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**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

**(REPUBLIC OF SOUTH AFRICA)**

CASE NO : **6779/2011**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES YES/~~NO~~
(3) REVISED

DATE 22/08/2012 SIGNATURE

In the matter between:

| | |
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| **CONGRESS OF THE PEOPLE** | First Plaintiff |
| **MOSIUOA LEKOTA** | Second Plaintiff |

and

| | |
|---|---|
| **MBHAZIMA SHILOWA** | First Defendant |
| **CONGRESS OF THE PEOPLE** | Second Defendant |
| **MBULELO NCEDANA** | Third Defendant |
| **MBULELO BARA** | Fourth Defendant |
| **ARCHIBALD RALO** | Fifth Defendant |
| **NIKIWE NUM** | Sixth Defendant |
| **AMOS LUNGEPHI LENGISI** | Seventh Defendant |
| **ZAYTOON KAFAAR** | Eighth Defendant |
| **MLULEKI GEORGE** | Ninth Defendant |
| **ZALE MADONZELA** | Tenth Defendant |
| **MOGAMAT MAJIET** | Eleventh Defendant |
| **SIPHO NGWEMA** | Twelfth Defendant |

**JUDGMENT**

**BAVA AJ:**

[1] The First to the Twelfth Defendants are the Applicants in an application for leave to amend the Defendants' claim in reconvention in terms of Rule 28(4) of the Uniform Rules of Court. In argument I was advised that the Sixth and Ninth Defendants were not being represented in the matter and there was some debate as to whether certain other Defendants may have withdrawn from the matter. However, I was not asked to decide which parties were properly before the Court and in the absence of any formal notices of withdrawal, I proceed on the basis that the First to the Twelfth Defendants (barring the Sixth and the Ninth Defendants) are the Applicants in the application for leave to amend the claim in reconvention.

[2] While the said Defendants are the Applicants in the application and the First and the Second Plaintiffs are the Respondents in the application, I will refer to the First to the Twelfth Defendants (excluding the Sixth and the Ninth Defendants) as *"the Defendants"*. The First and the Second Plaintiffs will be referred to as *"the Plaintiffs"*.

**BRIEF HISTORY OF THE PLEADINGS**

[3] On the 11th of February 2011, this Court granted an interim interdict in favour of the First Plaintiff in terms of which the First Defendant was interdicted on an interim basis, pending the final end and determination of an action to be instituted by the First Plaintiff against the First Respondent.

[4] On the 16th of February 2011, the Plaintiffs issued summons in the above Honourable Court in terms of which the Plaintiffs sought, *inter alia*, the following declarations:

[4.1] That the First Plaintiff lawfully expelled the First Defendant as a member of the First Plaintiff with effect from 8th February 2011;

[4.2] That with effect from 8th February 2011 the First Defendant lost his seat as a member of the National Assembly nominated by the First Plaintiff;

[4.3] That the Second Plaintiff is the president of the First Plaintiff.

[5] The Plaintiffs sought ancillary relief and it is not necessary for the purposes of this judgment to set out all the relief sought by the Plaintiffs.

[6] On the 22nd of March 2011, the First Defendant filed its plea to the Plaintiffs' Particulars of Claim without filing a claim in reconvention. On the

20th of April 2011, the Third to the Twelfth Defendants filed an application for leave to intervene in the proceedings, which application was granted by this Court on the 22nd of November 2011.

[7] Pursuant to the joinder of the Third to the Twelfth Defendants, the Defendants filed a plea and a claim in reconvention on the 26th of January 2012. The Plaintiffs pleaded to the Defendants' claim in reconvention on the 23rd of February 2012. In the claim in reconvention, the Defendants sought declarations, *inter alia*, that:

[7.1] Article 2.9 of COPE's Constitution, as adopted on 16 December 2008 in Bloemfontein ended on 16 December 2010;

[7.2] That the Plaintiffs are not members of the Congress National Committee ("CNC") of COPE;

[7.3] That the 2008 Constitution was validly amended by the National Congress on 30 May 2010 to provide for a National Congress quorum of 50% plus one instead of two-thirds of the membership of the Congress;

[7.4] That the National Congress which convened at Heartfelt, Pretoria, from 15 to 17 December 2010 was duly constituted and that the decisions taken there on 17 December 2010 are valid and binding;

[7.5] That the First Defendant is COPE's lawful president and its parliamentary leader;

[7.6] That the Second Plaintiff has ceased to be COPE's president with effect from 16 December 2010.

[8] The Plaintiffs amended their plea to the Defendants' claim in reconvention on the 4th of June 2012 and on the 12th of June 2012, the Defendants served a notice of amendment in terms of Rule 28(1). On the 22nd of June 2012, the Plaintiffs served a notice of objection to the proposed amendment in terms of Rule 28(3). On the 6th of July 2012, the Defendants served an application to amend in terms of Rule 28(4) and (6) – (8).

[9] The Defendants seek to amend their claim in reconvention by introducing a paragraph 51A as an alternative to the paragraphs 50.1 to 50.8 and 51.1 to 51.9 and to paragraphs 68 and 71.1 to 71.3 of the claim in reconvention where the essence of the amendment seeks to direct that the parties convene an elective National Congress under the auspices of an independent and overseeing body, within a period of 3 (three) months of the date of an order being granted. The purpose of electing a leadership in this way is to allow such leadership to take over from the interim leadership appointed in December 2008. The convening of such elective National Congress under the auspices of an independent overseeing body is to be

done subject to certain provisos.

[10] In order to realise the amendment to the body of the Particulars of Claim in reconvention, a new prayer is sought to be introduced as prayer 12A seeking the relief caused by the introduction of paragraph 51A to the claim in reconvention.

**THE SUBMISSIONS**

[11] Defendants contend that they are requesting the Court, in terms of the proposed amendment, to assist COPE, which is a voluntary association, in overcoming the impasse that has burdened it over the past years. They indicate that the arrangement which they suggest in the amendment of convening an Elective National Congress under the auspices of an independent overseeing body will be the subject of discussion and agreement between the parties and should the parties fail to reach consensus then the Court should issue a direction in that regard.

[12] The Defendants indicate further that the Elective National Congress, under the auspices of an independent overseeing body, insofar as the detail of convening the Congress and the manner in which the results of the congress will be dealt with needs to be agreed between the parties failing which the Court is also to issue a direction. The Defendants stress that the

prime importance in the matter is securing the services of an independent and credible overseer trusted by both parties. They argue that the Constitution of COPE, as a voluntary association, is a contract between its members and that it is trite law that the Constitutions of voluntary associations will be interpreted benevolently and not narrowly or restrictively. The Defendants, therefore, ask for a robust approach to be adopted insofar as the Constitution is concerned and they intimate that a court will instinctively and rightly shy away from telling COPE who its leaders are. They argue further that since the leaders of COPE are clearly unable to resolve the issues themselves that the Court will want to be informed of the views of the majority of COPE's members and that these views can only be established at a National Congress through the ballot box.

[13] In addition to this and on the day of hearing, I was furnished with Defendants' notes on argument and in these notes on argument the Defendants submit the following:

[13.1] That the crux of the matter to be determined is : who the validly elected leadership of COPE is;

[13.2] That in terms of Section 169 of the Constitution, the High Court may decide any constitutional matter with the exception of those reserved for the Constitutional Court or assigned by an Act of Parliament to another Court of

similar jurisdiction and any other matter not assigned to another Court by an Act of Parliament;

[13.3] That in terms of Section 173 of the Constitution, the High Court has an inherent power to protect and regulate its own process and to develop the common law taking into account the interests of justice;

[13.4] That the modification or creation of relief to meet a remediless right has been considered by the Courts under two separate and distinct heads, namely:

[13.4.1] first, by virtue of the maxim *ubi ius ibi remedium*; and

[13.4.2] under its inherent jurisdiction.

[14] In dealing with all of these issues, the Defendants contend that the issue that they have raised in their pleadings constitutes a triable issue and that it should be left for the trial Court to determine. In this regard, the Defendants argue, this Court should not curtail the Defendants' rights to proceed to have this remediless right tested at the trial Court and it is for that Court to determine the outcome of the amended counterclaim.

[15] The Plaintiffs, on the other hand, submit that the objection to the

amendment is premised on the fact that the amendments do not sustain a cause of action. Furthermore, the Plaintiffs submit, in the alternative, that if the amendments sought by the Defendants are to be allowed, they will render the pleadings vague and embarrassing. The Plaintiffs indicate that on the case authorities an amendment should not be allowed if it renders the pleading excipiable.

[16] The Plaintiffs further submit that the central aspect to the action instituted by the Plaintiffs is the Inaugural Constitution of COPE (2008) and that the allegations of the Defendants pertaining to the Constitution's amendments at St George's are denied by the Plaintiffs.

[17] Furthermore, the Plaintiffs submit that by becoming a member of COPE, the Constitution of COPE forms the basis of the contractual relationship between the members and COPE, as a voluntary association.

[18] The Plaintiffs state that the Defendants' case is that the Constitution was amended at St George's to reduce the quorum from the requirement of two-thirds to a simple majority of 50% plus one. The Defendants allege that as a result of this amendment the meeting convened at Heartfelt was quorate where the Defendants allege that the leadership of COPE was properly elected. Plaintiffs deny such an amendment to the Constitution and they deny that the meeting at Heartfelt was quorate.

[19] The Plaintiffs then referred to the provisions of the Constitution of COPE and in argument indicated that the Defendants have not established a right where they seek to convene an Elective National Congress under the auspices of an independent overseeing body. Plaintiffs indicate that nowhere is this to be found in the Constitution and that the Defendants have not established such a right. Plaintiffs argue that the Court should accept that no right has been established by the Defendants and accordingly the remedy sought by the introduction of the amendment (51A) and the prayer (12A), should not be allowed.

[20] Plaintiffs then also filed their response to the Defendants' notes on argument. These notes on argument were served on the Plaintiffs on the afternoon of Monday 6th August 2012, the afternoon before the matter was heard. Plaintiffs submit that:

[20.1] the reference to the maxim *ubi ius ibi remedium* by the Defendants does not assist them in seeking the amendment;

[20.2] the reference to Section 172(1)(b) of the Constitution and the reference to the inherent power of the High Court does not advance the Defendants' case at all in the application.

[21] The Plaintiffs further submit and emphasise that the matter is not a

Constitutional matter and that matters that are purely questions of fact are not Constitutional matters. The Plaintiffs also submit that the fact that this involves a political party does not make it a Constitutional matter.

[22] The Plaintiffs summarise that the central issues to the dispute between the parties are:

[22.1] either the Constitution was amended at St Georges or it was not;

[22.2] either Heartfelt constituted a National Congress or it was not;

[22.3] either Heartfelt was quorate or it was not.

[23] The Plaintiffs submit that the Defendants are not remediless and in fact there is a remedy available which remedy is to have their dispute determined by the Court. They indicate that the Court will determine whether it is the Plaintiffs who constitute the leadership or the Defendants. The Plaintiffs also submit that the Court will determine whether the expulsions from the party of the Defendants was valid and once the leadership issue is determined by the Court the disputes between the parties will be resolved. The Defendants, so the Plaintiffs argue, seek to introduce a cause of action which does not exist and which will amount to an exercise in futility. Furthermore, the Plaintiffs submit that a Court should be reluctant to interfere in what are essentially

political questions.

[24] Insofar as the development of the common law is concerned, the Plaintiffs indicate that Section 39 of the Constitution has no application to this matter and that this matter is not a novel matter which requires the development of the common law.

[25] Furthermore, the Plaintiffs also referred to the fact that the Defendants applied to the Constitutional Court for direct access under case number CCT17/2012 in March 2012 where the relief sought of the Constitutional Court by the Defendants is identical to the amendment that the Defendants seek to introduce in terms of paragraph 51A. The Plaintiffs opposed the application for direct access and the Constitutional Court refused the Defendants' application for direct access with costs.

**GRANTING OR REFUSING AN AMENDMENT**

[26] It is trite that where a Court is to decide whether to grant or refuse an application for an amendment, the Court exercises a discretion. This discretion, needless to say, has to be exercised judicially. In **Commercial Union Assurance Co Ltd v Waymark NO** 1995 (2) SA 73 (TkGD) the Court set out the principles governing applications for amendment of pleadings and indicated that:

[26.1] the Court has a discretion whether to grant or refuse an amendment;

[26.2] an amendment cannot be granted for the mere asking. Some explanation must be offered therefor;

[26.3] the Applicant must show that *prima facie* the amendment *"has something deserving of consideration, a triable issue"*;

[26.4] the modern tendency lies in favour of an amendment if such *"facilitates the proper ventilation of the dispute between the parties"*;

[26.5] the party seeking the amendment must not be *mala fide*;

[26.6] the amendment must not *"cause an injustice to the other side which cannot be compensated by costs"*;

[26.7] the amendment should not be refused simply to punish the Applicant for neglect;

[26.8] a mere loss (the opportunity of gaining) time is no reason, in itself, for refusing the application;

[26.9] if the amendment is not sought timeously, some reason must be

given for the delay.

[27] In **Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another** 1967 (3) SA 632 (D), Caney J, at 641A, states:

> *"Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."*

[28] See also **Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another** 1990 (3) SA 547 (A) at page 565 where Corbett CJ (as he then was) quoted Caney J with approval.

[29] In this particular matter it is common cause that the Constitution of COPE is a contractual relationship between its members and COPE. In **Turner v Jockey Club of South Africa** 1974 (3) SA 633 (A) at 645 B, Botha JA stated:

*"It is common cause that the relationship between a jockey licensed under the Respondent's rules – such as the Appellant – and the Respondent, is contractual, and that that relationship is governed by the Respondent's rules and regulations, which constitute the terms of the contract between the parties, and the applicable principles of common law. (Jockey Club of S.A. v Transvaal Racing Club, 1959 (1) SA 441 (AD) at p. 450)."*

[30] Then in **Matlholwa v Mahuma and Others** [2009] 3 All SA 238 (SCA) at page 240 [8], Van Heerden AJ stated:

*"As was correctly emphasised by the court below, a political party is a voluntary association founded on the basis of mutual agreement. Like any other voluntary association, the relationship between a political party and its members is a contractual one, the terms of the contract being contained in the constitution of the Party. In construing the provisions of the Party's constitution for the purposes of this appeal, it is important to bear in mind that expulsion is the most drastic form of punishment which a voluntary association can impose on its members and the power to do so must consequently appear expressly or by necessary implication from the provisions of its Constitution."*

[31] See also **Yiba and Others v African Gospel Church** 1999 (2) SA 949 (C) at 960 D – 961 B.

[32] In **Mcoyi and Others v Inkatha Freedom Party**, **Magwaza-Msidi v Inkatha Freedom Party** 2011 (4) SA 298 (KZP), Patel DJP at 309 B [30] stated :

> *"A political party is a voluntary association, and a voluntary association is founded on the basis of mutual agreement, which entails an intention to associate, and consensus on the essential characteristics and objectives of the association ..."*

[33] In considering the current amendment, I am guided by the principles dealing with amendments as set out in **Commercial Union Assurance Co Ltd v Waymark NO** *supra* and the cases referred to in that judgment. In this particular matter, the Defendants have correctly described what the crux of the issue is between the parties, namely, the trial Court will have to determine who the validly elected leadership of COPE is. This, to my mind, suggests, very clearly, that the ambit of the dispute falls within the confines of the Constitution of COPE.

[34] In having regard to the nature of the dispute and the fact that the parties are *ad idem* that the relationship is a contractual relationship between COPE and its members and that this contractual relationship is governed by the terms of the Constitution. I am not persuaded that the amendment relates to either a Constitutional matter or that it requires the development of

the common law where such relationship is governed by contractual terms. If I am to grant such an amendment, it will lead to the absurd situation where parties conclude an agreement, for example, and where they exclude an arbitration clause, that a party disgruntled with the terms of the agreement would seek a Court to direct that the parties subject themselves to an independent arbitrator. This is the absurdity in granting the amendment to the Defendants in the current matter.

[35] In **Benjamin v Sobac South African Building and Construction (Pty) Ltd** 1989 (4) SA 940 (CPD) at 958 A-D, Selikowitz J stated:

> *"Where a proposed amendment will not contribute to the real issues between the parties being settled by the court, it is, I think, clear that an amendment ought not to be granted. To grant such an amendment will simply prolong and complicate the proceedings for all concerned and must, in particular, cause prejudice to the opposing party who will have to devote his energy and expend both time and money in dealing with an issue, the resolution of which may satisfy the needs (or curiosity) of the party promoting it but which will not contribute towards the adjudication of the genuine dispute between the parties."*

[36] In the case of **Cross v Ferreira** 1950 (3) SA 443 (C), Van Winsen AJ held that where the proposed amendment of a declaration would render it excipiable, it is a good ground for refusing the amendment.

[37] I have given the matter considerable consideration in view of the fact that it is an important matter and that it affects the political landscape of our country. In considering the amendment proposed by the Defendants it is apparent that the Defendants seek a solution to the impasse reached between the parties. However good the intention or however reasonable the suggestion may be, it is not a suggestion that finds its home in the context and within the ambit of the terms that govern the relationship between the parties. The terms that govern the relationship between the parties is, as agreed to by both parties, the terms contained in the Constitution of COPE. In **Van Diggelen v De Bruin and Another** 1954 (1) SA 188 (SWA) at page 193, paragraph (5), Claassen J stated the following:

> *"The Court's paramount concern is always, within the frame-work of the law, to do justice between man and man. It will be guided by the terms and circumstances of the contract under consideration."*

[38] It is trite that the Court should not make an agreement for the parties but may enforce the agreement between parties. See **Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd and Another** 2007 (6) SA 404 (D) at page 414, paragraph [49].

[39] If I am to allow suggestions of alternate dispute resolution mechanisms not agreed to between the parties, this would allow parties to seek to

introduce external resolution mechanism into contracts where such resolutive terms are not incorporated in an agreement. I repeat the cautionary note expressed by Patel DJP in **Mcoyi and Others v Inkatha Freedom Party Magwaza-Msidi v Inkatha Freedom Party** *supra* where he stated at page 306, paragraph [23] of the judgment that a court should be reluctant to interfere in what are essentially political questions.

[40] I am of the view, therefore, that the amendment that the Defendants seek to introduce in terms of paragraph 51A and the concomitant relief sought in the intended prayer in terms of prayer 12A are excipiable. I do not hold the view that they are remediless rights that the Defendants seek to introduce but rather that the introduction of these paragraphs are not rights in law. The result being that where there is no right there cannot be a remedy and furthermore that where there is no right, the Defendants cannot introduce a supposed or hypothetical claim which would satisfy the Defendants but which finds no basis in law.

**ORDER**

[41] Accordingly, I make the following order:

1. The application for leave to amend the Defendants' claim in reconvention is dismissed with costs and such costs to include

the costs of two Counsel.

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|---|---|
| Counsel for the Applicants (Defendants) : | Advocate J C Heunis SC<br>Advocate S van Zyl |
| Counsel for the Respondents (Plaintiffs) : | Advocate Hilton Epstein SC<br>Advocate P A Venter<br>Advocate Ayayee |
| Attorneys for the Applicants: | Marais, Muller, Yekiso Incorporated |
| Attorneys for the Respondents: | Wertheim Becker Incorporated |
| Date of hearing: | 7th August 2012 |
| Date of judgment: | 22 August 2012 |

**Bava AJ**