REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 25045/2013

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

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DATE SIGNATURE

In the matter between:

MPHAHLELE LETLAPA	First Applicant
PAN AFRICANIST CONGRESS OF AZANIA	Second Applicant
and	
MOLOTO, NARIUS	First Respondent
DHLAMINI PHILLIP	Second Respondent
PAN AFRICANIST CONGRESS OF AZANIA	Third Respondent
SEROPANE, SENYANE ALTON MPHETI	Fourth Respondent

JUDGMENT

VICTOR J:

[1] This is an urgent application. It is one of many litigation driven attempts to resolve the intense internal conflict within the Pan Africanist Congress of Azania (PAC). The central issue is whether leave to execute a judgment pending an appeal should be granted if the appeal is a mere 40 days away.

[2] The applicant seeks an order in terms of Rule 49(11) for leave to execute its judgment granted by Kgomo J where the expulsion of the first applicant as president was set aside. This application for leave to execute was launched on 12 July 2014. Just prior to this the first and second respondents brought an application for leave to appeal and the third and fourth respondents launched an application for leave to intervene. On 31 October 2013 Kgomo J granted leave to the third and fourth respondents to intervene in the leave to appeal application and granted them all leave to appeal. He postponed the Rule 49 (11) application. His order also provided that in the event that the appeal is not expedited or if there was any form of procrastination the parties could apply on the same papers duly supplemented to move the Rule 49(11) application.

[3] The first applicant has now set the application down because he says “there is trouble in paradise”. The appeal process is taking time and the first applicant wishes to take up the leadership mantle in order to bring peace to the organisation. The first applicant justifies the urgency based on various internal events within the PAC. The first ground is that the first respondent has instituted a campaign to purge all officials of the PAC who are in support of

the first applicant. There has been successful resistance to this but it has cost the PAC a lot of money, presumably in respect of the various court cases. The applicant contends that the first respondent is abusing his powers as set out in clause 14 of the Disciplinary code in that he is ruling by decree. Clause 14.2 is as follows:

> 'The president shall have emergency powers, which he may delegate, to suspend the entire constitution of the PAC so as to ensure that the movement by decree, and is answerable for these actions to the National Conference or the National Congress.'

Presumably the word "ensure" in this clause means that the president can administer the entire PAC but is accountable. The second respondent explained that the emergency power was only to be utilised during the apartheid era when key members were incarcerated. In the absence of consensus as to who the president is and the continuous attacks of the National conferences as being quorate, rule by decree is a power which should not be used.

[4] The first applicant contends that the purge campaign has not ceased. The campaign is not authorised by the National Executive Counsel. The fourth respondent has now invoked article 14 of the Disciplinary Code whereby the president must administer the party. The first respondent is the existing president but this creates further problems as there is rift between first and fourth respondent.

[5] The applicant asserts that the PAC is therefore no longer able to function and hence the need to empower the first applicant to stop the fourth respondent from using his position as secretary general to drive his agenda of purging anyone who is not perceived to be with him.

[6] A further reason for urgency is that the National Executive Counsel has not called a quorate meeting. The first respondent appears to have a disproportionate influence over many members. They have acquiesced in his continued destructive activities to the extent that now the PAC is being ruled by way of emergency powers.

[7] The first applicant tells the court that he and the fourth respondent have undertaken to re-unite the PAC and make a fresh start. The fourth respondent is not able to succeed in doing this in a democratic way and now rules by decree. The first applicant wishes to play a meaningful role and to stop the divisiveness to which the first respondent is contributing.

[8] In a very concise and detailed submission, Mr Phillip Dhlamini, the second respondent, who appears in person, points out that there has been a further annual congress. More than 500 people attended that congress and there was no reason why the first applicant could not have attended that congress. He asserts that in a democratic manner the organization could have returned to peace and quiet without people taking points and furthering the litigation which is fuelling divisiveness.

[9] In my view Mr Dhlamini's submissions were very helpful and the central question raised by him is the adverse consequence there would be if the court imposed the first applicant on the PAC at this stage when an appeal is only some 40 days away. He suggested that it would really cause the organization to disintegrate into chaos. I accept his submission that the role of the court should be minimised in this internal dispute.

[10] A number of points have been taken *in limine*. The first point is that there was an objection in terms of Rule 7.1 to the authority of the attorneys Van der Merwe and Associates to act on behalf of the PAC. In my view this is something which does not affect this particular application as it is an application for leave to execute and this point was properly dealt with before Kgomo J. He found that the attorneys had authority to act. Therefore at this stage I do not non-suit the first and second respondents based on the fact that the authority of their attorney has been challenged.

[11] The second respondent acts in his own personal capacity. He is a member of the PAC and there is no reason why he, in his personal capacity, cannot oppose the application. In so far as the first respondent is concerned this again emanates from the matter that was before Kgomo J and the first respondent is entitled to place his opposition before the court. I do not find that he acts on behalf of the PAC. On a conspectus of all the issues raised in these papers in my view he really acts in his personal capacity.

[12] Although the first and second respondents have been cited in their official capacities as officers of the PAC, on a proper reading of the affidavits it is clear to me from the papers opposing the leave to execute that they are really doing so in their own capacities.

[13] The fourth respondent in a letter dated 4 August 2014 states that there is no decision that the PAC public representatives must be replaced and there is no formal resolution by the PAC for the first respondent to act in the way that he has. There are a myriad of disputes of fact in this matter. Hopefully the appeal will resolve many of these outstanding issues. Once the status of the first applicant is determined in that appeal it will then become clear as to how the governance of the PAC must continue.

[14] Mr Dhlamini advised the court that there was a National Congress and it seems to me the submission made by Mr Dhlamini is proper; namely, that this organisation must be organised in a democratic way and that the court should be reluctant to impose the first applicant as its president at this stage. The first applicant has approached the court at a very late stage and it would be counter-productive for the court to interfere at this stage and impose the first applicant on the organisation.

Superior Courts Act 10 of 2013

[15] The submission was made on behalf of the first respondent that in terms of s18 of the new Superior Courts Act 10 of 2013 a new test or threshold is introduced. Section 18 (1), (2) and (3) which came into force on 23 August 2013 provides that it is only in exceptional circumstances that a court should grant an application for leave to execute. Section 18 states:

> 'Suspension of decision pending appeal
> (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
> (4) If a court orders otherwise, as contemplated in subsection (1) —
> (i) the court must immediately record its reasons for doing so;
> (ii) the aggrieved party has an automatic right of appeal to the next highest court;
> (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
> (iv) such order will be automatically suspended, pending the outcome of such appeal.
> (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[16] The wording of the section is rather curious. In my view, although the statute introduces the words “exceptional circumstances” the proper interpretation of that particular threshold must really be read within its context. A proper statutory reading of the words “exceptional circumstances” does not really take away the historical manner in which an application for leave to appeal must be determined.

[17] Section 18 appears to be enacting the existing carefully crafted jurisprudence which has been the classical test as set out in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD) at 545C-G,

> ‘it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. …The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from . The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised …This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments .. In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has

> been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be. ‘

[18] In the *Law Society of the Northern Provinces v Mahon* 2011 (2) SA 441(SCA) the Supreme Court of Appeal referred to how a statute must be interpreted. See also in *Kubyana v Standard Bank of South Africa* 2014 (3) SA 56 (CC) at para 77 where Jafta J stated:

> ‘It is a fundamental principle of interpretation that words used in a statute or written document must be construed in their proper context. In Bato Star this court held that “the technique of paying attention to context in statutory construction is now required by the Constitution”. The court said: “'It is no doubt true that it is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning. But it is also a well-known rule of construction that words in a statute should be construed in the light of their context”’

[19] It is no doubt true that it is the primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning. It is a well-known rule of construction that words in a statute be construed in the light of their context.

[20] Rule 49(11) is still in place and the jurisprudence has evolved, more particularly in the various cases referred to namely the *South Cape* judgment supra. In this case if the court were to impose the first applicant on the PAC for a period of 40 days, the consequent chaos will be, in my view, irreparable. There is sufficient division in the organization as it is. The first applicant has a

noble motive to try and bring about peace and in so doing he has thought out a plan, namely to put the past behind and for the organization to go forward.

[21] In my view, this is laudable but this can be done after 40 days when the members of the PAC will know the outcome of the appeal. In this case the status ante quo in my view would cause more havoc than have a constructive effect. Obviously the features that I have referred to are not exhaustive and despite the wording of s18 of the Superior Courts Act I find that this court retains a discretion and the threshold, in my view, is no higher than the traditional threshold.

Costs

[19] There is the question of costs. The first applicant, in my view, has brought the application on a bona fide basis. He has not sought to embellish his position. It is correct that counsel, Advocate Pilani on behalf of the applicants, did make submissions on the personal circumstances of the first applicant. In my view, the import of this application is really a wish by the first applicant that peace be brought to the organization and the rule by decree and the purging of members of the PAC by the first respondent be brought to an end. In other words, the first applicant is trying to promote the adherence by the members to the Constitution.

[20] The application fails but I am not going to order that the first applicant must pay the costs for the reason that I have already referred to. Any cost

orders at this stage will simply create further acrimony. The order I grant is the following:

1. The application is dismissed.

2. There shall be no order of costs.

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VICTOR J

COUNSEL FOR FIRST APPLICANT: ADV S PILANI

ATTORNEY FOR FIRST APPLICANT: NGENO & MTETO INCORPORATED

COUNSEL FOR FIRST AND THIRD RESPONDENTS: ADV APJ ELS

ATTORNEY FOR RESPONDENTS: VAN DER MERWE AND ASSOCIATES

COUNSEL FOR SECOND RESPONDENT: APPEARS HIMSELF

DATE OF HEARING : 26 AUGUST 2014

DATE OF JUDGEMENT : 28 AUGUST 2014