

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO : 6512/2011

In the matter between:

THE INKATHA FREEDOM PARTY	First Applicant
MBANGISENI SHADRACH YENGWA	Second Applicant
DUDU NONHLANHLA ZONDI	Third Applicant
IGNATIUS NYOKA	Fourth Applicant
VILOSHENE PILLAY	Fifth Applicant
SILAM VINCENT ZONDI	Sixth Applicant
RAJENDRAPARSAD MAHARAJ	Seventh Applicant
MTHULISENI LEANERD SHEZI	Eighth Applicant
EMMANUEL NKOSIKAYISE MNCUBE	Ninth Applicant
MBONGISENI RICHARD DLAMINI	Tenth Applicant

and

THE AFRICAN NATIONAL CONGRESS	First Respondent
THE NATIONAL FREEDOM PARTY	Second Respondent
THE DEMOCRATIC ALLIANCE	Third Respondent
THE UMVOTI MUNICIPALITY	Fourth Respondent
AHMED MOHAMED SHAIK	Fifth Respondent
PHILANI GODFREY MAVUNDLA	Sixth Respondent
SIKHUMBUZO ENOCK MNGIMA	Seventh Respondent
PAMELA THANDAZILE ZUMA	Eighth Respondent
BONGANI EUGENE MLONDO	Ninth Respondent
ZANDILE CHRISTINA NGEMA	Tenth Respondent
BETHUEL GCINA DLADLA	Eleventh Respondent
SIBONGISENI ANTHONY NZAMA	Twelfth Respondent
KHULEKANI LINDOKUHLE CHONCO	Thirteenth Respondent
NQOBILA SIPHIWAYINKOSI VICTORY MAPHANGA	Fourteenth Respondent
ZAMOKWAKHE WILSON XABA	Fifteenth Respondent
ENOCH SIBONGISENI SHANGE	Sixteenth Respondent
PAUL RICHARDS BUSS	Seventeenth Respondent

J U D G M E N T

K PILLAY J

The Tenth Applicant instituted an application seeking an order declaring the decision of the Council of the Fourth Respondent at its meeting held on 31 May 2011 to appoint an *“Executive Committee consisting of two members of the African National Congress and only one member of the Inkatha Freedom Party”* unconstitutional and invalid and declaring that all decisions made by the Executive Committee from 31 May 2011 to date of application as null and void.

The Fourth Respondent opposed the application and on 21 July 2011 demanded security from the Applicants. The Applicants opposed the notice demanding security for costs. This opposition then gave rise to the present application.

The basis on which security is sought is as follows:

- (a) The main application is vexatious;
- (b) The First Applicant has serious financial problems and that it is highly unlikely that it will pay the Fourth Respondent’s costs should it be ordered to do so.

The Applicants deny both.

In dealing with the first issue, it is so that this Court has an inherent jurisdiction to prevent a vexatious action as being an abuse of the process of Court by ordering the vexatious litigant to furnish security for costs. *Western Assurance Co v Caldwell's Trustee* ¹

At the same time this Court is mindful of the provisions of Section 34 of the Constitution that allows everyone the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or tribunal, which right may be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society.

In order to be classified as vexatious, the action must be obviously unsustainable ² *Argus Printing & Publishing Co Ltd v Anastassiades*.

In *Fitchet v Fitchet* ³ the Court held that:

"It may well be that, in applications for security for costs, the test should be somewhat different. Where, in an application for dismissal of an action, the Court without hearing evidence on the merits will require moral certainty alone that the action is unsustainable, in an application for security for costs the merits test should be somewhat less stringent, and other factors, which are irrelevant in a dismissal application, should be taken into account. I am therefore in respectful agreement with the statement of Klopper J in Davidson's Bakery (Pty) Ltd v Burger 1961(1) SA 589 (O) at 593E, viz:

'Myns insiens is die meriete van eiser se aksie nie altyd deurslaggewend nie, maar slegs 'n factor wat in oorweging geneem moet word. Daar kan gevalle wees waar die Hof sekuriteitstelling sal verleen al word did slegs bevind dat die kanse van welslae op die aksie alleen twyfelagtig is sonder dat dit gesê kan word dat dit geen vooruitsigte van sukses inhou nie.'

¹ 1918 AD 262 at 274

² 1954(1) SA 72 (W) 73 A-H

³ 1987(1) 450 @ 454 E-C-D

Section 43 of the Structures Act provides:

“Composition of Executive Committees

- (1) *If the Council of a municipality establishes an executive committee, it must elect a member of councillors necessary for effective and efficient government, provided that no more than 20 per cent of the councillors or 10 councillors, whichever is the least, are elected. An executive committee may not have less than three members.*
- (2) *An executive committee must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion they are represented in the council.*
- (3) *A municipal council may determine any alternative mechanism for the election of an executive committee, provided it complies with Section 160(8) of the Constitution.” (our emphasis)*

It is the Fourth Respondent’s contention that the decision of the Council of the Fourth Respondent is consistent with the provisions of the Section 43(1) of the Act in that the Executive Committee consists of one member of the African National Congress, one member of the National Freedom Party and one member of the

Inkatha Freedom Party.

In this regard the Applicants contend that the decision of the Council is neither consistent with the provisions of Section 43(2) nor Section 43(3) of the Act, and whether or not this allegations are supported by the minutes does not affect their cause of action, as the Municipality is bound to follow the prescripts of the statute.

I have perused the main application. Therein the Applicants assert that a Municipality which has an Executive Committee must either constitute it so that its members represent the parties and interests in substantially the same preposition as they are represented in the Council or it may determine an alternative mechanism which ensures that the parties are fairly represented.

The Applicants contend that the Respondents have set about constituting and Executive Committee which does not comply with a system of prepositional representation as provided for in Section 43(2) of the Act. It is submitted that at no stage did the Council purport to determine an alternative mechanism which would allow the parties and interests reflected within the Council to be fairly represented.

The Respondents focus their submissions only on the interpretation of Section 43(1). No reference is made to Sections 43(2) or 43(3) of the Act. I am not persuaded that the Applicants case is obviously unsustainable.

Turning to the second issue viz that it is unlikely that its costs will

be paid if the Applicants are unsuccessful in their application, all that the Respondents have put up is a newspaper article wherein the.....

The Respondents did not seek to have it admitted in terms of Section 3 of the Law of Evidence Amendment Act 45 of 1988 (the Act). Section 3 of the aforementioned Act provides

The Applicants have placed it in dispute by alleging it is hearsay.

If this Court were to accept the newspaper article as proof its contents, then it could give rise to a situation where any litigant can simply rely on a newspaper article to

No proper foundation has been laid for its admission

Procedure laid down in Rule 53 of the Uniform Rules of Court should have been followed.

The Applicants counter claim this by stating that Rule 53 only applies to proceedings to bring under review the decision or proceedings of any inferior Court and of any tribunal, board or offices performing judicial, quasi judicial or administration function.

The Applicants assert that the Fourth Respondent does not fall under any one of these categories. In addition, it is contended that the application does not pertain to administrative, judicial or quasi judicial actions, but declaratory relief concerning the legality of a resolution passed by a legislative body.

The decision which they seek to have set aside is the result of a vote; accordingly there are no reasons to be obtained. They are also in possession of the record of the Councils deliberations.

K PILLAY J

Date of Judgment	:	April 2012
Applicants Counsels	:	Advocate R J Seggie SC Advocate A L Christison
Instructed by	:	J Leslie Smith & Company Applicant's Attorneys 332 Jabu Ndlovu (Formerly Loop Street) Pietermaritzburg Ref : W Smith/tm/MAT 15225
4 th Respondent's Counsel	:	Advocate T V Norman Advocate W S Kuboni
Instructed by	:	Garlicke & Bousfield Inc 4 th Respondent's attorneys La Lucia Ridge Office Estate c/o Ngcobo Poyo & Diedricks Inc 190 Hoosen Haffejee Street Pietermaritzburg

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