

SOUTH AFRICA / JUDGMENT

Pan Africanist Congress of Azania v Moloto (46162/2019) [2019] ZAGPPHC 538 (12 October 2019) [2019] ZAGPPHC 538

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

21/10/2019

In

the matter between:

THE

PAN AFRICANIST CONGRESS

OF

APPLICANT

AZANIA

And

MOLOTO,

NARIUS

RESPONDENT

JUDGMENT**MILLAR, A J**

1. On 12 July 2019 and pursuant to an application in the urgent court brought by the applicant I granted the following order:-

1.1 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;

1.2 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;

1.3 There is no order as to costs.

2. The respondent thereafter applied for leave to appeal which was set down for hearing on 23 August 2019. When the application for leave to appeal was called, a third party brought an application for leave to intervene in the proceedings and the applicant brought an application in terms of Section 18(3) conditional upon the granting of leave to appeal.

3. I heard the application for leave to appeal and was persuaded to grant leave as contemplated in Section 17(1)(b)(ii), there being

conflicting judgments on the legal test to be applied in the interpretation of the applicant's constitution and the respondents

conduct in terms thereof.

4. In consequence of the granting of leave to appeal, the application for intervention was rendered moot and the order sought for intervention

was not granted.

5. The final matter for consideration was the application in terms of Section 18.

6. Section 18(1) provides:-

"(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

7. Section 18(3) provides:-

"(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

8. Section 18(4) provides:-

"(4) If a court orders otherwise, as contemplated in subsection (1) -

- (i) the court must immediately record its reasons for doing so;
- (ii) the aggrieved party has an automatic right to appeal to the next highest court;
- (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
- (iv) such order will be automatically suspended, pending the outcome of such appeal.

9. The application in terms of Section 18 was predicated on the basis that were leave granted, the suspension of the courts order granted on 12 July 2019 would mean that the respondent could proceed on the course of action adopted by him and in so doing effectively render the appeal moot.

10. At the center of the dispute between the Parties was the arrangements for and attendance of delegates at a conference to elect a new National Executive. The National Executive Committee had prior to the invocation of the "state of emergency" by the respondent resolved that this conference would take place on 31 August 2019 in Bloemfontein. The respondent, once he had declared the state of emergency (which was set aside by this court) had then changed the date and venue of the conference. These were changed to 24 August 2019 at Marble Hall.

11. The venue of the conference and the delegates attending and permitted to attend are significant factors in the eventual identity of those elected to the National Executive Committee and with it the ultimate election of the leader of the organization.

12. The test to be applied in a Section 18(3) application was set out in *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) 195I- 196C which stated:-

"[24] ... In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. Buts 18(3) seems to require a different approach. The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the South Cape test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a "preponderance of equities". The discretion is indeed absent, in the sense articulated in South Cape. What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so-

called "fact" of "irreparability".

13. It is evident that the holding of the conference at Marble Hall on 24 August 2019 would have the effect of undermining and rendering

nugatory not only the original decision of the National Executive Committee to hold the conference on 31 August 2019 in Bloemfontein

but also the judgment of 12 July 2019. Simply put if that conference went ahead, the state of emergency declared by the respondent would have been legitimized and the outcome of the appeal rendered moot in effect, save for the determination as a matter of law of the test to be applied in the future.

14. The applicant would be irreparably harmed, its application having been rendered academic. The respondent on the other hand would not suffer any prejudice. The conference as originally arranged would accommodate the respondent's interest without that taint of arbitrariness associated with the unilateral declaration of the state of emergency, changed date and venue in consequence thereof.

15. For the reasons set out above I granted the following order:-

15.1 Leave to appeal is granted to the full court of this Division;

15.2 Costs of the application for leave to appeal are costs in the appeal;

15.3 The application in terms of Section 18

(3) is granted with no order as to costs.

A MILLAR

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:

23 August 2019

JUDGMENT

DELIVERED ON:

23 August 2019

REASONS:

21 October 2019

COUNSEL FOR THE APPLICANT:

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INSTRUCTED BY:

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MR. TSHABANGU

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MR. J KRIJT

INTERVENING PARTY:

MR P. DLAMINI - IN PERSON

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