IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Appeal case no: **A118/2023**
Case no: **1852/2023**

In the appeal of:

LEHLOHONOLO MOQOLO	1st Appellant
PATRICK MONYAKOANA	2nd Appellant
MAKOA CHRISTOPHEL LELALA	3rd Appellant
MAPASEKA MOTHIBI-NKOANE	4th Appellant
CHABELI FRANK RAMPAI	5th Appellant
PUSELETSO LETICIA SELEKE	6th Appellant
MPHO MOKOAKOA	7th Appellant

and

THE AFRICAN NATIONAL CONGRESS Respondent

CORAM: JP DAFFUE, C REINDERS & PJ LOUBSER JJ

HEARD ON: 26 JANUARY 2024

DELIVERED ON: 01 FEBRUARY 2024

JUDGMENT BY: JP DAFFUE J

ORDER

1. The appeal is dismissed with costs.

JUDGMENT

Introduction

[1] This is an appeal to the full court of the Free State Division of the High Court with leave of the court *a quo*. The appellants are seven disgruntled former members of the African National Congress (the ANC). The appeal emanates from a rule *nisi* issued on 14 April 2023 by Van Rhyn J on an urgent basis, the rule *nisi* having been confirmed by Molitsoane J on 23 June 2023.

The parties

[2] The seven appellants, they being the unsuccessful respondents in the court *a quo,* are Lehlohonolo Moqolo, Patrick Monyakoana, Makoa Christophel Lelala, Mapaseka Mothibi-Nkoane, Chabeli Frank Rampai, Puseletso Leticia Seleke and Mpho Mokoakoa. They are former members of the ANC and former municipal councillors of the Mangaung Metropolitan Municipality. I shall refer to them as the appellants herein, save insofar as I need to deal with specific individuals.

[3] The respondent and successful applicant in the court *a quo* is the ANC, a political party and voluntary association with legal personality, duly constituted and assembled as such, having adopted its amended Constitution.

The rule nisi of 14 April 2023 and its confirmation

[4] The operative part of the order granted on 14 April 2023, reads as follows:

'3. A rule *nisi* do issue, returnable on Thursday, **18 May 2023**, in terms of which the Respondents are called upon to show cause, if any, why the following order shouldn't be made final:

3.1.1 The Respondents are interdicted and restrained from in any way further acting as Councillors of the Mangaung Metropolitan Municipality;

3.1.2 The Respondents are further interdicted and restrained from performing any associated function germane and/or related to the holding of a position of a Councillor of the Mangaung Metropolitan Municipality;

3.1.3 The Respondents are interdicted and restrained from attending the Mangaung Metropolitan Municipality council scheduled meeting for 14 April 2023, in any capacity whatsoever and to perform any actions associated with the holding a Council seat at said meeting;

3.1.4 The Respondents shall pay the costs of this application on the scale as between attorney and client.'

[5] On the extended return date of the rule *nisi* the matter was heard by Molitsoane J. In addition to their opposition of the relief sought in the main application, the appellants, cited as respondents in the court *a quo*, also filed a counter-application wherein they sought the review and setting aside of the decision by the ANC's Interim Regional Disciplinary Committee: Mangaung (the Regional Disciplinary Committee) to expel them during June 2022.

[6] At the onset of the proceedings before Molitsoane J the appellants sought leave to withdraw their counter-application. No arguments were presented pertaining to the counter-application and after hearing argument on the main application the learned judge issued the following orders:

'1. The respondents (the appellants in this appeal) are hereby granted leave to withdraw the counterapplication.

2. The respondents are ordered to pay the costs occasioned by the withdrawal of the counterapplication.

3. The costs aforementioned shall include the costs occasioned by employment of two counsels (sic).

4. The interim order granted on 14 April 2023 is confirmed with costs which include the costs occasioned by employment of two counsels (sic).'

The application for leave to appeal

[7] Immediately after the judgment of the court *a quo* was handed down, and in open court, the appellants sought leave to appeal. Their counsel, Mr Gilliland, relied on four grounds of appeal as is apparent from his oral address which was transcribed and forms part of the record before us. These were the following:

a. The importance of the matter, the fact that by-elections had by then been published to be held in July (the next month), that the appellants intended to approach the court to interdict the by-elections and that 'they had already filed application to review the proceedings by the Regional Branch Committee, the disciplinary committee.' Mr Gilliland submitted that in the event of a successful review application, the expulsion of the appellants would fall away.

b. The second ground of appeal was based on the ANC's non-compliance with rule 25.10 of its Constitution insofar as the Regional Disciplinary Committee continued with disciplinary proceedings against the appellants without written authorisation as provided for in this sub-rule. The court *a quo* was blamed for not addressing this issue in its judgment, but instead relying on a case not advanced by the ANC.

c. The third ground of appeal, in line with the second ground of appeal, was that, objectively viewed, the written authority required by rule 25.10 had not been provided; consequently, the appellants' expulsion was unlawful as the proceedings were not in accordance with the ANC's Constitution.

d. Fourthly, the appellants relied on the fact that Mr Motsoeneng, who presented *viva voce* evidence on behalf of the ANC in support of the urgent application, failed to comply with the onerous duty of full disclosure expected of litigants in *ex parte* applications.

[8] The court *a quo* was not persuaded by the grounds of appeal and Mr Gilliland's submissions thereabout. It specifically made the point that the court was not called upon to decide on the legality of the appellants' expulsion as they had withdrawn the counter-application. It also accepted that, as found in its judgment in the main application, the decision of the Regional Disciplinary Committee was final and binding. However, the court *a quo* was of the view that 'another court may come to a different finding' insofar as the appellants continued to serve as municipal councillors under the ANC banner for about ten months after their expulsion until April 2023.

Preliminary issues

[9] Before I deal with the submissions of the parties in respect of the merits and possible mootness of the appeal, I need to raise two preliminary issues:

a. On being allocated the appeal I noticed that although the heads of argument of both parties were due by then, they had failed to comply with this requirement. I immediately made enquiries by email whereupon heads of argument as well as condonation applications were filed. The parties are *ad idem* that condonation should be granted to them in order to ensure that the matter is finalised. Although the late filing should be deplored, little inconvenience was caused. Consequently, the reasons for the late filing were accepted and condonation was granted to both parties.

b. The ANC filed an application for leave to adduce further evidence on 23 January 2023, ie a mere three days before the hearing of the appeal. The main purpose of the evidence that it sought to adduce was to prove that the appeal has become moot. Before I could ask Mr Grobler to make submissions pertaining to this application on behalf of the ANC, Mr Gilliland on behalf of the appellants took the floor and made concessions which he submitted for all practical purposes caused the ANC's application to become redundant. He also confirmed that even if the further evidence was to be admitted, the appellants could not be prejudiced. Mr Grobler insisted that the application be granted. Having considered the matter, leave was granted to the ANC to adduce the further evidence as contained in the affidavit annexed to its application.

Mootness

[10] The issue of mootness is in essence intertwined with the merits of the appeal, but it is apposite to deal with possible mootness of the appeal at first. Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 reads as follows:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[11] Bearing in mind Mr Gilliland's concessions and the further evidence produced on behalf of the ANC, it is now common cause that by-elections were indeed held in the Mangaung Metropolitan Municipality to fill the vacancies occasioned by the orders of the court *a quo*. The former ANC ward councillors, Lehlohonolo Moqolo, Makoa Christophel Lelala, Chabeli Frank Rampai and Mpho Mokoakoa, respectively the first, third, fifth and seventh appellants, unsuccessfully stood as individual candidates during these by-elections. The other three appellants represented the ANC as proportionate representatives, the so-called PR councillors. It was already recorded in paragraph 3.2.3 of the appellants' answering affidavit that the PR councillors had been replaced by others at the time when the answering affidavit was deposed to. I take cognisance of the fact that the reference in this paragraph is to second, third and fifth respondents which is apparently incorrect insofar as it should

be to second, fourth and sixth respondents, they being respectively Patrick Monyakoana, Mapaseka Mothibi-Nkoane and Puseletso Leticia Seleke. Whatever the situation, it is now common cause that the vacancies in respect of the PR councillors were filled in line with item 18 of Schedule 1 of the Local Government: Municipal Structures Act 117 of 1998, whilst the remainder of the appellants – the previous ward councillors - were out-voted during the by-elections. Therefore, the vacancies that occurred after the appellants' expulsion from the ANC have been filled by other ANC members.

[12] Notwithstanding the common cause facts set out in the previous paragraph, Mr Gilliland submitted that the appeal was not moot. He submitted that the appellants would be interdicted *ad infinitum* from ever becoming municipal councillors of the Mangaung Metropolitan Municipality, bearing in mind the permanency of the interdict as it stands. I do not agree. The interdict was obtained based on the facts presented to the court *a quo*. In accordance with the accepted facts the appellants were no longer members of the ANC due to their expulsion and consequently, they were not entitled to remain in their positions of municipal councillors. I do not have to speculate, but much may change in future. The appellants may decide to review the decision taken against them in the hope to restore their membership with the ANC. A new ANC leadership may in future be inclined to accept the appellants as members of the ANC and deploy them to whatever positions it may require them to fill.

[13] Although much criticism may be levelled at the manner in which the application was presented in the first place in order to obtain an urgent interdict, as well as the failure of the ANC to immediately act upon the sanction of expulsion imposed by its Regional Disciplinary Committee, the decision sought by the appellants will have no practical effect or result. Even if the appeal is to succeed, the meeting of 14 April 2023 has come and gone. Furthermore, the appellants' positions in the Municipal Council have been filled and there is just no way in which they can

now claim to act as councillors and/or perform any associated functions germane or related to the holding of positions of councillors of the Mangaung Metropolitan Municipality. The horse has bolted, or put differently, the egg cannot be unscrambled.

[14] I am satisfied that the decision sought by the appellants will have no practical effect or result and consequently, the appeal should be dismissed on this ground alone.

The merits of the appeal

[15] Insofar as the merits play a role in the adjudication of this appeal, I take cognisance of the fact that just as the ANC as the legal entity is subject to its own Constitution, so is every member thereof. The Constitutional Court stated the following in respect of the rights and obligations of political parties and their members in *Ramakatsa and Others v Magashule and Others*[1]:

'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.'

Relying on the aforesaid *dictum* of the Constitutional Court, the Supreme Court of Appeal reiterated in *Ramakatsa and Others v African National Congress and Another*[2] 'that the ANC just like other political parties, is under an obligation to act in accordance with its own Constitution.'

[16] There is uncertainty as to whether the Regional Disciplinary Committee merely recommended that the appellants be expelled, or whether it in fact expelled them. The decision never surfaced *ex facie* the record in these appeal proceedings,

[1] [2012] ZACC 31; 2013 (2) BCLR 202 (CC) para 16.
[2] (Case No. 724/2019) [2021] ZASCA (31 March 2021) para 11.

neither during the proceedings when urgent relief was sought, nor at any stage thereafter. I have scrutinised the ANC's Constitution, but could not find any option allowing a Disciplinary Committee to recommend a sanction, instead of imposing a sanction. I refer in this instance to rule 61 of appendix 3 of the ANC's Constitution stating as follows:

'If a charged member is found guilty, such ruling shall include a sanction as provided for in the ANC Constitution'.

'Sanction' is not defined in the definitions of the ANC Constitution, but rule 25.21, read with rule 25.34 provides sufficient clarity. Rule 25.21 reads as follows:

'Where the NDC acts as disciplinary tribunal of first instance, it shall have the competence to impose the following sanctions:

25.21.1 a fine;

25.21.2 a reprimand;

25.21.3 payment of compensation;

25.21.4 performance of useful tasks;

25.21.5 remedial action;

25.21.6 suspension of membership;

25.21.7 expulsion from the ANC;

25.21.8 in the case of an office bearer, removal or suspension from office;

25.21.9 in the case of a public representative, cancellation or suspension of his or her contract of deployment and/or removal from any list or instrument which entitles such person to represent the ANC at any level of government; and

25.21.10 A combination of sanctions set out in 25.21.1 to 25.21.6 above.'

Rule 25.34 provides that rule 25.21 *mutatis mutandis* applies to a Regional Disciplinary Committee. Therefore, no provision is made in the Constitution for a Disciplinary Committee to merely recommend any sanction.

[17] It is common cause that there is no review or appeal pending against the decision of the Regional Disciplinary Committee. Consequently, the appellants'

reliance on non-compliance with rule 25.10 of the ANC's Constitution is immaterial. Neither the court *a quo,* nor this court was called upon to adjudicate that issue, bearing in mind the withdrawal of the counter-application and the internal processes that the appellants were supposed to follow in accordance with the ANC's Constitution.

[18] Mr Gilliland also submitted that in the absence of the appellants' review and/or appeal of the Regional Disciplinary Committee's decision, the matter had not been elevated to a review or appeal body. Therefore, the ANC's Provincial Executive Committee could not ratify such decision on 30 March 2023 as Mr Motsoeneng testified under oath. The ANC correctly conceded this in paragraphs 13 to 15 of the replying affidavit, the reason being that the ANC's Constitution does not provide for such a ratification process. Be that as it may, the letter of 30 March 2023 was written by Mr Motsoeneng as Provincial Secretary of the Provincial Executive Committee and not in his capacity as a member of the Provincial Disciplinary Committee.

[19] Mr Gilliland quoted paragraph 8.8 of the answering affidavit fully. It is accordingly apposite to do so as well. It reads as follows:

'It is necessary to direct the Honourable Court's notice to the fact that the 2022 disciplinary proceedings that are referred to hereunder were held by the ANC's Interim Regional Disciplinary Committee: Mangaung, who, in terms of the ANC's Constitution, should recommend a sanction to the ANC's Provincial Executive who may, amongst other, concur with the recommendation. The sanction, if any, that is then imposed is considered to be imposed by the Provincial Executive.'

I have already indicated above that the ANC's Constitution does not make provision for such a procedure. However, even if the Regional Disciplinary Committee did make a mere recommendation to expel, the appellants were still duty-bound to appeal and/or review that decision which they failed to do.

[20] On 5 April 2023 the appellants filed notices to appeal to the ANC's National Disciplinary Committee (the NDC). They did this apparently after being informed on 30 March 2023 that the Provincial Executive Committee had ratified a decision to

expel them as members of the ANC. Yet, in their notices to appeal they alleged that 'the termination of [their] membership is based on recommendations made by the Mangaung Interim Regional Committee ('IRC').' Further on, they alleged that this committee's 'entire disciplinary process…and a sanction for expulsion are regarded as constitutionally flawed and null and void.' They had no right to appeal to the NDC. The ANC's Constitution is clear. They should have appealed to the Provincial Disciplinary Committee as provided for in rule 25.33, read with rule 25.35 which they failed to do. The appellants were expelled on their own version and they remain expelled as they failed to take the appropriate steps provided for in the ANC's Constitution.

[21] It is emphasised that the appellants did not apply to interdict the by-elections referred to in the first ground of appeal relied upon and although a review application had apparently been prepared earlier, they decided not to proceed therewith.

[22] Cognisance may be taken of the ANC's failure to act immediately upon the sanction of expulsion by the Regional Disciplinary Committee, if it was indeed an expulsion and not merely a recommendation. The appellants did not rely as a defence on the ANC's abandonment of rights or their legitimate expectation that their ANC membership would not be terminated notwithstanding their expulsion insofar as they were allowed to participate as councillors thereafter. The court *a quo* granted leave to appeal as mentioned above based on supplementary heads of argument filed by the appellants whilst the initial grounds of appeal referred to earlier herein did not cater for either of the two defences. What is clear from the record is that uncertainty was created. I refer in this regard to a letter dated 2 August 2022 by a certain Nompondo, an ANC official, who suggested that the Regional Disciplinary Committee's disciplinary process was flawed. Also, there was a belief that ratification was required, which was later conceded to be incorrect. Mr Gilliland placed it on record as mentioned above that the appellants had already filed an application to review the Regional Disciplinary Committee's process by the time he argued the

application for leave to appeal. There is nothing on the record to show when this review application was issued and/or when was it withdrawn. I do not believe that all relevant facts have been placed on record by both parties in this regard. Also, full legal argument with reference to relevant authority was not advanced to us and in the circumstances there is no need to deal with these aspects any further.

[23] I am satisfied that the court *a quo* acted correctly in confirming the rule *nisi* issued on 14 April 2023. The ANC had met the threshold for the granting of a final interdict. Save for the submissions dealt with herein, Mr Gilliland did not try to convince us to the contrary. Bearing in mind the merits of the appeal, no proper grounds have been pleaded for the appeal to succeed and it should be dismissed.

[24] Consequently, the following order is granted:

1. The appeal is dismissed with costs.

_____

JP DAFFUE J

I concur

_____

C REINDERS J

I concur

_____

PJ LOUBSER J

On behalf of the Appellants: Adv JG Gilliland
Instructed by: Noordmans Attorneys
BLOEMFONTEIN

13
13
13
13
13
13
13
13
13
13

On behalf of the Respondent:	Advv S Grobler SC and TM Ngubeni
Instructed by:	SMO Seobe Attorneys Inc BLOEMFONTEIN