

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

CASE NO. 5248/2018

In the matter between:

MPUTUMI DUBA

Applicant

And

AFRICAN NATIONAL CONGRESS YOUTH LEAGUE

1st Respondent

NATIONAL EXECUTIVE COMMITTEE

2nd Respondent

COLLEN MAINE

3rd Respondent

DESMOND MOELA

4th Respondent

NJABULO NZUZA

5th Respondent

THANDI MORAKA

6th Respondent

REGGIE NKABINDE

7th Respondent

EASTERN CAPE PROVINCIAL TASK TEAM

8TH Respondent

SANGA MANELI

9th Respondent

NTOMBI MENA

10th Respondent

AVIWE SILO

11th Respondent

SIVE KISWA

12th Respondent

SIPHE MJEY MNYANI

13th Respondent

BONGINKOSI SHETU

14th Respondent

ZIYANDA PENCIL

15th Respondent

NOSIPHIWO POSE

16th Respondent

LUZUKO PATULUKO

17th Respondent

VUSUMZI TSIBAPHI

18th Respondent

YOLANDA MESANI

19th Respondent

ZUKISWA BUNGENI

20th Respondent

THE MASTER OF THE HIGH COURT-SOUTH GAUTENG

21st Respondent

JUDGMENT

JOLWANA J

[1] On 11 October 2018 this court granted an interim interdict postponing this matter to the 18 October 2018 and directed the parties as to the filing of papers and heads of argument. The second to twentieth respondents were interdicted from acting in the name of first respondent or exercising the duties delegated to the twenty first respondent. These respondents were also interdicted from convening further congresses in the name of the first respondent. The interim interdict was to prevail until the hearing of this application to declare unlawful and set aside the Regional Elective Congress of the first respondent which was convened on 24 September 2018.

[2] The respondents did not oppose the application save for the ninth and eleventh respondents. The applicant claims to be a member of the first respondent. It is common cause that the applicant is the coordinator of the first respondent in the Amathole Region of the Eastern Cape having assumed that position on 19 February 2017. The ninth to the twentieth respondents are all cited as purporting to be chairpersons of the first respondent in the Amathole Region. It is not clear why all of them are chairpersons but that is not relevant for the purposes of determining the issues in this application.

Jurisdiction and urgency

[3] At the commencement of the hearing of this matter one of the contentious issues was whether on 11 October 2018 my brother Notshe AJ had dealt with two points *in limine* that had been raised by the ninth and eleventh respondents. Those were urgency and jurisdiction. I indicated that this court has no power to deal with those issues if they were dealt with and ruled upon by Notshe AJ.

[4] Mr Matotie, counsel for the ninth and eleventh respondents submitted that those issues were not dealt with. I must hasten to add that he did not participate during the proceedings of the 11 October 2018 and as I understand it he was not even in court on that day. It was Mr Mfeya who appeared for the ninth and eleventh respondents

who was not on brief on the 18 October 2018 when the matter was heard before me. Mr Malunga who appeared for the applicant on the 11 October and on the 18 October 2018 insisted that those issues were dealt with and ruled upon hence the court issued the court order that it did.

[5] The said order reads as follows:

- “1. The matter is postponed to the 18 October 2018 at 10h00am;
2. The respondents to file the answering affidavit on or before close of business, 12 October 2018;
3. The applicant to file the replying affidavit if any on or before close of business, 15 October 2018;
4. The applicant to file the heads of argument on 16 October 2018;
5. The respondent to file heads of argument on 17 October 2018;
6. Paragraph 9 of the notice of motion shall operate as interim interdict until the 18 October 2018; and
7. Costs of today the 11 October 2018 for the postponement of this matter at the request of the 9th and 11th respondents after their points of law could not stand¹ shall be determined on the 18 October 2018.”

[6] My understanding of this court order especially paragraph 7 is that the points of law raised and dealt with namely, urgency and jurisdiction could not stand. I refused the invitation to hear submissions on jurisdiction and urgency. There are two reasons in the main why I refused to deal with those issues.

[7] The first one is the Superior Courts Act 10 of 2013. Section 21 (1) of the Superior Courts Act provides that:

“A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognisance”

[8] It is simply unfathomable that a court can issue an order granting the interim interdict as it was done in this case without determining the issue of jurisdiction, this in circumstances in which the respondents were in court represented by counsel contending that it has no jurisdiction to entertain the matter.

[9] In my view regardless of whether or not the issue of jurisdiction is raised, the court must even *mero motu*, establish that it does in fact have jurisdiction to entertain

¹ My underlining

the matter before it. If it fails to do so perhaps in circumstances where none of the parties has raised the issue, it runs the risk of acting contrary to the provisions of section 21(1) of the Superior Courts Act by determining an issue that is determinable in another court.

[10] The second reason is that Mr Matotie submitted that in order for the hearing of the matter to proceed he was conceding jurisdiction, as he put it, “tentatively”. I am not sure I understand what he meant by saying he was conceding jurisdiction tentatively. My view is that there is no half way stop to a concession. A point must either be conceded or not conceded.

[11] The applicant relies on two grounds for the relief sought. The first ground is that the first respondent was placed under the administration of the twenty first respondent by the Gauteng High Court. Therefore convening the Amathole Regional Congress without the authority of the twenty first respondent was unlawful. The applicant also contends that the said Regional Congress had procedural deficiencies in that the Constitution of the first respondent and its Guidelines were not adhered to thus rendering the congress unlawful and therefore liable to be set aside by the Court.

[12] It is common cause that the Gauteng Local Division, Johannesburg granted an order on the 26 July 2018 placing the first respondent under final winding-up in the hands of the twenty first respondent. The applicant’s case is that the effect of the first respondent being placed under final winding-up in the hands of the Master is that the first respondent’s office bearers are divested of all their power which is vested in the Master and therefore only the Master has authority over the first respondent’s affairs.

[13] The second ground is that in any event certain procedural irregularities occurred during the congress and therefore the second to the twentieth respondents violated the first respondent’s Constitution and its Guidelines.

[14] In the applicant’s heads of argument his case in this regard is summarised as follows:

“36. The second ground on which the congress is impugned is the failure of the Respondents to follow the procedural requirements for the convening of a lawful congress in terms of the ANC Youth League Constitution and its guidelines, which are as follows;

36.1 Section 10 and 10.2 of the ANCYL Constitution requires that the regional congress must be attended by members of the Regional Task Team who shall have a full speaking and voting rights in the ex-officio capacity.

36.2 It is common cause at paragraph 53 of the applicant's founding affidavit that the applicant was prevented from attending the congress which is an undisputed fact and then effectively the congress was unlawful.

36.3 Regulation 3.1 and 3.2 of the congress guidelines were flouted in that had this congress preparatory committee been constituted the applicant would have chaired such committee, executed the duties as so described in these paragraphs, which role would have encompassed the implementation of regulation 12.3.

36.4 Regulation 7.1 of the congress guidelines was flouted in that no dispute resolution committee was formed to deal with such disputes and receive reports of the resolution of any disputes, as the receiver of this report would have been the applicant."

[15] I will now deal with this matter on the basis of the two grounds relied upon by the applicant *ad seriatim* starting with the alleged procedural and constitutional irregularities.

Applicant's membership of the first respondent

[16] In his founding affidavit the applicant makes a bald averment that he is a member of the first respondent. Beyond this bald averment he does not say what it is that makes him a member of the first respondent. This is important because there is a process provided for in the constitution of the first respondent through which a person becomes a member.

[17] Articles G of the first respondent's constitution provides as follows:

"ARTICLE G MEMBERSHIP

1. Membership of the ANCYL shall be open to all South African youth between the ages of fourteen (14) and thirty-five (35) who accept its policy guidelines, aims and objectives as referred to above.
2. The applications for membership shall be received and considered by the ANCYL Branch Executive Committee, where such exist, or by the Regional Executive Committee if no Branch Executive Committee exists. The Branch Executive Committee and Regional Executive Committee have the power to accept or reject an application for membership. In the event of a rejection the applicant must be informed in writing and shall be made aware of his/her right to appeal to the Provincial Executive Committee within twenty one (21) working days. The appeal should be in writing. The Provincial Executive Committee must finalize the appeal within sixty (60) working days.
3. Young people who qualify for membership in accordance with rules of this section shall be issued with a membership card upon payment of a joining fee. Members

shall be expected to pay Annual Subscription Fees. The national congress or the NEC shall determine the joining fee and annual subscription fees.

4. Members shall join the ANCYL only once, and membership shall lapse when a person turns 35 years old, is expelled following disciplinary proceedings, loses his or her South African citizenship, resigns from the Youth League in writing to the organization, passes away, and/or if after an annual membership audit or review, it is found that such a member has not paid his/her annual subscriptions for up to three (3) months.
5. All members shall on acceptance into the ranks of the ANCYL solemnly declare their readiness and willingness to serve the organization and shall declare as follows:

“I,, solemnly declare that I will abide by the aims and objectives of the ANC Youth League as set out in the Constitution, the Freedom Charter and all other policies adopted from time to time, that I am joining the organization voluntarily, without expectation of material gain, and will participate in the life of the organization as a loyal, active and disciplined member”
6. Dual or multiple memberships by individuals shall be welcome provided the policies and programmes of those organisations to which they belong, are not hostile or contrary to those of the ANCYL.
7. Young women who are members of the ANCYL and over the age of eighteen (18) years shall be obliged to join and play a full and active part in the general political life of the ANC Women’s League.”

[18] It was conceded that the applicant is in fact 37 years old. I do not see how the applicant could remain a member of the first respondent when its constitution says on turning 35 years old his membership shall lapse. The lapsing of membership does not require any process and there is no determination that has to be made. It is self-executing and lapses automatically by operation of law.

[19] In *De Lille v Democratic Alliance and Others*² the full court said:

“[45] The fact that the statements which were uttered by De Lille may have amounted to the expression of an intention to resign, within the meaning of

cl 3.5.1.2, does not however necessarily lead to the conclusion that her membership ceased, as was submitted by the party, either automatically or otherwise. It was contended by the DA that the cessation clause operated automatically and the function of the FLC panel and FedEx was simply to determine whether the facts which triggered the application of the clause existed, and if this was the case, De Lille’s membership ceased retrospectively as a matter of law, to the date when the interview took place.

[46] For the latter proposition reliance was placed on the dictum in *Phenithi v Minister of Education and Others* where the Court concurred with the finding of Van Heerden JA, in *Minister van Onderwys en Kultuur en Andere v Louw*. In the latter case, Louw was a general assistant and in permanent employment at a boarding house of a certain high school in Upington. He failed to report for duty over the period 29 July to 31 August 1992. On 11 September the principal wrote Louw a letter informing him, in essence, that according to the school governing council he had been discharged and that his last day of service was 28 July

² [2008] 3 All SA 684 (WCC)

1992. The principal relied on a provision, namely s 72 of the then Education Affairs Act (House of Assembly) 70 of 1988 which provided that ‘a person – employed in a permanent capacity at a departmental institution and who – (a) is absent from service for a period of more than 30 consecutive days without consent of the Head of Education ... shall, unless the minister directs otherwise, be deemed to have been discharged for misconduct.’ Following unsuccessful negotiations between the parties Louw instituted application proceedings in the High Court, seeking *inter alia* the setting aside of the decision to terminate his services. Van Heerden JA, in reversing the decision of the High Court said:

“The deeming provision [s72(1)] comes into operation if a person in the position of the respondent (i) without the consent of the ‘Head of Education’ (ii) is absent from his service for more than 30 consecutive days. Whether these requirements have been satisfied is objectively determinable. Should a person allege, for example, that he had the necessary consent and that allegation is disputed, the factual dispute is justiciable by a court of law. There is then no question of a review of an administrative decision. Indeed, the coming into operation of the deeming provision is not dependent upon any decision. There is thus no room for reliance on the audi-rule which, in its classic formulation, is applicable when an administrative – and discretionary – decision may detrimentally affect the rights, privileges or liberty of a person.”

[47] The rules which deal with cessation of membership in terms of Clause 3.5 of the party’s constitution are those set out in Part C of the FLC rules. The relevant ones which are applicable in this matter are as follows:

“Rule 2 –As soon as the relevant Provincial Executive or Federal Executive receives prima facie evidence which indicates that a public representative’s membership has ceased by virtue of the provisions of s3.5.1 of the Federal Constitution, then this evidence must be referred to the Chairperson of the FLC.

Rule 3- In the instance where a member publicly declares (as contemplated in s3.5.1.2. and s3.5.1.3 of the Federal Constitution) his/her resignation or intention to resign from the party or intention to join another party or him/her joining another party, the mere tendering of proof by means of a visual or audio clip from the relevant electronic medium, or a screen shot from the relevant social media platform and/or a copy of a printed letter, report or article in the case of print media constituting such public declaration of his/her resignation or intention to resign from the Party or intention to join or joining another party, shall constitute sufficient proof of such resignation, intention to resign or intention to join or joining another party.

Rule 4 -

Rule 5-A letter of cessation, including a sufficient description of the public declaration as set out in paragraph 3 hereof, or where applicable, including the relevant statements as set out in paragraph 4 hereof, must be served on the affected member. This letter shall state that the member has twenty-four (24) hours, after having been served with such letter of cessation to provide the Chairperson of the FLC with clear and unequivocal written reasons why his or her membership did not cease.

Rule 6-The Chairperson of the FLC must as soon as possible after receipt of the written reasons contemplated in paragraph 5 hereof, or

upon completion of the twenty-four (24) hours as set out in paragraph 5 hereof, present to a panel of the FLC:

6.1 A copy of the public declaration and or statements which allege the cessation of membership; and

6.2 The written response, if any, by the affected member.

Rule 7- Upon receiving the copy of the public declaration and/or statements and the written response by the affected member, the panel must without undue delay make a determination on the papers as presented to it and communicate this determination to the Chairperson of the FLC.

Rule 9- In the event that a determination is made that the member's membership has ceased, this determination shall be presented to the Federal Executive, which may then confirm the determination of the cessation of the membership of the affected member.

Rule 10-In the event that a determination is made by the panel, or a resolution is passed by the Federal Executive that the written reasons provided by the affected member sufficiently dispute the facts on which cessation may be based in terms of the Federal Constitution, the matter may be referred to the FLC for a disciplinary hearing, or to follow the process set out in paragraphs 5,6 and 7 of Part F of these rules."

[48] Unlike the operative provisions in *Pheniti* and *Louw* cessation of membership in terms of the party's rules does not occur automatically in terms of a deeming provision, and before a public declaration of the intention to resign has legal effect the rules require that there be a determination of the cessation by an FLC panel, which is then confirmed by FedEx. In essence the panel functions almost like a tribunal or court would- it is required to evaluate the contents of the member's public declaration and her response thereto and needs to be satisfied that 1) the declaration constitutes the expression of an intention to resign from the party, as envisaged by the cessation clause and 2) despite this the member has failed to provide clear and unequivocal reasons why his/her membership did not cease. Thereafter, FedEx is required to confirm the determination. And, as we read the rule in this regard FedEx has a wide discretion, which, notwithstanding the contents of rule 10 is not limited to simply deciding whether or not to confirm that the declaration is covered by the cessation clause. The discretion not to confirm the determination by the FLC panel could be exercised on the basis of extraneous considerations, such as whether for example, in the light of the explanation which was tendered by the member and the member's value to the party, it should condone the declaration which he/she made. In the circumstances counsel for the DA was constrained to concede that until such confirmation by FedEx, as a matter of law, cessation of membership does not occur. In the absence of such a finding the membership of an affected member remains extant and does not cease to exist in law.

[49] Our finding that in terms of the party's constitution and its rules, membership does not cease automatically, by operation of law, and is dependent upon a determination which has to be made to that effect, which must in turn be confirmed in order to become operative, has two further, important consequences. Firstly, it must follow that where there is a material defect in relation to the process ie where a panel is not properly constituted in terms of the party's constitution or rules, then there cannot be a valid determination made that membership has ceased, and secondly, there can be no valid and effective confirmation of such a determination."

[20] No contention was made by the applicant that there was a constitutional process necessary that would have led to the lapsing of his membership which was not followed or that such lapsing was not automatic but was subject to a process. I therefore find that on reaching the age of 35 years old his membership lapsed and therefore the constitutional rights which accrue to the members of the first respondent were not available to him as he was already automatically not a member on the 24 September 2018 when the congress was convened.

Applicant's *locus standi* – membership

[21] I find the argument of applicant about his *locus standi* unconvincing. In the applicant's heads of argument the following submission is made:

- “9. The phrase *locus standi* is a requirement that a party must have a direct and substantial interest in the right, which is the subject matter of the litigation and in the outcome of the litigation. It is then said that if a party does not comply with this requirement he or she lacks legal standing.
10. The applicant has established his *locus standi* in the founding affidavit and if the respondents' reliance on the applicant's age that an administrative decision which stays in standing and which has been set aside and as such remains valid.”

[22] The first point to be made about this submission is that it is not a model of clarity. Secondly, it has a footnote in which reference is made to *Oudekraal Pty Ltd v City of Cape Town and Others*³. In *Oudekraal* the court said:

- “26. For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

³ [2004] 3 All SA 1 (SCA)

[23] In this case the maximum *omnia praesumuntur rite esse acta* finds no application. This is so because the applicant would have joined and become a member of the first respondent at an appropriate age. There was nothing unlawful about that. His coming of age or turning 35 years old did not make his earlier membership an invalid act liable to be set aside. What happens is that on turning 35 years old the constitution of the first respondent kicks in and his membership lapses automatically. No administrative act is required, no letters need to be written to him, he simply automatically ceases to be a member.

[24] This is different for instances from a situation when it is found that he had not paid his annual subscriptions for up to three (3) months. In that event it would be necessary to establish that he had in fact not paid his membership fees for up to three months. This is a process in which the *audi alteram* principle would be applicable so as to make a valid finding that annual subscriptions had been outstanding for three months or longer. The date of lapsing of membership on turning 35 years old is determinable on the date on which he joins and becomes a member and therefore the lapsing of membership is constitutionally predetermined requiring no process when the date arrives. Therefore on the date of the congress the applicant was not a member as he had long turned 35 years old by then. He therefore, fails to prove that he had *locus standi* on this ground.

Applicant's *locus standi* –RTT coordinator

[25] This brings me to the issue of the applicant's appointment to the Regional Task Team of the first respondent in the Amathole Region. That he is a coordinator of the RTT of the first respondent in the Amathole region is not in issue or that he assumed that position on 19 February 2017 in a Special Regional General Council of the first respondent held at Great Kei Hall. This is the second basis on which the applicant seeks to found his *locus standi* in these proceedings. It is common cause between the applicant and the ninth and eleventh respondents that there are two fundamental documents that govern the affairs of the first respondent. The Constitution governs the affairs of the first respondent generally. However, when it comes to congresses, the affairs of the first respondent are governed by the Constitution and the Congress Guidelines.

[26] The introduction to the Congress Guidelines reads as follows:

“1. INTRODUCTION

- 1.1 The guidelines are intended to provide more details on organizational requirements to be adhered to for congress preparations and ensure consistency in our processes in line with the unitary character of the African National Congress Youth League. They must always be read together with the ANCYL Constitution as adopted by the 25th National Congress held at Gallagher Estate, Midrand in Gauteng Province. These guidelines are standing guidelines not developed for purposes of a specific congress but for all congresses from Regional to National Level.”

[27] The Congress Guidelines introduce task teams at different levels of the organisation as follows:

“2. DEFINITIONS AND ABBREVIATIONS

- 2.1 The word National Executive Committee (herein under abbreviated as NEC) refers to the elected national executive committee, elected, National Congress as determined by constitution of ANCYL where it does not exist it refers to the National Task Team or NTT.
- 2.2 The word Provincial Executive Committee (herein under abbreviated as PEC) refers to the elected provincial executive committee in a province as determined by constitution of the ANCYL where it does not exist it refers to the Provincial Task Team as appointed by NEC or NTT.
- 2.3 The word Regional Executive Committee (herein under abbreviated as REC) refers to the elected regional executive committee in a region as determined by constitution of the ANCYL where it does not exist it refers to the Regional Task Team as appointed by PEC/PTT.
- 2.4 The word branch executive committee refers to the elected branch executive committee in a region as determined by constitution of ANCYL where it does not exist it refers to the branch task team as appointed by REC/RTT.”

[28] The applicant makes the following averments in his founding affidavit which the ninth and eleventh respondents do not deny:

- “51. On the same day I addressed a correspondence to all the regional task team members for a meeting to be held at Walter Sisulu University, Ibika Campus at 12:00pm on the 24th September 2018.
52. On my arrival at the venue for an RTT meeting where I learnt of the impugned regional congress of Amathole region which was said to be taking place at Peddie on the same day. I attach hereto a notice convening the RTT meeting marked “MD9”.
53. I immediately drove to Peddie where I was chased away by the security personnel on the instructions of the PTT members who claimed to have been delegated by the fifth respondent.”

[29] I will not deal with other alleged irregularities which the applicant says took place regarding preparations for the congress. For instance he alleges that he wrote numerous letters requesting an audit report and a list of delegates from the fifth

respondent and these requests were not given heed. There is nothing in either the Constitution or the Congress Guidelines of the first respondent which says that only the Regional Coordinator must deal with the audit process of the congress or that the congress will be invalid if the preparations for the congress are not handled by the regional coordinator.

[30] Clause 10.2 of the Constitution reads:

“10.2 Powers and Duties

The Regional Congress shall:

- (a) Be held at least once in 18 months or more frequently if requested by two thirds of all branches in the region.
- (b) Receive and consider reports by the Regional Executive Committee, which shall be presented by the Chairperson, the Secretary and Treasurer.
- (c) Elect the REC that must be composed of the Chairperson, Deputy Chairperson Secretary, Deputy Secretary, Treasurer, and Twelve (12) additional members.
- (d) Develop and implement the policies and programs of the ANCYL guided by the National and Provincial resolutions and programs of actions, within the context of each region.”

[31] All these are the powers and duties of the Regional Congress. It is not difficult to imagine a situation in which a member of the RTT such as the applicant, is indisposed and therefore unable to attend. Does that mean that whatever functions he would have performed will necessarily not be performed? I do not think so. In any event the eleventh respondent has annexed a letter to his answering affidavit written by the fifth respondent dated 12 July 2018 which reads as follows:

“To: Eastern Cape ANCYL PTT

All Eastern Cape Regional Chair/Convenor and Secretaries / Coordinators

This serves to inform you that as from date all processes leading to Regional Congresses and Provincial Congress in the Eastern Cape will be led by the Secretary General's Office.

Comradely yours

NJABULO NZUZA

SECRETARY GENERAL (ANC YOUTH LEAGUE)”

[32] The applicant does not challenge the validity of this letter nor does he take issue with the fifth respondent exercising all powers pertaining to the congress preparations. He makes no reference to it in this founding affidavit as one of the

addresses and he does not claim to have not received it in his replying affidavit. His insistence on performing congress preparation tasks does not make sense as they fly in the face of the fifth respondent's letter dated 12 July 2018 in which the fifth respondent assumed all congress preparation tasks. He does not challenge on any constitutional basis, the fifth respondent's right to assume congress preparation tasks.

[33] I now turn to deal with the undisputed allegation by the applicant that he attended the Regional Congress on the 24 September 2018 and was chased away by the security personnel on the instructions of the PTT and the fifth respondent.

[34] To understand the ominousness of the chasing away of the applicant or any member of the RTT from the Regional Congress one need look no further than two provisions of the first respondent's Constitution, namely sections 10.1 and 12.2 which read as follows:

"10.1 Composition

The Regional Congress shall:

- (a) Be attended by delegates elected democratically by and from branches in good standing in proportion to their membership.
- (b) Branch delegates shall constitute at least ninety percent (90%) of all voting delegates to congress.
- (c) Be attended by members of the Regional Executive Committee who shall have full speaking and rights in their ex-officio capacity.

10.2 Powers and duties

- (a) ...
- (b) ...
- (c) ...
- (d) ...

Section 11: Region General Council

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...

Section 12: Regional Executive Committee

12.1 Composition

- (a) ...

- (b) ...
- (c) ...
- (d) ...
- (e) ...

12.2 Powers and Duties

- (a) The REC shall convene at least once a month. Its duties shall be to:
- (b) At its meeting after the Regional Congress, elect the Regional Working Committee.
- (c) It is responsible for the implementation of decisions of the Regional, Provincial and National Congress as well as decisions of the PEC, PGC and NEC;
- (d) Organise, establish, service and coordinate branches of the ANCYL in the Region;
- (e) Implement the policies and programs of the ANCYL and strive to further the interests, aims and objectives of the Youth League as a whole;
- (f) Manage and control the funds and property of the Youth League in the region;
- (g) Represent the ANCYL on the ANC REC in an ex-officio capacity through the Regional Chairperson and Secretary;
- (h) Carry out other responsibilities delegated by the PEC and NEC.
- (i) The REC shall have the power to co-opt not more than three members, in order to ensure that all different sections of the youth are well represented;
- (j) One shall cease to be a member of the REC upon absencing oneself from two successive meetings without a valid reason."

[35] It is self-evident from the reading of these constitutionally imposed duties that the REC is a very important structure of the first respondent. It performs very important tasks in the life of the first respondent. It is also a vital connecting point of all branches in the region.

[36] In the absence of the REC all of the above mentioned REC powers and duties are assumed and performed by the RTT. Therefore the applicant together with other members of the RTT have had these responsibilities since their appointment to the RTT on the 19 February 2017.

[37] It is clear from the provisions of clause 10.1 (c) of the first respondent's Constitution that the applicant in his ex-officio capacity as a member of the RTT had both the speaking and voting rights in the congress. That this is so is further amplified by the Congress Guidelines as follows:

“13.4 The final determination of the structure of voting and non-voting delegates to congress will be made by the NEC for purposes of National Congress and Province in the case of Provincial Congress. In the region voting delegates will only be Branches and the outgoing REC or RTT.”⁴

[38] Section 19 (1) of the Constitution ⁵ provides as follows:

“Political rights

19. (1) Every citizen is free to make political choices, which includes the right –

- (a) to form a political party;
- (b) to participate in the activities of or recruit members for, a political party; and
- (c) to campaign for a political party or cause.”

[39] There are many young people who chose to exercise their section 19 (1) constitutional rights through their membership of the first respondent and through the activities of the first respondent. The relationship between the first respondent and its members as well as the relationship between the first respondent and its office bearers is of a contractual nature and therefore it is binding.

[40] In *Ramakatsa and Others v Magashule and Others*⁶ the Constitutional Court had this to say:

“[79] Before demonstrating that some of the irregularities raised were established it is necessary to outline the nature of the legal relationship that arises from membership of the ANC. At common law a voluntary association like the ANC is taken to have been created by agreement as it is not a body established by statute. The ANC’s constitution together with the audit guidelines and any other rules collectively constitute the terms of the agreement entered into by its members. Thus the relationship between the party and its members is contractual. It is taken to be a unique contract.

[80] As in the case of an ordinary contract, if the constitution and the rules of a political party like the ANC, are breached to the prejudice of certain members, they are entitled to approach a court of law for relief. In *Saunders v Committee of the Johannesburg Stock Exchange* the Court said:

‘There is no doubt that the rules and regulations of a body like the Stock Exchange, just like the rules and regulations of an ordinary club, or the Articles of Association of a Company constitute a contract between its members and that is the reason why any particular member, if the contract is broken to his disadvantage has the right to come to the Court for the appropriate remedy.’

[81] We have set out in detail specific clauses in the ANC’s constitution and its audit guidelines which the appellants claimed were violated. It emerges from the papers that the appellants relied on two types of irregularities. The first type relates to what was done in breach of section 19 of the Constitution. The second arises from the breach of the audit guidelines and the ANC’s constitution. Proof

⁴ Mr underlining

⁵ Constitution of the Republic of South Africa, 1996.

⁶ 2013 (2) BCLR 202 (CC)

of both types of irregularities entitles the appellants to relief. But before we consider the remedy which the appellants ought to obtain, it is necessary to show the irregularities established by evidence and record.”

[41] The section 19 constitutional rights are fundamental to the creation of a peaceful political culture in the country. Most significantly, they are an indispensable catalyst to the establishment of the democratic state and key building blocks to the functioning culture of democracy and the enjoyment of civil liberties by the citizenry.

[42] In the recent past the Constitutional Court said in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another*⁷:

“[32] The right to vote derives its fundamentality from the central role voting plays in the establishment, functionality and vibrancy of the constitutional democracy. It is a prerequisite for the very existence of the legislature and the executive at all levels of the state. And the proper exercise of that right is so critical to the coming into being of our political arms of the state and the effective and efficient functioning of the entire state machinery that the need for transparency and accountability from those seeking public office is self-evidently more pronounced. The future of the nation largely stands or falls on how elections are conducted, who gets elected into public office, how and why they get voted in. Only when transparency and accountability occupy centre stage before, during and after the elections may hope for a better tomorrow be realistically entertained.”

[43] The fact that the applicant was denied access to the congress venue for reasons that have not be explained without any due process is inimical to constitutional democracy. It was a denial of his right to speak at that congress and his right to vote thereat. This was a violation of both the constitution of the first respondent as well as the violation of the Constitution of the Republic and therefore unlawful.

Non-joinder of the other members of the RTT

[44] It was argued on behalf of the ninth and eleventh respondents that the applicant qua member and coordinator of the RTT ought to have joined the other members of the RTT as they have a direct and substantial interest in this matter. I do not think so. It can never be that the entitlement and therefore the enforcement of the applicant’s constitutional rights must depend on other members of the RTT. It would be akin to saying that an individual member of the first respondent should be non-suited for his failure to join every member of the first respondent. I cannot see anything that could potentially erode the rights of members of any organisation or structure than their non-suitment by the requirement that every member of that organisation or structure be joined even in circumstances where no relief is sought against those members.

⁷ 2018 (5) SA 380 (CC)

[45] It is the applicant who was denied access to the venue. The other members of the RTT may have an interest in the congress and may even have participated to their satisfaction. However, the applicant was refused participation and therefore it is his rights to participate as indicated above that were denied. The non-joinder of other members of the RTT even if they have an interest in these proceedings is irrelevant and can certainly not be a basis for the quashing of applicant's case on that basis. In any event they have signed confirmatory affidavits in these proceedings. This means that they did become aware of these proceedings and have not expressed any desire to join or be party to these proceedings to protect whatever interest they may have. They have contented themselves with supporting the ninth and the eleventh respondents in opposing the relief sought by the applicant.

Failure to exhaust internal remedies

[46] The ninth and eleventh respondents have submitted that the applicant should be non-suited for his alleged failure to exhaust internal remedies contrary to the first respondent's constitution. In this regard reference is made to annexure "MD13", the Congress Guidelines. The answer to this lies no further than the deponent's own annexure "A", the letter from the fifth respondent dated 12 July 2018. In that letter the fifth respondent indicated that all processes leading to the Regional Congresses and Provincial Congress in the Eastern Cape would be lead by his office. Nothing in the said letter suggests that the dispute resolution processes were excluded from the powers that the fifth respondent assumed in relation to congress preparations. I go back to the undisputed allegation by the applicant that the fifth respondent was involved in the applicant being chased away from the congress. To expect the applicant to complain about the fifth respondent's conduct to the fifth respondent in relation to an issue that has to do with congress preparations is unhelpful and serpentine.

The winding-up of the first respondent

[47] I now come to the final winding up of the first respondent by the Gauteng High Court. That the first respondent was placed under final winding up in the hands of the Master, the twenty first respondent is common cause. In the matter of *De Waal v African National Congress Youth League*, case no. 49137/2017 (30 July 2018) giving

reasons for ordering that the first respondent be placed under final winding-up in the hands of the Master, Weiner J stated thus:

[31] For purposes of this application, the enquiry is whether the respondent, as an association, constitutes a body corporate that is susceptible to being liquidated. The authors of *Henochsberg* say the following in respect of whether an association can be a body corporate:⁸

“At common law an association of natural persons may be a *universitas*, ie. a body corporate. The characteristics of such a body are that it should be capable of owing property apart from its members and it should have perpetual succession... Whether a particular association is such a body depends on its nature, its constitution, its objects and its activities ... But it is decisive of its being a *universitas* if its constitution indicates that it has the said characteristics.”

[32] The authors opine that the definition of a body corporate bears its common-law meaning. This opinion was confirmed in *Lawclaims (Pty) Ltd v Rea Shipping Co. SA: Shiffscommerz Aussenhandelsbetrieb der VVB Schiffbau* Intervening, where the Full Court of the Natal High court, as it then was, held:

“‘Body corporate’ is not specifically defined and it therefore bears its common law meaning, an association of individuals capable of holding property and of suing and being sued in its corporate name.”

At 754H, the Court stated:

“A body corporate is not defined but, since a body corporate is included within the meaning of ‘company’ for the purposes of s 337 it is difficult to escape the conclusion that the Legislature intended that they should be wound up like an ordinary company or an external company in terms of chap XIV of the Act and that, when one sought to place such a body in liquidation, it could only be done in terms of chap XIV and in no other manner.”

[33] The common law meaning of body corporate has its origins in the Appellate Division decision of *Morrison v Standard Building Society*, where it was held:

“In order to determine whether an association of individuals is a corporate body which can sue in its own name, the Court has to consider the nature and objects of the association as well as its constitution, and if these show that it possesses the characteristics of a corporation or universitas then it can sue in its own name.”

[34] The applicant submits that the respondent fulfils the common-law requirements for an *universitas personarum* and is, therefore, a body corporate under section 337. The requirements for a *universitas personarum* were restated by the erstwhile Appellate Division in *African National Congress and another v Lombo* (per Corbett CJ):

“It is conceded by counsel for the appellants (correctly in my view) that prior to the enactment of certain legislation which resulted in each of the appellants being declared an ‘unlawful organisation’ ... each of them constituted a *universitas personarum*. ie. an artificial or juristic person constituting a legal entity apart from the natural persons (members) composing it, having the capacity to acquire rights and incur obligations and to own property apart from its members and to sue and be sued, and having perpetual succession.”

⁸ All footnote references referred to in these paragraph have been omitted.

[35] Accordingly, an entity must fulfil three main requirements to qualify as an *universitas personarum*.

35.1 First, it must have a legal existence apart from its members and thus be capable of suing and being sued in its own name.

35.2 Second, it must have perpetual succession.

35.3 Third, it must have the capacity to acquire rights and incur obligations as well as own property in its own name.

[36] In having regard to an entity's constitution, one can determine whether it has a legal existence apart from its members.

[37] All three the requirements set out above are borne out by the respondent's constitution, which in relevant part, provides:

"The ANCYL shall be legal persona with a perpetual succession of power apart from its individual members to acquire, hold and alienate property, enter into arrangements, do all things necessary to carry out its aims and objectives, and defend its members, property and reputation."

[38] Further, the respondent's constitution provides that it may be wound up separately from its members and any assets, remaining after satisfaction of all the respondent's liabilities, must then be transferred to the African National Congress:

"Upon dissolution or winding up, the assets of the ANCYL remaining after satisfaction of all its liabilities, shall be given or transferred to the ANC."

[39] The pursuit of profit is not a common-law requirement to qualify an entity as an *universitas personarum*.

[40] Accordingly, based upon the respondent's own Constitution and the authorities referred to above, the respondent falls within the definition of a body corporate, as defined in section 337 of the old Act and is liable to be liquidated as such.

GROUND OF LIQUIDATION

[41] As Chapter 14 of the old Act and its accompanying definitions remain the applicable law under which an insolvent company is wound up, they will be considered below.

[42] The applicant submits that respondent cannot pay its debts as envisaged by section 345 (1)(b) read with section 344(f) of the old Act and, accordingly, falls to be wound up on that basis.

[43] Section 345(1)(b) of the old Act stipulates when a company is deemed to be unable to pay its debts:

"(1) A company or body corporate shall be deemed to be unable to pay its debts if –

(a) ...

(b) Any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process;

(c)

[44] The Sheriff has rendered two separate *nulla bona* returns of service. This meets the requirement for purposes of section 345(1)(b). As set out above, the application was served on 15 December 2018 (sic), the *nulla bona* return was dated 29 June 2018, and several other processes have been served on the respondent in the past seven months. The respondent has not reacted to any of such processes. It has not opposed the application to show that it is now able to pay its debts and that its financial position has changed. The respondent is deemed to be unable to pay its debts. There is no evidence before this Court that rebuts the deeming provision."

[48] The applicant deals with the first respondent's winding up as follows:

"59. Justice Weiner J of the South Gauteng High Court on the 26th July 2018 issued an order with the following terms:

59.1 That the African National Congress Youth League is hereby placed under final winding up;

59.2 Costs of the application to be costs in the liquidation.

60. In the presence of this Court Order, the authority to run the affairs of the first respondent lies with the 21st respondent and/or the liquidator once same is appointed by the 21st Respondent.

61. The second to the 20th respondents have no authority whatsoever to purport to take decisions on behalf of the first respondent as same after the 26th day of July 2018 have been taken over by the 21st respondent.

62. Without this authority from the 21st respondent, that congress falls to be declared unlawful and set aside for the lack of authority to convene such a congress. I attach hereto a Court order dated 26th July 2018 together with reasons and same is marked "MD14" and MD15" respectively."

[49] In their answering affidavit the ninth and eleventh respondents respond as follows:

"47. AD PARAGRAPH 60, 61, 62 AND 67.

The contents of these paragraphs are denied. The denial is premised on the fact that the 21st respondent's authority does not include the power to do political transactions. Whilst the 21st respondent is handling the financial affairs of the first respondent, structures of the first respondent are obliged to do political work on behalf of the first respondent. If applicant's claim was to obtain then he would not have any right to assert in these proceedings but the 21st respondent."

[50] Putting aside the illogicality of this submission there are other difficulties with saying that the Master must only deal with the finances of the first respondent whose other activities must otherwise continue unhindered. This illogicality is self-evident from the submission that structures of the first respondent are obliged to do political work.

[51] That the very existence of the first respondent is to do political work is a given and on this there should be no ambiguity. Its aims and objectives as contained in its constitution make this abundantly clear. They read:

“ARTICLE D: AIMS AND OBJECTIVES

The ANCYL shall:

1. Strive to rally the youth of our country to support and unite behind the ANCYL, and actively participate in the struggle to create a non-racial, united, democratic and prosperous society;
2. Support and reinforce the African national Congress in the attainment of the goals of the National Democratic Revolution;
3. Ensure that the youth make a full and rich contribution to the work of the ANC and to the life of the Nation;
4. Champion the general interests and rights of the South African Youth and the working class in the socio-economic and political life of the country;
5. Promote unity and patriotism among the youth;
6. Promote the creation of a broad, non-aligned pioneer movement and fight for the rights of children as enshrined in the Constitution of the Republic of South Africa;
7. Strive and work for the educational, moral and cultural upliftment of the youth;
8. Promote gender equality in all spheres of life, especially amongst the youth;
9. Promote among youth a spirit of international solidarity, peace and friendship with other nations;
10. To champion the cause, of the African Renaissance.”

[53] These are all noble and admirable political objectives. However, there is no legal basis for excluding the first respondent from the general law of the land that applies to everybody. I was not given any legal basis or authority for the proposition that the twenty first respondent should handle only the financial affairs of the first respondent as against all of its affairs being under the authority of the Master. I could find no authority for the said proposition either.

[54] On the contrary even the organisations such as the first respondent are bound by and subject to the limitations of the law. In *Ramakatsa and Others v Magashule and Others* (supra) the Constitutional Court said:

“[71] In relevant part Section 19 (1) proclaims that every citizen of our country is free to make political choices which include the right to participate in the activities of a political party. This right is conferred in unqualified terms. Consistent with the generous reading of provisions of this kind, the section means what it says and says what it means. It guarantees freedom to make political choices and once a choice is made, the section safeguards a member’s participation in the activities of the party concerned. In this case the appellants and other members of the ANC enjoy constitutional guarantee that entitles them to participate in its activities. It protects the exercise of the right not only against external interference but also against interference coming from within the party.

[72] This right may be limited only on authority of a law of general application. But even then only to the extent that the limitation is reasonable and justifiable in “an open and democratic society based on human dignity, equality and freedom.” As no law of general application has been invoked to justify the limitation here, it follows that if any limitation is established by the appellants it will be unjustifiable. What this means is that constitutions and rules of political parties must be consistent with the Constitution which is the supreme law.”

[55] I will refer to a few cases to demonstrate the law of general application that the ninth and eleventh respondents say the first respondent should be exempted from so that it can continue to do its political work even though it has been wound up.

[56] In *Engen Petroleum v Goudis Carriers (Pty) Ltd (In Liquidation)*⁹ Sutherland J had this to say:

“[8].....In my view, Blackman articulates his rationale admirably in the cited passage; i.e. first, the impotence of the complainant’s office bearers after the final winding-up order and the passing of control into the hands of the master and liquidator, and secondly and consequently, the subjugation of the company being wound up to the statutory purposes of the insolvency regime. Henochlierg true enough, does not in the cited passage, offer a rationale save to invoke the concursus, and it may fairly be understood that he thought the point self-evident that after concursus the court could have no further role because of the effect off concursus.”

[57] The second case is *Richer v ABSA Bank Ltd*¹⁰ in which it was stated that:

“[10] The reasoning of the court a quo was motivated by an erroneous premise that upon Liquidation Bloempro ceased to exist, that it was stripped of its original legal status. The correct position is that upon the final order of liquidation being granted the company continues to exist, but control of its affairs is transferred from the directors to the liquidator who exercises his or her authority on behalf of the company. As to when liquidation commences, in terms of section 348 of the Companies Act 61 of 1973 (the 1973 Act) liquidation of a company by the court is deemed to commence on presentation to the court of the application for the winding-up and continues until the affairs of the company have been finally wound up and the master’s certificate to the effect is published in the Government Gazette, thus dissolving the company. Similarly s82 of the Act provides for existence of a company until deregistered by the Commission.”

[58] These authorities, if nothing else, do say that on winding-up the control of the affairs of the first respondent was transferred to the twenty first respondent and that the office bearers of the first respondent became impotent. This, in my view, does not mean that the first respondent or its office bearers are either helpless or hapless in so far as the need to continue functioning. All that it means is that they must do so either through the twenty first respondent or with his or her consent or the liquidator, when the latter is appointed. The decisions of the Master are, in my view, reviewable should the first respondent’s office bearers be dissatisfied with how

⁹ 2015 (6) SA 21 (GJ) para (8)

¹⁰ 2015 (5) SA 57 (SCA)

he/she handles the affairs of the first respondent or is disinterested or in any way obstructive. However, the Master cannot simply be ignored.

[59] To suggest that on the face of the winding up order it should be business as usual for the first respondent would be to make a mockery of the winding-up process and therefore the constitutional order which is founded on the rule of law. The repository of power and authority to run the affairs of the first respondent is the first respondent not the first respondent's office bearers or leadership whose constitutional and legal authority is divested from them and vested upon first respondent.

[60] In the result the applicant succeeds in his application. The following order shall issue:

1. The first respondent's congress in the Amathole Region which was convened on the 24 September 2018 is declared unlawful and set aside.
2. The resolutions and outcomes of the Amathole Regional Congress of the first respondent which was convened on 24 September 2018 are declared unlawful and set aside.
3. Any decisions taken by the leadership elected at the Amathole Regional Congress of the first respondent which was convened on 24 September 2018 are declared unlawful and set aside.
4. The ninth and eleventh respondents are ordered to pay costs of this application on a party and party scale including all reserved costs, such costs shall include the costs of two counsel.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: S.Y. MALUNGA

WITH S.H. MALIWA

Instructed by: **MAKANGELA MTUNGANI INC.**

MTHATHA

Counsel for 9th & 11th Respondents: L MATOTIE

WITH D SIKOTI

Instructed by: **GUBEVU HLALUKANA INC.**

MTHATHA

Matter heard on: 24 October 2018

Judgment handed down on: 22 November 2018