

SOUTH AFRICA / JUDGMENT

Pan Africanist Congress of Azania v Moloto (46162/2019) [2019] ZAGPPHC 304 (12 July 2019) [2019] ZAGPPHC 304

COURT

North Gauteng High Court, Pretoria

BEFORE

A Millar

CASE / FILE NUMBER

46162/2019

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IN THE HIGH COURT OF SOUTH
AFRICA
(GAUTENG DIVISION, PRETORIA)
(1)

REPORTABLE:

YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED
NO
Case No. 46162/2019
12/7/2019
In

the matter between:

THE
PAN AFRICANIST CONGRESS OF
APPLICANT
AZANIA
And
MOLOTO,
NARIUS
RESPONDENT

JUDGMENT

MILLAR, A J

1. This is an application in which the applicant applies to set aside a decision by the respondent, its current President, to suspend the applicant's constitution and office bearers and to administer the applicant by decree. The respondent avers an emergency entitling him to have acted as he did. The applicant disputes any emergency.
2. On 9 June 2019, the respondent addressed a letter to all structures of the applicant setting out what he asserted was the state of affairs within the applicant and concluded his report by stating:

"I therefore and hereby invoke clause 14.2 of the Disciplinary Code of the Constitution, and to suspend the Constitution to the extent that it would be necessary to ensure that a National Congress is timeously an(sic) properly convened and that the processes and compliance requirements leading up to the National Congress are adhered to ensure that the said meeting of members and properly mandated the delegates renders a legitimate result to ensure the future of our organization and the fulfilment of its objectives."

3. Clause 14.2 of the Disciplinary Code of the Constitution provides:

"The President shall have emergency powers, which he may delegate, to suspend the entire constitution of the PAC so as to ensure that the movement by decree, and is answerable for his actions to the National Conference or National Congress."

4. The word "ensure" in the second line of the clause seems to have been an error. The clause as presently worded makes no sense. The parties are common cause on the papers that the clause properly construed would have the word "ensure" substituted or replaced with the word "administer". A reading of the clause with this word in substitution for "ensure" would certainly be consistent with the conduct of the respondent after the issue of the letter and also with the applicants understanding of the effect of the invocation of the clause.
5. On 10 June 2019, the respondent then issued a decree in terms of clause 14.2 in terms whereof he inter alia summarily removed all members of the National Executive Council ("NEC") who had previously been elected to those positions and appointed his own office bearers. He also decreed that the National Conference which was to take place from 29 to 31 August 2019 in Bloemfontein would now take place on 24 August 2019 in Marble Hall.
6. It is the invocation of clause 14.2 and the subsequent decrees that caused the applicant to approach this court on an urgent basis for an order to set aside the invocation of clause 14.2 by the respondent and for consequential relief.
7. Central to the invocation of the clause was the existence of an "emergency" justifying its invocation. This also goes to whether or not the present application is urgent or not.

8. An "emergency" is "A situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action" and "The fact of happening or occurring suddenly or unexpectedly"[1]
9. Two issues arise for determination - firstly what then was the emergency that caused the respondent to invoke clause 14.2 and secondly was he entitled to do so?
10. On 8 March 2019, pursuant to litigation between various members of the applicant, an order was granted by consent in terms whereof the agreed leadership of the applicant was recorded. It suffices to state for purposes of the present application that the respondent was acknowledged to be the applicant's president and the deponent to the founding affidavit before me as its secretary general. The order also recorded that a national congress with the aim of electing an NEC would take place on or before 31 August 2019.
11. The NEC met on 18 May 2019. All the members who had been agreed as set out in the court order of 8 March 2019 were present. The resolutions taken at that meeting were inter alia that:
 - "a. The date of the Congress shall be 31 August 2019.
 - b. The venue of the Congress will be in Bloemfontein.
 - c. Secretary general will issue a circular of the congress in compliance with the Court Order and the PAC Constitution of 2000.
 - d. All other administrative requirements of the Congress with(sic) be attended by the Secretary General, including logistics."
12. On 23 May 2019, a letter from the office of the Secretary General and addressed to all branches and structures and component structures was dispatched. The letter contained notification of the holding of the National Congress as well as reference to the relevant provisions of the 2000 Constitution. It also pertinently stated that the agenda for the conference was predicated on paragraph 7 of the court order of 8 March 2019 :

"The PAC shall hold a national congress on or before 31st August 2019 with the primary aim of electing the National Executive Committee. The National Congress shall be held subject to the provisions of the PAC Constitution of 2000."
13. There was in addition attached to the letter a document headed "Road Map toward PAC Elective Congress to be Held 29th to 31st August 2019 in Bloemfontein". This document set out a specific time line and 13 separate steps towards the National Congress. It also specified who would be responsible for each of the steps.

14. On 26 May 2019 an internal 8-page memorandum prepared by the National Chairperson, Mr. Phillip Dlamini was circulated in which he took issue with the contents of the letter of 23 May 2019 and its annexure and a plethora of other matters. On 5 June 2019 the Secretary General responded in writing a 4-page reply in which he addressed the substance of each of the issues raised.
15. Nothing further transpired until the respondent in his letter of 9 June 2019 notified all structures of the applicant that he was invoking clause 14.2. The clause was invoked *inter alia* because:

"7. In terms of clause 3.1 of the Constitution it is the duty of the NEC to "organize, supervise and co-ordinate the activities of the party".

8. In order to do so and in order to ensure that not only the parties to the litigation, but also ordinary members of the organization who (are) entitled to the adherence to the court order and Constitution, the provisions of the Constitution must be observed and complied with.
9. It follows that an NEC meeting should be properly convened to afford the members of the NEC to deliberate and conclude on a date for the National Congress, to determine a proper time line that would ensure that the other requirements of the Constitution are properly adhered to, and to iron out any possible deficiencies that may bring the credibility and legitimacy of the National Congress into disrepute. The purpose of the said meeting would also be to delegate certain of the abovementioned tasks, for which the NEC is responsible, to specific office bearers to ensure that decisions are properly executed.
10. To date this compulsory first step was not possible due to the chronological sequence of events in 11 below that followed the court

date of the settlement agreement and the court order."

" 11.8 The notice issued by the Secretary General has not been discussed or issued by the NEC and does not have the required agenda as provided for in the Constitution. It was not sent (to) the branches of the party of the different wards of the country. It was sent only to a few people and it was further posted on social media platforms. I humbly submit that not all members belong to social media platforms."

16. What then was the emergency? It is clear that the letter of 9 June 2019 read as a whole but in particular the passages quoted above that the emergency perceived by the respondent arose firstly from a belief that there had been no NEC meeting held and also that the Secretary General had no mandate to give notice of the forthcoming National Congress or authority to attend to the administrative matters.
17. The NEC meeting held on 18 May 2019 was completely ignored by the respondent, even though he had attended it, and he proceeded on the basis that it had not taken place and that none of the resolutions passed at that meeting had any force or effect. In reality the NEC meeting had taken place and valid resolutions had been passed. The Secretary General had

acted in accordance with those resolutions and the mandate they gave him and proceeded to give notice for and arrange the National Congress. In terms of those resolutions, if the respondent had any cause for concern the appropriate course of action for him to follow was in the first instance to engage with the Secretary General, in much the same way as the National Chairperson had done.

18. In terms of clause 5.7 of the applicant's Constitution, notice and an agenda of an annual conference has to be given to the component structures and organs of the applicant at least 8 weeks beforehand. The sending of the notice of 23 May 2019 for the National Congress to be held on 31 August 2019 was sent out 14 clear weeks before. Furthermore, in terms of clause 5.8, members can call for the inclusion of specific items on the agenda of such conference by giving the Secretary General notice not less than 6 weeks beforehand. The 8- and 6-week periods respectively would have expired at the end of the 2nd and 4th weeks of July 2019 respectively - a full 6 weeks after the notice of 23 May 2019 was sent out.
19. Having considered the time periods available to the respondent, there was no pressing need to have taken the steps that he did by summarily invoking clause 14 .2 of the Constitution. The reasons proffered by him for doing so - which were technical in nature, could have been remedied simply by engaging with the Secretary General. The main reason however was a disregard for the fact that the NEC had met on 18 May 2019 and had passed valid resolutions - which included the delegation of authority to the Secretary General to make the necessary arrangements and take the steps required to ensure that the National Congress took place on the agreed date of 31 August 2019 .
20. Was the respondent's dissatisfaction with the NEC meeting of 18 May 2019 and the subsequent actions of the Secretary General indicative of an emergency? It was argued on behalf of the respondent that clause 14 .2 of the Constitution required only the subjective view of the respondent that there was an emergency for him to validly invoke the provisions of clause 14.2 .
21. I was referred to the judgment in the case of *Pan Africanist Congress of Azania v Ka Plaatjie and Others*[2] in which it was stated:

"[26] It was contended on behalf of the respondent party that the president acted unconstitutionally in suspending the constitution of the PAC. The contention failed to impress. Clause 14.2 of the Disciplinary Code empowers the president to suspend the entire constitution if there is a crisis. It is not open to any member to argue that the president acted unlawfully in suspending the constitution because there was no crisis. Whether the PAC faces a crisis or not, is not open for any democratic debate. The enquiry is not whether a reasonably informed member of the PAC would, in given circumstances, have objectively thought that the PAC was in a political crisis or not. On the contrary, the enquiry is whether the president subjectively believed that the PAC was in a crisis regard being had to the prevailing circumstances. It is a prerogative which is exclusively entrusted to the president. It resides squarely within the subjective province of his own mind. It follows, therefore, that even if the president's reading and assessment of the

situation is shown to be objectively wrong, it cannot, for that reasons, be challenged.

[27] It is a matter of democratic centralisation of emergency powers in the president. He wields unquestionable powers in terms of clause 14.1. On 22 September 2007 he was of the opinion that the crossing of the floor by 213 of his party's members of parliament, coupled with the immediate breakaway from his party, together boiled down to real crisis. Apparently there had never been such a rebellion in the history of the party as a liberation movement or as a registered political party. During the state of emergency the president was empowered to rule the movement alone by decree - clause 14.2. Implicitly he could lawfully dissolve any structure including the national executive committee. For his actions during the crisis he was obliged to answer only to the national conference or congress."

22. If this is the test to be applied then irrespective of the objective circumstances, the respondent could at any time invoke the provisions of clause 14.2.

23. The Constitution of the applicant read as a whole makes it plain that it is an organization founded upon a membership. Furthermore, it recognizes that the "national conference shall be the supreme organ of the organization." The applicant's Constitution does not recognize a situation where the applicant can as a matter of course be administered by decree. The circumstances under which this may occur must constitute an emergency.

24. The invocation of clause 14.2 is an extraordinary remedy. Its invocation has the effect of suspending the authority of all elected decision makers and strikes at the core of the aims and objectives of the applicant - inter alia to "fight for the overthrow of all forms of domination"

25. It is well established in our law and the Constitutional Court has held in *Albutt v Centre For the Study of Violence and Reconciliation*[3] that where a:

"decision is challenged on the grounds of rationality; courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved."

26. This principle has been applied where the power exercised is a public power, but I can see no reason why it is not also applicable in the present matter. The applicant is a voluntary body and its members are entitled to hold their elected office bearers within that voluntary body to the same standard. It is inimical to the very concept of a voluntary association with a constitution and elected office bearers, that one member may on an entirely subjective basis and without regard to whether a decision made is in any way rationally connected to the reason for the decision, make such a decision. For these reasons I consider that the appropriate test for considering whether clause 14.2 could be invoked is an objective one based on the principle of rationality.

27. A consideration of events from 18 May 2019 up to 9 June 2019 set out above makes it clear that there was indeed no "emergency"

and no basis for invoking clause 14.2. The decisions taken by the NEC on 18 May 2019 were validly taken and stand. The decisions taken by the respondent from the time of the invocation of clause 14.2 where these are inconsistent with those resolutions are set aside. Those decisions that are consistent will stand.

28. In the circumstances I make the following order:

28.1 The respondent's unilateral invocation of clause 14.2 of the PAC disciplinary code, adopted as part of the amended Ga-Matlala Constitution of 2000 is hereby set aside;

28.2 All decrees issued by the respondent from 9 June 2019 to date of this order, where such decrees are inconsistent with or contradictory of the resolutions of the NEC taken on 18 May 2019 are set aside;

28.3 There is no order as to costs.

A MILLAR

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:

9 JULY 2019

JUDGMENT

DELIVERED ON:

12 JULY 2019

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- [1] The Shorted Oxford English Dictionary, Oxford University Press , Fifth Edition, 2002, Vol. 1 page 814
- [2] (5173 /2008) [2008] ZAFSHC 73 (9 October 2008) at paragraphs26 and 27
- [3] 2010 (3) SA 293 (CC) at paragraph 51; a case where the Court considered the exercise of authority by the President of the Republic. See also Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC); Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC)
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