

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2022/6937

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

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SIGNATURE

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DATE

In the matter between:

AARON MOTLOUNG

Applicant

and

MOTSAMAI MOKOSO

1st Respondent

AFRICAN NATIONAL CONGRESS

2nd Respondent

NATIONAL EXECUTIVE COMMITTEE

3rd Respondent

ELECTORAL COMMITTEE OF ANC

4th Respondent

**NORTH WEST PROVINCIAL EXECUTIVE
COMMITTEE/INTERIM PROVINCIAL
COMMITTEE OF THE ANC**

5th Respondent

PROVINCIAL LIST COMMITTEE OF ANC

6th Respondent

**REGIONAL EXECUTIVE COMMITTEE
/INTERIM REGIONAL COMMITTEE
OF NGAKA MODIRI-MOLEMA REGION**

7th Respondent

DITSOBOTLA LOCAL MUNICIPALITY

8th Respondent

INDEPENDENT ELECTORAL COMMISSION

9th Respondent

JUDGMENT

MANOIM J:

Introduction

[1] This is an urgent application brought in terms of Rule 45A of the High Court's Uniform Rules, to stay the operation and execution an order granted on 12 July 2022 by Maier-Fawley J, on an unopposed basis. The applicant seeks the stay of the order pending the determination of an application for rescission.¹ Part A of the notice of motion is to seek the stay and that is what is before me today. Part B which is to be determined later, seeks to have the Maier-Fawley J order rescinded and set aside.

[2] In terms of that order the applicant's election as a councillor for a municipal ward was declared invalid. The order further required the relevant functionaries, the municipal manger, and the Independent Electoral Commission (IEC), to start the process of declaring a vacancy in that ward. They have done so and announced that a by election for the ward will be held in October 2022.

Background.

[3] This case comes about as a result of a dispute between the applicant, Aaron Motloung and the first respondent, Motsamai Mokoso, over who should have been registered as the ANC's candidate in last year's municipal elections for Ward 17 Ditsobotla, a ward in the Ditsobotla Local Municipality.² In terms of the

¹ Rule 45A states: "The court may suspend the execution of an order for such period as it may deem fit.

² Note on the Notice of Motion Mokoso's first name appears after his surname."

ANC's processes, before the party registers a candidate to contest a ward election on its behalf, the candidate must first be selected by a process of what is termed community votes in an election held under the auspices of the local ANC branch. Generally, the candidate who receives the most votes will be registered with the IEC to contest the ward unless for some good reason the party considers that person should not be put forward in which case the next person on the list is selected.

- [4] Mokoso claims to have received the most votes in the ANC internal branch election but despite this he was not registered as the party's candidate for the ward.³ But Motlounge contends that the voting was irregular and hence he was rightfully registered as the ANC candidate. It is common cause that once Motlounge was registered with the IEC as the ANC's candidate, he went on to win the ward under that party's banner in the municipal election in November 2021. He has since then served as the councillor for Ward 17.
- [5] That situation remained until Mokoso brought an application to this Court to have the election of Motlounge declared null and void and to order that there be a by-election for Ward 17. I set out below the salient terms of this order given by Maier Fawley J.

1. "That the registration of the 7th Respondent [Motlounge] as the First Respondent's Government Election Candidate with Independent Electoral Commission and his (7th Respondent) subsequent election as Ward 17 (Seventeen) Councillor for Ditsobotla-Local Municipality on the 01st of November 2021 is hereby declared unlawful, invalid and is set aside;

2. That the results and/or outcome of the community votes organized by the First Respondent at Ward 17 (Seventeen) of Ditsobotla Local Municipality on the 15 of August 2021 in terms of the First Respondent 2021 Local Government Elections Candidates Selection Rules in which the Applicant received more community votes following his nomination as the First Respondent's Election Ward Candidate by the ANC Ward 17

³ The documentation shows that Mokoso received 209 votes to Motlounge 200.

(Seventeen) Branch is declared valid and enforceable and that same be upheld by the First, Second, Fourth, Fifth and Sixth Respondents

3. That the Municipal Manager and/or Acting Municipal Manager of the Ditsobotla Local Municipality is ordered to declare a vacancy at the Ditsobotla Local Municipality Ward 17 (Seventeen) with the Nineth Respondent within 10 (Ten) Days of service of this Order.”

- [6] Mokoso’s application, which I from now on will refer to as the disqualification application, was served on Motloung on 23 February 2022. It was not served on him personally but on a clerk in the office of the Speaker of the Ditsobotla Municipality. In his affidavit in the stay application, Motloung says he never received this application. It is a matter of dispute, which I do not need to decide, whether this constituted competent service for the purpose of Rule 4(1)(a)(ii) of the High Court rules. That rule allows service on a person’s “*place of business.*” The argument was whether for the purpose of a councillor, the office of the speaker constitutes his place of business.
- [7] Mokoso later filed an amended notice of motion. This amended notice of motion was served on Motloung personally on 14 April 2022. Motloung admits he was served personally but says he did not understand what was going on because he had never been served with the original notice of motion. Motloung never opposed the disqualification application. Although there were also eight other respondents cited, none of them opposed the application. On 5 July 2022 the Maier-Fawley J order was granted unopposed. This order is stamped on 12 July 2022 and so I will assume for the benefit of Motloung that this is the relevant date when the order became effective.
- [8] Motloung says he only became aware of the Maier-Fawley J order on 16 July 2022. He then instructed an attorney who had to acquaint himself with the matter. On 3 August the IEC addressed a letter to the Provincial List Committee circulating a timetable for the by election which was scheduled for 5 October 2022. Motloung’s attorney’s first step was to write to the IEC to request that it delay the elections until Motloung had brought his application for recission. This

letter was written on 17 August. The following day the IEC replied. The IEC explained it could not do so as it had to comply with the terms of the court order. Second, it noted that Motloun should have been aware of the date of the order from 12 July 2022. The IEC then indicates that it had already set in motion a process to implement the court order in respect or preparing for the by-election. In this letter, dated 18 August 2022, it explains that:

“...when a ward vacancy arises and is due to be proclaimed by the relevant Member of the Executive Council for the relevant Province, the Commission must, inter alia, compile and publish an election timetable for such by-election and set in motion the logistic and human resource requirements for conducting the by-election. For the ward 17 by-election for Ditsobotla Municipality, this has already been done. Furthermore, there is a voter registration event that is scheduled for this weekend being the 20 and 21 August 2022 and all voting stations have been secured and electoral staff appointed for this purpose.”

- [9] The present application was eventually launched on 23 August 2022. Motloun argues that if the by election goes ahead as planned, he would not be able to overturn this process and someone else would be elected as councillor causing him, and those who depend on him, irreparable harm. Thus, as he put it his rescission application would be rendered nugatory.
- [10] As to why this application could not have been brought earlier, it was argued by Mr Van Graan for Motloun that the trigger date, for assessing urgency should, at worst for him, be 3 August 2022, the date of the IEC letter advising of the vacancy. Even then he argued, the applicant was correct to avoid the costs of litigation by first attempting to persuade the IEC not to hold the by-election pending the hearing of the rescission application.
- [11] But Mr Senjawa who appeared for Mokoso has challenged this narrative. He accuses Motloun of intentionally stringing out the litigation because as long as he does so he remains the incumbent councillor receiving a salary. Mr Senjawa does not accept there had not been proper service on Motloun. However, he

argues even if Motloun was not aware of the application when it was served, he was, on his own version, aware of the amendment application which was served on him personally on 14 April 2022. Motloun, who he points out is a councillor, and thus a man of experience of the how the world works, has not given any satisfactory explanation for his failure to then respond to the amendment. He also argues that in any event instead of bringing a stay as a matter of urgency he ought to have brought the recission application as a matter of urgency which he has not done. Mr Senjawa says the urgency is thus self-created and the matter should on this basis be struck off for not being urgent.

- [12] Mr Van Graan had two responses to this argument. First, he argued that the amendment is not a pleading and hence the lack of response to it was understandable. Secondly, he argued that there was no point in bringing a recission application as a matter of urgency as the bringing of such an application does not stay the order and hence, he had to bring the present application first in terms of Rule 45A.
- [13] As matters of law Mr Van Graan is correct on both points. An amendment is not a pleading that commences the proceedings and an application for recission does not in and of itself, lead to a stay. But this does not detract from the fact that the urgency has been self-created. The notice of amendment is still a court process. The terms of the amendment application made quite clear what relief was being sought. Motloun would have understood from reading this document, which had after all been served on him personally, that Mokoso, his opponent for the ANC's nomination, was seeking to set aside his election. His contention that he did not know what was going on cannot be accepted. The amendment makes this relief clear.
- [14] Had he then taken steps then to oppose the application then the whole train of events that then followed may have been averted, assuming of course that he succeeded in opposing the disqualification application, a matter on which I need not express a view.

[15] Then even after he came to know of the Maier Fawley J order on 16 July, his steps to react lacked any sense of immediacy. He first tried to persuade the IEC not to proclaim the by-election something he must have been advised it could not do, given the court order obliging it to take the necessary steps.

[16] Urgency will be regarded as self-created where a party faced with steps taken against it fails to react in time. As was held by Windell J in ***Dlamini and others v Mogale City Local Municipality and another*** [2021] JOL 51105 (GJ)

“It is trite that urgent relief will be denied in circumstances where any urgency claimed is self-created and/or where it is apparent that the applicant failed to act with the necessary haste in approaching the court.”

[17] In that case Windell J held that the urgency was self-created because the applicants had waited till after execution before approaching the court for urgent relief. She held that:

“The urgency is, therefore, clearly ' self-created and due to the failure on the part of the applicants to approach the court at an earlier stage or to file an application for leave to appeal.”

[18] It does not assist Motloung to assert that the failure to respond to the amended notice of motion is something to be considered only in his application for rescission and not this stay application. For the purposes of considering whether urgency has been self-created it is relevant to consider he could have acted earlier. His passivity at the time he got service of the amended notice of motion in April is what has led to his subsequent failure to oppose the disqualification application, and now, his need to prevent execution of that judgment through the vehicle of a motion to stay. His reason for not responding to the notice of amendment which, on his own version, he knew about since April 2022 is unpersuasive. But this is not the only criticism. Thereafter he did not act with any urgency once he knew of the order on 16 July; nor persuasive either is his choice to have gone with a stay application rather than an earlier application for rescission, which by now, proceeded with timeously, could have reached

resolution. Clearly Motlounq benefits from the more drawn out the litigation is, given that he is the paid incumbent.

[19] I find that that for these reasons the application is not urgent and must be struck off with costs.

ORDER:-

In the result the following order is made:

1. The application is struck off the roll for not being urgent.
2. The applicant is liable for the first respondent's costs on a party and party basis.

**N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

Date of hearing: 08 September 2022

Date of judgment: 13 September 2022

Appearances:

Counsel for the Applicant:

Adv E.S.J Van Graan & Adv J. Hlongwane

Instructed by.

De Swardt Myambo Hlahla

Counsel for the First Respondent:

Mr T.S Sejwane

Instructed by:

Sejwane-Thuwe Attorneys