

REPUBLIC OF SOUTH AFRICA

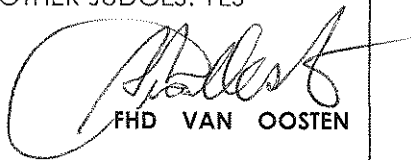


SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 6779/2011

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

21 SEPTEMBER 2012


FHD VAN OOSTEN

In the matter between

CONGRESS OF THE PEOPLE
MOSIUOA LEKOTA

FIRST PLAINTIFF
SECOND PLAINTIFF

and

MBHAZIMA SHILOWA
CONGRESS OF THE PEOPLE
MBULELO NCEDANA
MBULELO BARA
ARCHIBALD RALO
NIKIWE NUM
AMOS LUNGEPHI LENGISI
ZAYTOON KAFAAR

FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT
FIFTH DEFENDANT
SIXTH DEFENDANT
SEVENTH DEFENDANT
EIGHTH DEFENDANT

MLULEKI GEORGE
 ZALE MADONZELA
 MOGAMAT MAJIET
 SIPHO NGWEMA

NINTH DEFENDANT
 TENTH DEFENDANT
 ELEVENTH DEFENDANT
 TWELFTH DEFENDANT

Practice – Interdict - Interim interdict - to stop preparations for and convening of elective Congress of political party - prima facie right - balance of convenience - both found established in favour of applicants-interim interdict granted.

J U D G M E N T

VAN OOSTEN J:

[1] In December 2008 the political party known as the Congress of the People, or by its acronym Cope, was formed at its inaugural congress in Bloemfontein, with its president Mr Lekota and deputy-president, Mr Shilowa. In the 2009 national election Cope received 1 311 027 votes, constituting a 7,42% share of the total votes casted. In the municipal by-elections over the past 18 months the results show a marked decline in the support for the party. One of the reasons proffered for the decline in support is the on-going raging leadership rivalry between, on the one side, Mr Lekota and the Lekota faction, and on the other, Mr Shilowa and the Shilowa faction. This, I have been informed, has a crippling effect on the party. The leadership struggle came to a head-on confrontation between the two leaders at the National Congress of Cope which was held at St Georges, in Gauteng, from 28 to 30 May 2010. A long line of litigation ensued involving a numerous applications which eventually culminated into the action which has now been enrolled for hearing in this Court on 1 February 2013.

[2] It is common knowledge that the next national elections in South Africa will be held on a date to be promulgated in 2014. All political parties, including Cope, need to position and organise themselves in order to properly campaign and contest the election. For this purpose Cope is planning an elective Congress to be held at the end of October 2012. In the application presently before me Mr Shilowa, and his supporters, seek to interdict the Congress from taking place. The application is opposed by Mr

Lekota.

[3] The parties to this application are also the parties in the action I have already referred to. The action was instituted on 16 February 2011 by Cope and Mr Lekota, as the plaintiffs, against Mr Shilowa as the defendant. The other defendants were subsequently granted leave to join the action as defendants. The sixth and ninth defendants however, no longer pursue their defence of the action. The defendants filed a plea and counterclaim. The relief claimed by the parties in essence is for declarators and interdicts to in effect confirm the leadership of their respective candidates. For the sake of convenience and ease of reference I shall refer to the parties either as in the action or by reference to the names of their respective leaders. Before I deal any further with the relief sought in this application and for a better understanding of the disputes between the parties, it is necessary to briefly recount the long and chequered history of this matter relating to the litigation between the parties.

[4] The St Georges conference marked the beginning of the leadership struggle. Mr Shilowa and his supporters changed the policy conference into an electing conference. This resulted in an urgent application, launched by Mr Lekota, in which he sought and obtained an order from Makume J, interdicting Mr Shilowa and his supporters from proceeding with the elections at the conference. The proposed election was postponed but another meeting continued in which a no-confidence vote in Mr Lekota was passed and Mr Shilowa was appointed as the acting president of Cope. This prompted a further urgent application launched by Mr Lekota, in which Mathopo J granted an order, firstly, declaring the vote of no-confidence of no force and effect, that Mr Lekota was still the incumbent president of Cope and that Ms Charlotte Lobe was still the incumbent head of the communication of Cope, and, secondly, interdicting and restraining Mr Shilowa from amending and substituting any of the Cope's representatives in parliament and provincial legislature.

[5] At the next conference of Cope, held at Heartfelt, the leadership dispute again flared up. The congress became disorderly and pandemonium broke out. Mr Shilowa proclaimed himself a president of Cope which once again prompted Mr Lekota to launch an urgent application, in which Watt-Pringle AJ, on 11 February 2011, granted an

interim interdict, pending the finalization of an action which was subsequently duly instituted as I have alluded to, in effect barring Mr Shilowa from in any way being involved or participating in the affairs of Cope. Provision was made in the order for the anticipation thereof on 24 hours' notice, but this did not happen until 11 April 2011. On 25 February 2011 six members of Cope, all supporters of Mr Shilowa, lodged an application to the Western Cape High Court seeking interdictory and declaratory relief in an attempt to legalise their perception of the party and its leader. The application came up for hearing before Bozalek J who stayed the proceedings pending the outcome of an application by those applicants in this Court for leave to intervene in the action which, as I have mentioned, was made and granted.

[6] On 11 April 2011 Mr Shilowa gave notice for the anticipation of the interim interdict and claimed certain other relief. The matter could not proceed and was postponed. Affidavits were filed and a trial date was allocated for 22 to 25 August 2011. Shortly before the hearing of the application, senior counsel for Mr Lekota became indisposed. The application came up for hearing before me. I allowed the matter to stand down to the next day. Counsel for Mr Shilowa then applied for an amendment which was opposed. A postponement was sought and eventually agreed to. The matter was postponed to 5 December 2011. On that day Makhanya J recused himself and the matter was again postponed. During March 2012 the plaintiffs applied for a separation of issues in the action which was granted by Moshidi J on 27 March 2012. In terms of the separation order the status of the St Georges conference shall be determined separately and prior to a consideration of the full merits of the action. In April 2012 Mr Shilowa applied to the Constitutional Court for direct access which was refused by an order dated 7 May 2012. On 13 June 2012 the defendants gave notice of their intention to amend their counterclaim. The effect of the amendment was to seek an order that the Congress be held under the guidance of an independent third party and thus to overcome the impasse that had burdened Cope over the past years. The plaintiffs opposed the proposed amendment and the application for an amendment was enrolled for hearing. On 22 August 2012 Bava AJ dismissed the application with costs. Finally, the present application was launched, by way of urgency on 6 August 2012, for hearing

on 24 August 2012. The matter was by agreement postponed and a full set of affidavits has been filed.

[7] This brings me to the present application. The relief sought is for an interim interdict restraining Cope “from undertaking preparations for and convening a national elective Congress” pending the final determination of the action. The requisites for the granting of an interim interdict are well-established: firstly, a *prima facie* right, though open to some doubt, secondly, a well-grounded apprehension of irreparable harm if the interim interdict is not granted, thirdly, the balance of convenience favouring the grant thereof and, fourthly, the absence of any other satisfactory remedy in the circumstances (see *Video Rent (Pty) Ltd and another v Flamingo Film Hire* 1981 (3) SA 42 (C) 44E). In the view I take of the matter it is only necessary to determine the first and second requirements. Before I turn to do so it is necessary to set out the basis on which I propose to approach this matter.

[8] South Africa is a constitutional democracy. Our democracy relies on the active participation of political parties. All registered political parties have the right to participate in South Africa’s general election. The preamble to our Constitution states its fundamental purpose as “laying the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law”. Political parties therefore should be allowed to campaign and fairly contest the election. At the heart of a system of multi-party democracy lies the choice afforded to ordinary citizens to choose their government by voting for the political party they support (see *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others* 2005 (3) SA 280 (CC) 291 para 27-32, where the rights of all South Africans citizens to vote for the party they support in terms of s 19 of the Constitution was emphasized). The right includes the citizen’s participation in free and fair elections in an open and democratic society (see *United Democratic Movement v President of the Republic of South Africa and others* 2003 (1) SA 495 (CC) para 23-27). The supporters of Cope are entitled to vote for the party they support. But it goes further: within the party structure and within the

confines of the party's constitution, members of Cope have the right to campaign and vote for the leader of their choice.

[9] To revert to the requisites of an interim interdict and in particular whether the defendants have established a *prima facie* right. Two impediments at this stage prevent Mr Shilowa's participation in the congress, if it were to proceed at the end of October: first, that he has been expelled from Cope, and second, the interim interdict granted by Watt-Pringle AJ. The interim interdict will for all practical purposes lapse once the action is heard and finalised. At the time of the granting of the interim interdict the possibility of an elective Congress being convened was neither real nor anticipated. What was conceivably anticipated at the time is that the action would be finalized within a reasonable time, which of course, as I have shown, did not happen. Counsel for the plaintiffs strongly emphasized the impediment resulting from Mr Shilowa's expulsion from the party on 8 February 2011, following upon a disciplinary hearing, and further submitted that the blame for the delays in finalising this matter must be laid at the door of Mr Shilowa. It is true that some of the delays were caused by Mr Shilowa's inaction but others, as I have alluded to, resulted from extraneous causes. It in any event is apparent from the history of the litigation that Mr Shilowa's legal representatives, and I should add also the plaintiffs' legal advisers, were at all times desirous to advance the matter to finality as soon as possible. The expulsion of Mr Shilowa is one of the issues in the action that will be determined by the trial court. I have not been called upon, nor is it desirable or appropriate for me to express any views on the merits of the action. That being the situation I am satisfied that Mr Shilowa has succeeded in establishing a *prima facie* right.

[10] Of crucial importance and relevance to the present application is the determination of the balance of convenience. The crux of the matter concerns the leadership of Cope. Each of the factions contends for its candidate to be declared by this Court as the lawful leader of Cope. It is regrettable that the leadership rift and internal strife cannot be resolved within the party structure of Cope having regard to the constitutional principles I have referred to above. The "declaration" by the Court of one person to be the leader of the party is anything but ideal. But, I can do no more than to express these

outcome of the action will definitively determine the rights of or at least provide directions to the contesting leaders of Cope. And, finally, the inevitability of convening an elective Congress in lieu of the 2014 national elections may well be a relevant factor for the consideration of the trial court. For all these reasons I am satisfied that the balance of convenience favours the granting of the interdict I propose to order, pending the commencement of the hearing of the action.

[13] In the result I make the following order:

1. The first plaintiff, the Congress of the People, is interdicted, with immediate effect, from undertaking preparations for and convening a national elective Congress, pending the commencement of the hearing of the action which has been enrolled for hearing on 1 February 2013.
2. The costs of this application shall be costs in the action.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFFS

ADV H EPSTEIN SC
ADV K HOPKINS

PLAINTIFFS' ATTORNEYS

WERTHEIM BECKER INC

COUNSEL FOR DEFENDANTS
(EXCL 6th & 9th DEFENDANTS)

ADV JP VAN DEN BERG

DEFENDANTS' ATTORNEYS
(EXCL 6TH & 9th DEFENDANTS)

PS GEDDES ATTORNEYS

DATE OF HEARING
DATE OF JUDGMENT

13 SEPTEMBER 2012
21 SEPTEMBER 2012