15743/2012

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 15743/2012

DATE: 5 DECEMBER 2012

In the matter between:

HILDAGRADE NDUDE	Applicant
and	
CONGRESS OF THE PEOPLE	1st Respondent
PATRICK MOSIUOA LEKOTA	2nd Respondent
DEIDRE CARTER	3rd Respondent
LYNDALL SHOPE-MAFOLE	4th Respondent
JULIANA KILLIAN	5th Respondent
LEONARD RAMATLAKANE	6th Respondent
NDZIPHO KALIP	7th Respondent
THOZAMILE BOTHA	8th Respondent
LULAMA NGONYAMA	9th Respondent
SPEAKER OF THE PARLAMENT OF THE REPUBLIC OF SOUTH AFRICA	10th Respondent
JOHNNY HUANG	11th Respondent

J U D G M E N T

MATTHEE, AJ:

For a number of reasons I have decided to hand down an *ex tempore* judgment in this matter as soon after argument as possible.

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This means that the judgment will not be as comprehensive as it would have been if I had delayed my judgment. It is at the end of a busy term and if I did not hand down judgment now it would mean it would be delayed to next year. There is a need for the parties involved to have finality in this matter as soon as possible not least of all as if regard is had to the relief sought this matter ideally should be disposed of before parliament reconvenes early next year. I also am mindful of the fact that the parties include high profile public representatives who receive funding from South African tax payers and thus for the sake of the wider South African society it also is necessary for these sorts of disputes and conflicts to be finalised as soon as possible. The parties interested in this judgment will be conversant with the whole record. Accordingly I have at times in the judgment assumed knowledge of the entire record.

At the hearing of this matter Mr Arendse, who appeared for the applicant, informed the Court that the applicant was limiting the relief she sought to prayers 2, 3, 4, 5, and 10 of the notice of motion. He also informed the Court that the 10th Respondent was abiding the decision of this Court. Furthermore he informed the Court that applicant was not pursuing the second part of the relief sought in paragraph 3 of the notice of motion i.e. the relief relating to her reappointment as national treasurer of the first respondent. The issue of whether or not there was a non-joinder by the applicant

also was resolved between the parties by the chairman of the disciplinary hearing and the appeal body respectively indicating to applicant that they did not want to be joined as parties and also would abide the decision of the Court. This occurred at the last hearing of this matter on 18 October 2012. This assurance from the bar by Mr Arendse was accepted by Mr Epstein who along with Mr Sawma appeared for the first to sixth, eighth, ninth and eleventh respondent. The seventh respondent was not represented.

There was no dispute of substance on the following;

1. Prior to her expulsion from the first respondent, hereafter referred to as COPE, the applicant was a member of COPE and the duly elected national treasurer of COPE.

2. The Congress National Committee of COPE, hereinafter referred as the CNC, at a meeting on 15 April 2012 resolved *inter alia* as follows: "Recalling that the CNC ratified through a round robin resolution the recommendation of the chairperson of the disciplinary committee to expel Ms Ndude from the party, ... noting the report of the chairperson of the appeals committee, Mr Piet Van Staden, dated 7 April 2012, Resolves to adopt the report and ratify the decision of the chairperson of the appeals committee which states:

"In view of the aforementioned there is no merit in the representations made by Ms Ndude. Her appeal is unsuccessful and the decision made by the chairperson of the disciplinary enquiry is confirmed."

3. At the same meeting the CNC when adopting the report and ratifying the decision of the appeals committee saw this decision as

"Reconfirming the expulsion of Ms H Ndude from the Congress of the People."

4. Immediately hereafter the CNC resolved that Mr Chun-Chiao "Johnny" Huan, the next name in the party's parliamentary list should occupy the vacancy in Parliament created by Ms Ndude (and) to accordingly inform the secretary of Parliament about this resolution." Thereafter the tenth respondent was duly informed and the eleventh respondent was appointed to Parliament in the place of the applicant.

5. Prior to this meeting, at a meeting on 29 January 2012 the following decision was taken by the CNC:

"Ms Ndude is summarily suspended as a leader and a

member of the Congress of the People and may therefore not participate in any party activities or hold herself out as a member of COPE pending the outcome of a disciplinary hearing."

By necessary implication the suspension thus would come to an end when the disciplinary hearing and/or process was completed.

6. It was also accepted by the parties that the governing constitution of COPE at all material times was the one attached to the applicant's founding affidavit.

I now turn to the relief sought by the applicant. The manner in which prayers 3, 4 and 5 are framed make them dependant on the outcome of prayer 2. I will thus commence with prayer 2.

In essence the applicant's chief argument in this regard was two-fold. Firstly, stated in broad terms the constitution of COPE absent the implementation of article 23.1 of the constitution does not empower the CNC or indeed any other part of COPE to discipline and/or expel members from COPE. I might add in this regard that although at one stage the applicant did also rely on a lack of a quorum and that there was no proper resolution by the CNC to institute the disciplinary hearing, at the hearing of the matter the

applicant did not pursue this argument with any vigour. This was particularly so after I enquired from Mr Arendse whether this would not be putting form above substance.

The second argument presented by the applicant was that there was a failure of natural justice in the conduct of the disciplinary and appeal hearing and the decision of the CNC on 15 April 2012.

For reasons which will become apparent I will commence with the natural justice argument. In this regard the following is common cause or not seriously challenged by either party.

1. On Sunday 29 January 2012 the applicant received a letter from the fourth respondent informing her that the CNC had resolved to suspend her and institute a disciplinary hearing against her.

2. On Friday 3 February and after hours the applicant received a further letter from the fourth respondent informing her that she was required to attend a disciplinary enquiry scheduled for the following Wednesday 8 February 2012, at 09h00. It is also in this letter where various charges were set out.

3. The applicant immediately contacted her attorneys of

record and arranged to consult with them on Monday 6 February 2012.

4. According to the applicant, between the consultation on the Monday and the hearing two days later on Wednesday 8 February the applicant's attorney did attempt to obtain certain information from COPE about the impending hearing but to no avail. In this respect COPE did not deny this assertion but said it had no recollection of such attempts. From the transcript of the hearing there is no indication that COPE challenged this view when it was put to the chairman of that hearing.

5. It is common cause that a few minutes before the hearing commenced on the Wednesday the applicant was handed some 58 pages of documents by COPE.

6. Contrary to the letter informing the applicant of the hearing which stated: "Commissioner Ker" was going to preside, the chairman was a certain Mr Bosch.

I now turn to what transpired at the hearing when it commenced.

In this regard I will rely on the transcript. COPE was represented by a member of the Cape Bar and the applicant by Mr Petersen and Mr

Williams. At the outset the chairman observed that there were no real directives in COPE's constitution as to the process to be followed. He thus decided:

> "to run it along sort of fairly standard lines, ... employer presents evidence, employee challenges evidence."

Mr Petersen informed the chair that he had only been able to consult on Monday and then had made attempts to contact COPE on Monday and Tuesday the 6th and 7th February to obtain information but to no avail. He said he needed this information,

> "To take proper instructions and prepare my client for this enquiry."

He then asked for time inter alia to consider the bundle of documents which had just been presented to him. What followed was a long exchange involving the chairman, Mr Petersen and Advocate Harvey who appeared for COPE. Mr Petersen argued that he needed more time to peruse the documents, take proper instructions, possibly call for further documents, consult and prepare client for the matter. He emphasised the gravity of the case facing the applicant and the possible far reaching consequences for her. He made it clear he was not in a position to proceed on that day. In response Advocate Harvey suggested as follows, at page 80 of the record:

"What I would suggest is the following, that COPE start with the evidence today, that we call the president. (The reference to the president is Mr Lekota.) The president is the person who can actually explain all of this. You know, Mr Petersen is now asking me questions. I cannot give evidence I am not here to be cross-examined by him on what the charges are, what they mean and how we are going to prove them but it should be possible for us to start today to get that evidence and then Mr Petersen will really understand what case he has to meet. Rather than what I anticipate might happen which is that we go away today and there is a flurry of letters backwards and forwards and the whole thing just becomes very over complicated and technical. Why don't we hear the allegations today and then let Mr Petersen call for instructions?"

Mr Petersen responded as follows:

"Mr Chairman I just go back, I mean I've just said that if ... the system that was applied, if you've got a system that how the financial person is to pay out - if you say there is an invoice, services requested to be done, invoices there plus whatever requisition or authorisation required. Now it seems to me there was no such system. The allegation is that Ms Ndude led the

people to believe it was valid payments to be made. Now we turn up there is no system. Now the people say, we would never have signed if we had known or the invoice that was there was not a valid invoice."

At this stage Ms Harvey interjected:

"Mr Chairperson we are not going into the merits of the matter."

Mr Petersen responded as follows:

"No, no, no I am not going into the merits, I am not going into the merits. What I am just saying, what difference would it make - because I am definitely going to ask for more information. I am going to ask for information relating to the system that was there or the documents as the president would say he saw a document, he signed it - I want him to come and give the evidence, produce the documents, so it can be read into the record. So he can be properly cross-examined about it. It is so - that is my difficulty."

Thereafter follows the following exchange found at pages 81 through to 82 of the record. I will just sum up the essence of that exchange. The chairperson states that Mr Petersen's concern would be met if

he simply listened to the evidence in chief of Mr Lekota. Mr Petersen is not convinced. The chairperson reassures him that he is not going to cross-examine on that particular day. Mr Petersen replies that he is unprepared and is not prepared to do it. The chairperson then asks him what the harm in adopting this procedure is. Mr Petersen responds that the lady's life is at stake and asks the Chairperson how can he say what is the harm. The chairperson responds that he understands that but the proposition is that Mr Petersen listens to the evidence and that he does not have to respond to it. He will simply listen to the evidence and get a better understanding of what is the case that he is required to meet. The chairperson then asks Advocate Harvey about the availability of Mr Lekota. Ms Harvey responds that he is available on that day. The chairperson asks as regards his general availability and Ms Harvey responds that Parliament opens the next day (Thursday) and that is why it is possible for him to be available on that day but not on Thursday or on Friday. The chairperson then in effect made a decision and I quote at page 83 of the record:

> "I'm inclined to begin with the president's evidence. We will listen to his evidence in chief and we will probably postpone the proceedings after that."

In the light of this decision Mr Petersen then asked for a short adjournment so that he could talk to his client. From the subsequent

exchanges in the record it is clear that by this stage the chairman already had decided to refuse the postponement. The focus of the subsequent exchange is on what will transpire should the applicant remain in attendance or should she decide to leave the hearing, or perhaps it would be more accurate to say that the substance of the subsequent exchanges are to this effect. In this regard I pick up at page 92 of the record, where the chairperson stated the following:

> "CHAIRPERSON: The suggestion is that if you're not here at the conclusion of the evidence to request a postponement, Mr Petersen, then we proceed on the basis that the evidence remains unchallenged."

Mr Petersen replied:

> "MR PETERSEN: Well, Mr Chairman my instructions are still the same. My client requires a postponement. That is what she wants, and you refuse to do that. ... She says she can't participate without having properly prepared for this thing, this is what she is saying."

Mr Petersen continued further down on the page:

> "MR PETERSEN: And, I mean she's asked for further information ... what I fail to understand, what is the rush? It is

out in the media already. What is the rush? I mean, is justice going to be served by having this thing quickly done? I understand people is missing but, I mean, someone's life is hanging on a thread."

The chairperson responded:

"CHAIRPERSON: No, I understand that. But it's about balancing all these competing interests."

Mr Petersen responded:

"MR PETERSEN: Balancing interests ... the thing is that somebody is accused of committing a criminal offence. Now suddenly because one person, one witness, is available, now that he is available, everybody must be available, or must be ready. She's got the charge sheet on Friday late afternoon there is certain information that she needs to instruct us properly."

And then the chairperson responded as follows:

"CHAIRPERSON: Mr Petersen, let me just reiterate this. My view is that the procedure I suggested properly balances all the respective interests, and is the appropriate course to

adopt. Let's just take that as a given, that we won't postpone today, we hear Mr Lekota's evidence."

Later on the exchanges continue as follows and this is to be found at page 96 through to 97 of the record and I pick up with Mr. Petersen:

"MR PETERSEN: And then, further, my understanding also is that, if the other witnesses or any of the witnesses will testify on a date other than today, to enable to afford Ms Ndude a reasonable opportunity to prepare adequately, Ms Ndude is prepared to participate. But at this stage, since there's been no adequate preparation, she will not participate at this juncture. So if it intends to go ahead on some other date, they can inform Ms Ndude and she will fully participate but she needs to prepare adequately."

Advocate Harvey then responded:

"MS HARVEY: I think we just need a ruling."

To which the chairperson responded:

"CHAIRPERSON: I'll give you a ruling. There are some additional things we need to consider. The one is the suggestion that this committee, whatever you call it, by Mr Petersen was improperly constituted and the other is your

request for further particulars. As far as the request for further particulars is concerned, as I have indicated, the reason why I want us to engage in this formal process is to alleviate exactly that concern. We'll hear from Mr Lekota what the nature is of the allegations against Ms Ndude, and that way you'll get a better understanding of the case against her. So that issue should be dealt with by way of his evidence, and by way of the opening statement of Ms Harvey, for that matter. So I am not granting any request for further particulars at this stage. As far as this forum being improperly constituted is concerned, Mr Petersen I didn't understand what you were saying about that."

Thereafter there are exchanges from pages 99 through to 107 of the record as regards the point of whether or not the disciplinary hearing had been improperly constituted. In this regard I simply highlight some of the exchanges between the parties:

"CHAIRPERSON: Mr Petersen?

"MR PETERSEN: Yes, Mr Chairman. Thanks for the indulgence. I consulted with my client now, and again further issues were raised. The previous position is still the same, I need time to consult with her ... I need to check on this, I need to check on that. I need more time, I need more time. I've gone through the constitution now, it's the first two - I think it is section 3.2 of the constitution I've been to look at. I mean,

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it talks about 3.1(g). It talks about a meeting of the National Congress Committee, and I don't even know what it's all about. These things for your imbizo's and so on. So I need more time to consult with her."

To this the chairperson responded as follows:

"CHAIRPERSON: I do not understand the relevance of that. You need to talk me through this a bit more slowly. 3.2 talks about the Congress National Committee. I do not understand what the relevance of that is.

"MR PETERSEN: It is very relevant.

CHAIRPERSON: Why is it relevant?"

And I pick up again four pages later in the record and here Advocate Harvey made a contribution:

"MS HARVEY: Could I just make a call. Mr Lekota is under pressure because at the moment the National Officer bearers are in a retreat in Stellenbosch. They're in a three day intensive retreat to prepare of the opening of Parliament tomorrow. Mr Lekota has left the retreat. He is the president of the organisation. He is the national head of the party which sits in Parliament. He has left the retreat in order to make himself available this morning. This enquiry was supposed to start at nine it's now nearly 20 past 11.

CHAIRPERSON: I understand that."

Then on the next page the chairperson continued:

"CHAIRPERSON: What about this document? I mean, your concern was that the CNC should have met in order to take a resolution that this committee be constituted. Here is what purports to be the resolution that you said was lacking. Now, has clause three been complied with or not in your view because that was the basis of the objection?"

And then in brackets are the words "muted exchange between Petersen and client." This obviously refers to Mr Petersen trying to take instructions from his client as he is involved in these exchanges involving the chairperson and Ms Harvey. Ms Harvey at this stage intervened:

"MS HARVEY: Mr Chairman, maybe it would be quicker if they go outside and talk rather than writing down?

CHAIRPERSON: I do not know. I need an answer on this, please, as soon as possible.

MR PETERSEN: No, I'm going to give you an answer.

Ms Harvey then asked for clarity as regards the objection to which the chairperson responded:

"CHAIRPERSON: No, I am waiting for the rest of the submissions Ms Harvey. We will get there in due course.

MS HARVEY: They're putting them in writing they are coming very slowly."

Thereafter, the chairperson addressing the applicant stated:

"CHAIRPERSON: Ms Ndude, you can whisper your response to Mr Petersen. It might be quicker."

If I might just pause at this stage to note that the probabilities are that what is being referred to here is that as the exchanges are happening between the various parties Mr Petersen is having to take instructions from the applicant, whilst at the same time assessing what submissions to make in response to what is being asked of him by the chairperson. Further in the record the chairperson persisted and said:

"CHAIRPERSON: Yes. And how does it relate to your objection?

MR PETERSEN: Well, my objection was – that is where it comes in now, where my client says, ... now you need to go and find out the people who signed this resolution, the

attendance register, where that meeting was held."

The chairperson responded to that as follows:

"CHAIRPERSON: Okay. Well, let me tell you this. I accept that this is a proper resolution, that it indicates that a proper mandate was received for the purposes of 3.2. So to the extent that that was an issue around the constitution of this committee, that is my ruling. As far as whether this body should consist of more than one person is concerned, I certainly do not think there's anything in the constitution which indicates that it must, and that objection too is overruled."

What then follows deals with what is going to happen if they do leave the hearing. I pick up with the chairperson at page 105 of the record:

"CHAIRPERSON: Now, let me tell you what is going to happen. Mr Lekota is going to come and give his evidence in chief. At the end of his evidence in chief, Ms Harvey is going to address me as to what I should do going forward. If you are here, you can apply for a postponement at that stage. If you are not here then you are not here to do that, and then I have the discretion whether to proceed with the evidence or not. That is your choice. Can you explain to Ms Ndude the risk that

she runs"

The chairperson then gave him five minutes. The hearing is then reconvened and the chairperson stated the following:

"CHAIRPERSON: But let me make this very clear. It is on condition that she is here, that she was concerned about further particulars etc, she must be here and listen to Mr Lekota's evidence. At the end of that evidence Ms Harvey is going to make submissions as to what should happen, and if you are here to make submissions you do that. If you are not, you run the risk of whatever follows. Five minutes, please."

After the five minutes Mr Petersen came back and the following exchange followed:

"MR PETERSEN: Thank you, Mr Chairman for the indulgence. I have taken further instructions from my client. Now, that you are ruling on that resolution, but despite this my instructions are, it seems to me that the resolution does not warrant the process that has been followed today, and her instructions are as to whether in fact the CNC whether that was properly constituted. It needs to be investigated. And as stated from day one, my client also wants this process to be finalised, but she needed to be afforded the opportunity in fairness and

justice to prepare for it before this. But you have made your ruling on that point so this is all I want to add for the record.

CHAIRPERSON: Okay. That is on the record.

MR WILLIAMS: She is prepared to participate.

CHAIRPERSON: So what does that mean? You are sticking around, you participate today?

MR PETERSEN: No, we will not be participating today but she is prepared to participate in the process.

CHAIRPERSON: Ja, but you understand the risks you run in doing this?

MR PETERSEN: I understand. My client fully appreciates."

Then later on Mr Williams asked the chairman the following:

"MR WILLIAMS: Just for my own understanding, if the evidence is postponed to another date to be led, will my client be informed?

CHAIRPERSON: Yes.

MR WILLIAMS: Thank you.

CHAIRPERSON: We will certainly inform your client.

MR PETERSON: One way or the other."

This was the final exchange before the applicant and her lawyers left the hearing.

It is common cause that the hearing then proceeded and was concluded on the same day in the absence of the applicant. In the record of the hearing only the evidence of Mr Lekota is recorded. In the finding of the chairman there is reference to the evidence of a Ms Carter but her evidence was not part of the record of the disciplinary hearing furnished to the applicant and to this Court. From the bar, Mr Epstein indicated that he also had not had sight of the evidence of Ms Carter and did not know whether it in fact had been recorded. At the end of Mr Lekota's evidence, after submissions by Adv Harvey, the chairman decided to end the hearing without furnishing a copy of Mr Lekota's evidence to the applicant to consider her options for example as regards possible cross-examination of him at a later stage. Part of Adv Harvey's submissions were that if the applicant was unhappy about anything she always could take the matter to this Court for review proceedings. Adv Harvey asked the chairman to make a decision which included a recommendation to COPE that the applicant be expelled with immediate effect. From the record it also emerges that Mr Petersen had sent an email and a fax to the chairperson during the course of the day after he had left the hearing, but that the chairman had decided it would be inappropriate to read them at that stage. The proceedings then ended with the chairman indicating he would attempt to get his decision to COPE by the following Monday.

It is common cause that on 13 February 2012 without any further

input from the applicant the chairman found applicant guilty of charges 1 and 2 and found that the only appropriate sanction was expulsion from COPE. When considering an appropriate sanction the applicant was not given an opportunity to make submissions based on the merits of his findings. She also was not given an opportunity to make submissions on the legal interpretation of the chairman *apropos* the consequences for COPE and its members in the light of COPE not having adopted a code of conduct and discipline.

I pause at this stage to deal with the issue raised in the applicant's replying papers concerning the absence of the evidence of Ms Carter from the record. From his "analysis of evidence" it is clear that in finding the applicant guilty on counts 1 and 2 in addition to the evidence of Mr Lekota, the chairman heavily relied on the evidence of Ms Carter. The chairman of appeal of the applicant made his ruling on 7 April 2012. From his "outcome report" it is not clear whether he had sight of the evidence of Ms Carter before he made his ruling. From the resolution of the CMC on 17 April 2012 it also is not clear whether it at any stage had sight of the evidence of Ms Carter before it ratified the decision of the chairman or reconfirmed the expulsion of the applicant following the decision of the chairman of the appeal body.

Mr Epstein submitted that as reference to the absence of Ms Carter's

evidence was only introduced in the replying affidavit I should have no regard to it. Mr Arendse submitted that given the specific circumstances of the present matter including that it was an enquiry about natural justice and that it only is COPE which could provide a copy of the missing evidence of Ms Carter, I should have regard to it. Although it might have been helpful to the Court and a simple exercise for COPE to have introduced that portion of the record subsequent to the filing of the replying papers, the fact of the matter is that the applicant was aware of the dependence placed on Ms Carter's evidence and of the absence of Ms Carter's evidence from the record of the hearing, when she filed her founding papers. This notwithstanding, she failed to make this omission a part of her case in her founding papers. I can find no reason why I must make an exception to the norm in the present matter as regards allowing new material in replying papers. Accordingly I will have no regard to this point raised by the applicant in her replying papers.

I now return to my summary of events. From the resolution of 17 April 2012 of the CNC it can be extrapolated that prior to the decisions at that meeting concerning the applicant, the CNC did not invite or receive any further input from the applicant before it ratified and/or reconfirmed the expulsion of the applicant. It relied wholly on the findings of the original hearing and the appeal committee.

With this summary in mind I now turn to the issue of whether there

was a failure of natural justice. In this regard Mr Epstein referred me to various authorities which spell out the approach a court must take when assessing whether there has been a failure of natural justice in domestic disciplinary proceedings. The gist of these decisions are succinctly summed up in the following extracts: Abrahamse v Phigeland and Others 1932 CPD 196 at 199:

> "What is required from a body with quasi - judicial powers such as this committee is not that they should observe the legal rules of evidence, but that they should act *bona fide*, inform the accused person of the charge made against him and give him a fair opportunity of making his defence and meeting the allegations made against him."

Elsworth v Jockey Club of South Africa 1961(4) (WLD) page 142 at page 150 opposite paragraph E:

> "These domestic tribunals are not bound to observe the strict rules and formalities of procedure or the admitting of evidence. All that is necessary is that the person whose conduct is being investigated must have a fair trial. He must have a full and fair opportunity to present his case and to ask all those questions which he wants to ask. That this is so appears from many cases."

Meiring, N.O. and Olivier, N.O. v Kies Meiring, N.O. v Van Schoor 1958(3) CPD page 511 at page 520 opposite paragraph C:

> "In my opinion these matters can all be decided upon general principle. In the absence of any procedural rules or regulations having the force of law it seems to me that it was for the presiding officer to decide upon his own procedure. Section 185(c) confers upon a teacher certain basic rights, namely, to be heard either personally or by a duly authorised representative, to be present and to be represented at the enquiry, to produce evidence, and with one exception to be confronted with, and to cross-examine, all persons testifying against him. Subject to the implementation of these rights and to the observance of the principles of natural justice it seems to me that it was open to the Superintendent-General to follow such procedure as he thought fit."

Finally I refer to the matter of Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another 2003 (5) TPD page 451 at page 464 F. The importance of this quote is that at the end of the day when arriving or deciding on whether or not there has been natural justice, each case must be considered on its own merits.

> "I have found the dictum in Chairman, Board on Tariffs and

Trade, and Others ... to be particularly apposite where Zulman, JA said:

"There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts."

When I asses what transpired in the present matter in the light of these authorities the initial issue which needs to be addressed is whether or not it was fair of the chairman of the hearing to refuse the postponement application. In assessing this regard *inter alia* must be had to the following:

A. How long did the applicant and her attorney have to prepare her defence?
B. When preparing her defence, what was the degree of knowledge she and her attorney had, of the case that she had to meet?
C. What would the prejudice have been to COPE if a postponement had been granted?
D. What was the prejudice to the applicant if the postponement was not granted?

The evidence before me is that the applicant was first able to consult with her attorney early in the afternoon on the Monday before the hearing. On the same afternoon he prepared a letter requesting additional information which was sent on the Monday afternoon to COPE. He followed up on the Tuesday, but he informed the chairman of the hearing that by the time he arrived at the hearing on the Wednesday morning he had not yet received a response from COPE. At the hearing, as I have already stated, he was given 58 pages of documentation.

I find no unreasonable delay on the part of the applicant or her attorney in trying to prepare for the hearing. I also find that when he arrived at the hearing, due to no fault of his or the applicant, his knowledge of the case against his client would have been limited to what his client thought was relevant.

Here I might pause just to note that at the heart of the right to legal representation, is that lay people do not always know what is relevant and what is not relevant. The fact that they have been informed of what the charges are, does not necessarily mean that they know what would be relevant and not relevant when it comes to a defence to the charges. It is for this reason that lawyers enter the fray.

Turning to the prejudice to the parties arising from the decision concerning a postponement. Other than some inconvenience, I can find no real prejudice to COPE had the matter been postponed. It also is noteworthy that Mr Lekota was not available to be at the hearing on the Thursday and Friday. Thus if Mr Petersen had remained in attendance on the Wednesday the probabilities suggest that with cross-examination Mr Lekota's evidence would not have been completed on the Wednesday. If this did so transpire the matter then in any event would have to have been postponed for cross-examination. As far as prejudice to COPE is concerned, it must also be noted that at this stage the applicant already had been suspended and thus had no access to party funding as the national treasurer of COPE.

On the other hand, the huge prejudice to the applicant is self evident. Accepting Mr Epstein's argument for now that given the silence of COPE's constitution on the issue, the chairman could follow whatever procedure he felt was appropriate as long as it was fair in the circumstances presented to him, there was a weighty responsibility on him to ensure that he adopted a procedure which would be fair. In refusing the postponement in the circumstances set out above in this judgment I am of the view that he failed in this regard. Furthermore, this failure was compounded when he allowed himself to persuaded after only hearing the untested evidence in chief of Mr Lekota, and I presume Ms Carter, not to postpone the

matter at that stage to enable applicant an opportunity to assess her position in the light of the evidence in chief of Mr Lekota and Ms Carter. In this regard the last exchange between the attorney representing the applicant and the chairman also is ambivalent and for the sake of completion I repeat the last portion of this exchange:

> "MR WILLIAMS: Just for my own understanding, if the evidence is postponed to another day to be led, will my client be informed?
>
> CHAIRPERSON: Yes.
>
> MR WILLIAMS: Thank you.
>
> CHAIRPERSON: We'll certainly inform your client.
>
> MR PETERSEN: One way or the other."

Another issue which strikes one in the exchanges quoted in this judgment, which clearly shows the prejudice to the applicant of the chairman's refusal to postpone the matter, is the exchange concerning whether or not the hearing itself was properly constituted. From the exchange it is clear that Mr Petersen simply did not have adequate time in which to apply his mind to the point. Adequately to do this, would have required a sound grasp of the facts, a knowledge of the Constitution and of the applicable law. If he had been given adequate time and after research and reflection remained of the view that the hearing was improperly constituted, then this would have been argued right at the outset before any evidence on the merits was led. The conduct of the chairman

unfairly restricted Mr Petersen's ability to serve the interests of his client. The chairman simply did not give him adequate time in this regard. I might add that had he given him adequate time the chairman's ruling in this regard also might have been more considered than is the case from a reading of the record. It appears as if he also made a ruling on this point with very little, if any, reflection.

Another concern is the production of 58 pages of documents on the morning of the hearing. A perusal of the record clearly reveals that Mr Petersen simply was not given adequate time to apply his mind to these documents, consult with applicant and then assess his response to them. He basically was forced to address a multitude of issues often on an *ex tempore* basis as a result of the conduct of the chairman. Here it must be remembered that almost immediately after he first saw the applicant on the Monday he requested further information and documents from COPE, but to no avail.

Another omission as regards natural justice, was the chairman's decision on deciding on what an appropriate sanction was without giving the applicant an opportunity to address him on this in the light of his finding on the merits. In this regard not only did he fail to give the applicant an opportunity to give input in the light of his finding on the merits, he also arrived at a decision in law about the powers of COPE concerning sanction without affording the applicant an

opportunity to address him on this. Here I am referring to his finding that because COPE had not adopted a code of conduct and discipline it did not mean that COPE was precluded from disciplining its members.

Although it would not be proper for this Court to enter into the merits of the matter, a reading of Mr Lekota's evidence also fills me with disquiet as regards the failure of the chairman to be more directive as regards to the giving of hearsay evidence. The case law dealing with domestic tribunals does not in anyway suggest that chairpeople of such tribunals, especially where legally trained people are involved, do not have a duty to ensure that standards commensurate with fairness and natural justice be maintained. This is particularly so when the accused person is not present and when the stakes are so high for such accused person. Furthermore, it must be remembered that in the present matter it concerned the fate of a duly elected member of parliament and a political party, both of whom receive funding from the South African public. Furthermore the chairman and COPE's advocate were legally trained people. The danger in the present case is that the decided cases be interpreted in a manner which sets the bar far too low when it comes to ensuring that there was justice and fairness.

Also of concern to me was the decision by the chairman to have no regard to the email and fax he received from Mr Peterson during the

course of the day on which the hearing was held, without first establishing what was in the said communications. All things being equal, one might be able to understand him simply disregarding them out of hand but in the light of his decision to continue with the hearing in the absence of the applicant and the subsequent decision to finalise the hearing on the same day without giving the applicant an opportunity to have sight of Mr Lekota's evidence in chief, I am of the view that it would have been prudent of him at least to ascertain what was in the email and fax before he simply disregarded it. I have concluded that he had no regard to them for the following reasons. At the hearing to be found at page 161 of the record he notes that he has received an email and a fax from Mr Petersen and he ends off as follows:

> "CHAIRPERSON: I will at some later stage have a look at what he sent me and give a proper consideration."

This is after he has indicated that he was not going to read it at that stage. However, he made no mention of these communications in his "outcome report" when dealing with his decision not to postpone the matter at the end of Mr Lekota's evidence. In fact in his "outcome report" he went further and stateed as follows at page 167 of the record at paragraph 9:

> "Unfortunately, Ndude and her representatives elected not to

remain present to listen to the Lekota's evidence in chief. They were also not present at the conclusion of that evidence and therefore made no submissions as to how the matter should proceed at the conclusion of that evidence."

The only conclusion I can draw from this is that he had no regard to what was contained in that email and that fax.

I am of the view that given the cumulative effect of all the above, there was a clear failure of natural justice in the conduct of the disciplinary hearing. I might add there is nothing in the "outcome report" of the chairman of the appeals committee appointed by COPE nor in the meeting of the CNC on 15 April 2012, which in any way salvages this failure of natural justice.

In the light of this conclusion there is no need for me to deal with the point that COPE's constitution does not provide for the disciplining and expulsion of its members. Suffice to say that on my reading of the decision of Matlholwa v Mahuma and Others 2009(3) All SA Reports 238 (SCA), COPE's constitution as it stands does not provide for the disciplining and expulsion of members. In this regard the following extracts from this case are instructive. Paragraph 8:

"As was correctly emphasised by the court below, a political party is a voluntary association founded on the basis of mutual

agreement. Like any other voluntary association, the relationship between a political party and its members is a contractual one, the terms of the contract being contained in the constitution of the party. In construing the provisions of the party's constitution for the purposes of this appeal, it is important to bear in mind that expulsion is the most drastic form of punishment which a voluntary association can impose on its members and the power to do so must consequently appear expressly or by necessary implication from the provisions of its constitution. In the words of Van Winsen J in Conrad v Farrel and Others:

"Our courts, in common with the English Courts, have adopted the view that a voluntary association's right to expel a member must be stated expressly or by necessary implication in the constitution and that, in the absence of such a statement, there is no inherent right residing in the association to take action to expel a member. The courts have repeatedly taken up the attitude that if the power to terminate membership is not expressly given then the association can only enjoy that power if it appears as a clear and unambiguous implication from the terms of its constitution, read as a whole, that it was the intention to afford it such a power."

It then ends: /...

"Members, may thus be expelled by a structure of the voluntary association entrusted with the power of expulsion expressly or by "clear and unambiguous" implication. A purported expulsion by a structure other than one in which this power is vested in terms of the constitution will be *ultra vires* and unlawful."

In the latter part of paragraph 11 the judgment continues:

"As pointed out above, the power to expel a member may be exercised only by a body in which such power has been vested by the constitution expressly or by clear and unambiguous implication, failing which the purported expulsion will be *ultra vires* the constitution and void."

Going onto paragraph 12:

"It is thus to the provisions of the party's constitution that we must look. Unfortunately, this document is by no means a model of clarity or coherence."

And then the judgment ends off paragraph 12 as follows:

"Neither the grounds upon which a provincial committee may expel a member from the party or withdraw membership, nor

the procedure to be followed in that regard, are spelt out in the constitution."

In the latter part of paragraph 15 going onto paragraph 16 we read:

"There is nothing in the constitution of the party that confers any disciplinary powers on the FCMC, much less the power of expulsion. The constitution also does not provide for any delegation of powers to the FCMC. Even if one were to assume in favour of the party, without deciding, that the federal council could indeed delegate its power of expulsion to the FCMC ... there is nothing on the papers before us to show that any such delegation ever took place. It follows that, in my view, it has not been shown that the FCMC was either authorised or empowered by the constitution of the party to expel the appellant and that its decision of 27 August 2007 in this regard cannot stand."

Mr Epstein referred me *inter alia* to the matter of Mcoyi and Others v Inkatha Freedom Party 2011(4) SA 298 and particularly page 312 and I quote the first portion of paragraph 43:

"Moreover, it is relevant, when interpreting a constitution which is akin to a contract, to understand how the parties have applied the terms in the past and how they have interpreted

these terms."

What the Matlholwa case at the very least by necessary implication states is that there have to be terms as regards discipline and expulsion of members in the constitution in the first place. This is what distinguishes the present case in my opinion from the Mcoyi case. In the present case in COPE's constitution all there is, is paragraph 23.1, which is found at page 61 of the record and it reads as follows:

> "The Congress of the People shall establish independent disciplinary and appeals committees to adjudicate in matters that deal with conduct of membership that might be in contravention of the Congress of the People's code of conduct and discipline."

That is the only reference in the constitution to discipline. The constitution is completely silent on sanction and in the absence of such independent committees, discipline being exercised by other institutions of COPE or other subcommittees of COPE. Mr Epstein argued that the clause 23.1 permitted COPE to appoint *ad hoc* one person disciplinary and appeal committees as was the case in the present matter. If he is correct, and I might add that I am unpersuaded by this argument, then once such one person ad hoc committees are appointed the power resides in them alone to make a

decision concerning the applicant as not only does the constitution not give this power to the CNC, it expressly states that the power to adjudicate in matters that deal with the conduct of membership vests in independent committees. Obviously the CNC could not be such an independent committee. This would have some bearing on the argument of Mr Epstein that I can give no effective relief to applicant as she has not sought an order setting aside the expulsion by the CNC. I will return to this argument at a later stage.

Coming back to the argument that clause 23.1 allows for the appointment of *ad hoc* one person disciplinary committees as in the present case. Of course this still does not deal with the problem that there is nothing in the constitution which gives any person or committee any power to actually discipline and especially expel a member. It was argued that if one does not read this into the constitution, it would lead to chaos and absurdity. I am unpersuaded that this permits me to read powers into a constitution of a voluntary association which simply are not there. In any event, as was suggested to Mr Epstein at the hearing of this matter, in the interim COPE possibly could explore the route provided for by the law of contract.

As already indicated, given my finding that there was a failure of natural justice, there is no need for me to decide this issue. However, given that the order which I will grant in all likelihood will

not be the end of the underlying cause of the conflict in this matter and that public money is involved, I thought it prudent to make these observations concerning the apparent lacuna in the constitution of COPE in the hope that these could be addressed as a matter of urgency by COPE.

I now turn to the relief sought and Mr Epstein's arguments in this regard. I find the distinction between the relief sought in prayer 2 of the notice of motion and the expulsion by the CNC an artificial distinction. Prayer 2.3 of the notice motion uses the phrase "the outcome thereof" when referring to the disciplinary proceedings held on 8 February 2012. If for example one has regard to the resolution of the CNC on 15 April 2012, expulsion clearly was the final outcome of the disciplinary hearing. In any event if Mr Epstein is correct that article 23.1 of the constitution permits COPE to appoint one person *ad hoc* disciplinary committees to discipline its members, then as I have already stated the power to discipline vests only in that committee. Thus if one accepts his argument that such *ad hoc* committees also can discipline and expel members, then the decision of the CNC is of absolutely no value. The decisions which need to be set aside are those of the disciplinary and appeal hearings as referred to in prayer 2 of the notice of motion.

The word of the resolution of the CNC of the 15 April 2012 is also instructive in this regard. I highlight the use of the word "reconfirm"

where it states the following at 1. of that resolution:

"To adopt the report and ratify the decision of the chairperson of the appeals committee thus reconfirming the expulsion of Ms Ndude from the Congress of the People."

The wording "reconfirm" clearly suggests that the expulsion decision had already been taken and it simply wanted to reconfirm it, of whatever value such reconfirmation might have had. Furthermore, to the extent that the relief sought is not as clearly stated in the notice of motion as it should be, if one has regards to prayers 3, 4 and 5 of the notice of motion it is clear that the envisaged relief sought in prayer 2 was an order which permitted the granting of the prayers 3, 4 and 5. To entertain the argument of Mr Epstein would unjustifiably simply make more business for lawyers. As I understand the argument, given the failure to ask that the expulsion be set aside at best for applicant I only could grant prayer 2 at this stage. As this does not include setting aside the expulsion of applicant from COPE, I thus at this stage could not grant prayers 3, 4 and 5 as that relief is premised on the setting aside of the expulsion. Accordingly, so the argument goes, the applicant armed with prayer 2 would have to launch fresh proceedings in this Court for the setting aside of the expulsion and the granting of the consequential relief in prayers 3, 4 and 5 of the notice of motion.

COPE essentially based this submission on the basis that it only came to Court to meet the case set out in prayer 2 and not a case for setting aside the expulsion. In addition to this being an extremely narrow, strained and artificial reading of prayer 2, especially when one reads it with prayers 3, 4 and 5 and the founding papers of the applicant, this argument simply does not bear scrutiny when regard is had to the answering papers of COPE. A reading of the resolution at the CNC meeting on 15 April 2012 leads only to one conclusion - the only reason why it decided to expel applicant was because of the outcome of the disciplinary and appeal proceedings. The suggestion that COPE will be prejudiced as it did not prepare its papers to address the issue of expulsion has absolutely no foundation in fact whatsoever. A simple reading of the said resolution of the CNC makes that abundantly clear. There is nothing further which COPE could have put before this Court to justify expulsion if I found, as I have, that the hearings on which the expulsion was premised were unlawful and of no force and effect.

In similar vein, I am of the view that the argument that if I grant the relief in prayer 2 the applicant will remain suspended as she did not include a prayer to set aside the suspension is an artificial one which simply will promote further unnecessary conflict and legal costs. The decision on 29 January 2012 by the CNC to the extent that its constitution might have allowed it to take this action, and I have already alluded to my reservations in this regard, suspended

applicant as a member of COPE "pending the outcome of a disciplinary hearing." Accordingly, if I grant the relief sought in prayer 2 of the notice of motion there would be no need for any relief as regards the applicant's suspension, as in terms of its own resolution the suspension would come to an end. Obviously, this does not mean that COPE cannot re-evaluate its position afresh and take the steps it believes are necessary to protect its interests going forward. In this regard I need to emphasise that this judgment is not a pronouncement on the guilt or innocence of the applicant.

I might also add that, as I pointed out to Mr Arendse about putting substance above form *apropos* certain of his arguments, I am of the view that the argument of Mr Epstein concerning the applicant not having sought relief dealing with her expulsion and suspension, also in effect places form above substance.

It once again is important to take note that given that the parties include public representatives who receive funding from South African taxpayers, it is incumbent on this Court where possible to curb unnecessary expenditure as a result of unnecessary litigation. For this reason also, when framing the order, I have attempted to do it in a manner which as far as possible minimises the risk of further litigation on periphery issues. It is hoped that the parties going forward will focus their attention on addressing, in a fair and lawful manner, the obvious main issue which needs to be addressed

apropos the applicant.

Accordingly, I make the following order:

1. The finding and outcome of the disciplinary and appeal proceedings against the Applicant are null and void and of no force or effect.

2. The Applicant remains a member of the First Respondent.

3. The Applicant was unlawfully removed by the First Respondent as a Member of Parliament and replaced by the Eleventh Respondent.

4. The Tenth Respondent is directed to remove the Eleventh Respondent as a Member of Parliament for the First Respondent (Cope) and to replace the Eleventh Respondent with the Applicant.

5. The removal of the Eleventh Respondent as a Member of Parliament shall become effective as of the 31 December 2012.

6. The appointment of the Applicant in the place of the Eleventh Respondent as a Member of Parliament for the First Respondent (Cope) shall become effective as of 1 January 2013.

7. The First Respondent is ordered to pay the costs of the application, exclusive of the costs of the hearing on 18 October 2012.

/...

Republic of South Africa
The Hon. Ms. Justice Y.S. Meer.

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8 November 2012

As you are aware I shall be taking part of my long leave from 12 November until 7 December 2012. Below are my dates for the first term of 2013.

Judge Meer's Dates for the 1st Term 2013

Judge Meer's Dates

January / February / March 2013

Land Claims Court

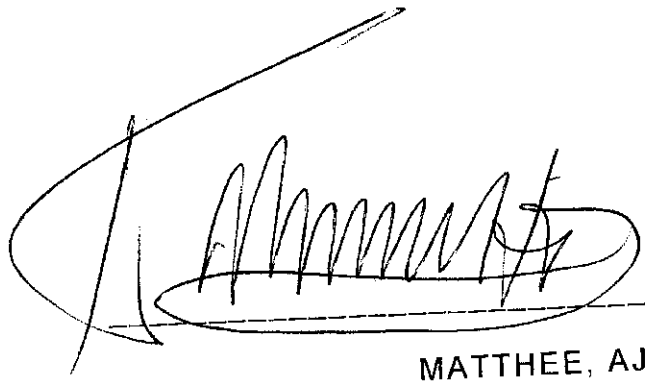
Week 1	21 – 25 January
Week 2	28 – 1 February
Week 3	4 – 8 February
Week 7	4 – 8 March
Week 8	11 – 15 March

High Court

Week 4	11 – 15 February
Week 5	18 – 22 February
Week 6	25 – 1 March
Week 9	18 – 23 March

Judge Meer

8. The parties shall pay for their own costs for the hearing on the 18th October 2012.



MATTHEE, AJ

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