(1) REPORTABLE	NO
(2) OF INTEREST TO OTHER JUDGES	NO
(3) REVISED	

C.E. [signature]

SIGNATURE

DATE: 18 October 2013

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: 6779/2011

In the matter between:

CONGRESS OF THE PEOPLE	1st Plaintiff
MOSIUOA LEKOTA	2nd Plaintiff

And

MBHAZIMA SHILOWA	1st Defendant
CONGRESS OF THE PEOPLE	2nd Defendant
MBULELO NCEDANA	3rd Defendant
MBULELO BARA	4th Defendant
ARCHIBALD RALO	5th Defendant
NIKIWE NUM	6th Defendant
AMOS LUNGEPHI LENGISI	7th Defendant
ZAYTOON KAFAAR	8th Defendant
MLULEKI GEORGE	9th Defendant
ZALE MADONZELA	10th Defendant
MOGAMAT MAJIET	11th Defendant

SIPHO NGWEMA 12th Defendant

JUDGMENT

WATT-PRINGLE, AJ

1. This judgment relates to issues arising from the defendant's counterclaim which have been separated for determination before any other issues have to be determined by this Court.

2. The trial commenced in February 2013 and the defendants concluded their case after some seven days of evidence. The matter resumed during court recess in July 2013 and the plaintiffs concluded their evidence and the parties completed argument over a further nine-day period.

3. The documents in this matter are voluminous. Once the exercise of sifting the wheat from the chaff has been done, the issues are somewhat narrower than the duration of the trial and the volumes of documents might suggest.

4. Before I refer to the issues to be determined in this judgment, it is necessary briefly to set out the context in which these issues arise.

5. It is a matter of public record that in the wake of the African National Congress' ("*ANC*") national conference in Polokwane in 2007 and the election of Mr Jacob Zuma (now President Zuma) as President of the ANC, the ANC's National Executive Committee decided to "*recall*" President Mbeki, who acceded to this decision by stepping down as President of the country in September 2008. Included amongst those prominent leaders in the ANC who were critical of this turn of events and the change in leadership of the ANC were the two main protagonists in this litigation.

6. Shortly thereafter an announcement was made of the formation of a new opposition party spearheaded, *inter alios*, by the second plaintiff Mr Lekota and the first defendant Mr Shilowa. The new opposition party in due course named the Congress of the People or COPE, held its inaugural congress at Bloemfontein on 16 December 2008. At this congress, COPE adopted its inaugural constitution ("*the 2008 Constitution*", or simply "*the Constitution*"), Mr Lekota was appointed as president of COPE and Mr Shilowa was appointed as the first deputy president. I use the word "*appointed*" advisedly, because no elections were held.

7. Clause 2.9 of the 2008 Constitution provided as follows:

> "*2.9 The Inaugural Congress of the Congress of the People shall agree by Resolution that the First National Congress of the Party*

shall be held within a maximum of 2 years, following the establishment of Party structures at branch, regional and provincial level as well as the Congress of the People Chapters in accordance with the provisions of this Constitution."

8. The first attempt to hold a national congress after the inaugural congress was at a venue known as St George's in Irene, Gauteng over the period 27 to 30 May 2010. The status of that meeting, whether ultimately it constituted a national congress or a policy conference (without the competence to elect the leadership to succeed the appointed inaugural leadership, including the president of COPE) and whether at St George's a quorum for a national congress was reduced from two thirds to fifty per cent plus one are matters in dispute. What is not in dispute is that there was no change in the elected leadership of COPE at St Georges in May 2010. For convenience sake I will refer to the gathering at St George's as the "*St George's congress*".

9. The next attempt to hold a national congress was the so-called Heartfelt congress scheduled for the period 15 and 16 December 2010 at a venue known as Heartfelt Arena in Pretoria, Gauteng. The main issue in dispute concerning the Heartfelt congress is whether Mr Shilowa and a new Congress National Committee ("*CNC*") were elected to replace Mr Lekota and the CNC then in office.

10. Following Heartfelt there were competing claims by Mr Lekota and the CNC as constituted at the commencement of the Heartfelt congress; and by Mr Shilowa and the CNC allegedly elected at Heartfelt, as to who constituted the authentic leadership of COPE.

11. According to Mr Lekota and COPE, Mr Shilowa was expelled as a member of COPE on 8 February 2011 and lost his seat in the National Assembly in terms of Section 47(3)(c) of the Constitution of the Republic of South Africa, 1996 on the same day and by virtue of his expulsion from COPE.

12. Mr Shilowa disputes that he was expelled as a member of COPE and as president of COPE and claims that he has been COPE's leader in parliament since 17 December 2010. Conversely Mr Shilowa contends that with effect from 17 December 2010, Mr Lekota was relieved of all his powers and duties as an office bearer or representative of COPE.

13. On 11 February 2011, this Court in an application under case number 6085/2011 granted an interim interdict against Mr Shilowa preventing him from holding himself out as a member, office bearer or representative of COPE or as the president of COPE and from acting as a member nominated by COPE of the National Assembly, together with certain other relief consistent with Mr Shilowa's alleged expulsion from the party. The interdicts were to operate pending the final end and determination of an action to be instituted by COPE against Mr Shilowa within a period of one

month of the order. Mr Shilowa was given leave to anticipate the interim order on not less than 24 hours' notice to the applicant, COPE. Coincidentially, I was the acting judge presiding when that order was given.

14. For reasons that are not necessary to traverse in this judgment, Mr Shilowa did not anticipate the interim order. Voluminous papers were filed and various attempts to have it heard failed. The matter remains unresolved to this day.

15. The present trial proceedings which commenced in February 2013 arose from the action instituted by COPE and Mr Lekota, as contemplated in the aforementioned interim order. The separated issues arise from the counterclaim instituted by Mr Shilowa and the other defendants

16. On 16 February 2011, COPE and Mr Lekota instituted the present action against Mr Shilowa for final relief confirming Mr Shilowa's expulsion from COPE with effect from 8 February 2011, declaring that Mr Lekota is the president of COPE and granting certain other interdicts which flow from the above mentioned relief. In due course further individuals were joined or given leave to intervene in the proceedings either as plaintiff or defendant, not all of whom have remained involved in the litigation. These individuals' interests in the matter were that they were either part of "*Mr Lekota's CNC* or "*Mr Shilowa's CNC*, as the case may be. I was advised

that the eighth, ninth and eleventh defendants are no longer participating in this litigation and abide the outcome.

17. The defendants pleaded to the plaintiffs' particulars of claim, disputed that Mr Lekota was still president of COPE and alleged that Mr Shilowa was duly elected president of COPE at the Heartfelt Congress on 17 December 2010. They also disputed Mr Shilowa's expulsion both from the party and from the House of Assembly. The defendants furthermore instituted a counterclaim aimed at validating the election of Mr Shilowa and his CNC on 17 December 2010. It is unnecessary for me to set out in detail the relief claimed, all of which is opposed by the plaintiffs in their plea to defendants' counterclaim.

18. It is common cause that in terms of the separation of issues ordered by this Court prior to the matter coming before me, I am required to deal with the issues arising from paragraphs 42, 45, 46, 47, 48 and 50 of the defendant's claim in reconvention and the plaintiffs' plea to these paragraphs.

19. In essence the issues which I am required to determine are the following:

    19.1 Whether COPE's constitution was validly amended at St George's on 30 May 2010 to provide for a National Congress quorum of fifty

per cent plus one instead of two thirds of those entitled to attend the congress.

19.2 Whether at Heartfelt and on 17 December 2010, Mr Shilowa was elected as COPE's president and a new CNC elected.

19.3 Whether, in any event, the term of office of COPE's leadership appointed on 16 December 2008 (which would include Mr Lekota and the CNC in office at the commencement of the Heartfelt congress) ended on 16 December 2010, being a date two years after the inaugural congress.

20. The above formulation is my own, since I deem it unnecessary to recite the relevant paragraphs of the pleadings for purposes of identifying that which I have to determine. There are ancillary issues which have to be determined in order to determine the issues identified above and certain other propositions would flow from the manner in which these issues are determined. So for example, if I were to find that Mr Shilowa and a new CNC were elected at Heartfelt in December 2010 it would follow that Mr Lekota was relieved of his powers and duties as an office bearer or representative on 17 December 2010 and the same would apply to the CNC then in office.

21. There is the further issue of a proposed amendment introduced by the defendants and opposed by the plaintiffs. It is convenient to deal with that towards the end of this judgment.

22. It was a major theme of the defendants' case that Mr Lekota feared elections because he realised that he would lack majority support for the leadership of the party. At every opportunity the defendants' witnesses and counsel in cross examination of Mr Lekota and in argument, advanced the theory that this was apparent from Mr Lekota's reluctance to hold the Heartfelt congress and alleged foot-dragging on his part and on the part of his leadership in holding the congress before December 2010 and in their alleged failure properly to prepare for the St George's congress. Mr Lekota's response to these accusations was that he was in fact keen to hold an elective congress, but not at the expense of doing so when COPE had put in place sufficient local and provincial structures which would enable COPE to hold a representative, credible elective congress.

23. I wish to make it clear that, firstly, it is not necessary for me to resolve this dispute for purposes of deciding the issues which I have to decide. Secondly, I would not be able, on a balance of probabilities, be able to make a finding one way or another on this question.

24. The way in which I see this issue in the context of this matter is as follows. There are two tenable schools of thought on the issue. One is that COPE's

organisational structures will indefinitely be a work in progress and there is thus no "*right time*" to hold an elective congress. The only thing which is clear is that the mandate of the leadership was to do so within two years of the inaugural congress. (I deal with this finding in detail below.) The contrary view is that an elective congress should be held as soon as practicably possible within the two year period, despite imperfections in the progress made towards having party structures in place. Precisely when this would be was necessarily a matter of opinion.

25. Whether Mr Lekota believed that his prospects of election to the presidency of COPE would be enhanced by delaying the elective congress for as long as possible is in my view immaterial. There was a *bona fide* dispute about the preparedness of COPE to hold a credible, inclusive elective congress and thus there was room for a *bona fide* dispute as to whether that congress should be held in May 2010 or later in the year. If Mr Lekota believed that he would stand a better chance of election once a greater proportion of COPE's membership could be represented at an elective congress that too is a tenable approach. In our law (other than in criminal law) motive is usually irrelevant. What is relevant is whether parties act within their rights or in breach of the rights of others.

26. The flip side of the coin is that Mr Shilowa may be accused of wanting to hold an elective congress when COPE was not in sufficiently good shape

for such a congress to be held. Underlying that approach would be a belief that Mr Lekota lacked support and that the elective congress should be held before he was able to consolidate his support from the vantage point of being the incumbent, appointed leader.

27. I wish to make it clear that I make no findings on these issues one way or the other. I view this struggle for the leadership of COPE as a political one. Within the bounds of COPE's Constitution and the law, the protagonists are entitled to advance their own strategic agendas in an effort to end up on top. This Court is only called upon to rule on the legalities of the issues placed before it and not to stand in judgment as to whether one camp or the other acted in the best interests of the party or the country for that matter.

28. In fact, both sides took every opportunity to play politics in the course of the hearing of this matter, a tendency probably encouraged due to the full gallery of COPE members and members of the media who attended the trial.

29. For my part, whilst it is abundantly clear that there is no love lost between Messrs Shilowa and Lekota; the issues which I have to determine do not require a determination as to which of these protagonists occupies the higher moral ground, relative to the other.

30. I propose to deal with matters in the following order:

30.1 The fate the opposed application under case number 6085/2011;

30.2 the St George's congress and whether the quorum of a National Congress was reduced from two thirds to fifty per cent plus one;

30.3 the Heartfelt Congress and whether Mr Shilowa and a new CNC leadership were elected;

30.4 the interpretation of clause 2.9 of COPE's inaugural constitution and its impact (if any) on the leadership of COPE post 16 December 2010;

30.5 the amendments and relief sought pursuant thereto by the defendants;

30.6 the order.

The opposed application under case number 6085/2011

31. During the course of this hearing before me, Mr Heunis SC (with him Ms van Zyl) for the defendants urged me to hear and determine the interdict application under case number 6085/2011, whereas Mr Epstein SC (with him Mr Sawma SC and Mr Ayayee) for the plaintiffs contended that that application had not been set down nor had it been allocated to me to be heard and decided. The papers in that application, which fill eight lever

arch files, were before me as an exhibit and certain of the affidavits and other documents included therein were referred to in the course of this trial.

32. I am however unable to accede to the request by the respondents in that application to decide the application because it was neither set down for hearing in this Court, nor allocated to me in the normal way in which cases are allocated in this Court. Although the two matters are related, the application is not part of or incidental to the trial action before me; indeed it was brought at an earlier stage and under a different case number. Judges of this Court have no autonomous right or power to hear matters which are not allocated in accordance with procedures determined by the Judge President and the Deputy Judge President and put into practice either by them or by a senior judge to whom the allocation of cases has been delegated. I do not suggest that it would not have been possible had the appropriate arrangements been made with the Deputy Judge President for me to hear this application at the conclusion of the trial, but this did not occur.

33. Secondly, because of the fact that the applicants' counsel did not accept that the matter was properly before me, they did not present argument in respect of the application.

34. In the circumstances I make no order in case number 6085/2011 on the basis that it was not before me.

The St George's congress and whether the quorum of a National Congress was reduced from two thirds to fifty percent plus one

35. On 5 February 2010 the CNC followed a recommendation of the National Congress Preparatory Committee and resolved that COPE's national congress would be held on 27 to 30 May 2010. Opinions were, however, divided as to whether the necessary party structures would be in place in time for the congress. Some CNC members held the view that the congress ought to be held in the second semester of 2010. Mr Lekota showed his dissension from the majority position by abstaining from the vote.

36. At a meeting of the CNC on 14 and 15 May 2010 COPE's draft constitution was presented and members of the constitutional committee advised the meeting that they needed time to consolidate their comments on the document. The state of organisation report was also presented and concluded that "*our membership system is dysfunctional and continues to create a number of challenges for the organisation ....*"

37. On 20 May 2010 COPE's general secretary Ms Lobe reported that the national audit for all branches was complete and referred to the allegation

that certain leaders of COPE had made calls outside of the formal structure of COPE for the St George's congress due to be held on 27 to 30 May 2010 to be postponed. During May Mr Lekota had expressed his view that COPE was not ready for the congress and was quoted in the press.

38. A CNC meeting was held on the eve of the St George's congress, 26 May 2010, to decide whether the congress should be held. By this time many delegates had already made their way to the congress. At the resumed meeting on 27 May, a compromise resolution was adopted, in the following terms.

"***CNC Resolution of 27 May 2010***

1. *Pursuant to the decision of the CNC of 5 February 2010 to convene the national congress as of today, and recognizing that in the process leading up to this national congress there are events and processes that threatened the unity and cohesion of our organization, the CNC has reviewed its decision to continue with the national congress and instead hereby resolves to convert the national congress into national congress policy conference under the same rules applicable to the national congress with the same agenda and powers as national congress save for the right to hold election of the CNC.*

2. *That all other congress items and preparations as previously agreed and discussed be proceeded with and adopted, in particular CNC reports (political, organizational and financial reports), policy discussions and constitutional amendments.*

3. *Defer the item on elections for a period of 4 months in order to allow nominations in terms of the portfolios to be adopted by amendment of the constitution.*

4. *Withdrawal of the Western Cape Congress litigation with immediate effect by the applicants (President & Phillip Dexter to assist).*

5. *Bring to a halt eminent litigation purporting to interdict national congress by any other member of the organization in order to allow national congress to proceed as above recommended. (President & Phillip Dexter to assist).*

6. *Extend registration period of delegates till 13h00 of Friday the 28th of May 2010.*

7. *Consequently shift commencement time of national congress from 10h00 on Friday the 28th of May 2010 to 14h00 of the same day so as to allow optimal opportunity for all eligible comrades to travel to and arrive at the congress venue.*

8. *Accept delegation to national congress on the basis of the national audit team report led by cde Neville Mompathi of branches that passed final audit which are no less than 1505 [and consider any others that may be added by the audit team within the ambit of the criteria previously accepted by the CNC.*" [*Sic*]

39. There was much debate about the effect of this resolution on the status of the St George's Congress. The plaintiffs contend that the effect thereof was to convert St George's from a national congress ("*congress*") into a national congress policy conference ("*policy conference*"), with the consequence that COPE's constitution could not be amended, nor new office bearers elected at St Georges. The defendants on the other hand contend that a CNC decision was made to hold the congress at St Georges; that all preparations and notifications to party structures were in line with that decision and that amongst the items on the programme for the congress were the consideration of constitutional aspects affecting the electoral process and voting for office bearers. The CNC's authority to call for a congress had to be done subject to COPE's constitution and to the resolutions or other actions of the national congress (clause 3.1 of COPE's 2008 constitution). It was further contended that the CNC decision of 27 May did not convert the congress to a policy conference and that the congress in any event had the power to alter any CNC decision, including

the decision purportedly altering the status of the congress to a policy conference.

40. The wording of the CNC resolution quoted above does not in my view simply purport to convert the congress to a policy conference, because of the qualification that it would have "*the same agenda and powers as national congress save for the right to hold election of the CNC*". Furthermore, item 2 of the resolution provides that all other congress items remain on the agenda, including "*constitutional amendments*".

41. The position adopted by the plaintiffs is that whatever else may be contained in the CNC resolution, what is clear is that St Georges would be the policy conference and not a congress. They argue that insofar as the resolution purported to retain on the agenda the possible amendment to COPE's 2008 constitution, this was not competent because such an agenda item fell outside of the ambit of a policy conference.

42. In my view it is necessary to have regard to the substance of what was decided and not to attach undue weight to nomenclature. The substance of the CNC decision was that the St George's congress, whatever one chose to call it, would retain the character of a congress, but not have the right to hold elections. Constitutionally speaking, it was neither fish nor fowl.

43. The plaintiffs argue that since the CNC has the power to convene a national congress, it also has the power to call it off. Against this, the defendants argue that the CNC had no power once it had summoned party structures of COPE to send delegates to a national congress, on the morning on which they were all due to arrive and register, to call it off, nor did the CNC have the right to reduce the powers of the congress after delegates have been given notice of the congress, since these are determined by the Constitution. Even if the CNC did so, the congress could decide otherwise.

44. I am in agreement with the defendants' approach to the CNC's resolution. There is no reason in my mind why the mere reference in the resolution to conversion of the meeting to a policy conference should trump the substance of the resolution which was really only to exclude the possibility that a new leadership would be elected, whilst in express terms retaining all other competencies. This is also the effect of the interdict granted by this Court on 29 May 2010, referred to below.

45. The CNC's powers and obligations included, in terms of clause 3.1(a), issuing notice of and convening the congress. If the CNC has the power to exclude a possible agenda item from consideration, it would surely be open to the congress itself to reinstate the agenda item. In terms of clause 2.2 the congress is the "*highest authority of* [COPE]".

46. On Friday night 28 May 2010 at a plenary sitting of the St George's congress chaired by Mr Mluleki George and Ms Lyndall Mafole-Shope, Mr George raised the question as to whether in light of the CNC's resolution of 27 May, a decision should be made to conduct a national congress. It is the defendant's case that there was overwhelming support for the proposition and that it was duly passed. It appears that upon this view having being expressed by Mr George, a number of delegates left the plenary session. Mr Lekota and Mr Phillip Dexter, COPE's Head of Communication went to this Court and on 29 May 2010 obtained an urgent interdict preventing COPE from holding elections at the St George's congress and deferring the elections "*for a period of four months in order to allow nominations in terms of nominations to be accepted as per paragraph 3 of its resolution of 27 May 2010*", a reference to the CNC resolution quoted above.

47. That interdict did not however place any impediment in the way of passing resolutions amending COPE's constitution. The plaintiff's submission that since the Court had interdicted elections and since elections are held at a national congress (article 2.6 of COPE's 2008 constitution) the gathering was no longer a congress is a *non sequitur*, for the reasons referred to above.

48. I will now turn to the evidence relevant to the question whether at St George's a resolution was in fact passed amending COPE's Constitution by reducing the quorum at a national congress from two thirds to fifty per cent plus one, as contended by the defendants.

49. At St George's there were various "*commissions*" (meetings held outside of the plenary sessions) dealing with specific agenda items which could be attended by those members of COPE interested in the issue at hand. One such commission was assigned to deal with amendments to the 2008 constitution. Each commission had a chairperson and rapporteur who would be required to report back to the plenary session on the recommendations of the commission. The defendants' first witness Mr Mbulelo Ncedana chaired this constitutional commission and Mr Caleb Tlondlana was the rapporteur. Mr Ncedana testified that he chaired the constitutional commission on 29 and 30 May 2010 and that their proposal to amend Article 22.8 of COPE's constitution in order to reduce the quorum to fifty per cent plus one was made in the commission. Messrs Tlondlana and Ncedana prepared the commission's report. Nowhere in that report is it recorded that clause 22.8 would be amended in this fashion.

50. Video footage of Tlondlana reading his report of the constitutional commission to the plenary session was viewed in Court. Tlondlana

followed his manuscript notes and from time to time embellished thereon. Ncedana thereafter took the podium and raised further issues, none of which is relevant. Tlondlana's evidence was that the amendment of Article 22.8 was never raised or discussed. Ncedana conceded that nowhere in the video recording of the commission's report to the plenary session was the proposed amendment mentioned.

51. Ncedana's evidence that the issue of the quorum had been addressed in the commission was supported by the evidence of Ms Clara Motau. She said that in the draft constitution under consideration in the commission it was stated that two thirds would be the quorum and that the debate was whether it should be changed to fifty per cent plus one. After the debate the general consensus was that the quorum should be changed to fifty per cent plus one.

52. Ms Motau testified in somewhat vague terms that when their commission's report was tabled in plenary, the new quorum was mentioned and adopted. Under cross-examination she ultimately conceded that she did not hear mention of the constitutional amendment during the report back to the plenary session.

53. The defendant also called Mrs Mali, who testified that she attended the plenary session at which the constitutional commission's report was tabled. She testified that she sat next to a young man who raised his hand

for an opportunity to speak but was ignored by Mr George who was chairing the session, for some time. He was eventually given an opportunity to speak after the constitutional commission report had been presented and he said that something had been forgotten by the person who had made the report and that was the issue of the fifty per cent plus one quorum. When cross-examined in more detail about these events, Mrs Mali was unable to deviate from the original script of her evidence. She was also reluctant to disclose to the Court, to whom in the defendants camp she had disclosed this information, which would have led to her being called as a witness. Only after she was assured by Mr Heunis that she would suffer no detriment if she disclosed the names, did she purport to do so.

54. I did not find Mrs Mali a credible witness, nor is her evidence probable, given the singular lack of corroboration for her version, which if true, related to events witnessed by a large number of delegates, many of whom would be able to give testify to these events. I gained the clear impression that she had taken the stand in order to testify to certain events suggested to her by others, rather than events witnessed by her. Her inability to give any further material details beyond that which to she had testified, very briefly it must be said, in chief, her peculiar reaction to being asked when and to whom she had disclosed the gist of her evidence to the defendant's camp (so that they were alerted to the fact that she was able

to testify to these matters), all pointed to her evidence constituting nothing more than a fabrication. I have no hesitation in rejecting it.

55. The plaintiffs urged me to find that in any event the defendants failed to prove that at the time that the constitutional commission's report was presented to the plenary session, that body was quorate.

56. There is much to be said for the proposition that whatever the position may have been when the congress was officially opened and pronounced quorate, it may no longer have been quorate by the time that the constitutional commission reported on 29 May 2010. In view of my finding that the issue of the amendment of clause 22.8 was never put to the plenary session of the congress, it is not necessary to decide this point.

57. It was contended by the plaintiffs that in any event, any motion to amend the Constitution was not in accordance with the Constitution itself, because it was not by secret ballot. Clause 22.4 provided that voting shall be free and fair and by secret ballot unless agreed otherwise. In view of my finding that no such amendment was put to the plenary session, it is likewise unnecessary to decide whether the fact that on any version, the alleged amendment was not put to the vote by way of secret ballot in accordance with clause 22.4 of the Constitution, is fatal to the defendants' case on this point.

The Heartfelt Congress and whether Mr Shilowa and a new CNC leadership were elected

58. Although a fair proportion of the evidence before me related to the events at Heartfelt, the finding that clause 22.8 of the Constitution was not amended at St Georges disposes of the central issue which I am required to decide, namely whether on 17 December 2010, at Heartfelt, Mr Shilowa and a new CNC were duly elected to replace Mr Lekota and the CNC then in office.

59. The case for the defendants is that after much difficulty and a significant delay, a quorum was established at Heartfelt. It is common cause that at a stage the congress, in the early hours of 16 December, descended into disarray, with chairs being hurled across the plenary venue, delegates being injured and having to leave the hall. This breakout of hostilities was caught on camera and viewed in Court. It is furthermore the defendants' case that Mr Lekota led a walkout of his followers from the venue in the early hours of 17 December 2010, whereas the majority decided to remain and continue with the congress. They point out that the process of registration of delegates continued even into the early hours of 17 December, suggesting a determination on the part of the delegates to continue with the congress, despite the expiry of its scheduled duration. The defendant's accordingly argue that those who left without an official

end to the congress having been called, did so of their own volition and cannot be heard to complain that resolutions were passed and elections held in their absence.

60. The plaintiffs' case on the other hand is that preparation for the congress was parlous; it descended into chaos before it got off the ground, the delegates were requested by the landlord to vacate the venue on the morning of 17 December and in any event, many had already left for a variety of reasons. People were entitled to leave when the congress failed to conduct its business within the scheduled period.

61. Suffice it to say that I have no reason to disbelieve the evidence of Mr Lekota that the delegates had been asked to leave the venue on the morning of 17 December 2010, before the congress got down to the business of electing new leadership, which they did. Some delegates apparently headed home, others remained outside the congress venue, whilst another group went to the Pretoria show grounds, there to be addressed by Mr Lekota before they too went their separate ways.

62. The group which remained in the environs of Heartfelt can safely be identified as the Shilowa faction of the congress. On the morning of 17 December 2010, they purported to establish that there was still a quorum of at least fifty per cent plus one and thereafter they conducted an

"*election*" at which Mr Shilowa was elected as COPE's new president and a new CNC was also elected.

63. I might add that the conditions under which the Heartfelt congress were held, if indeed the congress ever truly got under way, were far from ideal. Many delegates went without food or accommodation and were unable to wash or change into fresh clothing as the meeting progressed. The registration and accreditation of delegates is a topic all of its own, which on the admission of the defendants' witness Mr Johan Boot, was never properly finalised. Mr Boot was in my estimation an impartial witness who to the best of his ability attempted to enlighten the Court as to what had actually transpired at Heartfelt.

64. By the time that the congress *de facto* broke up, the independent contractors employed to attend to accreditation had left and the "*quorum*" was sought to be established by some of the delegates who remained. Even they did not claim that there was a two thirds quorum on the morning of 17 December.

65. In my view it cannot be held on the evidence that the congress was still in session by the time the election was purportedly held. Minor procedural irregularities may be insufficient to render the purported decisions of a meeting invalid, but the circumstances in which this election was purportedly held were materially different to any procedure envisaged in

COPE's constitution. The same applies to the other resolutions purportedly passed on the morning of 17 December 2010.

66. Ultimately, there are two definitive reasons why any purported election of new leadership at Heartfelt was not competent:

66.1 The first is that the defendants do not contend for a quorum of two thirds at the gathering which purported to elect the new leadership. The defendants concede that at best there was a quorum of fifty per cent plus one when the "*election*" was held and the other resolutions taken.

66.2 The second is that the Heartfelt congress was scheduled to be held over the period 15 and 16 December 2010 and the election, such as it was, was conducted on the morning of 17 December, outside of the venue which had been booked for the purposes of holding the congress and after a significant proportion of the delegates had in fact left the venue. The Congress was no longer in session and no matter what proportion of the delegates remained, they could not in the absence of the others who had left, decide to extend the life of the congress, as they purported to do. No amount of latitude can reasonably lead to the conclusion that the gathering of COPE delegates on the morning of 17 December constituted a proper continuation of the Heartfelt congress.

The interpretation of clause 2.9 of COPE's inaugural constitution and its impact (if any) on the leadership of COPE post 16 December 2010

67. As mentioned above, clause 2.9 of the 2008 Constitution provided as follows:

> "*2.9 The Inaugural Congress of the Congress of the People shall agree by Resolution that the First National Congress of the Party shall be held within a maximum of 2 years, following the establishment of Party structures at branch, regional and provincial level as well as the Congress of the People Chapters in accordance with the provisions of this Constitution.*"

68. The defendants allege as follows in paragraph 42 of their claim in reconvention:

> "*In terms of article 2.9 of the 2008 Constitution, the term of office of the 2008 leadership approved on 16 December 2008 ended on 16 December 2010*"

69. Pursuant to that allegation, the defendants seek as part of the declaratory relief in paragraph 50.1, an order in the following terms:

> "*Declaring that in terms of article 2.9 of COPE's Constitution, as adopted on 16 December 2008 in Bloemfontein (the 2008*

Constitution), the term of office of the 2008 leadership approved on 16 December 2008 ended on 16 December 2010".

70. Each of the parties has a different interpretation as to the meaning and effect of clause 2.9.

71. The plaintiffs argue that clause 2.9, properly construed, requires that party structures at branch, regional and provincial level, as well as the COPE Chapters must be established in accordance with the provisions of the constitution before the First National Congress can be held.

72. The defendants contend that the inaugural congress appointed leadership with a clear mandate to hold a national elective conference within two years, during which period party structures at branch, regional and provincial level, as well as the COPE Chapters were to be established in accordance with the provisions of the constitution.

73. The defendants furthermore contend that the inaugural leadership was appointed for a fixed term not exceeding two years from 16 December 2008 and that they cannot claim to occupy the positions to which they were appointed beyond that period by reason of their failure to have fulfilled their mandate.

74. The task of the Court in interpreting a document is to ascertain the probable intention of the authors of the document having regard to the

words employed and the context in which they appear. In **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at para 18 Wallis JA held as follows:

> "*The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.*"

75. Joubert JA in **Coopers & Lybrand v Bryant**1995 (3) SA 761 (A) at 767E-F commenced the formulation of the oft quoted "*golden rule*" of interpretation as follows:

"*According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.*" (Citations omitted.)

76. The plaintiffs' interpretation can be achieved, provided one ignores the comma after the word "years" and replaces the word "*following*" with "*after*". The clause would then read as follows:

"The Inaugural Congress of the Congress of the People shall agree by Resolution that the First National Congress of the Party shall be held within a maximum of 2 years after the establishment of Party structures at branch, regional and provincial level as well as the Congress of the People Chapters in accordance with the provisions of this Constitution."

77. That is not however how the clause is worded. With the comma in place, it is clear to me that the congress would take place within two years of the inaugural congress and this was intended to be a date following the work of establishing party structures.

78. In my view the meaning of clause 2.9 is clear. The inaugural leadership was required to hold an elective congress within two years. That period was intended to give the party, under the inaugural leadership, time to establish party structures. The inaugural congress regarded two years as a sufficiently long period within which to do so. This understanding of clause 2.9 was also recorded in various party documents, apparently without causing a controversy.

79. Apart from the fact that the above interpretation accords with the ordinary meaning of the words employed, the contrary interpretation is in my view both improbable and unworkable. If the two year period only commences after the establishment of the party structures, who is to determine when that has occurred? The establishment of party structures is an on-going process. Areas which lack sufficient COPE members to form a branch would not do so. Subsequent recruitment of members in that area could result in the formation of a branch. The same is true of regional and even provincial structures. The Court heard evidence that areas of Kwazulu-Natal were initially regarded as "*no-go*" zones for COPE, because the formation of COPE was regarded by some as having been in reaction to the ascendancy of (now President) Jacob Zuma in the ANC. The evidence, however, was that over the years since 2008 political tolerance has improved markedly, with the result that branches have now been established without hindrance in some of these areas.

80. This serves as an illustration of the consequences of adopting the plaintiffs' interpretation. What if political intolerance, or infighting for that matter, prevented COPE from establishing structures in particular areas? What if COPE was unable to muster any meaningful membership in an entire province? The delegates to their inaugural congress would not have been in a position accurately to predict such matters. Would the inaugural leadership continue indefinitely? If so, to what end?

81. The other question which arises is why would the inaugural congress allow such a long period between the establishment of party structures and the holding of an elective congress? Bearing in mind that COPE was founded on ideals of transparency and democracy, it is improbable that they were prepared to be led by an interim, appointed leadership in preference to a duly-elected leadership for an indeterminate period after the inaugural congress. It also seems that nobody in COPE interpreted clause 2.9 in the manner contended until the present dispute arose, after Heartfelt. Indeed the dates on which Heartfelt was held were calculated to comply with clause 2.9. Before those dates were finally accepted by the CNC, there were several other dates set and then abandoned in the second semester of 2010. Heartfelt was a last ditch attempt to comply with clause 2.9.

82. That is not however the end of the debate. Clause 2.9 as I have interpreted it has not been complied with. What remains is to decide what the effect is of such non-compliance.

83. The defendants contend that COPE's incumbent President (Mr Lekota) and CNC ceased to hold office at midnight on 16 December 2010, their terms of office having expired. They argue that if the Court so finds, COPE will not be without leadership, because provincial chairpersons and other ex-officio members of the CNC will remain, having been duly elected at the various structures which they represent.

84. In my view it does not follow that because no elective congress has been held, Mr Lekota and other CNC members appointed at the inaugural congress, or co-opted by the CNC in order to fill vacancies which have occurred, ceased to hold office after Heartfelt. Firstly, clause 2.9 does not in terms limit their term of office to a fixed period. What it does is to impose an obligation on COPE, under that leadership, to hold an elective congress. It cannot without more be inferred that a failure to comply with this provision of the Constitution results in the expiry of their office. In truth the constitution does not contemplate that their office would expire. It contemplates that they would be replaced by elected leadership, which may include them or some of them, as the case may be.

85. I am fortified in this view by the judgment of Solomon J in **Ex Parte United Party Club** 1930 (2) SA 277 (W) at 280 – 281. In that matter the Club was a voluntary association in which the constitution provided that the Club's committee members had to resign annually in order that the vacancies could be filled at the annual general meeting, which the committee had to call. If however the committee failed to call the meeting, they would remain in office until a meeting was held and they could be compelled to call such a meeting. That dictum was followed in **Padayichie v Pavadai No and Another** 1994 (1) SA 662 (W) at 772G. In that case, Levy AJ as he then was held as follows:

> *"Having been duly elected to office ... they may generally be removed only on the expiry of their term of office by a failure to obtain re-election in accordance with the constitution, and that only at a biennial general meeting. If no steps are taken to enforce the holding of a biennial general meeting (and only the committee may convene it), then the duly elected committee remains in office until the holding of such meeting. See Ex parte United Party Club 1930 WLD 277 at 281."*

86. It follows that whilst the members of COPE are entitled if necessary to seek a mandamus requiring the CNC to hold an elective congress, the incumbents remain in office until this is done or they have been removed for any other legal cause.

87. It also follows that any contention on the part of the defendants concerning Mr Lekota's position and status in COPE after 17 December 2010 which is dependent on his having been elected out of the Presidency in favour of Mr Shilowa, cannot be sustained. The COPE which Mr Lekota has continued to lead as its President since that day is not a "*parallel structure*"; it is the registered political party COPE which enjoys certain representation in the House of Assembly.

The amendments and relief sought pursuant thereto by the defendants

88. The defendants, during the course of the hearing, applied for the following amendments to their counter-claim. Although the amendment was sought in the course of the defendants' case, the defendants elected to argue the application after the presentation of the evidence. The amendments sought were, firstly, by the insertion of the following into the body of the counterclaim:

> *"51A. In the alternative to paragraphs 43 to 47, 50.1 to 50.8, and 51.1 to 51.9 above, and paragraphs 60, 61, 68 and 71.1 to 71.3 below, it is declared that -*
>
> *51A.1 COPE's 2010 Constitution, alternatively, its 2008 Constitution, is the operative Constitution;*
>
> *51A.2 COPE is not lawfully governed at national level in accordance with the provisions of its Constitution, and neither the so-called Shilowa faction nor the so-called Lekota faction is in de iure control of COPE;*
>
> *51A.3 lawful governance of COPE can only be achieved by the reconstitution of COPE's CNC at a*

properly constituted National Congress;

51A.4 *a National Congress cannot be convened by the one or the other of the so-called Lekota faction or the so-called Shilowa faction, but can be convened by both factions on the basis of mutual co-operation;*

51A.5 *the expulsion of Mbhazima Shilowa from COPE on 8 February 2011 is set aside;*

51A.6 *the interim orders granted against Mbhazima Shilowa on 11 February 2011 are set aside;*

51A.7 *the purported factional suspensions and subsequent expulsions of the representatives of COPE aligned to either faction are set aside."*

89. Secondly, by the insertion of the following new prayer as prayer 12A to the counterclaim:

"12A *In the alternative to prayers 1 to 12 above, an order declaring that -*

12A.1 *COPE's 2010 Constitution, alternatively, its 2008 Constitution, is the operative Constitution;*

12A.2 *COPE is not lawfully governed at national level in accordance with the provisions of its Constitution, and neither the so-called Shilowa faction nor the so-called Lekota faction is in de iure control of COPE;*

12A.3 *lawful governance of COPE can only be achieved by the reconstitution of COPE's CNC at a properly constituted National Congress;*

12A.4 *a National Congress cannot be convened by the one or the other of the so-called Lekota faction or the so-called Shilowa faction, but can be convened by both factions on the basis of mutual co-operation;*

12A.5 *the expulsion of Mbhazima Shilowa from COPE on 8 February 2011 is set aside;*

12A.6 *the interim orders granted against Mbhazima Shilowa on 11 February 2011 are set aside;*

12A.7 *the purported factional suspensions and subsequent expulsions of the representatives of COPE aligned to either faction are set aside."*

90. The plaintiffs objected to the proposed amendment, by way of a notice of objection dated 26 February 2013.

91. The premises on which these amendments were sought was formulated as follows in the plaintiffs' heads of argument:

321. *"As we have pointed out at the outset of these heads, the evidence before this Court emphasises an important feature of this case: whenever there was a possibility of elections being held, Lekota turned to the Courts to prevent such elections. Three things are evident.*

321.1. *The first is that the leaders who were appointed at the Inaugural Congress had to be replaced by duly elected leaders.*

321.2. *The second is that all the objective facts show that Lekota has repeatedly shied away from elections.*

321.3. *The clear inference is that Lekota knows that he does not enjoy majority support or, for that matter, even significant support, amongst the rank and file of COPE.*

322. *The solution – as we have earlier stated above, and as even Dexter has acknowledged – is to hold an elective National Congress as soon as possible. The defendants propose that this Court pave the way for such Congress by*

granting the following suggested amendment to the counterclaim, with the relevant declaratory orders."

92. The following principles are trite. This Court has a discretion to grant or refuse the amendments sought. This discretion must be judicially exercised. Whilst the Court will generally lean towards allowing an amendment which will facilitate the airing of the real issues between the parties, it will not do so if the amendment, or the timing of the amendment is such that it may prejudice the other party in the conduct of its case and in a manner which cannot be rectified by a postponement or an order for costs, or both. The court will not allow an amendment which does not raise a triable issue or which will render the pleading in question vague and embarrassing or otherwise excipiable. See **Caxton Ltd v Reeva Forman (Pty) Ltd** 1990 (3) SA 547 (A) at 565 and **Cross v Fereirra** 1950 (3) SA 443 (C) at 447.

93. There are several reasons why I am not inclined to grant the amendments sought by the defendants.

93.1 The first is that although the plaintiffs were put on notice at an eariy stage that the defendants intended applying for the amendments, the defendants, faced with the objection of the plaintiffs, did not do so. The application was noted but not argued, with the consequence that the matter was left in abeyance for

most of the trial. The plaintiffs made it clear that they would oppose the application whenever it was pursued, if at all and until then would proceed on the basis of the pleadings as they stand.

93.2 The defendants contend that although the issues raised by the amendment were not all on the pleadings, the evidence has been wide ranging and these issues were properly canvassed. The court would have to be satisfied that these issues were canvassed to the same extent as they would have been had they been included in the pleadings from the outset of the trial. See **Robinson v Randfontein Estates Gold Mining Co Limited** 1925 AD 173 at 198; **Shill v Milner** 1937 AD 101 at 105.

93.3 I am not so satisfied. It occurred more than once that Mr Epstein for the plaintiffs objected to a line of questioning on the basis that it went outside of the pleadings and appeared relevant to the issues foreshadowed in the proposed amendment, which had not been granted.

93.4 In particular, the issues of whether "*COPE is not lawfully governed at national level in accordance with the provisions of its Constitution, and neither the so-called Shilowa faction nor the so-called Lekota faction is in de iure control of COPE*", although canvassed by the defendants, were not dealt with as a pleaded

issue by the plaintiffs. I certainly would not feel comfortable making such a finding on the basis of the evidence before me.

93.5 Counsels' submission that the evidence was wide ranging is both true and part of the problem. I allowed counsel wide latitude in this regard, sometimes assuming that if the relevance of a particular line of questions was not immediately obvious, it would become so in due course. Alas this proved not to be so a great deal of the time. Counsel too, perhaps appreciating the need to canvas matters fully given the interest shown by the members of COPE and the media, felt the need to canvas points of fact which were designed more to show one protagonist in a better light than the other, than to elucidate the actual issues which I was required to decide. Because of the political nature of the dispute, no sleight by one side against the other could be left unchallenged, which led to evidence in rebuttal and cross examination on collateral issues.

93.6 I can only hope that this proved cathartic to the attentive and generally good natured gallery, because it certainly lengthened the trial.

93.7 Be that as it may, the point I wish to make is that this latitude cannot be used to seek adjudication on issues which were not

canvassed as matters on the pleadings. The potential for prejudice to the plaintiffs is in my view too great.

93.8 I have in any event considered the relief sought on the basis of the amendments, if granted. I would not be inclined to find that no national congress is possible whilst the current impasse exists. It is up to the party to hold a congress and if the current CNC does not do so, to seek a mandamus requiring it to do so.

93.9 Likewise, as indicated earlier in this judgment, I am not inclined to make a finding that Mr Lekota has, mala fide, sought to delay the holding of an elective congress. That he was reluctant to do so before Heartfelt was convened, is common cause, but he was not alone in that. The CNC of the time was party to successive postponements of the congress, until it was finally held on 15 and 16 December 2010.

94. In all of the circumstances, the application for the amendments is refused.

The order

95. It remains to formulate the appropriate relief.

96. The relief sought in pursuant to the separation of issues before me is set forth in paragraph 50 of the defendants' counter-claim. However, in terms

of the separation I am also required to determine certain issues. In light of the conclusions to which I have arrived above, the declaratory orders as envisaged in paragraph 50 must be refused. For the sake of clarity I will summarise the findings and then grant the formal order, including an order for costs.

97. For purposes of this exercise I have followed the formulation of the findings sought in the pleadings as it appears in the defendants' heads of argument. My finding appears after each issue as formulated and is underlined.

98. The separated issues encompass the following, with reference to the counterclaim and the plaintiffs' plea thereto:

98.1 Counterclaim para 42, read with Plea to Counterclaim para 5: Whether, in terms of article 2.9 of the 2008 Constitution, the interim leadership's term of office ended on 16 December 2010.

Finding: The interim leadership's term of office did not end on 16 December 2010.

98.2 Counterclaim para 43, read with Plea to Counterclaim para 6: Whether there was an amendment of article 22.8 of the 2008 Constitution at St. Georges on 30 May 2010 to provide for a quorum of 50% plus 1 and not two thirds of the membership of

Congress. The plaintiffs allege that the Congress was only a Policy Congress and no amendments of the Constitution were allowed.

Finding: There was no amendment of article 22.8 of the 2008 Constitution at St. Georges on 30 May 2010 to provide for a quorum of 50% plus 1 and not two thirds of the membership of Congress. The Congress was not only a Policy Congress and amendments of the Constitution were allowed as would be the case at a National Congress.

98.3 Counterclaim para 45, read with Plea to Counterclaim para 8: Whether a legitimate CNC was elected in December 2010 at Heartfelt.

Finding: No legitimate new CNC was elected in December 2010 at Heartfelt.

98.4 Counterclaim para 46, read with Plea to Counterclaim para 9: Whether Shilowa is the COPE leader in Parliament.

Finding: There is no finding to the effect that Shilowa is the COPE leader in Parliament.

98.5 Counterclaim para 47, read with Plea to Counterclaim para 10: Whether Lekota was relieved of his duties as office bearer or representative of COPE.

98.6 Finding: There is no finding to the effect that Lekota was relieved of his duties as office bearer or representative of COPE.

98.7 Counterclaim paras 48.1, 48.2, and 48.3, read with Plea to Counterclaim para 11: Whether Lekota started a parallel leadership structure, declared himself as President, and refuses to recognise Shilowa as President of COPE.

Finding: There is no finding to the effect that Lekota started a parallel leadership structure, declared himself as President, and refuses to recognise Shilowa as President of COPE.

99. The declaratory orders sought by the defendants are the following:

99.1 in terms of article 2.9 the interim leadership's term of office ended 16 December 2010;

99.2 the 2008 Constitution was validly amended at the St George's Congress;

99.3 the National Congress convened during 15 to 17 December 2010 was duly constituted and the decisions taken there are valid and binding;

99.4 the persons elected at Heartfelt constitute the valid CNC of COPE;

99.5 Shilowa is the parliamentary leader of COPE; and

99.6 Lekota ceased to be COPE's President on 16 December 2010.

100. It follows from the findings above that the declaratory orders sought must be refused. I also follows from these findings that COPE, where it is cited as the second defendant, is not before the Court, because it is cited on the basis that Mr Shilowa and the other members of the CNC purportedly elected at Heartfelt are by virtue of their office entitled to join and represent COPE in these proceedings to oppose the COPE cited as the first plaintiff and which they regard as a parallel structure. I mention this in the context of the appropriate order for costs.

101. The defendants, having employed two senior and one junior counsel, sought the costs of three counsel. Whilst I accept that this is a matter of some importance, detail and complexity, such orders are reserved for exceptional cases. The defendants coped with two counsel. I am not inclined to make the defendants pay for the relative luxury of plaintiffs' three counsel.

102. In the circumstances I make the following orders:

102.1 No orders are made in opposed, opposed application under case number 6085/2011;

102.2 The defendants' application for amendments to their counterclaim is dismissed;

102.3 The declaratory orders sought by the defendants in paragraph 50 of their counter-claim are refused;

102.4 The defendants, excluding the second, eighth, ninth and eleventh defendants are to pay the plaintiffs costs jointly and severally, including the costs occasioned by the employment of two counsel.

C.E.

CE WATT-PRINGLE, AJ
Acting Judge of the High Court

Date Argued: 17 and 18 July 2013
Date of Judgment: 18 October 2013

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