

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

NOT REPORTABLE

Case no: EL531/2020

In the matter between:

ONDELA SOKOMANI

First Applicant

ANELISA SONGQUMASE

Second Applicant

FUNDISWA SIZANI

Third Applicant

LUSAPHO COTO

Fourth Applicant

XOLANI LOBESE

Fifth Applicant

and

THE AFRICAN NATIONAL CONGRESS

First Respondent

NATIONAL EXECUTIVE COMMITTEE

Second Respondent

EASTERN CAPE PROVINCIAL TASK TEAM (ANC)

Third Respondent

DR WB RUBUSANA REGIONAL TASK TEAM (ANC)

Fourth Respondent

JUDGMENT

Govindjee J

Background

[1] The applicants launched an urgent application to interdict an ANC regional conference, which had been scheduled for 8 and 9 April 2022. They claimed that they had been excluded from participation, affecting their rights to political freedom, due to various irregularities. In addition to non-existing and deceased ANC members reflecting as having participated in Branch General Meetings (BGMs), it was alleged that an 'out of term' Provincial Executive Committee (PEC) had disbanded various Branch Executive Committees (BECs) and appointed new Branch Task Teams (BTTs) to lead the branches, without due process having been followed. It was also alleged that there had been non-compliance with the ANC Guidelines for Branch, Regional and Provincial Conferences ('the Guidelines'), as adopted by the National Executive Committee (NEC) of the party. The application was opposed by the third and fourth respondents ('the respondents').

[2] On 7 April 2022, this Court (per Mjoli J) issued a rule *nisi* calling upon the respondents to show cause why the following orders should not be confirmed:

- That the Branch Biennial General Meetings (BBGMs) and BGMs conducted during the months of February and March 2022 in the Dr WB Rubusana region of the ANC were conducted in an unconstitutional and unlawful manner.
- That the decisions, resolutions and outcomes of the above meetings ('the branch meetings') are void.

[3] The ANC Regional Conference of the Dr WB Rubusana region, scheduled to commence on 8 April 2022, was also interdicted pending the finalisation of all internal appeals and subject to the ANC ensuring compliance with its own constitution 'and the resolution of the cause of complaint by the applicants'. The third and fourth respondents were ordered to pay the costs of the application, including the costs of two counsel.

[4] The key issues to be determined are whether the rule *nisi* issued on 7 April 2022 should be confirmed, or whether the matter is moot given that internal appeals

have been concluded and considering that the interdicted conference was subsequently convened, and what costs order should be made.

[5] The applicants were, respectively, members in good standing of Wards 22, 16, 46, 40 and 34 of the ANC in the Dr WB Rubusana Region. In addition to raising various irregularities in their own branches,¹ the applicants purported to challenge the unlawful disbandment of branch executive committee structures of the party in Wards 42, 11, 12, 17, 20, 22, 26, 34 and 46. The basis for this challenge is that it was an 'out of term' PEC that resolved to disband the affected branches during January 2022. No response to appeals lodged with the NEC had been received and the dissolutions were unnecessary. BTTs were appointed in place of the dissolved BECs without due process and communication and held branch meetings without ensuring proper communication with members. The papers make it clear that the original application was motivated by the need to interdict the Regional Conference scheduled for 8 April 2022 'pending consideration of the appeal processes by the NEC on the dissolution of the respective branches'.

[6] Having unsuccessfully opposed the granting of the rule *nisi*, the respondents filed an additional answering affidavit seeking to demonstrate that the interim order was not capable of confirmation. They argued that the matter should be confined to those branches whose members were before the court as applicants² and in the context of appeals relevant to the interim interdict having been adjudicated to finality. The answering affidavit and supporting documentation reflect decisions of the Provincial Dispute Resolution Committee (PDRC) and, in some cases, the National Dispute Resolution Committee (NDRC) in addressing various appeals lodged in respect of irregularities. In two instances (wards 16 and 22), the internal process resulted in re-runs being ordered by the NDRC, nullifying the earlier meetings against which appeals were lodged.³ The interdicted regional conference had, by

¹ The complaints relate mainly to the names of people appearing in branch meeting scanner reports when they did not attend or could not have attended because they were incarcerated or deceased.

² In sequence, the branches implicated are wards 11, 12, 16, 17, 20, 22, 26, 34, 40, 42 and 46.

³ In the case of ward 16, the reasons provided by the NDRC included membership fraud and glaring discrepancies in the scanner report. The branch was ordered to rerun the meeting with a Provincial Task Team member deployed to oversee the meeting. In the case of ward 22, the NDRC noted that sworn affidavits had been provided by members whose identification documents had been scanned despite their non-attendance at the meeting, so that a rerun was ordered.

time the opposing affidavit was filed on 26 May 2022, already been convened, once the various internal appeals had been finalised.

[7] Only limited replying affidavits were filed in response, relating to two disputed scanner reports from March 2022. Based on these affidavits and the attached supporting documentation, it may be accepted that the scanner reports for wards 46 and 34 reflected, respectively, one and two deceased erstwhile members of the ANC appear in the record of persons in attendance at these branch meetings. It has also been established that at least certain branch meetings which took place during February and March 2022 were beset by irregularities.⁴ Whether a case was properly made out to declare all the branch meetings conducted during those months as unconstitutional and unlawful, and whether the rule should be confirmed given subsequent events, are separate matters. The applicants argued that the irregularities experienced constitute violations of the ANC constitution and the Guidelines, which constitute the terms of the agreement between the ANC and its members, so that the applicants are entitled to the declaratory order sought. The respondents submitted that the meetings in question were quorate and that even if these irregularities had occurred, they did not adversely influence the standing and outcomes of the meetings in issue, and that the internal appeal processes had effectively discharged the interim interdict, so that these issues are moot.

The ANC Constitution and Guidelines

[8] The legal nature of a political party is accepted as being that of an association. As a voluntary association is founded on the basis of mutual agreement, the relationship between a political party and its members is governed by the express or implied terms of the agreement. The constitution of a voluntary association, together with all the rules or regulations passed in terms thereof, collectively form the agreement entered into by that association's members and

⁴ On 24 February 2022, for example, the Provincial Secretary of the party advised that a PEC Investigative Team would conduct a process in respect of reported violent incidents in wards 1, 2, 6, 22 and 42, yet no report was forthcoming. See *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 ('*Ramakatsa 2*') para 16, where attendance register irregularities were found to render a BGM unlawful.

serve as the internal statute of that association.⁵ It is a contract concluded between its members that binds them and there is a duty on the association to comply with the provisions of its own constitution.⁶

[9] The ANC's constitution together with its rules constitute the terms of the agreement entered into by its members, who each have a unique contractual relationship with the party.⁷ The relationship is distinct given that the party constitution is the instrument that gives effect to the political rights entrenched in s 19 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). A breach of the rules of a political party may therefore give rise to a claim founded on the infringement of the underlying constitutional right.⁸

[10] The ANC is therefore obliged to act in accordance with its own constitution, based on the broader citizens' constitutional right to participate in the activities of a political party.⁹ How that participation right is exercised is unspecified in the Constitution and left to political parties to regulate. As the Constitutional Court held in *Ramakatsa 1*:

'Therefore, these parties are best placed to determine how members would participate in internal activities. The various Constitutions of political parties are instruments which facilitate and regulate participation by members in the activities of a political party.'

[11] In *Mgabadeli and Others v African National Congress and Others*, a full bench of this Division confirmed the principle of general non-interference with the internal arrangements and management of a political party acting within the terms of its constitution.¹⁰ Participation in the activities of a political party are regulated by parties

⁵ *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645B-C; *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 440F-G.

⁶ *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) ('*Ramakatsa 1*') para 16.

⁷ *Ramakatsa 1* ibid fn 6 para 79.

⁸ *Mgabadeli and Others v African National Congress and Others* [2017] ZAECHC 131 ('*Mgabadeli*') para 15.

⁹ *Ramakatsa 1* op cit fn 6 para 16.

¹⁰ *Mgabadeli* op cit fn 8 para 16.

themselves, who are best placed to regulate their own internal affairs. As to dispute resolution, the court held as follows:¹¹

‘Finally, by reason of the underlying contractual nature of an association, it is open to the parties to agree on an internal mechanism to deal with disputes. Judicial intervention may as a result be deferred or suspended until a member has pursued all extrajudicial remedies that may be available. Where the rules of an association provide for an internal remedy a member in the normal course of events first exhausts the remedy before seeking relief in a court of law. This is however not an absolute rule. As in the case of any other contract, the existence of an internal or domestic remedy, its content and effect is to be determined on a proper construction of the terms of the constitution of the association.’

[12] When it is necessary to interpret a constitution, it must be interpreted in accordance with the ordinary rules of construction that apply to contracts in general. This requires giving effect to the plain language of the document, objectively ascertained within its context.¹² In the course of interpretation, preference should be given to a sensible meaning over ‘one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document’.¹³

[13] The ANC constitution provides that the PEC is the highest organ of the ANC in a province between provincial conferences. It is empowered to ‘suspend, dissolve and re-launch Branch Executive Committees [BECs] and Regional Executive Committees [RECs] where necessary, subject to any directives from the Provincial Conference.’ The PEC must appoint an interim structure during the period of suspension or dissolution to fulfil the functions of the BEC or REC, as the case may be. A BEC or a REC which has been suspended or dissolved enjoys a right of appeal to the NEC in terms of the ANC constitution.¹⁴

¹¹ Ibid para 17 (footnotes omitted).

¹² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

¹³ See *National Federated Chamber of Commerce and Industry and Others v Mkhize and Others* [2014] ZASCA 177; [2015] 1 All SA 393 para 21.

¹⁴ Clause 19.9.12 of the ANC constitution.

[14] The Guidelines, adopted in terms of rule 26 of the ANC constitution, address branch dispute resolution processes, and provide for the BEC to consider complaints and deliver verdicts in respect of a range of matters, including disputes about membership lists and attendance registers, and about matters relating to the conduct, proceedings or constitutionality of BGMs or BBGMs.¹⁵ The Guidelines state further that if a member is not satisfied by the resolution of the dispute by the BEC, the member can appeal in writing to the PDRC. The final body of appeal on such disputes is the NDRC.¹⁶

[15] As indicated, the founding papers, in addition to their focus on branch meeting irregularities, also reflect substantive and procedural complaints about PEC decisions to disband various branches, the applicants confirming that the affected branches had exercised their right to appeal to the NEC and arguing that their constitutional rights had been violated by the NEC's failure to respond. Both of these issues (branch irregularities and disbandment) require consideration.

The legal position

[16] It must be emphasised that the present application concerns confirmation of a rule *nisi*. The rule has been defined as a court order issued at the instance of an applicant calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. The decree, rule or order does not take effect unless the person affected fails within the stated time to appear and show cause why it should not take effect.¹⁷ If cause is shown on the return day, the court must decide on the evidence adduced, and according to the circumstances, either discharge the rule, or make it absolute, or vary it, or make such order thereon as seems just.¹⁸

¹⁵ Clause 7 of the Guidelines.

¹⁶ Clause 7.6 and 7.9 of the Guidelines. Also see Appendix 4 of the ANC constitution on the National Dispute Resolution Committee and the National Dispute Resolution Appeal Committee.

¹⁷ *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg and Others* 1995 (4) SA 1 (A) at 18-19.

¹⁸ GB Van Zyl *The Theory of the Judicial Practice of South Africa* (4th Ed) (Juta) 401. The court is not bound by the exact terms of the rule *nisi*, but may mould it so as to meet the justice of the case.

[17] Section 172(1)(a) of the Constitution states that, when deciding a constitutional matter within its power, a court ‘must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’.¹⁹ The constitutional issue sought to be raised must arise on the facts of the case before the court.²⁰ This is a unique, constitutionally-created, remedy.²¹ The section does not, however, articulate the circumstances in which a Court should decide a constitutional matter:²²

‘[11] In determining when a Court should decide a constitutional matter, the jurisprudence developed under s 19(1)(a)(iii) will have relevance, as Didcott J pointed out in the *J T Publishing* case. It is, however, also clear from that judgment that the constitutional setting may well introduce considerations different from those that are relevant to the exercise of a Judge’s discretion in terms of s 19(1)(a)(iii).

[12] What is clear is that the High Court erred in approaching the prayer for constitutional invalidity as if it were a prayer for discretionary relief in terms of s 19(1)(a)(iii). The relief was sought in terms of the Constitution itself and not under the Supreme Court Act. It is already settled jurisprudence of this Court that a Court should not ordinarily decide a constitutional issue unless it is necessary to do so. Nor should it ordinarily decide a constitutional issue which is moot. The decision as to whether a Court should decide a constitutional matter remains one governed by the Constitution and its imperatives, not one determined solely by a consideration of the circumstances in which declaratory relief under s 19 of the Supreme Court Act would be granted.’ (Footnotes omitted).

¹⁹ S 172(1)(b) adds that a court ‘may make any order that is just and equitable’.

²⁰ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) para 43.

²¹ *Islamic Unity Convention v Independent Broadcasting Authority and Others* (‘*Islamic Unity Convention*’) 2002 (4) SA 294 (CC) (‘*Islamic Unity Convention*’) para 10. On the differences between the jurisdiction of the High Court to grant declaratory relief and s 172 of the Constitution, also see *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC) paras 55-56. In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) (‘*Rail Commuters*’), the Constitutional Court confirmed, with reference to s 38 of the Constitution, that a declaratory order might also be appropriate where a court has not found conduct to be in conflict with the Constitution: para 106.

²² *Islamic Unity Convention* *ibid* paras 11 and 12. Section 21(1)(c) of the Superior Courts Act, 2013 (Act 10 of 2013) contains similar wording to s 19(1)(a)(iii) of the repealed Supreme Court Act, 1959 (Act 59 of 1959).

[18] Cases in which a ‘bare declaration’ which would have no tangible, concrete result, because the matter involved an academic, abstract or hypothetical scenario, would seemingly not warrant such a declaration.²³ As Didcott J held, with reference to the interim Constitution:

‘Section 98(5) admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration.’

[19] Mootness arises when a matter ‘no longer presents an existing or live controversy’.²⁴ This is because judicial resources should be wielded efficiently and because, in line with the decision in *J T Publishing*, abstract, academic or hypothetical questions should be avoided by the courts. This principle has been repeatedly reaffirmed by the Constitutional Court.²⁵

[20] Nonetheless, mootness is not always an absolute bar to the justiciability of an issue, and it has been generally accepted that courts have a discretion whether or not to consider it.²⁶ The interests of justice is the key consideration.²⁷ In the context of appeals to the Constitutional Court, the following factors have been held to be potentially relevant in determining whether the interests of justice require a decision in a matter no longer presenting live issues:²⁸

²³ *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* (‘*J T Publishing*’) 1997 (3) SA 514 (CC) para 15. Also see *Islamic Unity Convention* *ibid* para 10.

²⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para 21 and fn 18.

²⁵ See, for example, *Director-General Department of Home Affairs and Another v Mukhamadiva* [2013] ZACC 47 paras 33-37, where Moseneke DCJ traced the development of this position.

²⁶ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) (‘*Langeberg Municipality*’) para 9; *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) para 32; Also see *Ramuhovhi and Another v President of the Republic of South Africa and Others* 2016 (6) SA 210 (LT) para 19.

²⁷ See *Van Wyk v Unitas Hospital and Another* (Open Democratic Advice Centre as *Amicus Curiae*) 2008 (2) SA 472 (CC); para 29; In the context of decisions of the ANC, see *Motswana and Others v African National Congress and Others* [2019] ZAGPJHC 4 para 19.

²⁸ *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) para 32; *Langeberg Municipality* *op cit* fn 26 para 11.

- the nature and extent of the practical effect that any possible order might have;
- the importance of the issue, including the public importance of an otherwise moot issue;²⁹
- the complexity of the issue;
- the fullness or otherwise of the argument advanced; and
- resolving disputes between different courts.

[21] Mootness is likely to be a bar to relief where the constitutional issue is not merely moot as between the parties but is also moot relative to society at large, and no considerations of compelling public interest require the court to reach a decision.³⁰ Such considerations have also been referenced, in considering the issue of mootness, by full benches of this Division, also when sitting as courts of first instance.³¹

[22] More recently, in *Minister of Justice and Others v Estate Stransham-Ford*,³² ('Stransham-Ford') the SCA held that constitutional issues only arise for decision where, on the facts of a particular case, it is necessary to decide the constitutional issue. Courts should avoid dealing with a situation where events subsequent to the commencement of litigation resulted in there no longer being an issue for

²⁹ *Director-General Department of Home Affairs and Another v Mukhamadiva* [2013] ZACC 47 para 40.

³⁰ *President of the Ordinary Court Martial NO v Freedom of Expression Institute* 1999 (4) SA 682 (CC) para 16.

³¹ *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG) para 59; *Malawu v MEC for Cooperative Governance and Traditional Affairs, Eastern Cape and Another* [2022] ZAECMKHC 27 para 42. Also see the remarks of the court in *The Fonarun Naree Trustees, Copenship Bulkors A/S (In Liquidation) and Others v Afri Grain Marketing (Pty) Ltd and Others* 2020 (4) SA 188 (GJ) para 21.

³² *Minister of Justice and Others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA) ('Stransham-Ford') paras 21-27.

determination.³³ The SCA added that the discretion to hear moot matters in the interests of justice was reserved by the Constitutional Court to cases where an order would have a practical impact on the future conduct of one or both of the parties to the litigation.³⁴ The SCA (and other appeal courts) enjoy a similar jurisdiction in terms of s 16(2)(a) of the Superior Courts Act, 2013.³⁵ But courts of first instance should take heed. According to Wallis JA:³⁶

‘In any event, I do not accept that it is open to courts of first instance to make orders on causes of action that have been extinguished, merely because they think that their decision will have broader societal implications. There must be many areas of the law of public interest where a judge may think that it would be helpful to have clarification but, unless the occasion arises in litigation that is properly before the court, it is not open to a judge to undertake that task.’

[23] The difference between the exercise of an appeal court’s jurisdiction in dealing with moot issues and the role of this Court was explained as follows:³⁷

‘When a court of appeal addresses issues that were properly determined by a first-instance court, and determines them afresh because they raise issues of public importance, it is always mindful that otherwise under our system of precedent the judgment at first instance will affect the conduct of officials and influence other courts when confronting similar issues...The appeal court’s jurisdiction was exercise because “a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required”. The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination.’

³³ The SCA appeared to confine consideration of the term ‘mootness’ to instances where events overtake matters after judgment has been delivered, so that further consideration of the case by way of appeal would not produce a practically effective judgment. The situation where a cause of action ceased to exist before judgment in the court of first instance was distinguished on the basis that there was then no longer a claim before the court for its adjudication: para 26.

³⁴ *Stransham-Ford* op cit fn 32 para 23.

³⁵ Act 10 of 2013.

³⁶ *Stransham-Ford* op cit fn 32 para 24. Cf *J and Another v Minister of Home Affairs and Another* [2023] ZAEQBHC 1 para 20.

³⁷ *Stransham-Ford* op cit fn 32 para 25 (references omitted).

Analysis

[24] This matter concerns the confirmation of the rule *nisi* issued on 7 April 2022. The rule is framed in two parts. The first relates to declaratory relief involving unconstitutional and unlawful conduct at ANC BGMs and BBGMs conducted during February and March 2022 in the Dr WB Rubusana region. The second part follows on from the first, holding that the decisions, resolutions and outcomes of the meetings held during February and March 2022 are void. Following the founding papers, the ‘unconstitutional and unlawful’ conduct alleged may be classified under two headings: irregularities in meetings and disbandment of the BECs.

[25] It is immediately apparent that the rule is couched in extremely wide terms. The only sensible interpretation of the rule is to read both parts to include all ANC BGMs and BBGMs conducted during the months of February and March 2022 in the Dr WB Rubusana region. The difficulty with this is that the applicants were members of a limited number of wards (22, 16, 46, 40 and 34). The application was launched ‘in our capacity as the leaders of the disbanded branch executive committee structures of the ANC, viz Ward 42, 11, 12, 17, 20, 22, 26, 34 and 46’. The case the respondents were required to meet, from the outset, was restricted to issues with these branches (in particular, disbandment and specified irregularities / non-compliance with the Guidelines in relation to branch meetings).³⁸

[26] I find no basis on the papers to confirm a rule relating to other ANC BGMs and BBGMs in the region that might have been conducted during February and March 2022. The mere fact that the first replying affidavit indicates that the membership statistics and data system of the ANC is not linked to the Department of Home Affairs neither makes out the case for systemic irregularities nor supports confirmation of the rule as constructed. The arguments ignore the reality that there may also be various other approaches to negating the fraudulent use of identification documents by people seeking to participate in branch meetings. In addition, what occurred at other meetings in the region during February and March 2022 was not

³⁸ On the importance of accuracy of pleadings and the need to hold parties to their pleadings in such matters, see *SATAWU v Garvas and Others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)* 2012 (8) BCLR 840 (CC) paras 113, 114.

placed before this court. Nevertheless, I accept that it remains possible, in principle, to confirm the rule in a varied, more restricted form and proceed to consider whether this is appropriate in the circumstances.

[27] The interplay between the ANC's constitution and s 19 of the Constitution has been thoroughly canvassed in the majority judgment in *Ramakatsa* 1. Given that relationship, it must be accepted that this court is seized with a 'constitutional issue' when it considers what transpired at the impugned meetings. This court need not belabour the unquestionable importance of proper participation in the activities of a political party, or reiterate that a breach of the terms of the constitution of a political party now has a direct link with a contravention of a constitutional right. Mr Katz SC urged the court to confirm the declaration of invalidity merely because conduct inconsistent with the Constitution had occurred at certain branch meetings. Based on s 172 of the Constitution, it was argued that such relief was obligatory in the absence of any explanation or justification from the respondents regarding the conduct of those meetings.

[28] The Constitutional Court has confirmed that declaratory orders are flexible remedies which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution and its values.³⁹ Following *Islamic Unity Convention*, however, it is clear that this court is not always obliged to decide a constitutional matter raised on the papers before it. This put paid to the argument that this court is obliged to declare any irregular conduct which occurred at branches unconstitutional and unlawful simply because the conduct occurred and the applicants seek such declaratory relief. In fact, a constitutional issue should not be decided unless it is necessary to do so, which will not ordinarily be the case if the constitutional issue is moot.

[29] Constitutional imperatives must be considered as part of deciding whether the constitutional matter should be decided. Hypothetical, abstract or academic cases where a 'bare declaration' would result in no tangible result would not merit determination. It is common cause that various internal appeal processes were

³⁹ *Rail Commuters* op cit fn 21 at 410F.

pending at the time the application was launched. The applicants' replying affidavit, filed on 5 April 2022, confirms as much in relation to alleged irregularities in branch meetings:

'In any event, the fact of the matter is that no appeal has been convened to determine these issues and the deponent is not the PDRC, as such we seek that the appeal for this branch be convened and a determination be made.'

[30] As indicated, the respondents subsequently provided responses as to the outcome of the various internal appeal processes, which, leaving aside the misplaced claim of systemic irregularities, relate to all the alleged irregularities in the different branches that were referenced in the founding papers. Following the completion of those internal processes, the regional conference was convened. There is nothing on the papers before me to suggest that any live issues or controversies emanating from those matters persist. The events subsequent to the granting of the rule *nisi*, particularly the various internal appeal processes followed, and their outcomes, have altered the landscape so that there is no real issue for determination.⁴⁰ As the Labour Appeal Court has noted in a different context, this is not an unusual occurrence.⁴¹ Reverting to what occurred at the impugned branch meetings, and declaring that conduct to be unconstitutional and unlawful would lack practical effect considering the subsequent events.⁴² If anything, confirming the second part of the rule may cause unnecessary consternation about whether the various subsequent occurrences, including internal appeal outcomes, re-runs and the regional conference itself, should now be rewound. No case for any of those drastic outcomes has been made. The confirmation of the rule based on irregularities at certain branch meetings is now unnecessary given the outcome of the internal appeal processes.

⁴⁰ See *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG) para 47.

⁴¹ *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union and Others* [2011] ZALAC 1; [2011] 5 BLLR 516 (LAC); (2011) 32 ILJ 1686 (LAC) paras 18-20.

⁴² Cf *Ntamo v African National Congress, Regional Executive Committee of the Eastern Cape Province* 2018 JDR 0881 (ECM) para 24.

[31] Following *Stransham-Ford*, as a court of first instance, that appears to be the end of the matter and there is no discretion to nevertheless proceed in the interests of justice, or because an issue of public importance has been raised, where there is no live issue for determination. The various cases cited by the applicants deal with the exercise of a discretion in appeal cases and are distinguishable.⁴³ I might add that even had I applied the factors traditionally considered by appeal courts in deciding whether the interests of justice require a decision, my view would have remained the same.

[32] There are different difficulties in respect of confirming the rule based on the issues raised in respect of the disbandment of certain branches. It appears from the papers that appeals against the dissolution of BECs were submitted to the NEC in terms of the ANC constitution, seemingly without response. One question is whether entering the merits of this aspect of the case is appropriate absent the NEC's response. The timing of a constitutional challenge and the doctrine of ripeness in the context of an ANC provincial conference and the duty to exhaust an internal remedy was carefully analysed in *Mgabadeli*.⁴⁴ Applying the principles confirmed in that decision, I am unconvinced that this dimension of the present application remains a 'real, earnest, and vital controversy between the litigants' given the flow of subsequent events. In particular, given that the Regional Conference has been held some time ago, the matter would appear to be of academic interest only. I do not consider the circumstances to warrant the exercise of a discretion to nevertheless proceed to address the merits in relation to a matter to be determined by the NEC.⁴⁵

[33] The outcome would remain unchanged even if this court were to accept that the NEC's failure to respond should be treated as a final position to refuse the appeal.⁴⁶ I hasten to add that this was not the applicants' argument. The respondents second answering affidavit took the point that any appeal to the NEC in respect of a dissolution would not return the affected BECs to office, so that the BTTs were within their rights to proceed to convene the various meetings that

⁴³ See, for example, *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) para 31.

⁴⁴ *Mgabadeli* op cit fn 8 para 17 and following.

⁴⁵ See *Mgabadeli* op cit fn 8 para 34.

⁴⁶ See *Ramakatsa 2* op cit fn 4 para 28.

followed, pending any decision by the NEC to overturn the dissolution. This averment was left unchallenged in reply and in argument and must be accepted as reflecting the correct position, so that the rule *nisi* cannot be confirmed based on reasons related to disbandment.

[34] I am in any event also unconvinced by the applicants' arguments on the merits related to the dissolution of the BECs, given the facts at hand. It is common cause that the COVID-19 pandemic resulted in the NEC postponing all conferences, and that the Secretary-General of the party mandated that all ANC structures should not be disbanded based (only) on the fact that the date by which they were to hold a conference was overdue. It may be accepted that this proclamation effectively postponed provincial and regional conferences, as well as branch meetings. The directive cannot be interpreted to have placed an absolute moratorium on disbandment of branches.

[35] The position changed during January 2022 when structures were advised to ensure that regional and provincial conferences should be finalised by the end of March 2022. As the applicants conceded in reply, the PEC is empowered to suspend, dissolve and re-launch BECs where necessary, subject to any directives from the Provincial Conference.⁴⁷ The PEC must then appoint an interim structure during the period of suspension or dissolution to fulfil the functions of the BEC.⁴⁸ The founding affidavit, while complaining about the appointment of BTTs to substitute the functions of the BECs in existence at the time, focused on the failure of BTTs to notify members of meetings and the subsequent irregularities discovered in relation to those meetings. In reply, the applicants accepted that the PEC has the power to disband a BEC but questioned only whether, given a directive from the Secretary-General not to disband branches, it was open for the PEC to do so without consultation with the REC.

[36] The PEC in office at the time resolved to disband various branches, even though there may have been internal consternation with that decision. There is

⁴⁷ Clause 19.9.12.2 of the ANC constitution.

⁴⁸ Clause 19.9.12.3 of the ANC constitution.

nothing on the papers to suggest that the NEC had exercised its power, in terms of clause 12.2.4 of the ANC constitution, to suspend or dissolve the PEC prior to the time the PEC exercised this power, or that it had been automatically dissolved through the passing of time. In the circumstances, the respondents' averment that the repository of the power to disband the BECs exercised this power must be accepted.

[37] As for the reasons for the disbandment, both the first and second answering affidavits make repeated reference to various BECs having been dysfunctional at the time they were dissolved. The implication is that dissolution was perceived to be necessary by the PEC. Procedurally, the power to dissolve branches was never delegated to the REC and a basis for a more complete form of consultation and notification of disbandment than that which occurred has not been established.⁴⁹ The dissolutions, and various related matters, were discussed with the affected BECs. Applying *Plascon-Evans*, these answers stand on the papers and must be preferred to the arguments to the contrary. BTTs were then put in place and fulfilled the functions of the BECs.⁵⁰ The answering papers add that the PTT, once in office, ratified those decisions, and that the same protocol would be followed in cases where the term of office of a REC or BEC ended without a regional conference or BBGM being called, averments left unchallenged in reply. To the extent that this remains a relevant consideration, I am not satisfied that the respondents' version as to ratification can safely be rejected on the papers.

[38] The rule must be discharged for all these reasons.

[39] As for costs, the applicants were successful in obtaining a costs order against the respondents when the rule *nisi* and interdict was granted in their favour. Various subsequent postponement orders were granted with costs to be costs in the cause. The rule *nisi* was confirmed by Stretch J on 4 October 2022, with costs following the

⁴⁹ The erstwhile secretary of the REC in the region confirms that he was consulted on behalf of the REC whenever the PEC dissolved branches in the region, that he, representing the REC, 'was always aware and participated in what was happening'. Also see clause 21.10 of the ANC constitution: 'The powers of the REC are those as may be delegated to it by the PEC. In addition, the REC may, subject to the directions and instructions of the PEC, exercise the following powers ...'

⁵⁰ See *Ntamo* op cit fn 42 para 33.

result, but that order was subsequently rescinded, with no order as to costs, on 7 October 2022. The question is whether the usual order in respect of the costs of proceedings subsequent to the granting of the rule and interdict, should follow, so that the applicants are saddled with a costs order.

[40] In *Ramakatsa 1*, the majority of the court considered whether the appellants, who had been substantially successful in their application for leave to appeal directly to the Constitutional Court, should obtain their costs following the usual approach, and because they had been compelled to approach the court to vindicate constitutional rights. The relevant part of the judgment reads as follows:⁵¹

‘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.’

[41] The awarding of costs is a discretionary matter, to be determined after careful consideration of the proceedings as a whole. While the applicants have been unsuccessful in obtaining confirmation of the rule, these proceedings involved the continuation of proceedings centred around a constitutional issue. I am cognisant of the practice in constitutional-related litigation that an unsuccessful litigant ought not to be ordered to pay costs. This is primarily due to the chilling effect such an order may have on future litigants seeking to vindicate constitutional rights, and because constitutional litigation, irrespective of outcome, often transcends the resolution of the dispute between the parties and has a wider impact on the rights of similarly

⁵¹ See *Ramakatsa 1* op cit fn 6 para 127. Also see *Dube and Others v Zikalala and Others* [2017] 4 All SA365 (KZP) paras 160-163.

situated persons.⁵² Despite the outcome, I am satisfied that genuine and substantive issues were raised in a proper manner when the applicants sought confirmation of the rule. To that consideration may be added the sentiments expressed in *Ramakatsa 1* about disputes that emanate from power struggles within a political party, and the need to move towards the healing of rifts, as well as the concern regarding the appropriateness of a costs order against the personal estates of party members. In these circumstances, I am of the view that each party should bear their own costs.

Order

1. The application is dismissed.
2. Each party is to pay its own costs.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 28 October 2022

Delivered: 03 February 2023

Appearances:

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⁵² See *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3 at para 138 and following.

Unit A

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