

SOUTH AFRICA / JUDGMENT

Motswana and Others v African National Congress and Others (35398/18) [2019] ZAGPJHC 4 (6 February 2019)

[2019] ZAGPJHC 4

COURT

South Gauteng High Court, Johannesburg

BEFORE

Kathree-Setiloane

CASE / FILE NUMBER

35398/18

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 35398/18

In

the matter between:

AARON

MOTSWANA First

Applicant

MAMONYENYANE

MALEKE Second

Applicant

KUTLWANO

MASISI Third

Applicant

GRAYN

NICHOLAS

JOOD Fourth

Applicant

SUPRA

MAHUMAPELO Fifth

Applicant

and

AFRICAN

NATIONAL

CONGRESS First
Respondent
THE
DISBANDED
PEC 2nd
to 48th Respondents
THE
PROVINCIAL TASK
TEAM 49th
to 78th Respondents

JUDGMENT

KATHREE-SETILOANE, J

- [1] The applicants are branch members of the African National Congress in the North West Province. They seek an order declaring unlawful and setting aside the decision of the National Executive Committee (NEC) of the African National Congress taken on 31 August 2018 to disband or dissolve the North West Province Executive Committee (PEC). The first applicant is a former member of the disbanded PEC. The fifth applicant is the former Chairperson of the disbanded PEC and former Premier of the North West Province. The second to the forty-third respondents are also members of the disbanded PEC.
- [2] On disbanding the PEC, the NEC appointed a Provincial Task Team (PTI) on 20 September 2018. The forty-fourth to seventy-fourth respondents are the members of the PTI. The applicants also seek orders: (a) declaring unlawful and setting aside the decision of the NEC to appoint the PTT, and (b) interdicting the PTI from carrying out the functions conferred on it by the NEC and the ANC Constitution. Lastly, the applicants seek an order reinstating the disbanded PEC within 7 days of issue of the order of this Court.
- [3] This matter first came before Moshidi J on 9 November 2018 on an urgent basis for interim relief. Moshidi J struck the matter from the roll on the basis of a lack of urgency. He, nonetheless, observed that the matter is of national significance and should be heard expeditiously. The matter was accordingly set down on the opposed motion roll on 29 January 2019 for final relief on a semi-urgent basis.

Background

- [4] The disbanded PEC was elected unopposed on 12 February 2015. The Organisational Report of the ANC, prepared by Mr Gwede Mantashe, the Secretary-General of the ANC at the time, and delivered to the ANC 54th National Conference held at Nasrec in Gauteng on 16 December 2017, describes the disbanded PEC as follows:

'... The current PEC was elected unopposed, reflecting the hard work of trying to eradicate anarchy. The NWC was elected and sub-committees

set up, and all PEC members deployed to the regions. The PWC, which was elected in the first PEC meeting after the Provincial.

Conference, has been active, optimally functional and meets regularly to process decisions of the PEC. The NEC deployees are hands-on in doing the work. They have good relations with the PEC, and have provided political guidance continuously.

The sub-committees are functional and make a big contribution to the work of the PEC. These meet regularly and make visible contribution, that is Organising and Campaigns; Economic

Transformation, Legislature Government and Media Communication. Political education was institutionalised after the revival of the Oliver Tambo Political School. All PEC and REC members have been trained as trainees for the Branch Manual. The following sub-committees hardly met, that is, Social Transformation; Peace and Stability; and international relations. . .

The province is campaign-oriented, beyond just the elections. This entails deploying organisers to support the regions. Overall, though, the regions are uncomfortable with the support as they perceive it as a way to monitor them. The membership drive is witnessed by the growth of membership."

[5] In the build-up to the 2017 National Conference, the ANC in all of its provinces including the North West experienced divisions and factionalism within the party as part of the national leadership race. These divisions became particularly marked in the North West Province since March 2018. Mr Obed Bapela the permanent NEC deployee to the North West writes in his undated report entitled 'Political Analysis of the North West Challenges' :

'The NEC deployees have so far been seized with issues in the North West since March 2018. The NWC has made early interventions, and the President has also had interface with the province and its leadership in trying to find a solution to the challenges facing the ANC and its Alliance partners. The situation in the North West has reached a very delicate and complex stage. We are at the point where, as the ANC, we are gravely burdened by the need to focus on more critical matters of the elections. We need to present a united force and help rebuild the confidence of our people that has taken a serious knock in the recent past. But it is also a time when there is a resurgence of renewed hope that the ANC can restore its firm place in the imagination of our people. The Thuma Mina Campaign has had some positive effects on our people and they are more and more pressed to spread the new spirit in the North West as well. However, a quick solution is in no way likely to help the situation, but a concerted effort over a period of time will go a long way towards unravelling the complexities that obtain in this province.'

[6] During mid-August 2018, the National Working Committee (NWC) had undertaken a road-show across the North West' Province to engage all the ANC regional structures. On 14 August, the Provincial Chair of the PEC and its acting-Secretary received a letter from the Office of the Secretary-General informing it of the visit by members of the NWC to the North West Province on 19 and 20 August

2018. The letter stated that the purpose of the NWC's visit to the province would be to "get an understanding of the provincial challenges and the state of the organisation for its readiness for the upcoming National

General Elections."

- [7] Attached to the invitation was a list of questions on (a) the "state of the organisation in the region" and (b) "governance in the region". Leading up to the North West's regional visit on 19 August 2018, the respective Branch Secretaries prepared the attendance registers for accreditation in accordance with the requirements that ANC meetings must be attended by members of the party in good standing (i.e. fully paid up members of the party). In fact, an annexure to the invitation listed the participants for each regional meeting as: NWC, NEC deployees, PEC deployees, RECS (Regional Executive Committee), Top five of each Branch, Five representatives from the Leagues (Youth League and Women's League), and representatives from branch or regional structure where there is more than one structure in a branch or region.
- [8] Meetings took place in each of the four ANC regions in the North West Province, namely Bojanala, Ngaka Modiri Molema, Dr Ruth Segomotsi Mompati and Dr Kenneth Kaunda. The meetings quickly descended into chaos and were marred by several irregularities including that:
- (a) Verification of membership in good standing was stopped midway and then abandoned due to the intervention by amongst others the Deputy President of the ANC and the NWC deployees attending the meetings. Consequently numerous people who attended and addressed the meeting were not verified as members of the ANC in good standing.
 - (b) Duly elected members of the RECs were not given an opportunity to either speak or make presentations to the NWC on the questions raised in the invitation.
 - (c) The reports prepared by the RECs were not presented nor considered as the NWC opened the meeting to unelected members of the community without verifying their membership with the party and their authority to speak on behalf of a branch.
 - (d) Non-ANC members and members of opposition parties were also allowed to speak and were consulted in these meetings, yet duly elected members of the properly constituted branches and regional structures of the ANC were not.
- [9] Following the NWC's visit to the branches, a report was compiled by the NWC and presented to the NEC at a closed meeting on 30 August
2018. The report presented by the NWC to the NEC makes disparaging and adverse remarks about the state of the organisation and governance in the North West Province. It was compiled on the basis of the views expressed at the meetings held in the four regions that were attended by non-members of the ANC.

- [10] In making these findings, the duly elected members of the Regional Executive Committees (RECs) and the Branch Executive Committees who were present at these meetings were not afforded an opportunity to present their regional reports or branch reports and to respond to adverse comments made about them and the state of the organisation in the province. The NEC, informed by the NWC's report and the improperly convened meetings, resolved to dissolve the PEC on 31 August 2018. The decision was communicated late at night on 31 August 2018.
- [11] It is common cause that between the NWC's visit on 19 and 20 August 2018 and the decision taken on 31 August 2018, none of the Branches or Regions were consulted about the impending decision. Nor were they given an opportunity to respond to the adverse comments and statements made by community members and non-ANC members at the meetings held on 19 and 20 August 2018.
- [12] On 20 September 2018, a Provincial Task Team (PTI) was appointed as an interim structure in the North West, with the full powers and responsibilities of the PEC.

The Applicants' submissions

- [13] The two bases upon which the Applicants seek the declaratory and interdictory relief is procedural fairness and substantive

irrationality. The applicants contend that the decision of the NEC to dissolve the PEC was procedurally unfair and therefore unlawful

because the Branches and Regions were not, as contemplated in the ANC Constitution, notified of the impending decision and nor were they consulted with prior thereto. They furthermore contend that the Branches and the Regions were not given proper reasons, by the NEC at the time of making its decision, for why it became "necessary" to dissolve or disband the PEC.

- [14] In relation to the substantive legality of the decision of the NEC to dissolve the PEC, the applicants contend that the NEC failed to comply with the requirements in Rule 12.2.4 of the ANC Constitution which specifies that the 'NEC may suspend or dissolve a PEC where necessary'. The thrust of their argument is that the NEC has failed to demonstrate, on the evidence, that the dissolution of the PEC was 'necessary' as contemplated in the Rule.

The ANC's submissions

- [15] The ANC opposes the application on two grounds. The first ground is that the application is moot, and the second is on the merits. On mootness, the ANC argues that the relief sought by the applicants has become moot as it will have no practical legal effect, if granted. On the merits of the case, the ANC submits that Rule 12.2.4 of the ANC constitution confers a wide discretion on the NEC to dissolve the PEC where necessary. It seeks to persuade the Court that the state of the organisation, its governance and the uprisings that took place in North West during April and May 2018, created the necessity for the PEC in the North West to be dissolved.

[16] The ANC contends that because the NEC decision was taken in the exercise of a discretion in terms of Rule 12.2.4 of its constitution,

the standard for review for discretionary decisions must be applied, namely that a court can only interfere where the discretion was exercised on a wrong principle or was capriciously made. In other words, a court's power to interfere is limited to those cases where the exercise of the judicial discretion is vitiated by misdirection, irregularity, or the absence of grounds on which the decision-maker acting reasonably, could have made the decision in question. In conclusion, the ANC argues that the very fact that the NEC, acting through the NWC, followed a process of consultation in the regions of the ANC and eventually came to a conclusion as to what decision to take without being beholden to the recommendation in the Obed Bapela Report, is a clear demonstration that it did not take its decision capriciously. It accordingly submits that there is no basis on which the NEC decision can be interfered with.

Mootness

[17] In relation to its primary contention that the issues for determination are moot, the ANC argues that if the relief in prayer

2.4 of the Notice of Motion seeking reinstatement of the PEC within seven days of the order is granted, it would have no practical effect because the PEC's term of office will expire on 13 February 2019. Coupled to this is the argument that the other relief sought is dependant on the declaratory relief sought, hence the Court must refuse to grant that relief as well.

[18] The ANC contends that if the Court were inclined to declare the dissolution of the PEC unlawful and order reinstatement, such

orders

would have no practical effect whatsoever as the term of the PEC will expire on 13 February 2019. The ANC accordingly urges the Court to dismiss the application on the ground that the relief sought is moot as it will have no practical effect if granted.

[19] Mootness is not an absolute bar to deciding an issue. In *Van Wyk v Unitas Hospital and Another* (Open Democratic Advice Centre as Amicus Curiae)[1], the Constitutional Court held that:

'It is by now axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue. The court has a discretion whether or not to hear a matter. The test is one of the interests of justice. A relevant consideration is whether the order that the court may make will have any practical effect either on the parties or on others. In the exercise of its discretion the court may decide to resolve an issue that is moot if to do so will be in the public interest. This would be the case where it will either benefit the larger public or achieve legal certainty.'

[20] Central to the relief sought in this matter is the question of whether the NEC's decision to disband the PEC violates the rights of the applicants in section 19 of the Constitution. Political rights under section 19 of the Constitution, are fundamental rights in our dispensation. The question of whether the decision of the NEC to disband the PEC violated this right is of paramount importance to the larger public as well as to the general ANC membership. The determination of this question will no doubt provide certainty for the future and serve to caution the NEC against acting unlawfully in the future.

[21] There is a further reason why the relief sought is not moot. On dissolution of the PEC, the NEC was enjoined by the Rule 12.2.4 to immediately appoint the PTT. The PTT would have, since its appointment taken numerous decisions. This means that if the Court

were inclined to declare the NEC's decision to appoint the PTT unlawful and set it aside, there are bound to be consequences arising

from the decisions taken by the PTT since its appointment. Therefore, at least some part of the application, particularly the consequences

of the declaratory relief that may be granted will certainly remain alive.

[22] There is, furthermore, no evidence before the Court that the PTT has made any arrangements to convene a Provincial Conference on 13 February 2019 to elect a new PEC. So even if the PEC's term ends on 13 February 2019 and there is no Provincial Conference convened to elect a new body by that date, it is within the powers of the NEC under the ANC constitution to extend the term of the PEC until such time that an Provincial Conference can be convened by the reinstated PEC to elect a new PEC. Should it be disinclined to do so, then I would imagine that the PEC will remain in place until a new PEC is elected by the Branches at a Provincial Conference in due course. Notably, in this regard, the ANC constitution makes no provision for an interim structure to be appointed between the expiry of the term of a PEC and the convening of a Provincial Conference to elect a new one.

[23] It is, however, not for this Court to regulate the internal affairs of the ANC in light of a declaration of invalidity which is inevitable if there is a breach of the provisions of the ANC constitution. The ANC constitution confers upon the ANC the power to regulate its own affairs.[2] As held by the Constitutional Court in *Ramakatsa*, and endorsed more recently by the KwaZulu Natal Provincial Division in *Dube & Others v Zikalala & Others*,[3] the consequences that flow from a declaration of invalidity are best dealt with by the ANC itself in regulating its own affairs. Should the Court be inclined reinstate the disbanded PEC, this will not affect any rights which the NEC may wish to exercise, including the dissolution, on proper grounds, and subject to proper and fair procedures. It follows from this that the issues for determination in this matter and the relief sought are not moot.

Procedural Fairness

[24] It is well established in our law that the principles of natural justice can be implied from the express terms of the contract of a voluntary association.[4]

[25] In *Psychological Society of South Africa v Qwelane & Others*[5] the Constitutional Court highlighted the considerations of legal policy that underpin the audi alterem partem rule which is the cornerstone of procedural fairness as follows:

'It is trite that at common law and in terms of the tenets of natural justice, hearing the other party - audi alteram partem - is an indispensable condition of fair proceedings.

...

The principle is underpinned by two important considerations of legal policy. The first is recognising the subject's dignity and sense of worth. Second, there is a more pragmatic consideration. This is that audi alteram partem inherently conduces to better justice."

Significantly, the application of the audi artem principle plays an important and indispensable part in providing the repository of power with an opportunity to obtain information which may be relevant for the proper exercise of the power.[6]

[26] Section 19 of the Constitution provides that:

'Every citizen is free to make political choices, which includes the right ... to participate in the activities of, or recruit members for, a political party.'

The rights in section 19 of the Constitution are enjoyed through the membership of, and participation in, political parties. In

Ramakatsa,[7] the Constitutional Court held:

'In relevant part section 19(1) proclaims that every citizen of our country is free to make political choices which include the right to participate in the activities of a political party. This right is conferred in unqualified terms. Consistent with the generous reading of provisions of this kind, the section means what it says and says what it means. It guarantees freedom to make political choices and once a choice on a political party is made, the section safeguards a member's participation in the activities of the party concerned. In this case the appellants and other members of the ANC enjoy a constitutional guarantee that entitles them to participate in its activities. It protects the exercise of the right not only against external interference but also against interference arising from within the party.'

[27] The ANC is a voluntary association created by agreement. Its relationship with its members is contractual. The terms of the contract are found in the constitution of the ANC (ANC constitution), which is the mechanism through which ANC members exercise their section 19 rights to participate in its structures and activities. The ANC constitution is premised on the constitutional values of non-racism, non-sexism and democracy to ensure accountability, responsiveness and openness. The ANC constitution is binding on the organisation and its members. There is a duty on the ANC to act lawfully and in compliance

with its' constitution[8]. Any breach by the ANC of a member's rights will not only be unlawful under the ANC constitution but it will also be in violation of that members' rights under section 19(1)(b) of the Constitution which entrenches the rights of citizens to form political parties and participate in their activities, including campaigning. The nature and scope of this right makes it clear that a constitution of a voluntary association must be construed in a manner which promotes the right of members to procedural fairness, when adverse decisions are taken.

[28] Rule 7 of the ANC constitution provides for the organisational structure of the ANC. Rule 7.1 specifies that the ANC consists of the:

'7.1.1 The National Conference which elects the National Executive Committee;

7.1.2 The Provincial Conference which elects the Provincial Executive Committee;

7.1.3 The Regional Conference which elects the Regional Executive Committee;

7.1.4 The Branch Biennial General Meeting which elects the Branch Executive Committee. '[9]

[29] The NEC is the highest organ of the ANC between National Conferences. The NEC has the authority to lead the organisation subject to the provisions of the ANC Constitution. Rule 12.2.4 of the ANC Constitution outlines the powers of the NEC. It enjoins it to:

'Ensure that the Provincial, Regional and Branch Structures of the ANC and the Leagues function democratically and effectively. (The ANC may suspend or dissolve a PEC where necessary.) The suspension of a PEC shall not exceed a period of 3 (three) months. The election of a PEC, which has been dissolved, shall be called within 9 (nine) months from date of dissolution. The NEC must appoint an interim structure during the period of suspension or the dissolution of the PEC to fulfil the functions of the PEC.' (own emphasis)

[30] Rule 3 of the ANC constitution provides that: (a) the ANC is a non- racial and non-sexist and democratic liberation movement. Its' policies are determined by the membership and its leadership is accountable to the membership in terms of the procedures laid down in the constitution.

[31] Rule 17 of the ANC constitution deals with the Provincial Conference. It provides that the Provincial Conference is the highest organ of the ANC in each province subject to the decisions of the National Conference and the National General Council, and the overall guidance of the NEC. Rule 17.2.1 provides that the Provincial Conference 'shall be held at least once every four years and more often if requested by at least one-third of all branches in the Province'.

[32] Under the ANC constitution all properly convened conferences at the National, Provincial and Regional tiers are constituted as follows:

- (a) At least 90% of the delegates of the Conference shall be from branches elected at properly constituted Branch General Meetings. The number of delegates per branch shall be in proportion to their paid-up membership, provided that each branch in good standing shall be entitled to at least one delegate.
 - (b) All members of the Provincial Executive Committee shall attend ex- officio as full participants in and delegates to the Conference.
 - (c) The remainder of the voting delegates at Conference shall be from the members of the RECs, ANC Veterans' League, ANC Youth League and the ANC Women's League, as allocated by the PEC.
- [33] Branches form the basic structure of the ANC. Rule 23 of the ANC constitution provides that a Branch shall be the place where members exercise their basic democratic rights to discuss and formulate policy and be the basic unit of activity for members in the ANC.
- [34] Rule 3.4 provides that in its' composition and functioning, the ANC shall be 'democratic, non-racial and non-sexist'.. The rights and duties of ANC members are spelled out in clause 5. Rule 5.1.1 states that 'members are entitled to take a full and active part in the discussion, formulation and implementation of the policies of the ANC'. Rule 5.1.4 provides that 'members are entitled to take part in elections and be elected or appointed to any committee, structure, commission or delegation of the ANC'. Rule 5.2 in turn sets out the duties of members of the ANC. In terms of Rule 5.2.1 members shall "belong to and take an active part in the life of his/her branch".
- [35] The PEC is elected by members of the ANC. In terms of Rule 17.2, the PEC is elected at a Provincial Conference which must be held "at least once every 4 (four) years". At least 90% of the voting delegates at a Conference "shall be from Branches, elected at properly constituted Branch General Meetings".
- [36] Clause 12 provides for the powers of the National Executive Committee. The overall power is contained in Rule 12.1 which specifies that the NEC is the highest organ of the ANC between National Conferences and has the authority to lead the organisation subject to the provision of the Constitution. The words 'subject to' make it plain that the NEC cannot act in conflict with or override the ANC constitution.
- [37] The ANC constitution places democracy, accountability and membership participation at its' centre. Rule 23.2.3 specifies that a Branch is 'the place where members exercise their basic democratic rights and formulate policy'. Rule 23.2.4, in turn, states that the Branch is the basic unit of activities for members.
- [38] What is clear from these core provisions of the ANC Constitution is that democracy is the ANC's grundnorm. In the words of retired Justice Moseneke, the ANC constitution serves to 'domesticate' the section 19 constitutional rights of its

members.[10] The powers of the NEC are not unconstrained. They are subject to the principle of legality which has both a substantive and procedural component. Therefore, as relating to this matter, not only is the NEC constrained by the jurisdictional requirement to act where it is 'necessary to do so' in Rule 12.2.4 of the ANC Constitution, but it is also constrained by the requirements of procedural fairness.

[39] It is clear from the provisions of the ANC Constitution that the right to hearing before adverse decisions are taken is implicit.

Importantly in this regard consultation and democracy are at the very heart of the organisation. The basic unit from which a member's

rights are exercised is the Branch. As such branch members, who elect the PEC in the first instance, were entitled as a matter of law, to be notified and consulted prior to the dissolution of the PEC.

[40] It is clear from the provisions of the ANC Constitution that the powers of the NEC to suspend or dissolve a PEC are not only

constrained by the jurisdictional requirement to do so where it is 'necessary' only, but they are also constrained by the requirements of procedural fairness. The basic unit from which the rights in section 19 of the Constitution are exercised under the ANC constitution are the Branches. It would follow therefore that the Branches in the four Regions - Bojanala, Ngaka Modiri Molema, Dr Kenneth Kuanda and Dr Ruth Segomotsi Mompati - who elected the PEC in the North West Province in the first place, were entitled, as a matter of law, to be notified and consulted prior to any decision by

the NEC to dissolve the PEC.

[41] The ANC contends that although it was not required to consult with the ANC membership in the Branches and the Regions because section 12.2.4 of the ANC constitution does not require it to do so, it nevertheless did engage in a consultative process with the Branches on 19 August 2018 at the consultative meetings which were convened in the four regions.

[42] The departure point for procedural fairness is notice of the decision in issue. The question is whether the applicants, members of the Branches, or the PEC itself were given notice of the decision to dissolve the PEC. It is plain on the facts that none of these bodies received notice of the impending decision to dissolve the PEC. The invitation to the Branches, RECs and the PEC recorded the purpose of the NWC visit as: 'to get an understanding of the Provincial challenges and the state of the organisation for its readiness for the upcoming general elections.' This notice/invitation does not record any intention to dissolve the PEC.

[43] The so called consultative meetings themselves were not meetings with the NEC but rather with the NWC which has no power to dissolve the PEC. The purpose of the meeting is said to be an assessment of the state of the organisation for its readiness for the general elections. This means that Branch members who attended the purported consultative meetings had

absolutely no clue that the PEC would be dissolved. Under any interpretation, these meetings do not equate to consultative meetings with the Branches on the question of whether the PEC should be dissolved. Branches were, therefore, not given notice of, or consulted on, the intended decision of the NEC to dissolve the ANC. Its' failure to do so was fatal.

- [44] The Branches were also given a series of questions to answer at that meeting. What is striking from those questions is that none of them dealt with the functionality and effectiveness of the PEC. To the contrary, the questions related to Branches, Branch General Meetings, disputes, suspensions, Regional Executive Committees and Regional Task Teams. This is a further indicator of the misleading nature of the purported consultative process followed by the NEC. Had the NEC been serious about embarking on a genuine consultative process with the Regions/Branches concerning the functionality and effectiveness of the PEC in relation to the state of the organisation in the North West Province, then it ought to have asked direct questions on the performance of the PEC.
- [45] It is clear from the undisputed facts that these so called consultative meetings did not meet the standard of procedural fairness as they were not properly convened. This much is clear from the undisputed facts below:
- (a) The meeting at Dr Ruth Segomotsi Mompati is described in the founding affidavit as having descended into chaos and having been attended by persons with no accreditation. Attempts to get the attendees to settle down failed and the meeting degenerated into chaos. Banana peels and bottle caps were thrown onto the stage and the NWC members walked out of the meeting and refused to proceed. None of these allegations are disputed by the ANC.
 - (b) Likewise in relation to the Dr Kenneth Kaunda Region, the same applies. In their founding affidavit, the applicants allege that there was a parallel structure that purported to conduct registration of people who were not members of the ANC. These people were not members of the ANC and had no authority to attend the meeting, yet the Secretary-General of the ANC, Mr A Magashule, allowed them to attend. The meeting was described by Mr Magashule as "a fact-finding meeting" and he did not raise anything concerning

the dissolution of the PEC. These allegations are not disputed by the ANC in its' answering affidavit.

- [46] Although there is a purported dispute in relation to whether the five members of the Branches who attended the so called consultative

meetings were allowed to speak, this dispute is not material to the allegations as the ANC admits that it did not consult specifically on the issue of the dissolution of the PEC at these meetings. The explanation provided by the NEC in the answering affidavit is that it did not approach the consultation with a specific outcome in mind. That may be true, but once the NEC decided that the dissolution would be the appropriate course of action, it was under an obligation to consult with the Branches which it failed to do.

- [47] The consultation meeting held at the Ngaka Modiri Molema Region suffers from exactly the same defects. In the founding affidavit, the applicants allege that the consultative meeting began at 09h00. It was attended by Mr David Mabuza, the Deputy President of the ANC. Upon his arrival he instructed that the registration process which was then underway should stop and everyone, regardless of whether their membership of the ANC was verified or not, should be allowed to attend. The applicants allege in the founding affidavit that this was unlawful and irregular.
- [48] In addition the applicants allege that the REC and NEC members who were in attendance at the meeting were not allowed to speak; the report of the Region was not entertained; and the Regional Secretary was not allowed to present the Regional report. Instead, members of other political parties including opposition parties and non-invited members were allowed to attend and to speak. Lastly, the applicants allege that the questions of the NWC which were listed in the questionnaire attached to the meeting invitation were not addressed at this meeting at all.
- [49] The NEC attempts to engage with these allegations in its answering affidavit through a report penned by Ms Barbara Creecy, who was present at the meeting at Ngaka Modiri Molema. However, Ms Creecy prepared a report of her observations of the meeting. This notwithstanding, the NEC does not deal with the substance of the applicants' allegations, in particular that non-ANC members were allowed to attend and to participate in the discussion at the meeting and that the issues raised in the questionnaire were not attended to.
- [50] The situation that prevailed at the so called consultative meeting which was held at Bojanala was no different. The applicants allege in the founding affidavit that the Regional Secretary was not allowed to speak and present her report at this meeting. It is also alleged that the meeting turned chaotic and that the credentials of the people who were allowed into the meeting were not verified.
- [51] The answering affidavit virtually admits these allegations. In particular it accepts that the meeting was rowdy and non-members were allowed to attend. It, however, seeks to justify the dissolution by alleging that there was division at the meeting which the PEC was obliged to resolve. There is no merit in this contention. The so-called consultative meeting simply failed to fulfil the function of consultation which was to provide a platform for the the NEC to satisfy itself as to the appropriateness and necessity for the decision that it intended to make. In short, the so- called consultative meetings were shambolic, chaotic and rowdy. They were furthermore not properly convened. They accordingly did not meet the basic requirements of procedural fairness.
- [52] Lastly, the NEC did not provide the applicants with the reasons for the decision. This is a further ground on which its decision was un- procedural. The NEC states that the reasons for the dissolution were clearly spelled out in Annexure "AM3". Annexure "AM3" is a copy of the press statement issued by the Secretary-General of the ANC. It is headed 'Dissolution of

the North West Province Executive Committee'. This in my view is a cryptic document which reads exactly like a press statement and is indeed a press statement. What it does not do is provide reasons for the dissolution of the PEC. The opening paragraph simply records that 'the special session of the NEC resolved to intervene in the North West Province to strengthen the organisation and enhance its capacity to meet its mandate to the people of the Province'. If the reason for dissolving the PEC was its dysfunctionality and ineffectiveness in the North West, or the violence and torchings that occurred in April/May 2018, then those reasons should have appeared in the press statement which on the ANC's version are the reasons for the decision. It is disingenuous, in my view, for the ANC to argue that the press statement constitutes reasons for the decision.

[53] In the premises, I am of the view that the decision of the NEC to dissolve the PEC did not meet the basic requirements of procedural

fairness which is contemplated in both the ANC constitution and the Constitution of the country. The dissolution of the PEC is a drastic and draconian measure that ought to have been resorted to as a last resort. The ANC acknowledges as much, but did not deem it necessary to notify or consult with the Branches before finalising its decision. Nor did it give the members of the PEC a hearing. Moreover, it failed to give proper reasons for dissolving the PEC.

Remedy

[54] For all these reasons I find that the decision of the NEC to dissolve the PEC is procedurally unfair, in breach of the ANC Constitution and in violation of the applicants section 19 constitutional rights. The applicants are accordingly entitled to the declaratory relief in prayers 2.1 and 2.2 of the Notice of Motion declaring unlawful and setting aside the decisions of the NEC to dissolve the PEC and to appoint the PTT, respectively. While a declaration of rights is important, it is not sufficient where the conduct of the respondent is unlawful for being in non-compliance with its own own constitution - as is the case here.

[55] Leaving the PTI in place as contended for by the ANC, will be to preserve an illegal state of affairs in the absence of any explanation from the ANC as to why the Court should countenance such illegality. A party seeking to preserve an illegal state of affairs must explain precisely why a court should countenance that illegality.[11]

[56] The relief granted must not only be just and equitable but also effective. The applicants are, therefore, entitled to the consequential order asked for in the Notice of Motion, namely the interdictory relief and an order reinstating the disbanded PEC. The ANC has, once again, produced no evidence why such an order would not be just and equitable.

[57] In view of this conclusion, I see no need to deal with the merits of the application.

Costs

[58] The individual applicants have brought this application to vindicate their constitutional rights under section 19 of the Constitution.

They have had substantial success. I, therefore, see no reason to deprive them of their costs in this application and the reserved

costs of 20 November 2018.

Order

[59] In the result I make the following order:

1. The decision of the ANC made on 31 August 2018 to disband the North West Provincial Executive Committee is declared unlawful and set aside.
2. The decision of the NEC of 20 September 2018 to appoint a Provincial Task Team (PTT) is declared unlawful and set aside.
3. The PTT is interdicted from carrying out any of the functions conferred on it by the NEC and the ANC constitution.
4. The disbanded PEC is reinstated within two court days of this order.
5. The first respondent is ordered to pay the costs of the application including the costs of two counsel.
6. The first respondent is also ordered to pay the cost of 20 November 2018 including the costs of two counsel.

F KATHREE-SETILOANE

JUDGE OF THE HIGH COURT

Counsel for the First, Second and Third applicants: T Ngcukaitobi with P Daniell and T Ramogale

Counsel for the Fourth and Fifth Applicants: D Mpofu SC with Y Peer and J Chanza

Instructed by: Mabuza Attorneys

Counsel for the African National Congress: W R Mokhare SC with MK Mathipa

Instructed by: M V Gwala Inc

Date of hearing: 30 January 2019

Date of judgment: 6 February 2019

[1] Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC) at para [29]

[2] Ramakatsa & Others v Magashule & Others [2012] ZACC 31; 2013

(2) BCLR 202 (CC) at para 125.

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- [3] Dube & Others v Zikalala & Others [2017] 4 All SA 365 (KZP)
- [4] Turner v Jockey Club of South Africa 1974 (3) SA 633 (A)
- [5] Psychological Society of South Africa v Qwelane and Others 2017 (8) BCLR 1039 (CC) at paras [33] and [34]
- [6] Psychological Society at paras 33 -34.
- [7] Ramakatsa at para 71.
- [8] Ramakatsa at para 16.
- [9] In terms of Rule 7.2 branches are grouped together in zones and may, for the purposes of coordination, be subdivided into smaller units such as street committees. Voting districts and zones may be grouped into sub-regions. Any sub-Branch established shall have the same voting powers as a Branch.
- [10] Ramakatsa at para 75
- [11] Mistry v Interim National Medical and Dental Council and Others 1998
- (4) SA 1127 (CC) at para 37
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