IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

CASE NO. 12174/2008

In the matter between:

THE PAN AFRICANIST CONGRESS OF AZANIA (PAC)	**APPLICANT**
and	
SALZWEDEL ERNEST MOTOSOKO PHEKO	**RESPONDENT**

In Re:

SALZWEDEL ERNEST MOTOSOKO PHEKO	**APPLICANT**
and	
THE PAN AFRICANIST CONGRESS OF AZANIA	**FIRST RESPONDENT**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**SECOND RESPONDENT**
LETLAPA MPAHLELE	**THIRD RESPONDENT**

JUDGMENT DELIVERED ON THURSDAY, 26 JANUARY 2012

KOEN, A J

[1] This is an application for the rescission of an order granted in the absence of the Applicant in favour of the Respondent by Meer J on 23 April 2009. It is

useful, briefly, to outline the facts which preceded that granting of the order as they appear from the papers.

[2] In what follows I propose to refer to the Applicant as the PAC and to the Respondent as Dr Pheko.

[3] Dr Pheko is a former President of the PAC. He and the PAC have been engaged in a long-running dispute concerning his alleged failure to account for certain funds over which he exercised control during his tenure as the PAC's President. During 2007 a disciplinary enquiry was convened to decide charges relating to Dr Pheko's administration of the funds referred to above. The enquiry was heard by the National Executive Committee of the PAC and was held on 20 June 2007. Although Dr Pheko did not attend the enquiry the committee found there to be sufficient evidence to find him guilty of the charges. It decided to expel him from the PAC.

[4] This precipitated an application by Dr Pheko in the South Gauteng High Court against the PAC for orders, *inter alia*, reviewing and setting aside the decision to expel him from the PAC. This application was decided by

Gildenhuys J on 3 August 2007. Having found that the hearing and finding were lawful Gildenhuys J dismissed Dr Pheko's application.

[5] During August 2007 Dr Pheko instituted proceedings in this Court against the PAC and the Speaker of the National Assembly. An order was made in that case by Davis J on 16 August 2007 in terms of which the PAC was interdicted from giving effect to the decision to expel Dr Pheko from the PAC, and from replacing him in Parliament, pending the disposition of an internal appeal against the National Executive Committee's decision to expel him.

[6] It appears from the papers that the appeal in question was heard and dismissed at a Special National Congress of the PAC held in Alice between 4 and 6 July 2008 ("the Alice Congress"). The original decision of the National Executive Committee was confirmed, and with it Dr Pheko's expulsion from the PAC. This precipitated the institution of an application by Dr Pheko against the PAC in this Court on 29 July 2008. I shall refer to the application, which culminated in the order which is the subject of this rescission application, as the "main application". In the main application Dr Pheko sought orders, *inter alia*, directing the PAC not to act upon the

decision it had taken at the Alice Congress, and an order declaring a constitution adopted by the PAC at the Alice Congress to be invalid.

[7] The main application was set down for hearing on 1 August 2008. It was postponed, by agreement between the parties, to 18 August 2008. On 18 August 2008 the application was again postponed by agreement, this time to 19 November 2008. This second postponement of the matter was brought about by the PAC's failure to file answering papers, as a result of which it was ordered to pay wasted costs. On 21 August 2008 Dr Pheko delivered a Rule 35 (12) notice to the PAC. Two letters were written by Dr Pheko's attorneys calling for a response to the Rule 35 (12) notice. These did not have the desired effect and no response was forthcoming. Eventually, on 24 February 2009, Dr Pheko brought an application to enforce compliance with the terms of the Rule 35 (12) notice. An order directing that the notice be complied with within five days was granted. The order was properly served on the PAC but it was not complied with. On 17 April 2009 Dr Pheko applied for an order striking out the defence of the PAC on account of its non-compliance with the order. The PAC was represented at Court when the application was called and requested a postponement. By agreement between the parties the matter was postponed until 20 April 2009. On 20 April 2009 the matter was again postponed at the request of the PAC, and with its

agreement, to 23 April 2009, when it came before Meer J. At the hearing on 23 April 2009, in default of an appearance by the PAC, the learned judge made the order which is the subject of the rescission application.

[8] Why the PAC was not at Court on 23 April 2009 is explained in the founding affidavit as follows: *"The Order was granted during the period when all the political parties, which took part in the General National Elections, were busy during the counting and periodical release of the results of such elections. This resulted in the PAC not legally represented at Court to oppose the application not because PAC is undermining this Honourable Court but because of the hectic period which resulted in the lapse of our mind and PAC unfortunately missed the Court date."*

[9] Although the PAC did not say so expressly, it is apparent from the manner in which its cause of action was formulated in the founding affidavit, and from the heads of argument filed by its counsel, that the application for rescission was brought under Rules 42 (1) (a) and (b). The Rules provide as follows:

"42. Variation and rescission of orders

(1) The Court may, in addition to any other powers it may have, mero motu *or upon the application of any party affected, rescind or vary:*

(a) An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission."

[10] In the first instance counsel for the PAC argued that the main application was flawed *in toto*, in that the cause of action articulated in the papers did not entitle Dr Pheko to the relief he sought. The difficulty with the argument, in my view, is that Rule 42 (1) (a) does not apply to judgements which are wrongly granted, in the sense that incorrect principles of law are applied to the facts[1].

[11] The sort of errors which fall within the purview of the Rule have been described by our courts as follows: *"...a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgement"*[2]. Thus, for example, a judgment granted after the claim has been paid, or one granted in the erroneous belief that the absent

[1] *Seale v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) at 52B
[2] *Nyingwa v Moolman* NO 1993 (2) SA 508 (Tk GD) at 510G

party knew that the matter was on the roll and deliberately refused to attend Court, would fall within this category.

[12] The essence of the first argument put up by counsel for the PAC was that the judgement had no basis, and was wrong, in law. Rule 42 (1) (a) cannot be used to rescind a judgment which might be appealable because the judge took a mistaken view of the law when it was granted. It is the function of an appeal court to correct mistakes of that kind[3].

[13] The same considerations apply to a further argument advanced on behalf of the PAC, namely that the error which triggered the power to rescind the judgment was constituted by the fact that Meer J was oblivious to two judgments in which the issue she had to decide had been dealt with (this argument is a variation on the theme of the first argument). In the first place I cannot find on the papers that the learned judge was indeed unaware of the two judgments referred to. In any event, as I shall endeavour to explain hereunder, I do not think that the two judgments were in point. But even if this was the case, and the learned judge did not know about two relevant and binding judgments, the granting of a judgment in ignorance of relevant case authority is not the kind or error

[3] See *Seale* , above, at 52B

which falls within the scope of Rule 42 (1) (a). My attention was not drawn to, and I could not find, any authority which empowered me to have resort to Rule 42 to correct a judgment which is wrong in law, even if I were to conclude that it was (I should add that I have not found that Meer J's judgment was wrong in law).

[14] Invoking the provisions of Rule 42 (1) (b) it was submitted, further, on behalf of the PAC, that the order contained a patent error in that it referred, in paragraph 3, to the "Provincial" instead of the "National" legislature. It was common cause that this was an obvious error, which could not have reflected the intention of the learned judge, or for that matter, Dr Pheko. But an error of this kind does not vitiate the whole order, or entitle a party to have whole order rescinded. It can be corrected without difficulty. As it happens, however, this is not necessary because events have overtaken the case. New elections have been held and Dr Pheko has lost his seat in Parliament. Correcting paragraph 3 of the order would be an exercise in futility, and would serve no purpose. It is well established that courts should not make orders which serve no purpose.

[15] It remains to be considered whether rescission can be granted under the common law. At common law an applicant for rescission must show

"good cause"[4]. Generally this requires of an applicant that he/she proffer a reasonable explanation for the default, and show that the application for rescission is *bona fide* in the sense that some prospect of success is enjoyed if rescission were to be granted[5].

[16] I shall deal, firstly, with the explanation advanced in regard to the PAC's failure to be present at court on 23 April 2009. The explanation offered by the PAC for its absence in Court on 23 April 2009 does not, in my view, bear scrutiny. Firstly, it is wholly lacking in meaningful detail. Secondly, why would the PAC have agreed, only three days earlier, to a hearing on 23 April 2009 if it was to be so engaged with election matters as not to be able to be present or represented in Court. It seems most unlikely that one could forget about a case one had agreed would be heard only three days previously. The more so if it is an important case with far reaching consequences, as counsel for the PAC submitted it was. Thirdly, the rescission application was launched on 7 September 2010, just under a year and a half after the order was made on 23 April 2009. Because no explanation for the delay is advanced by the PAC it must be inferred that no good reasons exist for the unusually long time it took for the application to be launched. Having regard to the lamentable

[4] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at par.11
[5] *Colyn*, supra, at par. 11

inadequacy of the explanation offered by the PAC for its absence in Court on 23 April 2009, and for the unusual and unexplained delay of over eighteen months before this application was launched, I would be very hesitant to exercise the discretion to rescind the judgement in favour of the PAC.

[17] But this is not where the enquiry ends. In *De Witts Body Repairs* [6] Jones J said *"...the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole"*. It is clear, in my view, from the judgment in *De Witts Body Repairs*, that what lies at the heart of the determination of an application for rescission of judgment under the common law is the necessity to ensure that justice is done between the parties, and that the proper administration of justice is not compromised.

[18] Notwithstanding that the explanation advanced in the papers for the PAC's absence in Court on 23 April 2009 is, to say the least, inadequate, a consideration of the merits of the case advanced by the PAC in the main application is therefore necessary.

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[6] *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (ECD) at 711D

[19] In the main application Dr Pheko sought orders reviewing and setting aside the decision taken at the Alice Congress held between 4 and 6 July 2008 to uphold the decision of the National Executive Committee of the PAC to expel him. This decision, it must be remembered, was decision in his appeal against the finding of the National Executive Committee taken on 20 June 2007. Dr Pheko also sought an order reviewing and setting aside a decision taken at that meeting to adopt a new constitution for the PAC.

[20] It is clear from the papers in the main application that Dr Pheko knew that his appeal against the decision to expel him from the party taken by the National Executive Committee was to be considered at the meeting to be held in Alice. He wrote to the PAC on 27 May 2008, 30 June 2008 and 3 July 2008. In the first two letters he raised numerous objections to the procedure which was to be adopted for the hearing of his appeal. In the last letter he advised the PAC that Mr Mama would represent him at the appeal hearing.

[21] Mr Mama deposed to an affidavit which was filed with the application. In short, the thrust of Mr Mama's affidavit was to the effect that he was

turned away from the meeting, and that Dr Pheko had therefore been deprived of a hearing at the appeal. In the answering affidavit, deposed to by Mr Skwatsha, the Secretary General of the PAC, he states that the content of Mr Mama's affidavit was, to use his words, "*mischievous to say the least*". Mr Skwatsha says that Mr Mama left the venue after being asked to wait and states that an affidavit deposed to by Mr Mudini Maiva confirming this would be filed with his answering affidavit as annexure "MS 5". I can only assume that the confirmatory affidavit was necessary because Mr Skwatsha had no personal knowledge of the allegation that Mr Mama did not wait for the appeal hearing to be held. The confirmatory affidavit was not filed. In the result Mr Mama's evidence must be accepted.

[22] No authority is required to support the proposition that a denial of a hearing in the circumstances I have outlined above is a serious irregularity which would render invalid the appeal. It is not necessary, in my view, to consider the other grounds of attack raised by Dr Pheko. Having been denied a hearing it follows that the decision should not stand. On this score then I do not think that it can be said that the merits of the PAC's case are such that they would tip the scale in favour of

rescission, in the light of the inadequacy of the explanation furnished in regard to the PAC's absence from Court on 23 April 2009.

[23] I should mention that counsel for the PAC argued that the question whether the decision in the appeal was lawful or not had been decided in favour of the PAC by Gildenhuys J in the case I have referred to in paragraph 4 above. There is no merit in this submission. Gildenhuys J dealt with the decision of the PAC's National Executive Committee to expel Dr Pheko which was taken on 20 June 2007. Gildenhuys J did not deal with the decision in the appeal, which was taken at the Alice Congress between 4 and 6 July 2008, long after Gildenhuys J handed down his judgement.

[24] What must be considered next are the merits of the PAC's opposition to the order setting aside the constitution which was adopted at the Alice Congress. Is the PAC's case in regard to this aspect of the main application so compelling that its default can be overlooked?

[25] On 26 September 2007, in response to the fact that two of the PAC's three members of Parliament had crossed the floor, the then President of the PAC, Mr Mphahlele, acting in terms of paragraph 14.2 of the

constitution of the PAC which was adopted in 2000 ("the 2000 constitution"), exercised emergency powers conferred upon him, suspended the 2000 constitution, and disbanded the National Executive Committee.

[26] In March 2008 Mr Mphahlele, exercising his emergency powers, announced by notice that the Alice Congress would be held between 4 and 6 June 2008. Amongst the agenda items for the meeting were "constitutional proposals" and Dr Pheko's appeal. At the meeting the 2000 constitution was replaced with a 2008 constitution. It is the adoption of the 2008 constitution, *inter alia*, which was challenged by Dr Pheko in the main application.

[27] Paragraph 34 of the 2000 constitution governs the manner in which it can be amended. It provides, *inter alia*, that *"Proposals regarding any amendment of the National Constitution must be sent to the Secretary General's office at least two months before the Conference/Congress at which they are to be discussed, and circulated, in writing, to the branches at least one month before such conference/congress."* In his founding affidavit in the main application Dr Pheko alleged that this paragraph of the Constitution had not been complied with prior to the purported

amendment to the constitution which occurred at the Alice Congress. His allegation in this regard is met with nothing but a bare denial, without any evidence, which one must conclude would be readily available, if it existed, of compliance with the clause being produced by the PAC. Denials of this kind do not give rise to genuine disputes of fact. In the circumstances, it seems to me likely that Dr Pheko's allegations concerning compliance with paragraph 34.2 of the 2000 constitution will be accepted.

[28] I should add that the power conferred upon the President of the PAC to "suspend" the constitution appears to be misunderstood by the PAC. A power to "suspend" the constitution is simply that. No more, and no less. A point in time must be reached when the suspension ends, and at that point the suspended constitution is resuscitated and once again becomes of full effect. It must then be fully complied with. A power to "suspend" the constitution is not a power to bring about changes to the constitution in an unconstitutional manner, without compliance with provisions relating to amendments. This much, in my judgement, is apparent from a reading of the plain words contained in paragraph 14 of the 2000 constitution.

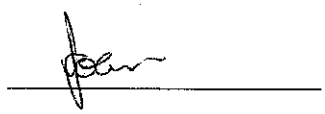
[29] In argument before me, counsel for the PAC relied upon a judgment of Rampai J in the Orange Free State Provincial Division. The order made by the learned judge is the confirmation of a *rule nisi* which had been previously granted. It is not apparent from the judgement what the terms of the *rule nisi* were, or precisely what relief was claimed in that matter, and it is thus difficult to extract from it the *ratio*. As far as I can discern from the judgment, the PAC had sought to interdict seven dissident members from convening a National Conference of the PAC to be held at Bloemfontein from 2 to 3 August 2008. The question whether the constitution had been lawfully suspended by Mr Mphahlele during September 2007 was considered. The court concluded that it was. This, however, is not the question which is in issue in the main application. It is not the suspension of the 2000 Constitution which is in issue in the main application, it is the adoption of the 2008 constitution. Rampai J's judgment cannot thus be of assistance to the PAC as it seems to relate to a different issue to the one raised in the main application.

[30] In the circumstances, applying the common law test for rescission, I am not satisfied that the PAC has shown good cause. In my judgement a reasonable explanation for its default has not been furnished, and it does not enjoy good prospects of success in the main application.

[31] It remains to consider the question of costs. I do not see any reason why costs should not follow the result. Counsel for Dr Pheko sought an order directing the PAC to pay the costs of two counsel. I do not think that this is warranted.

[32] In the circumstances I make the following order:

The application for rescission is dismissed with costs.



KOEN, AJ