

SOUTH AFRICA / JUDGMENT

Mokoena and Others v Magashule and Others (2555/2016) [2017] ZAFSHC 224 (14 December 2017) [2017] ZAFSHC 224

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Mathebula, Mhlambi

CASE / FILE NUMBER

2555/2016

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION. BLOEMFONTEIN

Case number: 2555/2016

In the matter between:

TUMELO JOHN MOKOENA

1st Applicant

SIZWE HLUBI

2nd Applicant

TSEKJSO VICTOR TSIBELA

3rd Applicant

TLALENG MOLOI

4th Applicant

MOTLOUNG LEKHETHO

5th Applicant

MARIA MBONAMBI

6th Applicant

PULANE MOLELEKI

7th Applicant

NTEBOHELENG MOOROSI

8th Applicant

SOLOMON DLAMINI

9th Applicant

MOMATHI NGOZO

10th Applicant

LEBEKO JACOB MONARE

11th Applicant

LEBEKO MAILE

12th Applicant

KINGSLEY LEMPE

13th Applicant

TEBOGOBOZO

14th Applicant

MATOBO KEELE

15th Applicant

PINKY CUZE

16th Applicant

TSHOKOLO MANJIES

17th Applicant

MOTSHWANE KOBUS KOLOBE

18th Applicant

DAVID SHASHA

19th Applicant

BOSALETSE PHEPHENG

20th Applicant

SOPHIA HADINKAME RAMAKAE

21st Applicant

RAMASIMONG DANIEL TAU

22nd Applicant

LANKIRI DANIEL BOLOFO

23rd Applicant

DITSEKE ABRAM MOEKETSI

24th Applicant

BUSISIWE MBOKOTWANE

25th Applicant

SILAS SEJAKE TAU

26th Applicant

and

ELIAS MAGASHULE

1st Respondent

THABO MANYONI

2nd Respondent

WILLIAM BULWANA

3rd Respondent

MAMIKI QABATHE

4th Respondent

MOSEBENZI ZWANE

5th Respondent

MAGGYSOTYU

6th Respondent

NOZILILO MASHIYA

7th Respondent

MALEWATLE NTHEDI

8th Respondent

DISEBO NAKEDI

9th Respondent

JOEY MOCHELA

10th Respondent

MANANA TLAKE

11th Respondent

MANANA SECHOARO

12th Respondent

OLLY MLAMLELI

13th Respondent

SARAH MOLELEKI

14th Respondent

MATHABO LEETO

15th Respondent

CONNY RAMPAI

16th Respondent

LUCYMAPENA

17th Respondent

MAUREENSCHEEPERS

18th Respondent

MONTSHENG TSIU

19th Respondent

PHINDIWE MASEKO

20th Respondent

TATE MAKGOE

21st Respondent

THANDIWE REACHABLE

22nd Respondent

BUTANA KOMPHELA

23rd Respondent

MADALA NTOMBELA

24th Respondent

SEBENZILE NGANGELIZWE

25th Respondent

JONAS RAMOKHOASE 26th Respondent

JACK MATUTLE 27th Respondent

CHARLES STOFIE

28th Respondent

NEELS VAN ROOYEN

29th Respondent

OUPA KHOABANE

30th Respondent

SIZWE MBALO

31st Respondent

TEFETSO PHITSANE 32nd Respondent

THABO MEEKO 33rd Respondent

JIHAD MOHAPI 34th Respondent

AFRICAN NATIONAL CONGRESS 35th Respondent

SELAKE TLADI 36th Respondent

MODISE ELIAS TSHOPO 37th Respondent

BRANCHES OF THE AFRICAN NATIONAL CONGRESS 37th Respondent

CORAM:

VANZYL, J, MATHEBULA, J, MHLAMBI J

HEARD ON:

27 November 2017

MINORITY

JUDGMENT:

MHLAMBI, J

ORDER GRANTED ON: 29 November 2017 REASONS FOR JUDGMENT: 14 December 2017

REASONS

FOR JUDGMENT

MHLAMBI, J

[1] This is a minority judgment, setting out the reasons why I did not concur and dissented from the majority and in particular with paragraph 4 of the majority order; and why I considered that that part of the order should not have been granted. For purposes of this judgment I shall restrict myself to the said paragraph 4 of the order which reads as follows:

"In holding that the aforesaid meetings were irregular, unlawful, unconstitutional and/or in breach of the ANG constitution, the Provincial Conference of the ANC, Free State, scheduled for 1 to 3 December 2017, will be a nullity and is not be held until the aforesaid meetings have been held in a lawful manner and in accordance with the constitution of the ANC"

[2] As indicated in paragraphs 9 and 10 of the majority judgment, the applicants, at the commencement of the proceedings, handed in a draft order narrowing down the relief they would seek, which, in effect, boiled down to the abandonment of the relief initially sought in terms of prayers 4-10 of the notice of motion. Prayers 9 and 10 of the notice of motion are of relevance and read as follows:

"9. The order obtained apparently by agreement on 6 October 2017 directing that the Provincial Elective Conference must be convened between 1-3 December 2017 is rescinded.

10. It is declared that in accordance with the resolution of the National Executive Committee of the thirty-fifth respondent no provincial or regional conferences in the Free State will take place beyond 30 September 2017;"

[3] Paragraphs 4 to 6 of the draft order read as follows:

"4. It is directed that any delegates nominated and/or appointed in the BGM's at the meetings highlighted in annexure 'A' hereto are prohibited from attending the National Conference, to be held on 16 November 2017, and/or the Provincial Conference scheduled for 1 - 3 December 2017;

5. It is declared that as a result of the above mentioned in prayers 2 to 4, the provincial conference scheduled to take place on 1 to 3 December 2017 is fatally defective, unconstitutional, unlawful and breaches the constitution of the ANC;

6. The respondents are interdicted and prohibited from holding, convening, electing leaders, or making any decisions at the

provincial conference, scheduled to take place on 1 to 3 December 2017."

[4] The draft order was in essence a substitution or a paraphrase of the abandoned prayers of the notice of motion. In my view, the notice of motion, save for a few changes, was in essence the draft order for the following reasons: On perusal of paragraph 5 of the draft order, it was evident that paragraph 4(excluding for the moment paragraphs 2 and 3) served as the basis for seeking the granting of the relief in paragraphs 5 and 6. Such orders should not have been granted as they would be prescriptive to the respondents. The introduction of the directive in paragraph 4 prohibiting any nominated and/or appointed delegates from attending conferences was a conduit to the declaratory order and the interdict of the respondents in paragraphs 5 and 6. The remedy sought in these paragraphs was without base and should not have been entertained. Appellants' counsels, on being taxed as to the reasons or the foundation for the court to grant such relief, suggested that should the relief in paragraphs 2 and 3 of the draft order be granted, the court should adopt a robust approach and grant the rest of the relief sought therein. This was in line with the conclusion reached in their heads of argument which stated the following: "The irregularities identified are clearly serious. The (sic) impact on the legality of the attendance by the branch delegates to the PEC election that will take place during the provincial conference. The relief sought in the amended draft order can be granted without more. It should be granted on a final basis because the applicants have demonstrated a clear right to the relief that they seek. "

[5] The effect of the relief sought in the draft order was a circumvention of the difficulties the applicants faced with the proof of the prayers in the notice of motion. I have read the relevant parts of the majority judgment that refer to paragraph 4 of the majority order. It is clear that the majority view was that the applicants had, inter alia, serious problems with the setting aside of the order granted on 6 October 2016[1]. However, in my view, the effect of the order granted by the majority is in effect overriding and rescinding that order without further ado. To hold that the validity of that order could not be challenged and yet be of the view that "the court that issued that order could never have intended that the Provincial Conference was to be held at those dates irrespective of whether it will cause the conference to be unlawful and invalid due to the facts and circumstances subsequent to the issuing of the said order[2]" is not helpful. In granting the order it did, the court descended into the arena. It would appear that the majority judgment is based on Ramakatsa[3] for the justification of the order in paragraph

4. The

difference between that case and the matter at hand is that the former was an appeal of review proceedings while the court, in nthis instance, pronounced itself prognostically. In Ramakatsa[4] the court was careful not to overstep or over-extend itself.

[5] My decision to dissent was also influenced by the following dicta by Justices Moseneke DCJ and Jafta J in Ramakatsa[5]

"[124] In our view, a declaration that the provincial elective conference of the ANC and the decisions taken at the conference are unlawful and void should suffice. We emphasise that the declaration of invalidity applies only to the Provincial Conference. The declaratory order we make does not relate to or affect the rights of delegates who have been elected at properly constituted branch general meetings of the Free State province to serve as delegates at any other conference of the party.

[125] We are disinclined to determine how the political party concerned should regulate its internal process in the light of the declaration made by this Court. We are satisfied that the ANC's constitution confers on the NEC or the National Conference adequate authority to regulate its affairs in the light of the decision of this Court. "

[7] These considerations I found appropriate and applicable in the present matter. In my view the court would over-extend itself if it made an order as envisaged in clause 4 of the draft order, more especially as the conferences being assailed by the respondents were to take place in the future.

[6] There are my reasons.

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[1] See paragraphs 121 and 122 of the majority judgment

[2] See paragraph 122

[3] Ramakatsa and Others vs. Magashule and Others: Case CCT 109/12 [2012] ZAACC 21

[4] Supra

[5] Supra

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