



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

**Not Reportable
Case number: 007/2023 EC**

In the matter between:

SITEMBISO DALKANYO SICENGU

Applicant

and

KHAYAKAZI MAGUDUMANE

First Respondent

INDEPENDENT ELECTORAL COMMISSION

Second Respondent

**EASTERN CAPE LOCAL GOVERNMENT &
TRADITIONAL AFFAIRS**

Third Respondent

MBHASHE LOCAL MUNICIPALITY

Fourth Respondent

Neutral Citation: *Sicengu v Electoral Commission of South Africa and Others*
(007/2023 EC) [2023] ZAEC 05 (29 September 2023)

Coram: Zondi JA, Modiba J and Shongwe AJ and Professor Ntlama-Makhanya and
Professor 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 11H00 am on 29 September 2023.

Summary: The Electoral Court does not have jurisdiction to grant an interdict relating to a matter falling outside the provisions of s 20 of the Electoral Commission Act 51 of 1996 as amended.

JUDGMENT

Shongwe AJ (Zondi JA, Modiba J and Professor Ntlama-Makhanya and Professor Phooko (Additional Members) concurring):

Introduction

[1] On 8 June 2023, this court (Zondi JA) handed down a judgment in case no 2/23EC (2023) ZAEC 2, wherein the application was dismissed with no order as to costs. That case involved the applicant, (Sitembiso Dalkanyo Sicengu and Khayakazi Magudumane, the first respondent; Independent Electoral Commission (the Commission), the second respondent; Eastern Cape Local Government and Traditional Affairs, the third respondent and Mbhashe Local Municipality, the fourth respondent). The present case also involves the same parties, as in case 2/23EC. The facts are the same, the issues are the same and the prayers are also the same. The present and previous cases were both brought on an urgent basis. What differs is the approach.

[2] The matter under Case no 2/23EC related to an application for the review of the decision of the Commission. The basis for this application is not clear as it was brought towards the end of August 2023, well after the judgment and order of the 8 June 2023 was delivered. The entire application appears to take the form of an argument on appeal. If it is intended to be an appeal it does not, however, comply with the provisions of s 20(2)(a) and (b) of the Electoral Commission Act 51 of 1996 (the ECA). Firstly, the decision of the Commission does not relate to the interpretation of any law. Secondly, the applicant has not sought from, and obtained leave to appeal of the chairperson of the Electoral Court.

[3] In the present case the applicant prays: (a) that the application be enrolled as urgent.; (b) that the first and second respondents be directed to nullify and not to implement the outcome of the by-election held in November 2020; (c) that the procedure followed to remove the applicant as Ward Councilor was unprocedural and null and void;

(d) that the third and the fourth respondents be ordered to reinstate the applicant in his previous position as Councilor for Ward 19 at the Mbhashe Local Municipality; (e) that third and fourth respondents be directed to reinstate the salary, benefits and all remuneration due to the applicant in his previous capacity as Councilor; (f) that pending the outcome of the appeal lodged by the applicant with his political party (the ANC) on 17 February 2020 which is currently on review in the Gauteng High Court (Johannesburg) under case no 7881/2021; (g) that the Court condone the bringing of the application outside the prescribed period.

Factual background

[4] It is common cause that the applicant was elected a Councilor of Ward 19 of the Mbhashe Local Municipality during the 2016 local government elections for a period of five years ending 2021. In June 2020, the ANC, the applicant's political party, informed the Municipal Manager (the MM), that it had found the applicant guilty of misconduct and suspended him for a period of three years. The ANC requested the MM to terminate the applicant's membership of the council as contemplated in s 27 (1)(f)(i) of the Local Government: Municipal Structures Act 117 of 1998. The MM then advised the second respondent (the Commission) and the Member of the Executive Council for Cooperative Governance and Traditional Affairs (the MEC) of this fact.

[5] The MEC, after consulting the Commission called and set a date for a by-election to elect the applicant's replacement. A by-election was duly held and a replacement elected, whose term of office expired in August 2021. The applicant unsuccessfully challenged the declaration of a vacancy at the High Court, Mthatha. At some stage the applicant appealed against the decision of the ANC and applied to the Gauteng High Court (Johannesburg) to review the decision of the ANC. It appears that the review is still pending.

[6] Firstly, the applicant alleges that this matter is urgent, that is vehemently opposed by the respondents. He fails to disclose the circumstances rendering it urgent and why it cannot be entertained in the ordinary motion course. Considering that the applicant was

removed as a councilor in June 2020, he fails to give a reason why he waited over three years before approaching this Court. This is an appropriate case to be struck off the roll as he unreasonably delayed, in my view.

[7] Secondly, the applicant has been informed that this Court has no jurisdiction in this matter in terms of s 20 of the ECA. As mentioned above, this is neither a review nor an appropriate appeal, it stands to be dismissed. The question whether or not this Court has jurisdiction is made clear by Zondi JA in the above quoted case. On this ground alone the application should be dismissed.

[8] Thirdly, I agree with the Commission's submission that the principle of Res Judicata and issue estoppel become relevant and applicable. As mentioned earlier, this matter involves the same cause of action between the same parties, and involves the same set of facts and the law and has been finally decided by this Court. I find no reason why this Court should revisit what has already been decided. (See *Prinsloo NO And Others v Goldex 15 Ltd and Another* 2014 (5) 297 SCA at para 10.)

[9] Fourthly, the relief sought by the applicant is incompetent and will not be capable of implementation. The applicant is seeking, *inter alia*, an order that he be reinstated as a Councilor for Ward 19 at the Mbhashe Local Municipality and to nullify the by-elections held in November 2020. He also seeks reinstatement of his salary and benefits. He is asking this Court to unscramble what is done and dusted. His period as Councilor ended in June 2020. A replacement was elected in the same year in another fresh by-election. The tenure for that election ended in November 2021. A Court can only make an order that is reasonable, effective, enforceable and capable of execution. (See *Thutha v Thutha* 2008 (3) SA (Tkh).)

[10] The applicant has ignored the order of Zondi JA completely and embarked on a purportedly fresh urgent application. In my considered view, he has failed to make out a case for the relief sought, therefore this application stands to be dismissed. I take into account that the applicant is indigent and could not afford to pay for legal representation.

He is probably unemployed and relied on the salary he received as a Councilor. In desperation, he decided to pursue this fruitless exercise. I am therefore minded not to mulct him with a costs order.

Order

[11] I therefore make the following order:

The application is dismissed with no order as to costs.

J B Z Shongwe
Acting Judge
Electoral Court

Appearances:

For Applicants: SD Sicengu (in person)

For 1st & 2nd Respondents: M Kanyane
Moeti Kanyane Attorneys, Centurion

For 4th Respondent: M Nako
Municipal Manager, Mbhashe