

SOUTH AFRICA / JUDGMENT

Zulu and Others v Provincial Executive Committee - ANC, Kwazulu-Natal and Others (189/2022P) [2023] ZAKZPHC 63 (19 May 2023)

[2023] ZAKZPHC 63

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Smart AJ

CASE / FILE NUMBER

189/2022P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

no: 189/2022P

In

the matter between:

MHLALISENI
ISMAEL ZULU FIRST
APPLICANT
BONGANI
PATRICK NGUBENI SECOND
APPLICANT
SIPHIWE
MAZIBUKO THIRD
APPLICANT
SIPHAMANDLA
MTHOBISI GULE FOURTH
APPLICANT
BONGANI
MANDLINGOZI FIFTH
APPLICANT
and
PROVINCIAL
EXECUTIVE COMMITTEE – FIRST
RESPONDENT
ANC,
KWAZULU-NATAL

AFRICAN
NATIONAL CONGRESS SECOND
RESPONDENT
ANC
REGIONAL EXECUTIVE COMMITTEE – THIRD
RESPONDENT
EMALAHLENI
ORDER
The
applicants' claim is dismissed with costs.

JUDGMENT

Smart AJ

Introduction

- [1] This is an application brought by the applicants for orders setting aside the 11th Emalahleni Regional Elective Conference ('the conference') of the second respondent, the African National Congress ('the ANC'), which was held at Newcastle on 4 to 5 September 2021 and setting aside its decisions, resolutions and elections. The application was launched on 12 January 2022 and the respondents opposed the application and delivered their answering affidavit on 9 May 2022. A supplementary affidavit was delivered by the third respondent on 21 June 2022.
- [2] At the commencement of the hearing counsel for the applicants confirmed that objections to the late filing of the third respondent's supplementary affidavit were withdrawn and that no costs order was to be made in terms of that application. To the extent that it was necessary, I granted condonation for the late filing of the aforesaid affidavit. A further supplementary affidavit, which was deposed to on behalf of the first and second respondents, was handed to me at the hearing and this was not opposed by the applicants. This supplementary affidavit dealt with an incomplete annexure which was annexed to the first and second respondent's answering affidavit, being annexure CM3 (the attendance register),
- and a complete document was annexed to this affidavit.
- [3] The applicants are members of the ANC registered at various wards in the Emalahleni region in Newcastle and Dannhauser.

- [4] The applicants brought the application in their personal capacity and on behalf of eleven individual branch leaders and members who were aggrieved by the calling of the conference which forms the subject matter of this application. The eleven branches are reflected in a list contained at an annexure attached to the applicants' founding affidavit, annexure EM1, and includes ten wards in the Newcastle sub-region and one ward in the Dannhauser sub-region.
- [5] The first respondent is the provincial executive committee of the African National Congress, KwaZulu-Natal ('PEC'). The PEC is the highest structure or organ of the ANC in the province between the conferences. The second respondent is the ANC and the third respondent is the Emalahleni Regional Executive Committee of the ANC, KwaZulu-Natal ('the regional EXCO').
- [6] The applicants contend that the respondents have breached the ANC constitution and the ANC Conference Guidelines by calling for the sitting of a Regional Elective Conference without following the ANC Conference Guidelines and the provisions of the ANC constitution.
- [7] The complaints of the applicants are that:
- (a) the conference was held even though 70% of the qualifying branches did not attend the conference;
 - (b) a final verification report was not available at the time that the conference was held;
 - (c) disputes were still pending; and
 - (d) eleven branches were excluded from participating in the conference.
- [8] The respondents placed in dispute the correctness of the factual allegations on which the applicants relied. The respondents contend

that the irregularities relied upon by the applicants are without merit, alternatively, give rise to disputes of fact which fall to be determined in favour of the respondents. No application was made for the matter to be referred for the hearing of oral evidence and, accordingly, the factual disputes raised in the papers are to be dealt with on the approach described in *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd*.^[1] The general rule is that, where disputes of fact have arisen on affidavits in application proceedings, a final order may be granted

if those facts averred in the applicant's affidavits which have been admitted by the respondent or not placed in dispute, together with the facts alleged by the respondent, justify such an order.

- [9] The respondents furthermore contended that the applicants had failed to comply with internal remedies and that the applicants lack locus standi to act on behalf of other members. As I understand it these contentions were not persisted with in argument and it was agreed that the only issue which was to be decided was whether or not there were irregularities in the lead up to the conference and, if so, whether these irregularities constituted grounds to set aside the conference.

The applicants' case

- [10] The essence of the applicants' claim is that the irregularities they allege to have occurred in the run up to the conference constitute an infringement of their constitutional right in terms of section 19 of the Constitution to participate in the activities of a political party and a breach of their rights provided for in Clause 5.1.4 of the ANC constitution. Section 19 of the Constitution provides for the protection of the right of all citizens to participate in the activities of a political party and Clause 5 of the ANC constitution deals with the rights and duties of members'[2]. Clause 5.1.4 of the ANC constitution provides that '(a) member shall be entitled to take part in the elections and be elected or appointed to any committee, structure, commission or delegation of the ANC'.
- [11] The applicants allege that, at the time of the conference certain branches of the region had not held branch meetings. This meant that the minimum required threshold was not met for the conference to proceed, the conference was not ripe for sitting and certain branches had not held re-runs subsequent to those branches having failed an audit. It is common cause that the 70% minimum threshold requirement applies which means that at least 70% of the branches must have completed all of the steps required in the process leading up to the conference. The 70% threshold requirement is set out in the judgment of *Dube v Zikalala*[3] at paragraph 9 and provides that '(a) conference is convened if there is a minimum of 70% of the branches that have successfully completed all steps in the pre process for the conference.'
- [12] According to the applicants, eleven branches of the region were not permitted to participate in the conference. Furthermore, four branches of the Emalahleni region should have been excluded from the conference as those branch meetings were not quorate, members of those branches were excluded and identity documents of persons not at the meeting were scanned to give the impression that a quorum was achieved. These issues and/or disputes were not resolved by the respondents prior to the conference and persons were permitted to participate at the conference in circumstances where they were not qualified to participate.
- [13] The applicants set out specific grievances and irregularities which were not dealt with by the respondents which meant that irregular meetings of the branches were validated by the respondents in violation of the conference guidelines. In particular, the applicants refer to the following disputes:
- (a) The first applicant was excluded from the branch meeting of Ward 27 of the Newcastle sub-region on 23 May
2021. The first applicant submitted a dispute to the respondents but this was not resolved. Instead, according to the first applicant, delegates were elected from that branch meeting to represent his branch at the conference.

- (b) Irregularities relating to the scanning of identity documents occurred at the branch meeting of the fifth applicant's branch resulting in non-ANC members being allowed to participate in the meeting at which delegates to the conference were elected. Those delegates who did attend the conference were not elected at a valid meeting.
- (c) A member of Ward 33, Newcastle launched a dispute concerning a branch meeting held on 10 April 2021. This dispute was not attended to by the respondents.
- (d) The fourth applicant launched a dispute regarding a branch meeting held on 16 May 2021 at Ward 10, Dannhauser on the basis that, inter alia, insufficient notice was given for the meeting and no quorum was met. This dispute was ignored by the respondents.
- (e) Eleven branches listed in EM1 were not provided with an opportunity to hold branch meetings or re-runs of branch meetings.
- (f) Draft credentials for the verification of delegates were not provided.
- (g) A final audit report signed by the acting secretary general of the ANC had not been provided.
- (h) The final outcome of disputes had not been resolved.

The respondents' opposition

[14] The respondents opposed the application on the basis that:

- (a) The applicants do not have locus standi to act on behalf of or represent other persons or members of the ANC.
- (b) The applicants should have exhausted internal remedies before approaching court.
- (c) The correct procedure for the holding of a conference was followed.
- (d) The complaints referred to by the applicants had been adequately addressed, alternatively, were invalid.

[15] It was conceded by the respondents that the applicants have locus standi in their personal capacities and the matter was argued on that basis. As I stated, the parties agreed that the only issue to be

decided was that relating to whether or not there were irregularities in the procedures leading up to the holding of the conference.

[16] The respondents dealt with each of the complaints relied on by the applicants and argued that the facts in support of their complaints were disputed by the respondents. According to the respondents these were disputed on reasonable grounds.

[17] I shall deal with each of those complaints and the responses thereto by the respondents.

Whether the first applicant was denied entry to a re-run of a branch meeting

[18] The first applicant alleges that he was refused entry to a re-run of a branch meeting. The respondents contend that the first applicant was not a member in good standing at the cut-off date and he accordingly did not qualify to participate in the branch meeting. In support of this contention the respondents attached a printed register reflecting all members in good standing. In reply, the applicants attached a printout from the ANC database reflecting his membership. Furthermore, the respondents alleged that the first applicant's dispute had been dealt with at the time that it was raised by the first applicant and the respondents attached to the answering affidavit documents detailing the finding of this dispute.

Dispute raised by the fifth respondent

[19] Various irregularities were relied upon by the fifth applicant in respect of the branch meeting held in Ward 2, Dannhauser. These irregularities are set out in a letter which the applicants allege was addressed to the respondents. The respondents deny that they received this letter and the applicants did not provide proof of delivery in reply. In any event, according to the respondents, none of the applicants were present at the meeting in question. In reply, the applicants allege that Ward 2 never had 100 members in good standing and was accordingly not permitted to participate. In argument, the respondents contended that this constitutes a new case in reply which is not permitted unless there is reason to do so.[4] The applicants do not explain why these allegations were not raised in their founding affidavit. In any event, say the respondents, there were not less than 100 members present at the meeting.

[20] A clear dispute of fact exists as far as this issue is concerned and it should accordingly be concluded in favour of the respondents.

Ward 33, Newcastle

[21] The applicants allege that a dispute relating to a branch meeting was not attended to by the respondents. In answer, the respondents contend that any disputes relating to Ward 33 were dealt with and annexed to their affidavit a document containing the findings of the dispute resolution committee. The version of the respondents is accordingly corroborated by documentary evidence attached to the answering affidavits and the dispute of fact should be concluded in favour of the respondents.

Ward 10, Dannhauser

[22] The complaint of the applicants is that disputes relating to short notice of the meeting and to the lack of a quorum at the meeting held at Ward 10 were not finalised or attended to by the dispute resolution committee. The respondents contend that the letter containing details of the complaint had not been received by the respondents.

[23] In reply, the applicants simply allege that the complaint was indeed sent to the respondents but they do not set out how or when the complaint was sent to the respondents.

[24] The respondents contend further that what is alleged by the applicants is not consistent with what is contained in the final verification report.

Branches not allowed to re-run

[25] It is the complaint of the applicants that eleven branches were not permitted to hold re-runs of branch meetings. The respondents contend that this complaint is without merit as the decision to hold a branch meeting is one that is initiated at branch level. These eleven branches were given the proper opportunity to qualify but failed to do so.

Short notice of conference

[26] The applicants allege that the conference is invalid due to a failure by the respondents to comply with the guidelines in respect of the distribution of the notice 21 days before the conference in question. In response, the respondents allege that the relevant calculation for the number of days for the notice is from the date of the original conference which, it is common cause, was due to take place in May

2021. The conference was postponed and the 21 days' notice was not required again. Furthermore, the applicants do not allege or prove any prejudice which arises from this.

The challenge by the applicants to the final audit report

[27] In support of the applicants' claim that the branches from the region had not met the 70% threshold to qualify to hold a conference, the applicants relied on a branch general meeting preliminary verification audit report which proved, according to the applicants, that the 70% threshold had not been met.

[28] In response to this contention, the respondents allege that a final verification report was prepared and signed by the acting secretary general of the ANC on 12 August 2021 and was presented before the conference was held. According to the respondents the preliminary report relied on by the applicants had been overtaken by the final verification report. In short, and from what appears from that report, what the applicants allege is simply not correct.

[29] The final verified audit report contained the following information:

- (a) The number of the ward, the branch meeting dates, the venue, the audited total membership, the expected quorum, the number of members who attended, the number of members who were in good standing, the verified quorum, the ultimate branch status, that is whether the branch qualified or was disqualified.
- (b) According to the respondents, a summary of the final verification report reveals that, out of fifty-three potential branches of the region, 37 were required to qualify, (ie 70%) and 42 branches were in fact qualified. This exceeded the minimum threshold requirement of 70% for the holding of the conference, and the conference could lawfully proceed.

- (c) Ward 30, Newcastle, was not listed in the verification report because it did not hold a branch meeting. Ward 32, Newcastle, is not reflected in the verification report because, consequent the upholding of a complaint, it was entitled to hold a re-run but did not.
- (d) At the time of verification based on membership for the cut-off date of the conference, Ward 1 of the Dannhauser sub-region did not have a minimum of 100 members to make it eligible to participate.
- [30] In reply, the applicants disputed what was contained in the final verification report and alleged that the final verification report relied on by the respondents was ‘manipulated’.
- [31] There is no way of making a factual finding on the papers as to whether or not the preliminary verification report or the final verification report is valid and I am accordingly unable to find in favour of the applicants on this issue.

Conclusion

- [32] I am satisfied that the respondents have raised genuine disputes of facts on the issues referred to above. The respondents’ affidavits unambiguously addressed the facts said to be disputed and, where necessary, their version is corroborated by documentary evidence attached to the answering affidavits. According to the Plascon-Evans rule, and where there are genuine disputes of fact, the respondent’s version must be accepted.
- [33] For these reasons I conclude that the applicants have not established that there were irregularities in the procedures leading up to the conference and it follows that the application must fail.

Costs

- [34] There is no reason to deviate from the normal principal that costs follow the result. It follows that, as the applicants have been unsuccessful, they have to be held liable for the costs, jointly and severally.

Order

- [35] I accordingly grant an order in the following terms:

APPEARANCES

DATE OF HEARING: Friday, 7 October 2022

DATE OF JUDGMENT: Friday, 19 May 2023

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[1] Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A).

[2] Ramakatsa and others v Magashule and others

[2012] ZACC 31; 2013 (2) BCLR 202 (CC).

[3]

[2017] 4 All SA 365 (KZP)

[4] National Council of Societies for the Prevention of Cruelty to Animals v Openshaw

[2008] ZASCA 78; 2008 (5) SA 339 (SCA); [2008] 4 All SA 225 (SCA) paras 29 – 30, Lagoon Beach Hotel v Lehane

[2015] ZASCA 210; 2016 (3) SA 143 (SCA); [2016] 1 All SA 660 (SCA) para 16, and MAN Financial Services (SA) (Pty) (RF) Ltd v Elsologix (Pty) Ltd and others

[2021] ZAGPJHC 655 paras 6 – 9.

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