



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

Case no: **1852 /2023**

In the appeal of:

THE AFRICAN NATIONAL CONGRESS

APPLICANT

and

LEHLOHONOLO MOQOLO

FIRST RESPONDENT

PATRICK MONYAKOANA

SECOND RESPONDENT

MAKOA CHRISTOPHELN LELALA

THIRD RESPONDENT

MAPASEKA MOTHIBI-NKOANE

FOURTH RESPONDENT

CHABELI FRANK RAMPAI

FIFTH RESPONDENT

PUSELETSO LETICIA SELEKE

SIXTH RESPONDENT

MPHO MOKOAKOA

SEVENTH RESPONDENT

JUDGMENT BY:

MOLITSOANE, J

HEARD ON:

23 JUNE 2023

DELIVERED ON:

The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 28 JUNE 2023. The date and time for hand-down is deemed to be 28 June 2023 at 10h00

- [1] On 8 June 2023 after the hearing of the main application, the Respondents requested this court to deliver its judgment in open court. The reason given was that if this court were to find against the Respondents in the main application, then in that case they intended to bring an application for leave to appeal. Subsequently this court confirmed the rule nisi in terms which the respondents were interdicted and restrained from inter alia:

“3.1.1... further acting as Councillors of the Mangaung Metropolitan Municipality;

3.1.2... performing any associated function germane and/or related to the holding of a position of a Councillor of the Mangaung Metropolitan Municipality;

3.1.3... attending the Mangaung Metropolitan Municipality Council scheduled meeting for 14 April 2023, in any capacity whatsoever and to perform any actions associated with the holding of a Council seat at said meeting.”

- [2] After this court had confirmed the rule nisi, true to what the Respondents had intimated during the hearing of the main application, Counsel for the Respondents launched an Application for leave to appeal from the bar. The essence of the application was twofold, namely:

(i) The importance of this case before court; and

(ii) That the case for the Applicants was anchored on clause 25(10) of the ANC Constitution and that this court failed to deal with that issue.

After the hearing of the application for leave to appeal, the Applicant filed supplementary Heads of Arguments. I issued directives and granted the

Respondents the same opportunity if they also wished to file and their Heads of Arguments' were filed on the same day of the directive.

[3] Section 17 of the Superior Court Act 10 of 2013 states:

“Leave to appeal

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[4] Section 17(1) requires that an applicant seeking leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success in the appeal. In *Democratic Alliance v President of the Republic of South Africa and Others*¹ the Full Court held as follows:

“The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, *Van Heerden v Cronwright and Others* 1985(2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word ‘would’ as opposed to ‘might’ serves to emphasise this point. As the Supreme Court of Appeal said in *Smith v S* 2012(1) SACR 567 (SCA) at para 7; ‘More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must

¹ (21424/2020) [2020] ZAGPPHC 326(29 July 2020) paras [4] – [5].

in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[5] The court in *Ramakatsa and Others v African National Congress and Another*² held as follows:

"[10] Turning the focus to the relevant provisions of the Superior Courts Act³ (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice.⁴... I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. ... The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.⁵"

[6] The submission that that this case is so important is underpinned by the fact that there are various cases pending before this court in involving the same parties founded on different causes of actions. It was also reiterated during the application for leave to appeal that the Respondents intend to review the decision to expel them, which forms the basis for the application in this case. The fact that the case is important to a party does not in itself imply that there is a measure that the appeal would arrive at a conclusion different from the trial court. I am not convinced that the Respondents should be granted leave to appeal on this ground. There is in my view no compelling reason to grant the Applicants leave to appeal simply because there are numerous cases pending before the courts in different forms.

[7] The Respondents submit that their application is anchored on the non-compliance of clause 25(10)⁶ of the ANC Constitution, which according to the Respondent this court failed to deal with. As a starting point it is necessary to

² [2021] ZASCA 31(31 March 2021).

³ "5. Section 17(2)(d) Act 10 of 2013."

⁴ "6. *Nova Property Holdings Limited v Cobbett & Others* [2016] ZASCA 63: 2016 (4) SA 317 (SCA) para 8."

⁵ "9. *See Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); *MEC Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 para 17."

⁶ Clause 25(10) of the ANC Constitution provides: "If a REC, RWC or BEC or office bearers of these structures, as the case may be, is satisfied that the institution of disciplinary proceedings is warranted against a member or office bearer of an REC or BEC within its Region or Branch in respect of any misconduct referred to in Rule 27.17 below, it, he or she shall first obtain written approval of the provincial Secretary before commencing with the institution of such disciplinary proceedings,"

confirm that this court was not called upon to decide on the legality or otherwise of the expulsion of the respondents. That function would be the subject of another forum should the Respondents persist with their application for review as it was so intimated during an application for leave to withdraw the counter application and the application for leave to appeal.

- [8] It is in my view clear that the Respondents were well aware that this court could not review the decision to expel them hence they sought to apply to declare same null and void by way of a counter application, which they subsequently withdrew. What was important for this court to adjudicate upon was the status of the Respondents in relation to the Applicant. For the court to determine this, this court had of necessity, inter alia, to decide if there was an expulsion of the Respondents or not. If there was an expulsion whether the appeals filed with the NDC constituted proper appeals and suspended the decision to expel the Respondents. It was not within the jurisdiction of this court, in this application to decide on the lawfulness of the expulsion. In its judgment this court pertinently said the following:

“ [18] At the beginning of this hearing I listened to an application for leave to withdraw the counter application by the Respondents. I will not dwell into the counter application as it is not before me. Of importance for me is that it was submitted that the Respondents intended to, inter alia, review the decision to expel them as members of the Applicant. To my mind, the Respondents seem thus to have accepted that they were expelled. Whether the expulsion was unreasonable or irrational is not an issue before me.”

- [9] It is within this context that the court did not pertinently deal with section 25(10) as its invocation seeks to impugn the Disciplinary proceedings. It has to be borne in mind that the ANC Constitution has its own internal processes of appeal and review set out in clauses 25.35 to 25.42. It is not the case for the Respondents that they have exhausted those internal processes save for the ill-fated appeal filed with the National Disciplinary Committee of Appeal as more fully dealt with in the main judgment. I already, in the main application held that the decision of the Disciplinary Committee was final and binding. The

Respondents can only appeal or review same in terms of the prescripts of the ANC Constitution.

[10] Against this backdrop, I cannot, however, ignore the compelling argument by the Respondents in the supplementary Heads of Arguments that in spite of the expulsion, the Respondents continued to serve as Councillors of the Applicant for about ten months, specifically from April 2022 until April 2023. The Respondents argue that the Applicants must have also viewed the expulsion on this basis as null and void. On this basis alone, I am of the view that another court may come to a different finding and I accordingly make the following order:

ORDER

1. The Respondents are granted leave to appeal the whole judgment of this court granted on 23 June 2023 to the Full Court of this Division;
2. The costs shall be costs in the Appeal

P. E. MOLITSOANE, J

On behalf of the Applicant: Adv. S Grobler SC

Appearing with: Adv. T Ngubeni

Instructed by SMO Seobe Attorneys
BLOEMFONTEIN

On behalf of the Respondents: Adv. J.G Gilliland
Instructed by Noordmans Attorneys
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