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REPUBLIC OF SOUTH AFRICA



**NORTH GAUTENG HIGH COURT
PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

Case no:75993/13

20/2/2014

In the matter between:

MZWANDILE MONTJANE

FIRST APPLICANT

AUBREW DIAPOLENG NGWATLE

SECOND APPLICANT

KOMOSASA JONAS MORABA

THIRD APPLICANT

JAMES KGASHANE MONYELA

FOURTH APPLICANT

ALFRED TOONA MATHABA

FIFTH APPLICANT

MOGOANE MANCHIDI

SIXTH APPLICANT

FRANK MONO MAIBELO

SEVENTH APPLICANT

EUGINE EUGENT KHOZA

EIGHTH APPLICANT

AND

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

20/02/2014

NARIUS MOLOTO	FIRST RESPONDENT
PAN AFRICANIST CONGRESS OF AZANIA	SECOND RESPONDENT
THE TSHWANE METROPOLITAN MUNICIPALITY	THIRD RESPONDENT
THE GREATER TUBATSE LOCAL MUNICIPALITY	FOURTH RESPONDENT
THE MARULENG LOCAL MUNICIPALITY	FIFTH RESPONDENT
THE MAKHUDUTHAMAGA LOCAL MUNICIPALITY	SIXTH RESPONDENT
THE EPHRAIM MOGALE LOCAL MUNICIPALITY	SEVENTH RESPONDENT
THE MUSINA LOCAL MUNICIPALITY	EIGHTH RESPONDENT
THE MOPANI DISTRICT MUNICIPALITY	NINETH RESPONDENT
PHALA WA PHALE KATSELA	TENTH RESPONDENT
GERT MASILELA	ELEVENTH RESPONDENT
MOSOTHO MOEPYA N.O	TWELFTH RESPONDENT
THE CHAIR PERSON OF THE ELECTORAL COMMISSION	THIRTEENTH RESPONDENT

JUDGMENT

BAQWA J

- [1] This is an application which has been brought mainly as a result of disagreements and factionalism which has occurred within the Pan Africanist Party. The result has been the expulsion of some members which has been contested in the courts. The said expulsions have in turn affected the positions of some of the members occupying positions in government.

- [2] The details of the on-going factionalism are apparent from the papers filed by both parties and I do not propose to reiterate them.
- [3] The essence of the application is to interdict the substitution of the applicants as members of municipal councils cited as respondents. Such substitution would be based on an assumption that applicants are no longer members of the PAC.
- [4] Part A of the application is intended to preserve the **status quo ante** by preventing the swearing in of new councillors by the respondent municipal councils.
- [5] In Part B of the application, appellants intend to seek a review of the decision of second respondent to suspend the applicants from membership of the second respondent and expelling them from membership of the second respondent.
- [6] First and second respondents' have filed an opposing affidavit. This is despite the fact that a notice of intention to abide the decision of this court forms part of the papers before me. In my view this apparent contradiction has no practical effect as the parties on both sides are members of the PAC and arguments about the status quo of the second respondent would therefore be academic.
- [7] The respondents in opposing the application have made submissions about improper service and that according to them the matter is not urgent. They also submit that the relief sought is moot and unsustainable.

[8] In order to succeed in an application of this nature an applicant is required to establish a **prima facie** right, a reasonable apprehension of irreparable harm if the interim relief is not granted, a balance of convenience in its favour and the absence of an alternative remedy adequate in the circumstances.

[9] Concerning a **prima facie** right, the applicants are members of various respondent municipal councils. They obtained such membership by virtue of being members of the PAC from which they have now been allegedly suspended or expelled. The underlying reason for the application is the expulsion or suspension but more pertinently the relief sought in Part A of this application is the prevention of the swearing in of substitute members in the respondent municipal councils.

In my view, members of the respondent councils does establish a **prima facie** right which applicants are entitled to protect.

[10] Respondents' counsel has argued that almost all the relief sought by the applicants on an urgent basis is moot. She submits that all the applicants (except the sixth applicant) have already been replaced on the respective municipal councils as a result of the declarations of the IEC.

[11] The fault line in this submission is that it assumes the legitimacy of the basis on which the IEC made its decisions. Applicants strenuously dispute the legitimacy of the IEC decisions and submit that the IEC has on some spurious basis preferred one of the warring factions within the PAC. Whilst I do not have to decide this issue in making a ruling concerning Part A of this application, I cannot adopt a stance that assumes or accepts the legitimacy of the IEC declarations. This is a matter to be considered in Part B of the application. For present purposes I do not consider applicant's case to be

moot. Neither do I consider a decision on present issues to be abstract, academic or hypothetical.

See JT Publishing (Pty) Ltd v Minister of Safety and Security 1996 12 BCLR 1599 (CC) at paragraph 15

- [12] Applicants' counsel has referred to an unreported decision of the South Gauteng High Court in which a similar application was launched under **Case number 43892/2013 NS Pooe and Another v N Moloto and Others**. Victor J did not find the issues to be moot and granted an order in favour of the applicants. A councillor who was about to lose his seat has since resumed his duties as a councillor subsequent to that order.
- [13] It bears noting that none of the applicant councillors were subjected to a disciplinary hearing. Respondents have made the allegations that applicants were expelled from the party but have proffered no evidence in that regard. Such expulsion would accordingly be contrary to the provisions of the PAC constitution which formed part of the papers before me.
- [14] On the applicant's version, the replacement councillors for first, second, third, fifth and eight applicants have not yet been sworn in. Their situation is similar to that in the **Pooe** decision of the South Gauteng High Court and is accordingly rectifiable. Whilst the swearing in process may not be necessarily a legal trigger of appointment, it is a significant pointer in the process of appointment.

Section 26(2) of the Local Government Municipal Structures Act 117 of 1998 which provides that "*A person assumes office as a councillor when declared elected or when appointment, as the case may be.*" should be read to imply

"legitimately appointed" and compliance with all the necessary legal prescripts and procedures having been followed.

- [15] The swearing in process for replacement councillors is imminent and logically, applicants would not be afforded redress in due course if not granted interim relief. By necessary implication they will suffer irreparable harm if interim relief is refused. Harm will ensue not only to their reputation but also in their loss of capacity to earn a living. Further, the balance of convenience favours the applicants and this can be inferred from the possible consequences of applicants losing their means of earning a livelihood.

- [16] In the result the following order is made:

Having read the documents files of record and having considered the matter:

An order is granted in terms of prayers 1, 2,3,4 and 5 of Part A of the Notice of Motion.



S.A.M BAQWA

(JUDGE OF THE HIGH
COURT)