



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Application: 5942/2017

In the application between:

<b>TUMELO JOHN MOKOENA</b>	1 <sup>st</sup> Applicant
<b>SIZWE HLUBI</b>	2 <sup>nd</sup> Applicant
<b>TSEKISO VICTOR TSIBELA</b>	3 <sup>rd</sup> Applicant
<b>TLALENG MOLOI</b>	4 <sup>th</sup> Applicant
<b>MOTLOUNG LEKHETHO</b>	5 <sup>th</sup> Applicant
<b>MARIA MBONAMBI</b>	6 <sup>th</sup> Applicant
<b>PULANE MOLELEKI</b>	7 <sup>th</sup> Applicant
<b>NTEBOHELENG MOOROSI</b>	8 <sup>th</sup> Applicant
<b>SOLOMON DLAMINI</b>	9 <sup>th</sup> Applicant
<b>MOMATHI NGOZO</b>	10 <sup>th</sup> Applicant
<b>LEBEKO JACOB MONARE</b>	11 <sup>th</sup> Applicant
<b>LEBEKO MAILE</b>	12 <sup>th</sup> Applicant
<b>KINGSLEY LEMPE</b>	13 <sup>th</sup> Applicant
<b>TEBOGO BOZO</b>	14 <sup>th</sup> Applicant
<b>MATOBO KEELE</b>	15 <sup>th</sup> Applicant
<b>PINKY CUZE</b>	16 <sup>th</sup> Applicant
<b>TSHOKOLO MANJIES</b>	17 <sup>th</sup> Applicant
<b>MOTSHWANE KOBUS KOLOBE</b>	18 <sup>th</sup> Applicant
<b>DAVID SHASHA</b>	19 <sup>th</sup> Applicant
<b>BOSALETSE PHEPHENG</b>	20 <sup>th</sup> Applicant
<b>SOPHIA HADINKAME RAMAKAE</b>	21 <sup>st</sup> Applicant
<b>RAMASIMONG DANIEL TAU</b>	22 <sup>nd</sup> Applicant
<b>LANKIRI DANIEL BOLOFO</b>	23 <sup>rd</sup> Applicant
<b>DITSEKE ABRAM MOEKETSI</b>	24 <sup>th</sup> Applicant
<b>BUSISIWE MBOKOTWANE</b>	25 <sup>th</sup> Applicant
<b>SILAS SEJAKE TAU</b>	26 <sup>th</sup> Applicant

and

<b>ELIAS MAGASHULE</b>	<b>1<sup>st</sup> Respondent</b>
<b>THABO MANYONI</b>	<b>2<sup>nd</sup> Respondent</b>
<b>WILLIAM BULWANA</b>	<b>3<sup>rd</sup> Respondent</b>
<b>MAMIKI QABATHE</b>	<b>4<sup>th</sup> Respondent</b>
<b>MOSEBENZI ZWANE</b>	<b>5<sup>th</sup> Respondent</b>
<b>MAGGY SOTYU</b>	<b>6<sup>th</sup> Respondent</b>
<b>NOZILILO MASHIYA</b>	<b>7<sup>th</sup> Respondent</b>
<b>MALEWATLE NTHEDI</b>	<b>8<sup>th</sup> Respondent</b>
<b>DISEBO NAKEDI</b>	<b>9<sup>th</sup> Respondent</b>
<b>JOEY MOCHELA</b>	<b>10<sup>th</sup> Respondent</b>
<b>MANANA TLAKE</b>	<b>11<sup>th</sup> Respondent</b>
<b>MANANA SECHOARO</b>	<b>12<sup>th</sup> Respondent</b>
<b>OLLY MLAMLELI</b>	<b>13<sup>th</sup> Respondent</b>
<b>SARAH MOLELEKI</b>	<b>14<sup>th</sup> Respondent</b>
<b>MATHABO LEETO</b>	<b>15<sup>th</sup> Respondent</b>
<b>CONNY RAMPAI</b>	<b>16<sup>th</sup> Respondent</b>
<b>LUCY MAPENA</b>	<b>17<sup>th</sup> Respondent</b>
<b>MAUREEN SCHEEPERS</b>	<b>18<sup>th</sup> Respondent</b>
<b>MONTSHENG TSIU</b>	<b>19<sup>th</sup> Respondent</b>
<b>PHINDIWE MASEKO</b>	<b>20<sup>th</sup> Respondent</b>
<b>TATE MAKGOE</b>	<b>21<sup>st</sup> Respondent</b>
<b>THANDIWE REACHABLE</b>	<b>22<sup>nd</sup> Respondent</b>
<b>BUTANA KOMPHELA</b>	<b>23<sup>rd</sup> Respondent</b>
<b>MADALA NTOMBELA</b>	<b>24<sup>th</sup> Respondent</b>
<b>SEBENZILE NGANGELIZWE</b>	<b>25<sup>th</sup> Respondent</b>
<b>JONAS RAMOKHOASE</b>	<b>26<sup>th</sup> Respondent</b>
<b>JACK MATUTLE</b>	<b>27<sup>th</sup> Respondent</b>
<b>CHARLES STOFIE</b>	<b>28<sup>th</sup> Respondent</b>
<b>NEELS VAN ROOYEN</b>	<b>29<sup>th</sup> Respondent</b>
<b>OUPA KHOABANE</b>	<b>30<sup>th</sup> Respondent</b>
<b>SIZWE MBALO</b>	<b>31<sup>st</sup> Respondent</b>
<b>TEFETSO PHITSANE</b>	<b>32<sup>nd</sup> Respondent</b>
<b>THABO MEEKO</b>	<b>33<sup>rd</sup> Respondent</b>
<b>JIHAD MOHAPI</b>	<b>34<sup>th</sup> Respondent</b>
<b>AFRICAN NATIONAL CONGRESS</b>	<b>35<sup>th</sup> Respondent</b>
<b>SELAKE TLADI</b>	<b>36<sup>th</sup> Respondent</b>
<b>MODISE ELIAS TSHOPO</b>	<b>37<sup>th</sup> Respondent</b>
<b>BRANCHES OF THE AFRICAN NATIONAL CONGRESS</b>	
<b>(AS PER ANNEXURE "A" TO THE NOTICE OF MOTION)</b>	<b>38<sup>th</sup> Respondent</b>

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**CORAM:** VAN ZYL, J, MATHEBULA, J et MHLAMBI, J

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**MAJORITY JUDGMENT:** VAN ZYL, J, et MATHEBULA, J

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**JUDGMENT BY:** VAN ZYL, J

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**DELIVERED ON:** 29 NOVEMBER 2017; 14 DECEMBER 2017

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**Introduction:**

- [1] This matter served before us as an urgent application on Monday, 27 November 2017. A full Court was constituted for purposes of hearing this application. Although the matter was enrolled for 9h30, it stood down on request of the applicants to enable them to file a supplementary affidavit and thereafter to grant the respondents an opportunity to file an answering affidavit thereto. The Court proceedings eventually commenced at approximately 15h00 and with one or two short adjournments in between, the proceedings continued until approximately 20h40. Judgment was reserved and it was indicated to the parties that an order will be issued on Wednesday, 29 November 2017. On the said date Mathebula, J and I issued the following order, which constituted the majority order:

- “1. The application is enrolled as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court and the rules relating to service and other forms of process are abridged accordingly.
2. It is declared that the following ANC Biennial and Branch General Meetings conducted during the months of August, September, October and/or November 2017 in the Free State province, were irregular, unlawful, unconstitutional and/or in breach of the ANC constitution:
  - 2.1 Region: Thabo Mofutsanyana  
Wards: 2-9, 11-13, 14, 16, 19, 22 and 23
  - 2.2 Region: Lejweleputswa  
Wards: 3, 7, 8, 17, 25 and 36
  - 2.3 Region: Mangaung  
Wards: 5, 8, 11 and 45
  - 2.4 Region: Gariep  
Wards: 1 and 5
3. It is declared that the decisions, resolutions and outcomes of the aforesaid meetings are null and void.
4. In holding that the aforesaid meetings were irregular, unlawful, unconstitutional and/or in breach of the ANC constitution, the Provincial Conference of the ANC, Free State, scheduled for 1 to 3 December 2017, will be a nullity and is not be held until the aforesaid meetings have been held in a lawful manner and in accordance with the constitution of the ANC.
5. Each party is to pay its own costs.”

[2] The following minority order of Mhlambi, J was also issued:

- “1. The application is enrolled as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court and the rules relating to service and other forms of process are abridged accordingly.
  
2. It is declared that the following ANC Biennial and Branch General Meetings conducted during the months of August, September, October and/or November 2017 in the Free State province, were irregular, unlawful, unconstitutional and/or in breach of the ANC constitution:
  - 2.1 Region: Thabo Mofutsanyana  
Wards: 2-9, 11-13, 14, 16, 19, 22 and 23
  - 2.2 Region: Lejweleputswa  
Wards: 3, 7, 8, 17, 25 and 36
  - 2.3 Region: Mangaung  
Wards: 5, 8, 11 and 45
  - 2.4 Region: Gariep  
Wards: 1 and 5
  
3. It is declared that the decisions, resolutions and outcomes of the aforesaid meetings are null and void.
  
4. Each party is to pay its own costs.”

[3] The application papers and the heads of argument filed in this matter consist of approximately 990 pages. In view of the facts of the matter, we considered it imperative that the order(s) be issued as soon as possible after the hearing of the application. The heads of argument were only handed to us at the inception of the proceedings on Monday afternoon, 27 November 2017. We consequently could only read, consider and discuss them subsequent to the hearing of the application. We were thereupon

able to issue the order(s) on Wednesday, 29 November 2017. However, due to the voluminous nature of the papers and the number of issues which needed consideration and that had to be addressed in the judgment, we were unable to provide reasons for the order(s) at the time. This judgment provides the reasons for the aforesaid majority order.

### **Background:**

- [4] The applicants are members of the African National Congress ("ANC") and as such members in good standing of different Wards of the ANC in different Regions in the Free State. The applicants also stated in paragraph 81 of their founding affidavit that they bring the application in terms of section 38(a), (b) and (c) of the Constitution of the RSA. In addition to acting in their own individual interests, they also bring the application on behalf of persons or a group of persons who have all been signatories to a petition attached to the founding affidavit as annexure "FA7". Those signatories are *bona fide* members of the ANC who belong to ANC Branches falling into one of the 5 regions of the ANC in the Free State province. According to the applicants they are also acting in the public interest. In the judgment of **Dube & Others v Zikalala & Others**, [2017] 4 ALL SA 365 (KZP), delivered on 12 September 2017, at paragraph [111], the following was determined:

"[111] When a provision of the ANC constitution or its rules is breached, the Applicants are denied the very political rights they are afforded in s 19 of the Constitution and they are entitled to apply to court to assert their

rights, if not directly then at least indirectly, under s 19. This would bring them squarely within the parameters of s 38(a), particularly where s 38 requires a 'wide approach' or a 'generous approach' to matters of standing."

[5] The 1<sup>st</sup> to 5<sup>th</sup> respondents are the chairman, deputy chairperson, provincial secretary, deputy provincial and treasurer, respectively, of the ANC in the Free State. They, together with the 6<sup>th</sup> to 34<sup>th</sup> respondents, were cited in their capacities as members of the Provincial Executive Council ("PEC") of the ANC in the Free State. The 35<sup>th</sup> respondent is the ANC itself. The 36<sup>th</sup> and 37<sup>th</sup> respondents are male persons who were the applicants in application number 5107/2017, which application will feature later in this judgment. They did not oppose the application. The 38<sup>th</sup> respondent was cited as the Branches of the ANC "as per annexure 'A' to the notice of motion."

[6] In terms of the notice of motion the applicants sought the following relief:

- "1. The application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court and the rules relating to service and other forms of process shall be abridged accordingly;
2. It is declared that the ANC Biennial and Branch General Meetings ('Bi-AGM's' and 'BGM's' respectively) conducted during the months of September and October 2017 in the Free State province were conducted in an unlawful and unconstitutional manner;

3. It is declared that the decisions, resolutions and outcomes of the above meetings held during the month of September and October 2017 are void;
4. It is declared that the official term of office of the Provincial Executive Committee ('PEC') of the Free State Province lapsed in April 2017;
5. It is declared that the current office bearers of the PEC in the Free State are occupying the office unlawfully, unconstitutionally and invalidly;
6. The current office bearers of the PEC in the Free State are directed to vacate office immediately;
7. The thirty-fifth respondent is directed to appoint an *interim* task team to run the affairs of the PEC in the Free State with immediate effect until a new PEC is elected;
8. The *interim* task team shall have all the powers of the PEC in terms of the ANC constitution, including the powers to facilitate the auditing of branches; verify credentials of members to the conference; holding of branch general meetings; appeals of dissatisfied members; arranging and confirming logistics for meeting;
9. The order obtained apparently by agreement on 6 October 2017 directing that the Provincial Elective Conference must be convened between 1 – 3 December 2017 is rescinded;
10. It is declared that in accordance with the resolution of the National Executive Committee of the thirty-fifth respondent no provincial or regional conferences in the Free State will take place beyond 30 September 2017;
11. Costs in the event of opposition; and

12. Further and/or alternative relief.”

[7] The application was initially set down for hearing on Thursday, 23 November 2017. The application was “*struck off the roll with costs, which costs shall include costs of three counsel where employed*”. The reasons for the said order have since come to hand. From the judgment it appears that the mentioned order was issued due to the applicants’ failure to properly comply with the provisions of the Free State Practice Directive 1/2016, which practice directive regulates the enrolment of urgent applications in this division. The merits of the application were not dealt with.

[8] On 24 November 2017 the application was re-enrolled for hearing on Monday, 27 November 2017, at 9h30.

[9] Before the onset of the hearing on Monday, 27 November 2017, Mr Mpofu, on behalf of the applicants, indicated in Chambers that the applicants have narrowed down the relief they would be seeking, subsequent to which we were handed a draft order in this regard. Mr Mpofu later confirmed this stance of the applicants in open Court at the commencement of the proceedings. This draft order reads as follows:

“1. The application is enrolled as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court and the rules relating to service and other forms of process are abridged accordingly;

2. It is declared that the ANC Biennial and Branch General Meetings (‘Bi-AGM’s’ and ‘BGM’s’ respectively) conducted during the months of September, October and November 2017 in the Free State province,

referred to in the attached annexure 'A' were unlawful, unconstitutional, and in breach of the ANC constitution;

3. It is declared that the decisions, resolutions and outcomes of the above meetings held during the months of September, October and November 2017 are null and void;
4. It is directed that any delegates nominated and/or appointed in the BGM's at the meetings highlighted in annexure 'A' hereto are prohibited from attending the National Conference, to be held on 16 November 2017, and/or the Provincial Conference scheduled for 1 – 3 December 2017;
5. It is declared that as a result of the above mentioned in prayers 2 to 4, the provincial conference scheduled to take place on 1 to 3 December 2017 is fatally defective, unconstitutional, unlawful and breaches the constitution of the ANC;
6. The respondents are interdicted and prohibited from holding, convening, electing leaders, or making any decisions at the provincial conference, scheduled to take place on 1 to 3 December 2017.
7. The respondents are directed to pay the costs of the application, such costs to include the costs of three counsel."

[10] On face value of the aforesaid draft order, it seemed that the applicants in effect abandoned the relief they initially sought in terms of prayers 4 – 10 of the notice of motion. For the sake of clarity it is to be stated that for purposes of this judgment we approached the application on the basis that such relief had in fact been abandoned by the applicants. As a result thereof, some of

the issues dealt with in the papers fell by the wayside and I do not intend dealing with same in this judgment.

**Essence of the founding affidavit:**

[11] The founding affidavit was deposed to by Mr Tebo Bozo, the first applicant, a member in good standing of Ward 8 of the ANC, on behalf of all the applicants.

[12] The introductory sentence explaining the nature and purpose of the application, reads as follows:

“This is an application for the assertion and vindication of the applicants’ constitutional rights to participate in the activities of the political party of their choice as enshrined in terms of section 19(1)(b) of the Constitution of South Africa”

[13] The applicants relied on two legal principles as basis for the relief sought. The first is the trite principle that the constitution of a voluntary association, such as the ANC, constitutes a contractual agreement between the association and its members. The terms of the contractual relationship are those contained in the constitution of the relevant association. The applicants therefore contended that a violation of the provisions of the ANC Constitution is accordingly a breach of the contractual obligations owed by the ANC to its members and constitutes unlawful breach of contract.

The application is secondly based on constitutional grounds, in that the applicants contended that the respondents violated the

applicants' inherent and fundamental right to participate in the activities of the political party of their choice as enshrined in section 19(1) of the Constitution of the RSA.

[14] In terms of Rule 17 of the ANC Constitution the Provincial Conference is the highest organ of the ANC in each province. The Provincial Conference is to be held at least once every four years. At the time of the hearing of this application, the next Provincial Conference was scheduled to be held from 1 – 3 December 2017. In terms of Rule 10 of the ANC Constitution the National Conference is the supreme ruling and controlling body of the ANC. The National Conference is scheduled to take place on 16 December 2017.

[15] According to the applicants it is customary with the ANC and prescribed in its Constitution and applicable Guidelines that certain processes and preparations must precede the holding of a legitimate conference. An exposition of the processes relevant to this application, the purpose thereof and consequences thereto is set out in the founding affidavit as follows:

“48. Of such processes and preparations includes the convening of branch general meetings (BGM's) aimed at ensuring that branches of the ANC, which constitute the life-blood of the organisation, are in good standing and ready to participate in the upcoming provincial conference.

49. The *rationale* for these pre-conference activities in the ANC branches is simply that the delegates to such an elective conference have to come from properly constituted branch general meetings. Without

properly constituted branch general meetings having nominated and elected delegates who are democratically representative of those branches, there can be no lawful mandated delegates to make up the requisite 90% of the elective conference. In addition, any impropriety at these meetings will have a similar effect.

50. Similarly, and as the branch is the basic unit of the ANC, all members of the ANC exercise their rights and entitlements, which are conferred in the ANC Constitution, via the medium of the branch and branch decisions and resolutions and by delegating their own democratic voices to a few of their members chosen according to a predetermined procedure. That is why these representatives are thereafter referred to as 'delegates'. Without having been properly and democratically assigned as such by the majority of members, they cannot qualify as delegates of that majority.
51. ....
52. The PEC is the conduit through which all the members of the ANC in the Free State will exercise their own organisational and constitutional rights to participate in the activities of their political party of choice, the ANC. It is accordingly of utmost importance that the BI-AGM's and BGM's are conducted in a lawful manner. A failure in this regard will inevitably have a ripple effect, the effects of which will be felt all the way to the National Conference.
53. Within the Free State province and amongst its members, there is a well-known and openly articulated contestation for the leadership of the PEC. .... Both groups are perfectly entitled to hold their opinions. The view that ought to prevail however, can only be determined by a genuinely fair and democratic process. Such contestation of power is normal within a political party such as the ANC, which is founded upon the principle of democracy.

54. I submit that a healthy contestation of power is not a problem. The problem occurs when contesting groups or factions overstep the borders of legality in order to cling to power or to ascend to it. When the borders of legality are crossed, the casualties are the thousands of ANC members who have no personal interest in the contested positions. Their only interest is that their rights as entrenched in both the ANC Constitution and the Constitution of the Republic should be observed and that no methods, other than democratic means, should be employed to determine the leadership of the party in the province and, by extension, the leadership of the entire organisation and also the leadership of the government at all levels. It is the multiple violations of the ANC members' rights, including the applicants, which have given rise to the disputes, which have now been brought to the above Honourable Court for adjudication in line with section 34 of the Constitution.
55. It is axiomatic that at the heart of any lawfully convened conference of the ANC, whether at a regional, provincial or national level, is the basic requirement that delegates participating in such gatherings must have been elected at properly constituted branch general meetings.
56. If the persons who participate at such a conference as delegates have not been elected at properly constituted branch general meetings or, conversely, if delegates who have been elected at properly constituted branch general meetings are denied such participation in a conference, it stands to reason that any decision to hold such a conference is invalid and that the outcomes of such a conference are equally invalid, null and void."

[16] According to the applicants certain irregularities manifested themselves at the BI-AGM's and BGM's which irreparably tainted them. Such irregularities complained of in the founding affidavit are the following:

1. Inadequate notice and/or a complete failure to notify members of an upcoming BGM.
2. Members were not given a reasonable opportunity and/or no opportunity at all to dispute the audited number of members for a particular Ward, including whether or not a member is a member in good standing.
3. Gate keeping; hence, "a process where a member perceived to be against the certain motion is prevented from attending a meeting where the motion is going to be deliberated on and voted upon and where a member is denied an opportunity to participate".
4. The manipulation of membership numbers in certain Wards which enabled a Branch to reach the required quorum or appoint more delegates than a branch would legally be entitled to. In some Wards officials entered the venue with pre-signed attendance registers.
5. Quorum issues, in that many of the BGM's held prior to 3 November 2017 did not quorate.
6. Active participation at BGM's by employees who were supposed to only oversee the relevant BGM.

[17] After the applicants dealt with the aforesaid alleged irregularities in general, the applicants continued by grouping the irregularities according to the different Regions. A Region by Region exposition and analysis of the alleged irregularities were then set

out. I will return to the detailed averments in this regard. The Regions affected were the Thabo Mofutsanyana Region, Lejweleputswa, Mangaung, Gariep and Fisele Dabi.

- [18] Complaints regarding the running of or conduct at BGM's were to be dealt with in terms of the provisions of a document titled "ANC 54<sup>th</sup> National Conference Nomination Process" ("the Nomination Process Guidelines"), attached to the founding affidavit as annexure "FA2". According to the applicants letters of complaint were indeed filed as per the aforesaid Nomination Process Guidelines. Some of those letters which the deponent had in his possession were attached to the founding affidavit as annexure "FA10". On 3 November 2017 a response was received from the Secretary-General of the ANC, which letter was attached to the founding affidavit as annexure "FA5". According to the applicants the response contained in the said letter was wholly inadequate, in that it only dealt with one of the irregularities complaint about and the Secretary-General did not provide any recourse for the members who had already been subjected to the irregularities. They had therefore exhausted their internal remedies to no avail.
- [19] The founding affidavit also dealt with the urgency of the application.
- [20] It is also to be mentioned that in paragraph [170] of the founding affidavit an explanation was provided as to why the applicants were unable to attach the signed confirmatory affidavits to the founding affidavit and begged leave that they be allowed that same be furnished in a supplementary affidavit or with the

replying affidavit. Most of those affidavits were eventually indeed attached to the applicants' replying affidavit.

- [21] At the commencement of the hearing the applicants applied for leave to file a supplementary founding affidavit. After the hearing of extensive arguments on the issue, we granted leave that the said supplementary affidavit be allowed in evidence, the costs of which to be costs in the main application. The 1<sup>st</sup> – 34<sup>th</sup> respondents filed a supplementary answering affidavit in response thereto. However, it is to be mentioned that during the consideration of this matter, we conclude that due to the factual disputes which were evident from the said supplementary affidavits, we were unable to take the contents thereof into consideration.

### **The Answering Affidavits:**

- [22] The 1<sup>st</sup> – 34<sup>th</sup> respondents, on the one hand, and the 35<sup>th</sup> respondent, on the other hand, filed two separate answering affidavits. The answering affidavit of the 1<sup>st</sup> – 34<sup>th</sup> respondents was deposed to by Mr William Bulwana, the provincial secretary of the PEC, Free State. Mr Samson Gwede Mantashe, the Secretary-General of the ANC, deposed to the answering affidavit filed on behalf of the 35<sup>th</sup> respondent, the ANC. When referring to both groups of respondents jointly, I will refer to them as "the respondents".
- [23] The grounds upon which the respondents opposed the merits of the relief claimed by the applicants, will become evident later in

the judgment when I deal with specific detailed allegations. In addition, however, the respondents raised the issue of urgency as a point *in limine*. The 1<sup>st</sup> – 34<sup>th</sup> respondents furthermore raised the following points *in limine*:

1. The *locus standi in iudicio* of all the applicants.
2. Non-joinder.
3. Mis-joinder.

They also raised a point *in limine* regarding the relief sought by the applicants for the rescission of the Court order dated 6 October 2017, issued under application number 5180/2017. That point, however, became moot as the applicants were no longer persisting with prayer 9 of the notice of motion.

[24] I will consequently first deal with the points *in limine*.

### **Urgency:**

[25] With regards to the applicants' allegation that members were not provided the opportunity to query membership audits, the respondents pointed out that on the applicants' own version, membership audits took place in May and June 2017 and the process was completed on 2 September 2017. The applicants themselves alleged that the period in which queries was to be lodged was scheduled for July and August 2017, in accordance with annexure "FA4" attached to the founding affidavit, being a statement of the ANC following a NEC meeting and NEC Lekgotla held from the 25<sup>th</sup> to the 27<sup>th</sup> January 2017. It was the

respondents' contention that despite the fact that the applicants, on their own version, had been aware of the alleged irregularity since July 2017, the applicants failed to bring the present application during August or September 2017, prior to the completion of membership audits. The applicants also failed to give any explanation in their founding affidavit as to why they did not bring the application at that stage.

[26] The respondents furthermore averred that despite the fact that the applicants had been were aware of the alleged irregularities that occurred in the BI-AGM's and BGM's in August, September and October 2017 already, they only launched the current proceedings on 16 November 2017 without providing a proper explanation for such inordinate delay.

[27] The further complaint raised by the respondents was that on the applicants' version consultations were held with over 300 members of the ANC from the Free State over a period of three days from the 30<sup>th</sup> of October 2017 to the 1<sup>st</sup> of November 2017. The applicants, however, failed to provide any explanation for the lapse of a period of 12 days between the alleged completion of the consultations and the issuing and filing of the application only on 16 November 2017. Both Mr Mogagabe, on behalf of the 1<sup>st</sup> – 34<sup>th</sup> respondents, and Mr Mokhare, on behalf of the 35<sup>th</sup> respondent, submitted that the applicants approached the Court without satisfying the requirements for urgency. They furthermore submitted that the purported urgency, if any, was self-created. In this regard Mr Mogagabe, *inter alia*, relied on the well-known

judgment in Schweizer Reneke Vleis Maatskappy (Edms) Bpk v Die Minister van Landbou, (1971) 1 PH F 11 (T).

- [28] It was consequently contended on behalf of the respondents that the application fell to be dismissed or struck off the roll, with costs.
- [29] In the founding affidavit the applicants averred that most of the BGM's in question were held on or about 29 October 2017 and some was still on-going up to 3 November 2017. In all of the Wards that experienced the irregularities referred to in the founding affidavit, letters of complaint were filed in accordance with the appeal process provided for in the Nomination Process Guidelines, referred to earlier. Only on the 3<sup>rd</sup> of November 2017 a "blanket response", which the applicants did not consider to be a satisfactory answer, was received from the Secretary-General of the ANC, as contained in a letter attached to the founding affidavit as annexure "FA5". The applicants therefore took the stance that only at that date their internal remedies had been exhausted, whereupon they could only then issue the present application.
- [30] The applicants furthermore specifically alleged in their founding affidavit that the impropriety and the resultant effect thereof on the BI-AGM's and BGM's, rendered the matter urgent in light of the Provincial Conference that was scheduled to take place during 1 – 3 December 2017, as well as the upcoming National Conference that is scheduled to take place on 16 December 2017. Regarding the requirement that an applicant needs to set out facts that indicate that it will not obtain substantial redress in

due course, the applicants indeed averred that they will not be afforded redress at a hearing in due course, as both the proposed Provincial and National Conferences would by then already have taken place.

[31] In so far as the time lapse pertaining to the auditing process is concerned, the applicants in their replying affidavit responded by stating that the results/negative impact of the irregular auditing process, only manifested themselves at the dates of the respective BGM's, most of which were held only on 29 October 2017.

[32] Regarding the lapse of time from the period of 1 November 2017 to 16 November 2017, I cannot agree with the respondents' contention that the applicants did not provide an explanation for this time period. In this regard they made the following allegations in paragraph 158 of the founding affidavit:

"As soon as the consultations ended, the applicants' legal representatives proceeded to collate the facts provided and began drafting the founding papers. The logistical difficulties of consulting with over 300 people, collating all the facts, obtaining the necessary supporting documents and drafting an application of this nature cannot be overly emphasised. The above Honourable Court is humbly requested to take these factors into account. As a result of the above, it cannot be said that there was any undue delay in launching the current application."

In addition the applicants dealt with a letter of demand which was dispatched to the office of the Secretary-General and the Free State provincial secretary on 9 November 2017 in an attempt to

solve the problems that manifested themselves at the BGM's which were held prior to 3 November 2017. This letter is attached to the founding affidavit as annexure "FA14". On 10 November 2017 the Secretary-General responded to the letter of 9 November 2017 by means of a letter dated 9 November 2017, attached to the founding affidavit as annexure "FA16". According to the applicants the responses contained in the said letter could not possibly have taken the matter any closer to resolution and therefore they continued with the drafting and issuing of the application. In their replying affidavit the applicants denied that the time period between consulting with the affected members and instituting the application was inordinate under the circumstances and again confirmed that "the collation of an application of this nature is no small feat".

- [33] Mr Mphofu, who appeared on behalf of the applicants, submitted that the respondents' complaint about self-created urgency had no foundation whatsoever. He contended that the applicants acted with the necessary level of diligence. The applicants were compelled to first explore internal remedies. When it became clear that there would be no meaningful response from the Secretary-General, the applicants instituted the proceedings. He furthermore submitted that the applicants would not obtain substantial redress in due course, as both the Provincial Conference and the National Conference would then have already taken place and it would not be possible to make the same complaint afterwards. Relying on the judgment of the Constitutional Court of South Africa in the matter between **M Ramakatsa & Others v E Magashule & Others**, Case

CCT109/12 [2012] ZACC 3, he submitted that it was in the interest of justice that the application was to be heard on an urgent basis.

- [34] The decision as to whether an application should be heard as a matter of urgency amounts to the exercise of a judicial discretion. That is clear from the wording of Rule 6(12)(a). In our view the applicants had explicitly set out facts which they averred rendered the matter urgent, as well as the reasons why they claimed that they would not be afforded substantial redress at a hearing in due course. As pointed out by Mr Mpofu, the respondents notably did not argue that the attendance by unlawfully elected branch delegates at the Provincial Conference could have been cured in due course. Based on the applicant's case, it is furthermore evident that the conduct the applicants' complained about, was an on-going process. According to the applicants, some members of the ANC had systematically and over time been deprived of their most basic rights to participate in the activities of the ANC.
- [35] The respondents had pleaded their respective cases fully. They did not seek additional time to put in new and/or additional facts. They had therefore not established that they would suffer any prejudice if the application was to be heard on an urgent basis.
- [36] We were therefore of the view that it was in the interest of justice that the following principles enunciated in **Trans-African Insurance Co Ltd v Maluleka**, 1956 (2) SA 273 at 278 F prevail:

“But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

[37] We therefore respectfully agreed with the conclusion of the Constitutional Court in the Ramakatsa-matter, paragraphs [17] and [18] of the judgment by Yacoob, J:

“[17] I have also come to the conclusion that it is in the interests of justice to hear the appeal. The appellants make serious allegations of irregularity and impropriety against a political party. The allegations go to the core of the propriety of the election in the Free State province. If it turns out that the appellants are right in their allegations, the political party in the whole of the province will be governed over the next four years by an irregularly appointed provincial leadership. And the size of the political party is not necessarily decisive. Suffice it to say that the political party we are concerned with here cannot be said to be insignificant. The importance of the requirement that members of political parties should not be governed by an irregularly elected leadership cannot be over-emphasised.

18. The appellants were denied the opportunity to have the merits of their application heard on the basis of technical, procedural grounds. We have come to the conclusion that these grounds were incorrectly relied upon by the High Court. ...”

[38] In the exercising of our discretion we were therefore satisfied that the applicants had made out a proper case for the application to have been heard on an urgent basis, as per paragraph 1 of the order we issued.

**Locus standi in iudicio of the applicants:**

[39] In their answering affidavit the 1<sup>st</sup> – 34<sup>th</sup> respondents raised the point that the applicants made an allegation that they are members of the ANC in good standing, but without any supporting proof of their membership. Supporting documentation which would serve as proof of their membership allegations are, according to the said respondents, essential in determining whether they have the requisite legal standing. They consequently averred that the absence of proof thereof is fatal to the applicant's legal standing in launching this application.

[40] In response thereto, the applicants, in their replying affidavit, attached the relevant documentation as proof of their respective memberships as annexure "TB1". In **eBotswana (Pty) Ltd v Sentech (Pty) Ltd And Others** 2013 (6) SA 327 (GSJ) the Court determined as follows:

"[27] The new matter raised in the applicant's replying affidavit may be divided into additional evidence to support the survey's findings, confirmation of eBotswana's right to broadcast in Botswana, confirmation regarding the conducting of the survey and also documentation emanating from Sentech or in respect of which it is an active party.

[28] Mr *Suttner* in his heads of argument did not contend that Sentech was prejudiced by the introduction of these averments. On the contrary the complaint was that no explanation was tendered for not introducing it in the founding papers and also that no legal basis is set out to receive the evidence in reply. The short answer is that in view of the contents

of the answering affidavit it was well within the ordinary procedural rules for the applicant to respond by introducing further corroborating facts. Even if certain of the averments could have been made in the founding affidavit, on its own that is no basis for excluding it from consideration. It is evident that Sentech would not have been able to challenge the averment or document produced. A common-sense approach based on want of prejudice precludes their exclusion from consideration. Mr *Budlender* I referred to two cases in point: *Hydro-Tech Systems (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 483 (C) in para 81; and *Smith v KwaNonqubela Town Council* 1999 (4) SA 947 (SCA) ([1999] 4 All SA 331) in para 15.”

- [41] In the premises this aspect was properly addressed by the applicants in the replying affidavit and this point *in limine* was consequently not upheld.

#### **Mis-joinder and non-joinder:**

- [42] The aforesaid points *in limine* were not really addressed and/or pursued during argument. I will, however, shortly refer to certain aspects thereof.
- [43] The 1<sup>st</sup> – 34<sup>th</sup> respondents in their answering affidavit pointed out that Conny Rampai, the 16<sup>th</sup> respondent, passed away on 28 May 2016 and that Ms Maureen Scheepers, the 18<sup>th</sup> respondent, resigned as a member of the PEC. In their replying affidavit the applicants admitted the last-mentioned allegations, but indicated that they were unaware of the regrettable passing of the 16<sup>th</sup> respondent and of the resignation of the 18<sup>th</sup> respondent.

- [44] In our view this point *in limine* was neither here nor there and we agreed with the applicants' contention in the replying affidavit that the aforesaid mis-joinder under the circumstances did not render the application fatally defective.
- [45] The issue of non-joinder was raised by the 1<sup>st</sup> – 34<sup>th</sup> respondents on the basis that in terms of Rule 19(2) of the ANC Constitution it is stated in peremptory terms that the PEC shall consist of elected, co-opted and *ex officio* members. After an explanation as to who those members are, it was alleged that the failure to have joined those interested parties to the application was fatal to the proceedings.
- [46] From the answering affidavit deposed to by Mr Bulwana it was evident that he deposed to the affidavit "on behalf of the PEC, by virtue of a resolution signed by the Secretary-General of the ANC". The said resolution, attached to the relevant answering affidavit as annexure "AA1", states that Mr Bulwana was nominated "to depose to an affidavit on behalf of the ANC, PEC (Free State)". In our view it was therefore clear that the affidavit was deposed to and filed on behalf of the PEC as an "organ of the ANC"; therefore, collectively on behalf of all its members. This was, in our view, confirmed by the fact that Mr Bulwana apparently in any event consulted all the members of the PEC for purposes of drafting the answering affidavit, considering his averments in paragraph 31.2 of the answering affidavit:

"Upon the application being brought to my attention I immediately contacted the other members of the PEC and our attorney of record to assist in opposing the application and enlist the services of counsel."

[47] In the circumstances we could not find that the failure to have joined the office bearers, to whom the 1<sup>st</sup> – 34<sup>th</sup> respondents referred to, rendered the application fatally defective.

[48] Although not addressed in their answering affidavit, Mr Seleka, who addressed the Court on the merits of the application on behalf of the 35<sup>th</sup> respondent, pointed out that in terms of prayer 4 of the draft order referred to earlier in this judgment, a prohibitory order was being sought against individuals who had not been cited, being the relevant delegates.

[49] In view of the fact that we did not grant prayer 4 of the said draft order, I do not consider it necessary to address this point in detail. The relevant circumstances pertaining to this aspect are somewhat different from those in the **Ramakatsa**-matter. However, by virtue of the use of the emphasised phrase, we considered the principle pronounced in paragraph [24] of the judgment to also be applicable in the present matter:

"[24] ... In any event, the interests of the Branches whose meetings had been contended as being irregular as well as the delegates of those Branches to the provincial conference were precisely the same. Neither the Branches nor the delegates were essential parties to the dispute. Indeed, to require service of this kind would be an almost impossible bar to the application being brought. In the circumstances,

this reason ought not to have been relied on by the High Court for its conclusion.” (Own emphasis)

- [50] In addition it is necessary to point out that the Branches relevant to this application had in fact been cited as the 38<sup>th</sup> respondent.

### **MERITS OF THE APPLICATION:**

- [51] The nature of the organisational structure of the ANC is aptly set out in the judgment of **Dube v Zikalala**, *supra*, in paragraph [31] thereof:

“The organisational structure of the ANC is best viewed as a pyramid, narrowing as it ascends from the members’ level which constitutes the base and largest substratum of the pyramid, followed in order by the branch level, the regional level, the provincial level (where the Provincial Conference will elect the PEC), and finally at the apex of the pyramid, the national level, where branches sent delegates to the National Conference which elects the NEC, the highest decision making body of the ANC. ...”

- [52] In terms of Rule 5 of the ANC Constitution, members are entitled to fully and actively participate in the discussion, formulation and implementation of the policies of the ANC. They are also entitled to take part in elections and be elected or appointed to any committee, structure, commission or delegation of the ANC.

- [53] Rules 23.1, 23.2.3 and 23.2.4 furthermore determine as follows:

“23.1 Every member of the ANC shall belong to a branch, which is the basic structure of the organisation.

23.2.3 The branch shall be the place where members exercise their basic democratic rights to discuss and formulate policy.

23.2.4 The branch shall be the basic unit of activity for members.

In terms of Rule 23.8 the quorum for Branch meetings where the branch makes nominations of candidates for elections within the ANC, is to be 50% plus 1 of the total paid-up members of the branch.

[54] In terms of Rule 12.2.14 the NEC has the power to develop and adopt Rules and Regulations and Standing Orders for the due and effective functioning of the ANC and achievement of its aims and objectives. Therefore, in addition to the provisions of the ANC Constitution, the applicants also relied on the provisions of the Nomination Process Guidelines, already referred to earlier, annexure “FA2” to the founding affidavit, and a document titled “ANC National Audit Guidelines for Conferences and General Councils” (“the Audit Guidelines”), attached to the founding affidavit as annexure “FA3”. The contents and applicability of the said guidelines were not disputed by the respondents.

[55] The Nomination Process Guidelines determine, *inter alia*, the following regarding BGM's:

- “1. BGM's to be chaired by the chairperson of the branch.
2. If the chairperson is not available, then the deputy chairperson or branch secretary must chair the BGM.
3. The REC or PEC must provide a deployee to oversee the BGM.
4. The PEC may in addition appoint an MP or an MPL to oversee the NGM.

**N.B. Oversight does not mean chairing the BGM. It means watching over the process to ensure that it is free and fairly conducted; to intervene if there is unfairness and to give guidance.**

5. A register must be kept, which all those in attendance must sign. The chair, the secretary of the branch and the deployee must sign to confirm accuracy of the register. The chair and secretary must ensure that 50% plus 1 of all audited members are present before starting the BGM to nominate the following:
  - (i) Nominate candidates for the ANC top six officials;
  - (ii) Nominate candidates for the 80 additional members of the NEC; and
  - (iii) Election of conference delegate/s.

### **Tasks of the Chair of the BGM**

1. Read the document entitled: 'The importance of leadership nomination and selection.
2. Allow for a discussion on the document.
3. Then read from 'Through the eye of a needle'.
4. After the nomination process for the branch delegates, the 'Top six' officials and the NEC is concluded, branches discuss the following:

...."

- [56] An appeal process is provided for in the said document in the following terms:

"In the event of a dispute arising at the BGM out of the process of nominating the top six officials and the additional 80 members for the NEC, an aggrieved member or members must lodge a dispute within 48 hours of the BGM with the Branch Executive Committee and send a copy to the Provincial Secretary. It must be emphasised that a person who raises a dispute must have been present at the BGM."

- [57] On page 4 of the Nomination Process Guidelines, the following is determined:

"Nominations by branches will take place at quorate (50% + 1) branch general meetings (BGM) chaired by the branch chairperson or as indicated.

....

All members are free to express their opinions in nomination meetings and to vote according to their own opinion. **Anyone trying to use improper influence or promising a reward to get a member to vote for a specific nominee, will be guilty of a disciplinary offence and should be reported to the Electoral Commission or the Disciplinary Committee."**

- [58] The Audit Guidelines contained in annexure "FA3", set out the criteria for the auditing of branch membership and the process for the selection of branch delegates for conferences. In terms thereof a national audit team is to visit each province to conduct audits of membership within each province. When a conference is planned, whether it is a Provincial or Regional Conference, the province is to determine a cut-off date for purposes of conducting an audit process. They also impose an obligation on the REC and the PEC to perform a pre-audit in order to produce an *interim* audit list of paid-up members in each Branch, as well as lists of Branches in good standing, which are to be used at BI-AGM's and GM's. The guidelines also contain the requirements which a

member needs to comply with in order to be considered to be a member in good standing of a particular Branch and it sets out the requirements which must be met by a Branch in order to be in good standing. It is specifically stated that “only constitutionally launched ANC branches in good standing will be able to send delegates to a Conference”.

### **Alleged irregularities:**

#### **General allegations in paragraphs 59 – 79 of the founding affidavit:**

[59] In dealing with the irregularities in the founding affidavit, the applicants, *inter alia*, gave a general overview of the alleged irregularities experienced at the BI-AGM's and BGM's within the Free State Province. Those allegations dealt with the following irregularities:

1. Inadequate notice.
2. Audit disputes.
3. Gatekeeping.
4. Manipulation of membership numbers.
5. Quorum.

The said allegations are contained in paragraphs 59 – 79 of the founding affidavit.

[60] In response to the aforesaid general allegations, both sets of respondents denied same and pleaded that the said allegations were vague and unsubstantiated. The respondents pointed out

that the allegations were made in broad and general terms in that the affected Wards were not identified, the members of the ANC who were affected by the alleged irregularities were not identified and the allegations were not substantiated and confirmed by the members who allegedly were affected and/or who were present during those incidents. The respondents consequently pleaded that because of the general nature of the allegations, they were not in a proper position to respond thereto. (In so far as the respondents did make certain substantive allegations in rebuttal, I will deal with those later).

- [61] The reason for the general manner in which the allegations in those paragraphs of the founding affidavit were set out, is to be found in the explanation set out in paragraph 80 of the founding affidavit:

"It is not reasonably practicable to detail every single instance or example in relation to all these categories or irregularities in these papers. This is due to the fact that the irregularities mentioned above are widespread and prevalent in almost all of the Districts and Wards mentioned below. It will be argued at the hearing that even a certain threshold of these breaches is sufficient for the court to grant the relief sought."

- [62] However, the aforesaid explanation cannot assist the applicants in so far as the relevant allegations lack probative value. The allegations in the said paragraphs of the founding affidavit are extremely generalised. It could not be ascertained from the contents of the allegations whether the deponent to the affidavit have personal knowledge of the alleged facts and circumstances and/or on what possible grounds such personal knowledge could

be based. In so far as he did not have personal knowledge of the events alleged, the deponent should have disclosed the source of such information, which he also failed to do. The applicants can also not be considered to automatically and/or necessarily be clothed with personal knowledge of the alleged events merely because they are members of a variety of Wards within the Free State province, especially so in the absence of the identification of the specific affected Wards.

- [63] We consequently agreed with the respondents' contention that the allegations in the aforesaid paragraphs of the founding affidavit fell short of constituting proper evidence for purposes of the relief claimed by the applicants.

Irregularities per district (paragraphs 87 – 119 of the founding affidavit):

- [64] In subsequent paragraphs of the founding affidavit, more specifically paragraphs 87 – 119 thereof, the applicants gave a Region per Region exposition of the alleged irregularities. This was preceded by the following allegations:

"[82] The most practical methodology is to group the issues according to the different regions, to identify the irregularities as they manifested themselves in specific regions and to cite only a few selected examples with the aim of providing a full spectrum of the irregularities in the different regions. The grouping of the violations by region is merely done to illustrate widespread nature thereof.

[83] Each of the applicants are members of the different Wards that experienced one or more of these irregularities. Each of the applicants, aside from myself as a main deponent, have deposed to confirmatory affidavits confirming the correctness of the events that transpired at their respective Branches.

[84] Given a total number of Branches, the categories of irregularities and the number of regions, the abovementioned methodology is the most logical and economical way to avoid the unnecessary prolixity of the papers.

[85] An important fact to emphasise is that the establishment of any single one of the abovementioned categories of irregularities is sufficient to fatally taint the legitimacy of the respective Branch meetings and its outcomes.”

[65] I will now deal with the allegations pertaining to the specific regions.

#### Thabo Mofutsanyana Region:

[66] According to the applicants there was no opportunity to query and/or object to the audit process before the Branch meetings commenced. The specific Wards that were affected were Wards 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 16, 19 and 22. Those Wards were not given an opportunity to dispute the number of audited members in their respective branches. Hundreds of members' names did not appear on the formal attendance register. Despite possessing the necessary credentials on the date of the meetings, those members were still not permitted to partake in the activities of the meetings. Apart from members in good

standing who were excluded in the manner described above, in Wards 2, 4, 5, 7, 8, 12, 13, 22 and 23 persons who were not members of the ANC, alternatively not members in good standing, further alternatively members of a different Branch, were allowed access to the venues and allowed to participate in the elections. Despite the fact that this was brought to the attention of the officials in charge, the concern fell on death ears. The 15<sup>th</sup> applicant, Matobo Keele, whose confirmatory affidavit is attached to the replying affidavit, communicated with representatives from the affected Wards that all experienced the same irregularity.

- [67] In the said Wards, the members were also not given adequate notice, being a clear seven days' notice, of the branch meetings to be held.
- [68] This region also suffered from extreme gatekeeping. In Ward 7, a private security company, Zero Tolerance, exercised control over who entered the venue of the meeting. The BGM was scheduled to take place on 27 August 2017. People who were not members, and whose names did not appear on the attendance register, were allowed to enter the venue. Members in good standing were denied access despite having had proof of their credentials and copies of their membership forms. As a result of an altercation that ensued because of the refusal of Zero Tolerance to allow access to members in good standing, Zero Tolerance fired rubber bullets. A member in good standing, Sizwe Hlubu, the 2<sup>nd</sup> applicant, was pepper sprayed and his wife was shot in the back with a rubber bullet while they were trying to

enter the venue for the purpose of participating in the activities of their Branch. The meeting did not take place, but was rescheduled for the following day. However, the same gatekeeping procedures occurred the next day. Reliance was placed on the confirmatory affidavit of the 2<sup>nd</sup> applicant, attached to the replying affidavit.

- [69] At the BGM in Ward 14, held on 13 October 2017, a councillor by the name of Tseki-Tseki accused one of the applicants, Ms Nteboheleng Moorosi, the 8<sup>th</sup> applicant, as being part of the “CR17” faction, which is a general reference to members who support Mr Cyril Ramaphosa. The 8<sup>th</sup> applicant was then intimidated by Zero Tolerance because of the association with Mr Ramaphosa. Any person belonging to the “CR17” faction or who raised a contentious issue relating to the procedural irregularities at the meeting was removed by Zero Tolerance and, at times, in a violent matter. The confirmatory affidavit of Ms Moorosi is attached to the replying affidavit.
- [70] Similarly, in Wards 6, 8, 13 and 22, if members were suspected of belonging to the “CR17” faction or indicated so during the meeting, they were either excluded from partaking in the meeting or removed from the venue.
- [71] In Ward 5 the elected deployee made an announcement to members who were present at the meeting that “we are ready for NDZ”, which was a reference to Ms Nkosazana Dlamini-Zuma.

[72] In the answering affidavit filed on behalf of the 35<sup>th</sup> respondent, Mr Mantashe specifically stated in paragraph 5 of the affidavit that the allegations regarding irregularities in respect of BI-AGM's and BGM's will be addressed in the affidavit of the other respondents. This clearly was an indication that he has no personal knowledge of those issues. This was also evident from his answering affidavit in that he consequently made no specific denials in relation to the aforesaid alleged irregularities.

[73] In the answering affidavit filed on behalf of the 1<sup>st</sup> – 34<sup>th</sup> respondents, it was denied that in the specified Wards members were not provided with the opportunity to adequately dispute the audited numbers of members for their respective Branches. The deponent alleged that the audit fell within the powers of the NEC, subsequent to which the PEC had a meeting over the audit report received from the NEC. The REC was present as they are *ex officio* members of the PEC. The deponent then made the following allegation in paragraph 22.4 of the answering affidavit:

"The REC as a structure responsible and assigned the responsibility to have direct contact with the Branches, convened the Branches resorting under each region to relay the audit outcomes and advised that Branches must further present the audit reports to Branches for verification and corrections which included the raising of objections by each individual member of the ANC."

[74] However, the deponent did not indicate that he has personal knowledge that the said verification with the Branches and with individual members in fact took place. Although a confirmatory affidavit of Ms Lindiwe Makhalema, a member of the REC in the

specific Region, was attached to the said answering affidavit, that affidavit was clearly attached for purposes of responding to the allegations regarding the involvement of Zero Tolerance in Ward 7. This is also evident from her confirmatory affidavit in which she confirmed the contents of the said answering affidavit "in as far as it relates to me and the respondents". It was therefore not intended to serve as confirmation of the actions of the REC and the REC had not been cited as one of the respondents either.

[75] In any event, the said denial did still not address the allegation that hundreds of members' names did not appear on the formal attendance register and that those members were not permitted to participate in the activities of the meetings.

[76] In fact, in the said answering affidavit no specific countermanding allegations were made in relation to the irregularities alleged in paragraphs 87, 88, 89, 91, 92 and 93 of the founding affidavit. The denials were vague and made in a generalised fashion.

[77] We agree with the submission of Mr Mphofu that the conduct of Zero Tolerance security services had not been addressed in the said answering affidavit in a meaningful manner. It was admitted that Zero Tolerance was "acquired by the Branch Executive Committee of the ANC in Ward 7". The account given by the applicants regarding the violence caused by the actions of Zero Tolerance, was undisputed. The deponent merely explained that the reason why Zero Tolerance was appointed was, *inter alia*, "to secure all members of the ANC against acts of violence that had erupted in the past BGM's". Not only did that statement entail an

admission of the presence of violence at previous BGM's, but the fact that the BEC considered it necessary to resort to the appointment of a security company, in our view, constituted sufficient proof of the climate of intimidation, fear and violence as alleged by the applicants. Furthermore, contrary to the alleged reason why Zero Tolerance was appointed, they were part of the cause of violence and became part and parcel of it, instead of preventing it.

Lejweleputswa Region:

- [78] In respect of this Region, the applicants, in paragraph 100 of the founding affidavit, referred to the BGM and BI-AGM meeting for Ward 7 for the sub-region Nomzamo in Lejweleputswa that took place on 29 October 2017. Mr Lebeko Maile, the 12<sup>th</sup> applicant, was present at the meeting and witnessed what transpired. The deployee was Mr Siswe Mbalo, who is also the deputy speaker in the Provincial Legislature. He attended the meeting with a pre-signed attendance register. Instead of a new register being utilised for the meeting of 29 October 2017, the deployee intended using a register that had previously been signed by certain members at a previous BI-AGM and BGM that was conducted on 22 October 2017. Despite the fact that the members confronted the said deployee about the clear violation of their rights, no positive results were attained.
- [79] The meeting failed to constitute a quorum between 12h00 and 16h00. The deployee informed the members present that they would be afforded a further two hours to meet the quorum.

During this period, many members signed the register and left before the commencement of business. Despite the fact that the meeting was never formally quorate, nominations were accepted. Mrs Nkozana Dlamini-Zuma was nominated as a candidate, which nomination was accepted without counting the votes. Another member nominated Mr Cyril Ramaphosa, but that nomination was completely ignored by the chairperson. Tempers consequently flared and a violent altercation broke out.

- [80] In Ward 17, the Matjhabeng sub-region, a BGM and BI-AGM took place on 29 October 2017. Persons who were not members were allowed to participate in the voting process. The members objected to same and requested that the persons within the venue be separated based on their membership status. However, this request was refused and the elections proceeded. Both the chairperson and the deputy-secretary, who were elected during the said meeting, have criminal records and as such were prohibited from having been appointed as such.
- [81] In Ward 3, a BGM was held on 3 October 2017. Members in good standing whose names appeared on the attendance register were not invited to attend the meeting. Good standing members whose names did not appear on the register were denied access, even after having showed the officials their credentials. The 13<sup>th</sup> applicant, Mr Kingsley Lempe, whose confirmatory affidavit is attached to the replying affidavit, witnessed a Branch leader who signed the register on behalf of members who were not present. When this was raised with the official in question, the complaint

was simply dismissed and nothing was done about it. There was also no provincial representative present.

- [82] In Ward 8, being the Ward of the deponent to the founding affidavit, a member in good standing who is well-known to the deponent to the applicants' founding affidavit, but who fears and refuses to be disclosed in the papers because she fears reprisals, was visited at home and requested to sign an attendance register in order to contrive a quorum. This was in conflict with the guidelines that an attendance register should only be signed by those persons present at a relevant meeting.
- [83] In Ward 36, 36 members in good standing whose names appeared on the attendance register were not invited to attend the BGM. One member, Mr Mthandazo Velebayi, was denied access to the meeting on the grounds that his surname was incorrectly spelled, despite the fact that his ID number and all other details were correct. He was furthermore in possession of the necessary credentials on the day of the meeting, but he was still not permitted to participate in the meeting.
- [84] In the answering affidavit of the 1<sup>st</sup> – 34<sup>th</sup> respondents, it was denied that Mr Sizwe Mbalo had recycled the attendance registers. In support of the denial it was alleged that copies of the two registers which were used on the two different dates of 22 and 29 October 2017 respectively, were annexed as annexure "AA9". However, no such annexure was in fact attached to the said answering affidavit.

- [85] The 1<sup>st</sup> – 34<sup>th</sup> respondents furthermore simply annexed attendance registers for Wards 3, 8, 17 and 36, but failed to have the contents thereof confirmed as true and correct under oath by an official who was present during the compilation thereof. This was especially necessary considering the number of alleged “signatures” reflected thereon which was merely affected by means of a cross (“x”). No probative value can be attached to such a mark without confirmation of the authenticity thereof.
- [86] Regarding the other allegations made by the applicants pertaining to these Wards, the respondents again failed to aptly deal with the specific averments.

Mangaung Region:

- [87] In Ward 8, a BGM was scheduled to be held on 21 October 2017. The venue was changed without proper notice to many of the members. As a result, several members did not attend. The meeting was scheduled to start at 9h00, but when members arrived, they were informed that the process had already begun at 6h00. People were allowed to enter and participate without proper credentials. The gate that allowed access to the venue was locked before all members could enter.
- [88] Ward 8 has 426 audited members. The PEC deployee announced that there were 214 signatures on the register and that a quorum had therefore been reached. However, there were only approximately 80 people at the venue. Despite the fact that there was no quorum, a delegate from this Ward was chosen.

- [89] In Ward 11 the first two BGM's were postponed and it was eventually scheduled to take place on 18 October 2017. Upon the arrival of some of the members, they were informed that the meeting had already been concluded. Upon inspection of the attendance register it was evident that the register initially used at the first postponed BGM was re-used at the meeting of 18 October 2017 in order to contrive a quorum.
- [90] In Ward 5 a BGM was held on 22 October 2017. Some of the members received no notice of the meeting and found out about it through word of mouth. There were also irregularities in the voting process itself. Despite the fact that one specific candidate received the majority of votes, the other candidate was selected by the deployee. The deployee refused to entertain any complaints thereof.
- [91] In Ward 45 the BGM was postponed twice for lack of a quorum. On the last day, 22 October 2017, there still was no quorum. The chairperson then attempted to establish a quorum by using the attendance register of the previous date as if those people were necessarily also present on 22 October 2017. The deployee proceeded with the meeting despite the glaring irregularities. Specific reliance was placed on the confirmatory affidavit of Pinky Cuze, the 16<sup>th</sup> applicant, attached to the replying affidavit.
- [92] In the answering affidavit filed on behalf of the 1<sup>st</sup> - 34<sup>th</sup> respondents, converse allegations were made regarding the events pertaining to the BGM held in Ward 8. However, no

indication was given that the deponent has personal knowledge of the alleged events.

- [93] In an attempt to refute the allegations regarding the lack of notice of the BGM held on 22 October 2017 in Ward 5, a copy of an alleged notice was attached to the answering affidavit as annexure "AA12". From a perusal thereof, it appears to be a copy of a so-called "whatsapp" message. However, in addition to the fact that it cannot be ascertained from the message that it in fact pertained to Ward 5, it can also not be seen to how many members it was addressed. Furthermore, the message was dated 20 October 2017, which would not have constituted proper notice of the relevant meeting which was scheduled for 22 October 2017.
- [94] The respondents attached the attendance register for Ward 8 in an attempt to refute the allegations pertaining to the lack of a quorum. However, in addition to the fact that the contents thereof were again not confirmed under oath, the attendance register in fact did not confirm that a quorum was reached. The quorum was supposed to be 212, but the number of signatures was only 209, although it was claimed that there were 214 or 216 attendees.
- [95] Other than the aforesaid, no detailed allegations were made in support of the respondents' denial of the irregularities as alleged by the applicants.

Gariep Region:

- [96] In Ward 5, Koffiefontein, the deployee, Mr Thabo Meeko, a PEC member, was advised that the current BEC was not in good standing, that the BEC members were not members in good standing and that there was no quorum for the meeting. He, however, refused to take any action. During the counting of the votes for the presidential candidates the said deployee deliberately distorted the figures in favour of one presidential candidate. The applicants relied on the confirmatory affidavit of Ms Sophia Hadinkame Ramakae, the 21<sup>st</sup> applicant, attached to the replying affidavit.
- [97] In Ward 1, Letsemeng subregion, the deployee, a PEC member, Ms Thandiwe Ivy Reachable, chaired the meeting in clear violation of the guidelines which specifically states that the deployee should not chair the meeting. When the deployee realised that the voting numbers were tipped in favour of one presidential candidate she sabotaged the meeting and the vote counting process by starting several vote counting processes until members got so frustrated that they left the meeting.
- [98] The responses to the aforesaid allegations, as contained in the answering affidavit of the 1<sup>st</sup> – 34<sup>th</sup> respondents, took the matter no further. Again only bare denials were recorded. Except for the attachment of the attendance registers for Wards 1 and 5 as annexure “AA14”, the said respondents failed to deal with the specific allegations made in relation as to how the respective

quorums were contrived. They also completely failed to deal with the conduct of the respective PEC employees.

- [99] The contents of the aforesaid attendance registers were also not confirmed under oath as being true and correct. In addition the number of signatures reflected on both the attendance registers did not correspond with the number of attendees stated on the documents. No explanation was provided for the discrepancies.

The letters of complaint:

- [100] In paragraph 125 of the founding affidavit the applicants alleged as follows:

"In all the Wards that experienced the irregularities mentioned above, letters of complaint were filed as per the Guidelines and within the prescribed 48 hour time. It must be emphasised that all letters of complaint dealt with several of the irregularities highlighted above. The complaints were either directed to the Electoral Commission, the Secretary General of the ANC ... or the Regional Secretary for the respective Branches. It is impossible to obtain each and every letter of complaint from all the different members. The few letters of complaint that are in my possession are attached hereto and marked Annexure 'FA 10' ..."

- [101] The respondents completely failed to deal with the contents of the said letters in their respective answering affidavits.

- [102] In view of the respondents' complete failure to contradict the contents and/or the authenticity of the letters, they are undisputed. I therefore do not deem it necessary to deal with

them in detail. Suffice it to say that a number of the letters dealt specifically with some of the incidents referred to in the founding affidavit. The other letters dealt with different incidents, but during which similar irregularities than those complained of in the founding affidavit, occurred. In the Ramakatsa-matter the Constitutional Court stated the following regarding similar type of letters:

“[102] The significance of the undisputed contents of the letters is that they furnish the backdrop and evidentiary support to the factual allegations that the appellants make in support of the specified irregularities they rely on in the regions.”

In our view the letters also served to be indicative of the widespread occurrence of the irregularities complained of.

**Consideration of the aforesaid alleged irregularities and the responses thereto:**

[103] In the Ramakatsa-matter the Constitutional Court duly referred to and applied the principles enunciated in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A), being the *locus classicus* on the approach to be followed in instances of factual disputes in motion proceedings. Those principles were applied by the Constitutional Court in conjunction with the principle that in motion proceedings the affidavits constitute both the pleadings and the evidence. See Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) at para [28]. The

aforesaid appears from paragraphs 94 and 95 of the Ramakatsa-judgment:

"[94] The proper approach to determining whether an applicant in motion proceedings has made out a case for the relief sought in a case where some of the allegations are disputed by the respondent was pronounced in *Plascon-Evans*. According to the *Plascon-Evans* rule the applicant would succeed if the admitted facts alleged by it, together with the facts alleged by the respondent, justify the relief sought. However, it 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.

[95] 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 allegations. In assessing whether the appellants have made out a case for the relief they seek, we will apply these principles."

[104] I have dealt with the instances where the respondents attempted to present countermanding evidence to rebut allegations made by the applicants, but dismally failed to do so successfully. The further denials which I have already referred to were vague, lacking in specificity and made in a generalised fashion. In our view the answering affidavits consequently failed to raise genuine *bona fide* disputes of fact. They constituted no more than "bare denials." As such, the irregularities identified by the applicants,

as supported by the letters of complaint, had in our view been established.

**Lack of quorum:**

[105] As already mentioned earlier, the applicant's raised the issue that many BI-AGM's and AGM's were held despite lack of a quorum. The answering affidavit filed on behalf the 1<sup>st</sup> – 34<sup>th</sup> respondents stated that "in rebuttal" they supplied the Court with "random sampling of registers", which were attached to their answering affidavit as annexure "AA6". However, in their replying affidavit the applicants provided an analysis of those random samples, from which the following figures were evident pertaining to the respective Wards in the relevant Regions:

**Thabo Mofutsanyana:**

[106] In Ward 5, the quorum was 74. However, the register only contained 69 signatures. In Ward 6, the quorum was 136, but whilst the purported attendees were indicated as 152, there were only 84 signatures. The said discrepancies were not explained by the respondents.

**Lejweleputswa:**

[107] In Ward 3, a quorum was reached, but whilst the attendance register stated that there were 114 people that attended, there were only 112 signatures and therefore actual attendees. In Ward 7, it was stated that the quorum was 301, but there were only 291

signatures, although the purported attendees were indicated as 304. In Ward 17 it was stated that the quorum was 309, but although it was claimed that there were 311 attendees, there were only 293 signatures. In Ward 36, the quorum was 168, but there were only 157 attendees, although the purported attendees were claimed to be 172.

Mangaung:

[108] In Ward 8, the quorum was supposed to be 212, but the number of signatures was only 209, although it was claimed that there were 214 or 216 attendees.

[109] In Ward 45, there were two meetings. The first meeting was on 21 October 2017, where the quorum was 146, but there were only 65 signatures. At the second meeting on 22 October 2017, still with the quorum being 146, the number of signatures was only 144, although the purported number of attendees was 147 due to duplicate names and duplicate signatures which were however reflected.

Gariep:

[110] In Gariep similar discrepancies were present. In Ward 1, with a quorum of 92, there were only 83 signatures, although the purported attendees were reflected as 97. In Ward 5, with a quorum of 145, the attendance register claims that there were 209 attendees, but the actual signatures reflected were only 154.

**Fezile Dabi:**

[111] Although the applicants were no longer claiming any relief pertaining to the Branch meetings held in Fezile Dabi Region, the two Wards also portrayed discrepancies. In Ward 5 the quorum was 86 and the quorum was reached, but whilst the purported attendees were reflected as 100, a numerical count of actual attendees showed that there were only 95. The same applied to Ward 10. Although the quorum of 159 was reached, the purported attendees were reflected as 166, but the actual attendees were only 164.

**Impact of sampling:**

[112] The aforesaid discrepancies have not been explained by the respondents. On the case of the respondents, the attendance registers in annexure "AA6" are a representative sample. However, considering the aforesaid irregularities reflected by those attendance registers, they actually serve to confirm that at many of the BGM's and BI-AGM's there was no quorum. It was accepted by both parties that in terms of the ANC Constitution, a BI-AGM and BGM must have a quorum of 50% plus 1. In the absence of the required quorum the consequence is that those meetings were irregular and unlawful and the decisions, resolutions and outcomes of those meetings null and void.

**Conclusion regarding the impact of the established irregularities:**

- [113] The irregularities established by the applicants, constituted numerous different transgressions of the ANC Constitution and the respective Guidelines referred to earlier. This occurred at Branch level, which constitutes the very place where members are entitled to exercise their basic democratic rights and entitlements in terms the ANC Constitution. They were entitled to participate in pre-determined lawful decision-making processes within the Branches by means of properly constituted Branch meetings. That would have afforded them the opportunity to delegate their own democratic voices to a number of their properly elected members to act as delegates on their behalf at the Provincial Conference and later at the National Conference.
- [114] The aforesaid rights which the applicants and other members of the ANC enjoy in terms of the ANC Constitution, were blatantly and grossly violated by the occurrence of the established irregularities. It furthermore constituted a violation of their basic constitutional rights to participate in the activities of the political party of their choice as enshrined in terms of section 19(1) of the Constitution of South Africa.
- [115] According to us the established irregularities fatally tainted the legitimacy of the relevant BI-AGM's and AGM's. The impropriety of the said meetings had the resultant effect that the delegates elected at those meetings were not democratically representative of the relevant Branches and were not lawfully mandated.

[116] In the Ramakatsa-judgment, paragraphs [118] and [119] thereof, the Constitutional Court made the following findings in circumstances similar to those in the present matter:

“[118] As stated earlier, the irregularity that occurred in the *Moses Mabhida* branch in respect of 10 members who were prevented from participating in a branch meeting and the exclusion of the *Joyce Boom* branch from the Provincial Conference, establish conduct that is inconsistent with section 19 of the Constitution. Once an inconsistency with the Constitution is proved, this Court is obliged by section 172 to declare that the conduct in question is invalid, unless it finds that the inconsistency is justifiable in terms of section 36 of the Constitution. The respondents have not advanced any justification for the conduct. It follows that it must be declared invalid.

[119] The remaining irregularities tabulated above constitute the violation of the ANC’s constitution and its Membership Audit Guidelines which amount to the terms of the agreement between it and its members. No explanation or justification was furnished for these serious breaches which adversely affected members of the party. The affected members are therefore entitled to appropriate relief.”

[117] We consequently, and in line with the aforesaid findings by the Constitutional Court, issued the declaratory orders contained in paragraphs 2 and 3 of the majority order.

[118] Because of the resultant consequences of the last mentioned two orders, the consideration of the prohibitory interdict which the applicants sought in terms of the draft order, became obsolete.

**The Povincial Congress scheduled for 1 – 3 December 2017:**

- [119] If the Provincial Conference were to be held to the exclusion of participation by properly elected delegates from the affected Wards, the abovementioned rights of the members of those Wards, both in terms of the ANC Constitution and the Constitution of the RSA, would again have been violated. That would therefore have the result that the Provincial Conference as such, as well as all decisions, resolutions and outcomes thereof, would similarly be invalid as determined in the Ramakatsa-judgment.
- [120] We could therefore not have allowed the Provincial Conference to be held in circumstances which would have rendered it unlawful and invalid. However, once the relevant Branch meetings had been held in a lawful manner and in accordance with the ANC Constitution, with the result that properly elected delegates from the respective Wards would be in a position to also participate in the Conference like they are entitled to, the Provincial Conference could continue.
- [121] We duly considered the fact that the Court order dated 6 October 2017, issued by agreement between the parties in application number 5107/2017, determined that the Provincial Conference was to be held on 1 – 3 December 2017. As mentioned earlier in the judgment, the applicants initially sought to have the said order set aside, but abandoned that part of the relief sought.
- [122] In our view there is no basis upon which that order can be set aside. The validity of that order cannot be challenged. One should

however be mindful of the fact that the order that we issued did firstly not preclude the respondents from holding the Provincial Conference on the aforesaid dates, as long as they first complied with the condition attached thereto. However, should that turn out not to be practically possible, we are of the view that the Court the issued that order, could never have intended that the Provincial Conference was to be held at those dates irrespective of whether it will cause the Conference to be unlawful and invalid due to facts and circumstances subsequent to the issuing of the said order. Compliance by the respondents with that order without first having removed the unlawful, irregular and unconstitutional elements of the Provincial Conference, will have the result that that order compelled parties to perform an action which will constitute an irregularity and a nullity. That could never have been the intention of the Court. We could therefore not allow and/or condone such an undesired result which will be against public interest. That is why we issued the order contained in paragraph 4 of the majority order.

### **COSTS:**

[123] Regarding the question of costs, the Constitutional Court in the **Ramakatsa**-matter decided the issue of costs as follows:

“[127] It is so that, ordinarily, a party that successfully vindicates a constitutional right is awarded costs. That is so particularly if the respondent is a public body that bears an obligation to uphold the Constitution. The present dispute amounts to not much more than a power struggle within provincial structures of the same political party.

If these rifts are to heal, in time, the parties will have to talk to each other. A costs order may make the healing and reconciliation more difficult for those concerned. The second relevant consideration is that this is a class action against, in addition to the ANC, several individual provincial and branch office bearers. A cost order against the personal estates of one or more of them may not be just and equitable. We accordingly make no order as to costs."

[124] The aforesaid considerations are *mutatis mutandis* applicable to the present matter. We consequently respectfully agreed with the appropriateness of such an order also in the present matter and therefore ordered each party to pay its own costs.

  
 C VAN ZYL, J

I concur:

  
 MA MATHEBULA, J

On behalf of the applicants:

Adv DC Mpofu SC  
 Adv TN Ngcukaitobi  
 Adv K Magan  
On instructions of:  
 Bekker Attorneys  
 Bloemfontein

On behalf of the 1<sup>st</sup> – 34<sup>th</sup> respondents: Adv R Mogagabe SC  
Adv PT Masihleho  
On instructions of:  
Moroka Attorneys  
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On behalf of the 35<sup>th</sup> respondent: Adv W Mokhare SC  
Adv PG Seleka SC  
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