

IN THE REPUBLIC OF SOUTH AFRICA

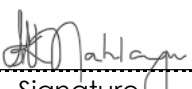


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 60975/2020

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. YES/NO

DATE: 23/08/2021



Signature

PAN AFRICAN CONGRESS OF AZANIA

First Applicant

THE NATIONAL COMMITTEE OF PAN AFRICANISTS OF AZANIA, ELECTED AT BLOEMFONTEIN

Second Applicant

MZWANDILE NYONTSHO

Third Applicant

APA POOE

Fourth Applicant

and

NARIUS MOLOTO

First Respondent

THE NATIONAL EXECUTIVE COMMITTEE OF THE PAN AFRICANISTS OF AZANIA, ELECTED AT TOMPI SELEKA

Second Respondent

THE INDEPENDENT ELECTORAL COMMISSION OF SOUTH AFRICA

Third Respondent

JUDGMENT

Mahlanu AJ

- [1] This application is about an ongoing leadership dispute which has engulfed the Pan African Congress of Azania (PAC) for some time. This dispute has seen the contending parties engaged in a series of litigations the current application being the latest in that series. This dispute has not only has had the effect of dividing the PAC but has also hampered its ability to participate fully in national politics thus depriving the membership of the PAC of their constitutional right to vote for a party of their choice. The Third Respondent, the Independent Electoral Commission, has deposed an affidavit to the effect that this dispute created uncertainty as to which faction of the leadership they should liaise, and which is entitled to the funding due by virtue of them holding seats in Parliament.
- [2] In this matter, the Applicants seek relief in the form of the declaratory order declaring the convening, election of the First and Second Respondent as the President of the PAC and National Executive Committee (NEC), and any resolutions taken at the Congress convened by the First Respondent at Marble Hall, Limpopo on the 25th and 25th and 24th of August 2019 to be unlawful and an invalid. In it stead, the Applicants calls upon this court to declare the NEC elected at the First Applicant conference at Bloemfontein on 29 and 30 August 2019 to be lawful and legitimate leadership of the PAC.
- [3] On the 23rd of August 2019, the First Respondent launched an application for leave to the judgement of A.J. Millar, where the First Respondent invocation of clause 14.2 of the PAC Disciplinary code which was adopted as part of the PAC constitution, was set aside. The effect of the A.J. Millar judgement was that it nullified all decrees issued by the Respondent on the 9th of June 2019, a date which the clause 14.2 invocations was issued, where such decreases were inconsistent with or contradictory to the resolution taken on the 18th of May

2019. A.J. Millar granted the First Respondent Leave for appeal; and also granted in addition the Applicant's request for leave for the execution of the order, after the Applicant lodged a counter-application.

[4] I have set below the chronology of events that relate to this matter which are pertinent in this case;

On the 8th of March 2019: Hon. Justice Mavundla Order is issued by mutual consent from in terms of which Joint Leadership of PAC is named and National Congress on or before the 31st August 2019.

18 May 2019: The Joint National Executive Committee meets and resolved the date and venue of the Congress, which is agreed to be 31 August 2019 and Bloemfontein respectively. They resolve the election will according to the Court order and PAC constitution of 2000.

23 May 2019: Secretary General Letter to all structures, branches and components of the PAC.

26 May 2019: Mr Philip Dlamini, Chairperson circulating an eight-page memorandum taking issue with the Secretary-General letter to the branches.

5 June 2019: The Secretary-General, Mr Pooe responds to Mr Philip Dlamini memorandum with a four-page explanation.

9 June 2019: President, Mr Moloto invokes Clause 14.2. of the PAC Disciplinary Code.

12 July 2019: PAC (Mr Apa Pooe) launch an application to set aside invocation of Clause 14.2 and the decree. Application is successful and Invocation is set aside.

23 Aug 2019: First Responded, Mr Moloto applies for leave of appeal against A.J. Millar Judgement. First respondent leave for appeal is granted.

23 August 2019: The Applicants launch a counter application for leave for executive application is also granted. But Moloto is right to appeal this application.

24-25 August 2019: PAC hold Conference in Limpopo-Mr Narius Moloto is elected President.

29-30 August 2019: PAC hold Conference in Bloemfontein – Mr Mzwanele Nyontsho is elected President.

- [5] The facts before this court concerned should in the first instance be able to assist this court to determine the lawfulness (legality) or otherwise of the First Respondent conference which was held on the 24th and 25th of August 2019 at Tompi Seleka in the Limpopo province. Secondly, it should also be able to clarify whether the other elective conference held by the Applicant on the 29th and 30th of August 2019 at Bloemfontein was legitimate and lawful. The Applicants argued that the Limpopo elective Congress is unlawful and its resolutions should be set aside as invalid.

It is common cause that within the context of those two factions, the party was able to agree to unity this agreement was reduced to an order by Hon. Justice Mavundla on the 8th of March, 2019. With regard to that order, the agreement was that the PAC is united in one organization under the following leadership:

- a) President, Mr Narius Moloto.
- b) Deputy President, Mr Nyntsho
- c) Secretary general, Mr Apa Pooe,
- d) Deputy Secretary, Mr Bennett Joker
- e) Treasurer, Phumzile Phatsha
- f) National organiser, Mr Mbuyisile Gontshu
- g) National Chairman is the Phillip Dlamini
- h) Deputy National Chairman, Mr Sibusiso Xaba

[6] It was further stated that PAC will be led and governed by a joint national (NEC) leadership of those stated above. Two additional members of the NEC would be Mr Alton Mphethi and Luthando Mbinda.

It was also stated that the signatories to the finances of the PAC shall be Mr Apa Pooe (Secretary-General) and Ms Phumzile (Treasurer). These two will provide monthly financial reports to PAC.

Mr Narius Moloto was said to be the face of the PAC in the forthcoming national elections on the 8th of May 2019. Mr Mzwandile Nyontsho shall be the PAC representative in Parliament.

It was further stated that the PAC national list shall have the following four people at the top of its national list. These are Mr Mzwandile Nyontsho.

[7] It is common cause that the Unity agreement was going to be formalized and finalized in National Conference was scheduled to take place on or before the 30th of August 2019 as per Justice Mavundla with the primary aim of electing a National Executive Committee subject to the provisions of the PAC, Constitution, 2000. Significantly, both the date and the venue were mentioned in the Mavundla judgement.

In pursuance of the court Order of Judge Mavundla of the 8th of March 2019, there was a Joined NEC meeting on the 18th of May, 2019 which was presided over by the First Respondent, Mr Moloto as the President of the PAC. During the said meeting, the following resolutions were taken that:

- a) The court order of the 8th of March would have adhered fully
- b) The National Congress will be held on the 29th of August
- c) The venue of the National Congress shall be Bloemfontein.

[8] In that meeting, responsibilities were assigned to individuals to perform various tasks in preparation for this conference. More significantly for the purpose of this case, the responsibility to organize and inform structures of the was

assigned to Mr Poo in his capacity as the Secretary-General. I am also informed that this approach towards organizing and preparing the conference was also consistent with the PAC Constitution of 2000.

[9] What appeared to be an initial point of dispute emerged on the 26th May 2019, after Mr Pooe had sent the letter and correspondences to the branches, where it is reported that Mr Philip Dlamini, the National Chairperson had a disagreement with certain aspects of the Secretary-General correspondence. The court has no records of the nature of the dispute but for purposes of this application, the matter was on the face of it resolved by the two officials of the PAC. On the 5th June 2019 the Secretary-General Mr Pooe, is reported to have provided a 4-page explanation to Mr Dlamini. Up until that point it seemed on the face of it that the unity of the PAC is on course and there is consistent compliance with the Justice Mavundla judgement and observation of the constitution.

- i. On 9 June 2019, the President of the PAC Mr Moloto invokes clause 14.2 of the PAC disciplinary code in terms of which he suspends the constitution and issues a decree which amounts to other things abolishes the JOINT NEC and also alters the date and venue of the National Conference.
- ii. The fragile unity of the PAC that appeared to be holding thus collapses as the two factions go back to courts to seek resolution. It is also common cause that the PAC represented by Pooe filed for an urgent application to set aside the invocation of clause 14.2. of the order which was granted by Honourable AJ Millar.
- iii. For purposes of this application, it is imperative to determine the legality of the First Respondent actions. This court is called upon to determine if the conference that took place on the 24 AUGUST 2019 Limpopo is lawful and valid. To determine this fact, regard will have to be had on the Judge Mavundla order, the PAC constitution and the Judgement of AJ Miller. Honourable Judge Millar dealt with the merits of this argument. For

purposes of this application is whether his application is standing and operative.

[10] In terms of the Civil Appeal from the High Court: Rule 49 provides as follows:

When leave to appeal is required, it may on a statement of the grounds, therefore, be requested at the time of the judgement or order. When leave to appeal is required and it has not been requested at the time of judgement, or an order, application with such leave shall be made. The grounds therefore shall be furnished within 15 days after the date of the order appealed against: provided when the reasons all the full reasons for the quote order of given on a later date than the date of the order comments such application may be made within 15 days after the later date provided further that the court may apparently cause shown common extend affirmation period of 15 days.

[11] When giving an order, the court declares the reasons for the order will be furnished to any of the parties. Such everything shall be delivered within 10 days after the order. The application mentioned in the paragraph be above shall be set down on a date arranged by the registrar who shall give written notice thereof to the party. Such application shall be heard by the judge who presided at the trial of the is not available by another judge. Of the division of which the surcharge, when he is so tired, was a member.

[12] If leave to appeal to the full court is granted, the notice of appeal shall be delivered to all parties within 20 days after the date upon which the Leave was granted. Or within such a long period as good cause shown to be permitted. A notice of cross-appeal shall be delivered within 10 days after delivery of the notice of appeal Section 18(4) provides that -

If a court orders otherwise, as contemplated in subsection (1):

- i. the Court must immediately record its reasons for doing so;
- ii. the aggrieved party has an automatic right of appeal to the highest next court.
- iii. the court hearing such an appeal must deal with it as a matter of extreme urgency; and

- iv. such order will be automatically suspended, pending the outcome of such appeal.

[13] Section 18(5) provides that an appeal or leave to appeal a decision becomes a subject of the application for leave of an appeal, as soon as the application for leave to appeal or notice of appeal is launched with the Registrar in terms of rules.

[14] As regards the application of the law regarding, leave for appeal. I wish to refer to Section 18(4) and Section 18(5) of the Superior Court Act. The first Respondent has placed reliance of Section 18(4) of the Superior Court Act in terms of which the orders of Millar A.J. Section 18(5) prescribes that for leave of appeal to be compliant, must be lodged with the Register in terms of the Rules governing such appeals.

[15] In addition to this, the First Respondent's legal representative placed the purported the notice of appeal in terms of section 8(4) onto the court file and thereafter never put prosecuted the appeal.

Acting on the strength of the so-called section 18(4) of the notice of appeal, the First Respondent proceeded with the congress on 24 August 2019.

[16] Despite being granted leave to appeal against the main order of 12 July 2019, the First Respondent only filed the notice of appeal in November 2019. The record was due within three months thereof, however, the Registrar granted him an indulgence to file the same by no later than 1 April 2020 which he failed to do. The effect of this delay is that the appeal lapsed and the orders of Millar were no longer and it says in the suspension.

[17] The First Respondent only filed the record on 17 July 2020 together with an application for leave to reinstate the appeal.

[18] The application for leave to reinstate the appeal together with the appeal (if reinstatement was granted) was set down for hearing on 3 November 2020.

[19] However, on the 30th of October 2020, the Presiding Judge through the Registrar's office addressed a letter in which he requested the parties to address the question of mootness because the impugned clause relied upon the First Respondent in the main proceedings to invoke the decree had been amended. The parties would consider the question for the purpose of addressing the court if they disagreed with the observation of the presiding officer or if they agreed (as they did in this case) would approach the court for an order removing the matter from the roll.

[20] On November 2020, the legal representative of both the Applicant herein in the First Respondent father trying to practice note, when it was agreed that the matter will be removed from the roll. This was because both parties were in agreement that the impugned clause in the PSE Constitution had been amended and therefore not raising a dispute between the parties. In light of this agreement, the removal of the appeal from the roll, it is clear that the Millar orders remain effective and the First Respondent decrees, to the extent that they relied on the clause of the PAC Constitution that had been amended, had no effect.

[21] The Effect of Section 18(4) on the question of whether the appeal was properly noted.

In terms of Rule 49 1(a) when leave to appeal is required and it has been requested at the time of the judgement. On the above question of whether section 18(4) had the effect of suspension on A.J. Miller orders, the Applicant submits that the starting point is to determine whether there was compliance with section 18(5) of the Superior Court Act (Act 10 of 2013).

[22] He submits that section 18(5) provides that an appeal or leave to appeal a decision becomes as a subject of the application for leave of an appeal, as soon as the application for leave of appeal or notice of appeal is launched with the registrar in terms of the rules.

- [23] On the other hand, the Respondent is of the view that at the time of the Congress, the order is granted by Millar AJ what suspended by the virtue that the noting of appeal in terms of 18(4).
- [24] Applicant submits that the Applicants had nominated that of Messrs MB Tshangana at their offices, Gable Office Park as the address at which service of all notices and documents were to be served. The Applicant's representative further contends that it is not in dispute that the purported notice of appeal in terms of section 18(4) was not served or no attempt was next to serve at the address mentioned. The applicant contends by the Respondent's legal representatives trying to serve on the Applicants legal representatives at court would not be regarded as proper service and this was not served at the physical address.

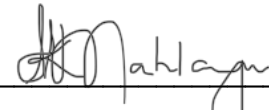
The Applicant indicates further that the appeal was also not served with the registrar, this is proved by the evidence in the form of a letter sent by the registrar where he says "we have checked our register and could not find a matter on appeal for the parties".

- [25] The Applicant has referred to the case of Aymacc CC v Widgerow where Gautschi AJ writing for the Court, where the mandatory steps were outlined in order to comply with the noting of an appeal. The steps were outlined as follows:

In terms of the rules governing the rules governing this appeal, the following ought to have occurred once leave to appeal had been granted;
Within 20 court days after the date upon leave was granted

- [26] In conclusion, the Applicant submits that the purported notice of appeal it is clear that there is no sufficient evidence produced by the Respondent to rebut what the Applicant submitted. I turn agree with the Applicant that there was proper service of appeal served.

- [27] Facts and evidence before the court is that the notice of appeal was only placed on the court file; and the applicant declined the service when the First Respondent's legal representatives attempted to serve, on account that the court an appointed address.
- [28] The Registrar of the court also writes the letter to the First Respondent, attesting him of the absence of the matter in the register of appeals.
- [29] On the balance of evidence, it seems probable that the appeal against A.J. Millar Judgement was not properly filed and such is defective. The argument and grounds by the first respondent that the notice of appeal which he purported to have launched, should have the effect of suspending A.J. Millar Judgement and order cannot be sustained and therefore falls to fail.
- [30] In the circumstances, I declare that:
- i. The election of the First and Second Respondents as the President and the NEC of PAC and any resolution taken at the congress convened by the First Respondent and held at Limpopo, on the 24th and 25th of August 2019 are unlawful and invalid;
 - ii. The NEC of the PAC elected at the conference held on the 29th and the 30th August 2019 at Bloemfontein, to be lawful leadership of the PAC;
 - iii. Directing the Electoral Commission of South Africa to allow the first Applicant through the application to participate in the 2021 local government elections;
 - iv. The first and Second Respondents are to pay for the cost of this application on a scale as between attorney and client;
 - v. The costs to follow results.



Keitumetse Mahlangu
Acting Judge of the High
Court of South Africa
Gauteng Division,
PRETORIA

For the Applicant:

Counsel: Adv D Mtsweni
Instructed by: Tshabangu Attorneys

For the 1st & 2nd Respondents:

Counsel: Adv JE Kruger
Instructed by: Moolman & Pienaar Inc

Date of hearing: 03 May 2021
Date of judgement: 23 August 2021