



**IN THE ELECTORAL COURT OF SOUTH AFRICA  
HELD AT BLOEMFONTEIN**

**Not Reportable**

**Case number: 003/2023 EC**

In the matter between:

**RONALD FEBRUARIE**

First Applicant

**SIYATHEMBA COMMUNITY MOVEMENT**

Second Applicant

and

**ELECTORAL COMMISSION OF SOUTH AFRICA**

First Respondent

**JOHAN ANDREW PHILLIPS**

Second Respondent

**Neutral Citation:** *Februarie and Another v Electoral Commission of South Africa and Another* (003/2023 EC) [2023] ZAEC 3 (1 August 2023)

**Coram:** Zondi JA, Modiba J and Shongwe AJ and Professors Ntlama-Makhanya and Phooko (Additional Members)

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11:00am on 1 August 2023.

**Summary:** *Appeal and/ or review* of the Independent Electoral Commission's decision in terms of s 20(1)(a) and/or s 20(2)(b) of the Electoral Commission Act 51 of 1996; application for an order declaring Regulation 9 of the Regulations for the Registration of

Political Parties 2004 to be unconstitutional; application to compel the IEC to execute its duties, powers and functions in terms of s5(1)(f).

*Points in limine – jurisdiction* – the Court's review and appeal jurisdiction not engaged. S 20(2A) jurisdiction engaged to the extent the application involves a leadership dispute. *Locus standi* – upheld. *Res judicata* – upheld - relief sought similar to that sought in first SCM judgment. Urgency – established – requirements for urgency in terms of s 20(1)(a) read with Rule 5(1) and 6(1) of the Electoral Court Rules met.

Merits – whether Regulation 9 of of the Regulations for the Registration of Political Parties 2004 as amended on 27 August 2021 is unconstitutional – whether the Independent Electoral Commission has breached s 5(1)(f) of the Electoral Commission Act 51 of 1996 – whether the term of Siyathemba Community Movement's District Management Structure has expired – application dismissed with no order as to costs.

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## JUDGMENT

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**Modiba J:**

### **Introduction**

[1] This is the third time that the facts that ground this application are considered by the Courts. The first applicant, Ronald John Februarie (Mr Februarie) together with Piet Arnold Olyn (Mr Olyn) and others on the one hand and the second respondent, Johan Andrew Phillips (Mr Phillips) and others on the other, are members of the second applicant, Siyathemba Community Movement (SCM). They have been embroiled in a dispute regarding the leadership of SCM since December 2021. Their dispute was first considered by this Court in *Siyathemba Community Movement v The IEC and Others* in the first term of 2022.<sup>1</sup> Depending on the context, I conveniently refer to that application as the first SCM application or judgment. The dispute was also considered by the Northern Cape High Court (the high court) under case number 148/22NCHC. The high court rendered its judgment in May 2023. Depending on the context, I conveniently refer to that application as the high court application or judgment.

[2] As anticipated by this Court at paragraph 11 of the first SCM judgment, the high court application determined the leadership dispute between the parties by rejecting the version Mr Februarie presents in this application. This time, although the applicants approach this Court on purportedly new facts and for slightly different relief, the application is primarily grounded on the facts that grounded the first SCM and high court applications. The applicants are regrettably unable to wiggle themselves out of the outcomes of the first SCM and high court applications. At worst, this application constitutes abuse of the process of this Court.

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<sup>1</sup> (Case no 005/22 EC) [2022] ZAEC 7 (22 April 2022).

[3] In the present application, the applicants, Mr Ronald Februarie (Mr Februarie) and the SCM seek the following orders:

- (a) declaring that Regulation 9 of the Regulations for the Registration of Political Parties 2004 as amended on 27 August 2021 (Regulation 9) which requires that changes to a registered party's particulars can only be effected by the party's registered leader is unconstitutional (prayer (a));
- (b) directing the Independent Electoral Commission (the Commission) to execute all its legislative duties, powers and functions in terms of s 5(1)(f) of the Electoral Commission Act, 51 of 1996 (the Electoral Act) by implementing the SCM's Constitution and the resolution taken by its General Assembly and effect changes to the SCM's registered particulars (prayer (b)); and
- (c) declaring that the term of SCM's District Management Structure (DMS) has expired and compelling the first respondent, the Commission to ensure that a new election process is initiated on an expedited basis to elect a new DMS for the SCM (Prayer c).

[4] The Commission opposes the application on the merits. The second respondent, Johan Andrew Phillips (Mr Phillips) has raised three dispositive points in *limine*, namely lack of jurisdiction, *res judicata* and Mr Februarie's lack of *locus standi*. He also opposes the application on the merits. Mr Phillips seeks a dismissal of the application with punitive costs.

[5] The members of this Court unanimously agreed that no oral hearing was warranted in this application and that it should be disposed of on the papers filed on record. None of the parties had addressed the question whether the application engages this Court's jurisdiction in terms of s 20(2A) of the Electoral Commission Act.<sup>2</sup> The Chairperson directed them to file further submissions in this regard. They all did. This judgment is rendered having considered all the papers filed. This Court is indebted

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<sup>2</sup> Act 51 of 1996.

to all the parties for complying with all directives issued and for the assistance they have rendered in ensuring that this matter is disposed of expeditiously.

[6] The *locus standi* and *res judicata* points in *limine* are dispositive of the application in this Court. However, I consider the rest of the issues for the following reasons. One of the bases on which Mr Phillips seeks a dismissal of the application with punitive costs is that the points in *limine* he raises demonstrates that the application should not have seen the light of day. The application also lacks merit. The second reason I consider all the issues is because of the binding authority discouraging peace-meal litigation to avoid the prospect of an appeal court considering any issue as the court of first instance in the event of an appeal.<sup>3</sup>

[7] Mr Phillips seeks condonation for the late filing of his answering affidavit. The applicants do not oppose the request. Mr Phillips served his answering affidavit within the time directed by this Court. He only filed it outside the time set out in the notice of motion. The explanation he has put up for non-compliance with the timeframe in the notice of motion is that the applicants had served him with an application that did not seem to be properly instituted. It did not bear the Court stamp or case number. The Court Registrar only confirmed the validity of the application on 14 June 2023 in response to an enquiry by his attorney. On 21 June 2023, this Court directed that he files his answering affidavit by 23 June 2023. His attorney only served it on the applicants on that date. He filed it with the Registrar on 7 July 2023.

[8] The time frame as directed by the Chairperson of this Court superseded that in the notice of motion. Court papers are only properly delivered when served on the other parties and filed in Court. The answering affidavit was timeously served as directed by

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<sup>3</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) ([2012] 2 All SA 345; 2012 (6) BCLR 613; [2012] ZASCA 15) para 49; *Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd and Others* 2019 (3) SA 97 (SCA) para 33; *Theron and Another NNO v Loubser NO and Others* 2014 (3) SA 323 (SCA) para 26.

this Court. The other parties suffered no prejudice as a result of its late filing. Mr Februarie has replied to it. The Court did not suffer any inconvenience as a result of the late filing of the answering affidavit. Mr Phillips has set out a full explanation for the delay. As appears from this judgment, he has prospects of success. His request for condonation is granted.

[9] I first briefly outline the background facts. Against the background, I consider the points in *limine* and the merits. Lastly, I deal with the costs of the application. An order concludes the judgment.

### **Background facts**

[10] The background facts are detailed in the first SCM and high court judgments. It is for that reason that I only set them out below concisely.

[11] SCM is a duly registered political party located in the Pixley ka Seme District Municipality (the DM) in the Northern Cape Province. It participated in the 2021 local government elections which were held on 1 November 2021 and won four of the eleven seats in the DM. Mr Februarie currently occupies one of these DM seats. The other seat is occupied by Mr Phillips. Mr Phillips is also the Mayor of the DM, a position he occupies as SCM's duly elected mayoral candidate. Subsequently, the leadership dispute referenced above arose. It culminated in the purported suspension in December 2021 and dismissal in January 2022 of Mr Phillips and two other members from SCM. On 19 January 2022, Mr Februarie addressed a letter to the Commission requesting it to give effect to the expulsion of these members by updating the SCM's proportional representatives list to reflect these purported developments. The Commission refused to give effect to this request, acknowledging the existence of an internal party dispute and citing its lack of jurisdiction over it.

[12] In February 2022, SCM instituted the first SCM application seeking an order to compel the Commission to implement Mr Februarie's request to amend the SCM's proportional representatives list to reflect the changes occasioned by the expulsion of the three members. The Commission opposed the application based on several points in *limine* and the merits. In an order granted on 22 April 2022, this Court upheld the Commission's points in *limine* and dismissed the application. Two of the points in *limine* are relevant to this application. Mr Februarie was found to lack *locus standi* to bring this application and to depose to affidavits on behalf of the SCM. The high court application which was at that time pending was found to sustain a *lis pendens* point in *limine*.

[13] In a judgment rendered on 23 May 2023, the high court upheld the application. I deal with its ruling in detail under the *locus standi* and *res judicata* sections of this judgment.

[14] On 31 May 2023, Mr Olyn addressed a letter to the Commission, asserting that the high court judgment paves the way for the Commission to implement the request Mr Februarie made to the Commission on 19 January 2022. (This assertion was clearly based on an incorrect reading of the high court judgment.) On 7 June 2023, Mr Februarie addressed another letter to the Commission decrying its failure to amend the SCM's registered particulars. On 9 June 2023, the Commission responded that in terms of Regulation 9, the only person who has the capacity to request the Commission to amend the SCM's registered particulars is Mr Phillips as its leader. If he refuses, in the absence of an order of Court declaring that Mr Phillips is no longer the SCM leader and stating who the new leader is, and an amendment request addressed to the Commission by the new leader, there is no legal basis for the Commission to implement the amendment request as it does not comply with Regulation 9.

[15] The applicants instituted this application on 13 June 2023, impugning the Commission's 9 June 2023 decision under this Court's review and/ or appeal

jurisdiction. They imply that by refusing to act on Mr Olyn's 31 May 2023 request, the Commission is not executing its statutory mandate in terms of s 5(1)(f). Hence, in prayer (b), they seek an order compelling the Commission to implement resolutions purportedly taken by the SCM General Assembly and amend SCM's registered particulars. The modified relief the applicants seek is the declaration of constitutional invalidity as sought in prayer (a). The new facts they rely upon is the alleged expiry of the term of the SCM's DMS. In prayer (c), they seek an order compelling the Commission to recognize this purported development and ensure that SCM elections are held to appoint a new DMS.

### **Points in limine**

#### *Jurisdiction*

[16] The Commission correctly points out that the jurisdiction point in *limine* is primarily only live between Mr Februarie and Mr Phillips as this application involves a factional leadership dispute within SCM. It asserts its duty to remain independent and impartial and to strengthen constitutional democracy and promote democratic electoral processes. Consistently with this Court's ruling in the first SCM judgment, correctly so, the Commission persists in its refusal to get embroiled in the resolution of a dispute involving two leadership factions within the SCM. It correctly asserts that this Court may not grant an order compelling it to act against its constitutional mandate. It only has a duty to implement this Court's order to the extent it has resolved the factional leadership dispute.

[17] The applicants have approached this Court on contradictory terms. Although in paragraph 17 of their founding affidavit, they state that they bring the application in terms of s 20(2)(a) of the Electoral Act. In paragraph 19, they state that they seek a review of the decision the Commission communicated to them on 9 June 2023. They also state that the Supreme Court of Appeal being the seat of the Electoral Court has jurisdiction to determine the constitutionality of Regulation 9.



[18] The application fails to engage this Court's review jurisdiction in terms of s 20(1)(a). It is confined to Commission's decisions on electoral matters. The 9 June 2023 decision does not relate to an electoral matter.

[19] The application also fails to engage this Court's appeal jurisdiction in terms of s 20(2)(a). In terms of s 20(2)(b), this Court's appeal jurisdiction is only engaged when the Chairperson of this Court has granted leave and if the appeal relates to any decision of the Commission to the extent it relates to the interpretation of any law or any matter for which an appeal is provided for by law. The applicants have not sought leave from the Court's Chairperson.

[20] To the extent that this application relates to a factional leadership dispute and enforcement of the SCM's constitution, it engages this Court's jurisdiction in terms of s 20(2A). This section provides as follows:

'(2A) The Electoral Court may hear and determine any dispute relating to membership, leadership, constitution or founding instruments of a registered party.'

However, given its constitutional and institutional mandate, this is an issue beyond the Commission's mandate. On this issue, the Commission has correctly elected not to enter the fray.

[21] In respect of the Regulation 9 relief, the applicants clearly misconstrue the jurisdiction of this Court *vis a vis* that of the Supreme Court of Appeal. The two Courts are distinct. Bringing this application before this Court does not by default engage the jurisdiction of the Supreme Court of Appeal simply because it is the seat of the Electoral Court.

[22] The jurisdiction point *in limine* stands to fail.

*Locus standi*

[23] The high court found that Mr Olyn's decision to suspend and expel Mr Phillips and the two others SCM members was unlawful, invalid and of no force and effect. Therefore, Mr Phillips remains the SCM's duly elected leader. The SCM's registered particulars at the Commission still reflect this position.

[24] At paragraph (b) of its order, the high court ruled as follows:

'It is declared that the first respondent [Mr Februarie] is not authorised to conduct disciplinary proceedings under the auspices of the fourth respondent [the SCM], and is not authorised to act in any manner on behalf of the fourth respondent.'

[25] This Court made a similar ruling in the first SCM judgment when it upheld the lack of *locus standi* point in *limine*.

[26] Mr Februarie has elected to ignore the binding authority of this Court and the high court and asserts his authority to act on behalf of the SCM. He did so by persisting in his request to the Commission to update SCM's registered particulars and by bringing this application. In paragraph 2 of his founding affidavit, he describes himself of a councillor of the SCM and its duly elected Chairperson when, on the authority of the first SCM and high court judgments, he is clearly not. He contends that in these two capacities, he is authorised and/ or qualified to bring this application. He does not set out the source of his authority which qualified him to bring the application. He is not relying on a written resolution of DMS leaders, authorising him to bring this application on behalf of the SCM.

[27] He clearly lacks the requisite *locus standi* to bring this application on behalf of the SCM.

*Res judicata*

[28] A *res judicata* special plea is competent when a dispute involves the same parties, seeking the same relief and relying on the same cause of action.<sup>4</sup> The rationale behind this principle is founded on public policy which requires that litigation should not be endless. There ought to be certainty on matters decided by courts by giving effect to the finality of judgments.

[29] Although in the first SCM application, SCM was the only applicant, Mr Februarie was the deponent to its affidavits. In this application, SCM and Mr Februarie are co-applicants. Therefore, substantively, the parties in the two applications are the same.

[30] As already observed, notwithstanding that in this application, the applicants rely on the expiry of SCM's DMS as a purported development since the SCM judgment was rendered, the two applications are grounded on the same cause of action, namely, the ongoing leadership dispute within SCM.

[31] In the first SCM application, SCM unsuccessfully sought an order compelling the Commission to update its proportional representatives list. It matters not that this Court did not deal with the merits of the first SCM application. It recognized the pending high court application when it upheld the *lis pendens* point in limine. That application has resolved the SCM leadership dispute. In this application, the applicants essentially seek the same relief they sought in the SCM application notwithstanding that Mr Februarie has been found to lack *locus standi* in the first SCM judgment. Further, the high court did not resolve in his favour the leadership dispute that forms the basis of the compelling orders the applicants seek against the Commission in this application.

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<sup>4</sup> *Molaudzi v S* (CCT 42/15) [2015] ZACC 20 paragraph 14.

[32] To the extent that the order referenced in 3(a) is different from the orders sought in the first SCM application and the applicants seek it on appeal to this Court, as already determined, this matter is not properly before this Court because the Chairperson's leave has not been sought in terms of s 20(2)(b). Further, it is not the applicants' case that the Commission has misinterpreted Regulation 9 when it refused to update the SCM's registered particulars.

[33] The effect of the orders sought in this application is essentially the same as that SCM sought in the first SCM application. This point *in limine* stands to be upheld.

### *Urgency*

[34] Mr Phillips contends that the applicants fail to meet the requirements for urgency. He alleges that the events giving rise to the application occurred in January 2022. The applicants have not explained their delay in bringing it. They have also not explained why they cannot be afforded substantive redress at a hearing in due course.

[35] But the applicants do not rely on the Commission's January 2022 decision. The Commission's decision the applicants are impugning was taken on 9 June 2023. The applicants brought the application within three days of that decision as required in terms of s 20(1)(b) read with Rules 5(1), 6(1) of the Electoral Court Rules. Therefore, there is no merit in this point *in limine*. It stands to be dismissed.

## **The Merits**

### *The Constitutionality of Regulation 9*

[36] Mr Februarie alleges that when it refused to amend SCM's registered particulars, the Commission violated his political rights in terms of s 19(1)(b) of the Constitution. This section entrenches the right of every citizen to make political choices, including participating in the activities of or recruiting members for a political party. Accordingly, Regulation 9 is unconstitutional as it limits his rights to exercise his political rights.

[37] The Commission derives its mandate from the Constitution and from the Electoral Act. It is one of the institutions established in terms of Chapter 9 of the Constitution to strengthen South African's democracy. Section 181(2) of the Constitution entrenches its constitutional independence. It is subject only to the law, must act impartially and exercise its functions without fear, favour or prejudice.

[38] The impugned Regulation as amended advances democracy by setting out provisions that enable the Commission in the administration of its constitutional and statutory obligations. It does not prevent members from exercising their political rights. It rather protects the Commission by ensuring that it is not drawn into internal party disputes. It also protects political parties by ensuring that unelected factions do not amend the party's registered details.

[39] Where party members are embroiled in an internal party dispute that adversely affect the exercise of their political rights, they enjoy the right in terms of s 34 of the Constitution to have that dispute resolved through the courts. The resolution of internal party disputes is beyond the scope of the Commission's constitutional and statutory duties and powers. In the first SCM application which Mr Februarie purportedly brought in his representative capacity, he unsuccessfully exercised his s 34 rights. He has not exercised his right in terms of s 34 to appeal that decision.

[40] The Commission's 9 June 2023 decision is consistent with the first SCM and high court judgments and the Commission's constitutional and statutory obligations to act independently and impartially when it administers the registration of political parties as part of its constitutional mandate to manage national and municipal elections. The Commission's 9 June 2023 decision does not constitute a violation of Mr Februarie's s 19(1)(b) rights. Mr Februarie is remiss to attempt to wiggle his way out of that the first SCM and high court judgments by bringing this application.

*The Commission's duty to register and maintain a Register of Parties*

[41] The Commission has a duty in terms of s 5(1)(f) of the Electoral Act to maintain a register of political parties. The amendment of a party's registration particulars is regulated by Regulation 9. It requires that the registered leader of the party notifies the Chief Electoral Officer of changes in the party's registered particulars within 30 days of the change. Since Mr Februarie and Mr Olyn are not the SCM's registered leaders, they are not authorised to inform the Commission of changes in the SCM's registered particulars. Their requests to the Commission to amend SCM's registered particulars are irregular. The Commission has no obligation to act on their requests.

[42] The Commission's refusal to make changes to the SCM's registered particulars is consistent with s 5(1)(f) of the Electoral Act read with Regulation 9. It is therefore lawful. In its 9 June 2023 letter to Mr Februarie, it notified him accordingly stating reasons for its refusal to act on his requests.

*Reconstitution of the SCM District Management Structure*

[43] The applicants allege that SCM is made up of management structures in terms of clause 4.4 of its Constitution, which provides for its autonomy in representation and decision-making. Their claim that its DMS structure has expired is an after-thought, conjectured to evade the first SCM and high court judgments. It is badly made and lacks particularity. The applicants have not set out any new facts to sustain any finding relating to a leadership dispute or the enforcement of Constitution. In that regard, there is no lis for this Court to resolve.

[44] In any event, Mr Olyn's 31 May 2023 request to the Commission was not premised on this issue. He contended that the high court judgment paved the way for the Commission to implement their January 2022 request. This is clearly incorrect. The high court judgment is not authority for the amendment of the SCM's registered particulars to remove Mr Phillips as the party leader.

## Costs

[45] For reasons that follow, I proposed a punitive cost order against Mr February. My brother Zondi JA prepared a well-articulated dissenting opinion, proposing that no order as to costs is made. I have considered Judge Zondi's dissenting opinion and remain unpersuaded that a departure from the trite approach to cost in Electoral Court matters is not warranted under these circumstances.

[46] Ordinarily, to encourage parties to exercise their political rights, this Court does not grant costs orders. However, Mr Februarie's conduct warrants a departure from this practice.

[47] It is trite that in awarding costs, the Court has a discretion to be exercised judicially upon a consideration of all the facts in each case and the exercise of a discretion is a matter of fairness to all side.<sup>5</sup> When exercising its discretion in respect of costs, the Court considers the circumstances of each case, carefully weighing the issues, the conduct of the parties and any other circumstance that may have a bearing on costs and make an order that is fair between all the parties.<sup>6</sup>

[48] For the reasons that clearly appear in this judgment, not only does Mr Februarie lack *locus standi*, the *locus standi* issue is *res judicata*. As earlier pointed out, these two issues alone are dispositive of the application. Mr February brought the first SCM application. He should have appealed the first SCM judgment if he considered it to be wrongly decided. Instead, he continues to purport to act on behalf of SCM when two courts have ruled that he lacks the authority to do so, thus abusing its legal entity. In addition, there is absolutely no merit in the application. The relief he seeks against the IEC in terms of s5(1)(f) would compel the IEC to act contrary to its constitutional mandate and is wholly incompetent. The high court judgment disposed of the SCM

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<sup>5</sup> Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) 1999 (1) SA 104 (SCA) at 109A-B.

<sup>6</sup> See Erasmus Superior Court Practice [Service 7, 2018] at D5-6 and all the cases cited there.

leadership dispute. Mr Februarie sought the IEC to act contrary to that judgment. No case is made out to compel the IEC to get embroiled in the implementation of the SCM Constitution. The constitutional attack to Regulation 9 appear to be a contrived after-thought. As pointed out by the EIC, Mr Februarie is essentially seeking the same relief he sought in the first SCM application.

[49] The application also constitutes an abuse of this Court's process and a waste of its judicial economy and the opposing respondents' resources. They have incurred legal costs opposing an application that should not have seen the light of the day had Mr Februarie accepted the binding authority of the first SCM and high court judgments.

[50] It would be unfair to leave the opposing respondents out of pocket under these circumstances. A punitive cost order is the most appropriate way of censoring Mr Februarie's conduct to ensure that in future he does not abuse the SCM's legal entity and this Court's process. Since he lacks the authority to bring the application, SCM should not be saddled with the costs of the application. Mr Februarie should bear the costs personally.

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L T Modiba  
Judge  
Electoral Court

Zondi JA (Shongwe AJ, Prof Ntlama-Makhanya and Prof Phooko)

[51] I have read the judgment prepared by Modiba J. I agree that the application should be dismissed for the reasons that she has set out. However, I disagree with my



colleague's costs order and the reasoning as set out in paragraphs 45 to 50 of the judgment, namely that the first applicant should be ordered to pay the respondents' costs on a punitive scale. My colleague correctly states that ordinarily, to encourage parties to exercise their political rights, this Court does not grant costs orders but deviated from this principle on the basis that the application constitutes an abuse of this Court's process.

[52] It is correct that the award of costs is a matter which is within the discretion of the court considering the issue of costs. This discretion must be exercised judicially having regard to the all the relevant considerations. One of such consideration is the principle that in general in this Court an unsuccessful party ought not to be ordered to pay costs let alone costs on punitive scale. But this is not an inflexible rule and it can be departed from where there are strong reasons justifying such departure such in instances where the litigation is frivolous or vexatious. For the reasons that follow the facts in this matter do not warrant a departure from the general principle and therefore I would dismiss the application with no order as to costs.

[53] First, the first applicant is not legally represented in these proceedings and has, as a result, inelegantly pleaded his causes of action. The fact that his claims are inelegantly pleaded ought not be used as a basis to non-suit him with costs either on a party and party scale or on a punitive scale. Purporting to represent the second applicant, the first applicant brought this application seeking various forms of relief. In Part A he sought an order to compel the Commission to revise the recorded particulars of the second applicant following a change in its leadership and management structure in terms of its constitution. In Part B the first applicant sought an order declaring that the term of the DMS has expired in terms of clause 5.4 of the second applicant's constitution. This is essentially a leadership dispute which engages the jurisdiction of this Court under s 20(2A) of the Electoral Act. That being the case, there can be no basis for a finding that in relation to this aspect of the first applicant's case the first applicant has abused the court process by bringing the application. Had the claim based

on s 20(2A) been properly pleaded there is no doubt that this Court would have entertained it.

[54] Second, this is a litigation between the Commission and the applicants. The applicants contend, among other things, that the Commission's refusal to accept and implement changes to the second applicant's structure in accordance with its constitution violates their political rights under s 19(1)(b) of the Constitution. This is a constitutional litigation and in terms of *Biowatch Trust v Registrar Genetic Resources and Others*<sup>7</sup> in general, the first applicant ought not be ordered to pay costs of the Commission unless the proceedings are frivolous and vexatious. In Part C the first applicant sought a declaration that Regulation 9 of the Regulations is unconstitutional and is of no effect and that this Court should order that a request made by a contact person suffices. The challenge is based on the provisions of s 19 of the Constitution. It cannot be said that in bringing this challenge albeit at the wrong forum, the first applicant acted frivolously. He asserted that after the expiry of the term of DMS the Commission was legally obliged of being informed of that fact to amend the registered particulars of SCM in its possession so as to reflect the correct position.

[55] In the result, I would dismiss the application with no order as to costs.

### **Order**

[56] In the premises, the following order issues:

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

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D Zondi

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<sup>7</sup> *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR1014 (CC).

Chairperson  
Electoral Court

Appearances:

For Applicants: R Februarie (in person)

For 1<sup>st</sup> Respondent: R S Patel  
DMO Attorneys, Bryanston

For 2<sup>nd</sup> Respondent: M G Pino  
MPI Inc., Kimberley