

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2021/23795

(1)	REPORTABLE: YES/ <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES/ <u>NO</u>
(3)	REVISED. <u>NO</u> ✓
	
SIGNATURE	
DATE: 13 September 2021	

In the matter between:

ELIAS SEKGOBELO MAGASHULE

Applicant

and

CYRIL RAMAPHOSA

First Respondent

JESSIE DUARTE

Second Respondent

AFRICAN NATIONAL CONGRESS

Third Respondent

Summary: Application for leave to appeal – test for leave to appeal reaffirmed.

Condonation – the applicant contended that the condonation by the respondents ought not to have been granted because they did not comply with the time frames set out in the Notice of Motion – condonation granted in the interests of justice – no prejudice resulting from the delay – no prospects that the appeal court would find otherwise.

Bias – perceived and actual bias – test for bias restated – the court having considered all the facts properly before it – accusation by the applicant of actual and perceived bias by the court not substantiated.

Precautionary suspension – no reasonable prospects of success that the appeal court would find that precautionary suspension attracts the application the *audi alteram partem* rule – no prospect of success that the appeal court would find that *au*, in the circumstances, was not complied with.

Power to suspend – no prospects of success that the appeal court would find that the Deputy Secretary General did not have power to suspend the applicant under Rule 25.70 read with Rule 16.9 of the ANC constitution.

NEC Resolution – no prospects of success that the appeal court would find that the NEC's step aside resolution narrowed down or amended the National Conference resolution.

Suspension of first respondent – no prospect that appeal court would find that applicant had the authority to issue letter of suspension.

Held – application for leave to appeal dismissed with costs.

JUDGMENT

KOLLAPEN, WEINER and MOLAHLEHI JJ

Introduction

[1] This is judgment in an application for leave to appeal against the whole of the order and judgment of this Court of the 9 July 2021.¹ The grounds for the application are fully set out in the notice of application for leave to appeal dated 30 July 2021.

[2] The applicant has also filed a supplementary application for leave to appeal, dated 19 August 2021, which relates to the intention of the applicant to seek to admit new evidence not available at the time of the hearing of the main application, in the event of leave to appeal being granted either by this Court or another court. It was not

¹ *Magashule v Ramaphosa and Others* [2021] ZAGPJHC 88; [2021] 3 All SA 887 (GJ).

in dispute that the supplementary application has no bearing on the adjudication of the application for leave to appeal in this Court, and will only arise if the matter is to serve before another court by way of appeal.

[3] In the application for leave to appeal, the applicant relies on both s 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013.

The law

[4] Section 17(1)(a) of the Superior Courts Act provides that leave to appeal may only be given where the court is of the opinion that:-

- ‘(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;’

[5] It is generally accepted that the existing provisions of the Act has brought with it a different and heightened threshold for an applicant to meet in securing the granting of leave to appeal in terms of s 17(1)(a)(i).

[6] In *Mont Chevaux Trust v Tina Goosen & 18 Others*,² the court said the following:-

‘It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cornwright and Others* 1985 2 SA 342 T at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.’

[7] It is accordingly against that bar that the application before us falls to be determined.

² *Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) para 6.

The grounds on which the application is based

[8] The application is advanced on several grounds and includes findings on preliminary issues as well as on the merits of the application. In regard to the preliminary issues, the stance taken is that the Court erred in various respect, which include:-

- (a) The court granting the condonation application of the first respondent;
- (b) The decision in respect of the applicant's application to strike out.
- (c) That the Court demonstrated actual or perceived bias.

Preliminary issues

Condonation

[9] The applicant submitted that the Court erred by granting condonation in respect of the filing of the first respondent's affidavit, and by accepting the second and third respondent's explanation as to why their affidavits were filed after that the date set out in the Notice of Motion.

[10] The application was set down for 1 June 2021. The Notice of Motion and affidavits were served on the respondents on 13 May 2021, calling upon the respondents to file their answering affidavits before 16h00 on 20 May 2021. The applicant contended that the failure to file the affidavits before the deadline was an 'arrogant disregard for the rules of court'. The applicant, however, did not disclose to the Court that on 18 May 2021 and 21 May 2021, the respondents' attorneys had sent letters to the applicant's attorneys detailing some difficulties that they had with the time period, and undertaking to file the answering affidavits by 25 May 2021. There was no response to these letters.

[11] The second and third respondents filed their affidavits on 25 May 2021, presumably assuming that the applicant had no objection thereto, in view of the lack of response. No condonation was necessary until the 25 May 2021 by virtue of the agreement as evidenced by the conduct of the parties. The first respondent filed his

affidavit on 27 May 2021, explaining the difficulties he had encountered in finalising his affidavit. He requested condonation in his affidavit, for the two-day delay (the reasons for the five-day delay already having been explained). Condonation was thus granted – it was only granted where and to the extent that it was sought.

[12] A case management conference was held on 25 May 2021, before the ADJP (as he then was). Dates for the filing of outstanding affidavits and further documents, as well as a date for hearing, were agreed on. The applicant's attorney and counsel did not raise the issue of the delay and/or the necessity for an application for condonation at the meeting.

[13] The applicant relied on *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*,³ What is clear from this authority is that, if the respondent fails to adhere to the time periods set by the applicant, it runs the risk of having a default judgment entered against it. In our view, it does not mean that the time periods are set in stone and cannot be adjusted, depending on the circumstances.

[14] The applicant also referred to *eThekweni Municipality v Ingonyama Trust*,⁴ where the Constitutional Court expressed its displeasure in so far as failure to observe timelines is concerned:-

'The conduct of litigants in failing to observe Rules of this Court is unfortunate and should be brought to a halt. This term alone, in eight of the 13 matters set down for hearing, litigants failed to comply with the time limits in the Rules and directions issued by the Chief Justice....'

[15] The situation in the present matter is distinguishable. There was no failure to observe the Uniform Rules of Court. The applicant's timelines were set out in the Notice of Motion; the respondents' attorneys requested more time; the applicant did not respond to such request; the affidavits were filed five and seven days late. For the applicant to submit that the Court failed to 'even apply the requirement and the test for condonation' and thus committed 'a gross misdirection' which would 'without doubt' be overturned by a higher court is, in our view, an unsound and unwarranted submission.

³ *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A).

⁴ *eThekweni Municipality v Ingonyama Trust* [2013] ZACC 7; 2014 (3) SA 240 (CC) para 26.

[16] The applicant's counsel made the quite extraordinary submission that counsel for the first respondent stated that 'the applicant ought to understand that he cannot dictate timelines to the first respondent as he is the President of South Africa'. This submission is factually wrong; no such statement was made and the Court did not make any such finding.

[17] In *Brummer v Gorfil Brothers Investments (Pty) Ltd*,⁵ the Constitutional Court laid down the standard that applies to the granting of both condonation and leave to appeal. In that case the court said the following:-

'It is appropriate that an application for condonation be considered on the same basis [as an application for leave to appeal] and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.'

[18] In our view, the principles laid down in *Brummer* support this Court's ruling that condonation, where necessary, be granted, in the interests of justice. No prejudice to the applicant resulted as a result of the delay.

[19] The first respondent asked, in his affidavit, that the delay be condoned and the Court did so. We do not believe that another court will find that this Court erred in granting this order.

The application to strike out

[20] The applicant also submitted that this Court grossly misdirected itself in not granting the application to strike out several of the respondents' documents and the first respondent's affidavit in its entirety. We do not find it necessary to repeat the findings made in the judgment. For the reasons stated therein, we believe that the correct order was made.

⁵ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC) para 3.

[21] It is, however, necessary to deal with another incorrect submission made by the applicant. In the heads of argument, the applicant stated that the court order read:-

'The application to strike out is dismissed with costs, including costs of three counsel, which costs are to include the costs of duplicated documents as set out fully in annexure A and B to the notice of motion in terms of Rule 6(15).' [Emphasis added]

[22] He stated further that although the Court held that some of the documents were irrelevant, the Court nevertheless 'found it appropriate to issue a cost order against the aggrieved applicant. A grosser misdirection is very hard to imagine.'

[23] In fact, what the Court actually held in regard to the strike out application was that:-

'The application to strike out is dismissed with costs, including costs of three counsel, which costs are to exclude the costs of duplicated documents as set out fully in annexure A and B to the Notice in terms of Rule 6(15).' [Emphasis added]

[24] The accusation levelled at the Court in this regard is thus not only unwarranted, but untrue. The issue of the documents which the applicant wished to have struck out had no bearing on the matter other than in respect of costs. The Court took this into account and made the order that it did. We are of the view that a higher court would not come to a different conclusion in this regard.

Bias – actual or perceived

[25] The applicant's counsel submitted that the judgment of the Court was 'littered with a plethora of examples which demonstrate deliberate distortion of the facts and the case of the applicant to the benefit of the respondents, all with the aim of justifying the pre-determined outcome by the court'.

[26] The applicant set out, in his heads of argument, various examples, which he submitted showed not only perceived bias, but actual bias, accusing the Court of prejudging issues and, 'ignoring the facts and the relevant background ... for purposes of assisting the respondent in its justification of the approach to the step aside regime.'

[27] The applicant submitted that the Court distorted the facts to produce a pre-determined outcome. This can be nothing other than actual bias and is a serious

matter. Of course, any litigant is entitled to raise it, provided that there is a proper basis to do so.

[28] The examples provided by the applicant, in which this Court is accused of distorting the facts to arrive at a pre-determined outcome include, but are not limited to, the Court:-

- (a) finding that a suspension in terms of the step-aside rule was precautionary and not punitive;
- (b) finding that hearing before the Integrity Commission and the various meetings which the applicant attended, within the ANC as a member, were part of the broader rubric where his right to be heard could be exercised;
- (c) distorting arguments made by the applicant, attributing assertions to him that were not made by him and rejecting his submissions in favour of those of the respondents, without providing reasoning;
- (d) prejudging the issue of the authority of the Deputy Secretary General (the DSG) in the intervention application when that same issue was one for determination in the main application;
- (e) accepting the respondents' assertion that the applicant's suspension was effected in accordance with the ANC constitution;
- (f) accepting, without a factual or legal basis, that the National Conference Resolutions 'do not constitute a rule' and rejecting the applicant's submissions that the step-aside rules were re-engineered for the express purpose of protecting the first respondent;
- (g) 'parachuting its own analysis and gap fillers' to come to the conclusion that the suspension letter (of the first respondent) was invalid when the first respondent made no case whatsoever in this regard;
- (h) committing the gross misdirection in failing to furnish reasons for and/or to even deal with the apparent rejection by the Court of numerous material submissions

advanced by the applicant in the exercise of his rights to have the dispute resolved by a court of law.

[29] The applicant referred to the *President of South Africa v South African Rugby Football Union*,⁶ where the Constitutional Court stated that the reasonable apprehension of bias, not actual bias, was the guiding principle and declared that:-

‘A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.’

[30] The applicant also referred to the Constitutional Court decision in *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd (Seafoods Division Fish Processing)*,⁷ where the court defined impartiality as follows:-

‘Impartiality is that quality of open-minded readiness to persuasion – without unfitting adherence to either party or to the Judge’s own predilections, preconceptions and personal views – that is the keystone of a civilised system of adjudication. Impartiality requires, in short, “a mind open to persuasion by the evidence and the submissions of counsel”; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding.’

[31] The applicant submitted that this Court failed to meet the threshold enunciated by the Constitutional Court in the cases quoted. He contended further that ‘the plethora of factual mistakes articulated above are so unreasonable as to give rise to a conclusion that they were actuated by bias.’

[32] In the context of these proceedings, although asserting actual bias in the heads of argument, the applicant’s counsel, at the hearing, appeared to rest his case on perceived bias. The submissions made in the heads of argument of actual bias (in the form of the distortion of facts to reach a pre-determined outcome) were not supported

⁶ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para 35. See also *S v Le Grange and Others* [2008] ZASCA 102; 2009 (2) SA 434 (SCA) para 21.

⁷ *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing* [2000] ZACC 10; 2000 (3) SA 705 (CC) para 13.

by any evidence to that effect. In essence, it would mean that three judges of this Court sitting together would have collectively:-

- (a) agreed on a pre-determined outcome and then having done so;
- (b) would agree to distort the facts, arguments and conclusions to reach such an outcome.

[33] The accusation of actual bias accompanied by collusive conduct on the part of judicial officers to reach a pre-determined outcome is a gravely serious one to make, and while no one should be precluded from advancing such a complaint, the integrity of the judiciary and the judicial system must require that such allegations be adequately supported when they are so advanced.

[34] The Court thoroughly analysed each material issue and came to a conclusion based upon the facts and the law applicable. The fact that the applicant may disagree with the factual findings of the Court, even if such disagreements are copious, does not lead to the ineluctable conclusion that the Court was biased.

[35] In so far as the charge is made that the Court prejudged an issue, namely on the authority of the DSG of the ANC, there was in fact no prejudgment in the sense described by the applicant. This Court, in the context of adjudicating an intervention application by a party seeking to join the main application, had to consider and deal with a challenge to the authority of the DSG to represent the ANC in those intervention proceedings. The issue of the challenge to the authority of the DSG was necessary in the adjudication of the intervention application and not a prejudgment. It was raised in a different context and it remained open to the applicant to pursue the issue in the context of the main application. This this was indeed so pursued. No reasonable perception of bias on the part of the Court could conceivably arise from that issue which was limited to the intervention application and dealt with in a different context.

[36] The question of bias was dealt with by the Constitutional Court in *S v Basson*,⁸ in dealing with mistakes on the facts by the court. The Constitutional Court stated that, '...to give rise to a reasonable apprehension of bias, it would need to be established

⁸ *S v Basson* 2007 (3) SA 582 (CC).

that *the mistake of fact is so unreasonable on the record that it must have arisen from bias or given rise to a reasonable apprehension of bias.*' [Emphasis added]

[37] In our view, none of the decisions that this Court made on the various factual issues which we decided on were so unreasonable that a perception of, or actual bias, can be shown. The Court was fully entitled to question the applicant's counsel on the submissions being made; this does not lead to a conclusion that we had prejudged an issue. As was stated in *Hamata and another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and other*.⁹

'It is our view that it is not bias *per se* to hold certain tentative views about a matter. It is human nature to have certain *prima facie* views on any subject. A line must be drawn, however, between mere predispositions or attitudes, on the one hand, and pre-judgment of the issues to be decided, on the other.' [Emphasis added.]

[38] There were no political imperatives which influenced our decision, nor did we prejudge the issues before us. We therefore reject the applicant's contentions that we displayed bias, either actual or perceived, and do not believe that a higher court would come to a different conclusion.

Merits

[39] The applicant submitted that the Court erred in the following material respects in its determination of the merits of the dispute:-

In finding that Rule 25.70 is not a rule of discipline

[40] In its judgment the Court considered the rule in relation to its content, objective and relationship with the other provisions of the Constitution of the ANC and, in particular, those that related to disciplinary proceedings. It concluded for the reasons given that it was not a rule of discipline, that it did not attract the measures that would apply to disciplinary hearings (in particular Appendix 3 of the ANC's Constitution) and

⁹ *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* 2000 (4) SA 621 (C) para 67.

further that the rule was not activated or connected to any disciplinary processes within the ANC.

[41] There is in our view no reasonable prospect that another Court will come to different conclusion on this aspect of the application.

In finding that a suspension under Rule 25.70 is 'precautionary' and 'not punitive' and therefore attracts different legal protections and considerations, as well as the question of 'audi'

[42] The applicant contended that this Court erred and misdirected itself in its approach in dealing with the issue of precautionary suspension. The two grounds upon which the judgment is attacked in this regard can be summarised as follows:

- (a) The principle in *Long v South African Breweries (Pty) Ltd*,¹⁰ which this Court applied, is distinguishable on the facts of the present matter. That case dealt with suspension in the context of the employment relationship, and had nothing to do with the rules of natural justice as applicable to voluntary associations such as political parties.
- (b) The correct approach that ought to have been followed was that of *Lewis v Hefer*,¹¹ and *John v Rees*,¹² where it was held that the suspension was punitive and deprived the suspended person of his or her rights.

[43] The above means that the applicant's suspension would amount to expulsion and thus, according to him, attracting the *audi alteram partem* rule.

[44] The applicant's counsel criticised this Court's application of the principle in *Ramakatsa*.¹³ He contended that political parties are regarded as being so important that they do not operate like other voluntary organisations. In this context, according to him, the suspension limited the applicant's right of participation in the political activities of the ANC, which he was entitled to in terms of s 19 of the Constitution.

¹⁰ *Long v South African Breweries (Pty) Ltd and Others* [2019] ZACC 7; (2019) 40 ILJ 965 (CC).

¹¹ *Lewis v Hefer and Others* [1978] 3 All ER 354.

¹² *John v Rees* [1969] 2 All ER 274.

¹³ *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC).

[45] In support of the proposition that *audi* also applied to a precautionary suspension, the applicant's counsel referred us to the case of *Mhlauli v The Minister of the Department of Home Affairs and others NNO*,¹⁴ the decision of the then South Eastern Cape Local Division. The issue, in that case, involved the suspension of a permanent employee of the Department of Home Affairs in terms of the Public Service Act, 21 of 1984 on the charges of misconduct. The suspension was conducted in terms of s 15(1) read with s 16(1) of that Act. Section 15(1) provided for suspension pending a disciplinary inquiry. The consequences of the suspension would, in terms of s 16(1), lead to the cessation of all employee benefits, including the salary. This means that the suspension, in that case, was punitive.

[46] The common features of *Mhlauli* and *Long* are that the suspensions were done in the context of an employment relationship. However, *Long* was decided by the Supreme Court of Appeal and *Mhlauli* by the High Court. This Court was therefore bound to follow *Long*. For this reason, this Court found that the correct approach to follow in dealing with a precautionary suspension was that stated in *Long*. *Mhlauli* dealt with the statutory punitive suspension, whereas the applicant's case involved a precautionary suspension. The present case does not involve a suspension pending a disciplinary inquiry; nor does the applicant suffer the cessation of all employee benefits, including his salary. They remain intact.

[47] The applicant's counsel also referred, in support of the proposition that *audi* applies to precautionary suspension, to the text *Grogan: Employment Rights*.¹⁵ The author in that book draws a distinction between preventative (cautionary) and punitive suspensions in the context of the employment relationship. He deals in detail with the concept of 'precautionary' suspension with reference to several Labour Court and the Labour Appeal Court cases. In distinguishing between preventative and punitive suspensions, the author writes:

'Preventative suspension differs from punitive suspension in that, in the former case, the employee has not been found guilty of an offence; in the latter, the employee has been found guilty and suspension is imposed as a sanction. The procedural requirements for a fair

¹⁴ *Mhlauli v The Minister of the Department of Home Affairs and others NNO* 1992 (3) SA 635 (SE) at 639

¹⁵ J Grogan *Grogan: Employment Rights* 2 ed (2014).

preventative suspension, therefore, differ from those of a punitive suspension. In the latter case, the normal principles subject to all disciplinary penalties apply: the employee must have been given a fair hearing; the employee must have been proven guilty of the offense; and the sanction must be appropriate.¹⁶

[48] In analysing the decision in *MEC for Education, North West Provincial Government v Gradwell*,¹⁷ the author said the following:

'The LAC then turned to the Labour Court's finding that *Gradwell* had not been afforded a hearing before being suspended. It found that the court *a quo* had failed to justify his view that *audi alteram partem* rule applied to precautionary suspension.'¹⁸

[49] The author further said:

'While this might suggest that the requirements of procedural fairness apply to both precautionary and punitive suspension imposed as a disciplinary sanction, the proposition that all suspensions must be procedurally fair, requires qualification. The court pointed out that the requirements of procedural fairness are flexible and ultimately depend on the balancing of a range of factors. In cases of precautionary suspension, a hearing may be attenuated and the requirements of procedural fairness is relaxed because the employee is not deprived of pay, the period of suspension will normally be limited, and because the balance of convenience normally favours the employer.'¹⁹

[50] In dealing with the issue of whether *audi* finds application in suspension cases, this Court found that, "the *audi* rule is part of the rules of natural justice, which is entrenched in our law."²⁰ In relation to the application of the *audi* in precautionary suspensions, it further found that the current legal position as set out in *Long* is that *audi* does not apply in precautionary suspensions.

[51] In light of the above discussion, we are not persuaded that there are reasonable prospects that another court, faced with the same facts and circumstances as those in the present matter, would find otherwise.

¹⁶ Ibid at 143.

¹⁷ *MEC for Education, North West Provincial Government v Gradwell* [2012] ZALAC 8; (2012) 33 ILJ 2033 (LAC).

¹⁸ Grogan (note 15 above) at 165.

¹⁹ Ibid at 166.

²⁰ *Magashule v Ramaphosa* (note 1 above) para 110.

[52] The other complaint of the applicant is the finding of the Court that there was compliance with *audi* if, on the facts and the circumstances of the case, it was to be found that compliance was required.

[53] The applicant contended that the Court erred in failing to recognise that he could not, by participating in the meetings of the NWC, the NEC and the Integrity Commission, be said to have waived his right to *audi*; neither could such participation amount to *audi*. It must be recalled that he undertook to the Integrity Commission that he would stand down, if the NEC required that he do so. This, in our view, is unsustainable because the argument elevates the *audi* to the level of a formalistic and rigid procedure akin to a trial or a disciplinary hearing. As stated in our judgment, *audi* is part of the flexible rules of natural justice.

[54] This Court decided the issue of whether *audi* was satisfied in the context of its flexibility and the facts and the circumstances of the case, after having regard to the evidence properly presented before it. In this respect, the Court took into account the totality of the evidence before it, and concluded that the requirements of *audi* were satisfied. This includes attendance by the applicant of the various meetings of the structures of the ANC, including attendance at the Integrity Commission.

[55] The important aspect of the Court's finding in relation to the meetings attended by the applicant was that, in the context of the flexibility of *audi*, the applicant acquired information about his suspension and had the opportunity to state why he believed that his suspension was inappropriate. We stand by this finding and do not believe that there are reasonable prospects that another court could come to a different conclusion than that of this Court.

In finding that the jurisdictional requirements of Rule 25.70 were met and/or that the power to suspend was ever delegated to the DSG and/or that she derived that power from Rule 16.9 of the ANC Constitution.

[56] The applicant contended that the Court erred in finding that the DSG had the authority to suspend him as the Secretary General of the ANC. According to him, the suspension was a nullity because the DSG had no authority to suspend him. The issue of whether the DSG had the authority to suspend the applicant is fully dealt with in the

judgment. We stand by that finding and do not believe that the appeal court would find otherwise.

[57] The other point raised, was that the DSG failed to exercise her discretion in that she did not show that she had “satisfied” herself that the suspension of the applicant was in the best interest of the ANC. The issue of the applicant’s suspension by the DSG and her power to do so, is also fully dealt with in the judgment. We have not been persuaded that the appeal court is likely, in this regard, to find otherwise.

In misdirecting itself in finding that the applicant’s suspension did not prima facie limit the applicant’s political rights, thereby triggering the duty on the part of the respondents to justify the limitation of such rights.

[58] In its judgment, the Court analysed the provisions of the ANC Constitution and concluded that the participation rights of its members guaranteed by s 19 of the Constitution were properly provided for, particularly if regard was had to Rules 4 and 5 of the ANC Constitution. Beyond that, it found that the ANC was entitled, in terms of its autonomy and its associational rights, to regulate the exercise of those rights. In doing so it must of course comply with its own constitution. This, the Court pointed out, was consistent with the *dicta* in *Ramakatsa* that:-

‘Section 19 of the Constitution does not spell out how members of a political party should exercise the right to participate in the activities of their party. For good reason this is left to political parties themselves to regulate. These activities are internal matters of each political party. Therefore, it is these parties which are best placed to determine how members would participate in internal activities. The constitutions of political parties are the instruments which facilitate and regulate participation by members in the activities of a political party.’²¹

[59] This is precisely the architecture of the Constitution of the ANC. It guarantees, in Rules 4 and 5, the right to participate and then having done so, regulates how the right is to be exercised internally. There is, in our view, no reasonable prospect that another court would come to a different conclusion on this matter.

²¹ *Ramakatsa* (note 13 above) para 73.

NEC Resolution and the complaint that it narrowed/repurposed the NASREC resolution

[60] The applicant contended that the Court erred in concluding that the NEC's, step-aside resolution did not amount to a narrowing down, repurposing or amendment of the resolution of the National Conference. This issue is dealt with fully in the judgment; we stand by the conclusion reached therein and do not believe that an appeal court would find otherwise.

Suspension of the first respondent

[61] The applicant criticised the Court's finding on this issue, stating that the grounds upon which the issue was decided were not those raised by the first respondent. The applicant contended that:-

- (a) he acted on the authority of the NWC;
- (b) he suspended the first respondent in terms of Rule 25.70.

[62] But the applicant did not act on the authority of the NWC; it was never given. And, Rule 25.70 only applies to persons who have been indicted; the first respondent had not been charged with any offence.

[63] The applicant, in his replying affidavit raised a new ground: that in 2018, the NEC delegated to him the power to take all steps necessary or warranted for the due fulfilment of the aims and objectives of the ANC.

[64] Besides this ground being impermissibly raised only in reply:-

- (a) the applicant did not provide any proof that the NEC delegated such powers to him and did not show whether the delegation was still in force;
- (b) he did not have the power to override the decisions of the NEC and the NWC.

[65] Thus, it was unnecessary to traverse the myriad of allegations made by the applicant on the conduct of the NEC, the NWC, the DSG and the first respondent,

which he raised in support of his decision to suspend the first respondent. It was clear that he had no authority to do so. This ground of appeal is also without merit.

[66] It is for these reasons that we conclude that there is no prospect that another court would come to a different conclusion, nor are there any compelling reasons why leave to appeal should be granted.

[67] In the circumstances we make the following order:-

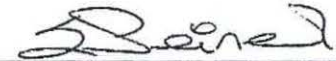
1. The application for leave to appeal is dismissed with costs including the costs of three counsel.



PP

J KOLLAPEN

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG



SE WEINER

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG



PP

E MOLAHLEHI

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 13 September 2021.

Date of hearing: 25 August 2021

Date of judgment: 13 September 2021

Appearances:

Counsel for the applicant: DC Mpofu SC

M Sello SC

M Qofa

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