IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 5712/2018

In the matter between:

LULAMA MAXWELL NTSHAYISA, N.O	APPLICANT
and	
AFRICAN INDEPENDENT CONGRESS	FIRST RESPONDENT
NATIONAL EXECUTIVE COMMITTEE AFRICAN INDEPENDENT CONGRESS	SECOND RESPONDENT
MANDLENKOSI PHILLIP GALO	THIRD RESPONDENT
KHAYA MHLABA	FOURTH RESPONDENT
STEVEN MAHLUBANZIMA JAFTA	FIFTH RESPONDENT
SUZAN GAZI	SIXTH RESPONDENT
SIVUYILE NGODWANA	SEVENTH RESPONDENT

MARGARET ARNOLDS	EIGHTH RESPONDENT
MXOLISI KOM	NINTH RESPONDENT
NOMBULELO XATASI	TENTH RESPONDENT
NINAWE ZIMBILI	ELEVENTH RESPONDENT
KATLHEHO SITHO	TWELFTH RESPONDENT
FIKISWA MPUMPU	THIRTEENTH RESPONDENT
NIKIWE MADIKIZELA	FOURTEENTH RESPONDENT
BOB NCOMBO	FIFTEENTH RESPONDENT
SIPHON MAHLANGU	SIXTEENTH RESPONDENT
LIZZY SAULE	SEVENTEENTH RESPONDENT
MXOLISI NTOBELA	EIGHTEENTH RESPONDENT
XOLILE MGUJULWA	NINETEENTH RESPONDENT
MONGEZI MPHATHENI	TWENTIETH RESPONDENT
TEBOHO STEMMER	TWENTY FIRST RESPONDENT

VATISWA NGCUKANA	TWENTY SECOND RESPONDENT
WISEMAN MHLONGO	TWENTY THIRD RESPONDENT
VUYISILE KRAKRI	TWENTY FOURTH RESPONDENT
ALFRED HLOMELA	TWENTY FIFTH RESPONDENT
MABULU GADLA	TWENTY SIXTH RESPONDENT
MATHAPELO NOSIDIMA	TWENTY SEVENTH RESPONDENT
SIKIWE DLOVA	TWENTY EIGHTH RESPONDENT
INDEPENDENT ELECTORAL COMMISSION	TWENTY NINTH RESPONDENT

ORDER

In the result, the following order is made:

(a) The second national congress of the first respondent held on 27 and 28 April 2018 at Kokstad, KwaZulu-Natal and its decisions, resolutions and elections are declared unlawful, invalid and unconstitutional and as such are hereby set aside.

(b) The first to twenty eighth respondents, jointly and severally, the one paying and the other to be absolved are ordered to pay the costs of this application including all costs previously reserved.

JUDGMENT

Delivered on 01 March 2019

Poyo Dlwati J:

[1] The issue to be determined in this application is whether the national congress of the first respondent held at Kokstad on 27 and 28 April 2018 ought to be set aside on the grounds that it was invalid, unconstitutional and therefore unlawful.

[2] The applicant, who averred that he also acted as a representative of 15 others who were also members of the first respondent, was the deputy chairperson of the first respondent prior to the congress of 27 and 28 April 2018 (April 2018 congress). He is also one of the founding members of the first respondent. The second respondent is the National Executive Committee (NEC) of the first respondent purportedly elected during the April 2018 congress. The third to twenty eighth respondents are the National Executive Committee members of the first respondent also purportedly elected during the April 2018 congress. The twenty ninth respondent did not participate in these proceedings and nothing much will be said about it.

[3] The gist of the applicant's complaint was that certain irregularities occurred prior to and at the national congress of the first respondent held at Tshwane on 15, 16 and 17 December 2017 (December 2017 congress). These, according to the applicant, included the fact that there was no Congress Preparatory Committee (CPC) elected and endorsed by the second respondent prior to the congress as required in terms of clause 9.4.6 of the first respondent's constitution. Furthermore, there was also no Electoral Commission Committee

(ECC) elected as required in terms of clause 11.9 and 11.10 of the first respondent's constitution. This, according to the applicant, led to the collapse of the national congress on 17 December 2017 as there was no accreditation process for delegates and therefore no voters' roll to enable elections to take place.

[4] According to the applicant, this was borne out by the EMCA (Elections Consulting Agency) report in their final close out report to the first respondent where they stated in para 3.4 that 'On Saturday, 16 December 2017 the AIC postponed the Election Process because the voters' roll which is required to be presented before the election takes place had not been verified and finalised'. According to the applicant, these irregularities were perpetuated even at the purported congress of April 2018 which was supposedly the continuation of the December 2017 congress. The applicant complained that he and others were not notified of the April 2018 congress. Whilst there were other irregularities complained of, I do not deem it necessary to deal with all of them. It was for all these reasons that the applicant believed that the April 2018 congress was invalid and unlawful and that all its decisions ought to be set aside.

[5] The respondents opposed the application and *in limine,* raised various issues. The first was that the applicant did not have *locus standi* to launch these proceedings. According to the third respondent, who deposed to the answering affidavit on behalf of all the respondents, the applicant was no longer a member nor a deputy president of the first respondent. His membership expired on 10 March 2018 and the application was launched after his membership had expired and not renewed on 18 May 2018. The applicant, therefore, had no interest whatsoever in the dealings of the first respondent and in the circumstances could also not represent the other 15 members in that capacity. He, therefore, could not have been authorized to launch these proceedings.

[6] The second point was that as the other purported 15 members of the first respondent, on behalf of whom the applicant was acting, were not a legal entity, but rather a loose group of individuals, those members ought to have been joined instead as co-applicants as the applicant had no right to represent them. The failure to join those other members, according to the third respondent, was fatal to the application as those members had a direct and substantial interest in the outcome of the application.

[7] The third point was that as the application was riddled with disputes of facts, and as the applicant ought to have foreseen that, he ought to have launched the proceedings by way of action. As he had failed to do so, and as the disputes of facts were incapable of being resolved on the papers, the application fell to be dismissed with costs. In the respondents' view, the applicant had, in any event, failed to make out a case for the relief sought and this again was another reason why the application fell to be dismissed with costs.

[8] On the main application, the third respondent denied that there had been any irregularities prior to the national congresses of December 2017 and April 2018. He averred that the second respondent and the CPC had a meeting on 26 October 2017. In this regard he referred to Annexure 'MFG1' being the minutes of that meeting. He, therefore, disputed that there was no CPC that had been elected prior to the December congress. He averred that because the April 2018 congress was the continuation of the December 2017 congress, there was no need to start the process afresh. The third respondent also disputed that no electoral commission committee had been appointed. In this regard he made reference to Annexure 'MFG2' being the minutes of a meeting held on 25 November 2017 where the issue of the electoral commission was discussed.

[9] Perhaps it is apposite at this stage to quote an extract from those minutes about what Ms Arnolds (the eighth respondent) reported at the meeting on this issue. She reported that:

'. . . as she was mandated to look and consult with the elections commission, she approached EISA and they said they do not conduct elections any more so she then approached EMCA. She is still communicating with this commission but more information is still needed from the organisation like, the constitution, etc.'

Other than this report, there does not appear to have been another report about the ECC nor does it seem that the names of the committee members were submitted and endorsed by the congress or the second respondent as provided for in clause 11.9.1 of the first respondent's constitution.

[10] With regard to the voters' roll, the third respondent averred that the credentials were presented at the NEC meeting of 25 November 2017 by the Secretary-General. Paragraph 3 of those minutes stated, with regard to credentials, that 'the credentials were done by secretary-general, Cde SM Jafta. No apology received from any member except Cde Kiviet who was absent'. This part in my view related to the credentials of that NEC meeting. However, under the report by the national organiser, it was recorded as follows:

'The national organiser presented a document he prepared reflecting the number of valid branches according to each province. After his presentation some members were not happy with the information regarding their branches. The meeting agreed that those members with queries must consult with the national organiser aside to correct the information'.

Other than what was contained in the EMCA report, there does not appear to have been any other report about the voters' roll.

[11] The third respondent, therefore, denied that there was no valid, verified voters' roll prior to both congresses. He, however, conceded that there were no

accreditation tags due to sabotage and destructive conduct of the 16 AIC members but that branches were provided with a list of delegates with identity numbers as a form of identification for those authorised to attend the December congress.

[12] With regards to the April 2018 congress, the third respondent averred that it was agreed at the NEC meeting held on 9 January 2018 that another congress had to be convened in order to finalise the December congress. In this regard, an extract from those minutes states that'it was resolved that the next congress date must be in mid-February 2018 and that will be determined by the availability of funds.' Whilst the third respondent seemed to be in agreement with this extract, he did not explain why the congress was not proceeded with in February 2018. He, however, contended that on or about 6 April 2018, an invitation for the resumption of the December congress was sent to all branches including the alleged AIC 16 informing them that the national congress would be continued on 27 to 28 April 2018. The communication was through telephone calls to the various branches of the first respondent as that was the first respondent's culture and practice.

[13] The third respondent further contended that the AIC 16 chose not to respond to the invitation for the meeting but instead launched interdict proceedings which were unsuccessful in the Gauteng High Court to try and stop the congress. According to the third respondent, the invitation to attend the congress was also orally communicated to the AIC 16 at the Gauteng High Court on 26 April 2018 when the matter was heard and subsequently struck off the roll for lack of urgency. It was for all these reasons that the third respondent believed that there were no irregularities, both at the December 2017 and April 2018 national congresses warranting again the dismissal of the application costs.

[14] I will deal with the points in *limine* first and thereafter answer the question whether there were any procedural irregularities prior to and at the national congresses of December 2017 and April 2018.

[15] With regards to the *locus standi* of the applicant, it was common cause that his membership expired on 10 March 2018. Clause 5.32 of the first respondent's constitution states that 'membership access cards will be issued once subject to renewal of membership status yearly over three months grace period, to revive such status after which such membership expires for readmission'. The applicant averred that he renewed his membership on 22 May 2018, within the three month grace period allowed in the constitution. He attached proof of payment and renewed membership card to his answering affidavit. Whilst the third respondent alleged fraud on the applicant's renewal of his membership in that it had not been issued by the relevant branch nor relevant chairperson, the first respondent's constitution is silent on a procedure to be followed when one renews membership. In any event, this point was not pursued any further in argument by Mr *Gama* who represented the respondents.

[16] Mr *Gama* instead contended that the renewal of membership by the applicant within the grace period did not confer a right to membership on the applicant. The membership, in his argument, still had to be confirmed. I do not know by whom and in terms of what provision in the first respondent's constitution. I, however, do not agree with his submission. In fact, the opposite is true if one has regard to the first respondent's constitution that if one fails to renew membership within the three months grace period, then the membership expires for readmission. In my view, once the applicant renewed his membership on 22 May 2018, he became a member in good standing of the first respondent. His membership status was renewed as this was not the first time he

was applying for membership. Therefore, nothing more was required. Accordingly, this point must fail.

[17] Mr *Gama* further argued that the applicant was not properly authorised by the other 15 AIC members to launch these proceedings but had in fact only been authorised to launch the interdict proceedings in the Gauteng High Court. If one has regard to annexure 'LMN1', it is clear that the purpose of the resolution was to challenge irregularities identified in the process leading up to the April 2018 national congress. Whilst the interdict proceedings were not successful because of technicalities, this did not take away the desire of the 15 AIC members and the applicant to challenge what they believed to be irregularities prior to the April 2018 national congress. I must mention that this point was never dealt with in the respondent's answering affidavit nor in the supplementary filed later in this court. It was not even dealt with in the heads of argument filed on behalf of the respondents. I am, however, satisfied that the institution of these proceedings was authorized and in any event the applicant, on his own, was justified and competent to institute these proceedings.

[18] In any event, it is trite that any challenge to authority must be by way of a rule 7 notice. In *ANC Umvoti Council Caucus & others v Umvoti Municipality*[1] Gorven J held that:

'. . . the position has changed, since Watermeyer J set out the approach in the *Merino Ko-operasie Bpk* case. The position now is that, absent a specific challenge by way of rule 7(1), "the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant" is sufficient. It is further my view that the application papers are not the correct context in which to determine whether an applicant which is an artificial person has authorised the initiation of application proceedings. Rule 7(1) must be used.'

[1] *ANC Umvoti Council Caucus & others v Umvoti Municipality* 2010 (3) SA 31 (KZP) para 28.

It is common cause that no rule 7(1) challenge was filed in this matter. It was accordingly not necessary for the applicant to prove the authority to initiate the application, nor appropriate to attempt to do so on the papers. Accordingly, this point in *limine* must fail.

[19] Interlinked with this point was the contention about the non-joinder of the other 15 AIC members as co-applicants in these proceedings. In my view, it was not necessary for them to be joined as co-applicants in these proceedings. That they had signed resolutions (Annexure LMN1)authorizing the applicant to launch these proceedings meant that they were confirming that they were aware of these proceedings and they would abide by the decision of this court. As held in *Judicial Service Commission & another v Cape Bar Council & another:*[2]

'. . . the joinder of a party is only required as a matter of necessity -- as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea.'

In my view, there is no prejudice that the other 15 AIC members will suffer even if they are not joined in these proceedings. This point, therefore, must also fail.

[20] With regards to the disputes of facts, I do not believe that these are incapable of resolution on the papers. I am not satisfied that the respondents have seriously and unambiguously addressed the facts said to be disputed,[3] hence I have decided to take a robust view of the matter. I say this for the following reasons, in light of the findings that I have made on the points *in*

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[2] *Judicial Service Commission & another v Cape Bar Council & another* 2013 (1) SA 170 (SCA) para 12, and also *Mulaudzi v Old Mutual Life Assurance Co (South Africa)Ltd & Others* 2017 (6) SA 90 (SCA) para 23

[3] See: *Wightman t/a J W Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.

limine, the only issue left to be decided is whether there were any procedural irregularities prior to the congress of April 2018. In order to answer this question, the starting point is the EMCA report and whether there was an ECC prior to the December 2017 congress.

[21] There is nothing on the papers before me that suggests that prior to the December 2017 congress an ECC was ever endorsed by the meeting of the first or second respondents. I have already referred to Ms Arnold's report about her intention to engage EMCA as at November 2017. One assumes therefore that EMCA was engaged for purposes of being the election commission. However, this cannot mean EMCA replaced the ECC. If it was, then it ought to have been recorded somewhere and endorsed by the first or second respondent which was not done. In the absence of that, it can safely be concluded that there was no ECC in place prior to December 2017 congress. If there was, the names of its members would have been disclosed to this court.

[22] At the December 2017 congress we know that EMCA dealt with the elections and provided a report. The report was that the elections could not take place as the voters' roll which was required to be presented before the elections took place was not verified and finalised. This part of the report is in line with the second respondent's minutes of 25 November 2017 where, under the national organiser's report, there was an issue about information regarding branches. Again, one can safely conclude that as at 16 or 17 December 2017, no voters' roll had been verified and finalised. The issue of the voters' roll was not discussed at the second respondent's meeting held on 9 January 2018 nor was EMCA endorsed as the election commission at that meeting. This can only mean that as at 9 January 2018 the voters' roll was not finalised and verified.

[23] Whilst I will deal separately with the meeting of 27 to 28 April 2018, I must allude at this stage to the fact that the issue of the voters' roll was never discussed in that meeting. Under item 2 of the agenda of that meeting, being confirmation of credentials, all that the secretary-general did was to advise that in December, 76 branches passed the audit to attend the congress. However, as this was one of the reasons why the December 2017 congress collapsed in terms of the EMCA report, and this report has not been disputed by any of the parties, one would have expected a confirmation that the voter's roll was then finalised and verified before the elections could take place. Either that roll could have been attached to the third respondent's answering affidavit or a close out report from EMCA for the April 2018 congress. None has been provided. This can only mean that the voters' roll issue was never dealt with again, therefore was not finalized or verified. This, in my view is fatal to the April 2018 congress as the first respondent did not comply with its own constitution. On this reason alone, the April 2018 congress ought to be set aside. However, that is not the end of the matter.

[24] In the second respondent's meeting of 9 January 2018, it was resolved that the next congress date ought to be mid-February 2018 subject to availability of funds. The congress did not happen in February 2018. There is no explanation as to why it did not happen. There does not appear to have been another meeting by the second respondent prior to April 2018 congress. If there was none, then who decided and sanctioned the April 2018 congress? The third respondent acknowledged on his own in paragraph 17 of his answering affidavit that the second respondent had a responsibility to convene a national congress to finish off what was left out before the national congress was disrupted in December 2017.

[25] At that stage, the second respondent included the applicant and would have been or ought to have been involved in organising the next congress including the date upon which the congress would be held. As this was not the case, surely then the process was procedurally flawed. The second respondent ought to have acted as a collective in such matters, in line with clause 4.B.1 of the first respondent's constitution, and in this instance, it did not, as the applicant who was one of its members and the Deputy President of the first respondent was not aware of the decision. It seems that the third respondent took it upon himself to run with the affairs of the first respondent but this was wrong. In the absence of any justifiable explanation as to why there was no collective decision about the date of the congress, then again the April 2018 congress ought to be set aside.

[26] Even if one were to speculate and say perhaps it was because of lack of funding that the congress did not happen in February 2018, it still begs the question whether this was communicated to the second respondent which included the applicant at that stage. The other question is whether the April 2018 date was communicated to all the first respondent's members. In my view, it was not. In this regard, paragraph 24 of the third respondent's answering affidavit stated as follows:

'On or about 6 April 2018, an invitation for the resumption of the December National Congress was sent to all Branches including the alleged AIC 16 informing them that the National Congress will be continued on 27 to 28 April 2018. It is the first respondent's culture and practice to communicate with Branches by telephone...'

[27] The third respondent did not mention in his affidavit as to who made the telephone calls to the Branches or to the AIC 16 and there was also no confirmatory affidavit from such a person in this regard. There was no proof of such telephone calls let alone one to the applicant. The applicant refuted this

averment in his replying affidavit. The third respondent elected not to deal with this averment in a further supplementary affidavit which was handed in with the leave of the court. There was also no confirmation by any of the branch chairperson to confirm that indeed there was such an invitation to attend the congress. The failure to notify the applicant and the 15 AIC members was a violation of their constitutional right to participate in the activities of their political party.[4]

[28] This leads to the question whether there was a CPC established prior to both conferences. In my view, there wasn't any prior to the April 2018 congress. If there was one or if the one that had been appointed prior to the December congress, which appears at page 200 of the indexed papers under Annexure MFG1, had been allowed to continue to perform its work as this congress was a continuation of the December congress, then it would have circulated all the congress information prior to the April congress as provided for in terms of clause 9.4.6 of the first respondent's constitution. It seems that that communication was left to some unidentified individual by the third respondent and this is an indication that the third respondent delegated some of the key functions required by the first respondent's constitution prior to the congress to his own cronies as the applicant was kept in the dark. As held in *Ramakatsa & others v Magashule & others,*[5] the right to participate in the activities of a political party confers a duty on every political party to act lawfully and in accordance with its own constitution.

[29] In my view, as the third respondent's denials are uncreditworthy and fall short of raising real, genuine or bona fide disputes of fact,[6] I am justified to

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[4] Section 19 (1)(*b*) of the Constitution of the Republic of South Africa, 1996.
[5] *Ramakatsa & others v Magashule & others* 2013 (2) BCLR 202 (CC) para 16.
[6] See: *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55 and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 SCA para 26,

APPEARANCES

Date of Hearing	:	13 February 2019
Date of Judgment	:	01 March 2019
Counsel for Applicant	:	Mr D Combrink
Instructed by	:	KMNS Incorporated c/o Mbili Attorneys
Respondent	:	Mr Gama
Instructed by	:	Messrs Ngcebetsha Madlanga Attorneys c/o Botha & Olivier Inc