SOUTH AFRICA / JUDGMENT

Pan African Congress of Azania and Another v Electoral Commission of South Africa and Another (50743/2015) [2015] ZAGPPHC 1011 (12 August 2015)

[2015] ZAGPPHC 1011

COURT
North Gauteng High Court, Pretoria

BEFORE
Mabuse

CASE / FILE NUMBER
50743/2015

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 50743/2015

DATE: 12 AUGUST 2015

PAN AFRICAN CONGRESS OF AZANIA.....First Applicant

LUTHANDO MBINDA.....Second Applicant

ELECTORAL COMMISSION OF SOUTH AFRICA.....First Respondent

LETLAPA MPHAHLELE.....Second Respondent

REASONS

MABUSE J:

[1] This matter came before me as an urgent application on 21 July 2015. After the matter had been debated before the Court on 23 July 2015 I dismissed the application with costs without giving any reasons. I have now been requested to furnish reasons for my order. These are therefore the reasons for the order that I made on 23 July 2015.

[2] In the urgent application the applicants had sought the following prayers among others:

"2. That the First Respondent be ordered to normalise communication with the First Applicant forthwith and unless directed otherwise by a competent court, the First Respondent be compelled to communicate with the leadership of the First Respondent elected at its National Conference on 27 and 28 September 2014 of which Mr. Luthando Mbinda is the President and Mr. Narius Moloto, the Secretary General of the PAC;

3. that the First Respondent restore the status of the PA C as contemplated in the Public Funding of Represented Political Parties Act of 1997 and that the current suspension is terminated in terms of the aforesaid legislation and the First Applicant's status be reinstated with immediate effect"

The application is founded on an affidavit by Narius Moloto as indicated above, an adult male and a duly elected appointed Secretary General of the First Applicant. It is opposed by the First Respondent. I was prepared to accept that prayer 2 of the notice of motion contained an error and to overlook such error.

[3] The first applicant is described as a party duly constituted as such in terms of its constitution since 6 April 1959. According to the Second Respondent's opposing affidavit, the First Applicant is described as a political party registered in terms of the laws of this country and governed by its own constitution. The Second Applicant is described as the President of the First Applicant, duly elected to the position of the President of the Applicant at the National Conference of the First Applicant on 28 September 2014. The First Respondent is the Independent Electoral Commission of this country which has been duly constituted as such in terms of the constitution of this country and which has its principal place of business situated at Election House, Riverside Office Park, Centurion, Gauteng. Its constitutional duties include, among others, funding registered political parties in this country. It derives its powers and authority to execute the said powers and duties from the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) and from the Funding Act.

[4] The Second Respondent is a major male person duly represented by his attorneys. In his opposing affidavit, the Second Respondent describes himself as the president of the First Applicant duly elected as such in terms of the Constitution of the First Applicant.

[5] The purpose of this application was set out as follows in the founding affidavit. The Applicants seek an order compelling the First Respondent to comply with its own undertakings and decisions recognising the First Applicant and the Elected National Executive Commission as representatives of the First Applicant together with an appropriate order of costs.

[6] The battlefield between the applicants and the First Respondent is the decision taken by the First Respondent and communicated to the First Applicant in a letter dated 17 June 2015 in terms of which the funding to the PAC, that is the First Respondent, was suspended with immediate effect in terms of the Funding Act. I will revert to this letter later during the course of this judgment.

[7] There is a struggle for power in the PAC. This struggle is within the national party. There are two factions within that party. Each faction is striving for the mastery of the national party. Whichever faction gains the mastery of the national party selects the parliamentary candidates for the party. The two factions are prepared to fight like Kilkeny cats for the mastery of the national party. So a faction that wins the election has a representative in the Parliament provided that it has gained sufficient proportional votes. The two factions call themselves by the names which are in all respects similar to the PAC. For purposes of this judgment I will refer to one faction as the "Letlapa Mphahlele faction", named after the Second Respondent in this application and the other faction as the "Luthando Mbinda faction", named after the Second Applicant in this application.

[8] Although Letlapa Mphahlele, the Second Respondent, has joined the skirmish, the fight in this matter is not so much between the two factions as it is between the Luthando Mbinda faction and the First Respondent. But it is not as if the other faction has no role to play in this fight between the applicants and the First Respondent. In fact it is as a result of the Letlapa Mphahlele faction that the First Respondent took the impugned decision or a step that constituted the subject matter of these proceedings. The history of the PAC is common cause between the parties. What is clear though in the papers is the continued infights that have bedevilled the First Applicant. This matter though has nothing to do with the fight for leadership of the PAC. I already have set out in paragraph 6 supra what the fight between the Applicants and the First Respondent in this matter is.

[9] The letter in which the First Applicant was informed that funding for it would be suspended was, for the purposes of this matter, preceded by, among others, the following the following sequence of events. These are by no stretch of imagination exhaustive. These are in my view the immediate events.

9.1 On 5 August 2014 the Narius Moloto informed the First Respondent that one Mr Mphethi had been charged with misconduct and that internal disciplinary proceedings were continuing. He informed the First Respondent furthermore that Mphethi's position as the president of the First Applicant had been terminated and that he was no longer a member of its National Executive Committee.

9.2 On 3 September 2014, the Second Respondent, Mphethi and the First Applicant launched an urgent application in which they sought an order in terms of which Narius Moloto and the National Executive Committee of the First Applicant were interdicted from interfering with the administration of the First Applicant. The said application, served before Bertelsman J on 16 September 2014 under Case No. 65798/2014, who struck it from the roll.

[10] On 8 September 2014 the First Respondent wrote a letter to the First Applicant, Narius Moloto on one hand and Mphethi on the other hand in which it formally gave them notice in terms s 6(7) of the Funding Act to suspend funding to the First

Applicant. The said letter, written by Mr Moepya of the office of the First

Respondent, stated as follows, among others,;

10.1 since the matter concerning the dispute in the leadership of the party(PAC) was raised with Mr Mphethi and Mr Moloto, no action appears to have been taken by any of the leaders involved in the dispute;

10.2 Both leaders seem attuned to writing to the Electoral Commission as if they were in fact the leaders of the PAC;

10.3 the actions of the PAC placed the Electoral Commission in a very difficult position as it is not in a position to determine which of the two leaders should be recognised;

10.4 the role of the Electoral Commission in the matter at hand is defined in law, except where a competent court directs otherwise;

10.5 in any legal proceedings involving inter-party disputes, the Electoral Commission can only be a respondent by virtue of these defined roles;

10.6 Mr Mphethi submits in his correspondence that the banking details of the PAC have changed;

10.7 as the Accounting Officer in terms of the Funding Act, he will await the immediate direction from a competent authority or a court of law on whose leadership should be recognised as the official leadership of the party;

10.8 in terms of s 7(b) of the Funding Act, the Electoral Commission hereby gives notice of the intention to suspend future funding to the party and Messrs Mphethi and Moloto are required to furnish reasons within thirty(30) days of the writing of this letter as to why the party's allocation should not be suspended;

10.9 according to the records of the Electoral Commission, Mr Moloto is the PAC's Accounting Officer and he will be held accountable for the funding which has already been allocated to the party for the year 2014/2015 financial year;

10.10 all other correspondence from the Pac can no longer be reacted upon until the leadership has been resolved.

[11] On 29 September 2014 the First Respondent received, under the letter head of the First Applicant, a letter in which the First Respondent was informed of the outcome of the First Applicant's National Conference held on 27 and 28 September 2014 in Bloemfontein. According to this correspondence, the new leadership of the First Applicant was Mr Mbinda, who had been elected as the president of the movement, Mr Sibusiso Xaba, who was elected as the deputy president of the PAC, Mr Narius Moloto who remained the secretary general and a member who had been assigned to liaise with the First Respondent, and finally, Mr Bernett Yoko, who remained the secretary general of the party.

[12] On 10 October 2014 the First Respondent received a letter from the Second Respondent. In this letter the Second Respondent advised the First Applicant that the election of the office bearers of the First Applicant is held once every three years and not annually. In that manner he cast doubt over the validity of the election of the office bearers of the First Applicant that was held on the 27th and 28th of September 2014.

[13] On 21 October 2014 the First Respondent informed the First Applicant that it's funding or allocations had been suspended for failing to respond within 30 days after it had been so requested to furnish reasons why the allocation should not be suspended. On 23 December 2014, Mr Moloto informed the First Respondent that the First Applicant's National Executive Committee had endorsed the National Disciplinary Committee's recommendation to expel Mr Mphethi from the party for a period of two years.

[14] On 13 March 2015 the First Respondent met with the delegation from the Lethlapa Mphahlele faction which was led by the second respondent.

[15] On 2 April 2015 the First Respondent's vice president, Mr I T Tselane, wrote a letter to the First Applicant. The said letter read as follows:

> *"In view of the above the Commissioner has decided to revise its position as articulated in the letter of 8 September 2014 and to normalise communication with the PAC forthwith. To that end and unless it is directed otherwise by a competent Court the Commissioner will henceforth communicate with the PAC's leadership elected at its National Conference on 27 and 28 September 2014 of which Mr. Mbinda is president and Mr. Moloto is general secretary. "*

Quite clearly the first respondent had taken a formal decision to recognise the leadership of the PAC.

[16] In a letter dated 7 April 2015 the First Respondent, through Mr Tselane again, informed the PAC that the First Respondent had revised its decision as set out in its letter dated 8 September 2014; that it would then normalise communication between it and the PAC by communicating forthwith with the leadership of the PAC that they had been elected at the Conference of September 2014 at which the Second Applicant was elected as president and Mr Moloto as the secretary general.

[17] Quite clearly the First Respondent received a deluge of correspondence from the two factions, each one of them trying to unseat the other; each one of them claiming to be the legitimate leadership of the PAC. It became difficult for the First Respondent to establish which of the two factions represented the legitimate leadership of the PAC.

[18] On 16 April 2015 the First Respondent met, this time, with a delegation of the Second Respondent and also Mr. Mphethi. At this meeting the Second Respondent expressed his displeasure at the substantive merits, processes and effect of the First Respondent's decision as communicated in its letter dated 7 April 2015.

[19] According to the applicants, despite the fact that the aforesaid letters seemed to be a regurgitation of the concerns of Mr. Mphahlele, it clearly attempted to contradict a decision made by the First Respondent on those very same facts and under the same circumstances as the letter issued on 7 April 2015. The Applicants were of the view that it was not up to the Second Respondent or any member of his delegation to approach the First Respondent and to make it change its decision nor was it up to the First Respondent to do so in clear contradiction of its undertakings to abide by an order of competent court. The Applicants also took umbrage to the fact that the First Respondent seemed to have taken a decision only after it had listened to the representations made by the Second Respondent. They felt that their goose was cooked at that meeting. They felt that the Second Respondent had led the First Respondent by the nose.

[20] On 15 May 2015 the First Respondent wrote a letter to the Applicants in which it indicated to them that it had held a meeting with the Letlapa Mphahlele faction on 7 April 2015.

[21] Following this meeting of 16 April 2015, Mr. Tselane then wrote to both factions in particular the Second Applicant and the Second Respondent and requested them to make their written submissions to the First Respondent not later than 20 May 2015. In response to an invitation by the first respondent to the Applicants to make submissions, on 19 May 2015 the Secretary General made his submissions to the First Respondent which were delivered by hand. After considering such submissions by both the First Respondent took the impugned decision on 17 June 2015 and notified the two sections accordingly.

[22] What happened thereafter was that the First Respondent issued a letter dated 17 June 2015 and forwarded same to the applicants on 19 June 2015. I wish to quote the contents of the letter dated 17 June 2015 copiously for it contains not only the full reasons why the First Respondent suspended the funding for the First Applicant but also the reasons why the First Respondent retracted its letter dated 8 April 2015. The said letter reads as follows:

"1. I refer to my letter of 15 May 2015 and thank you for the written representations received in response thereto.

2. / accept that it has taken some time to respond to your written representations. However, as you are well aware, this matter has a long and tortious history about which the parties have divergent narratives. As a result, the Electoral

Commission required an opportunity to comprehensively consider the written representations and its supplementary documents, to ensure that the decision taken by it is proceduralfy fair and lawful.

3. Having now studied your respective written representations and taken legal advice, the Commission is convinced that it's decision articulated in its it's letter of 8 April 2015 was taken in a manner that was not procedurally fair, in that the Commission failed to afford the faction of the PAC Leadership aligned to Notios Mphahlele and Mphethi notice of its intention to make such a decision, and an opportunity to make representations prior to

taking the decision which handset**, clearly affects the rights and legitimate expectations of that faction.

4. As a result, the Commission is advised that the decision was taken irregularly and that the Commission is duty-bound to disavow alliance on it and retract the letter of 8 April 2015.

5. I accordingly write to advise you of the Commission's decision to disavow the reliance on the decision and retract the letter of 8 April 2015. The effect of this decision is that the situation will revert to the status quo that obtained prior to the dissemination of that letter, being that:

5.1 the Commission wilt henceforth no longer act upon any correspondence from the PAC until the leadership dispute had been resolved by a pronouncement of a Court of competent jurisdiction of whom the Commission should recognise as comprising the lawful leadership of the party; and

5.2 the Commission suspension of the future funding of the PAC contemplated in the Public Funding of Represented Political Parties Act

103 of 1997 ("the Funding Act"), as contemplated in s. 6(7) of that Act, is reinstated with immediate effect

6. The respective written representations again underscore the fact that there are different factions simultaneously contained in that they constitute legitimate leadership of the PAC. The representations also illustrate that each of the factions has a different factual and legal narrative of the situation that presently obtains as far as the leadership of the PAC is concerned. The Commission has neither a conditional ** mandate nor an institutional capacity to resolve these disputes.

7. The Commission regrets the situation that has arisen where a registered party such as the PAC is hampered in its purpose of serving as a representative of the citizenry in exercise of their political rights guaranteed in

s. 19 of the Constitution. However, for as long as the current situation continues where different factions simultaneously contend that they constitute the legitimate leadership of the PAC, the Commission is not in a position to determine with whom it should lawfully and legitimately liaise, making the position adopted by it appropriately ** necessary for the Commission to perform its constitutional and statutory obligations. It is for this reasons that the Commission proposes that the different factions of the PAC should consider submitting the leadership dispute to arbitration in order to resolve the current impasse effectively, finally and expeditiously. Failing these, the Commission will await the resolution of this dispute by an order of Court of competent jurisdiction, and the Commission would accordingly act on such an order.

8.

9. Finally, / must regrettably deal with the unfortunate aspersions cast upon the integrity of the Chief Electoral Officer and "the Commissioner from the Eastern Cape", which I surmise ** is intended to refer to Commissioner Finca that appear on page 16 of Mr Moloto's letter of 19 May 2015. No factual basis has been advanced in the letter for these spurious claims of partiality, and they stand to be rejected in totality.

Yours faithfully IT Tselane

(Mr. Vice Chair Person)"

[24] The reasons for suspending any further funding of the First Applicant were set out in paragraph 6 and 7 of the letter I quoted above.

[25] The Applicants have built their case around the provisions of s. 6(7) of the Funding Act. Mr. Liversage, counsel for the applicants submitted that s. 6 of the Funding Act imposed an obligation upon the political parties that received money from the fund to keep separate bank account for allocation of such funds to the Party. The said section furthermore demands an appointment of an accounting officer by the receiving party to account for all the monies that have been allocated to such a party;

25.1 furthermore it directs that: a receiving party's accountant must keep separate books and records in respect of all monies received from the Fund and all monies involving transaction with those monies. In brief it requires the receiving party to account fully and respect all the monies that it received from the First Respondent;

25.2 it directs that within the two months after the end of a financial year, the accounting officer of the party must prepare its financial statements and submit the books and records to a registered auditor;

25.3 that the auditor so appointed must express an opinion as to whether or not the allocated monies were spent for purposes for which they had been allocated to the party receiving them and that the report and audited statements must be submitted within three months after the end of the party's financial year to the first respondent;

25.4 that the first respondent may appoint an auditor to verify the reports and audited statements submitted to it; and

25.5 that the auditor general may at any time audit any political party's books, records of account and financial statements relating to monies allocated to the party from the Fund.

[26] The Applicants, as I indicated earlier built their case around the provisions of s 6(7) of the Funding Act. This is so because of paragraph 5.2 of the said letter in which the First Respondent indicated that it had decided to suspend the future funding of the First Applicant as contemplated in s 67 of the Funding Act.

[27] Accordingly s 6 is aimed at a party's conduct with regard to proper bookkeeping system of monies which the party has received from the First Respondent. It is in the context of this application as imposed upon a political party that the provisions of the Funding Act must be evaluated.

[28] Section 6(7) of the Funding Act empowers the First Respondent to suspend the allocation of monies to a political party if satisfied on reasonable grounds that that party has failed to comply with any requirement of the Funding Act.

[29] Having regard to the short history that I have sketched above, the question now is was the First Respondent entitled to take the decision it took on 17 June 2019 and, if so, did the First Respondent follow the correct procedure in doing so?

[30] There is no doubt that, in terms of the provisions of s 6(7) (8) the First Respondent possesses the power to suspend the funding or all occasions to any political party. The PAC is indeed a political party, but the First Respondent's powers are not unlimited.

Before exercising such powers, the First Respondent must be satisfied on reasonable grounds that the party concerned has failed to satisfy the requirements of the Funding Act. The unending squabbles between the two factions, the numerous court applications the parties or the factions within the party have been involved in, the numerous meetings the two factions have had with the First Respondent and the numerous correspondence exchanged between the two factions on one side with the First Respondent have made it difficult for the First Respondent to identify the legitimate leadership of the First Applicant. The First Applicant, I must assume, is a juristic person and can only function through its legitimate leaders.

[31] Even before the First Respondent can take a decision in terms of s 6(7) (a) of the Funding Act, it has to follow the procedure set out in s 6(7)(b) of the Funding Act. This section provides that:

"(b) The suspension of a political party's allocations may be ordered in terms of paragraph (a) only if the Commission -

(i) by written notice has informed the party of the proposed suspension and the reasons therefore; and

(ii) has called on the party to furnish reasons, within the period specified in the notice (which may not be shorter than 30 days as from the date of the notice), why its allocations from the fund should not be suspended."

[32] The First Respondent's letter dated 8 September 2014 serves the purpose contemplated in s 6(7) (b) of the Funding Act. The intention to suspend funding to the PAC was communicated not only to the PAC but also the two factions in this letter. Secondly, the two factions were requested, as enjoined by s 6(7) (b)(ii) to furnish reasons within 30 days of the notice why the funding should not be suspended. It is not in dispute that the said period came and passed and that neither of the parties responded accordingly to the notice.

[33] It is contended by Mr. Liversage that the First Respondent was functus officio with regard to its decision of 17 June 2015. The applicants contend that the First Respondent became functus officio after having decided on 17 June 2015 to withdraw the PAC allocations. I do not understand this argument.

[34] Somewhere in his heads of argument, Mr. Liversage argued that the First Respondent became functus officio once it had taken its decision of 7 April

2015. There is no merit in this argument. This contention is contradicted by the fact that the First Respondent retains the power to terminate the suspension if it is satisfied, considering the subsequent conduct of the party, if the suspension is no longer justified. It provides as follows:

"Subject to paragraph (b), the Commission -

(ii) must terminate the suspension if satisfied in the light of the party's subsequent conduct, that the suspension is no longer justified. " Accordingly, once the First Respondent has decided that the allocation of monies to a political party should be suspended the First Respondent does not have to go back to court in order to have its decision reviewed if it wants to act in terms of s 6(7) to terminate the suspension of such allocations. In equal measures, once it has decided to terminate the suspension of the allocation of monies to a party the First Respondent does not need any leave of the Court in order to terminate the suspension.

[35] This Court is not interested in knowing about the many fights the factions had been involved in nor is it interested to know the results of such fights. This Court has no interest in this matter to know or even establish who the legitimate leaders of the party are. The issue in this application is whether the circumstances existed in terms of which the First Respondent could suspend the PAC's allocated monies and, if so, whether in taking such a decision, the correct procedure was followed. I am satisfied that this decision of 17 June 2015 was preceded by the circumstances which justified the decision taken on 17 June 2015 and accordingly I was satisfied that the Applicant's application could not succeed.

[36] Apart from raising a point that once it decided on 7 April 2015 to forthwith communicate with the leadership of the First Applicant, the First Respondent became functus officio, the Applicants have not seriously charged the decision that the First Respondent took on 17 June 2015. At any rate there is no application before this Court to review and set aside the impugned decision on the basis that when the First Respondent took it, it was already functus officio. Nowhere in their papers to the Applicants pray that the said decision be set aside. They have not raised with any clear voice the validity or invalidity of the decision. Firstly a decision, once made, is valid, binding and has consequences until it is set aside by a Court of law, on application by a party that holds a contrary view. It is the law as pronounced prominently in Oudekraal Estates (Pty) Ltd v City of Capetown and Others 2004(6) SA 222 SCA at paragraph 26 where the Court had the following to say:

.. the Administrator's permission was unlawful and invalid at the outset... but the question that arises what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to make it invalid, as if it never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's

approval and all consequences merely because it believed that they were invalid provided that its belief was correct. In our view, it was not, until the Administrator's approval (and does also the consequences of the approval) is set aside by a Court in proceedings for judicial review it exist in fact and it has legal consequences that cannot simply be overlooked. The proper function of the modern state will be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the Act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside. "

[37] In his heads of argument, Mr. Moerane raised the point that the application does not comply with the requirements of a final interdict and should therefore fail. An Applicant for a final interdict must satisfy the Court that:

37.1 it has a clear right to the relief that it seeks;

37.2 that there is a reasonable apprehension that such right has been or is expected to be infringed; and

37.3 that it has no similar protection through the ordinary means.

The Applicant must satisfy all these requirements and not only one or two. In the instant matter, the application cannot pass the first hurdle. The Applicants have not established a clear right. This is so because while one faction claims that the Second Applicant is the president of the First Applicant another faction raised the same claim to the presidency in respect of the Second Respondent. The two factions each claims that the other of them is not the legitimate leadership of the First Applicant.

[38] As no rights of the Applicants have been infringed by the impugned decision, the applicants also fail on this ground.

[39] With regards to the said requirement it was open for the Applicants to launch a review application, to challenge the validity of the decision of the First Respondent and to have it reviewed and set aside. This has not been done and as I have already stated somewhere supra, the said decision will stand. I accept that Mr. Liversage raised this points only in his heads of argument in which he stated that the First Respondent's decision to suspend the PAC's funding stands to be reviewed and set aside in terms of s 6(2)(c)(i) and/or s 6(2)(b) (i) of the Promotion of Justice Act 3 of 2000 (PAJA), alternatively in terms of s 6(2)(b) of PAJA were not being rationally connected to the purpose of the empowering provisions or the purpose for which it was taken. Before the Court there was no application to review and set aside the

impugned decision, despite this argument.

P.M: MABUSE JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants: Adv. Liversage

Instructed by: Van der Merwe & Associates

Counsel for the first respondent: Adv. Moerane (SC)

Adv. Lecoge

Instructed by: MB Tshabangu Inc

Date Heard: 23 July 2015

Date of Judgment: 8 December 2015

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