

SOUTH AFRICA / JUDGMENT

Mphethi and Another v Apooe and Others (11224/2017) [2020] ZAGPPHC 294 (1 June 2020)

[2020] ZAGPPHC 294

COURT

North Gauteng High Court, Pretoria

BEFORE

NM Mavundla

CASE / FILE NUMBER

11224/2017

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IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 11224

/ 2017

In

the matter between:

SEROPANE ALTON
MPHETHI
1ST APPLICANT
PAN AFRICAN
CONGRESS OF AZANIA N.O.
2nd APPLICANT
And
APA
APOOE
1st RESPONDENT
CHARGEIN
MABASO
2ND RESPONDENT
EDDIE MFULWANE
3RD RESPONDENT
ELECTORAL
COMMISSIONER OF
4TH RESPONDENT
SOUTH AFRICA
FIONA MZIKAZI
YOLANDA
5TH RESPONDENT

FUDUMELE
MPHUTHUMI
6THRESPONENT
GCOBANI
KATIYA
7THRESPONDENT
KEDIBONE SANDRA
TSOKODIBANE
8THRESPONDENT
KHUSELO OWEN
MAKAPELA
9THRESPONDENT
KOLISE
MBETE
10TH RESPONDENT
LETLAPA
MPHAHLELE
11TH RESPONDENT
LUNGA
MANTASHE
12THRESPONDENT
LUTHANDO
MBINDA
13TH RESPONDENT
MANELISI
MAMPANA
14THRESPONDENT
MBUYISELI
GANTSU
15THRESPONDENT
MMABATHO
MOSOLODI
16THRESPONDENT
MOHLOMPHEGI
MPHAHLELE
17THRESPONDENT
MZIMASI
SIBEKO
18THRESPONDENT
MZWANELE
NYHONTSO
19THRESPONDENT
NOAH SITTO
20THRESPONDENT
OWEN
KHATAZILE
21STRESPONDENT
PASEKA
MAKOTI
22NDRESPONDENT
SANELISIWE

DILATA
23RDRESPONDENT
SIBUSISO
XABA
24THRESPONDENT
SIVA NDAMANE
25THRESPONDENT
TEFU DAVID
MACHAKELA
26THRESPONDENT
ZAMIKHAYA
GXABE
27THRESPONDENT
MARIUS MOLOTO
1STINTERVENING
PARTY
PAN
AFRICANIST CONGRESS
2NDINTERVENING
PARTY
OF AZANIA
UNDER
THE LEADERSHIP OF
3RDINTERVENING
PARTY
NYHONTSO

JUDGMENT

Mavundla J,

- [1] This matter emanates from the debilitating fiasco that prevails within a once revered and feared political party, the Pan Africanist Congress of Azania, which has almost been reduced to a shadow of itself if not almost nothingness, at the eve of the national general elections of 2019, as splinter groups were mongering over its leadership.
- [2] The respondents, (with the exception for the fourthrespondent), together with intervening parties, opposed the mam application. The intervening parties also counterclaimed. Subsequently and after some persuasion, the parties concluded an agreement which this court marked "X" and made an order of court.
- [3] I must hasten to state that the fourth respondent was, so to speak, a by stander to the fiasco between the rest of the parties, who are all members of the Pan African Congress of Azania, which, it would seem, has mutated into three factions, each supposedly having its own leader professing to be the leader of the second respondent. The fourth respondent is the Electoral Commissioner; whose core function is to manage elections for public representatives in all three spheres of Government in South Africa. Although it was not in

the true sense opposing the application, it filed papers to place certain facts in perspective as well as its stance to the issues. It was also duly represented by senior counsel, inter alia, whose involvement was, in my view, necessary and valuable, just as much as that of counsel for the respective r parties.

[4] The first applicant, described himself as the leader of the second applicant, approached this court on urgent basis, seeking an order:

4.1 that the national conference of the PAC held in Kimberly between 14 and 16 December 2018 ("the December 2018 Kimberley Conference Kimberley") be declared as being unconstitutional and set aside the results thereof:

4.2 that the Commissioner be directed to amend its records to reflect him as being the president of PAC.

[5] The first and second intervening party, as its first salvo, in opposing the main application, resorted to rule 7 of the Uniform Court Rules, inter alia, challenging the authority of the first applicant to bring the application on behalf of the second applicant, and secondly counterclaimed seeking an order that he (Mr. Narius Moloto) be declared the legitimate leader of PAC.

[6] After some persuasion, the parties in respect of the counterclaims, reached an agreement which was made an order of court marked "X." This order recorded inter alia, that:

"1 the two counter applications delivered on behalf of Mr. Narius Moloto and Mr. Nyhontsho and the Pan African Congress of Azania ("PAC") are unopposed.

2. The PAC is united into one organization under the following leadership:

2.1 President, Mr. Narius Moloto;

2.2 Deputy President, Mr Mwanele Nhyontso;

2.3 Secretary General, Mr Apa Poee;

2.4 Deputy Secretary General Mr. Bennett Joko;

2.5 Treasury, Ms. Phumuzile Phatsha;

2.6 National Organiser, Mr. Mbuyise Gantshu;

2.7 National Chairman, Mr. Phillip Dlamini; and

2.8 Deputy National Chairman, Mr, Sibusiso Xaba.

3. The PAC will be led and governed by joint National Executive Committee "NEC" under the leadership of the aforesaid individuals.

The NEC shall consist of persons from the two National Executive Committees (Moloto and Nyhontso) . Mr. Alton Mphethi and Mr. Lutando

Mbinda shall further be members of the National Executive Committee.

4. The signatories to the finances of PAC shall be Mr. Apa Poee (Secretary General) and Ms. Phumuzile Phasha (Treasurer), the two shall provide the office bearers with monthly reports on the state and finances of the PAC.
5. Mr Narius Moloto shall be the face of PAC in the forthcoming national elections on the 8 May 2019. Mr Mwanele Nyhontso shall be the PAC representative in Parliament.
6. PAC's national list shall have the following four (4) people at the top of is nationalist:
 - 6.1 Mr Mzwanele Nyhontso;
 - 6.2 Mr Alton Mphethi;
 - 6.3 Mr. Bennett Joko; and
 - 6.4 Mr Luthando Mbinda

7 The PAC shall hold a National Congress, if possible, on or before the 13th of August with the primary aim of electing a National Executive Committee. Notwithstanding the foregoing, the National Executive Committees shall be held subject to the provisions of the PAC's Constitution of 2000.

8 No order as to costs."

- [7] In my view, the aforesaid order "X", namely order 2.1 thereof, makes it no longer necessary for this court to decide the counterapplication of Mr. Moloto, to be declared the legitimate leader of PAC.
- [8] According to Mr. Moloto, on or about 11 May 2013, Mr. Mphethi was appointed as the interim president of PAC. Mr. Mphethi remained president of PAC until 17 December 2014 when the National Disciplinary Committee of PAC found him guilty of charges relating to the contravention of PAC Constitution and he was consequently removed as President and expelled from the party.
- [9] It would seem, however, that Mr. Mphethi was per order of Teffo J, in the matter of Mphethi v Phillip Dlamini N.O., Learnad Nkosi N.O. and Narius Moloto N.O. case number 4558 /2015, reinstated as a member of PAC and as PAC parliamentary representative, with effect from his expulsion, being 23 December 2014. However, the Teffo J's order is silent on the issue of re-instatement as president of PAC. If the order was t e-instate his presidency, certainly the order would have

been specific in this regard.

- [10] Mr. Mphethi ascended to presidency in terms of the constitution which was amended during the National Congress held at Ga-Matlala during 7- 9 April

2000. This amended constitution provided, inter alia, that:

"5.11The National Congress shall elect the President, Deputy President, and members of the NEC tri-annually."

[11] It follows that, but for the expulsion, Mphethi's tenure of office would have endured for a period of three years, unless re-elected as such. His tenure of office as president would have ended in 2016. This reasoning was conceded by his counsel during the hearing of this matter.

[12] According to Moloto, he is the true and lawful president of PAC, having been elected as such at a conference of the PAC in December

2017. The Constitution of PAC has been amended on various occasions over years: 1990, 1992, 1996, 2000, 2008, 2015 and 2017. He attached a copy of the current Constitution of PAC, which was adopted at the December 2017 National Conference of PAC. In terms of this amended Constitution of PAC, a Biennial National Conference is held every 2 (two) years; A National Conference where election of the NEC is held every 5 (five years). This amendment, in my view, cannot operate retrospectively to embrace the period under

which Mphethi came into office, which is 2013.

[13] The question of the leadership of PAC has been in dispute for a considerable period, even before the launch of the present application in 2019. This as much was well known to Mphethi. It is trite that a party in motion proceedings must make his case in the founding affidavit.

[14] Mphethi, save for a bold statement that he is the president of PAC, nowhere in his papers does he disclose facts upon which this assertion is premised. He has also not attached any resolution by PAC NEC mandating him to bring the application. That being the case, it follows that he has not acquitted the onus of persuading this court that he was authorised to bring this application. In the premises, his application stands to be dismissed with costs.

[15] For the aforesaid reasons, this court ordered as follows:

1. That the application is dismissed
2. That the first applicant is ordered to pay the costs, such costs to include the costs of engaging senior counsel.

Sgn NM MAVUNDLA

NM MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT

: 01/06/2020

APPLICANTS' ADV

: ADV D. KHUMALO

SC

BRIEFED BY

: MVMT ATTORNEYS

Email address: HEIN.@MVMTINC.CO.ZA

REF: HEIN VALENTINE/THATO MASHISHI

4THRESPONDENT'S ADV

: ADV MT K MOERANE SC

INSTRUCTED BY

: MOETI KANYANE ATTORNEYS

Email address: moeti@kanyane.co.za

RESPONDENTS' ADV

: ADV M PETLANE SC 151 & 2ND INTERVENING PARTIES' ADV

: ADV M NOWITZ

INSTRUCTED BY

: NOCHUMSON & TEPER ATTORNEYS

Email address: gerald@nandt.co.za ;tshidi@nandt.co.za

Ref: Tshidi Tseki/ P394

13TH RESPONDENT

: IN PERSON

Email address: mbidalr@gmail.com

MKATA ATTORNEYS :email: mkataattorne@telkomsa.net

Ref: PAC015/CIV/JGWE/18

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