

SOUTH AFRICA / JUDGMENT

Ramakatsa and Others v Magashule and Others (3453/2012) [2012] ZAFSHC 207 (26 October 2012) [2012] ZAFSHC 207

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai

CASE / FILE NUMBER

3453/2012

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 3453/2012

M P RAMAKATSA AND 5 OTHERSApplicants

versus

E MAGASHULE AND 25 OTHERSRespondents

CORAM: RAMPAI, J

HEARD ON: 11 OCTOBER 2012

DELIVERED ON: 26 OCTOBER 2012

REASONS ON 13 NOVEMBER 2012

- [1] These were motion proceedings. Initially the applicants envisaged a two-phased litigation process. The relief sought was an interim interdict pending the finalisation of a review application. The application was opposed by all the respondents.

- [2] The purpose of the interdict sought was to have the first twenty five respondents provisionally restrained from politically acting as the legitimate members of the Provincial Executive Committee (PEC) of the African National Congress (ANC) in the Free State province. The applicants complained that the process leading up to the ultimate provincial election of such structure was manipulated and abused; that the principle of fair political play was flagrantly undermined and that the election was not free and fair.
- [3] The purpose of the review sought was to have the post election decision of the 26th respondent, as the mother body, whereby the PEC was recognised as the lawful, authentic and representative leadership structure, declared invalid and annulled. The applicants complained that the 26th respondent failed to consider their objections and grievances against the first respondent and twenty four others in an objective and impartial manner. They contended, therefore, that such a decision was a reviewable administrative act. They sought to have such decision annulled by the court, the PEC dissolved and an interim structure appointed by the 26th respondent to level the playing field so that a true legitimate, authentic and representative provincial leadership could be elected.
- [4] The application was launched on the 20th August 2012 and enrolled for the initial hearing on Thursday, 6 September 2012. On that day the matter served before Daffue, J. By then the application had not yet been served on the respondents save the 26th respondent who was served on the 28th of August 2012.
- [5] Notwithstanding the fact that the first 25 respondents had not yet been served as on that day, they were all legally represented, so it would appear. By agreement between the parties Daffue, J made the following order:
- “1. The application is postponed to the 27th of SEPTEMBER*
- 2012;
2. The respondents to serve and file their notice of intention
- to oppose, if any, within the time limits as prescribed by the Rules of Court / High Court Act;
3. The respondents to serve and file their opposing papers,
- if any, within 15 days after serving and filing their notice of intention to oppose;
4. This order is to be served on all respondents;
- No order as to costs.”
- [6] The wording of the order presupposed that the application had already been served on all the respondents, which was in fact not the case as on 6 September
2012. On Friday the 7th September 2012, in other words a day after the aforesaid court order was made; the sheriff served the copies of the application on the rest of the respondents.

- [7] On Thursday the 27th September 2012, the matter served before me. The applicants wanted to have the matter postponed, but the respondents were against the proposed postponement. They rather wanted to have the main application argued and dismissed with costs.
- [8] Since September 27, 2012 fell during the recess: there were urgent applications to be heard; the matter was not an urgent application and I was the only available judge, the matter could not be entertained. It had to be postponed. To the delight of the applicants, but to the dismay of the respondents, I indicated to the legal representatives of the parties what I was inclined to do. They then asked me to excuse them for a while.
- [9] On their appearance in court, the lawyers informed me that they had agreed on the contents of a draft order. The agreed order reads as follows:

“The application for the postponement of this matter having become opposed and it being impossible for the Court to entertain it, it is postponed to 11 October 2012 for consideration of the aspects which were, but for it being Court recess, (sic) to be considered today.

The costs of this application are to stand over for determination on 11 October 2012.”

- [10] On Thursday the 11th October 2012, the parties approached the matter from two diametrically opposed angles. On the one hand Mr Wessels, counsel for the respondents, submitted on the strength of the court order of 27 September 2012 that the proper approach to the matter was to freeze the time and to deal with the matter as if October 11 was September

27. Counsel wanted the court, first of all, to call upon the applicants to present their application for postponement as they had wanted to do a fortnight earlier.
- [11] On the other hand Mr Mpofu, counsel for the applicants, sharply differed. He submitted that the argument about the freezing of the time was neither here nor there. He went on to argue that October 11 was just that: October 11 and not September 27. He argued that on October 11, unlike September 27, the applicants sought no postponement, but were ready to argue the main matter, something the respondents had wanted to do a fortnight earlier.
- [12] In the circumstances I have to deal with the interlocutory saga of postponement ante omnia. I shall revert to the main application. As regards this sideshow, the 26th respondent abides. The relative notice to this effect was delivered on the 11th October 2012.
- [13] I have to revert to the genesis of these proceedings. They were initiated on the 20th August 2012 by way of ordinary motion proceedings. The matter was placed on the roll of Thursday the 6th of September 2012. On that day it turned out that the respondents, with the exception of 26th respondent, had not been served. Although Mr Rautenbach appeared and informed the court that he appeared on behalf of the first 25 respondents, it was not placed on record as to which attorney had briefed him. Seeing that the sheriff's returns of service were still outstanding and seeing that no name of any attorney had formally been placed on record as

the legal representative of those respondents, the respondents were legally not before the court on the 6th September 2012.

- [14] In the absence of proof of service, the respondents had to be deemed to be unaware of the pending application. Such proof is usually established by the filing of either a positive return by the sheriff or by the filing of a formal notice of intention to oppose. Both were missing in the current matter on 6 September 2012. Daffue, J clearly appreciated that he could not act on the assuring words of Mr Rautenbach alone in those circumstances. He accordingly directed that the respondents file the required notices within the time limits as prescribed by the rules of court – vide par 2 of the court order per Daffue, J. All the same Mr Rautenbach was, as a matter of courtesy, recognised as the legal representative of the respondents. The matter was then postponed.
- [15] The very next day, on Friday 7 September 2012, the sheriff served the application on the first twenty five respondents at the office of the ANC in Bloemfontein. From that date of service the rest of the respondents were entitled to a period of 10 court days, within which to serve and file the required notice(s) of intention to oppose. However, they all waived their procedural right by filing such notices on the 14th of September 2012, seven calendar days or five court days earlier than the rule required. Then the matter became an opposed application. Nonetheless it remained an ordinary and not an extraordinary urgent application.
- [16] After delivering the notices of intention to oppose, the respondents were entitled to a fifteen court day period, from the 14th of September 2012 within which to deliver their answering affidavits if they wished – vide par 3 court order per Daffue, J. Such procedural right was due to lapse on Monday, 1st October 2012, in other words, four calendar days after the date (27 September 2012) to which the matter had been postponed.
- [17] The applicants were patiently waiting, with expectation, to receive an answering affidavit from each of the respondents before Tuesday the 2nd of October 2012. Clearly they did not expect the matter to be argued before that day. Great was apparently their surprise on 21 September 2012 when the fourth respondent's affidavit was served. The fourth respondent was and still is the deputy secretary of the ANC in the Free State province. She made the affidavit for and on behalf of the first twenty five respondents. However hers was not an answering affidavit as envisaged in the rule or in par 3 of the first court order per Daffue, J. She did not deal with the substantive merits. She confined her affidavit to certain alleged objectionable procedural features of the application.
- [18] She characterised the dual purpose of her unexpected affidavit as follows:

“2.1 I wish, at the outset, to record that this affidavit is not meant or intended to address or respond to the various allegations of irregularities upon which the applicants purport to rely and is only meant and intended to support my (and the other relevant respondents’) opposition of a postponement of the application on 27 September 2012 and to support the submissions which will be made on my behalf that the application should then be dismissed with costs.”

That then is the nature of the affidavit before me.

[19] There was no substantive application by the applicants for the postponement of the matter on Thursday, 27th September 2012. They expected that the matter would be automatically postponed. Their expectation stemmed from the court order by Daffue, J. The respondents correctly anticipated that the applicants would make such an application as evidenced by their composite affidavit through the fourth respondent. The respondents pre-empted that the applicants would move such an application. Indeed the applicants intended to do just that, though on an informal basis, and seemingly expected no opposition from the respondents seeing that the main application had become opposed. However, the respondents had other ideas about the matter.

[20] The relief sought by the respondents was not spelled out in a notice of motion. As a matter of fact there was no notice of motion but a mere filing sheet. In the absence of such notice, I had to read the fourth respondent’s affidavit to ascertain precisely what relief the respondents sought. The respondents intended to resist the anticipated application by the applicants to have the matter postponed, but to insist that it be heard on the 27th September 2012 and to apply that it be summarily dismissed with costs.

[21] The respondents’ deponent was at pains to give critical reasons as to why the respondents decided to launch a provisional application to have the main application heard and dismissed with costs on Thursday the 27th September 2012. She said:

“Although, as I shall attempt to demonstrate below, this application, if it should be compared to a train had never left the station, I respectfully submit that, even if it has, it has been derailed to such an extent that it cannot be placed back on track and should, for the aforementioned reasons alone, not be, as the applicants are bound to apply for, postponed, but be dismissed”

[22] The first respondent’s affidavit was described as a provisional opposing affidavit – vide the filing sheet. It was similarly labelled in its own headnote. Since the affidavit of the respondents was not really an answering

affidavit and the application was not preceded by any formal application by the applicants to have the matter postponed, the procedure adopted by the respondents boiled down to a new matter, albeit still an interlocutory one. As such one would have expected it to be brought by way of a notice of motion and a supporting affidavit. As regards the question of postponement, this is how the affidavit must be interpreted. If the procedure adopted by the respondent is generously interpreted in this manner, then the affidavit of the applicants described as the responding affidavit was then supposed to be regarded as an opposing affidavit. Those two affidavits should,

in my view, be so considered within the limited context of the question of postponement only.

[23] Mr Mpofu contended, on the strength of the first court order per Daffue, J, that the matter had to be postponed on Thursday, 27 September 2012. He argued that such automatic postponement was justified by virtue of a prior agreement between him and Mr Rautenbach. On the contrary Mr Wessels contended that the respondents were not precluded by that court order from resisting the postponement of the main application on 27 September 2012 and demanding that it be heard without any further delay.

[24] A transcript of the court proceedings of Thursday the 6th September 2012 was handed in as exhibit “b” on the 27th September

2012. The following exchange between Daffue, J and Mr Mpofu was recorded:

“COURT Have you got a draft? I don’t have.

MR ? M’lord but I now notice in the draft that the agreed date is 27 September and your Ladyship (sic) has pointed out earlier that that falls outside the term. May I just ask that the matter stand down so I can get further instructions?”

[25] After that brief exchange, the court then briefly adjourned. When the court resumed Mr Mpofu continued to address the court about the draft as agreed inter partes. He said:

“May it please the court M’lord, I appear for the applicants in this matter. M’lord I have been furnished with a draft order. In terms of the draft the application is to be postponed to 27 September

2012. This will be on the unopposed roll and in the event that the matter then becomes opposed, the attorneys will make sure that the judge on duty does not read the papers unnecessarily and that day will be utilized to postpone ... to the (sic) postponed roll on an agreed date. Would the court then be inclined to have a look at the order? As the Court pleases. I also understand that my learned friend Rautenbach

appears for one of the respondent parties.”

(the highlights are mine)

[26] By the expression: “... to the postponed roll” as used in the foregoing quotation, counsel obviously intended to mean: “to the opposed roll”.

[27] Daffue, J then enquired from Mr Rautenbach whether “that” was correct. Mr Rautenbach’s answer was positive. He confirmed that he appeared on behalf of the first twenty five respondents. I think the answer was narrower than the question. I think, and I might be wrong, that the question went far more than the mere representation of the respondents. I understood the question by Daffue, J to mean whether the representations, as a whole, made to the court by Mr Mpofu, were correct.

[28] The answer given was more important for what Mr Rautenbach did not say than what he said. He did not object that the matter be postponed to the 27th September 2012; that the matter would merely be postponed to the unopposed roll of that particular day; that the judge doing recess

duty on that particular day would be informed by the attorneys, if the matter became opposed, not to unnecessarily read the papers; that on that particular day the matter would be postponed once again to a suitable date, and that, should his clients decide to oppose the matter, it would then be placed on the opposed roll for argument after 27 September 2012.

[29] What clearly emerges from the foregoing undisputed passages of the proceedings in question was that it was agreed. At least by the legal representatives that September 27, 2012 was a tentative date. It was understandable why such an agreement was reached. Firstly, it was and still is a practice in this division that only unopposed and urgent applications were heard during the recess. The current matter did not come to court as an urgent application in terms of Rule 6(12). It came as an ordinary, non-urgent application.

[30] Secondly, the sheriff had not yet served the application on the first twenty five respondents. On 6th September 2012 there were still a few uncertainties about the future of the matter. Since the sheriff's returns of service were still outstanding, it was uncertain as to by when each of the respondents would be served, by when each of the respondents would, in terms of Rule 6, be required to file notice of intention to oppose and by when the 10 day procedural right of the last served respondent would expire.

[31] It also has to be borne in mind that on the Thursday 27th September 2012, as a recess duty judge, I was not prepared to hear the matter because it was not an urgent application and it had become opposed. That the matter might become opposed was clearly foreseen by the legal representatives on 6 September 2012 which was why they made provision for such a situation then. In any event, even if the applicants wanted no postponement, but wanted to argue the matter just as the respondents wanted to on the 27th September 2012, it was practically difficult for me to entertain the matter after hours. Besides that, I had three opposed and urgent applications to deal with that particular afternoon.

[32] Notwithstanding any thing else the fact remains that on 6th September 2012, it was agreed that the main application would not be heard on the 27th September 2012, but that it would be postponed. The respondents probably heard about the pending matter from somewhere or got to know about it through the press. Before the application was served on them, they apparently appointed an attorney and briefed adv

Rautenbach to represent them. Therefore, they were bound by the agreement concluded on their behalf by those lawyers.

[33] The mere fact that the respondents subsequently discovered the alleged irregularities did not, in my view, entitle them to resile from such agreement. Similarly they could not without a substantive application circumvent the first court order made on the day in question by virtue of an agreed draft.

[34] I am persuaded by Mr Mpofu's submission that the steps taken by the respondents to oppose the postponement were unusual and unconventional. It was unorthodox to renege on the agreed deal in such a procedurally defective manner, where reliance was placed on the so-called provisional opposing affidavit, instead of a formal application on a proper notice of motion with a supporting affidavit. I am of the view that where a party seeks a relief, which is *prima facie* at variance with an earlier excitant court order, as in this instance, such a party must approach the court by way of a substantive

application to justify why the hearing of argument had to be anticipated. It was not done in *casu*. By 27 September 2012 the answering affidavit(s) were not due as yet.

[35] The applicants, rightly or wrongly, got the postponement they wanted on 27th September 2012. Obviously I caused the matter to be postponed for various reasons. But what the reasons were was of no significance.

What was significant was the fact the matter was in fact postponed. By virtue of the prior agreement which was substantially incorporated

into the court order, the postponement was justified. It should be apparent from my reasoning here that even if on 27th September 2012 I had heard the argument for and against the postponement, I would still have ruled in favour of the applicants

then as now.

[36] Two weeks later, on Thursday the 11th October 2012, the applicants no longer sought any further postponement. They were ready to argue the matter. The question of postponement was water under the bridge. The stance of the respondents was overtaken by events. I simply could not logically rewind the hands of time. Time did not stand still. October 11 could not logically be treated as though it were September 27. This was not an appropriate matter where time had to be frozen. However, even if it were, it would still not have made a difference to the conclusion I have come to.

[37] In the circumstances I am inclined to dismiss, with costs, the application of the respondents for the earlier hearing of the matter. The matter was not ripe for argument on Thursday, 27th September 2012 being the date on which the respondents wanted it argued.

[38] Now I turn to the main application. Initially the applicants intended seeking relief in the form of an interdict as an interim relief. On 11th October 2012 Mr Mpofu abandoned such relief and urged me to consider the ultimate relief, viz, the review application. His principal submission was that the applicants had made out a case for the grant of the relief sought in accordance with the second leg of the notice of motion.

- [39] Mr Wessels differed. He principally submitted that the application was riddled with defects so materially serious that it ought to be dismissed on that ground alone. Seeing that the respondents did not put up a defence on the substantive merits, counsel urged me, first and foremost, to entertain their procedural objections and, if needs be, to afford them an opportunity to file an answering affidavit to deal with the substantive merits, should their procedural challenge fail.
- [40] I allowed Mr Mpofu to address me on both the preliminary points and the substantive merits even though Mr Wessels was not properly armed with an answering affidavit to launch an orchestrated and sustained attack on the enemy on that front. The 26th respondent was served on 28th August 2012. As a peregrinus the 26th respondent had time until 8th October 2012 to file its answering affidavit. The first respondent was served on 7th September 2012. As an incola, the first respondent had time until 1st October 2012 to file his answering affidavit. The matter was argued before me on 11th October 2012. By then none of the respondents had filed an answering affidavit to deal with the substantive merits.
- [41] Mr Mpofu contended that the respondents deliberately refrained from addressing the substantive merits. He submitted that they all had adequate time to do so. Therefore, he urged me to give them no more time. The contention and the submissions were correct. The respondent had ample opportunity to deal with the substantive merits, but elected not to do so. Dealing with the procedural issues; first in one court sitting and then postponing the matter to another court sitting, to deal with the real substantive issues, clearly entailed great expense and thus undesirable piecemeal litigation.
- [42] In the case of *DEMOCRATIC ALLIANCE AND OTHERS v ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS* 2012 (3) SA 486 (SCA) par [49] Navsa JA said the following about piecemeal litigation:
- “Generally courts should be slow to allow parties to engage in piecemeal litigation, with attendant delays. Put differently, courts should be intent on obviating prolonged litigation. This case has shown precisely how undesirable for the administration of justice to-ing and fro-ing between the high court and this court over a long period of time, without the merits being finally adjudicated, can be. Courts should be circumspect when suggestions are made about the procedure to be followed on the basis that it might shorten rather than lengthen litigation.”*
- [43] In *BADER AND ANOTHER v WESTON AND ANOTHER* 1967
- (1) SA 134 (CPD) per Corbett J and *STANDARD BANK OF SOUTH AFRICA LTD v RTS TECHNIQUES AND PLANNING (PTY) LTD AND OTHERS* 1992 (1) SA 432 (TPD) per Daniels J, it was held that established practice required that a respondent should file answering affidavit on the substantive merits, irrespective of whether a preliminary point was to be argued, and cautioned that a respondent should not optimistically rely on subjective confidence in the expected success of the preliminary challenge. See also *RANDFONTEIN EXTENSION LTD v SOUTH RANDFONTEIN MINES LTD AND OTHERS* 1936 WLD 1 per Greenberg J.

- [44] In the light of the view I take of the matter it became desirable and logical to first consider the preliminary points as raised by the respondents. The first preliminary point raised in limine by the respondents concerned the publication of the notice whereby the relief sought by the applicants was brought to the attention of interested third parties and the public invitation extended to them. Before I proceed to examine the grounds of the objection, it seemed necessary to give an overview of the rules applicable to service of legal processes.
- [45] The general method of service of legal proceedings are governed by uniform rule 4. Sub rule 1(a)(vii) provides that where any voluntary association is to be served, service shall be effected at the place of business of such a voluntary association in accordance with section 1(a)(ii), otherwise service shall be effected on the chairperson or secretary of its committee.
- [46] Where two or more persons are sued in any joint representative capacity, over and above those representative capacities expressly specified in rule 4(1), service shall be effected upon each of them in any manner set forth in the rule – vide uniform sub rule 1(a)(ix).
- [47] There is provision made in uniform rule 4(2) for the departure from ordinary service methods as prescribed in uniform rule 4(1). If it is practically not possible, in any given circumstances, to effect ordinary service in terms of uniform rule 4(1), the court may, upon application by a person wishing to cause special service to be effected, give directions as to how the envisaged legal proceedings may best be brought to the attention and knowledge of third parties with possible interest in the court order sought – vide uniform rule 4(2).
- [48] In general every application has to be brought on notice of motion, supported by an affidavit as to the facts upon which the applicant relies for the relief sought, save where otherwise provided by law – vide uniform rule 6(1). Obviously this applies to an application for judicial leave for substituted service in terms of uniform rule 4(2) as well.
- [49] Where relief is claimed against any specific person or where it appears necessary or proper to give notice to any other person, notice of motion concerning such an application, shall be addressed to both the registrar and such other person otherwise it shall be addressed to the registrar only – vide uniform rule 6(2).
- [50] Every application except one brought ex parte, shall be brought on notice of motion as near as may be in accordance with form 2A of the first schedule, and true copies of the notice and all annexures thereto shall be served upon every person to whom notice thereof needs to be given – vide uniform rule 6(5).
- [51] Any proceedings for judicial review have to be institute without unreasonable delay within 180 days after the date on which internal remedies have been concluded or after the date on which the aggrieved person was informed of the administrative action taken or became aware of such action and the reason for it or might reasonably have been expected to have become aware of such action and such reasons – vide section 7(1) Promotion of Administrative Justice Act, 3 of 2000, which deals with the procedure for judicial review.

[52] The judicial review of an administrative action, which is obviously an external remedy, is subject to the following statutory provisions:

“7(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[53] Section 27 of the Supreme Court Act 59 of 1959 (now the High Court Act) deals with the time allowed for appearance:

“The time allowed for entering an appearance to a civil summons served outside the area of jurisdiction of the court in which it was issued shall be not less than-

- (a) twenty-one days if the summons is to be served at a place more than one hundred miles from the court out of which it was issued; and
- (b) fourteen days in any other case.

[54] Now I proceed to examine the grounds on which the first objective was premised. The objection concerned the publication in the press of the notice of motion. The strongest of the critiques that could be levelled against the publication of these motion proceedings in the print media was that it was not judicially sanctioned. The applicants, on their own free accord, caused the notice to be published. Since no special leave to serve interested parties by publication in the press, was first sought and obtained from the court and since no appropriate directions whatsoever were first given by the court – the notice was thus published in contravention of uniform rule 4(2).

[55] It follows, therefore, that the applicants also violated the provisions of uniform rule 6(1). The rule provides that every application, obviously this includes an application for special leave in terms of uniform rule 4(2), shall be brought on notice of motion supported by a sworn statement as to the facts upon which the applicant relies for the relief sought. In this matter no such substantive application was made.

[56] The applicants themselves reckoned, rightly or wrongly, that there were three identifiable classes of third parties with a potentially direct and substantial interest in the relief sought, namely: the first, second and third classes who were to be found among the readers of “The Star”, “Daily Sun” and “Die Volksblad”, but not necessarily in that respective order. Notwithstanding the fact that the applicants themselves had identified those three newspapers as being the preferred newspapers of such classes of interested third parties – it

was uncertain as to whether the notice had indeed appeared in two of those newspapers, namely “The Star” and “Daily Sun” as it did in “Die Volksblad”. The question which then arose on my mind was whether in those circumstances it could be said, with certainty, that the unauthorised notice had probably come to the knowledge of those targeted classes. It appeared to me, therefore, that uniform rule 6(2) was not complied with. If I am correct on this point, it follows that those two classes of interested thirds were prejudiced.

- [57] The court, if satisfied that none of the ordinary methods of service is likely to bring the proposed proceedings to the attention of the potentially interested thirds, may authorise an alternative method of service and give appropriate directions – vide *CONSANI ENGINEERING (PTY) LTD v ANTON STEINECKER MASCHINENFABRIK GmbH* 1991 (1) SA 823 (T). In the confirmatory affidavit made by Mr Vollenhoven, in support of the affidavit by the 4th respondent, he averred, and the applicants admitted, that notwithstanding the press invitation to the interested thirds, the applicants, through their attorney, refused to furnish many interested thirds with copies of the main application. By their own admission their attorney made it publically known to the multitudes of interested thirds, who had probably travelled from all over the province to obtain free copies thereof, that such copies would only be furnished provided those who demanded such copies produced proof that they had given written notices of their intention to oppose the application.
- [58] The applicants and their attorney strangely and belatedly called upon the interested thirds to demonstrate their interest in the matter by producing written notices of their intention to oppose, before they could be given copies of the application. But the law required the converse. It was contended on behalf of the applicants that the condition was reasonably necessary to curtail costs. I was not impressed by the contention. It was a hollow argument. Firstly the interested thirds had to be served, first and foremost, so that they could make informed decisions whether to oppose the matter or not. Had the applicants first applied in terms of uniform rule 4(2) read with uniform rule 6(1) the court would not have given such an untenable direction or allowed such a condition to be imposed by the applicants on any interested third party.
- [59] The service of any court process initiating any legal proceedings, such as a notice of motion, has to be effected by giving notice of such an application to the respondent before (s)he can be legally called upon to give notice of intention to oppose such an application. That procedure is a cornerstone of our legal system. When relief is claimed against any person, notice of motion initiating such an application has to be given to such a person. The potential respondent’s mere knowledge, through the press that an application has been issued in which an order adverse to his interests would be sought, does not constitute service. It can never, in my view, substitute the required service.
- [60] Therefore it was impermissible to require interested thirds such as Mr Vollenhoven and others to first oppose before they could be served. The rule requires the very opposite of what the applicants, through their attorney, erroneously demanded from the interested parties. Such a flawed procedure could not be justified on account of the high costs, however

prohibitive they could have been. The costs of serving this legal process legally had to be borne by the applicants. By inviting interested parties to the office of their attorney the applicants imposed an onerous financial burden on such third parties.

- [61] Secondly the argument of the applicants failed to take into account the fact that the interested thirds themselves had made financial sacrifices by travelling at their own expense, presumably from various places in the province to the office of the attorney for the applicants, who had invited them, to facilitate easy personal service of the important application upon them. They were unceremoniously turned away. The majority of them apparently never went back with the notices as demanded by the attorney for the applicants. The published notice or invitation in the press was therefore defective and the conduct of the attorney for the applicants improper. From the outset the applicants embarked upon a highly irregular process which had an adverse impact on the procedural rights of many members of the ANC across the length and width of the province.
- [62] The applicants were not entitled to embark on a special method of service other than the ordinary methods provided in uniform rule 4. From a procedural law perspective the unsanctioned press publication of a structurally very defective notice of motion, which was calculated to be a substituted service, was entirely devoid of legal consequences. Whatever resemblances of efficacy the unauthorised process might have had, were completely eroded by the misguided demand for the delivery of the notice to oppose before service of the application. In my view that was the high watermark of the cynical abuse of the court processes – HUDSON v HUDSON AND ANOTHER 1927 AD 259 and BEINASH v WIXLEY [1997] ZASCA 32; 1997 (3) SA 721 (SCA).
- [63] Service of an application on all interested thirds before any relief had been granted was, subject to certain exceptions, essential and a fundamental tenet of the audi alteram partem principle – vide uniform rule 6(2) which expressly requires that wherever it is necessary or proper to give any person notice of an application, notice of motion shall be addressed to both the registrar and such person.
- [64] It has been held that where legal proceedings have been begun without due citation of the defendant (or the respondent), the subsequent proceedings are null and void and that any judgment given pursuant to such proceedings is of no force and effect in law. In such a situation an interested but uncited party has a right to have the offensive proceedings annulled – vide DADA v DADA 1977 (2) SA 287 (T).
- [65] In the circumstances I have no hesitation in declaring the aforesaid press publication, purportedly as a form of substituted service, to be null and void and thus of no legal consequences whatsoever. This completes my consideration of the first objection.
- [66] The second preliminary point raised in limine by the respondents concerned the manner in which the specified individuals expressly cited by their names from the second to the 25th respondents, were served. All in all there were 26 respondents cited in the current matter. The ground of the objection was that none of them, save for the first and the last

respondents, were served with the complete application. It was common cause that 24 of the 26 respondents were not provided with bundles “a” and “b” which, in essence, formed part of the annexures to the application.

- [67] The applicants contended that since the first respondent, as the chair of the PEC, and the 26th respondent, as the voluntary association of which all the 25 respondents were members, it was legally unnecessary to serve each of the remaining 24 respondents with a complete copy or set of the founding application.
- [68] The applicants expressly cited 26 and not 2 respondents and claimed relief from each one of them. Therefore, the applicants were estopped from making such differentiation in the manner the respondents were supposed to be served with the founding papers. By citing, as they did, all the 26 respondents as distinct individuals and not as a collective in terms of uniform rule 4(1)(a)(vii), the applicants tacitly acknowledged that it was necessary and indeed proper to give specific notice of the current application to each of them – vide uniform rule 6(2).
- [69] In my view service in terms of rule 4(1)(a)(ii) on the 26th respondent as a voluntary association or service in terms of rule 4(1)(a)(vii) on the first respondent as the chairperson of the PEC could not, on the facts, be construed as proper service on the remaining 24 respondents. The irregular service on those 24 respondents could not be redeemed in that manner. The applicants chose to cite them in their representative capacities as individual members of the PEC which represented the ANC in the province, not as a single entity led by the first respondent. Therefore, the applicants were barred from contending that service on the first respondent amounted to service on all the respondents. Each of them had to be properly served – rule 4(1)(a)(ix).
- [70] It was undisputed that each of the respondents had a substantial and direct interest in the ultimate review order prayed for by the applicants. Such an unequal treatment of the respondents could not, in my view, be justified on any reasonable grounds. The mere fact that the applicants, subsequent to the service of the respondents’ heads of argument, delivered ten more copies of the two bundles to the attorney for the respondents did not retrospectively cure the defects in the earlier service of the founding papers on the 24 respondents.
- [71] It has to be mentioned again that the applicants caused this review application to be issued and to be enrolled before it had been served on 25 of the respondents. In *TLADI v GUARDIAN NATIONAL INSURANCE CO LTD* 1992 (1) SA 76 (T) at 77A, the court per Botha J determined that the crucial question in the application was whether an ordinary application could be considered to have been made if it had merely been issued, but not served. The court considered the applicants’ contention that mere issue of an application was sufficient. However, it found that there was no authority for such proposition. Bearing in mind the distinction between procedural steps over which an applicant has control, such as the issue and service of process, on the one hand, and steps over which an applicant has no control,

like dates of hearing and postponements, on the other hand, the learned judge concluded, and I am in respectful agreement, that it was not too onerous to require of an applicant not only to issue an application, but also to serve it. The decision was sound and accorded well with the normal procedural course of motion proceedings as envisaged in uniform rule 6(2).

[72] The instant matter was placed on the roll for the first time on 6 September 2012. By then the vast majority (96%) of the respondents had not been actually served. The application had only been issued, but not served. Because it had not been served, there was legally no application made against those 25 unserved respondents. The applicants did not take effective control over the service of the application – TLADI’s decision, *supra*. Moreover, the one and only respondent who had been served by then was the 26th respondent. However, even the service on that particular respondent was not properly served in accordance with section 27, High Court Act, 59 of 1959, as amended. The 26th respondent, as an peregrinus of this court, was entitled to a maximum of 21 court days within which to deliver notice of intention to oppose.

[73] Such a procedural right was also undermined by the applicants in that the 26th respondent was called upon to deliver such notice within a drastically and erroneously reduced period of ten court days only. Mr

Mpofu countered Mr Wessels’ objection. He contended that notwithstanding the apparent defect in the notice of motion and the resultant short service (or notice), the 26th respondent nonetheless received the application and reacted to it within a period of about eight court days. That being the case, counsel submitted that the real purpose of serving court process was not defeated by the failure of the applicants to comply with section 27. He further submitted that, in the circumstances, the 26th respondent must be regarded to have waived its procedural right, which entitled it to a period of 21 court days in which to decide

what line of action to take. There was force in those submissions.

[74] A pretty much analogous factual situation arose in the case of CONSANI ENGINEERING, *supra*, where Goldstein J held, at page 824 F:

“It seems to me, however, that, once a defendant has entered appearance to defend as it has done in the present matter, non-compliance with the Rules as to service and with s 27 becomes irrelevant.”

That was a complete answer to the objection in that case.

[75] It is so that the law requires actual and not mere potential prejudice before an objection that a legal process was so irregular as to warrant its setting aside by the court. In this particular instance, the magnitude of the irregularity did not entail proven actual prejudice. However, an important feature of this case cannot be ignored. Here it was shown that through the breach of section 27, cumulatively and not singularly considered, together with other breaches of the rules, that the applicants had displayed a regular pattern of cynical abuse of the legal process. The courts have to frown upon such repeated abuses of the rules. This disposes of the second objection raised by the respondents.

- [76] As regards the third objection the respondents contended that the applicants had failed to specifically cite the Branch Executive Committees (BECs) of the ANC in the province. Such failure, so submitted Mr Wessels, constituted fatal non-joinder of a very important structure of the organisation.
- [77] The branches occupy a vital position in the structural hierarchy of the ANC. They are like points of entry into the political arena of the membership of the organisation. All the rank and file members in good standing belong to one or other branch. Members of the organisation rise from the BEC through the ranks to the NEC, the supreme structure of the organisation. From the BEC, as the foundational structure, delegates are elected, once every five years to represent the various branches at the nine elective provincial conferences where members of the PEC are elected.
- [78] Once the question of joinder is raised in this circumstances there can be only one answer to it, to use the words of Schreiner JA in *COLLIN v TOFFIE* 1944 AD 456 at 520. It would appear that the Branch Executive Committees should have been afforded an opportunity of being heard on the point, namely the ultimate review of the outcome of the provincial elections. The rationale of the question of joinder is that it is a basic segment of the *audi alteram partem* rule, a normative rule informed by the dictates of substantial justice in the peculiar circumstances of a particular case. One essential principle of our law is that the court should not make an order that may prejudice the rights of third parties not before it. See *DADA,s* case, *supra*, at page 288 C – E.
- [79] In this instant matter it was common cause that many, third parties who showed interest, were turned away. Who they really were, precisely what legal interest each one of them had in the matter and what the magnitude of their *prima facie* interest was, were all questions that could not be ascertained *ex post facto* when the matter was argued before me.
- [80] In the circumstances and in view of the undeniable fact that the conduct of the applicants was responsible for the disappearance of a huge number of potentially interested third parties, the attendant uncertainties and the potential prejudice occasioned by the conduct of the applicants, I have to assume that all those individuals had a substantial and a direct interest in the outcome of the order sought. Their interest was clearly frustrated by the applicants.

“The question of joinder should surely not depend on the nature of the subject-matter of the suit, as some of the head-notes I have referred to would seem to imply, but - whether the suit relates to a will, an aqueduct, a partnership or anything else - on the manner in which, and the extent to which, the Court's order may affect the interests of third parties.”

(my own emphasis)

See *AMALGAMATED ENGINEERING UNION v MINISTER OF LABOUR* 1949 (3) SA 637 (A) at 657, per Fagan AJA, as he then was.

[81] At every such provincial conference, in this instance Parys, a provincial list of elected delegates to the elective national conference, in this instance Mangaung, is compiled and submitted to the secretary-general. At such national conference the national

leadership of the organisation, NEC, is elected. Since the ANC is the current ruling party, its president becomes the State President of the Republic of South Africa. Here lies the importance of the matter. About it the parties were agreed.

[82] It follows from the foregoing exposition of the ANC organisational hierarchy, that the BECs, particularly those that were implicated in the numerous reports and complaints lodged with the former provincial secretary, Mr Besani, earlier this year, have a direct and substantial interest in the relief, primary or ultimate, sought in this matter. It stands to reason that annulling the Parys election, declaring the current PEC illegitimate and ordering the 26th respondent to dissolve it immediately, would have profound adverse impact on constituent branches and their branch executive committees.

[83] The grant of the order sought by the applicants would have resulted in the denial of the rights of the affected branches to show whether or not they factually and lawfully existed; to show that they were functionally operative or not; to show that they had properly held branch elections in accordance with the domestic rules, procedures, practices and processes as laid down in the constitution of their organisations and to show whether or not the delegates they had sent to the provincial elective conference were their bona fide members and authentic representatives of their branches. The applicants should have been aware that the ultimate relief they sought, threatened to undermine the voting rights at certain branch levels. In my view, the citation of such branches was essential.

[84] In the case of *VRYSTAATSE LEWENDE HAWE KOÖP BPK v OLDEWAGE EN 'N ANDER* 1965 (4) SA 16 (O) the applicant unsuccessfully opposed the intervention of an interested third party who had applied to be joined. The case of the intervening third party, who was slotted in as the second applicant, was that he had a claim in the proceeds of the harvest, which the first applicant was claiming from the first respondent. The second applicant, just like the first applicant, wanted to have the first respondent permanently interdicted from delivering a portion of the proceeds of the harvest in dispute, to the second respondent. The court allowed the third party to join, despite the opposition of the first applicant on the ground that Groenewald, the third party, had not shown a prima facie case that he had a legal interest, in the outcome of the matter.

[85] In *AMALGAMATED ENGINEERING UNION v MINISTER OF LABOUR* 1949 (3) SA 637 (AD) on page 659 Fagan AJA said the following about the question of joinder:

“Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit...”

The interests of the branches in the validity of the provincial elections certainly invited the question whether they should not have been afforded an opportunity of being heard before the provincial elections were reviewed, set aside and the provincial executive committee defunct.

- [86] Consequently any decision which might have been taken by any Branch Executive Committee prior to and in connection with the elective provincial conference, held at Parys, and any subsequent decisions taken by the Branch Executive Committee, pursuant to the resolutions, directions or orders of the Provincial Executive Committee might also be tainted by an element of the alleged illegality and irregularities. Since the order may render the entire organisation in the province dysfunctional, I am of the firm view that notice had had to be given to all those who had demonstrated their interest in the matter.
- [87] In the circumstances I am persuaded that non-joinder, if not of all, then at least of certain specific branch executive committees, constituted a material procedural defect in the application. I would, therefore, uphold the third objection.
- [88] By the same token, it was contended on behalf of the respondents that the branch delegates who were elected, whether regularly by truly representative and authentic branches, or irregularly by the alleged fake, undemocratic and opportunistic so-called parallel branch structures, should have been identified, specified, cited and joined as respondents. There was substance in the submission. In my view there was a lot at stake in the application. Not only for the BECs, but also for their delegates who represented their various branches at the provincial conference. They too had considerable interest in the matter, in their representative as well as their personal capacities.
- [89] As regards the fourth objection, the respondents contended that there was no administrative decision actually taken by the ANC to recognise the current PEC at the time the current proceedings were actually initiated.
- [90] It has to be borne in mind that the previous provincial elections were set aside and a re-run done at the special instance and demand of the applicants. The second attempt was then made to appease the belligerent factions. The subsequent provincial conference of the ANC in the Free State was held at Parys. It endured for four consecutive days. It commenced on Wednesday the 21st June 2012 and ended on Saturday, the 24th June 2012. At that conference, certain decisions were taken, resolutions were passed and provincial leaders elected.
- [91] The applicants were still deeply aggrieved by a continuum of certain events that took place before, during and after that conference. It was their case that the previous and current PEC under the leadership of the first respondent was guilty of a number of undemocratic and unsavoury practices. That was the major accusation levelled against the first twenty five respondents.

- [92] However the accusation did not end with the 25th respondent. The applicants went further than that. They also accused the mother-body, in other words the ANC, of taking partisan sides in the factional saga in the province by condoning the alleged serious wrongs committed by the one faction, but disregarding the averred serious irregularities complained by the other faction. The thrust of the conduct complained of was that the 26th respondent took a final decision whereby the first respondent and his 24 co-respondents were officially recognised as the authentic and representative PEC of the ANC in the Free State province, notwithstanding the grievances of the applicants to the contrary.
- [93] The chief and ultimate relief sought by the applicants and around which the whole application revolved, was the review of the 26th respondents' alleged decision. The alleged decision was not identified or particularised in the notice of motion as was customarily the case in the review matters. In the founding affidavit the applicants averred, that the 26th respondent took the offensive decision in Johannesburg during the policy conference held during July 2012. However, no specific item on the agenda of that conference was mentioned in support of the allegation. As a matter of fact, neither the agenda was annexed to the founding affidavit nor was specific reference made to the relative item on that agenda.
- [94] Moreover, hardly any specific resolution was relied upon. Such obvious vagueness tendered to support the respondents' contention that no such decision was taken before the 20th of August 2012, being the date on which these motion proceedings were instituted. The law is stringent. Any proceedings for judicial review must be instituted without unreasonable delay. The regulatory deadline in terms of rule 53 is 30 days from the date on which the alleged offensive decision was taken. In this matter woefully inadequate reasons, if any, were given for the delay between the dates on which the decision was taken, as alleged by the applicants, and the date on which the review application was launched.
- [95] The 26th respondent was called upon by the applicants to give a record in terms of rule 53. The 26th respondent duly complied. It was never a case of the applicants that such record was incomplete or defective in any other manner. There was no request directed to the 26th respondent to augment the record. That being the case, the record had to be regarded as a true reflection relative to the decision complained of. Contrary to Mr Mpofu's contention, it was incumbent upon the applicants and not the respondent to have the record supplemented. It was not the respondents' business to make out a case for the applicants.
- [96] The record shows that the 26th respondent, the ANC, did not take the alleged decision to recognise the provincial leadership led by the first respondent at the time, as alleged by the applicants. This strongly militated against the contention of the applicants. It was argued on behalf of the respondents that the review application was premature, because no decision had actually been taken at the time the application was launched.

- [97] The record materially bolstered the assertion by the secretary-general of the 26th respondent. According to his sworn statement the decision was actually taken on the 14th of September 2012, some twenty five calendar days after the launch of the current application. It followed therefore, as a matter of logic, that where the decision targeted did not, in truth and reality, even exist when the application was moved, then the application was premature.
- [98] It is absurd to imagine that a decision that does not really exist can be logically reviewed. The very edifice of the relief sought did not really exist at the critical moment. The causa for the review was, at best for the applicants, still in an embryonic stage. The futile endeavour by the applicants to rely on either the policy conference or the website of the 26th respondent or both, was indicative of the spurious grounds on which some of the averments in support of the alleged reviewable decision, were made. No legal consequences flowed from such an abortive application – CHAIRMAN, STATE TENDER BOARD v DIGITAL VOICE PROCESSING (PTY) LTD & OTHERS 2012 (2) SA 16 (SCA) par [21].
- [99] I perused the founding affidavit and it appeared that no meaningful steps were taken by the applicants on the domestic front, to challenge the legality of the 26th respondent's decision on the domestic front. The 26th respondent was apparently never called upon to reconsider its decision. The 26th respondent, as the repository of the power complained of, was not notified the applicants' intention to take alleged adverse decision either on internal review or internal or internal appeal. Generally court is not entitled to review an administrative action before internal remedies had been completely exhausted by an aggrieved complainant - section 7(1)(a) of the Promotion of Administrative Justice Act 3 of 2000. In this instance, I am of the view that no proper case has been made out to justify deviation from the general principle.
- [100] It is only in exceptional circumstances that an administrative action performed, or an administrative decision taken, may be judicially reviewed before the aggrieved complainant has exhausted the available internal remedies – Section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000. The applicants did not make out a case that exceptional circumstances existed, which justified their abandoning of internal remedies and their venturing out to seek external remedies by way of judicial review.
- [101] In KOYABE & OTHERS v THE MINISTER FOR HOME AFFAIRS (Lawyers for Human Rights as amicus curiae) 2010 (4) SA 327 (CC) the court held, that the mere lapsing of a prescribed statutory period for the exhaustion of internal remedies did not, in itself, constitute exceptional circumstances. I am in respectful agreement. If it could cynical abuses would occur giving rise to absolute absurdities. Accordingly I am inclined to uphold the sixth objection.

- [102] Our constitution proclaims that everyone has a right to just administrative action – vide section 33. When such right is adversely affected by an unjust administrative action the bearer of the infringed constitutional right has a further remedial right to have the dispute, pertaining to the infringement, resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum – vide section 34.
- [103] The respondents contended that the applicants did not exhaust internal remedies but the applicants contended that they had no such remedies in terms of the constitution of the 26th respondent. The alternative contention of the applicants was that, if an internal review remedy was available, its pursuit in the domestic sphere would have been futile. They submitted that the impartial stance of the 26th respondent precluded them from meaningfully challenging that decision by way of internal review.
- [104] Both parties were members of a voluntary association. The existence of an internal administrative remedy ordinarily defers instant access to an external judicial remedy until the internal remedy has been exhausted. The principle of internal remedies recognises the vital relationship between internal administrative remedies and the external judicial remedies. The former entails an internal administrative review of an internal administrative decision by an impartial and independent domestic tribunal. The latter entails an external judicial review of an internal administrative decision as well as its internal administrative review by an internal review tribunal.
- [105] Where appropriate, the principle requires that an administrative decision be challenged by way of an internal review process in order to exhaust available internal remedies prior to challenging it by way of an external judicial review process.
- [106] The available internal remedies of a voluntary association just like those of an administrative body are designed to provide an immediate, effective and inexpensive domestic relief before aggrieved parties resort to litigation. They give the repository of the power an opportunity of utilising its own domestic mechanisms, processes and procedures to rectify irregularities complained of, if any, first. A process of internal review adjudication at times renders litigation unnecessary.
- [107] The ambit of the principle of domestic remedies was aptly discerned by Mokgoro, J in *KOYABE v MINISTER FOR HOME AFFAIRS* 2010 (4) SA 327 (CC) par [38 -39] on 343:
- “[38] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor (sic) should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in section 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial*

review nonetheless. Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute.

[39] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.”(sic)

[108] The applicants directly approached this court before any higher domestic tribunal was first approached to internally review the decision of the administrative repository of power. I was not persuaded by the argument that they had to go down that direct route because no internal remedies were available to them. The re-run of the earlier PEC elections fortified my view. The recent domestic case of Mr Julius Malema, the former president of the ANC Youth League is of significance in this regard. The appeal against the verdict and sanction followed the internal disciplinary hearing. The matter showed that there were internal remedies available to an aggrieved member of the ANC. Accordingly the main contention that the applicants were domestically remediless failed to persuade me.

[109] Although the organisation’s constitution did not give a right to an aggrieved member to present evidence or argument to the national disciplinarily committee (NDC) prior to the imposition of a sanction, the national disciplinarily appeal committee (NDAC) upheld the accused gentleman’s appeal as regards the sanction imposed. In the interest of fairness and justice, the higher appellate tribunal reviewing the sanction, set it aside and remitted the matter to the disciplinary tribunal below with the explicit direction that the aggrieved gentleman be given an opportunity of presenting his plea in mitigation of sanction before the NDC imposed the punishment.

[110] The point I’m trying to make is that even if I am wrong in finding that there were available internal remedies spelt out in the organisation’s constitution, the highest internal tribunal of the organisation has publicly demonstrated, that it can invent internal remedies and, for the benefit of an aggrieved member, retrospectively make them available.

[111] The aforesaid salutary practice also demonstrated that the NDAC of the organisation was an objective, impartial and independent internal review tribunal. Mr Mpofu, who also fearlessly defended the former president of the Youth League in that matter, did not suggest let alone contend that the internal appellate tribunal had, over the years, developed a rigid policy that rendered any endeavour to exhaust internal remedies a futile exercise. On the facts, it could not be confidently argued that the internal appellate tribunal, currently still chaired Mr Cyril Ramaphosa, was in any way pro-repository of the administrative decision that is under attack in these review proceedings.

[112] Where pursuit of an available internal remedy was not shown to be futile, a court may not ordinarily permit a litigant to directly approach the court. A litigant’s mistrust of a repository of an administrative decision should not be unfairly attributed to an internal

review tribunal. The repository as an original decision-maker and an internal review tribunal are distinct internal structures a must be seen and treated as such unless it can be shown that there exists an unholy alliance between them. In the absence of good cause shown as to why the exhaustive pursuit of internal administrative review would be futile, direct access to the court for external judicial review should be denied. And I do.

“[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, ...”

Mokgoro, J in Kayobe, supra, par 36

Accordingly the alternative contention by the applicants, that it was futile to pursue and exhaust internal remedies, failed to persuade me.

- [113] On the factual matrix of this particular matter I am inclined to uphold the preliminary objection raised in limine by the respondents that the applicants failed to discharge their duty to exhaust internal remedies before they approached this court for an external judicial review. I am of the view that there were no exceptional circumstances to condone their failure. I am inclined to uphold the sixth objection.
- [114] There was no attempt whatsoever made by the applicants to have their defective, irregular and non-complaint steps condoned. The failure to comply with the various rules of procedure could not be fairly ignored and the respondents put to their defence on the substantive front. On the facts, even if the applicants had applied for condonation, the prospects of success on the merits, however cogent they might have been, would not have been fairly treated as a justification to overcome the material shortcomings on the procedural front.
- [115] Having considered all the points in limine taken by the respondents, I have come to the ultimate conclusion that the application was lamentably riddled with fatal defects. It is my view that none of those proven procedural defects, particularly the one which triggered off the objection pertaining to the decision, was curative. Given the national importance of the matter, defects of that magnitude, cannot be lightly overlooked. On account of all those procedural blemishes I am inclined to grant the application.
- [116] In view of the foregoing conclusion, it became unnecessary to consider the substantive merits of the matter. Fairness entails a value judgment to be determined according to the peculiar circumstances of each particular case. Fairness is an abiding hallmark of any civilised civil justice system. It is a flexible, elastic and elusive concept with two fundamental dimensions, namely procedural fairness, on the one hand, and substantive fairness, on the other hand – vide GREATER LETABA LOCAL MUNICIPALITY v MANKGABE AND OTHERS

[2007] ZALC 74; [2008] 3 BLLR 229 (LC) 235 par 28.

- [117] The general principle in motion proceedings is that a respondent should ideally file his or her answering affidavit in order to deal with the substantive merits.¹ He or she should not merely take a preliminary point(s) in the expectation that should the preliminary challenge to the founding affidavit fail, he or she would be given extra time to file an answering affidavit afterwards.²
- [118] The principle is premised on the supposition that an applicant's founding papers are found to be substantially in order and that they were not preceded and blemished by a procedure which was materially irregular and objectionable. This implicit rule of procedure underscores a vital exception to the aforesaid general rule. The current matter is a classic example that good merits will not always prevail over bad procedure. The balance of spherical transition and equity at times dictates for the converse.
- [119] The correct and logical approach in matters like the instant one, is to deal with issues procedural first and issues substantive afterwards. To consider the respondents' failure to file answering affidavits before the applicants' compliance with the rules of procedure would have been a flawed approach. Putting a cart before the horses leads nobody nowhere.
- [120] The thrust of my decision is that notwithstanding the deliberate and calculated risky strategy of the respondents to file no answering affidavit in which the substantive merits of the matter were canvassed, the dismissal of the review application was for a procedurally fair reason. The procedural defects collectively and objectively considered, derailed the process of review before the transition from the procedural sphere into the substantive sphere of analytic consideration. The applicants failed to jump over the first hurdle of procedural fairness. This then disposes of the fourth objection.
- [121] The question that remains to be answered now concerns what an appropriate order should be. In a case where the court process was served in breach of the prescribed statutory method, the court upheld the defendant's objection that such service was fatally irregular; that the matter could not simply be postponed to enable the careless plaintiff to amend the summons and to have it properly served. Implicitly the court held the view that the irregular service vitiated the entire process and that the appropriate order in those circumstances was to dismiss the summons with costs – vide *COLLIER v ALGOA TOWNSHIPS LTD* 1947 (2) SA 559 (E) per Gardner J. I hasten to point out that in that case there was a single irregularity. In this matter, on the contrary, there was a great variety of irregularities. Therefore, a stronger case for the dismissal of the matter was made out here than there.
- [122] Finally, I need to comment on the notice of motion. It provided that after the interdict had been granted, the applicants would then apply for leave to serve notice of the proceedings by way of advertisement in the newspapers – vide Part A. Similarly the same form of service was envisaged after the ultimate relief, the review, had been granted – vide Part B. Clearly the notice of motion was seriously flawed. It did not comply with the prescribed form 2A of the First Schedule. I say no more.

[123] The respondents have emerged victorious in this lamentable factional struggle for the political leadership of the province in which the ANC is at war with itself. Save for the cost of the unnecessary opposition to the agreed earlier postponement, which costs have to be borne and paid by the respondents, they are entitled to the rest of the costs of the application, which costs shall include the costs occasioned by the employment of two counsels.

[124] Accordingly I make the following order:

124.1 The first preliminary point raised in limine by the respondents was well taken. The publication, by the applicants, of the notice of motion in the press purportedly as some sort of substituted service in terms of uniform rule 4(2) was procedurally irregular and thus materially defective. Accordingly the first objection is upheld. The purported service, on the unidentified and uncited but interested thirds, without prior judicial leave first sought and granted is declared procedurally irregular, null and void and of no force and effect in law

124.2 The second preliminary point raised in limine by the respondents was well taken. The incomplete service of the founding papers, on 24 of the 26 respondents, by the sheriff on behalf of the applicants, was materially defective as it substantially infringed the procedural rights of the respondents as set out in the uniform rule 6(5). Accordingly the second objection is upheld. The deficient service on the respondents is declared incurably irregular unprocedural null and void and of no force and effect in law.

124.3 The third preliminary point raised in limine by the respondents was good in law. The failure of the applicants to join the BEC, the fundamental structure and nucleus of the ANC, by specifying, citing and serving the chairpersons, of at least those branches accused of manipulating the important lists of delegates to the provincial conference, was procedurally irregular. Accordingly the third objection is upheld. The non-joinder of certain identifiable BECs with direct interest in the matter as demonstrated in the applicants founding papers was procedurally irregular.

124.4 The fourth preliminary point raised in limine by the respondents was good in law and, therefore, well taken. The applicants prematurely launched the current application for the judicial review of an administrative decision before it was actually taken. Accordingly the fourth and final objection is also upheld. In their notice of motion the applicants did not, as it is ordinarily the practice in review matters, precisely identify and particularise the alleged offensive act done or decision taken by the NEC, the authoritative structure of the ANC, in other words, the 26th respondent. These motion proceedings were thus procedurally abortive ab initio.

124.5 On the strength of the foregoing fatal procedural defects and irregularities, the application is dismissed.

124.6 The applicants are directed to pay the costs of this application, including the costs occasioned by the employment of two counsels, save those that were occasioned by the respondents' unnecessary opposition of the postponement of the matter on Thursday, 27 September 2012.

M.H. RAMPAL, J

On behalf of applicants: Adv D C Mpofu

With him:

Adv L A Roux

Instructed by:

Bezuidenhouts Inc

BLOEMFONTEIN

On behalf of respondents: Adv M H Wessels SC

Adv N Snellenburg

Gous, Vertue & Associates

On behalf of 26th respondent: No counsel

Bomela Attorneys

/sp

1DU TOIT v FOURIE 1965 (4) SA 122 (O) at 128 – 9 per Smuts AJ and EBRAHIM AND ANOTHER v GEORGOULAS AND ANOTHER 1992

(2) SA 151 at 154E – G per Khumalo J.

2 MOSKOVITZ v METEOR RECORDS (PTY) LTD 1978

(3) SA 996 (C) at 1000A per Friedman J. A respondent is not entitled to assume that he will successfully argue a point of law raised in limine. NORDBAK (PTY) LTD v WEARCON (PTY) LTD AND OTHERS 2009

(6) SA 106 (WLD) at 116A – 117D per Levenberg AJ.

2

MOSKOVITZ v METEOR RECORDS (PTY) LTD 1978

(3) SA 996 (C) at 1000A per Friedman J. A respondent is not entitled to assume that he will successfully argue a point of law raised in limine. NORDBAK (PTY) LTD v WEARCON (PTY) LTD AND OTHERS 2009

(6) SA 106 (WLD) at 116A – 117D per Levenberg AJ.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2012/207.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ramakatsa-and-others-v-magashule-unknown-topic-afshc-2012>

Prepared on 12 October 2026 · Esheria