REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A5043/10

DATE: 10/12/2010

In the matter between-

CONGRESS OF THE PEOPLE	First Appellant
MBHAZIMA SHILOWA	Second Appellant
CHARLOTTE LOBE	Third Appellant

and

MOSIUOA LEKOTA	First Respondent
PHILLIP DEXTER	Second Respondent

J U D G M E N T

BORUCHOWITZ, J:

[1] This appeal relates to an order granted by Makume J on 29 May 2010 interdicting the holding of an election. The first appellant is, nominally, "the Congress of the People". As will appear later, "the Congress of the People" is not, in fact, a party to this appeal.

[2] The respondents, who are office bearers of the first appellant, approached the court below on an urgent basis and obtained an order in the following terms:

1. That the first respondent (the first appellant) be interdicted and restrained from holding an election in contravention of the undertaking reflected in paragraph 1 of its resolution of 27 May 2010, a copy of which is attached hereto as Annexure “A”.

2. That the first respondent is ordered to defer the elections for a period of 4 months in order to allow nominations in terms of nominations to be accepted as per paragraph 3 of its resolution of 27 May 2010 (Annexure “A”).

3. Ordering the first, second, third and fifth to forty-third respondents to pay the costs of this application.

[3] Despite the fact that a full court of this division was constituted to hear the appeal on an urgent basis, the appellants have permitted the appeal to lapse. There is before us an application for condonation and reinstatement of the appeal. Condonation is sought in respect of the late filing of the appellants’ notice of appeal; the filing of an incomplete or defective power of attorney; the late filing and inclusion of several pages of the appeal record and the late filing of the appellants’ heads of argument.

[3] It is appropriate to first deal with the problems relating to the power of attorney as these are of a fundamental nature and cannot be remedied by means of an application for condonation. Rules 7(2) and (4) read:

> "*(2) The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorising him to appeal and such power of attorney shall be filed together with the application for a date of hearing.*
>
> *(4) Every power of attorney filed by an attorney shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law; provided where a power of attorney signed on behalf of the party giving it, proof of authority to sign on behalf of such party shall be produced to the registrar who shall note that fact on the said power.*"

[5] The relevant portions of the power of attorney filed with the registrar in the present case provide as follows:

> "*We, the undersigned,*
>
> ***MBHAZIMA SHILOWA***
>
> ***AND***
>
> ***CHARLOTTE LOBE***
>
> *hereby appoint* ***GUGULETHU OSCAR MADLANGA*** *and/or* ***JOHN SINDISO NGCEBETSHA*** *of* ***NGCEBETSHA MADLANGA ATTORNEYS*** *with power of substitution to be our attorneys and agents in instituting appeal proceedings under case number A18845/10 on behalf of the Appellants in our personal capacities and in representative capacities as the Deputy President and General Secretary of the 1st Appellant and as mandated by the Congress held on the 27th-29th of May 2010, as per its resolution. We hereby further revoke, cancel and annul all and any Power of Attorney, mandate and/ or dispositions heretofore made by us in respect of the matter referred to above.*"

[6] The power is signed by the second appellant whose signature is qualified by the words "*Duly authorized in terms of the resolution of the Congress held on 27-29 of May 2010*". Contrary to the provisions of Rule 7(4) the power has not been signed by the third appellant and nor does the second appellant purport to sign on her behalf. The Registrar has also not noted on the power, as required by Rule 7(4), that proof of second appellant's authority to sign on behalf of the first appellant was produced.

[7] Counsel for the appellant conceded that there was in existence no resolution of the first appellant that expressly authorised either the second or third respondent to institute appeal proceedings on first respondent's behalf. He sought to argue, however, that such authority was to be implied from the wording of the following resolution purportedly passed by the Congress at its national conference held during 27 to 29 May 2010:

> "*Given the legal challenges facing the Congress, Congress agreed on the following:*
>
> *4.1 That the Congress empowers the CNC to defend the Congress decisions including the right for the Congress to continue with its business as per its rejection of the CNC proposal to turn it into a policy conference.*
>
> *4.2 That the Congress will therefore stand adjourned until all the legal impediments have been dealt with to be resumed based on the same credentials that constituted this Congress.*"

[8] There is nothing in the wording of the above resolution to suggest that the second and third appellants are authorised to institute appeal proceedings on behalf of the first respondent, and to instruct the appellants' attorneys for such purpose. The defect in second appellant's authority to represent the first

appellant cannot be remedied by the grant of condonation, and no attempt has been made to rectify the defective power.

[9] The filing of a power of attorney in compliance with the requirements of Rule 7(2) and (4) is peremptory and where these requirements have not been adhered to the appeal will not have been properly enrolled. See *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at para [6] and cases there cited.

[10] It follows that the appeal of the second appellant only is properly before the court. But that appeal has lapsed and it is therefore necessary to consider the application for condonation and reinstatement.

[11] Rule 49(6)(b) provides that the court to which the appeal is made may upon "*good cause shown*" reinstate an appeal which has lapsed. The applicable principles have been discussed in a number of cases, most notably *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) where Holmes JA, in an analogous context, said the following [at 720E-G].

> "*It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.*
>
> *These factors are not individually decisive but are inter-related and must be weighed one against the other; thus a slight delay and a good explanation may be held to compensate for prospects of success which are not strong.*"

[12] Culpable inactivity or ignorance of the rules by an attorney may be such as to render the application for condonation unworthy of consideration, regardless of the merits of the appeal. See *Aymac* (*supra*) at paras [38] to [40].

[13] The appellants have breached the rules in more than one respect. Apart from filing an incomplete or defective power of attorney they have also failed to timeously file their notice of appeal, a complete transcript of the appeal record and their heads of argument.

[14] Rule 49(2) provides that if leave to appeal to the Full Court is granted, the notice of appeal shall be delivered to all the parties within 20 days after the date upon which leave was granted, or within such longer period as may upon good cause shown be permitted. The judgment granting leave to appeal was delivered on 8 June 2010 and the notice of appeal was only filed on 3 September 2010, some 19 court days out of time. Appellants' attorney, Mr Madlanga, has explained that the failure to deliver the notice of appeal timeously was due to inadvertence on his part and pressure from his involvement in various other matters relating to the parties. He asserts that his attention was diverted from the filing of the notice of appeal by virtue of the fact that he was involved in preparing an application for leave to appeal to the Supreme Court of Appeal and in corresponding with the Judge President to ensure that the present appeal be heard expeditiously.

[15] The appeal record, which is incomplete, was also filed late. It was lodged with the Registrar on 25 October 2010, some seven court days prior to the hearing of the appeal. The transcript of the proceedings before the court below is contained in 15 typed and numbered pages; however, pages 6 to 10 were not included in the appeal record. Why these relevant pages were omitted is not properly explained. The appellants' attorney states that it is not clear to him precisely how this omission arose.

[16] Both the rules of court (Rule 49(15)) and the Consolidated Practice Directives Manual of this division oblige appellants to deliver their heads of argument not later than 15 days before the appeal is heard, but the appellants sought to file their heads of argument with the Registrar on 26 October 2010, six court days prior to the date for the hearing of the appeal Appellants' attorney has explained that this delay was caused by the appellants' inability to pay counsel's fees and counsel's refusal to prepare the heads of argument until the outstanding fees were paid.

[17] The failure to timeously file the notice of appeal and a complete record resulted in the respondents delivering their heads of argument on 1 November 2010, some three days prior to the date designated for the hearing of the appeal instead of the stipulated ten-day period. Moreover, the appellants' heads of argument, which were hurriedly prepared, contain references to the record that do not accord with the typed transcript. This was due to the incompleteness of the transcript of the proceedings.

[18] The appellants' failure to comply with the rules and practice requirements of this division has occasioned prejudice not only to the respondents but also to the members of the court hearing the appeal. In a busy court such as the South Gauteng High Court it is essential that heads of argument be delivered within the time parameters laid down in the rules of court and practice manual. The fact that an urgent and special date for the hearing of the appeal was allowed by the Deputy Judge President did not absolve the appellants from their duty to properly and timeously comply with the rules relating to the prosecution of appeals.

[19] A further factor relevant to the discretion whether to reinstate the appeal relates to the question of mootness. Section 21A(1) of the Supreme Court Act 59 of 1959 provides as follows:

> "*When at the hearing of any civil appeal to the Appellate Division or any provincial or local division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*"

[20] Section 21A(1) encapsulates the long-standing principle that courts of law exist for the settlement of concrete or live controversies and not for the determination of abstract, academic or hypothetical questions. See *Coin Security Group (Pty) Ltd v S A National Union for Security Officers and Others* 2001 (2) SA 872 (SCA) at para [7]; *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA); *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA)). The section confers a discretion on the Court to deal with the merits of the

appeal where the appeal involves a question of law which is likely to arise again (see *Land & Landbountwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA); *Ethekwini Municipality v Combined Transport Services* (115/10) [2010] ZASCA 158 (1 December 2010)).

[21] The respondents submit that the appeal is moot, and would be of academic interest only. I am in agreement therewith. The respondents, Mr Lekota and Mr Dexter, approached the High Court on an urgent basis in order to prevent certain members of the first respondent from trying to hold an election. It is apparent from the notice of motion that they sought to interdict elections from being held in contravention of the resolution of 27 May 2010 of the executive body of the first respondent. By implication, the interdict was designed to ensure that no election of office bearers took place on the weekend of 29 May 2010 and that the attempted holding of further elections be postponed for a period of four months, as had been resolved. That weekend has come and gone, as have the four months. The case is thus clearly moot and the appeal against the judgment of the court below would have no practical effect or result. The issues that were in dispute are no longer justiciable and were the appeal to be heard, it should be dismissed on this ground alone.

[22] The explanations given in respect of the appellants' numerous procedural shortcomings are not reasonable or sufficient to justify the reinstatement of the lapsed appeal. In reaching this conclusion I have taken into consideration (1) that multiple breaches of the rules and practice procedures of this Court have occurred; (2) the unexplained dilatoriness of

the appellants' attorney; and (3) that the issues in the appeal appear to be moot and will have no practical effect or result.

[23] During the course of argument the respondents waived or abandoned any right to claim costs against the first and third respondents.

[24] The following order is therefore made:

(a) The application for condonation and reinstatement of the appeal is dismissed.

(b) The costs of the application for condonation and reinstatement are to be paid by the second appellant.

(c) The costs of the appeal are to be paid by the second appellant.

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P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

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R E MONAMA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

[25] I agree with my brother Boruchowitz that that the application for condonation should fail and that the appeal should not be heard. I do,

however, have certain additional reasons which I think should be recorded to underline the fact that there has been no injustice in this matter.

[26] Counsel for the appellant submitted that even if the point of the appeal is moot, the appeal may, however, be heard and that, in this particular case issues of such high public importance present themselves that justice requires that the appeal be considered. It seems clear enough from the wording of section 21A of the Supreme Court Act and the cases of *Premier Mpumalanga en 'N Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA) at 1141J-1142F and *Western Cape Education Department and Another v George* 1998 (3) SA 77 (SCA) 83F-84F that even where the outcome of the appeal will have no practical effect, a court of appeal may nevertheless hear the matter in exceptional circumstances.

[27] In the calm, measured and relaxed atmosphere of an appeal hearing, I am inclined to think that it may have been better for the court below to have cast its order in incontestably interim terms. Nevertheless, it seems to me to be most unlikely that a court of appeal would go so far as to find that the court below erred in making the order which it did. It is undesirable that a court of appeal should easily second-guess the decisions of judicial colleagues. It is clear that the court below acted fairly and carefully in tense, difficult and volatile circumstances to cast an order which best dealt with the situation. That order deserves respect rather than criticism by this court.

[28] Counsel for the appellant also submitted that the case brings to the fore important matters of policy as to when it is appropriate for a court to intervene

in the internal affairs of a political party. I shall accept, in favour of the appellant, that this issue has been raised by the appellant, however cryptically, in the process leading up to the consideration of the application for condonation. Nevertheless, it is clear from the heads of argument of the appellant that, on the day of the hearing, counsel was in no position to do justice to this argument of potentially considerable significance. In making this observation, I wish to make it clear that I cast no aspersions on counsel. Counsel for the appellant is well known to the court for his competence and argued this particular case impressively. The fault lies with the appellant himself. It is clear from the application for condonation that he failed timeously to place his attorney in funds in order properly to brief counsel. Such an issue would have required considerable preparation. The appellant has only himself to blame if he wished to have an important precedent established. In all the circumstances of the matter, he can hardly claim indulgence by the court on the grounds of his being indigent. In any event, he did not even make such a claim.

[29] Besides, a whisk through the law reports will make it clear that this is not the first time that a court has intervened, even under our modern constitutional order, to make orders that affect political parties in quite profound ways. It is unlikely to be the last. The judgment and order of the court below has created no precedent sending a tremor quivering through the ranks of either the legal or the political fraternity. Political contestation for election to office within the political party concerned is, at present, free from any restraining order by the court. In all the circumstances of this matter, I am satisfied that it best for this court to adopt an attitude of “let it be”. In my

respectful opinion, justice will be well served by the order proposed by Boruchowitz J.

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NP WILLIS
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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