

Firing the mayor with a 'double barrelled' motion

- While political parties can terminate a councillor's party membership, they cannot remove a mayor from office or require a mayor to resign.

Facts

The former mayor of the City of Cape Town, Peter Marais, decided to honour former Presidents Mandela and De Klerk by renaming Wale and Adderley Streets after them. This decision gave rise to much controversy. Allegations were made of irregularities in the public participation process and in statements to the media.

A commission of enquiry headed by the former judge Heath recommended that disciplinary action should be taken against Marais. However, when the matter was referred to the Rules Committee of the City Council, it found that he had not tried to mislead the public.

Marais' party, the Democratic Alliance (DA), appointed the Van der Westhuizen Commission to evaluate the integrity of the participation process. However, the commission's work was overtaken by a letter to Marais from the national leader of the DA, Tony Leon. It stated that Leon had lost confidence in Marais' ability to function as mayor and that a motion would be tabled at the DA's National Management Committee (NMC) calling on him to resign from his position. If Marais did not comply with the request, his membership of the DA would be terminated by the NMC.

The DA could not legally force Marais to resign as mayor.

Issues and rulings

Marais took the DA to court. The first issue in dispute in *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) was Marais' allegation that the NMC acted unfairly in that it took over the work of the Van der Westhuizen Commission. Furthermore, Marais argued that he was not given enough time to prepare and present his case.

In response, the DA argued that Marais should have first used his right to appeal to the Federal Council of the DA before starting legal action. They based this argument on section 7 of the Promotion of Administrative Justice Act, 2000, (Act 3 of 2000). However, the court held that the DA's decision was not administrative in nature. It was not taken in the exercise of a public power or in performance of a public function, despite widespread public interest.

The second issue was the DA's 'double barrelled' motion, calling on Marais to resign or lose his party membership. The court held that Marais was a duly elected municipal official and only the Council had the power to remove the mayor from office. (The court erroneously referred to section 58 pertaining to executive mayors; however, the correct section 53 has the same effect.) Therefore the DA could not legally force Marais to resign as mayor. Consequently, his failure to comply with the request to resign was not grounds for termination of his party membership. As he had not lost his membership, he was not compelled, in terms of section 27(c) of the Municipal Structures Act, to vacate his office as mayor.

The Court said that a political party cannot remove a mayor from office. If a political party is unsatisfied with a mayor from within its ranks, it should terminate his or her membership of the party in terms of its own internal disciplinary procedures. In terms of section 27(c) the mayor would then effectively lose his or her mayoral position.

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What constitutes a majority of councillors?

In Nokeng tsa Taamanes Municipality's 12-person council, a block of six ANC councillors gained control when one, a Mr. Sutherland, was elected as Speaker, giving him the casting vote when ordinary votes were tied. The other six councillors were independents or represented other parties.

An ANC councillor's resignation reduced the ANC block to five and the total councillors to eleven. The six councillors opposing the ANC requested that the Speaker call a council meeting before the by-election, as they wanted to elect a new Speaker. In terms of section 29(1) of the Structures Act, a Speaker *must* convene a council meeting at the request of a majority of councillors. However, Sutherland refused to do so, arguing that the six did not constitute the 'majority of councillors'.

One of the six, Mr Oelofse, applied to court for an order compelling him to convene the meeting, arguing that the term 'majority of councillors' in section 29(1) of the Structures Act refers to *council members* (incumbents) and not to *council seats*. Sutherland countered that it means the majority of seats, including vacant seats, and as the opposing group did not form a majority, they could not force him to convene a meeting. He based his argument on section 35 of the Structures Act, which states that when a municipal council has insufficient members for a quorum, the MEC must appoint an administrator until it does. If the 'majority' refers to members and not seats, he argued, section 35 would not be needed.

In *Oelofse vs Sutherland* (2001) JOL 8651 (T), the Court looked at section 160(3)(a) of the Constitution, which says that

a 'majority of members' form a quorum. Section 160(4) further states that 'no bylaw may be passed by a municipal council unless all members of the council have been given reasonable notice'. The Court said it is impossible to give notice to a council seat. Further, section 160(8) states that 'members of a municipal council are entitled to participate in its proceedings and those of its committees in the manner that allows parties and interests reflected within the council to be fairly represented...'. The Court said that the phrase 'members of the Council' can only relate to members and not to seats in the council. The Court therefore concluded that the group of six councillors were 'a majority of councillors' as required in section 29(1) of the Act and were entitled to demand that the Speaker convene a meeting.

Comments

The Court's reference to section 160 of the Constitution is useful. However, this judgement appears to render the application of section 35 of the Structures Act (MEC appoints an administrator if there are not enough members for a quorum) redundant. In terms of this judgement, the quorum simply changes when there are vacancies. The need for section 35 then never arises.

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key points

- A Speaker must convene a council meeting at the request of the majority of councillors.
- The Court said that the majority of councillors means the majority of *members* and not *seats* in the council.
- This also means that a majority of councillors (and not of seats) constitute a quorum.