

SOUTH AFRICA / JUDGMENT

Mangope v United Christian Democratic Party (173/2011)

[2012] ZANWHC 51 (17 May 2012)

[2012] ZANWHC 51

COURT

North West High Court, Mafikeng

BEFORE

N Gutta

CASE / FILE NUMBER

173/2011

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NORTH

WEST HIGH COURT, MAFIKENG

CASE NO. 173/2011

In

the matter between:

LUCAS

MANYANE MANGOPE

.....APPLICANT

and

UNITED

CHRISTIAN DEMOCRATIC PARTY

.....RESPONDENT

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] The applicant launched an application in two parts. Part A was an urgent application to postpone a meeting of the Federal Congress of the respondent, scheduled for 29 January 2011, pending Part B. The application was heard on 28 January 2011 and was dismissed with

costs. In Part B, which is before me today, the applicant is seeking an order that the decision of the purported Federal Council (“the Council”) of 07 January 2011 to terminate the applicant’s membership of the respondent, be reviewed and set aside, and that the respondent pay the costs, including the costs of 28 January 2011.

B.

FACTS

- [2] The applicant attended a disciplinary hearing on 15 December 2010, on 17 charges. It is common cause that the applicant did not participate in the disciplinary hearing and left before the charges were put to him.
- [3] The disciplinary hearing continued in the applicant’s absence and he was found guilty on all 17 charges.
- [4] On 07 January 2011, the Council met and resolved to recall the applicant from the North West Provincial Legislature (“the Legislature”) and to terminate his membership of the respondent. This was communicated to the applicant in a letter dated 07 January 2011. The applicant, after receipt of the said notice addressed a letter to the speaker of the Legislature, wherein he resigned as a member of the Legislature with effect from 31 January 2011.

C. POINTS IN LIMINE

- [5] The respondent raised two points in limine, namely, lack of jurisdiction and the second that the applicant had waived his right to apply for a review.

LACK OF JURISDICTION

- [6] The respondent submitted that the Court does not have jurisdiction to hear the application as, at the time that the application was launched, the applicant had resigned his seat in the Legislature and had no proprietary interest in his continued membership of the respondent.
- [7] Mr Swart, who appeared on behalf of the respondent, submitted that the applicant is a seasoned politician and litigant who voluntarily tendered his resignation from the Legislature. He submitted that the applicant had no proprietary interest in the respondent at the time of the launch of the application and that the applicant had other options available to him, namely, to bring an urgent application challenging the expulsion.
- [8] Mr Swart relied on the case of *Mcoyi & Others v Inkatha Freedom Party; Mgwaza-Msibi v Inkatha Freedom Party* 2011 SA 298 (KZP) at 32, where it was held that:

“The applicant must demonstrate to the Court that he or she stands to lose some proprietary interest if he or she is expelled from the party. Proprietary interest has been established in cases where the party members were also municipal councillors by virtue of their membership of the party. (See Sibiya & Others v Inkatha Freedom Party & Others [2006] JOL 17118 (N); Shunmygan & Others v Newcastle Local Municipality & Others; National Democratic Convention v Matthew Shunmugan & Others [2008] 2 All SA 106 (N)). Proprietary interest has also been established in cases where the affected member was also a member of the provincial legislature. (See Max v Independent Democrats & Others 2006

(3) SA 112 (C) at 115G–H; Diko & Others v Nobongoza & Others 2006

(3) SA126 (C) at 127E–F; Matlholwa supra.”

[9] Counsel for the applicant, Mr Semenya SC, submitted that the only remedy the applicant had, after he was expelled, was to resign from his position on the Legislature, which is in accordance with Section 106(3)(c) of the Constitution of the Republic of South Africa Act of 1996 (“the Constitution”).

[10] He also referred the Court to the case of Mcoyi & Others v Inkatha Freedom Party; Mgwaza-Msibi v Inkatha Freedom Party supra and submitted that in that case, the appeal process was alive, while in casu the respondent’s Constitution (“the UCDP Constitution”) does not provide for an appeal.

[11] Mr Semenya submitted that there is no authority for the proposition that the test of proprietary interest is at the launch of the proceedings and submitted that the test of proprietary interest is when the cause of action arose.

ANALYSIS

[12] It is common cause that the applicant was a member of the Legislature on 07 January 2011 when his membership in the respondent was terminated. He had a proprietary interest by virtue of his membership of the Legislature. See Max v Independent Democrats & Others 2006 (3) SA 112 (C) at 115E–H; Diko & Others v Nobongonza & Others 2006

(3) SA 126 (C) at 127E–F.

[13] Section 106(3)(c) of the Constitution provides that a person loses membership of a provincial legislature if that person “ceases

to be a member of the party that nominated that person as a member of the legislature, unless that member has become a member of another party in accordance with Schedule 6A”.

[14] I am of the view that there is no merit in the submission that the applicant, by his own conduct, terminated his proprietary interest because it is the Council, who expelled the applicant and who resolved to recall him from the Legislature. The applicant

accordingly ceased to be a member of the Legislature in terms of the Constitution, and only resigned as a member of the Legislature after he received the letter dated 07 January 2011.

[15] There is also no basis in law that the determination of the proprietary interest is when the applicant launched the application.

The test for proprietary interest is when the applicant's cause of action arose, that is, on the day the applicant was notified that his membership of the respondent had terminated.

[16] Accordingly, the applicant has demonstrated that his proprietary interest was lost following his expulsion, which expulsion the applicant is now seeking to review and set aside. The point in limine is accordingly dismissed.

THE APPLICANT WAIVED HIS RIGHT TO APPLY FOR A REVIEW

[17] Mr Swart submitted that the applicant by resigning as a member of the Legislature with effect from 31 January 2011, and by activating his right to pension from 01 February 2011, ignored the constitution, accepted his expulsion and waived his right to apply for a review.

[18] Mr Swart contended that the applicant is a seasoned politician who knew that he had the right to challenge his expulsion by launching an urgent application instead of resigning from the Legislature. That the applicant's conduct is inconsistent with the intention to review his expulsion.

[19] Mr Semenya submitted that the second point in limine is allied to the first point and that the applicant's resignation was in accordance with the Constitution, due to:

19.1 there being no appeal procedure in the UCDP Constitution;

19.2 the decision to expel stands until reviewed;

19.3. pending the review, the applicant is not a member of the respondent and cannot therefore sit as a representative of the respondent in the provincial legislature.

[20] The onus is on the party relying on waiver to allege and prove the waiver on a balance of probabilities. In assessing the probabilities,

the factual presumption that a party is not lightly deemed to have waived his rights should be borne in mind. See *Hepner v Roodepoort-Maraiburg Town Council* 1962

(4) SA 772 (A); *Feinstein v Niggli* 1981

(2) SA 684 (A).

[21] The respondent must allege and prove that the applicant abandoned the right that is being asserted, namely, to challenge his expulsion or removal from the respondent.

[22] It is common cause that the respondent terminated the applicant's membership of the respondent and a consequence of such termination in terms of the Constitution, is that, the applicant ceases to be a member of the Legislature. Accordingly, the applicant's

resignation from the Legislature cannot be viewed as an acceptance of the Council decision to terminate his membership and to waive his right to review the respondent's decision.

[23] Accordingly, I am of the view that the respondent failed to discharge the onus to prove the waiver and the point in limine fails.

D. GROUNDS OF REVIEW

[24] Turning to the merits, the applicant has raised the following grounds of review:

"16.1 The decision is ultra vires the constitution of the respondent;

16.2 There is bias or a reasonable suspicion of bias;

16.3. A mandatory and material procedure prescribed by the constitution of the respondent was not complied with;

16.4. The decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered;

16.5. The decision was not rationally connected to the information before the Federal Council; and

16.6 The decision is unlawful."

[25] The grounds of review will be dealt with hereinbelow.

ULTRA VIRES THE EMPOWERING PROVISION

[26] Mr Semenya submitted that this ground requires a consideration of Clause 13 of the UCDP Constitution, under the heading "Disciplinary Procedures". Clause 13 reads:

"13.1. The Federal Council may, in its discretion and for whatever reason and in the interest of the Party:

13.1.1. Ban any member of the Party upon which his/her membership is automatically terminated;

13.1.2. Suspend the rights and powers of any members [sic] for such a period and subject to such conditions as may be deemed fit; and

13.1.3. May dissolve or suspend any Branch, Branch Committee, Region or Regional Committee for such a time and subject to such conditions as Way [sic] be deemed fit.

13.2. The Federal Council can give written notice to any person or body of its Proposed consideration to ban, dissolve or suspend such person or body, hear any person or body or receive any proof with regard thereto, and give reasons for its decision, which decision will be final and binding.

13.3. Every member of the Party, who is also a member of either the National Assembly or a Provincial Legislature must respect each

decision by the Federal Council, the Federal Congress and the Parliamentary Caucus must execute such decisions.

The National Leader or the Deputy National Leader in the event of clause 11.2 or 11.3 being applicable, can after consultation with the Federal Council give written notice to a member who has deviated from such decisions, to the effect that his membership of the caucus of the Party is terminated.

13.4. Every member of the Party who deviates from a decision of the Federal Congress, the Special Congress, the Federal Council or the Parliamentary Caucus makes himself/herself liable for expulsion from the party by the Federal Council.”

[27] He referred the Court to the letter from the Council dated 07 January 2011, wherein the applicant’s membership of the respondent was terminated in accordance with Clause 13.4 of the UCDP Constitution. He questioned the function of the Council and whether the Council exercised its powers in terms of the UCDP Constitution.

[28] Mr Semenya contended that charges 1 to 17 do not mention a Council decision nor a deviation from a Council decision. He submitted that the Council did not expel the applicant because of a deviation from a decision in terms of Clause 13.4 of the UCDP Constitution and that the respondent was acting ultra vires when they relied on Clause 13.4 to expel the applicant.

[29] Mr Swart submitted that it was not necessary for the respondent to identify, in the charge sheet, which of the charges were brought in terms of Clause 13.4 of the UCDP Constitution and which were not.

[30] He submitted that the respondent relies on charges 2, 3, 4, 5, 12 and 14, as charges based on the applicant’s deviation from the decisions of the Federal Congress, Special Congress and the Council in terms of Clause 13.4 of the UCDP Constitution.

[31] Mr Swart submitted further that the remaining charges, namely, 1, 6, 7, 8, 9, 10, 11 and 13 justified expulsion in terms of paragraph 13.1 of the UCDP Constitution because when read in context, the word ‘ban’, clearly means ‘expulsion’.

[32] The doctrine of ultra vires literally interpreted means acting beyond the limits of power.

[33] In *Matlholwa v Mahuma & Others* [2009] JOL 23355 (SCA), the Supreme Court of Appeal held that:

“[8] As was correctly emphasized 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 & 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 unambiguous implication from the terms of its constitution, read as a whole, that it was the intention to afford it such a power.’

Members may thus be expelled only 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.”

[34] The respondent derives its powers from the UCDP Constitution and could only excise its powers in terms of the said Constitution. The UCDP Constitution, being an agreement, must be construed according to the ordinary rules of construction applicable to contracts in general.

[35] Hence, the question is whether the respondent acted ultra vires the UCDP Constitution in expelling the applicant in terms of Clause 13.4. The other clause in the UCDP Constitution which gives the Council the power to terminate the applicant’s membership is Clause 13.1. This raises the following questions for consideration, namely:

35.1. whether the respondent could expel the applicant in terms of Clause 13.1 of the UCDP Constitution and if the answer is in the affirmative;

35.2. was the applicant indeed expelled in terms of Clause 13.1 or Clause 13.4 of the UCDP Constitution;

35.3. was the decision to expel the applicant ultra vires the UCDP Constitution?

- [36] Disciplinary procedures are dealt with in Clause 13 of the UCDP Constitution. Clause 13.1 gives the Council the discretion to ban any member, whereas Clause 13.4 gives the Council the power to expel a member of the party, which power is limited to a deviation from a decision as stated supra.
- [37] The applicant submitted that he could only be expelled in terms of Clause 13.4 of the UCDP Constitution. Mr Semenya looked at the definition of ‘ban’ in the Concise Oxford Dictionary, 9th Edition, which reads as, (v.t) forbid, prohibit, (n) a formal or authoritative prohibition, and submitted that ‘ban’ and ‘expel’ have different meanings, and the respondent could not expel the applicant in terms of Clause 13.1.
- [38] The respondent, on the other hand, contended that the words ‘ban’ and ‘expel’ are the same and that the applicant could be expelled in terms of Clause 13.1 of the UCDP Constitution.
- [39] One turns to the law of interpretation when considering the meaning of the words ‘ban’ and ‘expel’. Joubert JA in *Coopers & Lybrand v Bryant* [1995] ZASCA 64; 1995
- (3) SA 761 (A) 767E–768E, summarized a technique adopted by our Courts in interpreting the language in documents:

“According to the ‘golden rule’ of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument . . . The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself . . . The correct approach to the application of the ‘golden rule’ of interpretation after having ascertained

the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and

purpose of the contract . . .;

- (2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted . . .;
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.”

- [40] The words must be read in their context, as Rumpff CJ stated in *Swart v Cape Febrix (Pty) Ltd* 1979

- (1) SA 195 (A) at 202C:

“Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in ’n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op ’n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat ’n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel.”

[41] The ordinary grammatical meaning of ‘ban’ as contained in the online Oxford Dictionary:

“Verb: officially or legally prohibit (something)

officially prevent (someone) from doing something.

Noun: an official or legal prohibition

an official exclusion of a person from an organization, country or activity.”

(Own emphasis)

[42] The online Oxford Dictionary of ‘expel’ is:

“Verb: officially making someone leave a school or other organisation.”

[43] Hence I am of the view, after having regard to the ordinary meaning as well as the context, that the word ‘ban’ in Clause 13.1 of the UCDP Constitution can also be interpreted to mean expel, i.e. the removal or exclusion of the applicant as a member of the respondent.

[44] Turning to the next question, namely, whether the applicant was expelled or removed as a member of the respondent in terms of Clause 13.1 or Clause 13.4 of the UCDP Constitution.

[45] There were 17 charges in the charge sheet. In the letter dated 07 December 2010, the Acting UCDP Leader, P.H.K. Ditshetelo, and M.N. Matladi, the Secretary General UCDP, summoned the applicant to attend the disciplinary hearing on the charges contained in a charge sheet. The applicant was informed inter alia that:

“.....

You will be entitled to lead all relevant evidence as you wish, and will be entitled to call witnesses. You will NOT however be entitled to legal representation.

At the end of the hearing the Chairperson will make a recommendation to the Federal Council or Federal Congress, and it will be for that body to decide what steps to take against you, if any.

If you elect not to attend the disciplinary hearing it will continue in your absence, and you are advised that the charges are such that the Federal Council/Congress may decide to expel you from the Party.”

[46] It is common cause that:

46.1. none of the charges made reference to a deviation in terms of Clause 13.4 of the UCDP Constitution, namely, the deviation from a decision of the Federal Congress, the Special Congress, the Council or Parliamentary Caucus;

46.2. charges 2, 3, 4, 12 and 14, which the respondent relies on to justify expulsion in terms of Clause 13.4 are silent on any deviation of the Council, special congress or parliamentary caucus decisions and further do not state when and by whom the decision was made and when the decision was deviated from;

46.3. the finding of the disciplinary committee in respect of charges 1 to 16 was that:

“... the defendant is found guilty on all charges from 1 to 16 and the committee recommends for his expulsion based on Section 13.4 of the party constitution because:

- a) he failed as a leader (charges 1 to 14); and
- b) he failed as a member of the party (charges 15 and 16)

He may be allowed to re-apply for membership after 5 (five) days.”

46.4. the disciplinary committee recommended that the applicant be expelled in terms of Clause 13.4 of the UCDP Constitution.

[47] The letter from the Council dated 07 January 2011 reads:

“The Special Federal Council meeting held today, 07 January 2011, having considered the report of the Disciplinary Committee regarding your case has resolved that you be recalled from the North West Provincial Legislature and that your membership of the United Christian

Democratic Party be terminated in accordance with Section 13.4 of the UCDP Constitution.

.....

The decision of the Federal Council is prompted by your under performance in the North West Provincial Legislature and failure to keep to the letter the latter part of the Oath or Solemn Affirmation of members of the provincial legislature as set out in Schedule 2 Section 4.(1) in the Constitution of the Republic of South Africa, 1996, (Act 108 of 1996). This goes for charge no 17 of the charge sheet.

Charges 1 to 14 relate to your failure to give decisive leadership in terms of the Party constitution upon which you acted arbitrarily even on being offered legal opinion at great cost to the party.

Insofar as charges 15 and 16 are concerned you acted in an improper and unbecoming manner for a senior member of the United Christian

Democratic Party.”

[48] What is apparent from the letter is that there is no reference to the word ‘expel’, but rather that the applicant’s

‘membership of the United Christian Party is terminated in accordance with Section 13.4 of the UCDP Constitution’.

[49] Hence, when considering the reasons for the termination of the applicant’s membership in both the report of the disciplinary

committee and the letter from the Council, it is apparent that the applicant’s membership could have been terminated in terms of Clause 13.1 of the UCDP Constitution.

[50] The decision to expel the applicant appears to be on grounds not relating to Clause 13.4 of the UCDP Constitution. This the respondent admits in so far as charges 1, 6, 7, 8, 9, 10, 11 and 13 are concerned.

[51] I am of the view that when considering the totality of the evidence, namely, the letter summoning the applicant to attend a disciplinary hearing, coupled with the charges, the report of the disciplinary committee and the recommendation of the disciplinary committee, together with the letter from the Council informing the applicant that the applicant’s membership has been terminated, that the decision of the respondent to expel the applicant is consistent with the UCDP Constitution and is accordingly not ultra vires the UCDP Constitution.

BIAS OR REASONABLE SUSPICION OF BIAS

[52] The applicant, in his founding affidavit avers that:

52.1. the disciplinary panel was not impartial, but comprised individuals with a recorded bias against him, such as Reverend Makhuba against whom he lodged a complaint regarding his impartiality at the time of the disciplinary hearing;

52.2. the disciplinary panel was not constituted by an independent tribunal as was decided by the Council;

52.3. the Council meeting held on 07 January 2011 was conducted by the National Chairperson, the Honourable I.S. Mfundisi, roll call was done by the Secretary General, the Honourable M.N. Matladi, and one of the managers present was I.C. Ditshetelo (hereinafter referred to as “the three persons”);

52.4. the applicant had expelled the three persons from the party on 02 October 2010, which decision was successfully reviewed, under case no. 2596/2010, and set aside by this Court on 24 November 2010. Leave to appeal the decision was granted to the applicant on 17 January 2011;

52.5. all three persons were not impartial and should not have participated in the decision of the Council to terminate his membership.

[53] Mr Semenya submitted that the three members of the Council were highly placed members and played a pivotal role. They were not ordinary members. That the perception of bias is the body that makes the decision and not the individuals and if the body is contaminated, then the body is incapable of arriving at a decision. That there is a reasonable apprehension of bias and that the Council's decision should be set aside.

[54] It is the respondent's case that:

54.1. a disciplinary panel may consist of party members as well as members of the Council;

54.2. neither Mrs Matladi, Mrs Ditshetelo nor Mr Mfundisi were biased. They considered the findings of the disciplinary committee objectively;

54.3. the question whether Mrs Matladi was entitled to be part of the process will be decided by the Full Bench;

54.4. the Council that took a decision to expel the applicant consisted of 156 members and that it is untenable to suggest that three of the 156 members could have influenced the others to vote in favour of the expulsion. The voting records show that there was no uniformity, which is indicative of the fact that members of the Council were not under undue influence.

[55] The applicant appeared to have abandoned the question of bias or reasonable suspicion of bias in so far as the disciplinary

proceedings are concerned, as there was no mention made in the applicant's heads of argument nor in the submissions to Court.

In any event, it appears that the applicant made a bald allegation in relation to the impartiality of the disciplinary panel as he failed to substantiate and provide proof in support of the allegation of bias or reasonable suspicion of bias.

[56] Turning to the issue of bias or reasonable suspicion of bias in relation to the Council.

[57] A party raising a perception of bias is required to show that a reasonable person in his/her/its position would have held an

apprehension and that such apprehension was reasonable in the circumstances. See *President of the Republic of South African Rugby Union v [1999] ZACC 9; 1999*

(4) SA 147 CC at paragraph 45; *Sager v Smith* 2001

(3) SA 1004 SCA at 1010F-G; *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (2) SA 705 (CC) at paragraph 14.

[58] Although the test for bias was formulated in the context of presiding officers in courts of law, there is authority for the proposition that it also applies to tribunals performing quasi-judicial and administrative functions. See *Liberty Life Association of Africa Ltd v Kachelhoffer & Others* [2004] 10 BLLR 1043 C at paragraph [30].

[59] The test applied is an objective one. Where it is found that there was a definite interest, be it material, pecuniary or any other interest resulting in bias, bias is established even if no injustice is proved.

[60] It is common cause that the three persons were the National Chairperson, the Secretary General and a manager, and it is the

National Chairperson who conducted the Council meeting and who read the charges and the Secretary General who conducted the voting as stated supra. It is also common cause that there was litigation pending between the applicant and the three persons.

[61] The three persons and other members of the respondent, on 23 November 2010, successfully obtained an interdict from this Court, under case no. 2596/2010, wherein the following order was granted:

“.....

1.1 doing or purporting to do anything in the name of and/or on behalf of the first applicant;

1.2 convening or attending any meeting of the first applicant;

1.3. making contact with any members of the first applicant in connection with the affairs of the first applicant;

1.4. attending any meetings of the North West Provincial Legislature as one of the representatives of the first applicant in that body, and/or in any other way participating in the activities of the North West Provincial Legislature as one of the representatives of the first applicant;

1.5. entering any of the premises owned and occupied by the first applicant for any purpose whatsoever;

1.6. carrying out any duties at all in the name of and/or on behalf of the first applicant whether on the instructions of the first respondent and/or otherwise;

1.7. making any contact with any members of the first applicant relating to and/or connected with the affairs of the first applicant;

1.8. entering any premises of the first applicant whether owned or occupied by the first applicant;

1.9 attending any meeting of the first applicant other than as members of the first applicant and in that capacity alone;

1.10. that the communication by the party under the hand of the first respondent that the second, third and fourth applicants had been expelled from the party effectively from 01 October 2010 and consequently from the date were not lawfully appointed representatives of the party in the National Parliament and North West Provincial Legislature of the Republic of South Africa is unlawful and of no force or effect.”

- [62] The applicant applied for leave to appeal to the full bench, which application was granted on 17 January 2011. A notice of appeal dated 27 January 2011 is attached to the applicant's founding affidavit.
- [63] The disciplinary hearing and the recommendation of the disciplinary committee was held on 15 December 2010 and the decision of the Council to terminate the applicant's membership was taken on 07 January 2011.
- [64] As litigation was pending between the applicant and the three persons, when the decision was taken by the Council to expel the applicant, the question of bias or perception of bias is glaringly obvious. The three persons who were initially expelled by the applicant and whose expulsion was set aside by this Court played a significant role in the Council, when Council took the decision to expel the applicant.
- [65] The fact that the Council constituted 156 members when the decision was taken does not alter the perception of bias, more especially when the role of the three persons in the Council is considered. As Hoexter JA in *Ndimani v Meeg Bank Ltd (bank of Transkei)* 2001 (1) SA 560 (SCA) said:

"It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the de minimis principle) he is disqualified, no matter how small the interest may be. . . . The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter."

Also see *BTR Industries South Africa (Pty) Ltd & Others v Metal & Allied Workers Union & Another* [1992] 4 All SA 701 (AD) at 720.

- [66] The nature of the litigation that is pending between the parties, the role played in the Council by the three persons and the decision to expel the applicant are all intertwined and cannot be viewed as separate and unrelated events.
- [67] Accordingly, I am of the view that the applicant is entitled to have the decision of the respondent set aside on the grounds of bias or reasonable suspicion of bias.
- [68] Although, in the light of the foregoing, it is not necessary for me to consider the remaining grounds of review, I have however briefly considered the following grounds of review, namely, that 'irrelevant considerations were taken into account or relevant considerations were not considered', as well as 'rationally connected to the purpose of the empowering provision deserves mention'.

irrelevant considerations were taken into account or relevant considerations were not considered; RATIONALITY CONNECTED TO THE PURPOSE OF THE EMPOWERMENT PROVISION

- [69] The ground of review, namely, relevant considerations not being considered, overlaps with the requirements of rationality and will be considered together. See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000
- (1) SA 1 (CC) at paragraphs 47, 69 and 226; *Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa & Others* [2000] ZACC 1; 2000
- (2) SA 674 (CC) paragraphs 82–83.
- [70] Mr Semenya submitted that each and every member had to satisfy himself/herself that the finding and the recommendation of the disciplinary committee was correct. For them to do this, the report of the disciplinary committee had to be made available.
- [71] Mr Semenya submitted that the decision was not rationally connected to the purpose of the empowering provision or to the documentation before it as there was no documentation before the Council and no deliberation held to determine whether the evidence justified the finding.
- [72] In paragraph 12.4 of the respondent's answering affidavit, the respondent avers that in terms of Clause 13.1, the Council can expel a member for any reason in the party's interests and that this is what the Council did based on the guilty finding on all the charges against the applicant.
- [73] Mr Swart submitted that the decision was rational as the applicant was expelled on the grounds relied upon in the charges. It was contended that the decision was not flawed because the disciplinary committee report was not made available as the report merely "recounts the brief appearance of the applicant, recites the charges and states the guilty finding in each case".
- [74] Both counsel for the applicant and the respondent relied on the SCA decision of *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004
- (3) SA 346 SCA. The relevant portion of the judgment at paragraphs [20] and [21] are:
- "[20] In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable: cf Bel Porto School Governing Body and Others v Premier, Western Cape, and Another. As made clear in Bel Porto, the review threshold is rationality. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria now laid down in s 6(2)(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see s 6(2)(h))."*

[21] We were invited by the respondent's counsel to adopt, instead of rationality, the test of perversity, in the sense, so suggested counsel, of utter irrationality. In this regard, reliance was placed on the respective passages in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*

[1973] 1 All ER 689 (CA) at 706e; *R v Radio Authority, Ex parte Bull and Another* [1997] 2 All ER 561 (CA) at 578a–b. The first formulates the following test:

‘Was [the authority’s] . . . one which no reasonable authority could have made? In simpler terms, did they make a perverse decision?’

The second reads:

‘The task of a supervisory court in a case of this kind is not to concern itself with the merits of the decision . . . unless that decision can be properly stigmatised as perverse or utterly irrational.’

A reading of those cases reveals that the review ground involved was that of unreasonableness, as developed and expounded in the leading English case of *Wednesbury Corporation*. The passage quoted from the second of the two cases cited by counsel is contained in the judgment of Brooke LJ. In the judgment of Aldous LJ at 577h, the test is put as follows:

‘Is the decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it?’

It is clear that the standard expressed in those cases approximates, to all intents and purpose, to the one constituted by s 6(2)(h) of the Promotion of Administrative Justice Act. The word ‘perversity’ may be appropriate (I need express no opinion on the subject) to the standard set by s 6(2)(h) and *Wednesbury Corporation* but it has no bearing on the rationality test set by s 6(2)(f)(ii) and explained in *Pharmaceutical Manufacturers, Bel Porto and Carephone*. It is the latter test with which we are concerned in the present case. In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying available and the

conclusion

arrived at?”

[75] At the Council meeting, the chairperson of the disciplinary committee, Mr N.J. Mokwena, commenced the discussion of the disciplinary committee report. He read and explained all 17 charges and stated that the committee found the applicant guilty of all 17 charges.

[76] The chairperson of the disciplinary committee then stated that the Council had to deliberate upon the report and take the charges one at a time to decide whether the applicant was guilty or not.

[77] The national chairperson, Mr I.S. Mfundisi, then took over the Council meeting purportedly to discuss the report.

- [78] The first charge and the finding of guilty was read and the floor was opened for discussion. One Mrs Kutu stated that they were not given documentation to refer to and it was explained that the report was not for public consumption.
- [79] Accordingly, it is common cause that the report of the disciplinary committee was not made available to Council members to consider and deliberate on before voting.
- [80] Although the report of the disciplinary committee fails to summarise the evidence in respect of all the charges and has its own shortcomings, the report is relevant and should nevertheless have been placed before the members of the Council to consider and deliberate upon.
- [81] In the case of relevant factors not having been considered, it appears axiomatic that a Court will hold a factor to be relevant only when it is material to the decision to be taken and that the decision would be invalid only if the factor not taken account of materially influenced the outcome of the decision. See *Judicial Review of Administrative Action in South Africa*, J R de Ville, Lexis Nexis Butterworths Revised First Edition, page 180.
- [82] The report by the disciplinary committee, which is based on the disciplinary hearing and in which report the committee recommended
- expulsion is in my view material to the decision to be taken by the Council. The fact that a member of the Council requested sight of the report is indicative of the fact that it was material as the report may have influenced the member when taking a decision.
- [83] I am of the view that the Council too considered the report to be material as they wrote in the letter of expulsion addressed to the applicant that the Special Federal Council meeting considered the report of the disciplinary committee in arriving at its decision.
- [84] As no report was made available, the only conclusion one can reach is that the decision was arbitrary and capricious and that Council in arriving at the decision to terminate the applicant's membership failed to take relevant considerations into account. The disregard for relevant considerations means that there is no rational objective basis justifying the decision to remove the applicant as a member of the respondent.
- [85] Accordingly, I am of the view that the relevant considerations were not taken into account when council took the decision to remove the applicant as a member, which decision was not rationally connected to the documentation before it as the report of the disciplinary committee was not available.

E.

CONCLUSION

- [86] The applicant is accordingly entitled to have the decision of the Council reviewed and set aside.

F. ORDER

[87] In the circumstances, I grant the following order:

- a) The decision of the Federal Council of the respondent on 07 January 2011 to terminate the applicant's membership of the respondent is reviewed and set aside.
- b) The respondent is directed to pay the costs of the application.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 29 MARCH 2012

DATE OF JUDGMENT : 17 MAY 2012

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