IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO**: 39/2018**

Date heard: 03/10/2019

Date delivered: 15/10/2019

In the matter between:

AMANDA KUPA **Applicant**

and

ECONOMIC FREEDOM FIGHTERS **1st Respondent**

INDEPENDENT ELECTORAL COMMISSION **2nd Respondent**

INTSIKA YETHU MUNICIPALITY **3rd Respondent**

ZOLEKA QOTOYI **4th Respondent**

JUDGMENT

ROBERSON J:

[1] There are two applications in the above matter. The first is an application by the first respondent for leave to appeal against the judgment of Mnyatheli AJ, who is not available to hear the application. The second is an application by the applicant for an order declaring the appeal to have lapsed.

Application for leave to appeal

[2] It was common cause in the application in the court a quo that the applicant was a member of the first respondent, a political party, and was expelled from the party following a disciplinary hearing. She sought, and was granted: an order suspending the implementation of the decision of the first respondent's Central Command Team (the CCT) confirming her expulsion pending the outcome of her appeal to the National People's Assembly; and an order directing the first respondent to do all things necessary to reinstate her to her position as its councillor in the third respondent municipality pending the outcome of her appeal to the National People's Assembly. The first respondent, which was the only respondent which opposed the application, was ordered to pay the costs of the application.

[3] In her founding affidavit the applicant recounted how she came to be expelled from the first respondent. Following the August 2016 municipal elections she was deployed by the first respondent as one of its proportional representation councillors in the third respondent's council. At the end of August 2016 an instruction was received from a senior member of the first respondent, Mr Floyd Shivambu, that all councillors who received less than 100 votes from their wards should justify why they should not be removed. The applicant felt this was unfair

because she was a proportional representation councillor. On request she made representations to the first respondent which were rejected and she was verbally told by its provincial co-ordinator to resign. She did not resign and in April 2017 received a notice of suspension in which she was requested to appear before a disciplinary committee in June 2017. She said that the notice did not set out the charges and she was given five days to prepare for the hearing. She pleaded guilty to non-compliance with a verbal instruction to resign. She said that such an offence was not listed in the first respondent's Code of Conduct and Revolutionary Discipline (the Code). She was sentenced to expulsion. The CCT wrote to her confirming the expulsion. She noted her appeal to the National People's Assembly and emailed it to admin@efighters.org.za. While waiting for a decision on appeal, she was advised by the Speaker of the third respondent that the first respondent had instructed the Speaker to replace her as a councillor. In support of this allegation she annexed a copy of a letter from the first respondent to the third respondent, from which it is apparent, inter alia, that the third respondent, on receiving the instruction, had informed the first respondent that it was aware that the applicant was appealing her expulsion. The fourth respondent was deployed by the first respondent in her place.

[4] It is convenient at this point to set out the relevant clauses of the first respondent's Code. Clause D.24 provides:

> "Sentences of suspension and expulsion from the EFF shall not be executed until the finding has been confirmed by the CCT."

Clause D.25 provides:

> "The decision of the CCT to confirm a suspension or expulsion may, on application by the offender, be placed before the National People's Assembly as a subject of final review/appeal."

[5] The answering affidavit was filed out of time and the court a quo refused condonation for the late filing, although the applicant filed a replying affidavit. Nonetheless for the purpose of considering the prospects of success of an appeal, I shall have regard to the contents of the answering affidavit.

[6] The deponent was Mr Yazini Tetyana, the provincial co-ordinator of the first respondent and the person who allegedly told the applicant to resign. He did not deny that he had done so. His response to this allegation was to say that he had no knowledge of it and put the applicant to the proof. The point was taken in the answering affidavit that the applicant's interpretation of the Code was improper. Tetyana maintained that the execution and confirmation of a sentence of expulsion is not dependent on the consideration of a review or appeal. If this was so it would have been expressly stated. Clause D.24 would have been non-existent (I think he meant purposeless) if confirmation of execution of expulsion vested under clause D.25. The first respondent was entitled to execute the expulsion pursuant to clause D.24.

[7] Tetyana denied the alleged instruction by Shivambu but admitted that councillors who did not get more than 100 votes were asked to make representations as to why they should not be removed as councillors. He denied that the applicant's representations amounted to representations. He admitted the

expulsion but repeated that the first respondent was entitled to execute the applicant's expulsion pursuant to the provisions of clause D.24 of the Code.

[8] When the application for leave to appeal was argued, I requested submissions on the appealability of the court a quo's order. It was submitted on behalf of the first respondent that it was appealable because the order to reinstate the applicant made her an employee and was therefore final in effect. I do not agree. The criteria for determination of appealability have evolved somewhat in recent years. In *Tshwane City v Afriforum* 2016 (6) SA 279 (CC), after stating at paragraph [39] that the appealability of interim orders in terms of the common law depends on whether they are final in effect, Mogoeng CJ said the following at paragraph [40] (footnotes omitted):

> "The common-law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability. The principle was set out in *OUTA* by Moseneke DCJ in these terms:
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> > 'This court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is the interests of justice. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and

> substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.'"

[9] Applying these dicta to the present case, I am of the view that the order does not have an immediate and substantial effect, nor is the harm, if any, flowing from the order, serious, immediate, ongoing and irreparable. The reinstatement of the applicant and the suspension of her expulsion was merely temporary pending the decision on her appeal, which could be decided either way. There was no finding on the merits of her appeal, merely an opportunity given to her to pursue her appeal without being prejudiced in the meantime. There was no suggestion that the applicant did not carry out her duties as a proportional representation councillor properly and in the interests of the people she served while in office. There was no suggestion that she would cause irreparable damage to her party or to municipal governance during her reinstatement while awaiting the outcome of the appeal. In the result I am of the view that the order of the court a quo is not appealable.

[10] If I am wrong in that regard, I am of the view that in any event there are no reasonable prospects of a successful appeal.

[11] The judgment of the court a quo turned on the interpretation of clauses D.24 and D.25 of the applicant's Code. I quote the relevant paragraphs of the judgment in relation to the interpretation of these two clauses:

> "[26] The expulsion of a member of any organisation is a very drastic and significant step. It severs the membership and cuts completely all ties a member has with the organisation. This Clause D.25 seems to afford, not just an offender a final opportunity to be heard, but also affords the organisation itself, the latitude to ensure that it has exhausted all channels before it parts final ways with the offender. It is a 'subject of final review/appeal'.
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> [27] Logically the subject of final review or appeal would have little or no effect if the offender has already left the organisation, her or his fate having been determined by the CCT. On a circumspect and reasonable or purposive interpretation, Clause D.25 occurring also, as it does as a final Clause of this disciplinary chapter of first Respondent's Code, it is intended to be the last phase in the process of expulsion following a disciplinary action, without which the process will not have been completed.
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> [28] Applicant was entitled to all procedural rights and processes contemplated in the Code for which she signed as a member. First Respondent acted prematurely in not affording her a hearing in terms of Clause D.25. There seems to be no other reasonable interpretation."

[12] I am in respectful agreement with such an interpretation and am of the view that there is no reasonable prospect that another court would interpret the effect of the clauses differently. Counsel for the first respondent was, at best, equivocal about the correctness of this interpretation.

[13] In the application for leave to appeal one of the grounds set out was that the applicant had not followed the correct procedure following a sentence of expulsion, and that her appeal was lodged out of time. It was further submitted during argument that the email address to which she sent her notice of appeal was incorrect. These points were not raised in the answering affidavit and it is apparent from the judgment that they were not argued. The focus in the hearing was clearly on an interpretation of clauses D.24 and D.25 and whether or not the first respondent could execute expulsion pending an appeal.

[14] A further ground was that even if the appeal had been correctly lodged, the expulsion of the applicant remained in force by operation of law, as prescribed in section 27 (c) of the Local Government: Municipal Structures Act 117 of 1998. This subsection provides:

> "**27 Vacation of office**
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> 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;"

In my view the subsection cannot take effect until the appeal process is finalised. Interestingly, as already mentioned, it is apparent from the first respondent's letter to the third respondent (see paragraph [3] above) that the third respondent had raised the fact that the applicant was appealing the expulsion. If this ground was raised as a new point of law on appeal I am of the view that there is no prospect that it would be successful.

[15] Yet a further ground of appeal which was not raised in the court a quo was that there can be no unlawful interference with the first respondent's right provided for in s 19 (1) (b) of the Constitution. This subsection provides:

> "19 **Political rights**
> (1) Every citizen is free to make political choices, which includes the right-
> *(b)* to participate in the activities of, or recruit members for, a political party;"

I do not think that this provision has any bearing on the interpretation of the relevant clauses in the Code and the applicant's right to appeal a decision of her party. Again, if this ground was raised as a new point of law on appeal, there is in my view no prospect that it would be successful.

[16] In the result the application for leave to appeal cannot succeed and should be dismissed.

Application to declare the appeal lapsed

[17] This was a misconceived application because leave to appeal had not been granted and all that was pending was the application for leave to appeal, which was launched in time. The first respondent justifiably opposed this application and filed an answering affidavit. The applicant accepted that the application was misconceived. It is only fair therefore that she should pay the costs of this application.

[18] The following order will issue:

[18.1] The application for leave to appeal is dismissed with costs.

[18.2] The application to declare the appeal lapsed is dismissed with costs.

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J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

Applicant: Adv S Poswa, instructed by Yokwana Attorneys, Makhanda.

First Respondent: Adv G Benson, instructed by Netteltons Attorneys, Makhanda.