

SOUTH AFRICA / JUDGMENT

Agang-South Africa and Another v Mayoli and Others (2015/2772) [2015] ZAGPJHC 24 (9 February 2015) [2015] ZAGPJHC 24

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

2015/2772

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2015/2772

DATE:

09 FEBRUARY 2015

In

the matter between:

AGANG-SOUTH

AFRICA and

Another.....1st

and 2nd Applicants

And

MAYOLI,

MONGEZI and

Others.....1st

to 12th Respondents

JUDGMENT

SPILG, J:

9 February 2015

THE APPLICATION

1. The application concerns the on-going dispute over the leadership of Agang-South Africa ('Agang-SA'), a political party that has two members in Parliament, Mr Andries Tlouamma who is the second applicant and Mr Michael Tshishonga who is the second respondent.

The leadership tussle is between the two men and their respective supporters.

2. While the party has a clear interest, little turns on it being cited as the first applicant and not as a respondent.
3. The second applicant is the incumbent chairperson of Agang-SA pursuant to a meeting convened by those persons who were declared to be members of the party's National Executive Council ('NEC') in terms of a court order issued by Potgieter AJ out of the Western Cape Division of the High Court sitting in Cape Town High Court on 19 December 2014 under case 16127/2014.
4. The application seeks to interdict a meeting of the party, called a Special National Congress of the party, from taking place on 31 January 2015.
5. Interdictory relief is also sought to prevent the individual respondents from holding out that they are office bearers or entitled to convene meetings or perform any other power or function conferred on the NEC under article 6.1 of its Constitution.
6. In addition a number of declaratory orders are sought.

One is to declare that members of the NEC invited to a meeting that had been convened on 22 December 2014 constitute for the time being the party's NEC pursuant to Potgieter AJ's order of 19 December).

The balance is to declare two purported provincial general meetings held in Gauteng and the Free State to be unlawfully convened and to have any decisions taken at those meetings (which would include selecting delegates to attend the Special National Congress) reviewed and set aside.

BACKGROUND

7. Agang-SA secured two seats in Parliament during the May 2014 general elections. Since then the party has experienced internal divisions. The first fracture occurred when issues arose between Dr M Ramphela and her supporters on the one hand and those who supported the second applicant and the second respondent on the other. This led to a number of court applications brought before this court and Western Cape High Court.
8. The significance of the order granted by this court in June 2014 was that the meeting convened of the NEC could go ahead. At the meeting a new NEC was constituted and its members identified the document which they recognised as being the party's governing constitution.
9. Davis J in the subsequent proceedings before the Cape High Court in August 2014 held that;
 - a. The valid and binding constitution of the party was the one of 27 April 2013; and
 - b. The lawful NEC is that constituted by the body that convened on 29 June 2014 in Gauteng with the membership as reflected in the founding affidavit.
10. These decisions were a victory for the Tlouamma and Tshishonga group over Dr Ramphela's supporters. However by September 2014 divisions had surfaced within the former group and spilled over into litigation.
11. The first was an application in September 2014 to effectively remove Tshishonga as the party's treasurer by replacing him with four other members as signatories to the party's bank accounts. The applicants, who represented the Tlouamma group, relied on a decision purportedly taken by the NEC. The application was brought urgently in the Cape High Court for interim relief pending the outcome of the main proceedings. An interim accord was reached pending the outcome of those proceedings.
12. In October another urgent application was launched in order to interdict Tshishonga from holding himself out as the party's president and restraining him from attending a meeting scheduled by the State President two days hence. There were also orders sought to declare a number of purported NEC meetings to be invalid. These proceedings were postponed to be heard with the main application mentioned in the previous paragraph.
13. Prior to the main application being heard the Tshishonga group brought a counter-application to have the court declare who were the members of the NEC. Other relief was also sought regarding disciplinary proceedings that had been brought in the meantime against Tshishonga and other matters concerning the appointment of party employees and payments made.
14. The main application together with the subsequent matters that had been conjoined to it were heard by Potgieter AJ.

15. In the subsequent judgment delivered on 19 December 2014 by Potgieter AJ, the learned judge noted that the rift between the two groups over the control of party finances started at the 10 August 2014 NEC meeting and that this was the last NEC meeting that Tshishonga attended until Tshishonga then called an NEC meeting on 27 September. Tlouamma called a rival NEC meeting scheduled for
- the same day (see para 21 of the judgment).
16. The further history of NEC meetings revealed in the judgment of Potgieter AJ (in paras 22 to 27) is that during the period from August to September neither group attended the NEC meetings convened by the other. A classic illustration is that on 27 September 2014 two meetings were held, one in Braamfontein by the Tlouamma group and the other in Arcadia. Both purported to be duly convened meetings of the party's NEC.
17. This appears to have precipitated another urgent application brought on 8 October 2014.
18. . The main application was then heard and oral evidence was led. The court then determined which members constituted the NEC at 11 November 2011. Both Tlouamma and Tshishonga were agreed as members. The court recognised 10 other persons as members of the NEC making a total of 12 members.
19. The court considered that the best way to resolve the signatory to bank accounts issue was to 'freeze' the accounts until the new NEC as determined by the judgment. Until then the court directed that no payments may be made without at least the co-signatures of Tshishonga and Tlouamma.

The court also considered that there should be no order as to costs.

CURRENT

ISSUES

20. The orders made by Potgieter AJ did not end the litigation.
21. On 11 January 2015 an application was brought before this court challenging the validity of the NEC meeting held on 22 December
2014. Wright J had struck the matter off the roll as not urgent.
22. According to the Tlouamma group the NEC as constituted in terms of Potgieter AJ's orders properly met on 22 December 2014 in order to prepare a National Congress to be convened in March 2015. According to the Tshishonga group they deny that the Congress is to be held in March. They aver that at the meeting of 29 June 2014, which had been called by Tshishonga as National Chairperson, it was resolved that the Congress would be held by the end of January 2015.

23. In the present application the Tlouamma group confirm that 7 of the 12 members attended the 22 December meeting which meant that the meeting was quorate. These are exclusively members of the Tlouamma group. In short the Tshishonga group were not in attendance. They are in the minority of the NEC as determined in the judgment of 19 December 2014.
24. The Tshishonga group then convened a rival meeting on 28 December at which one of the resolutions passed was to disband the interim NEC constituted by Potgieter AJ's order, appoint an ad hoc committee to oversee the day to day running of the party and guide the organisation to its National Congress. It was also resolved to place Tlouamma under suspension.
25. The Tlouamma group on becoming aware of these resolutions responded by disputing the regularity of the resolutions contending that they were in defiance of the 19 December court order and the resolutions passed on 22 December. There was also a challenge as to who attended.
26. On 4 January the NEC purported to hold a meeting at which it was resolved that a constitutional and elective conference meeting (clearly the National Congress) would be convened on 28 March 2015 and that anyone who wished to attend was required to renew his or her membership by 28 February.
27. On 20 January a Special National Congress of Agang-SA was ostensibly called by the Tshishonga group for 31 January 2015. It was purportedly called by the "majority of members".

A short while later another invitation was issued by the Tshishonga group convening a general meeting of the Gauteng province on 24 January in Midrand. The applicant contends that the purpose of the meeting was to elect a provincial structure. As will appear later provincial delegates to the National Congress are appointed by the provincial structures.

28. The applicant contends that there is an existing elected membership of the Gauteng Provincial Executive Committee duly appointed in 2014. Moreover the applicant contends that it is first necessary to ensure that only party members in good standing may be accredited to participate. That validation is done by the NEC which has not occurred. Moreover in terms of article 8.2.3 the Provincial Congress which is the highest organ within each province (and subject to decisions of the NEC) comprises at least the provincial political leadership, key provincial party leadership and "representatives from the branches".
29. The meeting did proceed and resolutions were passed.

30. The Tshishonga group also purportedly convened a Free State Provincial General meeting on 24 January to the same end. Again the applicant contends that there was in place a duly elected provincial executive committee which should have been responsible for convening such a meeting. It turns out that the meeting which did go ahead resolved to elect a new interim structure.

THE

ISSUES

31. The applicant contends that neither the national Congress to take place on 31 January was duly convened in terms of the party's constitution nor were any of the two provincial general meetings that had taken place.

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32. The respondents submit that they are entitled to place reliance on the 29 June 2014 resolution that a national congress is to take place at the end of January and the failure of the Tlouamma group to take any steps to prepare for the congress either nationally or provincially (which it will be seen is a necessary precursor) justifies their calling the meetings.

REGULARITY OF CALLING THE 31 JANUARY NATIONAL CONGRESS

33. In my view the convening of the national congress for 31 January 2105 fails at every elementary level.
34. The respondents conceded that there has been no verification either at local branch, provincial or national level of who are eligible to participate. Although the constitution was drawn up in great haste and is anything but a model of clarity, it is evident from a consideration of Article 11 (which is concerned with, membership and dues) and Articles 8 and 12 that only paid up members are eligible to vote and to stand for office either at provincial or national executive level.
35. Moreover an agenda has been prepared at the eleventh hour (on 26 January) which is inadequate to inform members of the business of the congress. The agenda indicates that their approval is sought to increase the number of provincial delegates attending and that ominously 'a "Founding Cabinet" will be put in place during the congress'.
36. There is no prior calling for nominations or any indication of how the "Founding Cabinet" is to be put in place. At best they are to be elected at an annual general meeting of members "during the foundational phase" which lasts until June 2016 in terms of article 10.10 as read with article 12.1.
37. In this regard it also appears that the Tshishonga group have resurrected the "Founding Cabinet". The original members of the "Founding Cabinet" in terms of articles 10.13 to 10.17 were Dr Ramphele, M Soko, Z Dawood and T Leshilo. The founding cabinet was the

highest decision making body (article 10.1). It was obliged to operate by consensus (article 10.11). On their departure from the party no “Founding Cabinet “existed. In my view it appears implicit in the numerous court cases to determine the office bearers of the party that it was common cause that the founding cabinet was defunct and that power now resided in what was identified in the constitution as the second highest decision making body , namely the NEC.

38. It seems that no point would be have been served in requiring Potgieter AJ to make the decisions he did if it were otherwise. It would have been an exercise in futility. The respondents now seek to resurrect that body. Irrespective of whether that is now competent, it appears impossible to expect members to distil the implications of the matters now placed on the agenda, to canvass, to lobby or to appoint speakers to address the topics, let alone nominate candidates for a post that may have become abrogated by the common actions of the main protagonists since the effective defeating of the Ramphele group pursuant to the order of 4 August 2014 by Davis J.
39. While the party’s constitution is sparse and does not detail the convening of meetings or nominations of members to the NEC or the Founding Cabinet the common law provides the necessary fillers. The failure to establish a verified list of members negates the purported appointment by the two provincial meetings of delegates to attend the congress and the failure to timeously prepare an agenda[1] (which should be clear and unambiguous) or timeously call for nominations undermines the fundamental requirements for a validly constituted meeting of a voluntary association. See generally Ramakatsa and others v Magashule and others 2013(2)BCLR 202 (CC) at paras 43, 63, 71, 73-74 and 90[2], on the infringement of the Constitutional right under section 19 to participate in the activities of a political party by reason of irregularities amounting to violation of the party’s own constitution. Compare Lewin ‘The Law, Procedure and Conduct of Meetings (5th ed) at pp37-38 (on agendas) and p134 (on nominations) .
40. On these grounds the attempt by the respondents to convene the meeting of 31 January 2016⁵ for its avowed purpose is stillborn. In addition the meeting would have had to appoint a chairperson. Counsel was driven to concede that no meeting would pass the stage of determining who would preside as chairperson. The determination of the chairperson is an essential prerequisite before a meeting can proceed in an orderly fashion[3]. The history of some dozen court cases within a year demonstrates that no genuine meeting to determine the will of the membership will see the light of day and the elective processes underpinning the appointment of the leadership under the party’s constitution is fundamentally compromised. Another court application is inevitable. Considering that the constitution required consensus by the highest organ, which the respondents now seek to resurrect, the internal procedural objectives of the constitution for the appointment of properly representative leaders by the membership cannot be achieved in the present climate. I will deal with the consequences of this more fully under the next heading.

41. The provincial branch meetings that were held also fail to meet the minimum requirements of a duly constituted meeting of a voluntary association in that there was no verified membership list to ensure the regularity of the process. Moreover inadequate notice was given of the meeting and of the business to be conducted. Its very purpose was undermined by the failure of proper notice.
42. So far I have dealt with the application on the basis of compliance with the minimum norms for convening a valid meeting of a voluntary association of this nature.
43. In considering the other orders sought it is necessary to deal with another aspect which also renders invalid and of no effect the convening of the meeting for 31 January and the provincial meetings that were held on 24 January or the resolutions passed at the latter. I deal with this in the following paragraphs. Nonetheless the ratio is equally applicable and determinative of the issues I have now dealt with.

THE OTHER RELIEF SOUGHT

44. The other relief applied for is intended to elevate the second applicant's group as the rightful leadership of Agang-SA to the effective exclusion of the respondent's group.
45. In an application of this nature the applicants are seeking final relief. Even if the orders could be couched in the form of interim relief, the applicant would nonetheless have to demonstrate a clear right, balance of convenience (by which I would include no prejudice to the members of the party) and no other effective remedy.
46. In my view all these issues must be answered by reference to whether the party operates from grass roots upwards or leadership downwards.
47. It is evident that with the demise of the "Founding Cabinet" and the requirement that even the "Founding Cabinet" members are subject to being replaced at an annual general meeting of the members which is to take place on or by the 30th of June of each year commencing in 2014 (article 12.1) that the constitution determines how the leadership is to be elected.
48. Articles 4 through to 12 make it clear that the party adopts the basic principle of democracy, namely that leaders are elected by the party's members who are in good standing. It commences at branches, going up to provincial then national level. Provincial and national executive committees are appointed by the membership.
49. The history of convening meetings demonstrates that since at least September each group has purported to convene meetings at which the other does not participate and is either barricaded from attending (I can make no finding but on paper that is the respondent's contention) or precipitated the other to hold a rival meeting.

In my view the situation has deteriorated, that having regard to the constitution and its proper interpretation where there is a lacuna, neither group can or will of their own accord be able to convene a competent or valid meeting. Neither represents the party. They represent their own self-interests and convene meetings to further their own ends.

50. The only basis upon which any valid meeting can be convened is once an NEC is voted in by a properly convened meeting of verified members in good standing. , or if the membership agrees by vote to a new Founding cabinet to which is then voted on, although the latter appears unnecessary if regard is had to the rationale for setting up the founding cabinet.
51. It is therefore the ratio of this court which will constitute an issue estoppel if transgressed, that neither group is capable of convening a meeting until there has been a proper meeting convened of the membership and the membership has elected the office bearers to the highest decision making body or bodies after a duly constituted provincial congresses as required by the constitution. The only basis upon which that can occur in law is if the two grounds reach consensus on the process otherwise the intent and purport of the constitution will be incapable of implementation.

THE ORDER

52. On 30 January I therefore ordered that;
 1. The matter is urgent;
 2. The respondents are interdicted from convening, holding or attending the meeting, described as a Special National Congress, scheduled for 31 January 2015;
 3. The Gauteng General Meeting of 24 January and the Free State General Meeting of the same date are declared not to have been lawfully convened;
 4. Each party is to pay its own costs.

The Honourable Judge Spilg

DATE OF HEARING: 28-29 JANUARY 2015

DATE OF ORDER: 29 JANUARY 2015

DATE OF JUDGMENT: 09 FEBRUARY 2015

LEGALREPRESENTATION

FOR APPELLANT ADV M. OSBOURNE

FOR RESPONDENT ADV S.VAN VUUREN

[1] See eg; Merion Court Durban Ltd v Kidwell & others 1976(4) SA 584 (D) See also Visser v Minister of Labour 1954(3) SA 975 (W) at 983

[2] Para 90 of the decision identifies the irregularities complained of.

[3] Compare Joynt v Joubert & others 1959(1) SA 512 (T). See generally Lewin at p46

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