

SOUTH AFRICA / JUDGMENT

Congress of the People and Others v Lekota and Others (4636/11) [2011] ZAWCHC 183 (24 March 2011)

[2011] ZAWCHC 183

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

4636/11

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IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN) CASE

NUMBER : 4636/11

DATE: 24 MARCH 2011
Inthe matter between: CONGRESS
OF THE PEOPLE

.....First

Applicant

MBULELO

MCEDANA

.....Second

Applicant

MBULELO

BARA

.....Third

Applicant

ARCHIE

RALO

.....Fourth

Applicant

NIKIWE

NUM

.....Fifth

Applicant
AMOS
LUNGEPHI LENGISI
.....Sixth

Applicant
ZAYTOON
FAKAAR
.....Seventh

Applicant
and
PATRICK
MOSIUOA LEKOTA
.....First

Respondent
HILDA
NDUDE
.....Second

Respondent
PHILIP
DEXTER
.....Third

Respondent
THOZAMILE
BOTHAM
.....Fourth

Respondent
DEIDRE
CARTER
.....Fifth

Respondent
LULAMA
NGONYAMA
.....Sixth

Respondent
LYNDALL
SHOPE-MAFOLE
.....Seventh

Respondent
NDZIPHO
KALIPHA
.....Eight

Respondent
JULIANA
KILLIAN
.....Ninth

Respondent
LEONARD
RAMATLAKANE
.....Tenth

Respondent
MODISE

MOKITLANE	Eleventh
Respondent	
NIC	
KOORNHOF	Twelfth
Respondent	
LUZELLE	
ADAMS	Thirteenth
Respondent	
SUZAN	
BEREND	Fourteenth
Respondent	
GRAHAM	
MCINTOSH	Fifteenth
Respondent	
NQABA	
BHANGA	Sixteenth
Respondent	
ELIZABETH	
SANGION	Seventeenth
Respondent	
WILLY	
MADISHA	Eighteenth
Respondent	
NOSIMO	
BALINDLELA	Nineteenth
Respondent	

JUDGMENT

BOZALEK.J I have before me an urgent application and counter application in which, very simply put, the protagonists are opposing camps in the COPE political party. The applications arise, it would appear, out of long running political disputes within that party centring around the issue of who are the lawful holders of office within the party. These differences appear to have reached a head at the party's consultative conference at the St George's conference venue in May 2010 and then at its later National Congress at the Heartfelt conference venue in Tshwane in December 2010. The leaders of the two camps are Mr Mbhazima Shilowa and Mr Mosiuoa Lekota. Both claim to be the lawfully elected president of COPE. The dispute has already engendered much litigation, some of it in this court but principally in the South Gauteng High Court. Most material

is an interdict application and a related action in the South Gauteng High Court in which COPE, on Mr Lekota's version, obtained interim interdictory urgent relief against Mr Shilowa alone in February 2011. In terms of the order obtained and presently in force the respondent i.e. Mr Shilowa is interdicted and restrained from holding himself out in any way and to any personal entity as a member, office bearer or representative of the applicant that is COPE or as president of the applicant. 2) He is interdicted and restrained from holding himself out or in any way acting as a member, nominated by the applicant, of the National Assembly. In prayers or paragraphs 1.3 and 1.4 relief is granted in relation to the defendant operating a certain bank account belonging to the applicant, COPE, and from gaining access or preventing access to offices occupied by COPE in Johannesburg. Paragraph 2 of the order reads that the interim interdicts in paragraph 1 above will operate pending the final end and determination of an action to be instituted by the applicants against the respondent within a period of one month from date of this order and the order makes provision further for the respondent to anticipate the order as not less than 24 hours notice to the applicant. There has been no intervention as provided for in paragraph 4 but the action was commenced by a combined summons issued on the 18th of February of this year. I am advised that the respondent has in fact filed a plea thereto. The relief sought in that action by COPE against and Mr Lekota, the other applicant in that matter against Mr Shilowa, is in the following terms: A declarator that COPE lawfully expelled Shilowa as a member of COPE with effect from the 8th of February 2011.

A declarator that with effect from the 8th of February 2011 Shilowa lost his seat as a member of the National Assembly nominated by COPE.

A declarator that Lekota is president of COPE.

Shilowa is interdicted and restrained from holding himself out in any way and to any personal entity as a member, office bearer or representative of COPE or as the president of COPE. Shilowa is interdicted and restrained from holding himself out or in any way acting as a member nominated by COPE to the National Assembly. The further relief sought relates to the use of the bank account and access to the premises which I mentioned earlier. The relief sought in the main application in the present matter is extensive and includes prayer 2, declaring that in terms of article 2.9 of COPE'S Constitution adopted on the 16th of December 2008 in Bioemfontein, the term of office of the 2008 leadership elected on the 16th of December 2008 ended on the 16th of December 2010, furthermore, and in any event, declaring the respondents not to be members of the Congress National Committee of COPE. I have to pause here to add that the first respondent in the main application is Mr Lekota and the balance of the 19 respondents include all, if not most of the most prominent national officer bearers in what I shall refer to as the COPE political party as seen by Mr Lekota and his followers. In prayers 4, 5 and 6 are sought declarations that the National Congress which convened at Heartfelt Pretoria in December last year was duly constituted and that the decisions taken there are valid and binding, that the constitution adopted on the 16th of December 2008 as amended and adopted on the 28 to the 30th of May 2010, was amended on the 15th to the 17th of December 2010 and is the valid and lawful constitution of COPE; declaring that the Congress National Committee of COPE as constituted by

the National Congress and convened at Heartfelt in December 2010 is the lawful CNC of COPE. And that, I might add, is the CNC contended for by the Shilowa camp. I pause here to add that this relief appears to me to be central to Mr Shilowa's case that he is the leader or president, lawfully so of COPE, lawfully so elected at the Heartfelt conference in December 2010. There follows then prayers 7 and 8 in the notice of motion, namely, declaring that: The first respondent, Mr Lekota, has ceased to be COPE's president with effect from the 16th of December 2010 and declaring that Mr Shilowa has been and currently is COPE's lawful president since the 16th of December 2010. It will immediately be seen that these prayers are mirror images of the relief sought in the South Gauteng action by COPE and Mr Lekota. There follows in the notice of motion in this matter a great deal more relief but in substance its underlying rationale is that the respondents no longer hold any lawful office in COPE and must cease to hold themselves out as such or to perform any act in such capacities. The papers in this application run now to more than 2000 pages, and that includes the counter application, and the principal theme throughout the main disputes of fact which the applications throw up are allegations and counter allegations as to whether Mr Lekota and his followers are the lawful leaders of COPE or Mr Shilowa and his followers. In my view although the parties in the South Gauteng High Court are much more limited at this stage, there is a very, very substantial overlap between the relief sought in that matter and the present, as well as the underlying issues. More importantly, the determination of various factual disputes in either matter will create a very difficult situation for the court hearing the other matter. It is undesirable in principle and practice that more than one court be seized at the same time with matters in which the issues are substantially the same. The potential for conflicting orders and the consequent potential and actual confusion is great and it is against this background that I approach Mr Irish's application on behalf of the applicants for a referral of various questions

- disputes of fact - to evidence. I regard it, further, as material that no clear reason has been advanced as to why the applicants have, comparatively late in the day, moved this court for the relief they seek and why Mr Shilowa whose cause and case is espoused here, is absent as a party. Mr Irish suggested that the South Gauteng High Court order bars Mr Shilowa from doing so, but I do not consider that that order can be interpreted so widely as to include asserting his rights in court proceedings. Some indication may lie in an exchange of correspondence between the attorneys where the applicant's attorneys evince the view that the outcome of this application should determine the fate of the South Gauteng High Court action. Needless to say the respondents are not amenable to such a course of action. In the very limited time available I have not had an opportunity to fully review the authorities, but in the exercise of a judicial discretion I do not consider that a court will lightly proceed to determine questions of law and fact between, in essence, the same parties, which questions are identical or between which there exists a very substantial overlap. I have had regard to the following matters and found some support in them: *Viljoen v Viljoen* 1964 SA198, *Matshawavo and others v New Way Investments (Pty) Limited*, All South African Law Reports 1988(3) at page 88 and for *re S (M) fan infant* a decision of the Chancery Division in England reported in the All England Law Reports 1971, Volume 1, at page 459. In the latter

case a court was faced with the question of whether to hear a matter or allow it to be dealt with by another court, a Scottish court, which was also seized with an application dealing with the same question, viz the custody of an infant. The court identified that some of the issues which arose was the public policy aspect, the question of comity and the question of a forum conveniens. This is in fact the approach which Mr Irish suggested was the key to the present application. I think there is merit in his submissions. Hope J in that matter held: "For these reasons in applying the principles I have stated I have come to the conclusion that I ought to regard the Scottish Court as the forum conveniens and accede to this application despite the fact that the English originating summons was first in the point of time." He went on to say: "Accordingly the application succeeds and I will make an order staying these proceedings but I want to make it absolutely clear that I form no conclusion on the merits of the question who should have custody or the care and control of this infant as I have not heard any cross-examination nor has that aspect of the matter being argued before me. And I think this judgment therefore even by comity should not have any persuasive influence one way or the other on the Scottish Court which will eventually have the trial matter." I echo these sentiments in the present matter in so far as this ruling is ever placed in front of another court seized with this or an equivalent matter. When one has regard to the factual disputes which Mr Irish has identified as requiring as to be referred to evidence or the subject of his application for a referral to evidence, and those are, firstly, was there a proper amendment of COPE's constitution in May 2010 at the St George's conference and, secondly, was there a proper election of a Congress National Committee at the Heartfelt conference in December 2010, in relation to the relief sought by the parties, I consider that he may well be correct in taking the view that his clients run the risk of falling foul of the Plascon Evans rule should they proceed only in seeking the relief they do only on the papers. The legal principles at play in such a situation are as set out in Erasmus. Superior Court Practise. Juta, at B1 - 50 and B 50 A: "The court will dismiss an application if the applicant should have realised when launching his application that a serious dispute of fact incapable of resolution on the papers was bound to develop. It does not necessarily follow that because a dispute of fact is reasonably foreseeable that an application will always be dismissed with costs. There may be circumstances present which will persuade a court to order the parties to go to trial together with an order that the costs of the application be costs in the cause or that the costs stand over for determination at the trial. The court will adopt this course when the factual dispute is within a narrow compass and can be expeditiously disposed of. The dispute of fact must be one between the parties and not a dispute between one of the parties and his agent or representative." In the view I take of this matter I do not consider that it is necessary for me to determine now whether Mr Irish's application should succeed or not. In my view that question should stand over pending the possible outcome of any trial action in the South Gauteng High Court matter and, more particularly, after the present applicants choose whether or not to apply, as they see fit, to intervene in that matter. If successful in that intervention application a duplication of actions with all the potential conflicting findings and orders may well be avoided. Mr Irish sought to rely on the refusal by Mr Smithers, who appears on behalf of the respondents, namely his refusal to indicate on behalf of his clients

that they would not oppose any such intervention application. His stance was rather that he could not presently commit to consent to any such intervention application but would have to be guided by the terms of the application and his client's instructions at the time. On balance I do not consider that this cautious attitude can be presently held against him, but I must guard against the possibility of the applicants being caught between two stools i.e. refused leave to intervene in the South Gauteng case but already refused leave to refer questions of fact for hearing by this court to which court they might wish to return depending on the stance they adopt in relation to the South Gauteng High Court case. The most appropriate course of action would then in my view be to defer a determination of the application for the referral of factual issues to evidence to trial in this court pending the outcome of possible intervention proceedings in the South Gauteng Court. In that way if the applicants are stymied for one or other reason from proceeding in the South Gauteng High Court they can reactivate the application for a referral to trial to evidence of certain issues in this court. In making this ruling I do not purport to firstly imply that such an order will be granted here if the applicants do not succeed in gaining admission to the South Gauteng High Court matter nor do I purport to dispose of the question of a possible determination of a legal point or points in the present matter most notably an interpretation of clause 2.9 of COPE'S founding constitution nor the question of the respondents' counter application. In the result the following order is made:

1. The application by the applicants in the main application for a referral of certain questions to evidence is stayed pending the outcome of an application by the applicants to intervene in case 2011/6085 in the South Gauteng High Court in the matter between COPE and Mr Lekota on the one hand and Mr Shilowa on the other.
2. Such an intervention application, if pursued, is to be brought within 30 days of date of this order.
3. The costs of this application will stand over for later determination. BOZALEK, J

JUDGMENT

BOZALEK.J

I have before me an urgent application and counter application in which, very simply put, the protagonists are opposing camps in the COPE political party.

The applications arise, it would appear, out of long running political disputes within that party centring around the issue of who are the lawful holders of office within the party. These differences appear to have reached a head at the party's consultative conference at the St George's conference venue in May 2010 and then at its later National Congress at the Heartfelt conference venue in Tshwane in December 2010.

The leaders of the two camps are Mr Mbhazima Shilowa and Mr Mosiuoa Lekota. Both claim to be the lawfully elected president of COPE. The dispute has already engendered much litigation, some of it in this court but principally in the South Gauteng High Court. Most material is an interdict application and a related action in the South Gauteng High Court in which COPE, on Mr Lekota's version, obtained interim interdictory urgent relief against Mr Shilowa alone in February 2011.

In terms of the order obtained and presently in force the respondent i.e. Mr Shilowa is interdicted and restrained from holding himself out in any way and to any personal entity as a member, office bearer or representative of the applicant that is COPE or as president of the applicant. 2) He is interdicted and restrained from holding himself out or in any way acting as a member, nominated by the applicant, of the National Assembly. In prayers or paragraphs 1.3 and 1.4 relief is granted in relation to the defendant operating a certain bank account belonging to the applicant, COPE, and from gaining access or preventing access to offices occupied by COPE in Johannesburg.

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Shilowa is interdicted and restrained from holding himself out or in any way acting as a member nominated by COPE to the National Assembly.

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I have to pause here to add that the first respondent in the main application is Mr Lekota and the balance of the 19 respondents include all, if not most of the most prominent national officer bearers in what I shall refer to as the COPE political party as seen by Mr Lekota and his followers.

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And that, I might add, is the CNC contended for by the Shilowa camp. I pause here to add that this relief appears to me to be central to Mr Shilowa's case that he is the leader or president, lawfully so of COPE, lawfully so elected at the Heartfelt conference in December 2010.

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"For these reasons in applying the principles I have stated I have come to the conclusion that I ought to regard the Scottish Court as the forum *conveniens* and accede to this application despite the fact that the English originating summons was first in the point of time."

He went on to say:

"Accordingly the application succeeds and I will make an order staying these proceedings but I want to make it absolutely clear that I form no conclusion on the merits of the question who should have custody or the care and control of this infant as I have not heard any cross-examination nor has that aspect of the matter being argued before me. And I think this judgment therefore even by comity should not have any persuasive influence one way or the other on the Scottish Court which will eventually have the trial matter."

I echo these sentiments in the present matter in so far as this ruling is ever placed in front of another court seized with this or an equivalent matter.

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The legal principles at play in such a situation are as set out in Erasmus. Superior Court Practise. Juta, at B1 - 50 and B 50 A:

"The court will dismiss an application if the applicant should have realised when launching his application that a serious dispute of fact incapable of resolution on the papers was bound to develop. It does not necessarily follow that because a dispute of fact is reasonably foreseeable that an application will always be dismissed with costs. There may be circumstances present which will persuade a court to order the parties to go to trial together with an order that the costs of the application be costs in the cause or that the costs stand over for determination at the trial.

The court will adopt this course when the factual dispute is within a narrow compass and can be expeditiously disposed of. The dispute of fact must be one between the parties and not a dispute between one of the parties and his agent or representative."

In the view I take of this matter I do not consider that it is necessary for me to determine now whether Mr Irish's application should succeed or not. In my view that question should stand over pending the possible outcome of any trial action in the South Gauteng High Court matter and, more particularly, after the present applicants choose whether or not to apply, as they see fit, to intervene in that matter. If successful in that intervention application a duplication of actions with all the potential conflicting findings and orders may well be avoided. Mr Irish sought to rely on the refusal by Mr Smithers, who appears on behalf of the respondents, namely his refusal to indicate on behalf of his clients that they would not oppose any such intervention application. His stance was rather that he could not presently commit to consent to any such intervention application but would have to be guided by the terms of the application and his client's instructions at the time.

On balance I do not consider that this cautious attitude can be presently held against him, but I must guard against the possibility of the applicants being caught between two stools i.e. refused leave to intervene in the South Gauteng case but already refused leave to refer questions of fact for hearing by this court to which court they might wish to return depending on the stance they adopt in relation to the South Gauteng High Court case. The most appropriate course of action would then in my view be to defer a determination of the application for the referral of factual issues to evidence to trial in this court pending the outcome of possible intervention proceedings in the South Gauteng Court.

In that way if the applicants are stymied for one or other reason from proceeding in the South Gauteng High Court they can reactivate the application for a referral to trial to evidence of certain issues in this court. In making this ruling I do not purport to firstly imply that such an order will be granted here if the applicants do not succeed in gaining admission to the South Gauteng High Court matter nor do I purport to dispose of the question of a possible determination of a legal point or points in the present matter most notably an interpretation of clause 2.9 of COPE'S founding constitution nor the question of the respondents' counter application.

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2. Such an intervention application, if pursued, is to be brought within 30 days of date of this order.
3. The costs of this application will stand over for later determination.

BOZALEK, J

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