



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO: 2452/2022

In the matter between:

GARY STANTON VAN NIEKERK	First
Applicant	
JOHN MERVYN MITCHELL	Second
Applicant	
BEVAN BROWN	Third
Applicant	
NORTHERN ALLIANCE	Fourth
Applicant	

and

NELSON MANDELA BAY MUNICIPALITY	First Respondent
CITY MANAGER OF THE NELSON MANDELA BAY MUNICIPALITY	Second Respondent
INDEPENDENT ELECTORAL COMMISSION	Third Respondent
NEVILLE STANLEY	Fourth Respondent

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....
DATE	SIGNATURE

**REASONS FOR ORDERS GRANTED ON 30 AUGUST 2022 AND
02 SEPTEMBER 2022**

POTGIETER J

INTRODUCTION

[1] I granted the following order without reasons due to the urgency of the matter, on 30 August 2022:

- “1. The First, Second and Third Applicants be and are hereby entitled to attend the First Respondent’s council meeting to be held at 10h00 on Tuesday, 30 August 2022 and to fulfil their duties as councillors.*
- 2. The application is postponed sine die to be case managed by the Deputy Judge President.*
- 3. The costs are reserved.”*

[2] The order was subsequently varied on 2 September 2022 to the following effect:

- “1. The order granted by the above Honourable Court on 30 August 2022 is reconsidered and varied as follows pending the final determination of the Applicants’ review proceedings still to be instituted:*

1. 1. 1 the First, Second and Third Respondents be and are entitled to attend the First Respondent's council meeting to be held on 7 September 2022, and to fulfil their duties as councillors;

1.1.2 The First, Second and Third Respondents are entitled to attend any subsequent continuation of the Council meeting of 30 August 2022.

2. The costs of the interim proceedings stand over for later determination by this Court.”

[3] The reasons for granting the aforesaid order as well as its variation follow and should be read together with the brief reasons that I gave on 2 September 2022 when I varied the original order.

BRIEF BACKGROUND

Main application

[4] The First, Second and Third Applicants (“the Applicants”) are members of the Fourth Applicant, the National Alliance political party (“the NA”). They have been representing the NA as councillors of the First Respondent (“the municipality”). The Second Respondent, the municipal manager (“MM”), opposed the application together with the municipality (“the Municipal Respondents”). There were no responses from the remaining two Respondents. The Municipal Respondents contended that the application papers were never served on the Fourth Respondent, hence his failure to respond. They submitted that this constituted a fatal defect in the proceedings. I deal with this issue more fully later in this judgement.

[5] The application was launched as a matter of urgency on 29 August 2022 seeking relief in general terms concerning the continued participation of the Applicants as councillors in the business of the municipal Council. The Municipal Respondents filed an answering affidavit on 30 August 2022. The Applicants elected not to file a replying affidavit.

[6] The stated basis for urgency was that a meeting of the municipal Council was scheduled for 10h00 on 30 August 2022 where matters of considerable importance to the NA were due to be dealt with. The First Applicant was elected as the Speaker of the Council and the Second Applicant was a Member of the Mayoral Committee (“MMC”) assigned to the Infrastructure and Engineering Portfolio which, according to the Applicants, was arguably the most important Department after the Treasury. The meeting of 30 August 2022 was scheduled to vote for the appointment of an Executive Director to this Department. The further important business to be dealt with at the meeting related to debating the Adjustment Budget and delivery of the Speaker’s oversight report. The Applicants indicated in their papers that if they were not allowed to participate in the meeting, the NA would be unrepresented at this important meeting, because they were the only representatives of the NA on the Council.

[7] The Applicants voluntarily decided during March 2022 to cease participating in meetings of the municipal Council pending the finalisation of High Court litigation in which they were involved. The finalisation of the litigation was considerably delayed for various reasons and it became necessary for the Applicants to attend the meeting of 30 August 2022 given the importance thereof. After having received confirmation from the Fifth Respondent, the Independent Electoral Commission (“IEC”), on 25 August 2022 that they were still officially listed as the representatives of the NA on the council, the Applicants wrote to the MM on Friday, 26 August 2022 seeking an undertaking by 16h00 on the same day that they would not be prevented from attending the council meeting on 30 August 2022. No reply was forthcoming, which resulted in the urgent application being launched on Monday, 29 August 2022. Having been the Duty Judge at that stage, a certificate of urgency was placed before me in the course of the morning on 29 August 2022 requesting that the application be enrolled as a matter of urgency in the course of the same afternoon. After having considered the matter, I issued directions in terms of Practice Rule 12(a)(i) of the applicable Joint Rules of Practice, *inter-alia*, for the matter to be heard at 14h15 on 29 August 2022 and for the issue of urgency to be argued at the hearing. I was subsequently approached by counsel for both the Applicants as well

as the Municipal Respondents who had reached agreement on the filing of answering papers and for the application to be heard before official court hours on 30 August 2022. I acceded to the request of the parties for the matter to proceed on the basis as agreed.

[8] In view of the attendant severe time constraints, the parties further agreed that the issue of the Applicants' participation in the meeting of 30 August 2022 only would be dealt with at the hearing and that the remaining issues would stand over for later determination, subject to the matter being dealt with in terms of the case flow management process applicable in this Division.

[9] The argument proceeded on 30 August 2022 on the papers as they stood by Mr Mullins SC on behalf of the Applicants, and Mr Moorhouse on behalf of the Municipal Respondents. The argument was concluded at approximately 9h30, about 30 minutes before the meeting was due to commence. In view of the need to dispose of the matter forthwith, I proceeded to issue the abovesaid order *ex tempore*.

Variation application

[10] I was subsequently presented with brief papers on Thursday, 1 September 2022 in respect of an urgent application for the reconsideration and variation of my above order which was set down for hearing on Friday, 2 September 2022 at 9h30. This application was also opposed only by the Municipal Respondents who filed a short answering affidavit deposed to by the MM. It was arranged that this application would be heard before the continuation of my normal Opposed Motion roll which stood down from the previous day until 10h00. The parties were not in a position to proceed with the matter before 10h00 on 2 September 2022 as envisaged and the Opposed Motion roll continued at 10h00. The application was accordingly only heard later in the afternoon towards the end of the normal roll. The application was again argued by Mr Mullins SC on behalf of the Applicants and this time by Mr Petersen on behalf of the Municipal Respondents. At the conclusion of the arguments, I gave brief reasons and varied the order as set out above.

THE MUNICIPAL RESPONDENTS' GROUNDS OF OPPOSITION

Urgency

[11] The issue of urgency was hotly contested by the Municipal Respondents in respect of both the main as well as the variation applications. The following facts and circumstances, which the Applicants submitted rendered the matter urgent, appear from their papers. A disaffected faction of the NA headed by the Fourth Respondent purported to terminate the membership of the Applicants. Notices to this effect were forwarded to the IEC and the MM during January 2022. On this occasion, the MM declined to act upon the notification in view of an envisaged High Court challenge, *inter alia*, to the validity of the termination of the membership of the Applicants. She notified the disaffected group accordingly on 26 January 2022. The envisaged challenge was brought as a matter of urgency under case number 329/2022. Judgement in this matter was subsequently handed down on 7 June 2022 effectively setting aside the termination of the Applicants' membership of the NA.

[12] On 21 March 2022, a further letter was addressed to the MM by the disaffected group erroneously indicating that case number 329/2022 was heard by the court on 22 February 2022 and was "*scrapped from the roll with cost (sic)*". In truth, the court declined to hear the application as a matter of urgency and it was consequently heard in due course resulting in the abovesaid judgement of 7 June 2022. On this occasion, the MM acted on the letter without affording the Applicants an opportunity to respond and notified the IEC of the apparent vacancies in a letter dated 22 March 2022. On the same day she wrote to the Applicants' attorneys refusing their request to withdraw her notice to the IEC relying on the basis that she was *functus officio*. On 23 March 2022 she issued an internal memorandum when it was brought to her attention by one of the officials that there might be an interim interdict prohibiting the declaration of proportional representation vacancies of the NA in the municipal Council. She adopted the stance in the memorandum that any interim interdict would be "*moot and unimplementable especially since I have already declared the vacancies of the three members (Speaker*

and two other councillors) of the Northern Alliance yesterday, 22 March 2022, and received confirmation thereof from the IEC accordingly. ... As such, the three former Northern Alliance members remain out of office and are no longer councillors, based on my declaration of their vacancies on 23 March 2022, and particularly in the absence of any other court order re-instating them to their former positions. ... Kindly ensure that the former speaker do not and cannot call any council meeting, since he, Gary van Niekerk, is no longer the speaker of council.” The MM gave instructions that the salaries of the Applicants were to be stopped. Their access cards were also withdrawn and the security personnel was advised not to allow the Applicants access to any municipal property or facility. This resulted in a further urgent application under case number 881/2022 to interdict the IEC from replacing the Applicants (the relief in Part A) and to review the decision of the MM to notify the IEC of the concomitant declaration of vacancies (the relief in Part B). An order was granted on 5 April 2022 in respect of Part A interdicting the IEC and the MM from filling the council seats of the Applicants pending the finalisation of the review in Part B of the application which is set down for 27 October 2022.

[13] It was in light of this pending litigation that the Applicants voluntarily decided during March 2022 to cease participating in the meetings of the Council. Due to the fact that the two applications were so interrelated, the parties agreed that both cases would be argued together on 12 May 2022. Shortly before the hearing and in light of the view of the parties that case number 329/2022 would effectively be dispositive one way or the other of case number 881/2022, it was decided that only the argument in respect of case number 329/2020 would proceed and that case number 881/2022 would be postponed pending the outcome of case number 329/2022. The court found in the aforesaid judgement of 7 June 2022 that the termination of the party membership of the Applicants was clearly unlawful.

[14] Case number 881/2022 is still pending and was set down, after some delays, for hearing on 27 October 2022. The application is still being opposed by the MM despite the outcome of case number 329/2022. The IEC is abiding by the decision of the court.

[15] Acting on legal advice and on the assumption that case number 881/2022 would be resolved expeditiously, the Applicants did not immediately challenge the aforesaid actions of the MM in ordering their exclusion and in effect awaited the outcome of the case without, as they put it, *“rocking the boat”*.

[16] However, unbeknown to the Applicants the Fourth Respondent wrote a letter dated 8 August 2022 to the MM in his capacity as *“President and authorised person”* of the NA indicating that the party membership of the Applicants had been terminated pursuant to disciplinary proceedings and requesting that they be replaced as councillors by three persons who were identified in the letter. The annexures to the letter indicate that separate disciplinary hearings were held in respect of each one of the Applicants in their absence. They were all convicted and expelled from the NA. The minutes of the respective disciplinary hearings are identical. The following incomprehensible note appears in response to a question from the chairperson to the initiator for proof of delivery of the notice in respect of the hearing: *“Mr Jansen (the initiator) produced a request a receipt from an Internet Cafe, Jeremy Samuels as proof of delivery.”* (sic) No *“receipt”* accompanied the minutes of any of the three hearings and there is no other explanation of the manner in which the notices were supposed to have been served.

[17] The MM forwarded the letter from the Fourth Respondent dated 8 August 2022, to the IEC on 18 August 2022 under cover of the following cryptic note: *“Kindly find enclosed hereto a letter I received from the authorised representative of the Northern Alliance together with annexures thereto, the contents of which is (sic) self-explanatory.”*

[18] The MM sent the following email to the First Applicant on 19 August 2022:

“Please be advised that I have received correspondence from the Northern Alliance, which I am bound by the Structures Act, to forward to the EC. Due to Case 881/22, I am informing you, as a courtesy.

Please inform Messrs Mitchell and Brown of the same.”

[19] On 23 August 2022 the attorneys of record of the Applicants wrote to the IEC in response to the letter dated 18 August 2022 addressed by the MM to the IEC. The attorneys indicated that contrary to the statements in the letter of the Fourth Respondent, the office bearers and leadership of the NA have not changed and specifically that:

“4.2 The correct procedure in removing and replacing the three appointed councillors has not been followed by the purportedly and self-proclaimed leadership of the party.

...

5. Our client has instructed us to proceed with a court application to interdict the purported ‘new leadership’ of the party from:

5.1 Misrepresenting the true state of affairs at the Northern Alliance.

5.2 Cease all irregular and unlawful communication with the Nelson Mandela Bay Municipality and IEC.

6. In light of the above, our client requests the IEC to provide a written undertaking that it will refrain from taking any such decision [removing and replacing the Applicants as councillors] before the matter is adequately ventilated in a court of law.”

[20] The Applicants’ attorneys wrote to the IEC again on 25 August 2022 requesting a list of the current councillors of the NA in the municipality and the identity of the authorised representative of the NA for IEC purposes. The IEC responded on the same day indicating that the First Applicant was the leader and contact person of the NA and that the three Applicants were the current NA councillors in the municipal Council.

[21] The Applicants' attorneys wrote to the MM on Friday, 26 August 2022 referring her to the interim court order of 5 April 2022 issued in case number 881/2022 and indicating that pending finalisation of that matter she and the IEC were interdicted from filling the Applicants' seats on the Council. The attorneys averred that in the interim the Applicants remained councillors and were entitled to attend Council meetings, especially the meeting scheduled for Tuesday, 30 August 2022. They called upon the MM to give an undertaking by 16h00 on 26 August 2022 that the Applicants would not be hindered from attending that meeting. No response was forthcoming from the MM, resulting in the present application having been launched on Monday, 29 August 2022 for the following urgent relief:

2. A declaratory order that, until the Third Respondent amends its records, the First, Second and Third Applicants are and remain councillors in the First Respondent's municipal council.

3. An order that the First, Second and Third Applicants are entitled to exercise all the functions as councillors including, but not limited to, attending council meetings.

4. An order prohibiting the Second Respondent and/or anyone acting on her instructions, from preventing the First, Second and Third Applicants from exercising their functions as councillors, including but not limited to, attending council meetings.

5. That the Second Respondent pay the costs of this application.

6. That in the event of any of the other Respondents opposing the application, they pay the costs together with the Second Respondent, jointly and severally, the one paying, the other/s to be absolved.

7. Further and/or alternative relief."

[22] The matter came before me on 30 August 2022 under the circumstances which I have already set out above. Having considered the matter, I was satisfied that a case was made out for urgency and exercised my discretion in favour of allowing the matter to be dealt with on that basis. I was satisfied that the urgency was not self-created and that the Applicants have acted expeditiously in bringing the matter before court. The arguments to the contrary advanced by Mr Moorhouse and his submission that the application should be dismissed for lack of urgency is without merit. It is readily apparent that the chain of events that resulted in the application being launched as a matter of urgency was triggered by the email that was transmitted by the MM to the First Applicant on Friday, 19 August 2022. There is no indication that the Applicants were aware, at any earlier stage, of their latest expulsion from the NA. When the undertaking that they sought from the MM was not forthcoming by 16h00 on Friday, 26 August 2022 the application was launched on the next business day being Monday, 29 August 2022. It is correct, as submitted by Mr Moorhouse, that the Applicants have elected not to attend a number of council meetings subsequent to March 2022. I have already set out the reason for this. The difference presently is that the meeting of 30 August 2022 was scheduled to deal with important matters and that it was necessary for the NA to have a presence at that meeting. In my view, the Applicants were fully justified in taking all necessary steps to have been able to attend that meeting. This included launching the present proceedings as a matter of urgency. I therefore allowed the matter to be heard as one of urgency.

Merits

[23] The application was also opposed on its merits. Reliance was placed in this regard on the provisions of section 27(c) of the Local Government: Municipal Structures Act, 117 of 1998 (“the MSA”) which provides as follows:

27 Vacation of office

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. (emphasis supplied)

[24] The argument advanced by Mr Moorhouse in this regard was that the expulsion of a member of a political party becomes immediately effective and stands until it is set aside either pursuant to an internal appeal or on application by the court. He submitted that upon receipt of the letter from the Fourth Respondent advising that the membership of the Applicants had been terminated, the MM was compelled to accept that their membership of the NA had ceased and to act on the notification without any further investigation. She was then legally bound to inform the IEC of the vacancies within seven days in terms of Item 18 of Schedule 1 of the MSA which provides as follows:

18 Filling of vacancies

(1)(a) If a councillor elected from a party list ceases to hold office, the chief electoral officer must ... declare in writing the person whose names is at the top of the applicable party list to be elected in the vacancy.

(b) Whenever a councillor referred to in paragraph (a) ceases to hold office, the municipal manager concerned must within seven days after the councillor has ceased to hold office, inform the chief electoral officer accordingly.

[25] He submitted that the membership of the Applicants ceased pursuant to the letter of the Fourth Respondent dated 8 August 2022 and that they were no longer members of the NA. By the same token they were no longer councillors on 30 August 2022. They accordingly failed to establish any right to attend the council meeting of 30 August 2022 and their application should be dismissed on this further ground as well. He relied in this regard on a number of authorities (*Cathcart Residents Association v Municipal Manager for the Amahlathi Municipality & Others* [2014] JOL 32644 (ECG) ["Cathcart"]; *Jeffrey Donson & Others v Nickolaas Valentyn & Others* case number 5028/22 WCD (15 March 2022) ["Donson"]; *Shunmugam & Others v Newcastle Local Municipality & Others*; *National Democratic Convention v Shunmugam & Others* [2008] JOL 21212 (N)

["Shunmugam"]; *Thabazimbi Residents Association v Municipality Manager (Acting): Thabazimbi Local Municipality & Others [2019] JOL 41153 (LP)* ["Thabazimbi"]. I have considered all these decisions. In my view they do not support the submissions advanced by Mr Moorhouse. I proceed to deal with the most pertinent of these decisions.

[26] In *Cathcart* (which counsel placed particular emphasis on) the applicant averred that at one of its meetings it had terminated the membership of one of the councillors on its proportional representation list. It communicated this decision to the municipal manager who refused to notify the Electoral Commission of the vacancy. As a result, it sought an order directing the municipal manager to do so. The councillor in question opposed the application, *inter alia*, on the basis that he was still a member of the applicant. The court held that the crux of the matter concerned the effect of the relevant decision. It referred with approval to the following statement by Rall AJ in *Shunmugam*:

"[42] I therefore approach the matter on the basis that the expulsion of the councillors was no different from the expulsion of a member of a voluntary association. In my opinion, a member of a voluntary association or organisation such as a political party who has been expelled and both contends that the expulsion was unlawful and wishes to enforce his or her membership rights, must, if the organisation does not concede the unlawfulness of the expulsion, take steps to have the expulsion reviewed and set aside. Such a person is put to an election. If the person, notwithstanding the contention that the expulsion was unlawful, decided not to challenge it, he or she is taken to have accepted the expulsion, and the expulsion will stand notwithstanding the fact that it may not have been lawful."

(emphasis supplied)

[27] After having expressed its agreement with the above statement of the law, the court in *Cathcart* continued as follows:

[15] In the case referred to by Rall AJ, Oudekraal Estates (Pty) Ltd v City of Cape Town, Howie P and Nugent JA explained why it is necessary to approach the issue from the perspective that administrative decisions stand until set aside. They said:

“The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even unlawful administrative acts are capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

[16] In my view, these same considerations apply for the same reasons and with equal force to the decisions of voluntary associations. It is not difficult to imagine the chaos that would be caused in organisations ranging from massive trade unions or church bodies to small sporting or cultural clubs if this default setting was otherwise.

[17] The third respondent has done nothing for a few months short of three years to challenge the lawfulness of the termination of his membership of the applicant. He must be taken to have accepted it and, whatever doubts may arise as to the legal pedigree of the decision, it must be accepted as having legally valid consequences until it is set aside.”

(emphasis supplied)

[28] I am in respectful agreement with the principle as stated in *Shunmugam* and confirmed in *Cathcart* relating to the effect of a failure to challenge an impugned decision to expel a member from an association such as a political party. It is not enough just to contest the decision and ignore it without taking steps to have it set aside. Generally speaking, the decision will stand and be binding until it is set aside by an appropriate court order. The effect of the expulsion will depend on the facts of the particular case. In *Shunmugam* the court held that the applicants had abandoned their right to have their expulsions set aside and that it was not open to them to resist relief based on their expulsions. In *Cathcart*, although the councillor claimed that he was still a member of the applicant, he had taken no steps for a period just short of three years

to challenge his expulsion. In those circumstances, the court held that the expulsion was valid and binding.

[29] In *Donson* the issue was whether the First and Second Respondents ceased to be members of the African National Congress (“ANC”) and as a consequence vacated their office as councillors elected from the ANC party list. The facts briefly were that the Respondents defied an instruction from the ANC which resulted in their suspension and a prohibition against them representing the ANC in any activities of the municipal Council. They also ignored this instruction and was expelled. The municipal manager was requested to declare the two vacancies which was duly done. The court analysed the constitution of the ANC and concluded that it was authorised to act summarily against the Respondents who could not simply ignore their expulsion and act as if they were still members without mounting a court challenge. The court found that their membership of the ANC had ceased in the circumstances. This decision is in line with *Cathcart and Shunmugam*.

[30] The present matter is distinguishable. The Applicants had successfully challenged their earlier expulsion which was found by the court to have been clearly unlawful. They had obtained an operative interim order in case number 881/2022 prohibiting their removal as councillors pending finalisation of the review in that matter. They learnt through an email from the MM dated 19 August 2022 that they had again been expelled pursuant to disciplinary hearings which were held in their absence. The IEC was advised in the letter from their attorneys dated 23 August 2022, that the correct procedure was not followed in removing and replacing them and that the attorneys had been instructed to proceed with a court application. They indicate in the founding affidavit (*paragraph 17*) filed in this matter on 29 August 2022 that they “... *are going to challenge this latest unlawful action by the rebel group, but that will be dealt with in an application to be launched in due course.*”

[31] It is a factual issue whether or not an expulsion had been acquiesced in or the right abandoned to challenge it and have it set aside. It can only be answered in light of the peculiar facts of a particular case. In my view, there is no room for the conclusion in the

present matter that the Applicants had acquiesced in the expulsions or abandoned their right to challenge the expulsions and have them set aside. Given the fact that the previous expulsions were successfully challenged, the credibility of the indication given by the Applicants that the latest expulsions would also be challenged, cannot be seriously questioned. Given the relatively short time lapse after having learned about the latest expulsions, it is not unreasonable for the envisaged court challenge not to have been launched yet.

[32] On a proper reading of the subsection it is only lawful action that can result in the cessation of membership as envisaged. Alternatively, a failure to exercise or the abandonment of the right to challenge an unlawful expulsion, would result in the expulsion becoming binding. In the present matter the lawfulness of the latest expulsions has unequivocally been placed in issue by the Applicants who indicated their intent to launch a court challenge.

[33] A contrary interpretation of section 27(c) would lead to absurd results. A notification of termination of membership from a political party cannot just be taken at face value and be acted upon by replacing the affected councillor. It might, for example, turn out to be fraudulent or a forgery upon a simple enquiry with the political party. The termination might be patently contrary to the provisions of the party's constitution or for a clearly unlawful reason and the affected member might be in the throes of launching a court challenge. There are various other scenarios that could be postulated to demonstrate the absurdity of a contrary interpretation.

[34] It appears to me that a municipal manager or the IEC who is presented with a notification of termination of membership, is required to apply their minds and to engage in a basic assessment or appropriate enquiries to satisfy themselves that the requirements of section 27(c) have been met and that the councillor has vacated office as envisaged, before acting upon such notification to effect the removal and replacement of the affected councillor. The process need not be formal, but should be fair and inclusive. Where appropriate, this could include verifying the authenticity of the notice and confirming that all internal remedies have been exhausted. The officials are

not required to engage in an in-depth investigation or in processes akin to an appeal or a review, by reconsidering the merits of the expulsion or determining whether there were any irregularities in the proceedings. At the very least and to facilitate making an informed decision, the affected councillor should be afforded a reasonable opportunity to respond to the contents of the notification. This approach is reinforced by the fact that the decision by a municipal manager to notify the IEC of the existence of a vacancy and of the latter to fill the vacancy, constitutes administrative action that is reviewable under the Promotion of Administrative Justice Act, 3 of 2000 [cf. *Thabazimbi Residents Association v Municipality Manager (Acting): Thabazimbi Local Municipality & Others* [2019] JOL 41153 (LP)].

[35] The MM should therefore at least have referred the Fourth Respondent's letter of 8 August 2022 to the Applicants for comment before communicating with the IEC. This would in all likelihood have elicited the response that the Applicants regarded the latest expulsions as unprocedural and intend launching a court challenge. She should then have adopted the same stance as she did in respect of the first expulsions, namely to await the outcome of the Applicants' challenge. To the extent that this was not done, the approach of the MM fell short of what was required in terms of section 27(c) read with Item 18 of Schedule 1 of the MSA.

[36] I do not wish to pre-judge any of the issues or the outcome of the main application and nothing that is said in this judgement should be regarded as having done so. Suffice it to indicate that in the present circumstances and on the facts before me, the NA membership of the Applicants appears not to have ceased in terms of section 27(c) of the MSA and the letter dated 18 August 2022 from the MM to the IEC would therefore not have had the effect of "declaring" the seats of the Applicants as being vacant. I am not required to put it any higher at the present interlocutory stage of the proceedings where the issue was limited to the attendance of the Applicants at the meeting of 30 August 2022. After due consideration, I was satisfied that a case had been made out that the Applicant should be allowed to attend the meeting.

VARIATION ORDER

[37] The Applicants launched a further urgent application on 1 September 2022 which was set down for hearing on 2 September 2022. They sought the variation of the 30 August 2022 order to allow the Applicants to attend the continuation on 7 September 2022 of the council meeting which was not finalised on 30 August 2022.

[38] The basis for the application was that the agenda of the 30 August 2022 meeting could not be finalised in the available time and the meeting was adjourned to 7 September 2022 to continue with the agenda. In particular, none of the items on the agenda that was of importance to the NA had been dealt with. The Applicants submitted that this eventuality was not foreseen. The original application was brought on the assumption that the meeting would be finalised on 30 August 2022. Furthermore, the intention was not only to be allowed to attend on 30 August 2022, but to participate in the council meeting that was scheduled for that day until its conclusion. The Applicants contended that the matter was urgent since the relief that they obtained on 30 August 2020 would be rendered nugatory if they were not allowed to participate in the imminent continuation of the relevant meeting. There was a material change of circumstances subsequent to the granting of the order on 30 August 2022. This, they submitted, warranted a variation of the order to cater for the changed circumstances and to render the order effective.

[39] The application was opposed by the Municipal Respondents on similar grounds to their opposition of the original application. In addition, they submitted that the application was fatally flawed because of a failure to serve the papers on the Fourth Respondent. I have already dealt with their grounds of opposition to the original application. I therefore only address the additional issue of service. It appears from the founding affidavit in the original application that the Fourth Respondent was cited as a party solely because of his stated position within the NA. He clearly had no personal interest in the subject matter of the application which concerned the ostensible termination by the NA of the Applicants' membership. No relief was being sought against him. Furthermore, the NA was before the court as a party to the litigation. The

failure to serve the papers on the Fourth Respondent accordingly did not constitute a material defect in the application.

[40] The power of the High Court to vary its orders of an interlocutory nature in view of subsequently changed circumstances, is well established. This was confirmed by the Constitutional Court in *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC) para [11]:

“Moreover, as has been indicated above, an order to execute pending appeal is an interlocutory order. As such, it is an order which may be varied by the Court which granted it in the light of changed circumstances. To the extent, therefore, that a litigant considers that new circumstances have arisen which would impact upon the Court’s decision to order execution pending appeal, the litigant may approach that Court once again to seek a variation or, where appropriate, clarification of the order.”

(See also: *Wellington Court Share Block v Johannesburg City Council; Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (A) at 832H; *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) and 532J, 535G & 536 B; *Knox D’Arcy Ltd v Jamieson & Others* 1996(4) SA 348 (A) at 360A; *Lagoon Beach Hotel v Lehane* 2016 (3) SA 143 (SCA) at para [10])

[41] In my view, there is no merit in the contention advanced on behalf of the Municipal Respondents that it was not competent to vary the order of 30 August 2022 in the present circumstances. The fact that the agenda of the meeting could not be concluded on 30 August 2022 is a changed circumstance that was not foreseen and that warranted the variation of the original court order.

[42] The matter was self-evidently urgent. The continuation of the meeting was imminent and the agenda would have been completed long before a hearing in due course could have been disposed of. In the circumstances there was no reasonable prospect of obtaining substantial redress at a hearing in the normal course. I was accordingly satisfied that the matter should be allowed to be heard as one of urgency.

CONCLUSION

[43] It was for these reasons that I granted the original order on 30 August 2022 and varied it on 2 September 2022.

D.O. POTGIETER

JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the applicants: Adv N Mullins SC, instructed by Boqwana Burns Inc
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For the Defendants: Adv A Moorhhouse, instructed by Kuban Chetty Inc
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Date of hearing: 30 August & 2 September 2022

Date of delivery: 15 September 2022