules for electioneering are the only means of advertising on City light poles as concessions were granted for election posters to be displayed, i.e. no payment required, number of posters may exceed the maximum of 2000, and scenic routes were opened up etc. "

[7] Ms Evans repeated the City's position in another e-mail of 5 October 2021. Again reference was made to only the 2021 poster rules and not the By-Law. In any event, the EFF's attorney addressed a letter to the City on 5 October 2021 responding to the City's position that the banners contravene the By-Law. The EFF also recorded and confirmed its refusal to remove the banners.

[8] Section 2 of Schedule 10 of the By-Law reads:

“2. Approval for third party advertising on banners and balloons shall only be granted for a function or event conducted for religious, educational, social welfare, animal welfare, sporting, civic or cultural purposes or to a function or event relating to a Municipal, Provincial or Parliamentary election or referendum. The display of such banners shall comply with the Municipality's standard conditions relating to the display of banners as set out hereinbelow.”

[9] Section 2 thus caters for banners to be displayed and allowed at a *function* or *event* in relation to elections. The rest of the sections of schedule 10 deals with where a banner may be displayed or attached, the size of it and the amount of banners allowed at a premises. In this regard clauses B1 and F44 of the By-Law, in general, obligates an applicant to apply for the use of banners at the recognised events. Section D(11) empowers the City to exempt an applicant from the terms of the By-Law in respect of sign types or areas of control set out in schedules 10, 11 or 12, taking into account various factors.

[10] What is the difference then between banners and posters? The definitions in the By-Law provide the answer.

A *banner* is defined as:

“...any material upon which a sign is displayed in such a manner as to be fully legible in windless conditions, attached to one or more ropes, poles or flagstaffs projecting vertically, horizontally or at an angle, or attached to buildings or special structures, but excludes banners carried as part of a procession. A flag which is not displayed on an approved flag pole shall for the purposes of this By-Law, be deemed to be a banner”.

A *poster* is defined as:

“...temporary signs capable of being attached to the Municipal electrical light standards and/or pasted to fixed structures to advertise or campaigns, including elections or referenda of limited duration and excluding signs advertising markets, exhibitions or events which are held on a regular basis of more than two days per month”

[11] The size of a poster may not exceed 0.9 x 0.6 metre in area. While a banner may not exceed 3m<sup>2</sup> in area.

[12] Another feature of differentiation, especially during an election, is in the approval process. No permits or payment is required from political parties during an election period to hang posters, subject of course to the size and other prescribed requirements. However, to hang a banner the By-Law requires that application for approval is made and the request for approval must be for advertising for a function or event relating to a “*Municipal, Provincial or Parliamentary election or referendum*” or one of the other purposes mentioned in section 2 of the schedule 10 of the By-Law.

[13] It is within the above context that this Court was engaged to determine firstly, whether the matter is urgent. Next, if urgency is not at issue, whether the EFF made out a case for interim relief and thus complied with the requirements for an interim interdict laid down in *Setlogolo v Setlogolo*<sup>1</sup> supplemented by what is known as the OUTA<sup>2</sup> test. The OUTA test being applicable in circumstances where an applicant seeks to limit the exercise of a statutory power.

[14] The City indicated that it no longer objected to the urgency of the matter. The matter was thus determined on the basis that urgency was not contentious.

**The case for EFF:**

[15] EFF's case is premised on a very narrow and direct attack on the City's By-Law that prohibits the use of banners during elections as opposed to posters.

[16] It contents that the City's By-Law and policies are irrational. The irrationality flows from the fact that there is no reason why the By-Law permits banners for functions and events, but not for elections and campaigning. Moreover, that the distinction that the By-Law seeks to draw between a banner for a function and an event on the one hand and a banner for electioneering/campaigning on the other is arbitrary and artificial.

[17] EFF cannot wait for the final determination on the constitutionality or not of the By-Law, as the banners serve to campaign and canvass votes on behalf the party for

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<sup>1</sup> *Setlogelo v Setlogelo* 1914 (AD 221)

<sup>2</sup> *National Treasury and Others v OUTA* 2012 (6) SA 223 (CC)

the upcoming local government elections on 1 November 2021. It thus seeks an interim order interdicting the City from removing the banners until the determination of the constitutional challenge.

[18] The EFF contends that its complaint establishes all the requirements for interim relief including exceptional circumstances, where the limitation of statutory powers is at stake, as required by the law.

**The City's position:**

[19] As a general proposition the City contends that the EFF has failed to establish the requirements for an interim interdict. Especially in light of the legal test as stated in the OUTA<sup>3</sup> judgment.

[20] According to the City serious doubt exist about the prima facie right alleged by the EFF. Furthermore, the EFF has failed to prove that there has been an infringement of the section in the Constitution on which it relies. The relief is also not sustainable as the EFF has failed to identify the subsection in section 19 of the Constitution on which it relies.

[21] In respect of the harm, the EFF has failed to put up any facts establishing the infringement of any constitutional right particularly in consideration of the fact that the By-Law has been in operation since 2001 with the same limitations. Regarding the balance of convenience the City contents that the rule of law and simple principles of

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<sup>3</sup> *National Treasury and Others v OUTA* 2012 (6) SA 223 (CC)

equity cannot bend to the political expediency of the EFF. In this case the balance of convenience rather favours the City.

[22] Lastly, the City asserts that since interdictory relief is always discretionary the circumstances of this matter dictates that due to the iniquitous results that would arise by favouring the applicant over the other political parties, the relief should be refused.

### **The Law: Interdicting a statutory power:**

[23] The Constitutional Court<sup>4</sup> has confirmed that this Court does have jurisdiction to grant an interim interdict pending a constitutional challenge, without having to grant an order of unconstitutionality of the impugned provision, provided that it does so only in exceptional circumstances.

[24] To obtain interim interdictory relief a litigant must overcome a few well established legal hurdles. The judgment of *Setlogelo*<sup>5</sup> applies to those situations absent a statutory power. However, where a litigant seeks to restrain the exercise of statutory power the legal position in *Gool*<sup>6</sup> applies in addition to *Setlogelo*. Both of these judgments have been endorsed by the Constitutional Court in OUTA.

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<sup>4</sup> *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute For Democracy in South Africa and Another As Amici Curiae)*<sup>4</sup>. 2003 (1) SA 472 (CC) at para 32 (applied in *McBride v Minister of Police and Another* (J1396/15) [2015] ZALCJHB 216 (24 July 2015))

<sup>5</sup> *Setlogelo v Setlogelo* 1914 AD 221 later confirmed in *Webster v Mitchell* 1948 (1) SA 1186 (W)

<sup>6</sup> *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C)



[25] Counsel on behalf of both parties agrees that the Court in OUTA has endorsed the more rigorous analysis where an applicant seeks to restrain the exercise of statutory power.

[26] At para 45 of OUTA the Constitutional Court endorsed another approach that entails that when a court wrestles with whether to grant an interdict or not the four pillars of *Setlogelo* must all be considered with the objective of giving expression to the objects, spirit and purport of the Constitution.

[27] With regards to the prima facie right requirement the Constitutional Court has said that this right can be open to some doubt. Regarding the harm analysis. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists<sup>7</sup>.

[28] Lastly, with regards to the balance of convenience enquiry in the context of an interdict to restrain statutory power the Constitutional Court expressed this balancing exercise best when it determined the boundaries of the enquiry. It said:

“ The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.

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<sup>7</sup> Par 46 of OUTA

[29] Having regard to these well-established Constitutionally infused principles, the applicant has to first establish the four requirements as laid down in *Setlogelo*. Then OUTA, confirming *Gool*, demands that a litigant's case, to restrain the exercise of statutory power, in support of the interim interdict requirements must be strong and furthermore exceptional circumstances must be present when a balancing of the convenience exercise is done.

**The requirements for an interdict in this matter:**

[30] This Court will attempt to stay clear from determining the cogency of the review grounds advanced by the EFF. For similar considerations expressed by the Constitutional Court in OUTA<sup>8</sup> it would not be appropriate to usurp the pending functions of the review court and thereby anticipate its decision. If this Court is required to do so it will only do so for a restricted purpose.

Prima facie right

[31] In its founding affidavit EFF relies on section 19 and 34 of the Constitution to establish its prima facie right. It also relies on a right to vindicate the supremacy of the Constitution and the rule of the law to the extent that the By-Law or the City's policies are at odds with the rule of law. During argument the EFF seems to only rely on section 19(1)(c) of the Constitution to establish the right that requires protection.

[32] Section 19 (1)(c) of the Constitution affords citizens and by extension political parties the following:

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<sup>8</sup> At para 31

- “ (1) Every citizen is free to make political choices, which includes the right –
- (a) .....
  - (b) .....
  - (c) To campaign for a political party or cause.”

[33] The City has two difficulties with the prima facie right on which the EFF relies.

[34] The first objection was that the EFF has failed to identify the exact Constitutional right it relies on and only relied in general on section 19. However, this is not a bar to the relief as the court has said in *Bato Star*<sup>9</sup> a litigant is not required to specify the statutory provision on which it relies but it must be clear from the facts alleged that the section is relevant and operative. While it is correct that in its founding papers the EFF simply refers to section 19 it is apparent that only s 19(1)(c) applies to political parties.

[35] The City’s second criticism is built on the proposition that the right is non-existent since no facts are alleged in support of the purported infringement or how it was infringed. The City relies on the Constitutional Court judgment of *Prince*<sup>10</sup> that requires of a party to place information before the court relevant to the determination of the constitutionally impugned provision. Fortunately, the Supreme Court of Appeal has given direction in *De Beer*<sup>11</sup> of what a party must at least allege to comply with the directive established in *Prince*. At paragraph 99 the SCA set out the minimum standard as follows:

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<sup>9</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 27.

<sup>10</sup> *Prince v President of the Law Society of the Cape of Good Hope* [2002] 2001 (2) SA 388 (CC)

<sup>11</sup> *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* [2021] 3 All SA 723 (SCA)

“At the very least it was for the respondents to allege: (a) each specific regulation sought to be impugned; (b) which constitutional right was alleged to be violated by the impugned regulation; and, (c) how the regulation allegedly infringed the specific right.”

[36] EFF has complied with the standard the SCA has set in *De Beers*. Firstly, EFF’s founding affidavit takes issue with section 2 of schedule 10 of the By-Law. Secondly, it further alleges that s 19 and in particular s 19(1)(c) of the Constitution is violated.

[37] Finally, in its founding affidavit the EFF also alleges that the By-Law is irrational and it advances its reasons for reaching that conclusion. The conclusion or allegation of irrationality is therefore not empty. EFF further alleges that the removal of its banners, on the basis that it is in violation of the impugned section 2 of schedule 10 of the By-Law will limit its ability to canvass and campaign for votes. The impact of the removal of the banners is again expressed at various paragraphs in the founding affidavit. These allegations certainly qualify as information relevant to the determination of the constitutionality of the impugned provision as required in *Prince* and *De Beer*. Whether there is credibility in painting the By-Law as arbitrary and irrational is not for this Court to decide but is left to the review court.

[38] The City contends that the allegations in the EFF’s founding affidavit amounts to nothing else but the EFF’s own conclusions and accordingly do not constitute evidential material capable of supporting a cause of action. It relies on a warning expressed by a Provincial Division in *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and*

*Others* 2003 (4) SA 207<sup>12</sup> that affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action.

[39] The *Dros* judgment does not cause a bar to the relief the EFF seeks. Firstly, the cause of action in this case is the infringement of a constitutional right that requires interim protection. The EFF has made allegations in compliance with the directions issued in the *Prince* and the *De Beer* judgments. However, for the other legs of the interim relief factual averments are also advanced. The *Dros* judgment is also distinguishable due to the fact that at this stage of the enquiry the EFF only has to establish a prima facie right though open to some doubt. It may very well be the impediment presented by the *Dros* judgment is more pronounced when the review application is heard. However, for this part of the enquiry this Court is satisfied that the EFF has advanced sufficient factual averments to identify the right it seek to establish in support of the relief it seeks.

[40] EFF locates its right in s 19(1)(c) of the Constitution. The role of the political party flowing from s 19(1)(c) is aptly described by *Cheadle et al*<sup>13</sup> as follows:

“The political party is the key institution in a pluralist democracy – the form of democracy entrenched in the Constitution – and is integral to the constitutional workings of the national and provincial legislatures. It is a necessary component of modern democratic system, and provides links between citizens and the government. The political party is the vehicle for the selection of candidates for public office. It forms and mobilises public opinion, provides the organisational focus round which the legislature and

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<sup>12</sup> at para 28

<sup>13</sup> Cheadle H; David D; Haysom N *South African Constitutional Law The Bill of Rights* 2<sup>nd</sup> edition , May 2019 Lexis Nexis [14-3]

the executive are structured, and ensures accountability, particularly if there is a strong opposition.”

[41] The importance of the right has also been expressed in *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC)<sup>14</sup> where the Constitutional Court warned that ‘*Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement*’<sup>15</sup>.

[42] EFF has therefore not only established a prima facie right, but a clear right. This Court is thus constrained and bound to follow OUTA that there is no further need to enquire whether the right exists. The EFF has advanced factual allegations that supports how the City’s By-Law will infringe its section 19(1)(c) right and why it needs protection. By threatening to remove the banners of the EFF on the basis of a statute that is under Constitutional attack threatens the EFF’s right to campaign and will lead to disenfranchisement rather than the opposite. Such a scenario is in direct conflict with the warning heeded in *August v Electoral Commission*.

[43] The EFF is thus entitled to protection of its right. It is therefore not necessary to weight up conflicting versions or to follow the approach in *Webster v Mitchell* 1948 (1) SA 1186 (W) to determine the existence of a right.

### Irreparable harm

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<sup>14</sup> Also reported at 1999 (4) BCLR 363 (CC)

<sup>15</sup> *Similar sentiments were expressed in African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at para 23

[44] Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing, and must not have taken place already<sup>16</sup>. In cases where money is not at stake, the harm consists, when interim relief is considered, in the applicant's temporary disablement from enjoying the right<sup>17</sup>.

[45] The test to determine whether harm is present is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm<sup>18</sup>. Actual harm need not be established. However, if an applicant can establish a clear right an apprehension of irreparable harm need not be established<sup>19</sup>.

[46] In *City of Tshwane v Afriforum*<sup>20</sup> the Constitutional clarified the meaning of harm in the context of a restraining order. At para 56 it stated the position as follows:

“Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some

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<sup>16</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*) at para 25.

<sup>17</sup> *Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd* 1993 (1) SA 853 (C) at 857J-858J; *Bamford v Minister of Community Development* 1981 (3) SA 1054 (C); and *Braham v Wood* 1956 (1) SA 651 (D&CLD) at 655A-C and H.

<sup>18</sup> *V & A Waterfront Properties (Pty) Ltd v Helicopter and Marine Service (Pty) Ltd* [2004] 2 All SA 664 (C) par 18

<sup>19</sup> *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality, Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) 267

<sup>20</sup> *City of Tshwane Metropolitan Municipality v Afriforum and Another* (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC)

legal protection, however much others might doubt its existence, relevance or significance.”

[47] This Court has already found that EFF has a clear right that requires protection. The harm it will suffer is anticipated since without protection the City will simply remove the banners. If that is the case even if the EFF should succeed with their review it will never be able to turn back the clock and re-campaign or recoup the benefit it would have obtained while campaigning with its banners displayed across the City. It is this Court’s view, even though a harm analysis is not necessary, that objectively the harm the EFF will suffer from a removal of their banners will be irreparable.

#### Balance of convenience

[48] The consideration of this requirement of an interim interdict is often the decisive factor in an application<sup>21</sup>. It usually resolves itself into a consideration of the prospects of success and the balance of convenience; the stronger the prospects of success, the less need for such balance to favour the applicant; the weaker the prospects of success, the greater the need for it to favour him<sup>22</sup>.

[49] This Court has already found that the EFF will suffer harm if the interim interdict is not granted. Harm is also an element of the balance of convenience enquiry<sup>23</sup>. However, to prevent the necessity to evaluate the strength or weaknesses of either parties’ case this Court will accept that the parties’ changes on

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<sup>21</sup> *Coalcor (Cape) (Pty) Ltd & others v Boiler Efficiency Services CC & others* 1990 (4) SA 349 (C) at 361 D-E

<sup>22</sup> *Erikson Motors Ltd v Protea Motors, Warrenton & Another* 1973 (3) SA 685 (A) at 691 C-E

<sup>23</sup> *Harnischfeger Corporation & another v Appleton & another* 1993 (4) SA 479 (W) at 491 B-E



success in the review are equally balanced. This will prevent the need to provide a view on the merits, even if its *prima facie*, that may possibly impact on the approach of the review court. In any event this Court's understanding of the legal position is that only if the balance of convenience fails to assist the applicant then an enquiry into the strength or weaknesses of the applicant's case is appropriate to determine whether interim interdictory relief is warranted.

[50] Therefore, even a neutral approach on the merits does not excuse the court from doing a balance of convenience enquiry. In the context of this particular case it is necessary for another reason. To assess whether exceptional circumstances are present that warrants the interference with a statutory power. The following factors tip the scale in favour of the applicant:

- (a) The EFF is firstly seeking to protect and express a clear Constitutional right to campaign during a local government election. The relief it seeks is of a limited nature and only for a short period.
- (b) Since, this Court is not tasked with having to make a declaration of unconstitutionality now, the By-Law will continue to be in effect after the conclusion of the election on 1 November 2021.
- (c) EFF is simply asking: don't remove our banners, in circumstances where we contend that the By-Law is unconstitutional. For as long as no declaration of unconstitutionality is made in respect of the By-Law the City is still free to enforce the By-Law.

- (d) The City contends that by allowing this interdict will have an outcome of inequality since other political parties are not afforded the same privileges. Considering that the right at stake is of a constitutional nature and since our Constitutional Court has said that when it comes to expressing a section 19(1)(c) right the aim should rather be to allow more freedom instead of limitation, the scenario would actually heed the direction issued by the court in *ACDP v Electoral Commission*. A Court should rather promote enfranchisement and participation where provisions in electoral statutes are at play. Section 19(1)(c) deal with the electoral issues and the same approach should thus apply when doing the balance of convenience analysis.

[51] As to whether exceptional circumstances are present.

[52] Firstly, objectively the relief is strictly necessary and clearly in the interest of justice. It is imperative that political parties be allowed to campaign freely within the bounds of the law. Parties like EFF will be more adversely affected by the City's By-Law during an election. The By-Law prima facie seems to limit a political party's ability to use all possible means to campaign for a local election. Secondly, the operation of the By-Law is subsidiary in nature and its operation is only interfered with for a short period of time. This must be contrasted with the fact that the City itself allows for a special dispensation during elections in respect of its poster rules. Why the same approach cannot apply in respect of banners during an election was not explained. This indicates that the interdict sought by EFF will hardly impact the operation of the City over the next three weeks.

[53] Other facts that indicates exceptional circumstances are that the election itself is an exceptional event, that only happens once every five years. The short period prior to the day citizens actually vote is the only opportunity for a party to canvass and campaign for votes. The banners are not permanent and must be taken down seven days after the election. Considering the impact of the Covid-19 pandemic and the severe restrictions on political parties to campaign in public and in large crowds it makes sense that more flexibility should be at play and *no-contact* methods of campaigning should be promoted. Allowing a political party to put up banners clearly falls within that no-contact method.

[54] This Court thus finds that all the factors mentioned in the preceding paragraphs indicates that the balance of convenience clearly favours the EFF and the granting of an interim interdict. To be allowed to hang banners will allow the EFF to campaign openly and effectively and give an effective expression of the indispensable right to vote and will further promote the objects, spirit and purport of the Constitution<sup>24</sup>.

#### No alternative remedy

[55] The City contended that the EFF does have an alternative remedy as it can apply to the City for exemption to comply with the Election rules and possibly receive approval to keep hanging its posters. This submission contradicts what the City communicated to the EFF on 5 October 2021. Firstly, the EFF was never invited to apply for exemption. Secondly, the City's communication implies that the banners

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<sup>24</sup> *New National Party of South Africa v Government the Republic of South Africa and Others* 1999 (5) BCLR 489 (CC)

will never be allowed. So applying for an exemption would not have served any purpose.

[56] It is thus apparent that the EFF had no other option or alternative but to approach this Court. Except for the alleged exemption the City did not point out any other remedy available for the EFF to pursue to protect its right.

**Costs:**

[57] In exercising this Court's discretion with regards to costs, in the circumstances of this matter the prudent costs order would be to let that aspect stand over for determination by the review court.

**Conclusion and order:**

[58] The EFF has made out a case for the interim protection of its right pending the review of the constitutionality or not of the By-Law.

The following order is granted:

- (a) The applicant's non-compliance with the forms and periods provided in the Uniform Rules of Court is condoned and the matter is dispensed with as one of urgency.

- (b) Pending the outcome of the constitutional challenge in Part B of the notice of motion, the City of Cape Town is interdicted and restrained from removing the election banners of the Economic Freedom Fighters within the City metropole.
- (c) The costs of this application to be costs in the review.



**A MONTZINGER**  
**Acting Judge of the High Court**

**Appearances:**

Applicant's counsel:	Adv T Ramogale
Applicant's attorney:	Ian Levitt Attorneys
Respondent's counsel:	Adv A Oosthuizen SC
	Adv A Nacerodien
Respondent's Attorney:	Timothy & Timothy Inc.