

In the matter between:

BADANILE NTAMO
MLANDELI NDABETHA

First Applicant
Second Applicant

and

**AFRICAN NATIONAL CONGRESS, REGIONAL EXECUTIVE
COMMITTEE OF THE EASTERN CAPE PROVINCE**
**AFRICAN NATIONAL CONGRESS, EASTERN CAPE
PROVINCIAL EXECUTIVE COMMITTEE**
**AFRICAN NATIONAL CONGRESS, NATIONAL
EXECUTIVE COMMITTEE**
AFRICAN NATIONAL CONGRESS

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

Bloem J.

- [1] On 19 June 2018 the court dismissed the applicants' application for an order that the regional conference of the O R Tambo region of the African National Congress (the ANC) that was held on 16, 17 and 18 October 2015 as well as the decisions taken at that conference be declared unlawful, illegal, unconstitutional and consequently null and void. The court also ordered the applicants to pay the costs of the application. The first applicant (the applicant) now seeks leave to appeal to the Supreme Court of Appeal alternatively the full court of this Division.
- [2] The bases upon which a court may give leave to appeal are set out section 17 (1) of the Superior Courts Act¹. Mr Notyesi, attorney for the applicant, relied on section 17 (1)(a)(i) for the submission that leave to appeal should be given because, so the submission went, an appeal would have a reasonable prospect of success. Although in his notice of application for leave to appeal the applicant seeks leave to appeal on numerous grounds, at the hearing Mr Notyesi relied only on three grounds, namely that the court erred in finding that the task team which was under the leadership of Derek Hanekom (the task team) made decisions

¹ Superior Courts Act, 2013 (Act No. 10 of 2013).

which still stand because they have not been set aside; that the court erred in finding that it does not follow that, because the applicant was not allowed to participate in the branch general meeting, the regional conference and the decisions taken at that conference should also be set aside; and that the court should have ordered each party to pay his or its own costs of the application.

- [3] In his answering affidavit Oscar Mabuyane, the then secretary of the ANC in the Eastern Cape, alleged that the applicants and other aggrieved parties appealed internally to the ANC for the re-run of the branch nomination processes and election of delegates to attend the regional conference. The appeals were based on alleged irregularities at branch level. The ANC appointed the task team to consider the appeals. Mr Mabuyane alleged that the task team “*dismissed all the appeals ... and that the decisions of the ANC on the applicants’ appeals remain extant and will remain extant*” because they had not been challenged.
- [4] Another person who filed an answering affidavit was Mlamli Nonkonyana, the chairperson of the applicant’s branch. He alleged that a branch meeting was called on receipt of the task team’s report. At that meeting the report was explained to those in attendance. Mr Nonkonyana alleged that the applicant was also present in the meeting and “*was fully aware of the Hanekom report which also dismissed their appeal*”. In his replying affidavit the applicant denied that Mr Nonkonyana ever reported the outcome of the task team’s deliberations to him. In the judgment I dealt with the above dispute and accepted the ANC’s version on the basis of the *Plascon-Evans* rule. I accordingly accepted that the applicant became aware of the task team’s report during November 2015.²
- [5] In his replying affidavit the applicant alleged that after he and others were heard by the task team, Mr Hanekom undertook to deliver the outcomes of the appeal, but failed to do so. He furthermore stated firstly, that the court should not have regard to the task team’s report because Mr Hanekom did not file a confirmatory affidavit; secondly, that the report was not given to him and he saw it for the first time on the delivery of Mr Mabuyane’s affidavit; and thirdly, that even “*if our appeal was dismissed by Mr Hanekom and his team, that would not bar*” them from launching the application.
- [6] What emerged from the above is that the ANC, inclusive of the task team,

² See paragraph 28 of the judgment in respect whereof leave to appeal is sought.

accepted that the task team had taken a decision to dismiss the applicant's appeal. Whether or not the task team had the power to take the decision to dismiss his appeal was not an issue for determination. The papers indicate that the task team took the decision to dismiss the applicant's appeal. Until that decision is set aside, it stands. The submission that the task team did not take that decision must therefore fail.

- [7] It is worth mentioning that initially the applicant did not challenge the report on the basis that the task team did not make decisions but merely recommendations. At the hearing on 26 April 2018 Mr Notyesi submitted that the rule, that a decision stands until it is set aside, applies only to administrative action. He submitted then that the task team's decisions did not amount to administrative action.³ Implicit in that submission was an acceptance that the task team made decisions but that those decisions did not amount to administrative action.
- [8] Mr Notyesi relied on paragraph 118 of *Ramakatsa and others v Magashule and others*⁴ for the submission that, because the applicant was not allowed to participate in the branch general meeting, the regional conference and the decisions taken at that conference should be set aside as invalid. My reading of paragraph 118 is that Moseneke DCJ and Jafta J stated no more than that the irregularities summarised in that paragraph (the prevention of ten members from participating in a branch meeting and the exclusion of a branch from the provincial conference) amounted to conduct that was inconsistent with section 19 of the Constitution which obliged the Court, in terms of section 172 of the Constitution, to declare that conduct invalid. In this case the only irregularity that the applicant established was that he was prevented from participating in a branch meeting. That conduct was inconsistent with section 19 of the Constitution, a finding which I made in paragraph 24 of the judgment. It is that conduct which, in terms of section 172 of the Constitution, should be declared invalid.
- [9] Paragraph 118 of *Ramakatsa* does not state that the provincial conference was set aside because of the irregularities referred to in that paragraph. The reason therefor is because the Constitutional Court dealt with additional irregularities. Some of those irregularities involved the violation of the ANC's constitution and others its Membership Audit Guidelines. The irregularities relating to the audit

³ See paragraphs 27 to 30 of the judgment.

⁴ *Ramakatsa and others v Magashule and others* 2013 (2) BCLR 202 (CC).

guidelines impacted directly on the impugned provincial conference because the manipulation of membership numbers in some branches enabled those branches to send delegates to the provincial conference or to send a different number of delegates than they would lawfully be entitled; no audit was conducted in some branches; some branches were not given an opportunity to query the findings of a preliminary audit report or raise objections before the report became final; and in other branches members complained that they were not presented with a preliminary or final audit report before the commencement of the provincial conference which allowed persons to attend purportedly as “delegates” when they were not duly elected by those branches as delegates to the provincial conference. In this application the accreditation and auditing of delegates to the regional conference was not raised as an issue. For the above reasons the present application is accordingly distinguishable from *Ramakatsa*.

- [10] Insofar as the issue of costs is concerned, at the hearing on 26 April 2018 both parties submitted that there was no reason why the general rule, that costs should follow the result, should not apply herein. In the exercise of my discretion as to the payment of costs of the application, I considered, as a factor, the parties’ submission in this regard whereafter I ordered the applicants to pay the costs of the application. Mr Notyesi has now submitted that, because the applicant approached the court in order to vindicate his rights contained in section 19 of the Constitution, I should have ordered each party to pay his or its own costs of the application. That submission was made on the basis of what was stated in paragraphs 126 and 127 of *Ramakatsa*⁵.
- [11] A court of appeal will not readily interfere with the exercise of the discretion of a court of first instance regarding the awarding of costs. It has not been shown that I have not exercised my discretion properly in this regard or that there are good grounds for interfering with the exercise of my discretion. I am of the view that it is unlikely that a court of appeal will interfere with the costs order that I have made. In all the circumstances, I am of the opinion that an appeal would not have a reasonable prospect of success.
- [12] In the result, the application for leave to appeal is dismissed with costs.

⁵ *Ramakatsa and others v Magashule and others* 2013 (2) BCLR 202 (CC).

G H BLOEM

Judge of the High Court

For the first applicant: Mr M Notyesi (attorney) of Mvuso Notyesi Inc,
Mthatha.

For the third and fourth respondents: Adv A M Bodlani, instructed by N Z Mtshabe
Inc, Mthatha.

Date heard: 13 August 2018

Date of delivery of the judgment: 28 August 2018