



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

20/4/16

Not reportable

Not of interest to other Judges

CASE NO: 8340/2016

In the matter between:

PAN AFRICANIST CONGRESS OF AZANIA

Applicant

and

**INDEPENDENT ELECTORAL COMMISSION
OF SOUTH AFRICA**

First Respondent

LETLAPA MPHAHLELE

Second Respondent

PAN AFRICANIST CONGRESS OF AZANIA

First Intervening Party

MR MPHETHI

Second Intervening Party

J U D G M E N T

MAKGOKA, J

[1] In this application the applicant seeks an order to review what it says is a decision of the first respondent made on 21 December 2015 in terms of which the first respondent allegedly suspended the applicant from participation in the 2016 local government elections. Ancillary to the review and setting aside of the alleged decision, the applicant seeks the following orders:

(a) That the first respondent restores and involve the applicant as a participating political party in the 2016 local government elections;

(b) That the first respondent communicates with the applicant on issues pertaining to the 2016 local government elections through its Secretary-General and President.

[2] At the commencement of the hearing, by agreement of the parties, I made an order admitting the first and second intervening parties to these proceedings.

[3] It is prudent at this stage to identify the parties in the dispute. The applicant (the PAC) is a political party registered in terms of s 15 of the Electoral Commission Act 51 of 1996 (Electoral Act). It says that its President is Luthando Mbinda (Mbinda), and its Secretary- General, Narius Moloto (Moloto), the deponent to the founding and replying affidavits in these proceedings. Mbinda is currently the PAC's sole representative in the National Assembly, having been sworn in as such on 19 March 2015. The second respondent's application to prevent Mbinda from being sworn in was dismissed.

[4] The first respondent (the Electoral Commission) is a commission established in terms of s 181(1)(f) of the Constitution of the Republic of South Africa, 1996, and s 3(1) of the Electoral Act. The core mandate of the Electoral Commission is to manage elections for public representatives in all three spheres of government in South Africa. The second respondent (Mphahlele) is a politician who claims to be the President of the PAC. The first intervening party is represented by Mr Pooe, who aligns himself with Mphahlele. The second intervening party (Mphethi) is a politician who also claims to be the legitimate President of the PAC.

[5] The Electoral Commission opposes the application mainly on the basis that the leadership dispute that has bedeviled the PAC has placed it in the invidious position of not knowing who leads the organization. Furthermore, it asserts that no decision was taken by it on 21 December 2015. Instead, it says that the only decision it took in relation to the PAC was the suspension of public funding to the

PAC in terms of the Public Funding of Represented Political Parties Act 103 of 1997 (the Funding Act), until such time as the leadership struggle within the PAC had been resolved. That decision was taken by the Electoral Commission on 17 June 2015. An application in July 2015 by the PAC (Mbinda faction) launched in this court, challenging that decision, among others, was dismissed by this Court (Mabuse J). There has not been any appeal against that order.

[6] On 21 December 2015 the Electoral Commission, in response to earlier correspondence from the PAC dated 18 December 2015, regarding the alleged removal of the PAC logo from the list of political parties registered with the Electoral Commission. In response, the Electoral Commission stated that it had not removed the PAC from the list of registered parties. It further stated: 'As matters stand, the Electoral Commission has suspended participation by the PAC in electoral process pending the much needed clarification of its leadership through judicial processes that are presently unfolding. The PAC says that this is a new decision, distinct from the earlier one suspending the public funding to the PAC. In light of how the application was argued, and the view I take of the matter, it is not necessary for me to decide the issue.

[7] This application is one of the many that have occupied this court and our local division in Johannesburg. At the heart of the litigation is the power struggle that has engulfed the PAC over many years. None of those applications have succeeded in determining once and for all, who the legitimate leaders of the PAC are. The present application is no different. In fact, the issue here falls within a much narrower compass. What has to be decided in this application concerns the relationship or contact that the Electoral Commission has to have with the PAC for the purpose of the 2016 local government elections. The Mbinda faction, the Mphahlele faction (supported by the first intervening party led by Pooe) and the Mphethi faction, all claim legitimacy of the leadership of the PAC.

[8] From these factions, I must determine which one, or more, or all, should the Electoral Commission communicate with for the purpose of the 2016 local government elections. The history of squabbles between the above factions is long

and complex, and has formed the basis of several applications in this court. These were mainly applications of interlocutory nature by one faction against each other, but none had a direct bearing on the legitimacy of the leadership of the PAC. I will not attempt to recite the full factual background here. For the present purposes, I am of the view that the following should suffice.

[9] Mphahlele was elected the President of the PAC in July 2012. He was expelled in May 2013. He approached the High Court (South Gauteng) to challenge his dismissal. He was successful in that court (Kgomo J) and his expulsion was set aside. The PAC appealed against the order of Kgomo J to the Full Court. Mphahlele made an application in terms of rule 49(11) of the Uniform Rules of Court, seeking the execution of Kgomo J's judgment pending the determination of the appeal. That application was postponed *sine die*. On 18 October 2013 the chairperson of the Electoral Commission, in view of these developments, conveyed to Moloto that it had decided to recognize the Mbinda faction as the legitimate PAC, 'until the court otherwise decides.' I shall revert to this aspect later. Mphahlele's application in terms of rule 49(11) for leave to execute the order granted by Kgomo J, pending the appeal to the Full Court, was finally heard by Victor J, who dismissed the application on 10 November 2014 by Victor J.

[10] On 9 October 2015 the Full Court upheld the appeal by the PAC and overturned the order of Kgomo J. It appears that there were faint attempts to appeal the judgment of the Full Court to the Supreme Court of Appeal (SCA). During the hearing of this application, counsel for Mphahlele confirmed that there is no appeal pending against the judgment of the Full Court. After the judgment of the Full Court, Mphahlele apparently approached the Electoral Commission, claiming to be the President of the PAC.

[11] In these proceedings, Mphahlele asserts himself as the President of the PAC, based on his election in July 2012. According to him, he was re-elected in July 2015, and his term would endure until July 2018, in terms of the constitution of the PAC. What Mphahlele conveniently fails to mention, and deal with, is the fact of his expulsion from the PAC in May 2013. In my view, his expulsion, and its

consequences, presents insurmountable obstacle for Mphahlele. He has sought to challenge it through the court. The judgment of the Full Court referred to above, until set aside by either the Supreme Court of Appeal or the Constitutional Court, should, *de jure*, be the guiding point of departure on the issue.

[12] Mphahlele seeks to downplay that judgment and its effect. Instead, he places reliance on the *dicta* in three judgments of this Court (per Windell J, Sutherland J and Mabuse J). But none of these judgments made substantive pronouncements on the leadership issue. What is more, the judgment of Windell J was granted before the judgment of the Full Court in October 2015. All what Windell J did was to dismiss the application on the basis that there non-disclosure of material facts and insufficient information. Regarding the judgment of Mabuse J, the learned Judge was seized of a specific aspect, namely, whether the Electoral Commission was within its right to suspend public funding to the PAC, and not with the determination of the leadership of the PAC. Sutherland J also was faced with an urgent application to prevent the holding of a congress by one of the factions of the PAC. Like Windell J, Sutherland J found himself unable to deal with the factual disputes raised in the papers. In the course of his judgment, the learned Judge made the following pertinent remarks:

'Nothing this judgment has to say will any way dent any claims which they have made, and I make specific reference to the fact that because it is plain that the judgment of Windell J, in dismissing a similar application by the respondents ...has been seriously misunderstood. That judgment, too, did not in any way confer any status or validation on either of the PAC factions. Windell J, like me in this application, was met with the insuperable problem of having to decide a dispute of fact on paper which is not something Courts are able to do.'

[13] It is therefore clear that reliance by Mphahlele on the judgments of Windell J and of Sutherland J is misplaced. They do not serve as *res judicata*, as suggested by Mphahlele in his answering affidavit.

[14] Mphahlele further seeks to downplay the effect of the judgment of the Full Court by saying that it was decided on a technicality without dealing with the merits of the leadership dispute in the PAC. That might be true, but this does not detract from the effect of the judgment. At the risk of repetition, the effect of the Full Court

judgment is that Mphahlele's expulsion from the PAC stands. Absent any appeal to set it aside, it remains an important focal point in the leadership tussle in the PAC. It might not be the final word on the leadership battle for the heart and soul of the PAC. But it cannot simply be ignored, as Mphahlele seeks to do. Mphahlele has not, in his answering affidavit, mentioned any intention to appeal against that judgment. In fact, he does not seem to have any intention to appeal that judgment. Instead, he seems to pin his hope on an action suggested by Sutherland J in his judgment. Despite the fact that learned Judge made that suggestion in December 2015 already, Mphahlele has not instituted the envisaged action, to date.

[15] During argument, counsel for Mphahlele, Mr *Mokhari* SC, took the argument further regarding the effect of the judgment of the Full Court upholding the PAC's expulsion of Mphahlele. He relied on an event of 4 April 2015. On that occasion, the Mphahlele faction met as the 'National Executive Council' of the PAC and took a number of 'resolutions'. One of those was to 'derecognise and put aside expulsions and counter expulsions of individuals and structures from the PAC that (had) taken place to date.' In the same breath, they resolved to indefinitely suspend Moloto as Secretary-General for failing to attend that meeting. Accordingly, so was the argument by counsel, the PAC's appeal, and the Full Court's judgment, became moot and of no consequence, because of a resolution by the Mphahlele faction of 4 April 2015 to reinstate him.

[16] There is no merit in this argument. Until the Full Court pronounced itself on the issue, Mphahlele remained expelled from the PAC. The meeting of the 'National Executive Council' on 4 April 2015, which purported to re-instate Mphahlele and others, was therefore of no consequence. Mphahlele had elected to challenge his expulsion through the courts, and he had to await the outcome of the appeal lodged by the PAC. It is an untenable proposition that Mphahlele could circumvent the appeal process by simply 're-instating' himself. The Full Court heard the appeal on 9 October 2015, months after that decision had been taken. Even if one accepts the validity of the resolution of April 2015, it should have been argued before the Full Court that the appeal had become moot as a result. I was informed from the Bar that this was never argued. As stated earlier, the first intervening party, represented by

Pooe, aligns itself with the Mphahlele faction. As a result, the remarks made with regard to Mphahlele are apposite to the first intervening party.

[17] Now to the second intervening party, Mphethi. He was appointed acting President of the PAC in August 2013, following the expulsion of Mphahlele earlier during May 2013. In August 2014 Mbinda was elected President at a National Congress of the PAC. Although there is muted dissatisfaction with the legitimacy of that congress, it has to date not been set aside in any competent court. In December 2014 Mphethi was expelled from the PAC for, among others, seeking to rule the organization by decree. He thereafter lodged several applications challenging his expulsion, which were all dismissed. There is currently an application pending to review his expulsion.

[18] It is correct that before the judgment of the Full Court, there was uncertainty and confusion on the part of the Electoral Commission, as to who the leader of the PAC is. But not after the judgment of the Full Court. Earlier I mentioned the stance taken by the Electoral Commission that it would await the outcome of the legal process as to the leadership battle in the PAC. That stance was, with respect, the correct one by the Electoral Commission. Clarity in that regard was provided by the judgment of the Full Court, in terms of which the expulsion of Mphahlele was upheld.

[19] In the light of the above, one should decide on the appropriate order in the circumstances. During the argument, all counsel representing the parties were in agreement that this court should find in the public interest, especially for the PAC members and supporters, to make a provisional order for the purposes of the upcoming 2016 local government elections, on which faction within the PAC the Electoral Commission should interact with concerning the management of the elections and the PAC's participation in such elections. This relates to prayer 4 of the notice of motion. It became clear that the prayers 2 and 3 (the alleged suspension of the PAC from participation in the local government elections, and its restoration as a participant therein) were no longer in issue. As stated earlier, the focus was on the faction with which the Electoral Commission should interact for the purposes of the local government elections.

[20] Counsel for the PAC, for Mphahlele and the intervening parties, provided me with draft orders for consideration. On 15 April 2015 counsel for the Electoral Commission filed supplementary submissions commenting on those draft orders and their likely practical effect. Mphahlele's draft order envisages the recognition of the Mbinda and Mphahlele factions as both being representatives of the PAC. It is suggested that the nomination of candidates for the 2016 local government elections shall be done on a 50/50 basis split between, on one hand, members of the Mphahlele faction and first intervening party, and those of the PAC, on the other, in all wards which the PAC will be contesting.

[21] Counsel for the Electoral Commission have pointed out that this would give rise to more complex issues, in part, because of the legislative framework that details the nomination of electoral candidates, the composition, membership, operation and dissolution of municipal councils. Counsel proceed to demonstrate that for the proposal to be implemented, a high degree of co-operation between the contending factions of the PAC is required the Electoral Commission to comply with its statutory obligations. Given the very deep-seated problems that exist already among the various factions of the PAC, co-operation is not possible. What is more, counsel point out, the 50/50 split does not explain how the contesting factions of the PAC would manage the nomination of candidates on the relevant proportional representation party list in respect of seat allocation.

[22] I have given very careful and anxious thought to each of the draft orders presented to me, as well as the comments on behalf of Electoral Commission. Much as one would wish to be as accommodative as possible to the various factions in the PAC, I have to defer to the views of the Electoral Commission, and not hamstring it with a complicated and difficult-to-implement order. In the result, I must have a basis for identifying any of the factions as the contact centre for the PAC that the Electoral Commission would interact with. That basis, in my view, must be informed by the current legal status of each faction.

[23] I have already outlined that earlier. Mbinda's faction has been successful in upholding Mphahlele's expulsion from the PAC (in terms of the judgment of the full

court). There is currently no pending litigation between the PAC and Mphahlele concerning the leadership of the PAC or his expulsion from the PAC.. He therefore remains expelled from the PAC. All his conduct and actions purportedly on behalf of the PAC, while his suspension remains, are obviously without any force. This includes the purported congresses where he was 're-elected' as 'PAC President.' The same goes for Pooe faction. Mphethi has also been expelled from the PAC. His review application has yet to be determined. That leaves only the Mbinda faction as the only one on a superior legal standing at the moment.

[24] The above must not be understood to mean that the Mbinda faction is the legitimate one for all intents and purposes. I consider this only for the purposes of the upcoming local government elections. Given all of the above, I am of the view that the Electoral Commission should interact with Mbinda's faction for the purposes of the up-coming local government elections.

[25] There remains the issue of costs. The PAC, as the applicant, has been successful. There is no reason why the costs should not follow the cause with regard to Mphahlele and the two intervening parties. There shall be no costs order as between the PAC and the Electoral Commission.

[26] In the result the following order is made:

1. The first respondent (the Electoral Commission of South Africa) is directed to, for the purposes of the up-coming 2016 local government elections, to communicate with the Pan Africanist Congress of Azania (PAC) through its President, Mr Luthando Mbinda and its Secretary-General, Mr N. Moloto;
2. The second respondent (Mr Letlapa Mphahlele), the first intervening party (represented by Mr Pooe) and the second intervening party (Mr Mphethi), are ordered to pay the costs of the applicant (the PAC), jointly and severally, the one paying the others to be absolved.



T.M. Makgoka
Judge of the High Court

Date of hearing:	30 March 2016
Date of judgment:	20 April 2016
For the Applicant:	Adv. F. Botes SC Adv. M.Thipe
Instructed by:	Van der Merwe & Associates, Pretoria
For the First Respondent:	Adv. M.T.K Moerane SC Adv.L.Gcabashe
Instructed by:	Gildenhuys Malatji Inc., Pretoria
For the Second Respondent:	Adv. W. Mokhari SC Adv. P. Managa
Instructed by:	Ngeno & Mteto Inc., Johannesburg
For the 1 st Intervening Party:	Adv. W. Mokhari SC Adv. P. Managa
Instructed by:	MR Phala Attorneys, Benoni KP Seabi & Associates, Pretoria
For the 2 nd Intervening Party:	Mr MB Tshabangu
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