

SOUTH AFRICA / JUDGMENT

Sithole and Others v African National Congress and Others (020623/2022) [2023] ZAGPJHC 791; [2023] 3 All SA 890 (GJ) (17 July 2023)

[2023] ZAGPJHC 791

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

020623/2022

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FLYNOTE:

CONSTITUTION

– Political rights – Conference

of ANC –

Dissatisfaction

with the exclusions of delegates – Meaning of member in good

standing – Rule that conference may proceed

if 70% of members

qualify – Processes excluding branches had no foundation

in the ANC constitution or the guidelines

– Decisions taken

pursuant thereto were taken to the prejudice of the applicants and

were ultra vires and void – Regional

Conference and its

resolution and decisions set aside – Constitution, s 19

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 020623/2022

REPORTABLE

OF

INTEREST TO OTHER JUDGES

NOT

REVISED

In

the matter between:

JABULANI
DERRICK SITHOLE
First Applicant
RETHABILE
SAMSON LUKHELE
Second Applicant
DOLLY
MOLLY NKOSI
Third Applicant
MBEKEZELI
PHILLIP THWALA
Fourth Applicant
TSHIDISO JOSEPH
SAUL
Fifth
Applicant
MOSES
LEKHOLO MOREKU
Sixth Applicant
JEAN
STATO
Seventh Applicant
ROMEO
MOKONI
Eighth Applicant
And
AFRICAN NATIONAL
CONGRESS
First
Respondent
AFRICAN NATIONAL
CONGRESS: PROVINCIAL EXECUTIVE COMMITTEE – GAUTENG PROVINCE
Second
Respondent
AFRICAN NATIONAL

CONGRESS:

EKURHULENI REGION
Third
Respondent
THE
ELEXIONS AGENCY (PTY) LTD
Fourth Respondent
LESIBA
MPYA
Fifth Respondent
TLOU
CHOKOE
Sixth Respondent
LOVEMORE
CHAUKE
Seventh Respondent

SIZAKELE
MASUKU
Eighth Respondent
TSHIKANI
HASSANI
Ninth Respondent
NOMADLOZI
NKOSI
Tenth Respondent
MZIYANDA
MKETSU
Eleventh Respondent
FIKILE
KHUMALO
Twelfth Respondent
TIISETSO
NKETLE
Thirteenth Respondent
PHELISWA
DONDOLO
Fourteenth Respondent
LOYISO
CAPA
Fifteenth Respondent
MPHO
MOSHOESHOE
Sixteenth Respondent
MAPULE
MOHLAKOANA
Seventeenth Respondent
ISABELA
RAMASILO
Eighteenth Respondent
PAULINA
BODIBA
Nineteenth Respondent
JANE
NHLAPO
Twentieth Respondent
BUSISIWE
KHOZA
Twenty-First
Respondent
ANDILE
MNGWEVU
Twenty-Second
Respondent
TELISWA
MGWEBE
Twenty-Third
Respondent

SIPHO
NGOBESE
Twenty-Fourth
Respondent
MZWANDILE
MASINA
Twenty-Fifth
Respondent
JONGIZIZWE
DLABATHI
Twenty-Sixth
Respondent
THEMBINKOSI
NCIZA
Twenty-Seventh
Respondent
MOIPONE
MHLONGO
Twenty-Eighth
Respondent
SELLO
SEKHOKHO
Twenty-Ninth
Respondent
AFRICAN NATIONAL

CONGRESS:

THE
IMMEDIATE PAST MEMBERS OF THE PROVINCIAL EXECUTIVE COMMITTEE –
GAUTENG PROVINCE
Thirtieth
Respondent
SUMMARY
Relief
sought: The applicants sought the setting aside of
/declaration of invalidity of the Ekurhuleni Regional Conference of
2022 (the Conference)
and its outcomes and consequent relief.
Facts: N,
an erstwhile member of the expired Regional Executive Committee (REC)
who had aspirations for leadership and was a powerful and
controversial figure in the ANC, was appointed as the coordinator of
an ad hoc Regional Task Team (RTT) appointed by the ANC to
attend to
the preparations leading up to the Conference.
The
auditing and verification of members in good standing was performed
by a National Organising Committee led by NEC member, M.
N
singled out certain branches for possible disqualification from
attendance at the Conference on the basis of the alleged flouting
of

a rule relating to electronic scanning of members IDs for registration purposes. He purported to make the complaint on behalf of the RTT, but the other members of the RTT said that the complaint was that of N alone and accused him “fiddling with”

the
verification process.

Four
branches singled out for complaint by N were disqualified a week before the Conference which meant that there was no time to exhaust
appeal processes.

It
was decided by the ANC that the Conference would proceed notwithstanding; that the appeal processes would be exhausted ex post facto the
Conference; and the votes of the four branches (which numbered 14) would be quarantined (meaning they would not be counted) pending the
final determination of the appeals. The same arrangement was made in respect of the ward 83 (the first applicant’s ward) in which case an appeal was allowed to be lodged on the day of the
Conference and its five votes quarantined pending the appeal.

The
conference was chaotic and marred by violence because of dissatisfaction with the exclusions of delegates.

The
quarantined votes turned out to be potential swing votes in the Conference and this led to the declaration of the elections as being
provisional.

The
Provincial Conference was imminent and the provisional nature of the regional election results created an impediment to it proceeding, because of the hierarchical nature of the ANC.

The
NEC was called on in terms of its duties under the ANC constitution and the election guidelines and section 19 of the Constitution to
present a fair democratic solution to the problem.

In
purported pursuance of this duty, the NEC appointed a senior National task team. This task team noted significant procedural
and
substantive unfairness in the process.

The NEC
decided that the Provincial Conference should proceed notwithstanding the irregularities noted and that that the incoming PEC should decide
the disputes relating to the irregularities at the impugned Conference.

N was ultimately appointed Provincial Secretary at the Provincial Conference having been provisionally elected as Regional Secretary at the impugned conference.

The newly elected PEC members were thus called upon by the ANC to determine disputes which directly affected their positions as PEC members and were thus conflicted.

The decision of the PEC was that the quarantined votes would not be counted and the results of the impugned Conference would thus stand as, by implication, would the results of the Provincial Conference.

The ANC raised the rule of 70% which it alleged meant that provided 70% of the branches qualified without complaint, an elective Conference could proceed regardless of irregularities relating to the other 30%.

Held :

The rule that, provided 70% of the members qualify as being in good standing, a conference of the ANC may proceed, cannot not be construed to mean that the 30% minority may validly be denied the right to qualify for participation; rather it means that, provided all members are afforded the opportunity to participate in the processes of the ANC including the exhausting of appeal processes, the relevant conference may be validly held regardless of disqualification of members who have not taken advantage of such opportunity. Thus, if the ANC fails to afford a member his membership rights in relation to an elective conference and this failure is materially prejudicial, the conference and its results fall to be set aside.

Held:

A member of the ANC is in “good standing” for the purposes of the ANC constitution and related guidelines and rules if he/she has paid his or her subscriptions due and has not had his/her standing adversely affected as a result of a duly authorised, procedurally and substantively fair and transparent process.

Held: The processes in issue leading to the exclusion of the branches had no foundation in the ANC constitution or the guidelines and the decisions taken pursuant thereto were taken to the prejudice of the applicants and were ultra vires and void. The Regional Conference set aside.

ORDER

1. The Eighth Regional Conference of the Ekurhuleni Region of the African National Congress (“the Conference”) held at the Indaba Hotel in Fourways on 27 to 29 May 2022 and all decisions resolutions and election results emanating from the Conference are set aside.
2. The first respondent (the ANC) is to pay the costs of the application.

JUDGMENT

Fisher J

Introduction

- [1] The applicants seek to set aside all decisions, resolutions and elections resulting from the Eighth Regional Conference of the Ekurhuleni Region of the African National Congress (“the Conference”), which took place on 27 to 29 May 2022 and an order that the National Executive Committee (“NEC”) of the African National Congress (“ANC”) appoint an interim regional task team, to exercise the powers of the Regional Executive Committee (“REC”) of the ANC in the Ekurhuleni Region until such time as the ANC is able properly to organize and constitute a new regional conference.
- [2] There are a number of respondents cited for their alleged interest, including members elected to official leadership positions at the impugned Conference and the regional and provincial structures of the ANC. Only the ANC opposes and it is not disputed that this opposition takes account of all of the relief sought.
- [3] The relevant facts and the relief claimed must be understood in the context of the organisational structure of the ANC and the rights

that every citizen of South Africa has arising out of participation in these structures. I will start with an overview of this

organizational structure.

The organizational structure of the ANC

- [4] The ANC is a voluntary political organisation comprising approximately 1,6 million members who belong to four thousand branches which are spread throughout the country. It conducts its affairs and serves the needs of its members through nine provincial offices and 53 regional offices.
- [5] The organizational framework of the ANC is to be found in its constitution and rules and regulations adopted by the NEC.

- [6] In December 2019 the NEC adopted guidelines for the holding of branch, regional and provincial conferences (“the guidelines”).

These guidelines were updated in 2021, primarily to address the impact of the Covid 19 pandemic, which prevented large gatherings as well as to recognize the creation of a Regional Dispute Resolution Committee (“RDRC”) established by the Provincial Executive Committee of the Gauteng and the Limpopo Provinces. These updated guidelines were in force in the lead up to the impugned Conference. Obviously, the Covid provisions did not strictly find application at this stage as restrictions had, by then, been relaxed. It is common cause that the application of these guidelines is a central feature of this case.

- [7] The ANC structure is hierarchical and pyramid-like narrowing as it ascends from the members’ level which constitutes the base of the pyramid, followed by the branch level where branch meetings are held, Branch Executive Committees (“BECs”) are elected delegates from the branches are chosen to attend the Regional Conference which comprises the regional level and where the Regional Executive Committees (“RECs”) are elected. These RECs go on to play a defining role at provincial level at the Provincial Conference where the Provincial Executive Committees (“PECs”) are elected. Finally at the apex is the national level, where branches send elected delegates to the National Conference which elects the National Executive Committee (“NEC”) which the highest decision making body of the ANC. The NEC comprises the President of the ANC, its Deputy President and various other officials and eighty additional members.
- [8] The election structure is such that leadership from regional level up to the apex takes place at conferences of the kind in issue in this case. These are known as elective conferences
- [9] This case has to do mainly with events which took place at branch level and the arrangement of the Ekurhuleni Regional Conference in issue. However, it obviously has consequences for the higher structures because of the knock-on effect of elections.
- [10] The branches or wards, as the basic units of the ANC, are controlled by the BEC which is elected at a regional conference of the type here impugned. Delegates are elected at Branch General Meetings (BGMs), or alternatively at Biennial Branch General Meetings (BBGMs). It seems that these types of meetings can be combined but the BBGMs at which elections take place must be held by each branch biennially.
- [11] The renewal of tenure of leadership through elective conferences is an important part of the structure and it is central to this case. Elections for members of the NEC are held once every five years; for the PEC once every four years; for the REC once every 3 three years and for the Branch Executive Committee (BEC), once every two years.
- [12] These elections must be conducted in line with the ANC constitution and in line with the policies adopted by the NEC of behalf of the ANC.

[13] The NEC, as the highest organ of the structure is obliged — in terms of rule 12.2.4 of its constitution — to “[e]nsure

that the Provincial, Regional and Branch structures of the ANC and the Leagues function democratically and effectively”.

[14] Rule 21.4 of the ANC constitution provides that 90% of the delegates at a regional conference must be from branches in the region elected at properly constituted branch general meetings. All members of the REC are entitled to attend the Regional Conference ex-officio as full participants and delegates. The remainder of the voting delegates at the branch are chosen from among members of the BECs, the ANC Veterans League, the ANC Youth League and the ANC Women's League, as allocated by the REC.

[15] The number of delegates per branch has to be in proportion to the size of their paid-up membership, provided that each branch in good standing is entitled to at least one delegate.

[16] All members ordinarily participate in their branch BGMs and BBGMs but only the chosen branch delegates go on to participate in the

conferences of the higher structures.

[17] These branch delegates and the votes which they wield for their branches are an elemental part of the democratic structure of the ANC and the government of the Country. It thus stands to reason that, if the attendance of elected delegates from the branches is allowed to be materially interfered with or is otherwise irregular this has significant ramifications for the democratic process as a whole.

[18] In this case, the three-year period of incumbency of the REC has been allowed to expire. It seems that this was, inter alia, as a result of the prohibition on gathering as a result of the Covid 19 pandemic. The National Organizing, Campaigns and Mass Mobilisation Committee (“Organizing Committee”) was deployed by the NEC to oversee the processes leading to the impugned Conference. The Organizing Committee was led by Ms Nomvula Mokonyane who is currently the deputy Secretary General of the ANC.

[19] This intervention of national structures in the planning stages of the impugned Conference was apparently employed to maintain order and functionality in the process which had lapsed at branch and regional level. Thus, there was the need to “play catch-up” so that the provincial and national structures could be put back into kilter.

[20] The Provincial Conference had already been arranged to take place a few days after the holding of the impugned Conference. The all-important

auditing and verification process under Mokonyane was intended to serve both conferences. Thus it was intended that the Regional

Conference lead straight onto the Provisional Conference with a minimum of delay.

[21] As I have said, the guidelines which apply to the holding of elective conferences are central to this case. It is not disputed that the ANC is bound to apply these guidelines.

[22] A central feature of the guidelines is the dispute resolution process. Compliance with this process is vital to this case and for this reason, it is quoted in full:

“8. Branch dispute resolution process

8.1 Disputes arising from the Membership List and Attendance Register must be lodged in writing with the Branch Executive Committee (BEC) in not less than two days before the BGM or BBGM and a copy send (sic) to the Regional and Provincial Secretary.

8.2 The BEC must consider the complaint and make a verdict. The verdict of the dispute under 7.1 must be communicated to the complainant in writing, and a copy send (sic) to the Regional and Provincial Secretary, within 24 hours after the matter was processed by the BEC, and therefore the BGM and BBGM.

8.3 In the event that a member is aggrieved by any matter related to the conduct, proceedings and/or constitutionality of the BBGM or BGM, such a member must lodge a dispute in writing within 48 hours after the meeting with the BEC and copy the Regional and Provincial

Secretary. A member who raises such a dispute must be a member in good standing and must have been present at the BGM or BBGM.

8.4 An ANC member who failed to register, staged a walk out, disrupted the BGM or BBGM, threaten ANC members or failed to raise his or concern in the BGM or BBGM under the appropriate agenda item will not be eligible to lodge a dispute.

8.5 The BEC must sit and communicate its verdict, in writing to the complainant, and copy the Regional Provincial Secretary, within 48 hours after receipt of a compliant under 7.3.

8.6 If a member is not satisfied by the resolution of the dispute by the BEC, the member can appeal in writing to the Regional Dispute

Resolution Committee (RDRC), Provincial Dispute Resolution Committee (PDRC) and the National Dispute Resolution Committee (NDRC)

8.7 The PEC must ensure that members of the PDRC are not conflicted by hearing a case related to his or her own branch, or to a branch to which the member is/was deployed to.

8.8 Reports on all disputes arising from a BBGM or BGM shall be submitted to the Secretary General's Office.

8.9 The final body of appeal on disputes shall be the National Dispute Resolution Committee. Determinations of the NDRC with regards to regional and provincial conferences are final, shall be in writing and shall be communicated to the affected region, province and to the complainants.” (Emphasis added.)

[21] In 2021 the ANC introduced a system of electronic scanning of identity documents in order to register attendance at meetings and

conferences. In terms of the guidelines, attendance is also registered by means of signature of an attendance register. Thus, there are two records of attendance. These methods are used, inter alia, to determine quorum. They are important also because only a member who attended a meeting may lodge a complaint under the guidelines.

[22] More needs to be said about this scanner system. It seems that it takes the form of computer application which is referred to in the guidelines as “the Evidence of Attendance app”. The court was not provided with precise details of this system but, from a reading of the guidelines, it seems to operate on the basis that bar codes on the South African identity documents of members are electronically captured into the system by the use of a scanner.

[23] It is the task of the Branch Secretary to ensure that a report is done of a BBGM and that all documents are loaded on the relevant ANC websites and the details of the new BEC submitted to the Regional, Provincial and National offices for updating in the membership

management system and a portal called the ANC Cloud. This information is crucial for auditing and verifying the standing of branches for the purposes of participation in the regional conference and beyond.

[23] The required quorum at branch meetings is 50% plus one. If, three hours after the designated starting time of the meeting, there is still no quorum, the BEC is obliged to postpone the meeting and set a date for the next attempt at a meeting which must be more than 48 hours after the first attempt.

[24] It is alleged by the ANC and apparently accepted by the applicants, that it is a rule that if, after a third attempt at reaching quorum for a branch meeting, a quorum it is not reached then no delegates may be sent to a conference – i.e. there is no scope for the holding of a fourth meeting. I will refer to this as the three-meeting rule.

[25] It is furthermore alleged by the ANC and apparently accepted by the applicants that there is also a rule that the proof of branch

attendance at meetings has to be electronic only, with a margin of less than 10% allowed for manual registration on the scanning system. I will refer to this as the scanner rule.

[26] Curiously, even though these two alleged rules are central to this case and more specifically the defences of the ANC, I was not pointed to a directive or resolution in terms of which these rules were adopted by either the NEC or the PEC.

[27] The only reference in the guidelines to misconduct in relation to the scanners is that members may not scan the ID of a member who is not present at a meeting or use the ID of another member to gain access.

The political rights of every citizen

- [28] Section 19 of the Constitution of the Republic of South Africa, 1996 provides to every citizen the freedom to make political choices, which includes the right to participate in the activities of a political party.
- [29] Section 19(2) accords to every citizen the right to free, fair and regular elections for any legislative body established in terms of the Constitution and to every adult citizen the right to vote in elections for any legislative body established in terms of the Constitution, to do so in secret, to stand for public office and if elected, to hold such office.
- [30] That these voting rights are sacrosanct and the reasons why this is so needs no elaboration.
- [31] The Constitution obliges every citizen to exercise the franchise through a political party. Therefore, political parties are indispensable to the right of every citizen to enjoy the right given by section 19(3)(a) to vote in elections.
- [32] Section 19 of the Constitution does not dictate how members of a political party should exercise their right to participate in the activities of their choice of party nor is this regulated in terms of legislation. As was stated in *Ramakatsa v Magashule* (*Ramakatsa1*):[1]
- “Section 19 of the Constitution does not spell out how members of a political party should exercise the right to participate in the activities of their party. For good reason this is left to political parties themselves to regulate. These activities are internal matters of each political party. Therefore, it is these parties which are best placed to determine how members would participate in internal activities. The constitutions of political parties are the instruments which facilitate and regulate participation by members in the activities of a political party.”*[2] (*Emphasis added.*)
- [33] The ANC constitution, read together with rules and regulations adopted by the party such as the guidelines is a unique contract. As in the case of an ordinary contract, if a provision thereof is breached “to the prejudice of certain members, they are entitled to approach a court of law for relief”. [3] (*Emphasis added.*)
- [34] In this case the applicants’ complaints arise by virtue of and in the context of their membership to the ANC. They complain that the provisions of the ANC constitution and the guidelines have been breached to their prejudice. They argue that they have thus been deprived of their fundamental section 19 rights.
- [35] Against this background, I now will deal with the facts which are material to this case.

The material facts

- [36] The deponent to the affidavit filed for the ANC, Mr Paul Mashatile, the current Deputy President of South Africa, describes the founding affidavit as taking a scattergun approach. This description is not uncalled for. The affidavit of the first applicant, Mr Sithole, who makes the founding affidavit for the applicants is far from coherent in that it contains disjointed references to processes in which he was not directly involved.

[37] However, the salient facts emerge from the ANC's own internal documentation. This takes the form of correspondence between the leaders and other protagonists in various structures, internal reports and memoranda, general notifications to members and media statements.

[38] I do not understand the ANC in its affidavits by Mashatile and Mokonyane to dispute any of the facts which arise from such documentation. On the contrary, the answering affidavit proceeds on the basis that these documents are indeed what they purport to be.

[39] A central document which deals in some detail with crucial facts relating to the impugned conference is a report drawn at the instance

of a national task team of senior members appointed by the NEC to investigate irregularities which occurred at the Conference. The ANC does not deny the contents of the report; it merely says that the report "was not adopted" by the NEC. The suggestion appears to be that the salient facts which emerge from the report are irrelevant unless adopted. Clearly facts do not need to be "adopted" to have relevance or veracity. The approach of the ANC to the answering of the allegations in the founding affidavit is bald and evasive.

[40] In Ramakatsa¹ the following was said with reference to the application of the rule in Plascon^[4]:

"[I]t must be pointed out that where a respondent raises a bare denial to an allegation made by an applicant, the denial is not regarded as raising a genuine dispute of fact. In such a case the allegations made by the applicant may be taken into account in deciding whether the order sought is justified, unless the respondent has requested that the applicant's deponent be subjected to

cross-examination.

Because affidavits in motion proceedings constitute pleadings and evidence, the failure to respond to allegations made by an applicant is taken to be an admission of those allegation."^[5]

[41] The material facts emerge from a conspectus of these documents and the affidavits, viewed through the prism of the Plascon rule.

Events leading up to the impugned Conference

[42] As I have said, Ekurhuleni had been due to hold a conference in 2021 but the REC could not convene because of, inter alia, covid restrictions.

[43] The term of the REC was thus allowed to expire and there was thus no incumbent REC whose task it would ordinarily have been to prepare for the next regional conference.

[44] The NEC decided that the members of the lapsed REC would make up a Regional Task Team ("RTT") which had, as its sole

mandate, to prepare for the Regional Conference in 2022. As I have said, this process was conducted at a national level under the

Organizing Committee headed, as I have said, by Mokonyane. This organisation was meant to serve both the Regional Conference and the Provisional Conference.

[45] This outgoing REC had been led by Mr Thembinkosi Nciza who is the 27th respondent.

[46] Nciza is an important protagonist in this case. He was and still is a powerful figure in the ANC. He was appointed the co-ordinator of the RTT and a member of the Regional Dispute Resolution Committee (“RDRC”) under the guidelines and he was also standing for election at the Conference for the position of regional secretary and at the Provincial Conference as Provincial Secretary.

[47] There had been complaints from provincial office bearers that the RDRC was constituted by members of a faction which included Nciza and that it was thus a biased appeal structure. There is a further issue raised, being that Nciza attempted to create confusion as to the applicable guidelines. These allegations are denied by the ANC and its version is accepted.

[43] The RTT, being set up by the NEC to fill the lacuna left by the expiry of the term of the REC, was thus not a body which would ordinarily

prepare for the Regional Conference. It is not entirely clear what its powers and functions were in that it is a body which is *sui generis* and *ad hoc*. There can be no doubt however that it was required to act with procedural and substantive fairness.

[44] The ANC argues and I accept, that the role of the RTT was similar to that of a REC. One must thus understand the steps usually taken by the REC in the preparation for the regional conference under the guidelines in order to provide context for the role of the RTT.

[45] The usual process starts at branch level with the incumbent BEC. It must meet and consider its existing branch membership list and set two dates – first a cut off date for members to get their membership in order (i.e., pay up their subscriptions) and second a date on which the BBGM will be held. It is the duty of the Branch Secretary to communicate the date, time and venue to all members in “good standing and in grace period”. Presumably, the latter means that they are not up to date with their membership fees but have been given a grace period to pay.

[46] The BEC also has to elect an elections facilitation team to conduct the election of the new BEC at the BBBM. The BEC must ensure that it schedules BEC meetings before the BBGM to deal with disputes by members relating to the process and particularly their standing.

[47] It is the usually duty of the Branch Secretary to print the membership list and attendance register of those members qualifying to participate in the BBGM as at the cut-off date. This membership list and attendance register is presented at a BEC meeting.

[48] Formal registration takes place at the meeting venue. The members have their identity documents scanned by members assigned the job of “Scanning Agent”. A branch attendance register is, as I have said, also signed.

- [49] The most important single qualifying feature in relation to the process is “good standing”. One cannot participate in the activities of the ANC unless one is in good standing and one’s branch cannot participate in the regional structures unless all its members are in good standing.
- [50] This fundamental ingredient to participation raises questions of how one maintains good standing and how one loses it. This is central to this case. It entails an interpretation of the ANC constitution and the guidelines.
- [51] It is helpful to understand what good standing and qualification/disqualification mean at this stage of the examination of the facts in order to give context to this central feature of the factual complex.

Good standing/qualification and disqualification

- [52] It is now well understood that the process of interpretation does not stop at a perceived literal meaning of words but considers them in the light of all relevant context, including the circumstances in which the document came into being. Interpretation is no longer a process that occurs in stages but is one unitary exercise.[6] In *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*, [7] it was said that “[w]ords without context mean nothing.”[8]
- [53] ANC constitution indicates what “good standing” means through its definition of what it means to not be in good standing. A member not in good standing is defined as a member who fails to pay his or her subscription for three months and whose membership has lapsed.
- [54] It is thus clear that the essential component of being in or out of good standing is the payment of the subscription. There is no indication of any other manner in which a member may fall out of good standing without some process under the ANC constitution deciding that this should occur.
- [55] The process which naturally offers itself as one which can result in the stripping of a member of his or her good standing is the disciplinary process in the ANC constitution. This process provides detailed procedural rules which includes appeals up to national level.
- [56] Thus, in sum, provided a member pays his or her subscription and has not otherwise been disqualified from participation in the affairs of the party through a disciplinary ruling or some other legitimate process, the member is in good standing and thus qualifies to participate in the ANC structures.
- [57] In *Ramakatsa v African National Congress*, [9] (*Ramakatsa2*) the following was said in relation to the auditing of good standing:

“The importance of auditing is underscored by the fact that it ensures that the participants in the ANC process are fully paid-up members of the ANC who can participate in the elections and vote for those they want to lead them and not non-members.” (Emphasis added.)

[56] A branch in good standing is defined in the ANC constitution as a branch whose members' subscriptions are all fully paid up. The branch must also be "recognised by the ANC as being fully compliant with its obligations". This latter requirement is wide. No process is set out in the constitution or guidelines for disqualification of a branch.

[57] This lacuna notwithstanding, it can be safely assumed that the disqualification of a branch from participation in ANC structures

would have to be done in a procedurally fair manner and in accordance with the ANC's constitution and applicable guidelines.

[58] The applicants' contention that the disqualification of the branches in issue during the audit process was procedurally unfair

and irregular lies at the heart of this case.

[59] The guidelines draw a distinction between being in good standing and objection by a member as to the procedural irregularity in the running of a branch meeting. In terms of rule 8 of the guidelines (quoted above) a member of a branch may raise any matter related to the conduct, proceedings and/or constitutionality of the BBGM or BGM, which dispute must be lodged with the BEC by such member in writing within 48 hours after the meeting and copied the Regional and Provincial Secretary.

[60] There are two conditions to the raising of a dispute: first, the member must be a in good standing and second, he must have been present at the branch meeting which he seeks to impugn. This stands to reason. If the person concerned was not at the meeting, then any report by him or her would not be within his or her personal knowledge.

The auditing and verification of members' and branch standing

[48] The National Organizing Committee under Mokonyane took control of this all important audit process. It is not in dispute that it was intended that the audit and verification process for the Conference would serve as a basis for the upcoming Provincial Conference which was initially to take place in from 4 to 5 June following the Regional Conference at the end of May 2022. As I have said, there was a race to catch up and regularize the process which had already expired at regional level. It was important that the Provincial Conference take meet the four year period prescribed by the ANC constitution.

[49] This Provincial Conference ultimately took place from 23 to 26 June.

[50] The lead-up to the convening of the conference was an anxious period for the ANC in light of the irregularities pertaining to the impugned Conference. The NEC was called upon at this time to uphold the democratic constitutional principles on which the party and the country are founded. The applicants contend that it failed dismally in the duty. This is the gravamen of the applicants' case.

- [51] Under the guidelines, the audit process entails the compilation of a list of members in good standing at a stage which allows sufficient time for complaints by members in relation to their standing as reflected on that list and the raising of complaints as to the validity of the branch meetings.
- [52] It is intended that this period be sufficient to allow appeal processes from regional, through provincial and up to national level to be exhausted.
- [53] The period for the lodging of such complaints under the guidelines is short. The report must be made to the BEC within 48 hours of the meeting and must be dealt with by the BEC also within 48 hours. These short time periods are aimed at achieving a resolution of complaints properly raised before the Regional Conference takes place.
- [54] Complaints made by Nciza are central to this case.

Nciza's Complaints

- [55] In the lead-up to the Conference and as at the beginning of May, the National Organizing Committee led by Mokonyane produced a verification of membership report which recorded that there existed 112 branches in the Ekurhuleni region. These 112 branches represented

a total membership of approximately 20 706. The branches were assessed as to their standing and of these branches, 108 were verified as in good standing; 99 branches were, in terms of this audit, qualified for participation at the Conference. To complete the picture, 9 branches had been disqualified and 4 other branches had not been verified.

- [56] Importantly, the five branches in issue were verified in this initial audit report by the National Organizers as being in good standing. This means that at this stage and before Nciza involved himself in the verification process, their members were regarded as paid up and there were no complaints pending as to irregularity at the branch meetings.
- [57] Importantly, this was not a correct reflection of the state of affairs in relation to ward 83 in that its branch meeting had been set aside by the Provincial Dispute Resolution Committee as a result of a complaint made by the first applicant.
- [58] As far as the other four branches were concerned this standing was to change as a result of the direct intervention of Nciza.
- [59] I now deal with how the disqualification of branches unfolded and Nciza's role in such disqualification.

The disqualification of the four branches

- [60] On 03 May 2022 and pursuant to the publication of this first audit and verification report by the Organizing Committee, Nciza sent a letter to the office of the Secretary General ("SG") with the subject "Flouting of conference Guideline and manipulation of scanner".

- [61] This letter purports to be written on behalf of the RTT. Nciza states therein that he has noted “with suspicion the manipulation of the online membership system through the tempering (sic) of the scanner in some branches”. He explains that it has “come to his attention” that, in certain branch meetings, members were not being electronically scanned but instead their identity numbers were directly taken from the attendance register and “punched in to the scanner whilst members were not even present in the meeting”.
- [62] Nciza named some of these branches as also being in contravention of the three meetings rule. The letter also makes allegations to the effect that there were further irregularities including the fact that RTT officials deployed to the branch meeting by the RTT were not recognised by the branch leadership. Eight branches are mentioned in this first letter of complaint by Nciza. They are wards 2, 24, 40, 50, 56, 76, 99 and 106.
- [63] It is never explained how Nciza came by the information in the letter. There is also no indication by the ANC as what the response was to this letter by the SG. What is however, clear from the correspondence which follows, is that the letter was contentious.
- [64] On 09 May 2022 Nciza sent a second letter containing complaints against branches to the Acting Provincial Secretary (PS) and copied the SG and the National Organizing Office.
- [65] This second letter informed its recipients that the RTT had held its ordinary meeting on 08 May 2022 where it was resolved that “the RTT in its collective wisdom, request the National Organizing Office through the PSO [Provincial Secretary’s Office] to urgently investigate certain branches which the RTT strongly believes convened their meetings outside the prescribed organizational processes”.
- [66] Curiously, no reference is made in this second letter of complaint to the initial letter of 03 May in which the eight branches were accused. Furthermore, in this second letter Nciza named the delinquent branches as wards 2, 56, 76, 99, 106 and 40. Thus wards 24, 40, 50 from the first complaint seem to have fallen back into favour or in some other way fallen out of contention.
- [67] Nciza asked that these branches be investigated by the SG’s Office and the National Organising Committee and that a detailed report on these branches be produced. He added that the urgent intervention by “upper structures” will assist the RTT to convene the conference in accordance with the set time frames.
- [68] These letters by Nciza are central to the case in that they were the genesis of the impugned disqualification of the four branches.
- [69] This second letter led to a meeting being held with Nciza and other members of the RTT and executives of wards which were the subject of the reports. The meeting was chaired by Mokonyane.

[70] The ANC states the following in its answering affidavit as to these reports by Nciza:

“158. The concerns of comrade Thembinkosi Nciza were legitimate because according to the conference guidelines, no branch can receive a scanner without notifying the Regional Executive Committee (in this case the Regional Task Team) of the scheduled meeting and making a formal request for a scanner. As co-ordinator of the RTT, comrade Thembinkosi Nciza had no knowledge that these 8 branches had scheduled meetings.

159. The allegation by the First Applicant that comrade Thembinkosi Nciza was intending to manipulate processes and influence outcomes by trying to keep these branches out of the conference has no substance.

160. The outcome of the meeting which is reflected in the Final BBG report was that comrade Thembinkosi Nciza's concern were valid in respect of Wards 106, 40, 50 and 56, and these Wards were disqualified and precluded from participating in the Conference. The representatives of these four Wards accepted this outcome and did not appeal to the regional or national dispute resolution structures.

161. In the case of Wards 2, 24, 76 and 99 comrade Thembinkosi Nciza's claim was not upheld and these 4 wards participated in the

conference.” (Emphasis added.)

[71] This answer appears to refer to the complaints made against the eight branches in the first letter. This is notwithstanding that not all the branches referred to in the first letter made their way into the second letter and that prima facie the other RTT members were not allowed it see it.

[72] The answer is also inaccurate in that the conference guidelines attached by the ANC do not contain the alleged rules relating to the scanner and the maximum convening of non-quorate meetings at three.

[73] The answer fails to give any detail as to the process followed in relation to the disqualifications. It is merely stated that these

disqualifications happened “at a meeting”. This shows a failure on the part of the ANC to appreciate and deal with the fact that, prime facie, such disqualification did not happen in accordance with the procedure in the guidelines and the constitution.

[74] Furthermore, this answer pertinently fails to deal with the fact that the reports against the branches were dealt with as if they were made by Nciza in his official capacity on behalf of the RTT. This ignores that on 12 May an important letter which, on the face of it is written by the other RTT members, makes the point that the complaints made do not emanate from the RTT but are part of the machinations of Nciza alone.

[75] This letter from the RTT explain what occurred after Nciza's first letter of complaint. It is stated that pursuant to Nciza's

first letter of complaint of 03 May the RTT, including Nciza, was summoned to a meeting held by the Gauteng Provincial Office Bearers

(POBs). At this meeting, the RTT informed the POBs that the letter of complaint was not authorised by the RTT and that it did not emanate from the RTT. The RTT members claim that they had not even seen the letter of 03 May.

[76] The RTT was then instructed by the POBs to convene a meeting to deal with the issue of the letter of 03 May and give feedback to the POB.

[77] It is stated further in this letter by the RTT members that Nciza refused to table this letter for discussion at the next RTT meeting.

He is said to have refused even to disclose the contents of the letter of 03 May to the RTT. The members of the RTT complained

that they were, as a task team, thus unable to deal with the complaints in this letter.

[78] Why this letter of 03 May was dealt with in this way is not addressed.

[79] It is further stated that another meeting was held with the POBs on 10 May 2022, this time to deal with the second letter of complaint dated 09 May. The letter records that, at this second meeting, it was resolved that the POBs would take over the process in relation to these complaints and escalate the matter to the NEC.

[80] This letter from the RTT concludes with the following statement:

“However, we are dismayed to learn that another process that has ensued through RTT Coordinator and the Office of the National Organiser, i.e. fiddling with the verification process.”

[81] The allegations in this letter from the RTT members are very serious. They cry out for an explanation. And yet they are not dealt with by the ANC. This is notwithstanding that both Nciza and Mokonyane make confirmatory affidavits.

[82] It seems that these concerns of the RTT members were not taken into account, because on the following day (13 May) Mokonyane made a report as to the disqualification of five wards, being 2, 40, 50, 99 and 106 and mentioned one branch (ward 108) that qualified but did not run elections. On the same date Mokonyane sent an ANC summary report for Ekurhuleni setting out that there were 112 potential branches and that 97 branches qualified to send delegates to the Conference. Thus, the process of the finalizing of the audit report for the Conference was at an advanced stage and branches targeted by Nciza had been disqualified.

[83] Mokonyane gives the following report of how the final verification report was settled:

“The National Organising Team met with the Gauteng Secretariat led by Acting Provincial Secretary Cde Nomantu Nkomo-Ralehoko on Wednesday 11 May 2022, for the presentation of Verification Reports, intending on clearing all branches on the reports with all Regional Secretaries.

As per the letter to SGO[Secretary General's Office] from the RTT of Ekurhuleni dated 09 May 2022, disputing certain branches, this matter was presented to the meeting.

All Regional Secretaries including Ekurhuleni's made their comments. Issues were raised about the following branches;

As per verification the following was found to be in transgression of the guidelines (sic) the system.

1. Ward 02
2. Ward 40
3. Ward 50
4. Ward 99
5. Ward 106

Further note that Ward 108 Qualified but did not proceed with the Elections of BEC and nominations.

Therefore, in view of the transgressions, the branches do not qualify and each of them has an explanation to that effect.

Please find attached the UPDATED Preliminary Report of Ekurhuleni Region."

[84] Thus, in terms of this final verification report, Mokonyane purports to deal with the complaints of Nciza as emanating from the RTT when it emerges at this stage from the correspondence that she has been told by the RTT members that the complaints are those of Nciza and not the RTT.

[85] The ANC does not explain this treatment of the complaints. This is notwithstanding that Mokonyane filed a confirmatory affidavit.

[86] The statement in the letter that "All Regional Secretaries including Ekurhuleni's made their comments" is also

patently false in that it is common cause that there was no Regional Secretary for Ekurhuleni at the time. Nciza had been the Regional

Secretary but his term of office had expired.

[87] The ANC in its answering affidavit responds baldly to the allegations relating to manipulation of the system as follows:

"The contents of these paragraphs have been dealt with above. The applicants are needlessly speculating as to the reasons for Nclza's

conduct. They ascribe ulterior motives without any basis."

[88] Thus, the allegations of impropriety on the part of Nciza and Mokonyane are not dealt with save by way of platitudes and bare denial.

[89] The final verification report was produced and formally signed off by Mokonyane on 18 May. This was a week before the conference. In this report the four branches were recorded as disqualified. It is not disputed that this was insufficient time to appeal these disqualifications.

The Conference

[90] The exclusion of delegates led to a chaotic state of affairs as the date of the Conference approached.

[91] The pre registration process for the Conference on Thursday 26 May at the Benoni Civic Centre was disrupted by violence and had to be aborted and moved to the Conference venue at the Indaba Hotel.

[92] On Friday 27 May 2022 registration resumed at the Indaba Hotel. Delegates who had managed to pre register were allowed access on presentation of their delegate tags; the delegates who had not pre registered were admitted once their names had been verified

against the list of nominated delegates.

[93] During the early part of Friday evening, large crowds had gathered outside the entrance to the hotel. After one of the delegates refused to allow himself to be searched before being allowed into the premises a scuffle broke out between the delegate and security. The crowd then pushed past the boom gate to the hotel premises. The gate was broken. It was, at this stage, unclear who was legitimately within the hotel grounds.

[94] In consultation with the security service provider and South African Police Service, it was agreed that the hotel be evacuated. Delegates were then allowed in on verification against the delegates list.

[95] This attempt at obtaining an ordered registration had also to be abandoned after threats of violence. Registration resumed the following morning (Saturday, 27 May).

[96] The Steering Committee which was running the Conference met and agreed that the Conference would start at 14h00. Two NEC officials were deployed to the Conference, presumably to observe and keep order. The Conference business ultimately started at about 17h00.

[97] The Conference was opened by the then Gauteng Provincial Chairperson, David Makhura. A press report in the Sowetan states that the

conference was described as being like “war zone” by Makhura in his keynote address. He is quoted as saying:

“When you walk around here it’s like a war zone. This must make us ashamed as ANC members ... I see arms, I see the sort of things happening that says this is not a conference of the ANC. We must be ashamed.”

[98] The following general observations were made in the report filed by the Elexions Agency (the fourth respondent) which was the agency

appointed to administer the nomination and voting process at the Conference:

“The Elexions Agency arrived on Saturday afternoon and left in the evening as the conference could not resume, we waited at the accommodation

venue, and we started work only on Sunday 29 May in the afternoon as delegates has (sic) issues with adopting credentials. The mood and atmosphere were tense, and we had to deal with all sorts of allegations and verbal abuse from delegates.”

[99] Voting proceeded throughout the night on the Saturday with the Steering Committee meeting from time to time to deal with issues as they arose.

[100] Through this process it came to the attention of Mr Mduduzi Manana the Chairperson of the National Dispute Resolution Committee (NDRC) at the Conference that an appeal had been lodged against the PDRC ruling in respect of the first respondent’s complaint relating to of ward 83. This appeal was lodged by one of the five delegates from ward 83, Mr Mabena. Apparently, the delegates had did not know that the meeting and results of ward 83 had been set aside. As I have said this did not emerge from the verification report compiled by the Organizing Committee.

[101] The NDRC informed Mr Mabena in writing that the NDRC would deal with this issue after the conference. The NDRC Chairman ruled that ward 83 should be allowed to participate but have its votes quarantined. This entailed the five votes from ward 83 not being counted until the appeal processes were dealt with ex post facto the conference. It had also been agreed that wards 40, 44, 50, 106 and 108, being the remaining wards reported by Nciza and disqualified, would suffer the same fate.

[102] It is not clear on what basis the NDRC Chairman had the authority to make such a ruling in relation to ward 83 and it is also not clear who ruled that the votes of the other four wards would be quarantined.

[103] Such a process is not provided for in the guidelines. Indeed, the guidelines suggest that the disputes raised as to the conduct of meetings by branches must be dealt with before the Conference on the basis that all appeal processes are exhausted. I will deal in more detail with this latter point later.

[104] A number of members were, by this stage, so disgruntled that they threatened litigation. On the day of the conference the applicants’

attorney, Mr Obert Ntuli, addressed a letter to the ANC in terms of which he confirmed his representation of Thabisa Beauty Makapaka (of ward 106), Phillip Thwala (of ward 50) who is the third applicant and Thomas Tiego Moloi (of ward 95). The letter recorded the concerns of his clients that the process of pre registration had commenced for the conference notwithstanding that there were unresolved disputes. It was indicated that if the pending disputes were not settled his clients would be prejudiced. Mr Ntuli noted that he had been instructed that there was a systematic failure by the RTT which was designed to influence the outcome of the Conference.

- [105] The complaint made through the applicants' attorney is that there was not a parity of treatment in that some disqualified branches were allowed to run BBGMs again whilst others were disqualified outright.
- [106] On 27 May and at the height of elections at the Conference, Mr Senzo Mchunu, the Chairperson of the Organising and Mass Mobilization NEC subcommittee wrote a letter to Mashatile which was copied to Ms Gwen Ramokgopa and to Mokonyane.
- [107] This letter sought urgent clarity as to the eligibility of the excluded branches. It is indicated that branches were disqualified because of matters relating to the use of manual scanning. It is noted also that in Ekurhuleni as a whole, Branch Secretaries did not make use of the 10% scanner rule and that this practice was not just confined to the four branches. In essence, the question posed by Mchunu who was a Chairman of the Organizing Committee is why some branches were singled out for immediate disqualification because of alleged misuse of scanners when the misuse was widespread. The fact that the Chairman of the committee tasked with the verification of standing of branches was expressing concerns as to the fairness of the process seems important. Clearly there were concerns in senior ANC structures that the process might not have been fair.
- [108] As I have said, it was decided that the delegates from those disqualified branches would be allowed to participate in the Conference on the basis that their votes were quarantined. The ANC does not explain how this decision was made or under which provision of the rules. A sum of 19 votes were so quarantined. This included five votes from ward 83.
- [109] It seems that it was hoped by the leadership that the results of the voting would not be impacted upon by the quarantining of the votes – which seems a somewhat unusual solution. If the chosen delegates won by a clear margin it could probably have been argued that the allegedly arbitrary disqualification of the four branches was immaterial to the results of the Conference.
- [110] However, this was not to be. The 19 quarantined votes turned out to be potential swing votes, at least in respect of the three of the top five positions.
- [111] It is not disputed that the quarantining of the 19 votes had a material and direct bearing on the results of the Conference. In relation to the top leadership positions, the results were as follows:

- a. In respect of the position of regional chairperson, Mzwandile Masina (“Masina”) got against Nkosindiphile Xhakaza (“Xhakaza”) who got 163 to 151 (a difference of 12 votes);
- b. In respect of the position of regional deputy chairperson, Jongizizwe Dlabathi (“Dlabathi”) got against Theliswa Mgweba (“Mgweba”) by 163 to 150 (a difference of 13 votes);
- c. In respect of regional secretary Nciza got the position of regional secretary, against Nokuthula Xaba (“Xaba”) by 170 votes to 142 (a difference of 28);
- d. In respect of the position of deputy secretary, Moipone Mhlongo (“Mhlongo”) got against Andile Mngwevu (“Mngwevu”)

by 162 to 149 (a difference of 13); and

- e. In respect of the position of treasurer, Sello Skhokho (“Sekhokho”) got against Absalom Budeli (“Budeli”) by 167 to 145 (a difference of 22).

[112] It is set out in the report of the Elections Agency that, after discussions with officials deployed from the PEC and at the directive

of the Electoral Commission Chair the results at the conference were declared to be provisional as it was clear that three out of the top five contested positions – i.e. Chairperson, Deputy Chairperson, Secretary, Deputy Secretary and Treasurer.

[113] The applicants make the point that the results of the vote for the additional members of the REC were also affected for two further

reasons – first the election of the top five positions had to be clear before the election of the additional members commenced in that delegates who had not made the top five were then eligible to contest in the positions for additional members and second that the contestations for additional members was also inconclusive in many instances.

[114] The results were thus announced as being only provisional.

[115] Recall, time was of the essence to complete the regional elections because the Provincial Conference was imminent. This inconclusive result had the potential to scupper the Provincial Conference.

[116] This position obviously did not serve the interests of those vying to preserve the benefits obtained at the impugned Conference and to contest the positions at the Provincial Conference. This included Nciza.

The aftermath of the Conference

[117] The aftermath of the Conference was clearly a tense and anxious time for the ANC. This stands to reason. The expired regional structure which was to be reset as the foundation for the higher structure appeared shaken.

[118] On 31 May 2022 Mashatile sent letter to Mr Jeff Radebe stating that the National Officials had expressed concern as to the manner in which the Conference was conducted and the “negative public perceptions generated about the ANC”.

[119] The NEC decided urgently to constitute a Task Team consisting of Radebe (Convenor), Ms Boitumelo Moloi and Mr Derek Hanekom. This team was tasked with investigating the circumstances leading to the quarantining of the 19 votes from the five branches. This National

Task Team was to report to the National Treasurer General by the end of 31 May 2022 and to prepare a final report to the National

Officials.

[120] The matter was thus, at this stage, being dealt with by the NEC with as one of urgency and on the basis that it was serious. There can be no doubt that this was as sensible response.

[121] This report was duly delivered by this National Task Team. It is of crucial importance in this matter in that it casts light on the fact that the NEC was acutely aware that there were potentially serious irregularities surrounding the impugned Conference. For this reason, the report is quoted in its entirety:

“TASK TEAM REPORT INTO THE DISQUALIFICATION OF THE FIVE BRANCHES OF THE EKURHULENI REGION AT THE CONFERENCE HELD FROM THE 27TH TO THE 29TH MAY 2022

BACKGROUND

On the 31st May 2022, a meeting was convened by the Acting Secretary General, the Treasurer General of the ANC, to inform the meeting

about the decision of the National Officials to constitute a team comprising of Comrades Jeff Radebe as the Chair, Boitumelo Moloi and Derek Hanekom as the Task Team to lead the investigation to the Ekurhuleni five branches disqualified to the regional conference held on Saturday, the 27th to the 29th of May 2022; and the nineteen quarantined votes of those branches, and the circumstances that led to it. (The letter containing the terms of reference is attached - Annex “A”)

The meeting was attended by the following Comrades: Paul Mashatile, Jeff Radebe, Senzo Mchunu, Boitumelo Moloi, Gwen Ramokgopa, Derek Hanekom, Nomvula Mokonyane, Mduduzi Manana, Joe Maswanganyi, and Andries Nel. The meeting was also attended by Technical Team consisting of Comrades Mojalefa Nale, the organising Department Manager, and Dan Semanya, responsible for Gauteng, who dealt with Ekurhuleni during that period. The comrades mentioned above presented in detail what unfolded in the processes before the conference.

While the Task Team was deliberating the matter, the Chairperson, Comrade Jeff Radebe was contacted by the Provincial Secretary of Gauteng, Comrade Jacob Khawe, indicating that the Office Bearers of Gauteng would like to present their provincial view on the matter of Ekurhuleni.

The POBs [provincial office bearers] forwarded a copy of the letter earlier sent to the Acting SG [secretary general] dated the 27th of May 2022. The letter stated that they were awaiting the outcome of the disputes; they also indicated that they would like to make a written presentation to the Task Team to understand their point of view. In addition to the letter sent to the Acting Secretary General, the POBs submitted two more documents, the first one being the letter disqualifying the five branches and the role of the regional coordinator [Nciza] in that process; the second was the document explaining their perspective on how the regional conference unfolded.

At the meeting with the GP POB's [Gauteng Provincial Office Bearers] the Provincial Chair also emphasized that the province would like to engage with the National Officials during this process. They also cited that they did not trust the National Organisers based on the view that they were the source of the problems in Ekurhuleni. They further mentioned that they were conniving but did not state who they were conspiring with. Therefore, the POBs were very determined that the Ekurhuleni conference should be set aside. As a result of their comment, the task team deemed it fit for the technical team to recuse themselves from the meeting, and they complied. Subsequent to the POB's leaving, the Technical Team responded in detail to comments made by the POB's.

Four of the five branches namely wards 56, 106, 50 and 95 found services of a law company to approach the high court to present their grievance. (The letter is attached as Annex "B")

On Monday 6th June 2022, the Task Team Chairperson Comrade Jeff Radebe received communiqué from the Chairperson of Ward 50; Comrade Mpiyakhe Twala [the third applicant]. The letter stated that they were targeted and excluded by the Regional Coordinator Comrade TK Nciza. The view of the branch was that ward 50 was not the only branch that exceeded the 10% manual threshold. Also cited in the letter was that the Regional Coordinator [Nciza] penned a letter to the National Organiser Mokonyane requesting for the branch disqualification as they exceeded the quota. The branch believed that there were many other branches in Ekurhuleni that have exceeded the quota however, they were qualified and participated in the conference. (Attached are the letter from the Regional Coordinator and the analysis of the scanner that indicates that there were more branches that exceeded the quota - Annex "C")

Furthermore, the Task Team Chairperson received a letter (Annex – "D") transcribed to the Secretary General's Office dated 03rd of May 2022 by the Ekurhuleni Regional Coordinator, Comrade Thembinkosi "TK" Nciza; citing the flouting of Conference Guidelines and Manipulation of the scanner. Seven wards were listed in the letter attached for reference.

CONCLUSION

AND FINDINGS

- The five branches were present in the meetings that dealt with issues as stated in the report from the national organisers, which was chaired by the PS [Provincial Secretary] and/or the Deputy PS;
- The technical team explained in detail how the process of disqualifying was undertaken, at the meeting on the 18th of May 2022, as contained in the report;
- The decision to disqualify the five branches was based on the scanner report and the verbal submission presented to the meeting: -
 - o Ward 40 - disqualified - exceeded 10% of manual scanning
 - o Ward 44 - disqualified - no reason stated in the report
 - o Ward 50 - disqualified - manual scanning exceeded 10%
 - o Ward 56 - disqualified - scanned beyond two days
 - o Ward 106 - disqualified - manual scanning exceeded 10%
- During the meeting held on the 31st of May 2022, Comrade Senzo Mchunu indicated that the process might have been unfair as there was information that there were other branches that exceeded the 10% threshold but they were qualified and attended the conference;
- We have been given information that there were other branches that exceeded the 10% threshold as indicated in the scanner report as presented by ward 50 branch and the POBs;
- The letter from the PS [Provincial Secretary] which was sent to the TG [Treasurer General] came on the first day of the conference the 27th of May 2022, was complaining that the province was still awaiting the disputes that the province had raised;
- The steering committee of the conference, the PEC and NEC deployees in consultation with the Acting SG [Secretary General] took a decision to allow those branches to participate and quarantine their (19 votes) pending the investigation by the National Office and Province;
- The PEC deployees wrote the report after the conference, which the TG shared with the Task Team (Annex - "E");
- With regard to the allegations that three branches were targeted and excluded for reasons of exceeding the 10% threshold for manually scanned ID's, the information provided to the task team lists twenty-nine (29) branches of which nineteen (19) exceeded the 10%

threshold. Seventeen (17) of these branches were qualified in the final BBGM report dated 18th of May 2022 and two (2) were disqualified; ward 40 and 44. Wards 50 and 106 were not included in the list provided to the task team of the branches which exceeded the 10% threshold. The total number of branches which should have been disqualified is therefore a minimum of twenty-seven (27).

RECOMMENDATIONS

1. That the National Officials note this report, its conclusions and findings;
2. The National Office Bearers should evaluate the consequences of the branches that branches exceeded the ten percent manual scanning

threshold, and also look into the status of the regional conference as information was provided that more branches exceeded the quota and yet participated in the conference;

3. The National Officials must meet with the POB's and NEC/PEC deployees to the Ekurhuleni conference before they take final decision about the way forward.”

[122] Attached to the Task Team report was a report of the persons deployed to the Conference by the PEC. It states that these deployed officials noted with disappointment the factional composition of the RDRC. Nciza who was a member is mentioned in this context.

[123] It cannot seriously be disputed that Nciza was perceived as a controversial powerful and ambitious figure.

[124] There can be little doubt that it suited the purposes of Nciza and others who had vested interests for the Provincial Conference to proceed notwithstanding the provisional nature of the results of the Conference.

[125] However, there seems to have been a large measure of discomfort in senior and median ANC levels as to how the impugned Conference had been run.

[126] It becomes clear from the correspondence however that there was an intention in some quarters to forge ahead with the Provincial

Conference notwithstanding this discomfort.

The Provincial Conference

[127] The Provincial Conference was to be convened on 23 June. A special NEC meeting was held on that day. It seems that by this stage the continuation of the Provincial Conference was regarded as inevitable. However, it had not yet been formally convened by the ANC.

- [128] Reports regarding the impugned Conference were presented at a special NEC meeting from the National Working Committee, the Task Team appointed by the National Officials, the PEC, the NEC subcommittee on Organizing and the NEC officials deployed to Gauteng. This information emerges from a letter written to the Provincial Secretary, Jacob Khawe by Mashatile dated 24 June 2022.
- [129] Mr Khawe was informed that “after extensive deliberations” the special NEC decided (1) that the Gauteng Provincial Conference should proceed and (2) that the Gauteng PEC should decide on matters related to the outcome of the Ekurhuleni Conference affecting the five disqualified branches and the 19 quarantined votes.
- [130] It was stated further the results of the Provincial Conference would not be announced pending the finalisation of the processes relating to the quarantined votes.
- [131] On 24 June, a letter from office of NEC which was said to be sent on behalf of the NDRC Chairperson, recorded the following findings with respect to ward 83: That the NDRC found that the PDRC did issue a verdict on 27 March 2022, although it was possible that the appellant did not receive it on that day; that it had been established by the NDRC that the dispute of Sithole was not lodged with the BEC within 48 hours as it should have been in terms of rule 8.3 of the guidelines nor with the RDRC. It was noted that that the PRDC is not the appeal body of first instance. Furthermore, it is stated that the NDRC engaged with a former RTT deployee to the meeting, Mr Sizakele Masuku, who confirmed that the branch meeting of ward 83 ran successfully. The notice was careful to exonerate the PDRC of any “mischief” for releasing the verdict on the day of the Conference.
- [132] In the result, the PDRC verdict stating that ward 83 should re run the BBGM was set aside during the Provincial Conference. This ruling came directly from the NEC and not from the NDRC.
- [133] The Provisional Conference was allowed to proceed. This decision which were taken once the period of the Provincial Conference had already started gives the impression that every attempt was being made to forge ahead with the Provincial Conference, no matter the illegalities which had ensued.
- [134] Nciza contested and was appointed to the top position of Provincial Secretary having been provisionally appointed Regional Secretary at the impugned Conference.
- [135] On 29 July a media statement relating to a PEC meeting held on 27 July was issued by Nciza, now acting as Provincial Secretary. There were various items on the agenda including the conference. It was noted that the outcome of the Conference was “accepted”.
- [136] A further media release of 05 August 2022 confirms that the PEC resolved that the election results of the Conference should stand and the 19 votes which were quarantined would not be counted.

[137] Inexplicably, the ANC in its answering affidavit deals with the processes relating to some of the wards referred to in the founding affidavit in some detail, but in relation to the five wards in issue it says simply at para 183 of the founding affidavit that the PEC in Gauteng “investigated the matter and concluded that the 5 votes from ward 83 will be counted based on the decision of the NDRC on 24 June and that the 14 votes of the other branches would be excluded because those branches did not qualify to attend the Conference. This latter reference to the disqualification of the branches begs the question as to the legality of the process.

[138] I now turn to deal with the arguments raised by the parties.

The arguments

[139] The case of the applicants is that the results of the Conference must be set aside because of the unlawful disqualification of branches and the quarantining of their votes which had a material effect on the election process undertaken at the Conference.

[140] Further, they theorise, with reference to the Elexions report read with the National Task Team findings that, had the proper processes been followed and the disqualification of branches been applied consistently on the basis of the scanner issue, this had the potential to render the conference in violation of the rule of 70% - being that a Conference is validly convened provided 70% of the members are in good standing. There is a factual dispute as to this point which is not capable of resolution on the papers. However, the

mere fact that the dispute is raised has some relevance in that it demonstrates that an unequal application of the rules and processes

has the potential to compromise the foundational integrity of the structure.

[134] The ANC has produced a bare denial of the irregularities contended for but argues that, in any event, the rule of 70%, correctly construed, means that as long as a 70% quorum is reached it makes no difference that there may have been irregularities relating to the other 30%.

[135] It argues further that there is no requirement that excluded wards be allowed to exhaust their appeal processes before the Conference

but contends that, in any event, the disqualified wards were allowed to exhaust their appeal processes albeit ex post facto.

[136] It does not seem to be in dispute that, if the ANC’s argument as to the rule of 70% is rejected and the irregularities complained of are established by the applicants and it is, in addition, established that such irregularities were material then the applicants are entitled to relief.

The

issues

[137] The questions which thus to be considered on the arguments are as follows:

137.1. Is all that is required for a valid conference that 70% of the branches are in good standing?

137.2. Are the irregularities established?

137.3. If so, are the irregularities so material as to allow for the setting aside of the Conference and its results?

137.4. If the Conference and its results are set aside what consequential relief should be ordered by this court, if any.

I will deal with each of these questions in turn.

The rule of 70 %

[138] The rule of 70% has its origin in amongst others the document “What Constitutes a Legitimate ANC Conference”, where it is formulated thus:

“The conference is convened if there is a minimum of 70% branches that have successfully completed all steps in the pre-process for the conference.”

[139] The ANC argues that this means that, provided the rights of 70% of members are accorded them, the election results of a conference must be accepted. The argument goes that the purpose of the rule is to prevent conferences from being scuppered by a minority of members and the rules abused by mischievous factions.

[140] The implication of the ANC’s argument is that it may conduct its processes unlawfully in relation to a minority of its members.

[141] In Ramakatsa¹ the Constitutional Court stated as follows as to the rights of members of a political party:

“I do not think that the Constitution could have contemplated political parties could act unlawfully. On a broad purposive construction, I would hold that the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution. This means that our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party.”[10]

[142] The argument that all that is needed is for 70% to qualify regardless of the validity of the complaints of the minority was raised and, with respect, by a Full Court in KwaZulu Natal in *Dube v Zikalala*,^[11] Koen J had the following to say in dealing with the argument:

“As much as one can understand the practical and logistical difficulties which may arise in individual branches, the requirement is clearly one to operate constitutionally, and is more in the nature of a quorum requirement. ... The constitutional rights and entitlement of members and branches cannot, for the purpose of demonstrating this principle, be violated in the run up to qualifying

to participate in a provincial conference, and that violation then be justified on the basis that at least 70% of other branches had qualified. The application of the 70% rule to that situation would be misdirected, improper and irregular.”[12]

[143] Thus, on the prevailing legal principles the position is as follows: provided the members are allowed the opportunity to qualify to participate in the processes of the ANC, including the exhausting of appeal processes, the Conference may be validly held, regardless of disqualification of members who have not taken advantage of such rights.

[144] The ANC attempts to argue that regional structures are not subject to the same rigour as provincial and national structures and that Ramakatsa1 and Dube are thus distinguishable on this point.

[145] There is no foundation for this submission. Clearly reference to the ANC constitution, the Constitution and the guidelines accord

to every member the right to participate in the party activities according to the tenor of his or her membership.

[146] The Constitutional Court in Ramakatsa1 described the nature of the legal relationship that arises from membership of the ANC thus:

“At common law a voluntary association like the ANC is taken to have been created by agreement as it is not a body established by statute. The ANC's Constitution together with the audit guidelines and any other rules collectively constitute the terms of the agreement entered into by its members. Thus the relationship between the party and its member is contractual. It is taken to be a unique contract.”

[147] Clearly there is no scope for an argument that some structures enjoy the protections of the ANC constitution whilst others do not. The clear implication of the constitutional prescripts as they emerge from the ANC constitution is that, for the structures to operate constitutionally, they must operate in an integrated manner in accordance with the constitution and guidelines. This means that, from the perspective of election of officials, lower structures are feeders for the middle structures and ultimately the NEC.

[148] If there is corruption and/or illegality in any tier of the structure, the entire structure is compromised.

Were the affected branches dealt with in a lawful manner, including being allowed to exhaust their rights of appeal?

[149] The disqualification of the four branches on the complaint of Nciza was determined by the Organizing Committee under the leadership of Mokonyane. It is common cause that these disqualifications were ultimately decided on the basis of the scanner issue. As I have said, this 10% rule is not to be found anywhere in the documents and I was not pointed to any directive of the ANC which allowed for the non recognition of a branch for this reason.

- [150] Clearly, if this rule does not apply, then there was no basis whatsoever for the disqualifications.
- [151] However, on the basis that the applicants seem to accept the existence of the rule, I shall proceed on the assumption that the rule did apply. I do not understand the applicants to concede, however, that the breaching of this rules would necessarily be grounds for disqualification of branches.
- [152] The guidelines prescribe in some detail the manner in which complaints as to the results of branch meetings are dealt with. As I have said, this allows members in good standing who were present at the meeting concerned to dispute the constitutionality of the meeting.
- [153] The applicants point out that there is no process which allows for disqualification on the report of a non-member who was not present at the impugned meeting. This is correct. The implication is that members not in good standing and/or who were not at the meeting have no standing to impugn a meeting.
- [154] In relation to Nciza's entitlement to lodge the complaints, the ANC merely says baldly that he had the right to do so arising from his position as head of the RTT.
- [155] The claiming of such a right without due explanation or elaboration, fails to make out a case. There is no indication in the ANC constitution, the guidelines or elsewhere that Nciza would have had this power as the head of the ad hoc RTT. He would also not have had this power were he still the incumbent Regional Secretary.
- [156] This assertion of the authority of Nciza also fails to take account of the correspondence in terms of which the members of the RTT stated in no uncertain terms that the complaints were not those of the RTT and that they suspected that there was "fiddling with the votes" going on in the context of this process. This is indeed the crux of the case for the applicants. And yet it is widely skirted by the ANC. This is of concern to this court.
- [157] In order for the ANC to rely on the complaints of Nciza and the acceptance by Mokanyane of such complaints as a basis for the disqualification of the branches it would have been necessary for it at least to have set out facts from which it could be argued that these disqualifications were made under a process which was fair and regular.
- [158] The "process" suggested by the ANC is that Nciza was entitled to make a random complaint which Mokonyane had the discretion to accept or reject. The arbiter of the complaint was thus, according to the ANC, Mokonyane.
- [159] I was pointed to no provision which allows for an office bearer simply to decide to disqualify a branch without exercising the procedure in the guidelines and the constitution. Such a power would, to my mind, be inherently arbitrary and undemocratic.

[160] The disciplining of members, which I accept may include disqualification of the member and lead to the disqualification of that member's branch, must take place under the structures provided for in the constitution and guidelines or some other regular and transparent process. Members are entitled to certainty as to the processes to which they are subject and entitled.

[161] In order to conform to constitutional prescripts of justice and fairness, the taking of decisions must be in accordance with an

empowering rule and must be procedurally fair.

[162] If the decision to disqualify a member or a branch is not taken in a procedurally and substantively fair manner and this has a material effect on rights on the applicants, the applicants are entitled to relief. The same applies if it is established that the impugned decisions were taken ultra vires.

[163] It is confirmed in Ramakatsa¹ that "the ANC's Constitution regulates and facilitates how its members may participate in internal activities of the party"[13], and further "that the leadership of the party is accountable to its members in terms of the procedures laid down in its

constitution".

[164] At common law, non-compliance with the peremptory provision of an agreement/constitution results in the setting aside of the conduct

which flowed therefrom. Thus, in *Matlholwa v Mahuma*,^[14] it was held that:

"As pointed out above, the power to expel a member may be exercised only by a body in which such power has been vested by the constitution

expressly or by clear and unambiguous implication, failing which the purported expulsion will be ultra vires the constitution and void."^[15]

[165] There can be no doubt that the processes leading to the exclusion of the branches had no foundation in the guidelines or the constitution. The decision by Mokonyane to disqualify these branches on the purported complaint of Nciza is ultra vires and void.

Materiality

[166] In *Dube*, under similar circumstances relating to the exclusion of branches from a Provincial Conference, the Court held that, although the

irregularities were established by the applicants this was not material because, whether or not the branches had been allowed to participate in the impugned conference or not would have made no difference to the result because of the vast number of votes between the candidates.^[16]

- [167] This case is different. It is not in dispute here that the quarantining of the votes had the potential to have a determinative effect on the elections at the Conference such that the results of three of the top five positions were ruled inconclusive and the result of the Conference provisional.
- [168] In this case, to my mind, the entire lapse in process was so egregious that it evidences a complete lack of regard for the application of fair process on the part of the National Organizing Committee.
- [169] The NEC followed this up by abdicating its responsibility to a conflicted PEC, led by the very actor whose conduct was under scrutiny. To my mind, in doing this, it acted contrary to its duties under its own constitution and denied the applicants their section 19 rights.
- [170] In relation to ward 83, had the appeal process been allowed to take its natural course, the branch meeting would probably have been rerun as was ordered by the PDRC ruling rather than an appeal lodged with the NDRC. This would have been a fairer result and the one to which the first applicant was entitled.
- [171] The ex post facto resort to the NDRC in relation to ward 83 came about only because of the fact that the five delegates had already been allowed unlawfully to register at the Conference. To my mind, this unlawfulness was compounded rather than ameliorated by allowing the appeal to be lodged at the last minute and when the Conference was already underway.
- [172] The ANC argues that the first applicant was not one of the chosen delegates forward 83 and thus cannot be heard to complain. This exhibits a lack of appreciation for the democratic process. The first applicant may not have been an elected delegate but he had the right to a fair process in which to elect his chosen delegates.
- [173] In the case of the four branches which were the subject of the Nciza report, the verification of these branches, as being disqualified

occurred only a week before pre-registration for the Conference started. What is more, the process was inherently flawed in that

Nciza had no standing under the rules to make the complaints and did not lodge them in accordance with the due process. Thus, any appeal had inherent prospects of success. Furthermore, as I have said the Organizing Committee under Mokonyane acted ultra vires, meaning the purported disqualification was invalid.

- [174] The ANC argues that, for an elective conference to be validly convened, it is not necessary for all appeal processes to have been exhausted. I have dealt with this argument relating to the rule of 70%. The applicants argue that they are entitled to participate to the fullest extent in the qualification process. This involves being audited and verified in accordance with the rules.

- [175] Thus, if the ANC has failed to afford a member his membership rights and this failure has had a material effect on the results, the Conference was not validly convened.
- [176] The importance of a fair auditing process was emphasized in Ramakatsa². It was stated that such a process “ensures that the participants in the ANC process are fully paid-up members of the ANC who can participate in the elections and vote for those they want to lead them and not non-members”.^[17]
- [177] In relation to ward 83, the PDRC set the branch meeting aside. This meant that ward 83 was not entitled to send its five delegates
- elected at the meeting. And this is what the status of this branch should have been reflected as in the final verification report. This PDRC result was, however, not placed on the audit record approved by Mokonyane and only came to light on the day of the Conference. This was irregular.
- [178] It is not clear why or how this failure in the record keeping relating to the qualification occurred. This is information which is peculiarly within the knowledge of the ANC, but no attempt is made to explain it. The most that is said is that it “seems not to have come to the attention of the appellant”.
- [179] The ANC argues that it was open to it to allow the lodging of an appeal even as the Conference was underway and, in this manner, disturb the status quo as to qualification at this crucial stage.
- [180] I was not addressed in any real sense as to the lawfulness of this eleventh hour appeal. It cannot be denied however that it was not in terms of the guidelines. It also cannot be disputed that it had a material effect on the result which seems, on the face of it, to be unfair.
- [181] The ANC argues that it has alleviated any potential unfairness and prejudice caused by a failure to accord to its members in issue their right to exhaust their appeal process before the Conference by allowing the appeal processes to be exhausted ex post facto and quarantining the votes pending the result of the appeals.
- [182] In fact, the contrary is true. To my mind, the quarantining of votes was inherently unfair in that it created potential for ex post facto manipulation of the voting results.
- [183] This position was exacerbated by the ANC putting the very people who would benefit from this irregular appeal process in charge of it.
- [184] It seems to me that the quarantining of the votes was nothing more than the paying of lip service to the rights of the applicants. It could not rationally have been conceived as a legitimate way for the remedies of the affected branches to have been exhausted.

[185] The NEC allowed the Provincial Conference to proceed notwithstanding the clear illegality of the election process at the Conference. The provisional nature of the elections at the Regional Conference was such that it was not constitutional for the Provincial Conference to be convened. This is inherent in the hierarchical election structure which lies at the heart of democratic elections

[186] At best, the NEC's conduct in relation to the impugned Conference reveals a profound disregard for the rules; at worst it constitutes turning a blind eye to an attempt to manipulate the votes by Nciza under circumstances where he was personally conflicted.

[187] Regardless of the motivations, it amounted to a materially unfair process.

[188] In the circumstances, it cannot be found that the processes leading up to, during and after the Conference were in accordance with the ANC constitution, the Constitution or the guidelines. In addition, the procedural and substantive irregularities were material to the outcome of the Conference.

[189] This court thus has no alternative but to declare that the Conference and its election results are unlawful and void.

[190] I now move to deal with the relief which is appropriate in the circumstances.

Appropriate relief

[191] Section 172 of the Constitution provides:

"Powers of courts in constitutional matters"

1. When deciding a constitutional matter within its power, a court –
 - a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - b. may make any order that is just and equitable, including –
 - i. an order limiting the retrospective effect of the declaration of invalidity;
 - ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[192] The ANC constitution simply gives effect to the political rights in section 19 of the Constitution, thus in determining the relief this court is "deciding a constitutional matter" as contemplated in s 172.

[193] A just and equitable order may be granted even where the determination of a constitutional dispute does not depend on constitutional

invalidity of legislation or conduct. In *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*, [18] it was held as follows:

“In other words, the order must be fair and just within a context of a particular dispute. It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution.”[19]

[194] This principle was referred to with approval by Mogoeng J in *Minister of Safety and Security v Van der Merwe*, [20], where it was stressed that such a just and equitable order should be one “structured in a way that avoids unnecessary dislocation and uncertainty.”[21]

[195] In *Ramakatsa* it was argued that it would be “just and equitable” for the Court to order the ANC to install an interim structure in terms of Rule 12.2(d) of its constitution’. Rule 12.2 provides:

‘12.2 Without prejudice to the generality of its powers, the NEC shall:

12.2.1 ...

12.2.2 ...

12.2.3 ...

12.2.4 Ensure that the Provincial, Regional and Branch structures of the ANC function democratically and effectively. (The NEC may suspend or dissolve a PEC when necessary. A suspension of a PEC shall not exceed a period of 3 (three) months. Elections for a PEC, which has been dissolved, shall be called within 9 (nine months) from dissolution. The NEC may appoint an interim structure during the period of suspension or the dissolution of the PEC to fulfil the function of the PEC).”

[196] The applicants seek to invoke these same internal powers in that they seek an order that the NEC appoint an interim Regional Task team to exercise the powers and perform the duties that the REC would otherwise perform until a properly constituted conference of the Ekurhuleni region has been held.

[197] Rule 11.3 of the ANC constitution also gives the National Conference “the right and power to review, ratify, alter or rescind any decision taken by any of the constituent structures, committees or officials of the ANC.”

[198] In Ramakatsa¹, after having concluded that “a declaration that the provincial elective conference of the ANC and the decisions taken at the conference are unlawful and void should suffice”[22] expressed the following:

“We are disinclined to determine how the political party concerned should regulate its internal process in the light of the declaration made by this Court. We are satisfied that the ANC’s constitution confers on the NEC or the National Conference adequate authority to regulate its affairs in the light of the decision of this Court.”[23]

[199] Furthermore, the setting aside of a principal act does not inevitably result in the invalidation of the subsequent acts. In *Democratic Alliance v President of the Republic of South Africa*,[24] the Constitutional Court per Yacoob ADCJ held:

“However, in these circumstances, we should make an order that the invalidity of Mr Simelane’s appointment will not by itself affect the validity of any of the decisions taken by him while in office as National Director. This will mean that all decisions made by him remain challengeable on any ground other than the circumstance that his appointment was invalid.”[25]

[200] Generally, however, an act contrary to a constitution is void, as held in, inter alia, *Mahuma*.

[201] In this case, the court has not been provided with argument or facts from which guidance could be drawn as to the appropriate relief which should follow the declaration of invalidity.

[202] As in *Ramakatsa*¹, this court should be disinclined to determine how the ANC should regulate its internal processes, given the powers in rules 11.3 and 12.2.4 of the ANC constitution providing for continuity.

[203] Consequences will follow from the declaration of invalidity which, going forward, are best dealt with by the ANC itself in regulating its internal processes and/or by further resort to judicial intervention on the basis that a clear case is then made out as to the appropriate relief.

[204] There are any number of parties who may have locus standi in such a case.

Costs

[205] There is, to my mind, no reason why the costs should not follow the result.

Order

[206] In the circumstances I make the following order:

1. The Eighth Regional Conference of the Ekurhuleni Region of the African National Conference (“the Conference”), held at the Indaba Hotel in Fourways on 27 to 29 May 2022, and all decisions, resolutions and election results emanating from the Conference are set aside.

D FISHER

JUDGE OF THE HIGH COURT

JOHANNESBURG

Heard: 3 May 2023

Delivered: 17 July 2023

APPEARANCES:

For the applicants: Adv S Tshikila Instructed by: Obert Ntuli Incorporated For the respondents:
Adv E A Ayayee Instructed by: KN Attorneys

[1] Ramakatsa v Magashule 2012 JDR 2203 (CC) (“Ramakatsa1”).

[2] Id at para 73.

[3] See Ramakatsa1 (fn

1) at para 80.

[4] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (AD).

[5] See Ramakatsa1 (fn

1) at paras 94-95.

[6] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; [2012] (4) SA 593 (SCA).

[7] Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 (1) SA 518 (SCA).

[8] Id at para 28.

[9] Ramakatsa v African National Congress [2021] ZASCA 31 (“Ramakatsa2”).

[10] See Ramakatsa1 (fn

1) at para 16.

[11] Dube v Zikalala 2017 JDR 1513 (KZP) (“Dube”).

[12] Id at paras 102-103.

[13] See Ramakatsa1 (fn

1) at para 74.

[14] Matlholwa v Mahuma [2009] ZASCA 29; [2009] 3 All SA 238 (SCA).

[15] Id at para 11.

[16] See Dube (fn

11) at para 91.

[17] See Ramakatsa2 (fn

9) at para 27.

[18] Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo [2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC).

[19] Id at paras 96-97.

[20] Minister for Safety and Security v Van Der Merwe [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC).

[21] Id at para 26.

[22] See Ramakatsa1 (fn

1) at para 124.

[23] Id at para 125.

[24] Democratic Alliance v President of South Africa 2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

[25] Id at para 93.

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