

SOUTH AFRICA / JUDGMENT

Ntozini and Others v African National Congress and Others (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) [2018] ZAGPJHC 415

COURT

South Gauteng High Court, Johannesburg

BEFORE

Carelse

CASE / FILE NUMBER

18798/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

Case

no: 18798/2018

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED.

25/6/2018

In

the matter between:

Nomakaya
Ntozini First
Applicant
Ntombekhaya
Gunguluza Second
Applicant
Nkululeko
Mali Third
Applicant
Mbulelo
Geswindt Fourth
Applicant
and
The

African National
Congress First
Respondent
The
National Executive
Committee Second
Respondent
Cyril
Ramaphosa
N.O Third
Respondent
David
Dabede
Mabuza Fourth
Respondent
Gwede
Mantashe
N.O Fifth
Respondent
Elias
Sekgobelo Magashule
N.O Sixth
Respondent

JUDGMENT

Summary

Applications – Urgent application – self-created urgency – bald and unsubstantiated allegations – whether applicants have set out objective grounds why matter is urgent – whether or not applicants have explained in their founding affidavit why they cannot get substantial redress at a hearing in due course

The applicants are disgruntled members of the African National Congress (“ANC”) and have brought this urgent application

following the events of the Provincial Executive Conference of the Eastern Cape (“the Conference”) which took place on 28 September to 1 October 2017. Pursuant to disputes arising from the Conference, the National Executive Committee (“NEC”) of the ANC met and appointed an appeals panel to deal with these disputes. The appeals panel which was chaired by Mr Sbusiso Ndebele

compiled a report now commonly referred to as the “Ndebele Report”. The Ndebele Report essentially recommends, amongst

others, the suspension of the Provincial Executive Committee (“PEC”) and the appointment of an interim structure, with a convenor and co-ordinator and representatives from the polarised groups to fulfill the functions of the PEC during the period of suspension, in terms of the rules of the ANC Constitution. Further it recommends that Branch General Meetings in the branches which lodged claims of irregularity in the selection of delegates be re-run; and that the 8th Provincial Elective Conference be re-run within 3 months.

The applicants launched this urgent application seeking the ANC, the NEC and its members, to consider and make a decision to accept or reject the findings of the Ndebele Report. In the event they accept its findings, to action them, or should they reject the findings and refuse to implement it, to provide reasons for their rejection and/or refusal within 10 days of finalisation of the application.

The applicants on the other hand, also seek a referral to oral evidence in respect of particular paragraphs of the respondents’

answering affidavit, which provides that the relief sought is moot as a decision had been taken to reject the findings of Ndebele Report at a meeting of the NEC which took place on 23 to 25 March 2018. The answering affidavit provides further that reasons were expressed at the meeting why the contents of the report could not be accepted. It is this dispute that the applicants were seeking a referral to oral evidence.

The crux of the applicants’ grounds for urgency is that they would not otherwise be afforded substantial redress at a hearing made in the ordinary course. The applicants contend that an “undemocratically elected PEC” continues to infringe their rights as members; ongoing improper conduct relating to disciplinary proceedings, instigated by the PEC against certain councillors in which four have been finalised and two of the four councillors have been suspended; and according to the Ndebele Report, the appeal panel was “implored to consider the task as urgent and to submit concrete recommendations”.

The respondents challenge the urgency on the basis that the case made out for urgency is “vague and speculative”. The applicants allege as a basis for urgency that governance in the Eastern Cape has been negatively affected.

Held it is important to distinguish what applicants consider to be urgent from what courts consider to be urgent. In terms of Rule 6(12) of the Uniform Rules of the Court an applicant is in law required to set out the circumstances which justify the hearing of an application on an urgent basis and the basis on which it contends that it would not obtain substantial redress at a hearing in due course.

The court finds it extraordinary that the applicants complain yet the councilors affected by the disciplinary hearings do not; and further do not attach confirmatory affidavits from the affected councilors to support the allegations relating to the hearings. The court finds that these allegations are not supported by any evidence. The applicants have also failed to show a link between the leadership and the disciplinary action.

The most cogent reason advanced for urgency by the applicants is that the alleged continued infringement of the applicants' rights as members of the ANC. The applicants referred to the case of Ramakatse and Others v Magashule and Others where the Constitutional Court affirmed the common law rights of members of a political party and the applicability of Clause 19 of the Bill of Rights. The respondents submit that the applicants in this application had not stated what rights in the ANC Constitution had been affected. In this case, the court finds that the applicants have failed to demonstrate what rights were negatively impacted upon by the Ndebele Report.

The court finds that the reliance by the applicants on the statement in the Ndebele Report that that matter is urgent does not necessarily

render the matter urgent. In the case of East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite and Others Notshe AJ held "... the fact [that] the applicant wants to have the matter resolved urgently does not render the matter urgent." The court further held that the "procedure set out in Rule 6(12) is not for the taking".

Further, ordinarily matters in the urgent court in the Division are set down a Thursday for hearing the following Tuesday. The court finds that there was a delay, for which there was no explanation, from the time applicants heard on 7 May 2018 that the Ndebele Report had not been dealt with by the NEC and when the application was launched [17 May 2018] and a further month-long delay between the launch of the application and the set down of the hearing.

Further that on the applicants own version the matter cannot be rendered urgent to the extent that the applicants have requested a referral to oral evidence. The applicants have not made a case for urgency and if there is any urgency it is self-created. The matter is struck from the roll with costs.

Carelse J:

[1] The applicants apply as a matter of urgency for the following relief:

"3.1 The Second Respondent be and is hereby ordered, within 10 days of the finalisation of this application, to consider and make a decision to accept or reject the findings of the Ndebele Report, attached to the founding affidavit as "FA2";

3.2 In the event of the Second Respondent accepting the findings of the Ndebele Report to, with immediate effect, implement the recommendations on page 14 of the said report;

3.3 In the event of the Second Respondent rejecting the findings of the Ndebele Report, or refusing to implement the recommendations, it provide written reasons for such rejection and/or refusal within 10 days of the finalisation of this application."

The Parties

[2] The applicants are members of the African National Congress (ANC), the first respondent. The first respondent is a voluntary

association. The second respondent is the National Executive Committee (NEC) of the first respondent. The NEC is the highest organ

of the first respondent between National Conferences and has the authority to lead the organisation in terms of the ANC Constitution.

The third respondent is Mr Cyril Ramaphosa N.O, the President of the Republic of South Africa and the President of the NEC. The fourth respondent, Mr David Dabede Mabuza N.O, is the Deputy President of South Africa and the Deputy President of the NEC. The fifth respondent is Mr Gwede Mantashe N.O, is the National Chairperson of the NEC. The sixth respondent is Mr Elias Sekgobelo Magashule N.O, the Secretary General of the NEC. The seventh respondent, Ms Jessie Yasmine Duarte N.O, is the Deputy Secretary General of the NEC. The eighth respondent, Mr Paul Mashatile N.O is the Treasurer General of the NEC.[2]

[3] At the outset of the hearing the respondent sought condonation for the late filing of the Answering Affidavit which was not opposed by the applicants. I accordingly granted condonation. The applicant on the other hand sought a referral to oral evidence in respect of para [28], [38], [39] which includes [39.2] and page 297 para [3] of the Answering Affidavit which provides respectively;

“28. The relief is moot. The applicants have been told of the decisions taken by the NEC in response to the Ndebele Report. Despite been told of such decisions, they have nevertheless persisted with this application.[3]

...

38. These allegations are baseless. The Ndebele report was first represented before the national working committee. But since the national working committee has no decision- making powers, it was referred to the national executive committee. The meeting at the national executive committee concerning this matter took place on 23 to 25 March 2018. The discussion on the Ndebele report was wide and extensive. But, eventually, it was decided that its recommendations should not be accepted. Instead, the organisation, in line with the spirit of revival and renewal which has been championed by the current president, Cyril Ramaphosa, decided that an inclusive political strategy should be found to resolve the impasse.

[39] The following reasons were expressed at the meeting why the contents of the report could not be accepted:

39.1 ...

39.2 In any event, there was clear evidence before Ndebele that credentials were adopted ... His finding that they were not adopted was flawed, unsubstantiated and factually baseless[4]. . .

- [4] Furthermore at page 297 para [3] of the confirmatory affidavit attached to the answering affidavit of Mr Lulama Ngcukayithobi, the Secretary General of the ANC in the Eastern Cape Province the following is stated:

“I confirm I was present when what has since become known as the “Ndebele Report” was considered and a decision to reject it was taken. Accordingly, once the Ndebele report had been considered and rejected ,as it was rightly rejected , there was nothing to implement . . .”

- [5] Counsel for the applicants submit that the foregoing statements of both the Deputy Secretary General of the NEC, Ms Duarte and the Secretary General of the ANC in the Eastern Cape , Mr Ngcukayithobi are contradicted by the minutes of the NEC meeting held between 23 and 25 March 2018 where at par 13.4.10 the following is stated:

“The recommendations of the Ndebele Commission regarding the Eastern Cape Provincial Conference were noted. The NEC directed cde Phumullo Masualle, the Premier, to meet the PEC and pursue a political solution. It was also decided that the Officials should visit the province to bring the parties closer...”[5]

- [6] The applicants submit that nowhere in the foregoing minutes does the NEC accept or reject the Ndebele report. The respondents vehemently dispute that the NEC did not take a decision on the Ndebele report. It is this dispute that the applicants seek a referral to oral evidence.
- [7] Notwithstanding the request for a referral by the applicants, the respondents insist that this court should deal with the three preliminary issues that have been raised in their answering affidavit. Firstly, the matter is not urgent and should be struck from the roll with costs. Secondly, the Eastern Cape Provincial Executive Committee (PEC) has not been joined. As a result hereof the application should be stayed pending the joining of the PEC. Thirdly, the application should be dismissed because this court does not have the necessary jurisdiction. It is common cause that the head office of the ANC is in Gauteng.

Before I deal with the preliminary points it is necessary to set out briefly some background facts.

- [8] From 28 September to 1 October 2017, the ANC’S Provincial Executive Conference of the Eastern Cape (Conference) was convened.

What occurred at the Conference was hotly disputed. For the purposes of this judgment it is not necessary to deal with what took place at the Conference per se. What is pertinently relevant is the events that took place from the 11 to 13 November 2017, when the NEC met and appointed an appeals panel to deal with the disputes emanating from the Conference. The appeals panel was chaired by Mr Sbusiso Ndebele who compiled a report now commonly referred to as the “Ndebele report”. The following recommendations were made[6]:

“. . . , the appeal panel recommends that the NEC take the following bold action in the best interest of the organisation:-

- a. Suspend the PEC in terms of Rule 12.2.4 of the ANC Constitution;
 - b. Appoint an interim structure, in terms of Rule 12.2.6 read with the all - encompassing Rule 12.2.20, with a convenor and co-ordinator and representatives from the polarised groups to;-
 - 1. Fulfil the functions of the PEC during the period of suspension;
 - 2. Re-run BGMS in those branches which lodged claims of irregularity in the selection of delegates for the 8th elective conference;
 - 3. Re-run the 8th Provincial elective conference within 3 months;
 - 4. Work with the Integrity Commission and NEC Deployees and commence a healing process in the Province; and
 - c. Comrades Oscar Mabuyane and Phumullo Masualle should lead the unification and healing process as members of the interim structure.”
- [9] Parallel to the appeals process, disgruntled members of the ANC in the Eastern Cape Province applied to the Eastern Cape High Court to have the Conference set aside on an urgent basis. The application was opposed. A Full Court of the Eastern Cape High Court dismissed the application on 12 December 2011⁷. It bears mentioning that the interpretation of the judgment is disputed. However, for the purposes of this judgment it is not

necessary to deal with this dispute.

Urgency

- [10] In terms of Rule 6(12) of the Uniform Rules of Court an applicant is in law required to set out the circumstances which justify the hearing of an application on an urgent basis and the basis on which it contends that it would not obtain substantial redress at a hearing in due course. The pertinent question is whether the applicant has set out objective grounds, why the matter is urgent and whether or not the applicants have explained in their founding affidavit why they cannot get substantial redress at a hearing in due course. The applicants’ grounds for urgency are set out herein below:

“69. It is incumbent upon me to set out the grounds why the ordinary time limits set for applications to the above Honourable Court should be curtailed.

70. I submit that Applicants would not otherwise be afforded substantial redress at a hearing made in the ordinary course as:

70.1 The divisive action of an undemocratically elected PEC continues unabated;

70.2 I and other affected members of the First Respondent in the Eastern Cape are suffering a continued infringement of our rights as members, which infringement needs to be urgently addressed;

70.3 The apparently invalid nature of the Provincial Conference does not only impact upon the members of the First respondent but has a real effect upon the governance of the entire Eastern Cape Province.

The subject matter of this application is therefore of importance to the province as a whole and indirectly to the nation;

70.4 Should it be found that the PEC was invalidly elected, which is quite clearly the case, then all of its actions are invalid as well? The more actions which the PEC is permitted to make, the greater the harm which is to be reversed;

71 This matter is urgent for the further reason that improper conduct relating to disciplinary proceeding is currently underway.

71.1 As mentioned previously, the PEC instigated disciplinary proceedings against twenty five councillors of the Mnquma municipality. The charge invariably being that said councillors voted a mayor into office who was not supported by the current PEC;

71.2 Of the twenty five disciplinary hearings, four have been completed. The outcome for two of the councillors is that they are suspended from the First Respondent for a period of five years, but the sanction is suspended for one year;

71.3 The other two councillors are Zakhele Mkiva and Zibutha Mnqwazi in the positions of chief whip and speaker of council, respectively. For ostensibly the same charge, these men were suspended from the First Respondent for a period of five years by the Provincial Disciplinary Committee (PDC”), which is also linked to the PEC;

71.4 An appeal was lodged by Mkiva and Mnqwazi against the finding. In terms of Rule 25.43 of the ANC Constitution, a sanction imposed on a member can only come into operation after the finalisation of the appeal;

71.5 Despite the pending appeal by Mkiva and Mnqwazi the PEC is currently moving to remove the two councillors in question and advertise the vacancies of their positions under the guise that only members can hold said positions and that said councillors are no longer members;

71.6 A letter from my attorney –who also represents Mkiva and Mnqwazi – dated 14 May 2018, is attached hereto and is marked “FA3”;

71.7 In addition, the remainder (twenty-one) of the disciplinary hearings were “heard” on Sunday 13 May 2018.

Despite all twenty-one of the councillors being absent –the one councillor was booked off sick - the proceedings continued the outcome has yet to hand down;

72. . .

73 Further the matter is inherently urgent as:

73.1 While not being given a time limit, the appeal panel was, according to the Ndebele Report, ‘implored to consider the task as urgent and to submit concrete recommendations’. Therefore the Second Respondent acknowledges the time sensitivity of the Ndebele report and its decision thereon.

73.2. . .

74 I have not delayed unreasonably in bringing the present application as:

74.1 The case of Magabadeli, handed down on 12 December 2017, made it clear that the outcome of the internal appeal procedures of the Second respondent had to be awaited;

74.2 Only on 23 February 2018 was the Ndebele Report submitted. The Second Respondent had to be given a reasonable time to pronounce on the Report, which it was

74.3 On 23 April 2018 my attorney put the Second Defendant on terms to make a decision regarding the Ndebele report by 6 May 2018;

74.4 On 7 May 2018 the Second Respondent met with the Premier and the Chairperson of the current PEC. It was only subsequent thereto that I became aware that the Ndebele report had still not been addressed.

74.5 Thereafter I immediately sought legal advice and assistance in the bringing of the present matter which has occurred with all haste.

74.6. . .”

[11] Ordinarily an applicant is obliged to afford each other time for the filing of notices and affidavits in terms of applicable normal time periods set out in the Rules of Court. There are circumstances where grave harm will be made to be borne on an applicant if the applicant has to follow normal procedures. When an applicant launches an urgent application the applicant essentially requests the court to condone the non-compliance with the Rules of Court. Courts are required to give preference to prevent harm. It is very important to distinguish what applicants consider to be urgent from what courts consider to be urgent. What is urgent must be determined on a case by case basis. When an applicant gains knowledge of the respondents prejudicial behaviour, it is very important that the applicant take steps to launch their application as expeditiously as possible .

[12] Pertinently, the South Gauteng High Court’s Practice Manual in section 9.23 deals with urgent applications. [8] It provides:

“ . . .

2. The normal time for the bringing of an urgent application is at 10h00 on Tuesday of the motion court week.
3. If the urgent application cannot be brought at 10h00 on the Tuesday of the motion court week, it may be brought on any other day of the motion court week at 10h00. The applicant must, in the founding affidavit, set out facts to justify the bringing of the application at a time other than 10h00 on the Tuesday....

6 The aforementioned requirements are in addition to the applicant's obligation to set out explicitly the circumstances which render the matter urgent. In this regard it is emphasised that while an application may be urgent, it may not be sufficiently urgent to be heard at the time selected by the applicant.

7. The aforementioned practices will be strictly enforced by the presiding Judge. If an application is enrolled on a day or at a time that is not justified, the application will not be enrolled and an appropriate punitive cost order may be made. . .

[13] This matter was set down for hearing on 18 June 2018, a Monday with no explanation in the founding affidavit why the matter could not be heard on 19 June 2018, the Tuesday. The explanation proffered from the bar was that the date was arranged with the Registrar. The explanation is not satisfactory to this extent there is a clear non-compliance with the practise directive. Be that as it may, the question that may be dispositive of this matter is whether the grounds objectively speaking warrant an urgent hearing and reasons if any, why the applicants claim they cannot be afforded substantial redress at a hearing in due course.

[14] The urgency of the matter was seriously challenged on the basis that the case made out for urgency was "vague and speculative". The applicants allege as a basis for urgency that governance in the East Cape has been negatively affected. Nowhere is it alleged what and how governance in the Eastern Cape has been affected. This is a bald and unsubstantiated allegation. In any event it does not follow because councillors have been removed alternatively suspended that the governance of the Province will be negatively affected.

[15] The most cogent reason advanced for urgency is the alleged continued infringement of the applicants rights as members. When the applicants were asked what rights were affected, the applicants referred to the case of Ramakatse and Others v Magashule and Others[9] where the Constitutional Court affirmed the common law rights of members of a political party and the applicability of Clause 19 of the Bill of Rights. The respondents submit that the applicants have not stated what rights in this application have been affected. In other words the applicants have failed to point out what rights in the ANC Constitution have been affected. Ramakatse supra was about the validity of the Provincial Conference of the Free State and the applicants relied on Clause 19 of the Bill of Rights. This case is about the Ndebele report. In my view the applicants have failed to demonstrate what rights have been impacted on xxxxxxxx.

- [16] A further ground for urgency contended by the applicants is that the disciplinary enquiries against twenty five Mquma councillors in which four have been finalised and two of the four councillors have been suspended. It is extraordinary that the applicants complain yet the councillors affected do not. There are also no confirmatory affidavits from the affected councillors to support these allegations . Pertinently these allegations are not supported by any evidence. There is no evidence when the alleged disciplinary enquiries took place and when the suspensions occurred. There is also no link between the leadership and the disciplinary action taken.
- [17] The reliance on the statement in the Ndebele report that the matter is urgent does not necessarily render the matter urgent. In the case of *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite and Others*[10] my brother Notshe AJ held: “. . . the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent.” The court further held that the “procedure set out in Rule 6(12) is not for the taking.” [11]
- [18] The applicants submit that if the incumbent PEC is found to be invalidly elected, then the decisions taken are invalid. Not only is this submission extraordinary it is also misplaced. In *Democratic Alliance v President of South Africa*[12] the court held that Mr Simelane’s decisions while he was National Director of Prosecutions remain valid.
- [19] This application was launched on 17 May 2018 and set down for hearing on 18 June 2018, a month later and on a Monday. It is not disputed that the Ndebele report the subject of this matter was published on 27 February 2018. The reason proffered for the two and half month delay from the time of publication to the launch of this application was to afford the Second Respondent an opportunity to deal with the report. By 23 April 2018, the applicants placed the Second Respondent on terms and demanded a response by 6 May 2018. On 7 May 2018, the applicant submitted that they received further information that the Ndebele report was not dealt with. There is no explanation why the application was only launched some 11 days later and set down for hearing a month later. Ordinarily matters in the urgent court in this Division are set down a Thursday for hearing on the following Tuesday. There is no explanation for the month long delay between the launch and the set down of the hearing.
- [20] What is inexplicable is that the Second Respondent met during the period 23 March and 25 March 2018. The minutes of that meeting clearly makes reference to the Ndebele Report. The applicants submit that the minutes do not reflect that a decision on the Ndebele Report was taken at this meeting. . That being so, it is inexplicable why the applicants did not launch this application after the NEC meeting because they were of the view that the Ndebele report was not dealt with by the NEC during the period 23 March to 25 March 2018.
- [21] Pertinently on the applicants own version the matter cannot be rendered urgent to the extent that the applicants have requested a referral to oral evidence. This in my view puts an end to the question of urgency. In my view the applicants have not made out a case for urgency. If there is any urgency it is self -created. Having regard hereto, it is not necessary to deal with the points in limine.

[22] In the result I make the following order;

22.1 The matter is struck from the roll with costs.

Carelse J

Judge of the South Gauteng High Court

Appearances:

Counsel for the Applicants: Mr I Jaime SC, Mr Mullins SC, AND Mr E Dyer

Instructed by: Wikus van Rensburg c/o Tim Du Toit & Co

Counsel for the Respondents: Mr Ngcukaitobi

Instructed by: Vally Chagan & Associates

[1] FA page 2 par 3

[2] FA page 8-10

[3] AA page 243

[4]

[5] Minutes of NEC meeting 23 March to 25 March 2018 page 295

[6] FA1 page 91

[7] Mgabadeli supra

[8] Practise manual – Gauteng Local Division-February 2018

[9]

[2016] JOL 35782 (CC)

[10] (11/33767)[2011] ZAGPJHC196(23 September 2011) page 4 par 9.

[11] East Rock supra page 3 para [6]

[12] CCT 122/11 [2012]ZACC 2 PAR [93]

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