IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 10575/2007

DATE: 16 AUGUST 2007

In the matter between:

SALZWEDEL ERNEST MOTOSOKO PHEKO Applicant

And

THE SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

PAN AFRICANIST CONGRESS OF AZANIA Second Respondent

J U D G M E N T

DAVIS, J:

Introduction

[1] On 11 June 2007 a notice was issued to applicant calling upon him to attend a disciplinary enquiry of the National Disciplinary Committee ("NDC") of second respondent concerning, *inter alia*, an alleged failure to account for funds in the Robert Sobukwe account which was under his control while he had been the president of the second respondent. Applicant requested further particulars

regarding the charges on 18 June 2007. He also objected to the manner in which the NDC was constituted.

[2] He did not attend a disciplinary hearing which took place on 20 June 2007. In his absence he was found guilty and a sanction of expulsion was imposed. This decision was confirmed by the National Executive Committee ("NEC") of second respondent on 30 June 2007 and it was communicated to applicant on 2 July 2007.

[3] On 6 July 2007, applicant brought proceedings in the Witwatersrand Local Division of the High Court ("WLD") in which he sought, *inter alia*, to have the decisions of the NDC and the NEC overturned essentially on the basis that the NDC had been improperly constituted because it had been appointed by an NEC which as required by second respondent's constitution, was not properly elected.

[4] It appears that, at second respondent's National Congress held in October 2006, some 17 of the 24 members of the NEC had not been elected. At the Congress the delegates, after electing seven office bearers, resolved that the rest of the members of the

NEC be selected from a list of 133 candidates by the president. There were also other procedural objections which have been raised by applicant against the decision of the NDC and the subsequent ratification by the NEC.

[5] On 3 August 2003, Gildenhuys, J dismissed the application. The learned judge found that the challenge to the manner in which the NDC was constituted had to fail as it was an impermissible collateral challenge to the decision of the NDC. The learned Judge found that no direct challenge had been brought to the manner in which the NEC was constituted and it was accordingly capable of making valid decisions such as, for example, the appointment of the NDC. To cite the judgment of Gildenhuys, J:

> "The fact is, the National Executive Committee members believed that that Committee was properly constituted and there had been no direct judicial challenge of the constitution of the Committee. The collateral challenge by the applicant in these proceedings should, in my view, not be permitted".

[6] Furthermore, Gildenhuys, J rejected a veritable litany of procedural objections against the disciplinary process (at para 28). In particular, he remarked:

"I get the impression that most, if not all, the procedural objections are afterthoughts. The applicant should have raised them before or at the disciplinary hearing. He chose not to attend the hearing. In my view, none of the procedural shortcomings, indeed there are shortcomings, resulted in an unfair hearing or an unfair result".

[7] On 31 July 2007, that is before the judgment was handed down, applicant's attorney caused an email to be sent to both first respondent and second respondent. In this email applicant's attorney gave notice of an internal appeal which was to be lodged against the decision of the NDC and accordingly requested second respondent not to replace the applicant pending the outcome of both the judgment and the internal appeal (if that was necessary). This request was refused in a letter on 2 August 2007 which was generated from second respondent's attorney.

[8] On 2 August 2007, second respondent's Chief Whip, Mr Lekotse, wrote to first respondent as follows:

"Our previous correspondence regarding the dismissal of Dr S E M Pheko as a PAC member has a reference. We now wish to advise your good

offices that Mrs Thembeka Jali will replace Dr Pheko [the fax is indistinct] as an MP with immediate effect. We herein also attach a revised candidates' list for your easy reference".

To this, first respondent replied:

"I acknowledge receipt of your letter of 2 August 2007 in which you informed me of the PAC's intention to replace Dr S E M Pheko as its member of the National Assembly. I wish to inform you that I have not been formally informed of Dr Pheko's dismissal from the PAC. The PAC's request to replace Dr Pheko can therefore not be given effect to until such time that I have been informed of his dismissal from the PAC. The review of your party list has been processed".

[9] It appears that some time during these proceedings, applicant appointed another attorney who then submitted grounds of appeal to second respondent. Requests were also made to second respondent to provide an undertaking not to replace applicant pending the outcome of the appeal. When this undertaking was not given, the present application was launched on 5 August 2007, to be heard on 6 August 2007. On 6 August 2007, the matter was postponed to 13 August 2007. Legal

representatives of the parties agreed on a timetable for the filing of answering and replying affidavits and it was also agreed that no action would be taken pursuant to the replacement of applicant.

Second respondent's arguments

[10] Two main arguments have been put up by Mr Ncongwane on behalf of second respondent as to why any relief sought by applicant to stay the process of swearing in of a new representative of second respondent in the National Assembly should not be granted: (i) the question of a waiver of domestic remedies; (ii) the time of lodgement of an appeal. This application is not for final relief. This dispute is not about applicant's case and the strength thereof on appeal to any internal organ of second respondent. It concerns the questions of whether this kind of interim relief is justifiable on the facts.

[11] Second respondent has contended that no relief is competent notwithstanding the apparent justification for such relief on the basis that the balance of convenience would dictate that this kind of interim relief should generally be granted.

[12] I turn, therefore, to deal with the two issues raised by second respondent; waiver and lodgement of the appeal.

Waiver

Mr Ncongwana referred to an affidavit deposed to by applicant for the purposes of the WLD proceedings in which he apparently stated under oath that it is legally untenable for him to appeal the decision of the National Disciplinary Committee to the National Executive Committee of the second respondent (averment set out in the answering affidavit deposed to by Mr Tabane).

[13] There may well be substance in the allegation that applicant has played (either directly or through legal advice) an opportunistic game, but that on its own does not amount to waiver. The crisp question is this: it is alleged by Mr Tabane that applicant gave the following reasons for not exhausting the internal remedies available to him when the matter was heard before Gildenhuys, J:

> "11.2.1 That the incumbent National Executive Committee has not been constitutionally elected and therefore lacks legitimacy. It does not have the powers to appoint the National Disciplinary Committee.

11.2.2 The incumbent NEC has already considered the findings of the National Disciplinary Committee.

11.2.3 The incumbent of the NEC has already expressed itself by endorsing those findings and therefore is *functus officio*".

In my view, this is an insufficient range of allegations to conclude that second respondent discharged the *onus* of showing that applicant waived his right to an internal appeal.

[14] There is no doubt that applicant sought to diminish the possibility of a fair internal appeal. It may well be that applicant was not as candid with the Court in the WLD as some might have expected that he should have been. However, there is no evidence that he did more than urge the WLD to hear him before recourse to what he considered to be an internal appeal devoid of viable prospects of success. In Laws v Rutherford 1924 AD 261 at 263, Innes, JA set out the requirements for the establishment of waiver thus:

> "The *onus* is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct, plainly inconsistent with an intention

to enforce it. Waiver is a question of fact, it is always...to establish".

[15] In this case it appears as if the argument concerning exceptional circumstances may have been employed, that is that the central argument of applicant was that although there was a duty to exhaust internal remedies, that duty could be disregarded by a court in the case where there were exceptional circumstances. Section 7 of the Promotion of Administrative Justice Act (PAJA) which sets out a procedure for review provides that "a court may not hear an application for review unless any internal remedy provided for in any other law has first been exhausted (section 7(2)(a)). Where a court in an application for review is of the view that such remedies have not been exhausted, it must instruct the parties to first exhaust such remedies. However, in terms of section 7(2)(c) in exceptional circumstances a court may, on application, exempt a person from the duty to first exhaust internal remedies if the court...deems it in the interests of justice".

[16] The duty to exhaust internal remedies was first developed in the case of Shanes v South African Railways & Harbours 1922 AD 228 where Solomon, JA

developed the doctrine. This was later approved by Centlivres, JA in Jockey Club of South Africa v Feldman 1942 AD 340 at 362. In Shanes, Solomon, JA said:

> "But the question still remains at what stage of the proceedings is it competent for an aggrieved servant to have recourse to a court of law? Is he entitled to do so at the initial stage, so as soon as a penalty has been inflicted upon him or only at the final stage when he has exhausted all the remedies which under the Act are open to him?...I am clearly of the opinion that that it is only if the irregularity or illegality has been persisted in up to the final stage that it is competent to the servant to take legal proceedings for, *non constat,* that if he has appealed to the various tribunals which under the Act are open to him, the irregularity complained of may not have been set right and justice done to him".

[17] Clearly, the principle of exhausting internal remedies is important because it exists to ensure that organisations such as second respondent are able to operate without undue influence by a court. Indeed, I should say that there is a problem in courts having to deal with political questions of this kind. When a relationship between a

member of a political party and a political party, has become fraught it appears that the court becomes the last desperate refuge in such cases. A court should be reluctant to interfere in what are essentially political questions. For this reason, the internal remedy route plays a vital role.

[18] In this case, however, it appears from my reading of the judgment of Gildenhuys, J, together with the affidavit from Mr Tabane, that a range of reasons were put up by applicant as to why the matter should be heard in the WLD. There is nothing on the papers nor in the judgment which indicates that the applicant stated expressly that there was no internal appeal which he wished to invoke. Rather he appears it take the view that it was preferable that the matter be heard by the WLD because of the difficulties which he had raised. That approval appears to fit within the argument about exceptional circumstances, rather than constitute waiver of the internal appeal. Accordingly, it appears that the second respondent has not discharged what is a heavy *onus* that waiver of a right to an internal appeal has taken place in this case.

[19] I should make one further remark that none of these questions are expressly dealt with in the judgment in the WLD, making matters more difficult for this Court. There is however no other reasonable inference which I can draw from the papers which have been placed before me.

Appeal out of time

[20] I turn therefore to deal with the second argument, namely an appeal lodged out of time. Mr de Waal, who appeared together with Mr Osborne on behalf of the applicant, submitted that the only point raised by second respondent relevant to this application was the allegation that the right to appeal lapsed because it was not instituted within the 14 day period provided for in clause 26.1 of second respondent's constitution. Second, respondent's constitution provides that in terms of clause 25.4 of the constitution, a disciplinary committee has to inform the member in writing of the outcome of the hearing within 21 days after its decision has been ratified or otherwise by the appropriate level of authority.

[21] In this case, applicant was informed by the NDC on 2 July 2007 of its decision. Clause 25.4 requires that the NDC has to inform the applicant of his right to appeal. This was done but it was stated that the applicant is

entitled to an appeal in terms of clause 25.4 of the constitution. A right of appeal is not conferred by clause 25.4 but by clause 26. Mr de Waal therefore submitted that this mistake would normally have been trivial if the right of appeal entrenched in clause 26 had been clearly described. This, however, was not the case. Clause 26 conferred, in his view, two different rights on an aggrieved person. Firstly, in terms of clause 26.1 a person may within 14 days of the decision of the relevant disciplinary body lodge an appeal to the RDC, PDC and finally to the NDC. While Mr de Waal conceded that this clause did not expressly deal with the situation where the NDC was the committee of first instance, he submitted that it was clear from clause 8.1.6 read with clause 26.3 that in such a case the apply would lie to the NEC.

[22] Secondly, in terms of clause 20.3 in limited cases where the NEC regarded the matter as of national significance, a person aggrieved by the final decision of the NEC should have a right of appeal to the National Congress or annual conference. Such an appeal shall be in writing and not later than a month from the date on which the decision of the appeal case was known.

[23] The 14 day period referred to in clause 26.1 expired on 4 July 2007 and the one month period referred to in clause 26.4 expired on 2 August 2007. Therefore it is clear that the appeal of the applicant is out of time; that is out of the 14 day period but within the one month period. The question therefore arises as to whether there remains a viable possibility of an appeal being heard. Mr de Waal referred in this connection to the decision in the Hamata v Chairperson:Peninsula Technikon Internal Disciplinary Committee 2002(5) SA 449 (SCA), a case which concerned external legal representation and a rule which provided that a student may conduct his or her own defence or may be assisted by any student or member of staff of the technikon. Such representative shall voluntarily accept the task of representing the student. If the student is not present the committee may nonetheless hear the case, make a finding and impose a punishment.

[24] The question arose as to whether this particular rule barred the possibility of external legal representation from taking place. The question as to whether an internal body had a discretion to go beyond the rule, vexed the Court in Hamata, is of equal application in such case. Marais, JA set out the problem thus:

"But if the correct point of departure of interpreting the rule is that constitutionally the rule requires the flexibility to which I have referred...the absence of any express provision of the rules conferring the discretion does not matter. The question is rather whether there is sufficient indication in the rules that any such residual discretion on the part of the IDC was intended to be excluded. The answer, in my opinion, is that it is not. The fact that a student's entitlement to representation has been qualified to achieve the purpose referred to in paragraph 19 is not of itself a sufficiently strong indication of an intention to exclude a residual discretion to allow representation of a different kind in appropriate circumstances". (at paras 19-20)

[25] In my view, this reasoning must be applied in the present case. The mere fact that clause 26.1 confers a right to appeal as a right to the NEC within the 14 day period does not mean that the NEC is not possessed of a residual discretion to hear an appeal lodged out of time. That discretion is one that must be exercised legally. Accordingly, to argue that the appeal was lodged out of time, is not itself destructive of <u>any</u> appeal which might still have to be heard by the NEC.

[26] I must concede that this is not an easy case because of the approach which was adopted by applicant before the WLD. The judgment of Gildenhuys, J based, of course, on the papers which were presented to him, indicates that the learned Judge did not regard any defence raised by applicant as being of significant merit; that is a defence to his expulsion. But an appeal will be decided on the facts and there may well be, as urged upon me in the founding affidavit, further argument and evidence which applicant can bring to bear in justifications of his appeal.

[27] The point that needs to be made, however, that this is an application for interim relief. Second respondent can convene an appeal body and, provided it follows the rules of natural justice, it may well find that the applicant's defence notwithstanding, he stands to be dismissed. By contrast, if applicant succeeds and he has already been replaced as a member of Parliament, any success which he might have enjoyed at the appeal would be completely illusionary.

[28] With all the jurisprudential fireworks that lit up the court when the arguments were presented, the key question

remains that of the balance of convenience. This point raised in the founding affidavit was unfortunately never argued before me; yet it is a point that seems to be definitive in cases of this nature.

[29] In short, in the founding affidavit applicant states:

> "I stand to suffer severe inconvenience if this application is not granted and I prevail subsequently in the appeal for the NDC. Neither the first nor the second respondent will suffer any inconvenience if the swearing in of my successor is postponed. I am willing to agree to an extraordinarily expedited appeal procedure in order to minimise any inconvenience that the second respondent may claim".

Whilst I would disagree that the second respondent will not suffer any inconvenience if the swearing in of the successor is postponed, when the Court weighs the inconvenience of convening an appeal body compared to the impossibility of applicant being reinstated as a member of Parliament, were he to win the appeal, then it is clear that this question has to be cardinal to the evaluation of the competiting arguments.

[30] For these reasons, therefore, the following order is made:

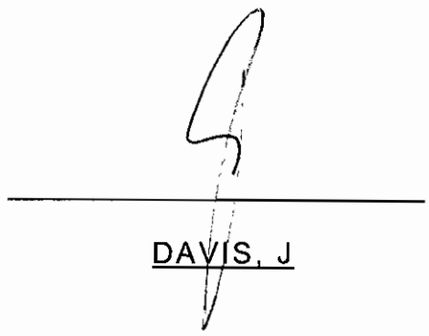
1. Pending the disposition of applicant's appeal to the National Executive Committee of second respondent against the decision of second respondent's National Disciplinary Committee to find him guilty on four counts of misconduct and to expel him from the party:

   1.1 First respondent be interdicted from swearing in any person to fill the seat in the National Assembly held by applicant;

   1.2 second respondent be interdicted from taking any steps to replace applicant in the National Assembly;

   1.3 declaring that the seat of applicant in the National Assembly is not vacant.

2. As to costs, Mr de Waal urged that I should award the costs of two counsel. Frankly this was not so difficult a legal case that it necessitated two counsel. Accordingly, second respondent is merely ordered to pay the costs of the application.



5 DAVIS, J