HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

CASE NO: **8340/2016**

In the matter between: 21/6/2016

LETLAPA MPHAHLELE	First Applicant
PAN AFRICANIST CONGRESS OF AZANIA	Second Applicant
MR MPHETHI	Third Applicant

and

PAN AFRICANIST CONGRESS OF AZANIA	First Respondent
INDEPENDENT ELECTORAL COMMISSION OF SOUTH AFRICA	Second Respondent

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J U D G M E N T – Leave to appeal

MAKGOKA, J

[1] This is an application for leave to appeal against the judgment and order of this Court handed down on 20 April 2016. In terms of the order of the judgment, the Electoral Commission was directed to communicate with Mr Luthando Mpinda and Mr Narius Moloto as representatives of the Pan Africanist Congress of Azania (PAC) for the purpose of the upcoming local government elections. The application is

brought by Mr Letlapa Mphahlele, the PAC and Mr Mphethi, who, respectively, were the second respondent, first intervening party and second intervening party, in the main application. The application for leave to appeal is opposed by the PAC which was cited as the applicant in the main application, represented by Mr Luthando Mpinda and Mr Narius Moloto. There was no appearance for Mr Mphethi in the present application, and only the application on behalf of Mr Mphahlele was argued.

[2] Mr *Els*, counsel for the first respondent, contended, among others, that the order is interim, and therefore, not appealable. The test for appealability was established in *Zweni v Minister of Law and Order*[1] where it was held that an order must have the attributes of a final order and be definitive of the rights of the parties or dispose of at least a substantial portion of the relief in the main proceedings. But the *Zweni* attributes are not cast in stone, as observed in *Moch v Nedtravel.*[2] Even where a decision does not bear all these attributes it may nevertheless be appealable if some other considerations are evident, including that the appeal would lead to a just and reasonable prompt resolution of the real issue between the parties.

[3] The overriding consideration should be that of the interests of justice, as explained in *Philani-Ma-Afrika v Mailula.*[3] There, the Supreme Court of Appeal adapted the general principles on the appealability of interim orders, and concluded that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice. The approach of the Supreme Court of Appeal received the imprimatur of the Constitutional Court in *Intl Trade Administration v SCAW.*[4] The Constitutional Court observed that the Supreme Court of Appeal had adapted the general principles to accord with the equitable and the more context-sensitive standard of the interests of justice favoured by the Constitution.[5] In the present matter, the order is final with regard to the participation by the parties in the upcoming local government elections. For the above considerations, I conclude that the judgment in this case is appealable.

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[1] *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A).
[2] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F-11C.
[3] *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA).
[4] *Intl Trade Administration Commission v SCAW SA (Pty) Ltd* 2012 (4) SA 618 (CC).
[5] Para 52.

[4] With regard to merits of the application, much of the grounds are premised on the arguments presented in the main application. They have been dealt with comprehensively in the judgment, and it would therefore serve no purpose in regurgitating them here. The main thrust of the argument on behalf of Mr Mphahlele is that because there are 'factions' within the PAC, the court erred in preferring one 'faction' over the others as the one that the Electoral Commission should communicate with for the purpose of the local government elections. As explained in the main judgment, Mr Mphahlele was expelled from the PAC. His legal challenge to his expulsion ended when the Full Court of the then South Gauteng High Court upheld the appeal by the PAC. The effect of the judgment of the Full Court is that the decision by the PAC to expel Mr Mphahlele remains. He has done nothing since the judgment of the Full Court to challenge the decision.

[5] Although the decision to expel Mr Mphahlele is not administrative action, I think that by analogy the reasoning in *MEC for Health, Eastern Cape and Another v Kirland Investments t/a Eye & Lazer Institute*[6] and *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[7] is applicable. In para 101 of *Kirland*, the Constitutional Court held as follows:

'The essential basis of *Oudekraal* was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process'.

[6] One of the grounds on which this conclusion was reached is set out in *Kirland* at para 103:

'The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid'.

[7] Applying the above principle to the present case, the PAC is entitled to organize its affairs on the basis of finality of the judgment of the Full Court which has

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[6] *MEC for Health, Eastern Cape and Another v Kirland Investments t/a Eye & Lazer Institute* 2014 3 SA 469 (CC).

[7] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA).

restored its decision to expel Mr Mphahlele. Whether the Full Court came to its conclusion on a technical basis is of no moment. What is important is the effect of that judgment. At the risk of repetition, the effect of that judgment is that the PAC's decision in May 2013 to expel Mr Mphahlele stands. Mr Mphahlele is not entitled to simply ignore that decision because he considers it wrong or invalid for one or more reasons. Mr Mphahlele continues to base his claim to the membership and presidency of the PAC on selective *obiter* comments in the judgments of Windell J and Sutherland J. I do not read any of those judgments, or the *obiter* comments therein, to have the effect Mr Mphahlele purports them to have. But to the extent they purport to pronounce him as a member and President of the PAC, they are at odds with the effect of the judgment of the Full Court, and on the basis of judicial precedent, they should be considered wrong. In *Trade Fairs and Promotions (Pty) Ltd v Thomson & Another* 1984 (4) SA 177 (W) at 187B Coetzee J made the following apposite remarks:

'.. (J)udicial comity also lies at its (judicial precedent) root. And so does common sense. Loyalty to the higher tribunal in the hierarchy of authority is essential for the smooth working of the system. The dignity of the court is bound to suffer irreparable harm if every one of the 34 Transvaal Judges can go his own merry way.'

[8] Lastly, I consider the argument on behalf of Mr Mphahlele that the Court erred in granting the order it did without setting aside the Electoral Commission's decision on 17 June 2015[8] in terms of which the Electoral Commission suspended the allocation of funding to the PAC until such time as the leadership struggle within the PAC had been resolved. Mr *Mokhari* SC, counsel for Mr Mphahlele, contended with reference to *Oudekraal*, that absent an order setting aside that decision, the order that this Court made, was not competent. There is no merit to this argument. The Electoral Commission's decision has always been a conditional and provisional one. It required of the PAC to get its house in order, and once that was done, its decision would automatically fall away. No court order is needed to set aside its decision. To demonstrate this by way of a practical example. If all the factions of the PAC had resolved their differences and approached the Electoral Commission as a united

[8] The decision of the Electoral Commission was taken on 17 June 2015. This was mischaracterized as 21 December 2015 in the papers. The letter dated 21 December 2015 was simply communicated the practical effect of the decision of 17 June 2015.

front, the Electoral Commission would have been satisfied and uplifted its decision. It would be absurd, under those circumstances, to insist that there should be a court order setting aside the Electoral Commission's decision.

[9] Similarly, where the issue of the leadership struggle in the PAC had been judicially pronounced on, albeit provisionally, it serves no purpose to insist on the setting aside of the Electoral Commission's decision. In fact, this is the basis on which the main application was argued. Both in its written and oral submissions, the Electoral Commission made it very clear that in the event that the Court finds a basis of resolving the leadership dispute, even if only on a provisionally, it would abide thereby and give effect to such an order. What is more, it was generally accepted by all parties during the argument of the main application that it was in the public interest for this Court to make a provisional order for the purposes of the participation by the PAC in the upcoming local government elections. All parties suggested practical ways to achieve this, including Mr Mphahlele. It is therefore a disingenuous contention advanced on behalf of Mr Mphahlele in this application that the main application should have been dismissed, among others, on the basis of the *Oudekraal* principle. In any event, as explained above, the decision of the Electoral Commission is distinguishable from the range of administrative decisions envisaged in *Oudekraal* on the basis of it being provisional, it being dependent on the resolution, either way, of the leadership tussle in the PAC. Therefore, reliance on *Oudekraa*l in this context is misplaced.

[10] The common law test in an application for leave to appeal has always been whether there are reasonable prospects that another court, given the same set of facts, might arrive to a different conclusion. That test has been codified by s 17(1)(a)(i) and(ii) of the Superior Court Act 10 of 2013, in terms of which leave to appeal may only be given where a judge is of the opinion that the appeal <u>would</u> have reasonable prospect of success, or that there is some compelling reason why the appeal should be heard.

(my underlining for emphasis)

[11] It is clear that by the use of 'would' in the s 17, the legislature intended a heightened threshold than the common law one. Given what has been considered in this judgment, I conclude that there appeal would not have a reasonable prospect of success. There is no compelling reason why the appeal should be heard.

[12] The sum total of the above is that the application for leave to appeal is unmeritorious and falls to fail. The following order is made:

1. The application by the first applicant, Mr Letlapa Mphahlele for leave to appeal is dismissed with costs;

2. The application by the second applicant, Mr Mphethi for leave to appeal is struck from the roll with costs.

3. The costs orders in paragraphs 1 and 2 are in favour of the first respondent, the Pan Africanist Congress of Azania as represented by Mr Luthando Mpinda.

4. There is no costs order as between the applicants and the second respondent, the Electoral Commission of South Africa.

T.M. Makgoka
Judge of the High Court

Date of hearing:	17 June 2016
Date of judgment:	20 June 2016
For the First and Second Applicants:	Adv. W. Mokhari SC
Instructed by:	MR Phala Attorneys, Benoni KP Seabi & Associates, Pretoria

No appearance for the Third Applicant

For the First Respondent:	Mr Els
Instructed by:	Van der Merwe & Associates, Pretoria
For the Second Respondent:	Adv. M.T.K Moerane SC
Instructed by:	Gildenhuys Malatji Inc., Pretoria