



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Reportable

Case no: 006/2024EC

In the matter between:

THABAZIMBI FORUM 4 SERVICE DELIVERY

Applicant

and

**INDEPENDENT ELECTORAL COMMISSION
OF SOUTH AFRICA**

First Respondent

**CHAIRPERSON OF THE INDEPENDENT ELECTORAL
COMMISSION OF SOUTH AFRICA**

Second Respondent

BUTANA BEN TLHABADIRA

Third Respondent

MEISIE MZWANA

Fourth Respondent

THABAZIMBI LOCAL MUNICIPALITY

Fifth Respondent

Neutral Citation: *Thabazimbi Forum 4 Service Delivery v Independent Electoral Commission of South Africa and Others* (006/24EC) [2024] ZAEC 12 (13 May 2024)

Coram: Zondi JA and Adams and Yacoob AJJ and Professor Ntlama-Makhanya and Professor Phooko

Heard: Decided in chambers on the papers.

Delivered: 13 May 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by publication on the website of

the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 13 May 2024.

Summary: Application to compel Electoral Commission to amend records and replace proportional representation candidate – not appropriate to create own timelines and deemed decision for convenience – disjunction between Electoral Commission requirements and Municipal Systems Act, 117 of 1998 – proper case must be made out that requirements fulfilled or that requirements impossible to fulfil – no case made out – application dismissed.

ORDER

The application is dismissed, with no order as to costs.

JUDGMENT

Yacoob AJ (Zondi JA and Adams AJ and Professor Ntlama-Makhanya and Professor Phooko (Additional Members) concurring):

[1] This application is concerned with the circumstances in which a person occupying a seat in a local municipal council by virtue of his or her place on a party's list may be replaced. It deals also with the intersection between how legislation requires political parties to deal with the Electoral Commission of South Africa ("the Commission"),¹ which is the first respondent in this matter, and how legislation requires them to deal with local government structures, in particular, in this case, Municipal Managers. The application also raises the issue whether a litigant can create its own timeline by imposing a deadline on the Commission.

[2] The applicant in this matter ("the Forum") is a registered political party which obtained a proportional representation seat in the Thabazimbi Local Municipality, which is the fifth respondent ("the Municipality"), in the 2021 local government elections.

[3] The Forum approaches this Court on the basis of urgency. It seeks an order directing the Commission to "make a decision" deleting the name of the third respondent, Mr Butana Ben Tlhabadira (Mr Tlhabadira) as the Forum's contact person, representative on the proportional representative list and municipal councillor and inserting that of Mr Kopo Motshegwa (Mr Motshegwa). It also seeks an order directing the Commission to delete the name of the fourth respondent, Ms Meisie Mzwana (Ms Mzwana), and replace it with the name of Ms Mita Mtjila (Ms Mtjila) as the head of administration and political head of the Forum. Ms Mtjila is the deponent to the founding affidavit.

¹ The Commission has been incorrectly cited by the applicant but nothing turns on that.

[4] The Forum seeks in the alternative the review and setting aside of the Commission's refusal implement these changes. The Forum relies on section 27(1)(c) of the Local Government: Municipal Structures Act, 117 of 1998 ("the Structures Act") for this relief.

[5] There are a number of deficiencies evident in the founding affidavit. Because of this, and the view I take of the matter, I deal first with the facts as set out in the founding affidavit, before then dealing to the extent necessary with the cases of the Commission and Mr Tlhabadira. Ms Mzwana and the Municipality have not participated in these proceedings.

The applicant's founding affidavit

[6] Ms Mtjila's founding affidavit begins, effectively, with a letter sent on 1 September 2023 from the Forum, in the person of Ms Mtjila and a Mr George Rangwanasha, informing the Municipality in writing that Mr Tlhabadira was no longer a member of the Forum, and that a vacancy in the municipal council therefore needed to be declared and filled.

[7] The letter of 1 September 2023, as well as a resolution annexed to the founding affidavit dated 5 January 2024, list Ms Mtjila as the "Central Chairperson" of the Forum. However, in her affidavit, she describes herself as the head of administration and political head of the Forum, and the "appointed contact person" between the Forum and the Commission. She does not annex any document in support of these allegations. She further does not explain when or how she acceded to or was appointed or elected to these positions, and does not explain the discrepancy between her affidavit and the documents annexed to it. The letter also, describes Mr Rangwanasha as the Deputy Chairperson of the Central Council.

[8] The letter has annexed to it a dismissal notice addressed to Mr Tlhabadira dated 25 August 2023, signed by Ms Mtjila and Mr Rangwanasha, informing him that he has been expelled for gross misconduct with effect from 1 September 2023. The nature of the alleged misconduct is not disclosed to the court, nor the circumstances of the proceedings which culminated in the expulsion.

[9] The letter also has annexed to it an undated party list of candidates on which Mr Motshegwa's name is at the top. There is nothing stating that this list replaces a previous list or anything of that sort. In the body of the affidavit, this document, FA9, is described as the list of office bearers or members of the Forum's executive committee. It is not, however, labelled as such, and if it was, Ms Mtjila's name does not appear on it. There is no such list on which Ms Mtjila's name appears.

[10] The Forum, also in the person of Ms Mtjila and Mr Rangwanasha, then wrote to the Commission on 3 September 2023, informing the Commission that Ms Mtjila was the chairperson and head of the administration of the Forum and that Mr Motshegwa was the contact person of the Forum. The letter does not say when or how these people were appointed to these positions, nor does the letter say anything about the people who had previously been the Forum's contact persons. The letter does not purport to de-authorise any person who had previously been an authorised contact person between the Forum and the Commission.

[11] The Municipality, in the person of the Municipal Manager, wrote to the Commission on 20 October and 7 November 2023 confirming that Mr Tlhabadira was no longer a member of the Forum.

[12] On 13 December 2023 the Commission wrote to the Municipality informing it that Mr Tlhabadira was the registered contact person of the Forum and that Ms Mzwana was the registered leader of the Forum. Ms Mtjila was copied on this correspondence but the Commission apparently misspelled her email address.

[13] The Forum became aware of this correspondence at some time in December and retained attorneys on 8 January 2024. It then caused a letter to be sent to the Commission on 22 January 2024 setting out its version of who the proper officials of the Forum were and asking the Commission for "proof".

[14] Unfortunately the founding affidavit does not explain when Ms Mtjila and Mr Motshegwa were elected or appointed to their positions, or when Ms Mzwana was removed and what steps were taken to inform the Commission of her removal.

[15] In the meantime, an interdict had apparently been obtained to prevent Mr Tlhabadira from representing himself as the Speaker of the Municipal Council. The founding affidavit does not explain the circumstances or relevance of this interdict to this application.

[16] The Forum caused a number of letters to be addressed to the Commission, none of which received a substantive response, and eventually on 27 February 2024 it addressed a letter imposing a deadline of 1 March 2024 for a response, failing which it would approach this Court, which it then did. According to the Forum, the Commission “failed to make a decision” on 1 March 2024, and the application for review of that failure must be brought within three days of the decision, in terms of the Rules of this Court. The application was then instituted within three court days of 1 March 2024.

[17] I must emphasise that the problems in the Forum’s case are discernable even before one has recourse to the answering papers. This is of concern because it is by now trite that, in application proceedings, an applicant bears the onus, and must make out its case in its founding affidavit. In addition, if there is a dispute which can be determined on the papers, it is determined on the respondents’ version. It is clear from what I have set out above that there are problems for the Forum before one even gets to the respondents’ versions.

[18] The Forum has, by means of imposing the date of 1 March 2024 on the Commission, artificially created a date on which the Commission has taken, or failed to take, a decision. It has also failed to establish that the people it seeks to have substituted in the Commission’s records are properly appointed or elected to the positions it alleges they hold, and that the people it seeks to oust, in particular Ms Mzwana, have been properly ousted. However, for completeness sake, I now set out the versions of the respondents.

The respondents’ versions

[19] The Commission has filed an answering affidavit setting out its position. It acknowledges receipt of correspondence from the Municipal Manager informing it that Mr Tlhabadira is no longer a member of the Forum. The Commission states

that when it receives a notification from a Municipal Manager it undertakes what it calls “basic due diligence” in order to ensure that proper processes have been followed. According to the Commission this includes considering whether the notification was signed by the “registered party leader or contact person”, as required by section 27(2) of the Structures Act. The Commission takes the view that there is an internal party dispute and it is unclear whether a vacancy truly has arisen.

[20] According to the Commission it has received correspondence from Mr Tlhabadira who is the registered contact person for the Forum, contending that there is fraudulent conduct. The Commission also annexes a letter sent to the Municipal Manager by the Forum, this time in the person of Ms Mzwana and Mr Tlhabadira, demanding the retraction of the letter of 20 October 2023, confirming that Ms Mzwana is still the Central Leader of the Forum and Mr Tlhabadira still the Chairperson of the Central Council, and still the authorised representative of the Forum. In these circumstances the Commission is, in effect, hamstrung. It submits that it cannot be compelled in these circumstances to take a decision nor can any notional decision be reviewed. Instead, the dispute within the party needs to be determined. Certainly, as far as the Commission is concerned, the people who are, according to its records, the registered leader and the registered contact person of the Forum, have asserted that they still hold those positions, and Ms Mtjila has not provided any basis on which the Commission can replace them.

[21] Mr Tlhabadira alleges in his answering affidavit that the urgency is self-created, and that Ms Mtjila is no longer a member of the Forum. According to him Ms Mtjila ceased to be a member of the Forum on 10 March 2024, which is after the founding affidavit was signed and the application was instituted. Nevertheless, Mr Tlhabadira alleges that she does not have the authority to have brought the application on the Forum’s behalf. He also alleges that Mr Motshegwa is not a member of the Forum.

[22] Both Mr Tlhabadira and the Commission annex affidavits from Mr Rangoanasha, (referred to by Ms Mtjila as Mr Rangwanasha) in which he distances himself from the letters apparently co-signed by him, dismissing Mr Tlhabadira as a member of the Forum and advising the Municipal Manager that Mr Tlhabadira is no longer a member of the Forum. He also states that he was never the Deputy

Chairperson but that he is the Treasurer. Mr Tlhabadira contends therefore that the notice expelling him is fraudulent.

[23] Mr Tlhabadira also raises as a point *in limine* that the Municipal Manager has not been joined. However, the Municipality has been joined and in my view that is sufficient for purposes of this application.

The replying affidavits

[24] The Forum in the person of Ms Mtjila filed two replying affidavits, one in response to each answering affidavit. Ms Mtjila does not deal with the issue of the authorised representative raised by the Commission. She simply states that it is a point raised only now by the Commission, and ignores the fact that it is a legal requirement.

[25] Ms Mtjila still does not explain the basis on which she contends that Ms Mzwana is no longer the leader of the party. Instead, Ms Mtjila castigates Ms Mzwana's failure to participate actively in these proceedings. She also takes issue with the Commission for not demonstrating how Mr Tlhabadira and Ms Mzwana became the registered authorised persons in the Commission's records. This is despite the fact that, in her own founding affidavit, she describes Ms Mzwana as the registered head of administration and political head of the Forum. She simultaneously does not deny that they held the positions they purport to hold in the letter annexed to the Commission's affidavit.

[26] Ms Mtjila, instead, makes simply a bald allegation that she is the person the Commission should communicate with, and that that information was timeously communicated to the Commission, without setting out either the relevant facts or the legal basis for this claim. The letter dated 3 September 2023 unfortunately does not fulfil that requirement, for reasons set out below.

[27] Ms Mtjila takes the point that s 27(2) of the Structures Act, by requiring notification by an "authorised person", fails to cater for the situation in which the authorised person is the person who has been removed. Of course, although Ms Mtjila has, on the face of it, set out a *prima facie* basis for a conclusion that Mr Tlhabadira has been removed, there is not one word explaining or alleging that Ms

Mzwana is no longer the leader, or saying why she cannot be the person who informs the Commission that a new contact person must be entered into its records.

Urgency and the relevant time periods

[28] On Ms Mtjila's version, Mr Tlhabadira was expelled from the Forum with effect from 1 September 2023. The application was only instituted over six months later. The Forum, or Ms Mtjila, appears to have been happy to simply send letters and not receive substantive responses for six months. Any claim of urgency cannot be considered with seriousness. Bound up with the claim that the matter is urgent is the contention that, because the Forum imposed a deadline for a response on the Commission on 1 March 2024, and the Commission did not respond by that date, the deemed date of the Commission's decision is 1 March 2024.

[29] There appears to be a practice among litigants approaching this Court, who, months after obtaining an unsatisfactory response from the Commission, impose a deadline for a "final" response on the Commission, so that the time period within which a review must be brought in terms of this Court's rules can start running from a date which suits the litigant. This manner of litigation is expedient and frivolous and is to be frowned upon.

[30] The Commission took a decision on 13 December 2023. Although it did not reach Ms Mtjila immediately, she does acknowledge that it reached her at some point in December 2023. It is on that date that the clock started running. That is when the Forum ought to have resolved to retain attorneys and sought legal advice. It did not. Instead, it did these things at dates which remain unexplained and which the Court must assume were for its own convenience. This too shows that the matter was not truly urgent.

[31] Having found that the matter is not truly urgent and that any review is out of time, it would have been in this Court's power to simply decline to deal any further with the matter. However, I consider it is in the interests of justice to at least give the parties the benefit of an analysis of what is before us, to avoid the institution of other abortive and wasteful proceedings.

Analysis of the applicable legislative framework

[32] Local municipal councils consist of councillors elected directly to represent wards, and councillors proportionally representing parties that contested the election in that municipality.² Councillors elected by way of proportional representation obtain seats by virtue of a place on the party's list of candidates. Seats are allocated to the party in proportion to the votes cast for it, and candidates are allocated seats in the order in which they appear on the list.³

[33] These candidates therefore hold their seats by virtue of the favour of the party that has garnered the votes of the electorate, and, naturally, would lose their seats if they stop being a member of that party. This is provided for in s 27(1)(c) of the Structures Act. Section 27(2) of the Structures Act, which was added with effect from November 2021, limits the power to inform a Municipal Manager that there is now a vacancy because the person is no longer a member of the party to an "authorised representative", who is a person authorised by the party to act on the party's behalf to do that notification of the Municipal Manager.⁴

[34] So, although the identity of the authorised representative is something that is for the relevant party internally to do, it is something that has external effect and the party must, therefore, take steps to ensure that the Municipal Manager is aware of who the authorised person is. The Structures Act does not make provision for how this happens. It is up to the individual party to ensure that this happens.⁵

[35] It is not clear from the constitution of the Forum which is annexed to the founding affidavit who the authorised person is. Ms Mtjila's letter of 3 September 2023 to the Commission states that the Chairperson of the Central Council is the authorised person. The Forum's constitution states that this person has the responsibilities including the organisation and administration of the Forum and "exercises as head of deployments", so it is possible that this includes the functions of the authorised person contemplated in the Structures Act. There is nothing on the papers which demonstrates that the identity of that authorised person has been

² In terms of section 22 of the Structures Act.

³ The exact mechanics are set out in Part 3 of Schedule 1 of the Structures Act.

⁴ In terms of the definition of "authorised representative" inserted into section 1 of the Structures Act.

⁵ The Local Government: Municipal Electoral Act 27 of 2000 also requires parties to use an authorised representative for submitting party lists and nominating ward candidates, but also does not specify how those representatives are made known.

conveyed to the Municipality.

[36] Once a party has informed the Municipal Manager that there is a vacancy because the person who held the proportional representation seat is no longer a member of the party, the process to fill the seat again is governed by items 18, 19 and 20 of Schedule 1 of the Structures Act.

[37] The Municipal Manager must inform the Commission within 14 days after the councillor has ceased to hold office. Obviously this requires that, where necessary, section 27(2) has been complied with. The Commission, in the person of the Chief Electoral Officer, must declare then that the next person at the top of the list is elected to the vacancy. If the Municipal Manager fails to inform the Commission, the relevant provincial Member of the Executive Council for Local Government must do so. However, the party has 21 days from the vacancy occurring to amend its list, and the vacancy must then be filled within 14 days of that amendment.

[38] The Commission in its interaction with a political party is regulated, amongst others by the Regulations for the Registration of Political Parties, 2004 (“the Regulations”) promulgated under the Electoral Commission Act, 51 of 1996.

[39] Regulation 2 provides that parties must register with a registration form, which is Annexure 1 to the Regulations. The Annexure includes the details of the party leader, the contact person of the party, and the members of the party’s executive body. Regulation 9 provides that a change to the information provided in that form must be given in writing within 30 days by the registered leader of the party.⁶

[40] It is clear from this that there is no reason why the “registered leader” and “contact person” in accordance with the Regulations need to be the same person or persons as the “authorised person” in terms of the Structures Act. To the extent that the Commission’s due diligence exercise requires that the authorised person is in some way congruent with what the Commission has in its records, when the records do not mirror the requirements of the Structures Act, this is not acceptable. The

⁶ For some reason Ms Mtjila states in her Founding Affidavit that this Regulation was amended in 2024, but refers to the version promulgated in 2004, before amendment in 2021.

Commission should, if it wishes to be able to carry out such checks and balances, have a requirement that it also be informed in writing of the “authorised person”.

The relief sought in the context of the legislative framework

[41] The Forum asks in its notice of motion for relief that is somewhat incoherent. In the heads of argument submitted on the Forum’s behalf, the relief sought is limited to a direction to the Commission to effect the name changes and update its records in terms of s 27(1)(c) of the Structures Act, to replace Mr Tlhabadira’s name on the party list with that of Mr Motshegwa, and to replace Ms Mzwana’s name with that of Ms Mtjila.

[42] Taking the second part of the relief first, there is absolutely no basis laid in the papers for the deletion of Ms Mzwana’s name, or for the substitution of Ms Mtjila’s name. Ms Mtjila acknowledges in her affidavit, at paragraph 13, that Ms Mzwana is the registered head of administration and political head. As I have noted multiple times in this judgment, there is not one word about when and how Ms Mzwana ceased to hold that position, or when and how Ms Mtjila came to that position. As I noted earlier, Ms Mtjila’s letter of 3 September 2023 to the Commission states that ‘according to the hierarchy of TSFD Leadership, the Chairperson of the Central Council is the head of Administration of the organization’. Ms Mtjila does not assert that she is the Chairperson of the Central Council. She is allegedly the Central Chairperson, which, according to the Forum’s constitution, is a different office.

[43] Ms Mzwana is the registered head of the party. The Regulations require that she inform the Commission in writing that she is no longer the person who occupies that position and who has taken her place. She has not done so and no evidence has been placed before the Court that she cannot do so, or that she was obliged to do so and refused to do so. In those circumstances there is no case made out for that relief.

[44] Secondly, the replacement of Mr Tlhabadira’s name on the party list with that of Mr Motshegwa requires the Court to find that the notification to the Municipality by the Forum on 1 September 2023 was consistent with s 27(2) of the Structures Act. There is no evidence regarding on what basis Ms Mtjila should be considered

to be the authorised person to make that notification, or on what basis the Court can come to a finding that there is no other authorised person as required by the Structures Act, and that therefore the notification of 1 September 2023 is valid and must be acted upon.

[45] Again. Ms Mtjila, while acknowledging Ms Mzwana's position in the Forum, does not say anywhere why Ms Mzwana is unable to fulfil the duty of an authorised person, or to write a letter either to the Commission or to the Municipality.

[46] The argument that s 27(2) of the Structures Act is deficient is not supported by the facts of this case – there is absolutely nothing in the facts alleged by Ms Mtjila that a person who is entitled in terms of the Forum's constitution to act as the "authorised person" is unable to do so. Certainly, nobody has suggested that Mr Tlhabadira is the only person who can do so. On Ms Mtjila's rather convoluted and garbled version it seems that Ms Mzwana would have the authority to do so, and no reason is given by her why Ms Mzwana cannot do so. Any argument on the failure of the section to deal with a situation where the authorised person is the person who is no longer a member of the party is therefore speculative, irrelevant and not ripe for determination.⁷

[47] There is no case made out, therefore, for a finding that there was a valid notification to the Municipal Manager.

[48] To the extent that the relief sought requires the Court to find that, in fact there was a valid expulsion of Mr Tlhabadira, there is insufficient evidence before the Court for that to take place. The Commission's contention that there is a dispute within the party that requires determination, is correct but that dispute is not currently before the Court and the Court cannot now determine it.

Costs

[49] It is the practice of this Court not to make costs awards, and the Commission does not seek costs against the Forum. However, Mr Tlhabadira seeks a costs order against Ms Mtjila in her personal capacity for having, according to him, instituted

⁷ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 para 199.

these proceedings when she is not even a member of the Forum. As pointed out above, the documentation on which Mr Tlhabadira relies for this is dated after the application was instituted. Ms Mtjila was, at the very least, still a member of the Forum at the time the application was instituted.

[50] Although Ms Mtjila's founding papers are woefully deficient in any facts on which the Court may have come to her assistance, this does not mean that the application was instituted in bad faith or that this application has any bearing on the outcome of how any leadership dispute of the Forum may be determined. I therefore do not consider that it would be in the interests of justice to make a costs order.

[51] For these reasons I order as follows:

The application is dismissed with no order as to costs.

S YACOOB
Acting Judge of the Electoral Court
Bloemfontein

APPEARANCES

For the applicant: E Mokutu SC and M Motlogelwa
Instructed by: JL Raphiri Attorneys Inc

For the first and second respondents: M De Beer
Instructed by: Moeti Kanyane Attorneys

For the third respondent: SS Tebeile and TA Makola
Instructed by: Mampa and Machethe Attorneys