

SOUTH AFRICA / JUDGMENT

## Fransman v Shabangu and Others (22690/16) [2016] ZAWCHC 189 (9 December 2016) [2016] ZAWCHC 189

COURT

Western Cape High Court, Cape Town

BEFORE

Le Grange

CASE / FILE NUMBER

22690/16

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 22690/16

In the matter between:

MARIUS LEWELLYN FRANSMAN APPLICANT

And

SUSAN SHABANGU FIRST RESPONDENT

GWEDE MANTASHE SECOND RESPONDENT

INTEGRITY COMMISSION OF THE ANC THIRD RESPONDENT

AFRICAN NATIONAL CONGRESS FOURTH

RESPONDENT

JUDGMENT – 09 DECEMBER 2016

LE GRANGE, J:

- [1] In this matter the Applicant seeks relief in two parts against the Four Respondents (“the Respondents”). In Part A, the Applicant seeks urgent interdictory relief for the release of certain documents against the Respondents and in Part B, in terms of Rule 53 of the Uniform Rules of Court, the Applicant seeks the review and setting aside of the findings and

recommendations made by the Third Respondent, the Integrity Commission of the ANC (“IC”) dated 14 July 2016, including the findings and sanctions imposed by the First Respondent on 9 November 2016.

- [2] Advocate Montzinger appeared for the Applicant and Advocate N Nyman appeared for the Respondents.
- [3] The factual matrix underpinning this application, in summary, is the following. The Applicant is currently the Provincial Chairman of the Fourth Respondent, the ANC, in the Western Cape. In February 2016, the Applicant was summonsed to appear before the IC in respect of allegations of sexual harassment of a young woman “LW” during the ANC’s 108 anniversary celebrations that was held in Rustenburg in early January 2016. LW was apparently invited by the Applicant to accompany him and two other persons to the ANC celebrations. They travelled from Cape Town to Rustenburg by car and en-route stayed overnight in Kimberley. It was during this trip that the allegations of sexual harassment against the Applicant surfaced.
- [4] The above-mentioned allegations culminated in a criminal investigation by the South African Police Service (“SAPS”)

and a criminal complaint was laid against the Applicant. SAPS investigated the complaint and during May 2016, the National

Prosecuting Authority (“NPA”) informed the Applicant that it would not prosecute the complaint against him.

- [5] The Provincial Executive Committee (“PEC”) of ANC in the Western Cape, in January 2016, after the allegations of sexual harassment surfaced took a decision to refer the Applicant’s matter to the IC.
- [6] In February 2016, the Applicant was summonsed to appear before the IC in respect of the allegations made by LW.
- [7] It needs to be mentioned that the IC is a committee of the ANC’s National Executive Committee (“the NEC”). One of the IC’s main responsibilities is, inter alia, to “[p]rotect the image of the ANC” and “[to take] corrective action, excluding disciplinary action against leaders and members who are facing damaging allegations of improper conduct”.
- [8] The IC during the period February to April 2016, interviewed amongst others, the Applicant and LW. A report was compiled and produced on 4 July 2016 (“the Report”). In the Report, the IC recommended that the allegations against the Applicant be referred to the ANC’s National Disciplinary Committee (“the NDC”).

- [9] The Applicant, in a letter dated 1 February 2016, was informed by the deputy chairperson of the IC that at the conclusion of the proceedings, it will prepare a report to the NEC and a copy thereof will be forwarded to him which will include the IC's findings and recommendations.
- [10] A copy of the Report was not immediately made available to the Applicant. This state of affairs led to a flurry of correspondence between the Applicant and the Second Respondent, Mr Mantashe, regarding the delivery of the Report.
- [11] According to the Applicant, despite his attempts to obtain the Report his requests were met with resistance. Mr Mantashe has a different view on this issue. According to Mr Mantashe, in a letter dated 12 July 2016, he requested the Applicant exercise some patience as the Report of the IC (who is a sub-committee of the NEC) was only received by him on 10 July 2016. According to Mr Mantashe, the Report at that time needed to be discussed by other responsible structures in the ANC, namely the National Working Committee, the National Executive Committee and the National Officials before a final decision could be taken regarding the Report. The Applicant was also informed that the ANC was in election mode for the Local Government Elections that was held on 3 August 2016, and that some officials involved are high ranking government officials with other commitments and cannot be assembled at short notice.
- [12] The Applicant, however, decided on 25 July 2016 to institute an application on an urgent basis against the Deputy Chairperson of the IC, Mr Mantashe as the Secretary General, and the ANC for the release of the Report.
- [13] On 27 July 2016 the parties reached a settlement as to when the Report will be released to the Applicant. This settlement was made an Order of Court by Klopper AJ.
- [14] In terms of Paragraph 2 of the Order of Court, Mr Mantashe was ordered to deliver the complete Report to the Applicant's erstwhile Attorneys.
- [15] A copy of the Report was ultimately handed to the Applicant on 27 July 2016. In a letter dated 15 August 2016, the erstwhile Attorney of the Applicant confirmed that the High Court application was withdrawn after receiving a copy of the Report. Paragraph 3 of the letter recorded the following:
- 'Having studied the Report our client is now more convinced than ever that the Report is not only fatally flawed but was inspired by a desire to settle a local factional ANC dispute.'
- [16] At paragraph 5 of the letter it is stated that "many of the annexures and documents mentioned in the Report, was [sic] not supplied".
- [17] In paragraph 6 of the letter, the Applicant noted the list of documents it now sought, namely:

- 1.1 The transcripts and records of the interviews with Angie Motshega and Derek Hanekom;
- 1.2 The affidavit of Ilse Folscher;
- 1.3 Copy of the Report filed by the NEC deployees of the Western Cape led by Derek Hanekom;
- 1.4 Transcript of the interview conducted with me by the Commission;
- 1.5 Transcript of LW's interview with the Commission;
- 1.6 Copies of LW's statements;
- 1.7 Copies of any other statements considered by the Commission;
- 1.8 Copies of any other documents mentioned in the Commission's report.

[18] The following day, 16 August 2016, Mr Mantashe replied by stating, inter alia, that "all the information sought in your letter could be requested and obtained at the pre-hearing conference". The letter continued and it was recorded that "As your client is aware, neither the National Officials nor the National Executive Committee can intervene in the disciplinary machinery of the ANC".

[19] The NDC, on 22 August 2016, issued a charge sheet against the Applicant containing three charges, which consists inter alia of abusing his office for sexual or any other undue advantage, and the making of certain utterances which brought or could potentially bring the ANC into disrepute.

[20] On 23 August 2016, the Attorney of the Applicant sent a letter to the current Respondents' Attorneys stating the following:

'1. We refer to the correspondence received from your client on 16 August 2016.

2. We are concerned that all of the documents we requested in paragraph 5 of our letter of 15 August 2016 has not been received despite this being specifically included in the Court Order under case number 13132/2016. (the Klopper AJ, Order)

3. This is an issue between our client and Mr Mantashe in his official capacity and compliance is sought without further delay by close of business on Wednesday, 24 August 2016.'

[21] The abovementioned letter was not met with a response.

[22] On 22 September 2016, the Applicant requested further particulars to the charge sheet. The request included a request for copies of the documents received by the Commission.

[23] The ANC's Chief National Presenter, during October 2016, in its reply to the request for further particulars, answered the request for documents as follows at paragraph 9:

'The Integrity Commission Report will not be submitted as evidence and, as such, the particulars sought are not relevant.'

And at paragraph 15:

‘The information sought is not necessary for the purpose of pleading or preparation for the disciplinary hearing.’

- [24] The disciplinary enquiry was held during November 2016. The Applicant elected not to attend the proceedings but was represented by his Attorney who restricted his submissions to the request for the documents.
- [25] On 9 November 2016 in its written findings, the NDC found the Applicant guilty of only two charges and suspended him for a period 5 years.
- [26] On 15 November 2016 the Applicant’s Attorney sent a letter of demand to the current Respondents’ Attorneys requesting it to provide the documents by 16 November 2016, failing which the Applicant will approach this Court on an urgent basis.
- [27] This application was launched on 22 November 2016 and the matter was set down on 30 November 2016 for hearing but was postponed to 6 December 2016 at the Applicant’s request.
- [28] The Respondents oppose the relief sought by the Applicant, and raised various grounds in opposition to the relief sought. The points raised are primarily directed at the relief as contained in Part A of the notice of motion, although some grounds are also directed to deal with Part B of the notice of motion. The grounds of opposition include a number of points in limine, inter alia urgency, the existence of alternative remedy, res judicata and the lack of jurisdiction.
- [29] As a result of the view I have taken in this matter, it is unnecessary to consider all of them.
- [30] It is trite that in order to obtain a final interdict the Applicant must establish that it has a clear right, that an unlawful

interference with the right has actually taken place or is reasonably apprehended and that there is no other satisfactory remedy available to him. Even if those requirements are satisfied, the court may in the exercise of its discretion decline to grant an interdict. See Erasmus Superior Court Practise Vol 2 at D6-12 and the cases referred to therein.

- [31] At the heart of the Applicant’s complaint is the purportedly incomplete Report he received pursuant to an order of this Court on 17 July 2016. Moreover, according to the Applicant, he urgently required the said documents on or before 2 December 2016 to timeously lodge his appeal or review against the findings of NDC that was chaired by the First Respondent. The Applicant further gave evidence on the importance of the documents in order to prepare his defence as, according to him, on a mere perusal of the Report the findings and deliberations of the IC were unlawful, irrational, totally removed from the facts and only aimed to endorse a deliberate agenda to unseat him from his leadership position of the ANC, in the Western Cape.

[32] The claim by the Applicant that the IC's report was aimed to endorse a deliberate agenda to unseat him from his leadership

position in the Western Cape was rejected as unfounded by the Respondents. It was repeatedly stated by the Respondents that the

Report was not used as evidence during the NDC proceedings or in its findings and recommendations. Moreover, Mr Mantashe implored the Applicant to adhere to the constitution of the ANC and exhaust the internal remedies available to him.

[33] It is now well established in our law that "a political party is a voluntary association founded on the basis of mutual consent. 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". See *Matlholwa v Mahuma* [2009] 3 ALL SA 238 (SCA) at para [8]. As such a voluntary association's power to punish offending members must be exercised in conformity with the terms of its constitution. A court will not normally intervene in the internal domestic affairs of a voluntary association duly constituted and operating in terms of its rules, but will reluctantly intervene where the domestic tribunal is properly constituted but fails to follow the prescribed procedural rules of its constitution or if it acts ultra-vires or unlawfully. In this regard see *Yiba and Others v Gospel Church* 1999 (2) SA 949 CPD at 961 D and *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) at para [16].

[34] In the present instance, the Applicant's rights emanate from his contractual relationship with the ANC. As member of the ANC the Applicant is entitled to be treated fairly and in accordance with the rules and procedure of the ANC's constitution.

[35] The relief sought in Part A by the Applicant, in my view, is premature and ill-conceived. On a careful reading of the ANC's constitution, Rule 25.24 provides that '[W]here the NDC acts as a disciplinary tribunal of first instance, an appeal from or review of its decision shall be to the National Disciplinary Committee of Appeal' ("the NDCA"). Furthermore, the Rule empowers the NDCA to '[U]phold the appeal and set aside the decision of the NDC; dismiss the appeal and confirm the sanction imposed by the NDC; dismiss the appeal and impose appropriate sanction; uphold the application for review and refer the matter back to the NDC for rehearing or with an appropriate directive; uphold the application for review, consider the merits and impose an appropriate sanction, if necessary; and uphold or dismiss the application'. The decision of the NDCA is final.

[36] The Applicant's contention that he could not exhaust his internal remedies as long as the documents are not provided to him is contrived. The Applicant indeed instituted internal review proceedings as envisaged by the ANC's constitution on 1 December

2016. There is nothing before me to suggest that the NDCA will not give the Applicant a fair hearing whether on review or appeal as provided for in its constitution. Moreover, the Applicant failed to advance any cogent evidence that his internal remedies would be ineffective, futile and or stifled.

[37] Although Courts are duty bound in terms of the Constitution to uphold the Rule of Law and to provide aggrieved litigants access to justice, this is clearly not a matter that falls within those categories where judicial interference is warranted in the domestic affairs of a voluntary association. In my view, to not allow the NDCA the opportunity to exhaust its own existing mechanisms would be to undermine the very essence of the ANC's constitution and the autonomy of its internal processes. Although the relief sought in Part B stands over for later determination, due deference to the NDCA in that matter may equally be applicable.

[38] For these reasons, the relief sought by the Applicant in Part A cannot be sustained.

[39] It follows that the Application must be dismissed.

[40] In the result, the following order is made:

The Application is dismissed with costs.

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LE GRANGE, J

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