



IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not Reportable

Case No: 1208/2023

In the matter between:

SIYATHEMBA COMMUNITY MOVEMENT	FIRST APPLICANT
CHAIRPERSON SIYATHEMBA COMMUNITY MOVEMENT: RONALD JOHN FEBRUARIE	SECOND APPLICANT
COUNCILLOR DANNY JONAS	THIRD APPLICANT

And

INDEPENDENT ELECTORAL COMMISSION OF SOUTH AFRICA	FIRST RESPONDENT
MUNICIPAL MANAGER: THEMBELIHLE LOCAL MUNICIPALITY	SECOND RESPONDENT
JAYMIAN NKOSANA	THIRD RESPONDENT
THE MEC- DEPARTMENT OF CO-OPERATIVE GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS- NORTHERN CAPE	FOURTH RESPONDENT
THEMBELIHLE LOCAL MUNICIPALITY	FIFTH RESPONDENT
VICTOR SIPHIWO DOLOPI	SIXTH RESPONDENT
BRANDA MPAMBA	SEVENTH RESPONDENT
THANDISWA DIENA	EIGHTH RESPONDENT
TOMMY YOLA	NINTH RESPONDENT
ELZAONE VAN NIEKERK	TENTH RESPONDENT
FRANS MANS	ELEVENTH RESPONDENT
LEONARD MAKENNA	TWELFTH RESPONDENT
MARNUS VISSER	THIRTEENTH RESPONDENT

Neutral citation: *Siyathemba Community Movement and Others v Independent Electoral Commission and Others* (Case no 1208/2023) (29 September 2023)

Date heard: 27 July 2023

Date delivered: 29 September 2023

Judgment

Phatshoane DJP

[1] Siyathemba Community Movement (Siyathemba), its ostensible chairperson or district management chairperson, Mr Ronald Februarie (Mr Februarie), and Mr Danny Jonas (Mr Jonas), the first to the third applicants, approached this Court on 27 July 2023 on an expedited basis for an order that the Independent Electoral Commission (the commission), the Municipal Manager of Thembelihle Local Municipality (Thembelihle) and Mr Jaymian Nkosana, the speaker of Thembelihle, the first to third respondents, be held in contempt of this Court's interim order dated 25 June 2022 issued under Case no 1308/2022. They further seek a declaratory order to the effect that the inauguration of Mr Marnus Visser (Mr Visser), the thirteenth respondent, as a councillor of Thembelihle, is unlawful. This Court is further urged to direct the commission to remove Mr Visser's name from its records and to substitute it with that of Mr Jonas, the third applicant. The applicants further move for an order that Mr Jonas remains a duly elected member of Thembelihle Council.

[2] The applicants appeared in person. There is an ongoing litigation cocktail in this Court involving some of the parties in the present application. Mr Februarie mentioned 10 such applications which the applicants launched in this Court whereas the commission alluded to five applications where it has been hauled before this Court to answer to the allegations made by the applicants. Apart from the application to review the commission's decision, in having declared Mr Visser elected as a councillor of Thembelihle, amongst the multiplicity of legal proceedings pending in this Court, Mr Visser brought an application for the reconsideration of the interim order of 25 June 2022, sought to be enforced through this contempt proceedings, for reasons, inter alia,

that he had not been cited as a party having a substantial interest in the outcome of that litigation. He is also of the view that the Court in that application had been misled into issuing the order in question in that Mr Jonas withheld material facts which, had they been disclosed, would have resulted in a different outcome. The reconsideration application, like many other applications filed in this Court, is still pending.

- [3] There had also been a proliferation of litigation in the Electoral Court mostly at the behest of the applicants. On 15 August 2023 the parties were invited to provide written submission on the relevance, to the present application, of the Electoral Court's decision in *Februarie and Another v Electoral Commission of South Africa and Another*¹ handed down on 01 August 2023. I am grateful to them for the concise heads which were filed on or before 23 August 2023, as directed. I shall refer to this judgment where I deem it appropriate.
- [4] Eight of the respondents did not participate in these proceedings. However, five respondents resisted the application. These are: the commission, Thembelihle, its municipal manager, its speaker and Mr Visser (collectively referred to as the respondents where suitable). The attack on the application is multi-pronged. First, it was contended for the respondents that the application is not urgent and ought to be struck off the roll. Secondly, Thembelihle, its municipal manager, its speaker (the municipal respondents) and Mr Visser took issue with Mr Februarie's locus standi to bring the application on behalf of both Siyathemba and Mr Jonas. Thirdly, the municipal respondents raised the defence of *lis alibi pendens*. They argued that the commission's removal of Mr Jonas as a councillor is already a subject of one of the several review applications he launched in this Court. The relief sought in that review has the same effect as the relief presently urged. Fourthly, the municipal respondents raised non-joinder. They contended that the relief sought in the present application affects all the councillors of Thembelihle and therefore all councillors ought to have been joined in the proceedings. Fifthly, the municipal respondents complain that, contrary to rule 6(5)(b) of the Uniform Rules of this Court, the applicants' address of service is 15 km away from the seat of the Court.

¹ (003/2023 EC) [2023] ZAEC 3.

[5] Few pages of the founding affidavit and Mr Jonas's supporting affidavit had not been filed together with the application. The applicants sought condonation because they had relied on public facilities to transmit the papers. In that process, some of the pages were inadvertently not transmitted. So soon, upon being made aware of the oversight, they corrected it. It goes without saying that all the relevant issues which the parties wish to bring to the Court's attention ought to be placed before the Court for the proper evaluation of the matter. Consequently, I am of the view that the application for condonation should be upheld. The commission's and Mr Visser's answering affidavits, in light of the truncated period allowed in the Notice of Motion for filing, served their papers one and two days late, respectively. They too, seek condonation. I can conceive of no prejudice should condonation be granted and it is so ordered.

Urgency

[6] The respondents submitted that they had been prejudiced by the truncated time period allowed to file their answering affidavits. In terms of rule 6(12)(b) of the uniform rules the applicants are required to set forth explicitly the circumstances which render the matter urgent and the reasons why they claim they could not be afforded substantial redress at a hearing in due course. They must do so in the founding affidavit and justify the extent of the departure from the established filing and the Court's sitting times.²

[7] The extreme urgency in which the application was brought left the respondents with only three days to deliver their answering papers. In laying the basis for the urgency, Mr Februarie states that he was informed by the registrar of this Court that the only date available in the opposed motion court roll, for an application brought in the normal course, was in February 2024. He intimated that "although the applicants are likely [to] get redress in [the] normal cause, such redress will not be substantial."

²*Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 136-137.

[8] On a reading of their papers, the applicants' real ground for urgency is their quest to vindicate the rule of law through contempt proceedings. Mr Februarie submitted that the order sought to be enforced was granted on 25 June 2022 and: "since then, the first respondent [commission] has not taken any steps to ensure that the order is complied with." What he does not say is what measures the applicants took in the past 13 months to instil compliance with the order.

[9] It is so that persistent contemptuous conduct would render a matter urgent.³ It is also important to bear in mind that civil contempt has not divested itself of its criminal dimension.⁴ The convictions following the proceedings are very serious in nature whereas the remedies of committal or a fine have material consequences on an individual's freedom and security of the person.⁵ To this end, the alleged contemnors must be afforded a reasonable opportunity to state their case in full and to challenge evidence.

[10] The extreme urgency in which the application was brought may have denied the municipal respondents the full opportunity to ventilate their defence as they sought to argue. The issues raised did not necessitate that the matter be disposed of on truncated timeframes proposed by the applicants. The applicants also neglected to provide reasonable explanation why they claim that they would not be afforded substantial redress at a hearing in due course. Ordinarily, the result would be to struck the application off the roll for want of urgency. However, in light that all the necessary affidavits have been exchanged and the matter fully argued, I shall dispose of the application on the papers as they stand to avoid further unwarranted delays.

Lack of standing

[11] It is common cause that Siyathemba has been beset by internal factional leadership disputes. The municipal respondents and Mr Visser argued that Mr Februarie has no

³*Secretary, Judicial Commission of Inquiry Into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC) para 35.

⁴ See the remarks by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 11- 17.

⁵ *Matjhabeng Local Municipality v Eskom Holdings Ltd and others* 2018 (1) SA 1 (CC).

locus standi to institute these proceedings on behalf of Siyathemba and Mr Jonas. Mr Februarie, on the other, submitted that he had the necessary authority to bring the application by virtue of Siyathemba's resolution dated 13 February 2022, passed more than a year and five months prior to the launching of the present application. The minutes of the meeting and the resolution he relies on reads in part:

"Disciplinary hearing

The chairperson explained that 3 councillors who [were] expelled [lodged an application for a declaratory order in] the high Court. The court date will be 04 March 2022. The chairperson also advised that we must also register a case against the IEC at the Electoral Court because the case at the High Court has nothing to do with our declaration of the PR positions. It only delays our process. Mrs Catherine Greeff proposed that the chairperson Mr Ronald Februarie and the Secretary Mr Piet Olyn be the authorised persons to deal with the cases on behalf of the party. Mr Mandisi Neels seconded. The meeting agrees."

[12] With specific reference to the present application, Mr Februarie intimated that Siyathemba and members of its elected structure made a decision that Siyathemba "proceed with the matter to court..." The record of the decision or resolution of the so-called "elected structure" is not attached to the founding papers.

[13] The municipal respondents argued that insofar as the purported resolution is dated February 2022, a year and half prior to the launching of the application, it has no bearing on the present litigation. They argued that Mr Februarie ought to have obtained authority from the general meeting of the members of Siyathemba but failed to do so. The municipal respondents further argued that a rule 7(1) Notice was served on Mr Februarie and Jonas to produce documents which conferred authority upon them to act for Siyathemba. They failed to respond to the notice. The municipal respondents further complain that Mr Jonas did not co-sign the Notice of Motion but attested to a confirmatory affidavit which predates the founding affidavit. This, they argued, cannot serve to support the allegations contained in the founding affidavit.

[14] In terms of clause 3.3 of Siyathemba's constitution its management is endowed with authority to act on its behalf. Mr Visser argued that Mr Februarie is not a party leader

and is not authorised by the party's management to launch the application on behalf of Siyathemba as required in terms of clause 5.10 of Siyathemba's constitution which provides that:

"The management of Siyathemba may at any time delegate its powers to one or more of its members or special sub-committee and may also make use of professional services of persons and/or legal persons who are not members of the SGB".

[15] About 6 of the registered party leaders, whose names appear in the commission's records, attested to supporting affidavits in which they deny participation in any meeting authorising Mr Februarie to institute the present application. They also intimated that they did not pass the resolution which Mr Februarie relies on. Mr Visser went on to state that Mr Februarie's contention, that he is the chairperson of Siyathemba, is founded on the unlawful meeting convened by Mr Piet Olyn. In *Phillips and Others v Olyn and Others*,⁶ where Siyathemba's internal leadership differences were at play, Williams J issued a declaratory order that Mr Olyn: "(I)s not authorised to conduct disciplinary proceedings under the auspices of the fourth respondent [Siyathemba], and is not authorised to act in any manner on behalf of the fourth respondent."

[16] It has been held in *Siyathemba Community Movement v The IEC and Others*⁷ that for the Commission to exercise its duties and functions properly, it is best for it to stay away from 'interfering or meddling in internal affairs of political parties' other than those germane to the management of elections. In that case it was said that on 19 January 2022 Mr Februarie had directed a letter to the commission advising that Mr Johan Phillips, Ms Estell Nimmerhoudt and Ms Patricia Mooi had been expelled and requested the commission to give effect to the expulsion by updating the SCM's proportional representatives list to reflect the purported developments. The commission refused to give effect to the request, acknowledging the existence of an internal party dispute and citing its lack of jurisdiction over it. In February 2022, Siyathemba brought an application in the Electoral Court seeking an order to compel the commission to implement Mr Februarie's request to amend Siyathemba's proportional representatives list to reflect

⁶ (148/2022) [2023] ZANCHC 21 (26 May 2023).

⁷ (005/22EC) [2022] ZAEC (22 April 2022) para 8.

the changes occasioned by the expulsion of the three members. On 22 April 2022, in *Siyathemba* (supra)⁸, the Electoral Court upheld the Commission's points in *limine* one of which was that Mr Februarie had no *locus standi* to bring the application and to depose to affidavits as the chairperson of the Siyathemba because Mr Phillips was the registered party leader. In a further judgment of the Electoral Court handed down recently on 01 August 2023, *Februarie and Another v Electoral Commission of South Africa and Another*⁹ it was said:

“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 [Siyathemba]. 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 as 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.

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

[17] Mr Februarie's professed standing to bring the present application is no different to that which he purported to have possessed in the above cited cases. His lack of standing here is further fortified by his failure to respond to the rule 7 Notice. This would ordinarily be the end of the matter. However, on the basis of the caution sounded in various decisions of our courts, that a court in exercising its inherent power in application proceedings to separate issues in *limine* must do so with circumspection,¹⁰ something must be said concerning some of the remaining preliminary issues raised and the merits of the application.

Non-joinder of the councillors of Thembelihle

⁸*Ibid* para 12-13.

⁹ (003/2023 EC) [2023] ZAEC 3, para 26-27.

¹⁰*Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd and Others* 2019 (3) SA 97 (SCA) para 33; see also *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.

[18] It was argued for the municipal respondents that the applicants failed to join all councillors of Thembelihle, in particular, Ms R Jansen of the Democratic Alliance (DA) and Mr P Van Niekerk of the Freedom Front Plus. The two councillors are not implicated in the contempt proceedings although they may well have participated in Mr Visser's inauguration proceedings. It is so that the declaratory order sought, if granted, may lead to some changes in the composition of the membership of Thembelihle Council. However, in my view, the municipal respondents failed to substantiate how the two mentioned councillors' rights (individually and collectively) would be affected by the order. While it would have been ideal to join all the councillors in the proceedings, failure to do so, on the view I take of this matter, is of little importance. Therefore, the point taken cannot be sustained.

Contempt of court

[19] It is trite that an applicant for civil contempt must prove the existence of the order; service or notice of the order; wilfulness and mala fides beyond reasonable doubt on the part of contemnors. Once the applicant has proved the order, notice and non-compliance, the respondent's conduct is presumed to be both wilful and mala fide and it bears an evidential burden to rebut that presumption. For an act to constitute civil contempt, there must have been an intention to defeat the course of justice.¹¹

[20] The applicants did not seriously challenge the lengthy background set out in the commission and Mr Visser's answering affidavits which is relevant to the question whether the commission and the municipal respondents had demonstrated that there had been no deliberate, intentional or willful and mala fide disobedience of the order on their part. True to its constitutional obligations the commission disengages itself from internal party disputes within Siyathemba and submits that the resolution of such disputes remains with members of the political party concerned.

[21] On 10 August 2021 the Chief Electoral Officer (CEO) of the commission approved Siyathemba's application for registration as a political party in terms of s 15 of the

¹¹ *Multichoice Support Services (Pty) Ltd v Calvin Electronics and another* 2021 JDR 2529 (SCA) para 20.

Electoral Commission Act 51 of 1996. According to the commission, a political party's application for registration, upon successful registration, acts as the deed of foundation of the political party concerned and is utilised by the commission as a record of that party's particulars and its executive members.¹² Where a political party wishes to change these particulars, written notification must be given to the CEO by the political party's registered leader. From Siyathemba's deed of foundation Mr Phillips is its registered leader and chairperson whereas Mr Piet Olyn is the secretary and contact person. Should Siyathemba wish to change any of the particulars on its deed of foundation, including a change to the executive members, the CEO is constrained to only accept and implement such change when Mr Phillips, the registered party leader, notifies it to do so in terms of regulation 9 of the Regulations for the Registration of Political Parties 2004.¹³

- [22] The procedure for the filling of vacancies of proportional representation seats in municipal councils is set out in Item 18 read with Item 20 of Schedule 1 of the Local Government: Municipal Structures Act 117 of 1998 (the Structure Act). Item 18 provides:
- “(1) (a) If a councillor elected from a party list ceases to hold office, the chief electoral officer must, subject to Item 20, declare in writing the person whose name 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 14 days after the councillor has ceased to hold office, inform the chief electoral officer accordingly.
- (c) If the municipal manager of the municipality concerned does not inform the chief electoral officer of the vacancy referred to in paragraph (a), the MEC for local government in the province, must inform the chief electoral officer of the vacancy within 14 days where the municipal manager does not.

¹²See regulation 3 of Regulations for the Registration of Political Parties, 2004, published under GN R13 in GG 25894 of 7 January 2004.

¹³ Ibid- Regulation 9 provides that: 'Any change in the particulars furnished in Annexure 1 must be notified to the Chief Electoral Officer in writing within 30 days after such change by the registered leader of the party'.

(2) Where a party list has become exhausted, Item 17, adjusted as may contextually be necessary, applies to the supplementation of the list, and if the party fails to supplement its list, or if the party has ceased to exist, the vacancy must remain unfilled.”

- [23] Item 18(1) of Schedule 1 of the Structures Act imposes an obligation on the CEO of the commission to declare, the person whose name appears at the top of the applicable political party list, elected in the vacancy if a councillor ceases to hold office, but only after the CEO had been informed by the municipal manager or the relevant MEC for Local Government, as the case may be, that a vacancy exists.
- [24] On 19 January 2022, the Commission received a letter from Siyathemba, signed by Mr Olyn, which indicated that Mr Phillips was no longer a member of the Siyathemba having allegedly been expelled pursuant to an internal disciplinary process. The Commission was requested to remove Mr Phillips as a representative of Siyathemba. On that same date Siyathemba also transmitted a letter to the acting municipal manager of the Siyathemba Local Municipality (SLM) in which Mr Olyn notified the municipality that Mr Phillips had been expelled from the Siyathemba and that his seat on the SLM had to be declared vacant. Insofar as the commission’s records reflected Mr Phillips as the registered party leader of Siyathemba, the commission requested him to provide it with a response to Mr Olyn’s claims of his expulsion.
- [25] In his response Mr Phillips indicated inter alia, that the dispute between the members of the Siyathemba had been referred to the Northern Cape High Court for adjudication and urged the commission not to entertain any communication or action from persons who claimed to have been mandated by Siyathemba. Due to Siyathemba’s internal leadership disputes, the commission deferred the changing of Siyathemba’s deed of foundation to allow the dispute to be finally determined by this Court.
- [26] On 23 February 2022 Mr Olyn’s faction launched an application in the Electoral Court under case number 005/22EC, referred to earlier,¹⁴ against the commission, Mr Phillips and others, seeking relief inter alia, that the commission be directed to accept that Mr

¹⁴Ibid, fn 7.

Phillips' expulsion from the Siyathemba was consistent with Siyathemba's constitution; that the decision of the commission to regard the factional battle as a dispute of leadership within the SCM was not supported by the facts and be reviewed and set aside; and that the commission be ordered to implement the applicants' request to amend the proportional representative list and to further update the applicant's details. On 22 April 2022, the Electoral Court dismissed the application. In so doing Shongwe AJ said:

"In my view, this application is flawed in all fronts. On the merits, it is clear that there is an internal leadership dispute, which dispute removes it from the realm of the mandate of the Commission. In my view, the Commission does not have authority to deal with it in terms of the existing legislation."¹⁵

- [27] It bears repeating that recently in May 2023 this Court in *Phillips and Others v Olyn and Others*,¹⁶ ordered that Mr Olyn was not authorised to conduct disciplinary proceedings under the auspices of Siyathemba, and to act in any manner on behalf of Siyathemba. What the order of this Court in *Phillips* confirms is that Mr Phillips remains the registered party leader.
- [28] More pertinent to the present case is that, in the course of the events relayed in the preceding paragraphs, Mr Jonas was also expelled from Siyathemba on 19 May 2022 following a disciplinary hearing. On 22 May 2022 the acting secretary of Siyathemba informed Mr Visser that the Siyathemba's executive committee had nominated him as the next proportional representative which nomination Mr Visser accepted.
- [29] The acting municipal manager of Thembelihle notified the commission on 8 June 2022 that Mr Jonas had been expelled from Siyathemba and that a vacancy was declared on the local council in terms of Item 18(1)(b) of Schedule 1 of the Structures Act. This correspondence was supported by, inter alia, a letter from Siyathemba dated 7 June

¹⁵Ibid, fn 7 para 13.

¹⁶(148/2022) [2023] ZANHC 21 (26 May 2023).

2022 signed by Mr Phillips confirming the expulsion, requesting that a vacancy be declared by Thembelihle, and that the party list be amended to reflect the substitution of Mr Jonas's name with that of Mr Visser as the party's 'new proportional representative'. In addition, Phillips had attached to his letter the nomination of party list and the amended party list reflecting Visser as the candidate. On the basis of this information, the commission forwarded a letter to the municipal manager on 22 June 2022 in which it advised that Mr Jonas had ceased to hold office of councillor and that Mr Visser, being the candidate at the top of the party list, was declared elected as contemplated in terms of Item 18 of Schedule 1 of the Structures Act.

[30] Mr Visser assumed office as a councillor of Thembelihle in terms of s 26(2) of the Structures Act.¹⁷ Since 23 June 2022, he was listed as a councillor representing Siyathemba and still appears on the list in the commission's records. According to Mr Visser, Mr Jonas approached this Court disingenuously on 25 June 2022, two days following Visser's assumption of office, without citing him as a party to those proceedings or disclosing to the Court that the commission had already declared Visser elected. Mr Jonas obtained an order before Nxumalo J, sought to be enforced through contempt, which reads:

- '1. Part A of this application be and is hereby dealt with as a matter of urgency and that the applicant's [Mr Jonas's] non-compliance with the Rules of Court regarding service and process is condoned in terms of Rule 6(12)(a) and pending the determination of the review envisaged in part B.
2. The first to the fifth respondents [the commission, the municipality, the municipal manager, Siyathemba and its chairperson] are hereby interdicted and restrained from appointing a councillor to replace the applicant as councillor pending finalisation of a review application.
3. The fourth to the fifth respondents [Siyathemba and its chairperson] are ordered to reinstate the applicant to his position as a member of the fourth respondent [Siyathemba] pending finalisation of the review application.
4. There is no order as to costs.'

¹⁷Section 26(2) provides that: 'A person assumes office as a councillor when declared elected or when appointed, as the case may be'.

[31] Mr Februarie argued that the commission and the municipal respondents continue to act in defiance of the order issued on 25 June 2022 in that on 23 June 2023 the municipal respondents ‘took the law into their own hands and appointed Mr Visser. Consequently, this Court is urged to hold them and the commission in contempt. Relying on the common law principle expressed in the maxim *lex non cogit ad impossibilia*, the commission countered that no one should be compelled to perform or comply with that which is impossible. It was “simply impossible to comply with the order” “from the get-go”, because the commission had already performed its statutory obligations when the order was issued.

[32] It is not in dispute that the above interim order of 25 June 2022 was brought to the attention of the commission. However, Mr Februarie did not provide proof of service of the order on the current municipal manager of Thembelihle and its speaker, the second and third respondent. That in itself is problematic for the applicants. Nonetheless, on the principal question whether the commission and the municipal respondents wilfully and mala fide disobeyed this Court’s order, it is important to bear in mind the trite principle that an interdict is appropriate only when future injury is feared. This was reaffirmed in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*¹⁸ as follows:

“An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.”

[33] From the background sketched, by 22 June 2022 the commission had already discharged its constitutional and statutory obligation in that it declared that Mr Visser was elected to serve in the Thembelihle council and so filling the vacancy in terms of Item 18 of Schedule 1 of the Structures Act. In essence, when the order of 25 June 2022 was issued, the commission had already performed its duties.

¹⁸ 2008 (5) SA 339 (SCA) para 20; See also *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC) para 48.

[34] It appears that Nxumalo J was not informed that the commission had already discharged its mandate at the time he made the order. However, it bears emphasis that Court orders, irrespective of their validity, are binding until set aside. Wrongly issued judicial orders are not nullities. They are not void or nothingness, but exist in fact with possible legal consequences.¹⁹ But on the foregoing exposition, it can hardly be argued that there was willful or mala fide disobedience of the order on the part of the commission and the municipal respondents when the order had been issued ex post facto.

[35] What further militates against an order of contempt at this stage is that the acting municipal manager of Thembelihle, who attested to the answering affidavit on behalf of municipal respondents, was appointed on 01 March 2023. He was not a party to the litigation under case no 1308/2022, which led to the interim order of 25 June 2022 being issued. Indeed, much is expected of a municipal manager to ensure compliance with the Court orders as a local government functionary and the accounting officer. However, it is axiomatic that in this case, he would not have been able to comply with the interim order which had already been overtaken by the events. It follows that the application to hold the commission and the municipal respondents in contempt must fail.

The declaratory orders

[36] In truth, it was argued for the respondents, that the application is not about contempt of court but an abuse of court process in the context of Siyathemba factional internal leadership disputes. That may well be. Just to recap, the applicants seek a declaratory order to the effect that the inauguration of Mr Visser, as a councillor of Thembelihle, is unlawful. This Court is further urged to direct the commission to remove Mr Visser's name from its records and to substitute it with Mr Jonas's. The applicants further move for an order that Mr Jonas remains and prevails as a duly elected member of Thembelihle Council. In *Yola and Another v Jonas and Others*²⁰ (*Yola*), a case which

¹⁹*Municipal Manager OR Tambo District Municipality & another v Ndabeni* (2022) 43 ILJ 1019 (CC) para 24.

²⁰

(Case no 1800/2022) (08 November 2022)

came before me on 13 October 2022, involving some of the parties in the present litigation, I made the following observations in the judgment dated 08 November 2022:

[12] On 22 June 2022, the IEC issued a notice in terms of which it declared a vacancy in respect of the position that was held by Mr Jonas in the council and further advised that Siyathemba had recommended Mr Marnus Stanley Visser (Mr Visser), the twelfth respondent, as the next candidate to fill the vacancy. It further directed that Mr Visser, being the candidate on the top of Siyathemba's list, was declared to be elected to the council as envisaged in Schedule 1 Item 18 of the Structures Act and that Mr Visser had replaced Mr Jonas who had ceased to hold office in the municipal council. It is partly on this basis that the applicants approached this court for the declaratory order that Mr Jonas was removed as a councillor on 22 June 2022 which resulted in his seat being vacant and his position as a Speaker, being brought to an end.

[22] The principal controversy that emerges on the papers is whether Mr Jonas is still a councillor and the speaker of the council or has been removed. . .

[25] . . .(T)he expulsion of Mr Jonas as a member of Siyathemba is the subject matter of a review application pending before this court under case No 1308/2022. On the date of the hearing of the present application Mr Jonas also filed, from the bar, an application to review and set aside the decision of the IEC for having declared and filled the vacancy. The pending reviews are not irrelevant or "designed to create a certain atmosphere and detract attention away from the facts of this matter" as the applicants sought to argue. On the contrary, as I see it, they lie at the heart of this application.

[30] To expedite the hearing of the reviews, I am of the view that the applications filed under case no 1308/2022 be placed before the Judge President or any other judge to be designated by him for an expedited judicial case flow management."

[37] The relief sought in *Yola* is set out in para 2 of that judgment in these terms:

"Mr Tommy Yola and the African National Congress (ANC), the first and second applicants, approached this court on a semi-urgent basis for an order declaring that Mr Danny Jonas (Mr Jonas), the first respondent, was removed as a councillor of Thembelihle Local Municipality (the municipality), the second respondent, on 22 June 2022 which resulted in his seat being vacant and his position as a Speaker brought to its abrupt end. They further sought an order

interdicting Mr Jonas from holding himself out as a councillor or speaker of the municipality or taking part in the affairs of the municipality as a speaker or councilor.”²¹

[38] The declarator sought in the present application is the converse of what was sought in *Yola*. It is remarkable that the applicants did not file a counter-application in *Yola*. This would have avoided a fragmentary adjudication of the issues and proliferation of proceedings which may lead to conflictual outcomes. I withheld the order in *Yola* for the following reason:

“[28] To my mind, any declaratory order at this stage, to the effect that Mr Jonas was removed as a councillor and speaker of Thembelihle Local Municipality would be legally untenable. This is so because of the pending review concerning the expulsion of Mr Jonas from his party and the review concerning the decision of the IEC to declare the position held by Mr Jonas vacant and filling it. The outcome of the reviews in question would have a bearing on the order which this Court is enjoined to make. In my view, it would be expedient that they be disposed of first, on an expedited basis.”

[39] More than a year has passed since the interim order of 25 June 2022 was issued and approximately eight months since the judgment in *Yola* was handed down. The reviews remain pending. The applicants appear to have no appetite to prosecute them. The applicants ought to pursue the reviews for the ventilation of their true complaint. In my view, the pending reviews, concerning the expulsion of Mr Jonas from Siyathemba; the commission’s pronouncement that Mr Jonas had ceased to hold office as a councillor and its declaration of Mr Visser as elected to serve on Thembelihle council, may well be dispositive of the declaratory relief that the inauguration of Mr Visser is unlawful.

[40] It is not necessary for present purposes to consider whether the inauguration of Mr Visser was a decision capable of being reviewed under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or merely a symbolic act as the municipal respondents sought to argue. That remains a matter to be dealt with by the reviewing court if raised there.

[41] Insofar as Mr Februarie and Mr Jonas seek an order aimed at compelling the commission to change its records through the substitution of the name of Mr Visser with

²¹ Ibid para 2 of the judgment.

that of Mr Jonas and that the latter prevails as a councillor of Thembelihle, they have considerable difficulties on their path. This is so because the conclusion by the Electoral Court in *Februarie and Another v Electoral Commission of South Africa and Another*,²² is against them. It was there said:

“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.

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.”

- [42] The decision of the commission, even when it is defective, would have to be treated as valid until it is reviewed and set aside under PAJA or the principle of legality. On the foregoing analysis, the declaration that the inauguration of Mr Visser as a councillor of Thembelihle is unlawful and any order directing the commission to alter its records does not withstand scrutiny. The upshot of this is that the application stands to be dismissed.

costs

- [43] The municipal respondents argued that Mr Februarie and Mr Jonas should have never filed the present application and ought to bear costs on a punitive scale in their personal capacities. The commission sought costs in the ordinary course against them. It argued that the applicants were well aware of Item 18(1)(a) of Schedule 1 of the Structures Act which compelled the commission to fill the vacancy once it is declared by the municipal manager. They ought to have known that the proper course to follow was to approach

²²Ibid, fn 1, paras 41-42.

this Court by way of a review as opposed to contempt proceedings. For Mr Visser it was argued that the present application is ill-conceived and an abuse of court process which justifies costs on a punitive scale.

[44] The respondents were clearly unjustifiably hauled to Court on an urgent basis. Albeit the applicants' unmeritorious litigation against the respondents at whom ought to be discouraged I am unconvinced that a punitive costs order, as a mark of this Court's opprobrium, would be just and ought to issue. Costs shall be on party and party scale. I am also not swayed that the applicants ought to be held liable for the wasted costs in respect of the proceedings of 20 July 2023 because they did not occasion that postponement. Mr Februarie and Jonas had no standing to bring the application on behalf of Siyathemba, consequently, it must be absolved from the payment of costs. In the result, I make the following order.

Order

1. The application is dismissed.
2. Mr Ronald Februarie and Mr Danny Jonas, the second and third applicant, are to pay the costs of the application, in their personal capacities, jointly and severally, the one paying the other to be absolved.

1
2
3
4

Phatshoane DJP

For the applicants:

Mr Februarie (in person)
Mr Jonas (in person)

For the first respondent:
Instructed by:

Adv M Tsele
DMO Attorneys, Johannesburg.
Majiedt Swart Incorporated, Kimberley.

For the second, third
and fifth respondents:
Instructed by:

Adv RJ Groenewald
Calteaux & Partners, Johannesburg.
Duncan & Rothman Attorneys, Kimberley.

For the thirteenth respondent:
Instructed by

Adv T Tyuthuza
Mkhokeli Pino Incorporated, Kimberley.