REPORTABLE JUDGMENT

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 17633/2012

In the matter between:

JEMAYNE ALVIRA ANDREWS	**Applicant**
and	
THE DEMOCRATIC ALLIANCE	**First Respondent**
THE MUNICIPAL MANAGER	**Second Respondent**
THE CHIEF ELECTORAL OFFICER INDEPENDENT ELECTORAL COMMISSION	**Third Respondent**
MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE	**Fourth Respondent**

Counsel for the Applicant	:	Adv. K H Warner
Instructing Attorneys	:	S Morgan & Associates
Counsel for Respondents	:	Adv. D Borgström
Instructing Attorneys	:	Minde Schapiro & Smith Inc.
Date of Hearing	:	11 October 2012
Date of Judgement	:	13 November 2012

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 17633/12

In the matter between:

JEMAYNE ALVIRA ANDREWS	Applicant
and	
THE DEMOCRATIC ALLIANCE	First Respondent
THE MUNICIPAL MANAGER OF THE CITY OF CAPE TOWN	Second Respondent
THE CHIEF ELECTORAL OFFICER THE INDEPENDENT ELECTORAL COMMISSION	Third Respondent
MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	Fourth Respondent

Date of Hearing: 11 October 2012
Applicant's Supplementary Submissions: 31 October 2012
Order: 13 November 2012

JUDGMENT

MANSINGH, AJ

[1] The applicant, Jemayne Alvira Andrews ("Andrews"), seeks urgent, interim relief interdicting the respondents, namely, The Democratic Alliance, ("the DA"), The Municipal Manager of the City of Cape Town ("the City") and The Independent Electoral Committee ("the IEC") from:

1.1 calling any by election in the ward in respect of which applicant is a councillor and/or;

1.2 appointing, or taking any steps to appoint, any person in the place of applicant as councillor of the City of Cape Town and

1.3 suspending or, in any way, reducing or terminating the payment to applicant of her salary.

[2] This urgent relief is sought pending a hearing for final relief. Initially, the final relief was solely for an order reviewing and setting aside an alleged "*decision*" by the DA to terminate the applicant's membership. After the answering papers were filed, the applicant amended her Notice of Motion to seek orders: (a) "*reviewing and setting aside ... the decision by the First Respondent to terminate the Applicant's membership of it*"; and, in the alternative (b) "*declaring the cessation of Applicant's membership, whilst a sitting elected public representative, or First Respondent pursuant to the provisions of clause 3.5.1.9 of the constitution of First Respondent was invalid and unlawful.*"

[3] The applicant was a member of the DA and served as a representative of the party, as a municipal ward councilor, for ward 22 (which covers the areas of Belhar, Uitsig, Ravensmead and Malawi Camp), on the Council of the City of Cape Town ("the City").

[4] Only the DA opposed this application. The second, third and fourth respondents filed notices that they will abide by the decision of this court.

[5] The applicant was required to pay a *"candidate fee"* to the DA, arising from the fact that she acted as one of its public representatives. In a nomination application form before the May 2011 local government elections, the applicant undertook to pay this "*candidate fee*" if she was elected as a councillor. The fee was to be a once-off payment equal to 50% of her monthly gross salary as a councillor.

[6] The applicant was clearly aware of her obligation to pay. She identified "*DA policy*" as one of her skills on the nomination form, and corrected the amount owed from 40% to 50%, and initialed this change.

[7] Clause 3.5.1.9 of the DA's constitution, reads:

> *"A member ceases to be a member of the Party when he or she ... is in default with the payment of any compulsory public representative contribution for a period of 2(two) months after having been notified in writing that he or she is in arrears and fails to make satisfactory arrangements for payment of the arrears. For this purpose 'in writing' means a letter of demand setting out the amount owing and the date by which it must be paid."*

And Clause 3.5.2 of the DA's constitution reads:

> *"A member, who ceases to be a member of the Party, loses all privileges of Party Membership and, if that member is a public representative, he or she also loses the office which he or she occupies by virtue of his or her membership, with immediate effect."*

[8] It is common cause that:

8.1. The applicant was required to make payment of candidate fees. The full amount was R14 062.00.

8.2. She was given numerous notices of her obligation to pay. She was sent notices on: 1 July 2011; 3 August 2011; 2 September 2011; 20 September 2011; 4 October 2011; 7 November 2011; 7 December 2011; 13 January 2012; and 8 March 2012.

8.3. On 20 September 2011, she agreed to make payments by debit orders of R2 343.67 per month. She did not.

8.4. By 8 March 2012, she informed the DA that she would instead make payment by a lump sum. She did not.

8.5. On 13 April 2012, the applicant was sent a notice by email notifying her that payment was outstanding and informing her of the consequences of non-payment, including a full repetition of clause 3.5.1.9.

8.6. On 10 May 2012, she was personally presented with a written notice dated 21 April 2012 requiring payment within 7 days. This notice complied with all the requirements of clause 3.5.1.9 of the DA's constitution. The clause was reproduced in the notice. The applicant was therefore fully aware that if she did not pay the outstanding amount within two months, she would cease to be a member of the DA.

8.7. Two months later, on 10 July 2012, the applicant had still not made payment. She therefore, as a fact, ceased to be a member of the DA on that date.

8.8. On 15 August 2012, the DA advised the applicant in writing that she had ceased to be a member of the DA. She was afforded 72 hours to provide "*clear and unequivocal reasons in writing*" why her membership had not ceased in terms of clause 3.5.1.9. In other words, the DA recognised that it had to make a factual determination if the payment had been made or not, and allowed the applicant the opportunity to make submissions in this regard.

8.9. On 17 August 2012, two representatives of the DA (Ms. Shafer, who is a senior member and an MP; and Ms. Viljoen) reminded the applicant of her obligation to make representations by 18 August 2012. She did not dispute this obligation, but failed to provide any submissions or to request any further time to do so.

8.10. In the absence of any contrary submissions by the applicant, on 20 August 2012, the DA's Federal Legal Commission ("FLC") determined that her membership had ceased on 31 July 2012. The DA's Federal Executive confirmed this conclusion on the same day.

8.11. Thereafter, the DA still provided the applicant with additional opportunities to prove that she had paid her fees. There were conversations between the applicant and officials of the DA up to at least 30 August 2012, when the applicant was afforded yet another opportunity to show that she had, as she alleged, at least attempted to pay her fees. She failed to provide the necessary proof.

8.12. In terms of s 27(f)(i) of the *Local Government: Municipal Structures Act* 117 of 1998 ("the Structures Act"), when the applicant lost her membership of the DA, she also automatically lost her position as a councilor on the City's Council.

8.13. Because the applicant was a ward councillor, the vacancy created by her departure triggered the need for a by-election. The City Manager did not do so. That by-election had not yet been called.

8.14. The applicant did not, and has still not, paid the R14 062.00 she owes the DA.

[9] The applicant's argument for why she should nonetheless retain her membership of the DA is as follows:

9.1. Although she had not paid her candidate fees as a fact, she believed she had paid; and

9.2. Although the "*grammatical or ordinary meaning*" of clause 3.5.1.9 would have the consequence that the applicant's membership automatically terminated, that interpretation would violate the applicant's constitutional right to just administrative action. It should therefore be avoided in favour of an interpretation that would require the DA to afford the applicant a disciplinary hearing before taking any action against her.

[10] Although the applicant delayed launching the current application. The DA did not, however, dispute the urgency of this matter. This is so as it transpired that a by-election will not be called by the fourth respondent unless and until this matter is resolved.

[11] The issues for determination are:

11.1. Whether the applicant made any attempt to pay her candidate fee?

11.2. Whether the applicant has a *prima facie* right to the relief sought? And

11.3. Whether the applicant will suffer any demonstrable irreparable harm, and whether the balance of convenience is against granting her the relief sought?

WHETHER THE APPLICANT MADE ANY TTEMPT TO PAY THE CANDIDATE FEE?

[12] On the applicant's version, although she had not, as a fact, paid her candidate fees, she believed that she had paid the amount due in two payments: R4000,00 paid on 30 March 2012; and R10 062,00 on 31 May 2012. The DA did not receive these alleged payments because, as the applicant accepts, she paid them to the incorrect account number.

[13] The DA had two responses to the Applicant's continued assertion that she attempted in good faith to make the payments and believed that she had done so. First, it is irrelevant. What matters in terms of clause 3.5.1.9 is whether she had in fact made the payments, not what she intended to do or what she believed she had done. Secondly, her allegations demonstrate her dishonesty, even under oath. As the Constitutional Court has recently held: "*It is obvious that dishonesty is inconsistent with … conscientiousness and integrity*". **Democratic Alliance v President of the Republic of South Africa [2012] ZACC 24 (5 October 2012).**

[14] The DA's mission statement includes the following: "*I commit myself to serve with integrity the people of my country*". The DA submitted that the applicant's lies and half-truths about her payments clearly demonstrate that she lacks the integrity to which the DA aspires.

[15] In its answering affidavit the DA indicated factual allegations pointing to the applicant's dishonesty. The DA submitted that the applicant refuses or fails to deal with the allegations in the papers suggesting that it is irrelevant. The DA submitted that this is incorrect. That, not only should honesty be a hallmark of a public representative, but the facts illustrate that the applicant approaches this Court with proverbial 'dirty hands'. The DA submitted that on this basis alone her application should be dismissed.

[16] The DA submitted that these facts illustrate that:

16.1 On 22 and 23 August 2012 the Applicant explained that she was dealing with a Ms. Erendsen at Standard Bank (her Bank). An e-mail message was provided, purportedly from Ms. Erendsen, which was supposed to serve to confirm that the applicant had made payments to the DA's account.

16.2 Despite several requests, the applicant failed to ever provide Ms. Erendsen's contact details. The reasons for her reticence became clear when the DA directly tracked Ms. Erendsen. Not only did she work in the Vehicle and Asset Finance Department, but denied having written the e-mail.

16.3 In the same period, the applicant was advised that documents she had produced until then were not conclusive, and she promised to provide her bank statements for April, May and June 2012. She failed to do so.

16.4 The applicant was also advised by the DA that it appeared that she had paid the money into the wrong account. The applicant then amended her version to suggest that the money she had paid had been returned to a "*suspense account*" at Standard Bank, and was still being held there (several months later). In substantiation of this version, the applicant put the DA in contact with a Mr. Anthony Jonathan of Standard Bank.

16.5 Mr. Jonathan however failed to ever provide promised written confirmation of his advice. On investigation, it came to light that he was a clerk in Standard Bank's processing centre. It has also come to light that he is the applicant's husband.

16.6 During all this time the applicant failed to come into the DA's offices and provide any documentary proof. Only on 28 August 2012 did she provide bank statements via the offices of another provincial Minister (Theuns Botha). These were printed off her internet banking service which purported to show that the payments had been made.

16.7 The DA did not accept the validity of these bank statements as they were unlike any statements the DA's officials had seen. The DA therefore requested official stamped bank statements and an affidavit from an official at Standard

Bank stating that the money was being held in a suspense account. The applicant did not provide this proof.

16.8 The applicant has never done so, and still fails to provide any evidence of the sort in the current application. She has in fact compounded suspicions by only providing stamped copies of statements indicating "*payments*" and "*deposits*" into her account, which exclude amounts paid from her account. Clearly it is the latter, and not the former, that are relevant. This selective provision of information is inexplicable.

[17] The DA submitted the applicant's version is also completely implausible. That the following facts show that the applicant did not even attempt to make payment, or at least manipulated facts to suit her belated attempts to justify her failure to pay her candidate fees:

17.1 The applicant's version is that the payments are being held in a suspense account with Standard Bank (her bank) because they had been paid into an invalid account number. This possibility has been denied by officials of both ABSA Bank (the DA's bank) and Standard Bank. Both banks confirmed that the money would have been returned to the applicant's account within a few days.

17.2 As noted above, the applicant's version relies on the advice of Mr. Jonathan, who has been identified as a processing clerk at Standard Bank. The applicant confirmed in reply that this person was in fact her husband. Yet, she does not confirm his position at the Bank. Nor does she explain why, of all the employees of Standard Bank, it was her husband who contacted the DA. Nor

does she explain why, if her husband works at Standard Bank, it was so difficult for her to obtain proof of her payments to the wrong account, or to obtain return of the money from a suspense account. The involvement of Mr. Jonathan demonstrates the lengths the applicant went to so as to deceive the DA, and now this Court.

17.3 The applicant only provides stamped bank statements in her replying affidavit that show only the credits to her account. She relies on these statements to show that the money she allegedly paid to the invalid account number has not been returned to her account. This, she contends, proves that it is being held in a suspense account. Yet she does not explain why she could not supply a stamped bank statement that also showed the debits to her account. That statement would prove beyond dispute that she made the payments. Her failure to do so can only be interpreted to mean that, if she did provide that statement it would show that no such payments were ever made.

17.4 On the applicant's version, the R14 062.00 is sitting in limbo in a suspense account. The applicant also asserts that since she lost her DA membership and her seat as a councillor, she lost her "*primary source of income*". In those circumstances, the R14 062.00 that is allegedly waiting in a suspense account would be much needed. Yet, the applicant does not explain why she has not requested Standard Bank to return the R14 062.00 to her account. If she had, that transaction would then appear on the credit statements she has provided. It would both prove that she made the payments and provide her with desperately needed funds. Again, her failure to request Standard Bank to return the money

that is allegedly in a suspense account can only be seen as an admission that she never made the alleged payments.

[18] That the evidence also illustrates that the applicant concocted e-mail correspondence with a Ms. Erendsen of Standard Bank, which she provided to the DA in substantiation of her version that amounts were being held in a suspense account.

[19] The DA's counsel submitted that in sum, the applicant's version should be rejected as incredible. Despite numerous opportunities to produce clear proof that her version is true, she has not done so. That this court should decide this case on the basis that the Applicant simply never even attempted to pay the candidate fees that she owed.

[20] I am not prepared to decide this case on that basis and turn then to the requirements for an interim interdict.

NO *PRIMA FACIE* RIGHT

[21] The applicant's case fails on this ground. This is so as on her own version it is admitted that she, as a fact, failed to pay the full amount of her candidate fees for more than two months after the notice of 21 April 2012 (which came to her attention at least on 10 May 2012).

[22] This is simply the end of the case. There is thus no question that clause 3.5.1.9 of the DA's constitution was triggered.

[23] The applicant's response to the unambiguous terms of clause 3.5.1.9 is to argue: (a) there was a decision to terminate her membership; (b) that decision was administrative action because she was not only a member of the DA, but also an elected representative; (c) the decision was not procedurally fair because she was not afforded a fair hearing; (d) clause 3.5.1.9 can and should be interpreted in light of the Constitution to require a disciplinary hearing; and (e) therefore, her termination should be set aside as unlawful and invalid.

[24] The DA's response to this line of argument is fourfold:

24.1 First, the DA did not take a decision; the Applicant lost her membership automatically. As no decision is taken, there can be no administrative act;

24.2 Second, even if a decision was taken, the actions of a political party – even where it results in the removal of an elected representative – are not administrative acts;

24.3 Third, the applicant was in substance afforded a fair hearing about the issue in question: whether she had paid the money owed. There can be no right to a hearing about the consequences that should flow from her violation of the DA's constitution; and

24.4 Fourth, the applicant has not directly challenged the validity of clause 3.5.1.9 of the DA's constitution, nor suggested how it could be interpreted in the manner that she suggests.

No decision was taken

[25] As noted above, in her amended Notice of Motion, the applicant seeks final relief in the alternative. The first prayer is for an order "*reviewing and setting aside ... the decision by the First Respondent to terminate the Applicant's membership of it*". This relief is premised on the assumption that the DA has taken a decision to remove the applicant as a member, and that this decision/action constitutes "*administrative action*" in terms of s33 of the *Constitution of the Republic of South Africa, 1996* and s1 of the *Promotion of Administrative Justice Act* 3 of 2000 ("PAJA").

[26] This is incorrect. For an act to qualify as "*administrative action*" under PAJA, it must constitute a "*decision*". Although the latter term is defined widely, it still requires some positive determination or action by the administrator.

[27] In **Phenithi v Minister of Education and others**, the Supreme Court of Appeal held that a consequence that occurs by operation of law is not "*administrative action*" in terms of PAJA.[1] In that case a teacher was dismissed as a result of section 14(1)(a) of the *Employment of Educators Act* 76 of 1998 because she had been absent from work without leave for 14 days. The Court concluded that the teacher could not review her dismissal under PAJA because no decision had been taken. Her employment terminated automatically. The court quoted with approval from an earlier decision of the Appellate Division:

[1] 2008 (1) SA 420 (SCA) at paras 9-10. See also *Minister van Onderwys en Kultuur en Andere v Louw* 1996 (4) SA 383 (A) at 388-389.

"There is then no question of a review of an administrative decision. Indeed, the coming into operation of the deeming provision is not dependent upon any decision. There is thus no room for reliance on the audi *rule which, in its classic formulation, is applicable when an administrative - and discretionary - decision may detrimentally affect the rights, privileges or liberty of a person."*

[28] This does not preclude the possibility of reviewing the authority's determination that the factual basis for the operation of the provision exists (as an objective jurisdictional fact). But there is no scope to demand a hearing before a law applies. **Pheriti** is indistinguishable from the current case.[2]

[29] Three decisions of this court have applied this well-established heel principles to the precise circumstances involved in this case: automatic termination of membership of a political party.

In **Henderson v The Democratic Alliance,**[3] the court considered the termination of the membership of a member of the DA who had been found guilty of a crime contained in schedule 7 of the Criminal Procedure Act. In terms of clause 3.5.1.8 of the DA's constitution, this caused the loss of membership. The applicant complained that the DA ended his membership without offering him a hearing. The court found that such a hearing was not necessary:

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[2] The same conclusion has been reached in a number of cases involving provisions with the same effect: *Mkhwanazi v Minister of Agriculture and Forestry* 1990 (4) SA 763 (D) at 768C-G; *Yanta and Others v Minister of Education and Culture, KwaZulu, and Another* 1992 (3) SA 54 (N) at 55H-56B; *Dyani v Director-General for Foreign Affairs and Others* [1998] 7 BLLR 735 (Tk) at 740-741.

[3] Unreported judgment of this court in case 12540/07, of 4 December 2007, per Veldhuizen J.

"... [I]*t is common cause that the applicant's conviction of the crimes of fraud fall squarely within schedule 7 of the Act. In terms of clause 3.1.5.8 of* [the DA's] *federal constitution the applicant, upon his conviction, ipso facto ceased to be a member of the* [DA]. *It follows that no decision to end the applicant's membership of the [DA], which is subject to review by a court, was taken.*"[4]

[30] Similarly, in **Noland v Independent Democrats,**[5] Louw and Erasmus JJ considered the validity of a decision to summarily expel the applicant from the ID before the opening of the floor-crossing window-period; as well as the validity of her subsequent attempt to cross the floor. In so doing, it became clear that the applicant had signed a floor-crossing form before her expulsion, thus indicating her desire to join another party. The court noted that in terms of clause 15 of the ID's Constitution a member automatically terminated their membership if they joined another party. The case was ultimately decided on other bases, but the court noted as follows:

"*As a member of the ID, the applicant's relationship with the ID was determined by the ID constitution and the consequences which, in terms of the constitution flowed from the fact of her joining another political party. She took the decision and joined another political party and she is bound by and must accept the automatic consequence of her action. On the construction of the constitution that she had, by joining another party, automatically terminated her membership, the applicant ceased to be a member of the ID before the end of Friday 31 August 2007.*"[6]

[4] Ibid (my emphasis).
[5] Unreported judgment of this court in case 13275/07, of 1 April 2008, per Louw J, Erasmus J concurring.
[6] Ibid at para 26 (my emphasis).

[31] Finally, in **Brummer v Democratic Alliance & Others**, case no. 17305/12, unreported judgment, Traverso DJP held that, absent an attack on the validity of clause 3.5.1.9, a member who fails to pay candidate fees for two months after demand has no *prima facie* right to have her membership re-instated. Implicit in this conclusion, was the finding that the clause operated automatically and no decision was taken.

[32] The founding papers in the current application were clearly based on those in the **Brummer** case. The applicant however attempts to distinguish her case in that:

> 32.1 Mr. Brummer was a so-called proportional-representation councilor, while she was a ward councilor. Why this should make a difference is hard to see. Clause 3.5.1.9 of the DA's Constitution does not distinguish between types of councilors. Both types are required to pay candidate fees. The similarity is instead that both Mr. Brummer and the applicant failed to pay the required amounts.
>
> 32.2 Mr. Brummer sought to be reinstated as a member of the DA in urgent proceedings. This is however identical to the applicant's case. She can only take up her seat as a councillor again if she never lost her membership of the DA.
>
> 32.3 Mr. Brummer actually made submissions to the DA's FLC as required in the notice to him. This however counts against the applicant. She is in an even worse position that Mr. Brummer, because she failed to take up the opportunity to make submissions when she had the chance to do so.

32.4 At the hearing of this matter on 11 October 2012, the parties agreed that once the written judgment in the Brummer matter was handed down, they could elect to file supplementary submissions. On 31 October 2012, applicant filed supplementary submissions seeking to distinguish the cases on twofold:

32.4.1. That in the Brummer matter, at the hearing the interim relief for an interdict against taking steps to appoint another in the position declared vacant and for filling the vacancy created by the termination of Brummer's membership became moot and only prayer 2 remained, that of final relief seeking the reinstatement of Brummer as a member of the DA. That it was conceded by Brummer's counsel that this final relief could not be granted without a declaratory being granted that clause 3.5.1.9. of the DA's constitution was against public policy. That an application to amend the notice of motion to incorporate such a prayer was made during argument and the court without going into the merits, refused the application to amend, and as a consequence of the concession by Brummer's counsel, the application for final relief failed. That in *casu*, the matter is for interim relief not final relief.

32.4.2. That in *casu*, the issue of clause of 3.5.1.9 of the DA's constitution was, raised and dealt with (to the extent necessary in interim proceedings) both in the papers and in argument.

I find that, the applicant's submissions take this matter no further.

[33] These cases conclusively refute the applicant's suggestion that it is grossly unfair or unconscionable for a political party to include in its constitution provisions which summarily terminate membership of the party in defined circumstances. This court has repeatedly accepted that these provisions require no decision.

[34] The applicant attempts to deal with this fatal flaw in her case by arguing that the DA did in fact take a decision: it granted her additional time to comply with clause 3.5.1.9 and then gave her numerous opportunities to show that the DA's initial factual determination was false. The applicant appears to suggest that by attempting to accommodate the applicant, the DA somehow turned an automatic consequence into a decision. This would in essence mean that her automatic loss of membership was, or could be, 'undone' by the DA when it sought to accommodate her or give her the benefit of all doubts. This argument is dealt with below in the section demonstrating that the applicant did in fact have a fair hearing.

Decisions of Political Parties are not Administrative Acts

[35] The applicant correctly accepts that, ordinarily, decisions of political parties do not constitute administrative actions because they are simply the decisions of private parties. However, she contends that if the member is also an elected public official, then disciplinary action against that member is administrative action.

[36] This in my view is incorrect. Decisions to terminate a person's party membership is not administrative action even if that person holds elected public office. Further more,

the principle of equality demands that all members no matter what their positions within the party and structures must abide by the same membership disqualification criteria.

[37] In the first place, the actions of the DA regulating its relationship with its members (under the DA's constitution) are not an exercise of public power, or a power akin to any governmental power. The DA's conduct is thus not subject to PAJA, or to so-called 'rule-of-law' review in terms of s1(c) of the Constitution.

37.1 The question whether a function by an ostensibly private body was subject to review as an exercise of public power, was considered in **Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another.**[7] The court noted that the question whether the actions of a political party amounted to administrative action had received "*varying responses*".[8] The court concluded that disciplinary decisions by sports clubs were not susceptible to review merely because the public was interested. Nugent JA noted that he had "*considerable doubt whether a body can be said to exercise 'public powers' or perform a 'public function' only because the public has an interest in the manner in which its powers are exercised or its functions are performed, and I find no support for that approach in other cases in this country or abroad.*"[9]

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[7] 2010 (5) SA 457 (SCA).
[8] Ibid at para 35.
[9] The court thus doubted the findings in the earlier case of *Tirfu Raiders Rugby Club v SA Rugby Union and Others* [2006] 2 All SA 549 (C), which had held that the SA Rugby Union exercised public powers and performed a public function, principally, it seems, because the matters in which it engages are matters of public interest. So too, the decisions of the erstwhile United Cricket Board (as CSA's predecessor) were not considered to constitute administrative action in *Cronje v UCBSA* 2001 (4) SA 1361 (T). See also the majority judgment in *National Horseracing Authority of Southern Africa v Naidoo and Another* 2010 (3) SA 182 (N).

37.2 The test which arises from the cases of **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another**[10] and **Calibre Clinical** is that a function by an ostensibly private body is subject to review under PAJA if it is "*governmental in nature*". In **Calibre Clinical** the court stated that –

"*[40] It has been said before that there can be no single test of universal application to determine whether a power or function is of a public nature, and I agree. But the extent to which the power or function might or might not be described as 'governmental' in nature, even if it is not definitive, seems to me nonetheless to be a useful enquiry. It directs the enquiry to whether the exercise of the power or the performance of the function might properly be said to entail public accountability, and it seems to me that accountability to the public is what judicial review has always been about. It is about accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct, and the question in each case will be whether it can properly be said to be accountable, notwithstanding the absence of any such special relationship.*"

37.3 In **Calibre Clinical**, the procurement decisions of a bargaining council created under legislation were not treated as governmental in nature. This was because it was "*a voluntary association that is created by agreement to perform functions in the interests and for the benefit of its members*".[11] The DA is no different.

[10] 2007 (1) SA 343 (CC).
[11] *Calibre Clinical* at para 41.

[38] I find that there is thus no general right to review the actions of the DA as if they were a public power.

[39] The only basis on which this court could possibly intervene is in cases on unfairness in the proceedings of a domestic tribunal.[12]

[40] An additional requirement of 'fairness' cannot be implied or interposed in all circumstances. For instance, in **South African Maritime Safety Authority v McKenzie**, Wallis AJA found that in the employment setting, there is no imperative to "*develop the common-law contract of employment by simply incorporating into it the constitutional guarantee* [of fairness]".[13]

[41] In the second place, the cases that the applicant relies on are easily distinguishable:

41.1 The majority of these decisions concern the need for natural justice in disciplinary proceedings. The DA fully accepts that the principles of natural justice apply when it disciplines its members. But that does not mean that a person can never lose her membership of a political party without a hearing. Nothing in the decisions address the constitutionality of a provision such as clause 3.5.1.9.

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[12] *Taylor v Kurtstag NO and Others* 2005 (1) SA 362 (W) at para 42; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A); and *Max v Independent Democrats and Others* 2006 (3) SA 112 (C).
[13] 2010 (3) SA 601 (SCA) at para 35.

41.2 In **Max v Independent Democrats & Others**,[14] Davis J did not hold that the decision to discipline a member of a political party constitutes administrative action in terms of PAJA. He expressly held that it makes no difference as the process would in any event be subject to the principles of natural justice. Recognising the public consequences of a decision to expel a member does not convert the decision into administrative action. The case does not aid the applicant.

41.3 In **Marais v Democratic Alliance**,[15] although the court accepted that, in principle, a decision of a political party could constitute administrative action, the decision to expel a person from a party and thereby remove him as the mayor was not administrative action. In any event, the clause in issue concerned a situation where the party took an active decision, not a case where a person lost her membership automatically.

41.4 **Diko & Others v Nobongoza & Others**[16] concerned a decision to expel a member of a political party where the party had not given the member proper notice of the disciplinary hearing. The DA accepts that it must give notice of disciplinary hearings. But its constitution did not require a hearing in these circumstances, so *Diko* is irrelevant.

41.5 **Harding v Independent Democrats**[17] concerned a provision of a political party's constitution that read: "*any member who joins another political party or is*

[14] 2006 (3) SA 112 (C).
[15] [2002] All SA 424 (C); 2002 (2) BCLR 171 (C).
[16] 2006 (3) SA 126 (C).
[17] [2008] 2 All SA 199 (C); 2008 (5) BCLR 523 (C)

proved to have assisted in the formation of another political party may be summarily expelled from the party by the party leader". The court held that the member was entitled to a hearing before being expelled, and that he had received a fair hearing. The case is in any event different as the party leader had a discretion to expel the member, while clause 3.5.1.9 affords the DA no discretion. Davis J held that being a career politician does not establish any legitimate expectation to a salary; politicians serve at the pleasure of the electorate.

The Applicant had a fair hearing

[42] Even if the applicant can raise procedural fairness – either under PAJA or the rules of natural justice – the determination must be based on the facts of the case.[18] In this case the applicant was given an opportunity to make submissions to the DA, which were considered. This satisfied the requirement of procedural fairness.

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[18] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 45. See also *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A), Corbett CJ referred to the (now) oft-quoted words of Lord Mustill in *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL) at 106d – h:

> "*What does fairness require in the present case? My Lords, I think it unnecessary to refer [to] by name, or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From B them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.*"

[43] The applicant was granted every opportunity to: (a) pay the money she owed; and (b) prove that she had in fact paid the money by the agreed deadline.

[44] The applicant was given nine monthly reminders of her outstanding fees beginning on 1 July 2011. She had more than a year to pay. Despite promises to pay, she did not. She was sent a notice informing her of the consequences of her continued non-payment on 13 April 2012. She did not pay. She was sent a second notice on 10 May 2012. She did not pay. The last two notices repeated the text of clause 3.5.1.9 and clearly indicated the consequences of non-payment. The applicant ignored those consequences.

[45] On 20 August 2012, the DA concluded that she had not paid her candidate fees and her membership had therefore ceased on 13 July 2012. But the DA afforded her ample opportunity after that decision to indicate that the FEC and the FLC had been mistaken. She was initially given 72 hours, and thereafter additional opportunities to show that she had paid her fees. She did not. The applicant cannot reasonably contend that the process followed by the DA was unfair.

[46] The applicant now contends that the DA's largesse in giving the applicant every opportunity to first make the payment, and then to show that the payment had been made, places the DA in the "horns of a dilemma". Either the cessation of membership flowed automatically in which case the DA was not entitled to grant the applicant any extensions and her membership ceased on 13 June 2012, not 10 July 2012 as the DA contends. Or, the DA does in fact have the power to take a decision to terminate membership, which is then reviewable as administrative action.

[47] This argument has no merit. First, clause 3.5.1.9 provides that a person loses her membership if she "*is in default with the payment of any compulsory public representative contribution for a period of 2(two) months after having been notified in writing that he or she is in arrears and fails to make satisfactory arrangements for payment of the arrears.*" The opportunity to make "*satisfactory arrangements*" necessarily implies that the DA may agree with a member that the payment may be made outside of the two months default period. If, for example, the DA issues the required written notice and the member immediately responds stating that she can only pay the outstanding amount in installments over four months, the DA can permit her to do so. If she fails to comply with that "*satisfactory arrangement*" she loses her membership. To put it differently, a member will lose her membership if: (a) she fails to pay or make "*satisfactory arrangements*" within two months; or (b) she reaches an agreement with the DA on how the money will be paid, but fails to comply with that agreement. Clause 3.5.1.9 therefore permits the opportunities that the DA provided to the applicant.

[48] The decisions to allow a member to make alternative arrangements for payment are not decision about membership. They are a decision about how payment will be made. If that arrangement is not complied with, the member loses her membership automatically.

[49] Hoexter partially criticizes the decision in **Phenithi** on the ground that the legislation deemed the educator to be dismissed after 14 days "*unless the employer directs otherwise*". This wording implied that there must have been a decision not to

direct otherwise.[19] But, as Mpati DP noted in **Phenithi**, it was not the applicant's case that there was a decision not to direct otherwise. It was only her case that there was a decision to discharge. The same applies in the current case.

[50] As in **Pheniti**, the applicant here has challenged the decision to terminate her membership. She has not challenged the decision to grant her additional opportunities to comply with her obligations under the DA's constitution. It would be unusual if she did.

[51] Second, if indeed clause 3.5.1.9 does not permit the DA to grant any extensions, and the notice of 13 April 2012 was a notice in terms of clause 3.5.1.9, then the Applicant lost her membership on 13 June 2012, rather than 10 July 2012 as the DA contends. It is not clear how it might assist the applicant's case if she convinced this court that she lost her membership one month earlier. The fact would remain that she lost her membership as an automatic consequence of clause 3.5.1.9.

[19] Administrative Law in South Africa (2ed) at 202.

There is no challenge to clause 3.5.1.9

[52] Finally, all the applicant's texts are incompatible with the clear wording of clause 3.5.1.9. The applicant amended her notice of motion to attack not only the "*decision*" to terminate her membership, but also the "*cessation*" of her membership in terms of clause 3.5.1.9. However, despite hinting at such a challenge in both her founding and replying affidavits, the applicant has not asked this court for a declaration that clause 3.5.1.9 itself is invalid. This court therefore accepts that clause 3.5.1.9 as it stands is valid.

[53] In **Brummer v Democratic Alliance & Others**,[20] Traverso DJP held on virtually identical facts, that in the absence of a challenge to the validity of clause 3.5.1.9, a person in the position of the applicant had no *prima facie* right.

[54] In reply, the applicant suggests that she will, in the envisaged final proceedings, attack clause 3.5.1.9. The applicant's amended Notice of Motion however specifies the final relief that will be sought, and gives no inkling of an attack on clause 3.5.1.9. Her intentions are thus far from clear, as is the basis of any attack on Clause 3.5.1.9.

[55] Instead of attacking the validity of clause 3.5.1.9, the Applicant seems to argue that clause 3.5.1.9 can be "*interpreted*" to afford the DA a discretion or obligation to: (a) afford the applicant a disciplinary hearing; and (b) following that hearing impose a sanction other than termination of membership.

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[20] Case No. 17305/12 (12 September 2012).

[56] This appears to be akin to the principle of 'reading down' unconstitutional legislative provisions – i.e. reading them in a manner which avoids an unconstitutional result.[21] But such relief must be based on a plausible reading of the words, which is not overly strained.[22] Tellingly, the applicant makes no attempt to explain how her favoured interpretation is compatible with the words of the clause. She points to no vagueness or ambiguity and no influences of textual or historical context that make such an "*interpretation*" plausible. She argues only that such an interpretation would better protect her right to just administrative action.

[57] But interpretation must have some relationship to the words that are actually used. Words cannot be "interpreted" to mean something they do not say, no matter how high the constitutional stakes. There is absolutely no suggestion in the text of clause 3.5.1.9 that suggests either the power (let alone the obligation) to grant a disciplinary hearing, or to impose any sanction other than termination. The applicant's remedy in the

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[21] See Bishop "Remedies" in Woolman *et al* Constitutional Law of South Africa (2ed), Vol 1, chapter 9, at 9-87.

[22] In *Investigating Directorate: Serious Economic Offences And Others v Hyundai Motor Distributors (Pty) Ltd And Others; In Re Hyundai Motor Distributors (Pty) Ltd And Others v Smit NO and Others* 2001 (1) SA 545 (CC), the Court stated the principle that:

> "*[23] ... [J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.*
>
> *[24] Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.*" [emphasis added]

In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC) at para 81 (and at n80) the Court refers to the range of cases in which the principle has been applied that a lawful interpretation must be favoured over an unlawful one. The Court (at para 84) however "*cautioned ... that an interpretation that seeks to bring a provision within constitutional bounds should not be unduly strained.*" [emphasis added]

face of the striking clarity of the text of clause 3.5.1.9 is to seek a declaration that clause 3.5.1.9 is unconstitutional and invalid. She has not done so.

[58] Even if clause 3.5.1.9 were textually capable of an alternative interpretation, the DA disputes that it would be appropriate to adopt such an interpretation. The applicant's case appears to be that there are no circumstances in which a political party can terminate a person's membership without a disciplinary hearing – at least where that person is an elected official. Put differently, the applicant contends that a political party may not determine that there are some actions for which expulsion is the only punishment.

[59] A consideration of some of the other situations in clause 3.5.1 show that this is an untenable view. Clause 3.5.1 provides that a member automatically loses her membership if she: (a) joins another party; (b) canvasses other DA members to resign from the Party or support another party; (c) stands against an official candidate of the DA; or (d) is convicted of a serious criminal offence. The applicant cannot seriously suggest that a member of the DA who joins another party must be given a disciplinary hearing to determine what the appropriate sanction for that action should be. The DA must be allowed to decide that there are certain offences that are so serious that termination is the only option.

[60] The DA has decided that non-payment of candidate fees is one of those offences. There are obvious reasons for this choice. It indicates the importance the DA places on paying fees, provides a strong incentive for members to do so expeditiously, and eases the administrative burden of convening disciplinary hearings. It is not for this court to

determine what actions the DA should regard as sufficiently serious offences to warrant automatic expulsion.

[61] Clause 3.5.1.9 does not preclude the applicant from making representations to the DA challenging its factual determination that she had not paid her fees. She was given every opportunity to do so. Nor does it prevent judicial review of the DA's factual determination. All it does is provide that, once it has been conclusively determined that a member had not paid her fees, termination is the only possible result. There is nothing constitutionally objectionable about such a provision.

IRREPARABLE HARM

[62] The applicant's application recognises that – as a fact – she has lost her membership of the party. The determination underlying this situation is not directly challenged.

[63] Nonetheless, she seeks interim relief to, in effect, temporarily reinstate her membership of the DA, in order to retain her seat on the City Council. This would require this court making the finding, in interim relief proceedings, that the applicant's membership must be prospectively reinstated for a short period until a court can hear the final relief and decide whether she is a member of the Party or not. This would be unprecedented.

[64] It is also clear that the applicant only seeks to foist herself on the DA so that, pending a hearing for final relief, she can be "*restored*" to the seat she previously held as

a councillor. Her interest in taking up these positions also appears to be merely to secure her "*salary*".

[65] In **Harding v The Independent Democrats and others** this court found as follows:

> "*One has to ask serious questions as to what are the implications of being a professional politician. Are Courts to come to the rescue of politicians who may lose their livelihood by losing their seat? The livelihood of politicians surely depends upon their accountability to the electorate. It is the electorate who put them there in the first place. They have no legitimate expectation to enjoy a livelihood in perpetuity. Accordingly it appears to me that this argument can certainly have little weight in this dispute. It does not place the applicant in any higher position than an aggrieved employee in a disciplinary hearing.*" [23]

[66] Even if the applicant could be viewed as an employee, her relief would be exceptional. In the context of labour law, Grogan Workplace Law at 435 explains the situation as follows:

> "*Initially, the court appeared to take the view that it could not [*grant status quo orders to order the temporary reinstatement of an employee pending resolution of a dispute under the *Labour Relations Act 66 of 1995]. In later decisions the court has held that temporary reinstatement is permissible in appropriate circumstances. However, the court has stressed that mere loss*

[23] [2008] 2 All SA 199 (C); 2008 (5) BCLR 523 (C) at

of income or the humiliation caused by suspension pending a disciplinary inquiry is not necessarily sufficient to justify a claim for urgent relief."

[67] In **Hultzer v Standard Bank of SA (Pty) Ltd**[24] the court (per Revelas J) found as follows:

"[11] These ... cases illustrate the principle that the Labour Court would only grant urgent interim relief amounting to status quo relief in very special circumstances has now been firmly established.

[12] I have considered the grounds for urgency raised by the applicant. Insofar as the applicant alleges that there would be an injury to his reputation and a possibility that the respondent could employ another person in his position, these are not factors which distinguish the applicant's case from any other dismissal case. The applicant has not demonstrated with reference to proper facts why his particular case is different in this regard.

[13] Financial hardship or loss of income is not regarded as a ground for urgency .... The applicant, in its founding papers, has not put forward any evidentiary detail with regard to injury to his reputation if he is not reinstated in his former position by way of urgent interim relief."[25]

[24] (1999) 20 ILJ 1806 (LC).
[25] This approach was also taken in University of the *Western Cape Academic Staff Union and Others v University of the Western Cape* (1999) 20 ILJ 1300 (LC) at para 16, and in many other cases.

[68] In **Zwakala v Port St John's Municipality and Others**[25], the court considered reinstating a Municipal Manager pending the resolution of dispute proceedings. The court found that the "*humiliation suffered by him by reason of the suspension and the tarnishing of his name which it implies*", was not a good enough basis for this relief. This approach has also been followed in many subsequent cases.

[69] Thus, even if the applicant could be treated as an employee, she would have to show more than financial prejudice and embarrassment to justify reinstatement on an interim basis. She has failed to do so.

[70] The interim reinstatement of a politician into public office would also lead to undesirable results. The applicant was elected as a DA representative and held her seat as a representative of the DA. Now that her membership of the DA has ended, so has her democratic mandate. If the applicant is convinced that she has electoral support outside of her membership of the DA, she is free to stand as an independent candidate or as a member of another party in the by-election for the ward.

[71] If the applicant could occupy the seat, while in open dispute with the DA, the DA would effectively lose its seat which it won in democratic elections. Instead, the applicant would be able to occupy the seat for her personal interests, and would be beyond the party's discipline and political instruction.

[25] (2000) 21 ILJ 1881 (LC).

BALANCE OF PREJUDICE

[72] For current purposes (i.e. for interim relief), the relief sought by the applicant would only be justified if it was necessary to maintain the *status quo*. In other words, the applicant would have to show that if the City Manager or the Minister performed their duty and called the by-election, then her claim for final relief would somehow be rendered meaningless.

[73] No case to this effect has been made out in this regard. The applicant's only concern is securing her salary. Her financial position will not be affected if the seats either: (a) remain vacant; or (b) someone else fills the seat in the interim. She is neither prejudiced nor advantaged by the alternatives.

[74] If the applicant persists with her application for final relief, and if she is successful, it will be open to her to argue that she should be 'reinstated' in the seat. Of course, a Court will have a discretion whether to grant relief that has such 'knock-on' consequences;[27] and whoever is appointed following the by-election may wish to oppose the matter.

[75] Only in reply does the applicant make out any semblance of a case in this regard – suggesting that a Court will never reinstate her in due course and remove her replacement. Courts have, in other cases, reinstated a councilor who was unlawfully removed and in so doing removed his or her replacement. In this regard, see for

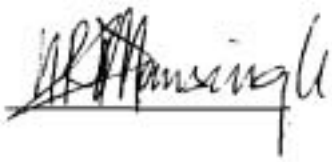
[27] A court has a discretion to grant relief setting aside allegedly unlawful action - *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) at para 28. In *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) at para 13, the court highlighted that the knock-on consequences would be an important consideration in exercising this discretion.

instance, **Dorfling v The Independent Democrats**[28] and **Mthethwa v Municipal Manager, Uthungulu District Municipality and others.**[29]

[76] By contrast, granting the applicant relief will cause the DA and the citizens of Ward 22 real prejudice. The DA will lose one of the seats on the City Council that it won in a democratic election. The people of Ward 22 will be represented by a person for whom they did not vote and who will be outside the discipline of the party that they supported. The balance of prejudice lies against granting interim relief.

IT IS ORDERED THAT:

The application is dismissed with costs.



URD MANSINGH, AJ

[28] Unreported judgment of this court in case 14963/2007 of 11 June 2007, per Steyn AJ (as she then was).
[29] [2007] JOL 20640 (N).