

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION - BHISHO)**

**CASE NO: 447/2011
DATE HEARD: 31/07/2012
DATE DELIVERED: 27/09/2012**

In the matter between

CONGRESS OF THE PEOPLE

1ST APPLICANT

MOSIUOA LEKOTA

2ND APPLICANT

DEIDRE CARTER

3RD APPLICANT

and

THE SPEAKER, EASTERN CAPE

1ST RESPONDENT

PROVINCIAL LEGISLATURE

MLULEKI GEORGE

THE SECRETARY, EASTERN CAPE

2ND RESPONDENT

PROVINCIAL LEGISLATURE

MLULEKI GEORGE

3RD RESPONDENT

N C SIWISA

4TH RESPONDENT

SAM KWELITA

5TH RESPONDENT

JUDGMENT

ROBERSON J:-

[1] This is an application for rescission of an order granted on 22 September 2011 by Revelas J under case number 377/2011. The application was opposed by the fifth respondent (Kwelita). The first applicant (COPE) is a political party, and conflict within COPE, between those claiming leadership of COPE and those claiming to represent COPE in the Eastern Cape Province, is prominent in the application.

[2] In order to provide some background it is useful to refer to the provisions of COPE's constitution which deal with the affairs of COPE at a provincial level. Article 7 of the constitution provides *inter alia* that a provincial congress shall be the highest authority of the congress of the people within a province, and that the provincial congress shall elect the Congress Provincial Committee (CPC). Article 8 provides *inter alia* that the CPC shall have general responsibility for the affairs of COPE within a province, subject to the provisions of the constitution and to resolutions or other actions of the provincial congress. Article 9 regulates the duties and functions of provincial office bearers, article 10 provides for the holding of a provincial congress policy conference, and article 11 provides for the establishment of a provincial finance committee which has general responsibility for the management and control of finances of COPE within the province.

[3] The application before Revelas J (the main application) was brought by COPE, initially against the first respondent (the Speaker) and the second

respondent (the Secretary). COPE sought an order setting aside the Secretary's decision not to pay constituency and caucus funds into COPE's Standard Bank accounts, and an order that the Secretary pay such funds into those accounts not later than 26 September 2011.

[4] Prior to the hearing of the application, the second applicant (Lekota), the third applicant (Carter), the third respondent (George), the fourth respondent (Siwisa) and two others were joined as respondents. The Speaker and the Secretary opposed the application, while George and Siwisa raised no objection to the order sought. Lekota and Carter were served with the application papers but did not appear to oppose the application. In this application they claimed that they did not have knowledge of the application until it had been granted.

[5] The founding affidavit in the main application was deposed to by Kwelita, who claimed in his answering affidavit in the present application to represent COPE in the Eastern Cape Provincial Legislature (the Legislature). The resolution to bring the main application appears to have been taken at provincial level.

[6] For the purpose of this judgment it is not necessary to mention in detail the issues which were argued before Revelas J and the reasons for her order. Suffice it to say that payment of constituency and caucus funds to political parties represented in the Legislature is governed by a policy document, which sets out, *inter alia*, the purpose of such funding, and how it is determined, allocated and

used. It emerged from the papers in the main application that the Legislature was receiving conflicting instructions regarding into which bank account payments of such funds should be made. The instructions emanated on the one hand, from Lekota, as president of COPE, and on the other hand from Kwelita, as provincial leader of COPE. On 26 July 2011 the Legislature informed Kwelita's attorneys that it had decided to comply with the instructions of Lekota, who they regarded as the leader of COPE. On 3 August 2011 this Court ordered by agreement that the decision to change the bank accounts into which constituency and caucus funds were to be paid (the accounts requested by Lekota) was reviewed and set aside. The parties in that matter were COPE as applicant, and the Speaker and the Secretary as respondents. Despite this order, on 30 August 2011 the Secretary informed Kwelita's attorneys that he had decided as a precautionary measure to direct the Legislature to hold payment of constituency and caucus funds due to COPE in abeyance, pending a lawful resolution by COPE concerning the bank accounts into which funds should be paid.

[7] As already indicated, Revelas J granted COPE'S application and there was no appearance for Carter and Lekota at the hearing.

[8] The founding affidavit in the rescission application was deposed to by Carter. She stated that she is the acting General Secretary of COPE, and that Lekota is the president of COPE. According to her, in the main application Kwelita misled

the Court into believing that he acted on behalf of COPE. Kwelita was not authorised by COPE to bring the application, and is neither a member of COPE nor a representative of COPE in the Eastern Cape Province. On 22 January 2011 the Congress National Committee of COPE (the CNC) was informed that two separate provincial congresses had been held in the Eastern Cape in October 2010, and that two CPC's had been elected. The CNC resolved to disband both CPC's and established an interim committee headed by three CNC members. Further on 22 January 2011 the CNC resolved to suspend Kwelita from all party activities, and in due course, following a disciplinary hearing, Kewlita was expelled from COPE, and advised accordingly. George was also expelled. Accordingly, so Carter averred, Kwelita had no *locus standi* to institute proceedings on behalf of COPE. The "true" COPE was therefore not a party to the application.

[9] Carter stated that she only became aware of the judgment on 23 September 2011. Her personal assistant, Linda Geraghty, had received the application papers on 16 September 2011 but did not bring them to Carter's attention.

[10] Lekota deposed to a confirmatory affidavit and also stated that the application papers had been served on his personal assistant, Lebogang Thobye, who did not bring them to his attention. He too only learned of the application after the order was granted. He annexed to his affidavit a letter he addressed to the COPE caucus in the Legislature, informing them of changes of

office bearers of COPE in the Legislature.

[11] Geraghty deposed to an affidavit in which she stated that she had received the application papers from Thoby and had locked them up for safekeeping pending Carter's return to Cape Town. Although she noticed that the papers related to litigation involving COPE, she was under the impression that they related to previous litigation involving COPE. Thoby deposed to an affidavit in which he stated that the application papers had been served on him by the Sheriff. He did not realise that the papers related to an urgent matter and did not inform Lekota, who was in Johannesburg at the time.

[12] In his answering affidavit, Kwelita challenged the assertions that Lekota was the president of COPE and that Carter was the acting General Secretary. He stated that leadership of COPE was in dispute and was the subject of litigation. He denied that he had misrepresented himself in the main application and maintained that he does represent COPE in the Legislature and that he acted on behalf of COPE, having been authorised to do so. He also relied on the provision in COPE's constitution to the effect that the provincial congress was the highest authority in the province, and stated that there was no need for a resolution from the CNC to institute the proceedings. The "true" COPE was therefore before the Court.

[13] He professed no knowledge of the disbandment of the CPC's and stated

that as far as he was aware COPE's constitution did not provide for the disbandment of CPC's. Even if it did, such disbandment would be invalid, as the CNC would have acted *ultra vires*.

[14] With regard to his expulsion from COPE, he stated that he had appealed against his expulsion. As proof of this assertion, he annexed a letter from Carter to his attorneys in which he and other persons who had been expelled from COPE were advised of the person through whom they should lodge an appeal. He annexed a further letter from COPE's attorneys addressed to his attorneys, setting out the appeal procedure, and attaching an "appeal form" for completion. He annexed two letters from his attorneys addressed to COPE's attorneys, to the effect that COPE had given an undertaking not to "commence or continue with" any disciplinary proceedings against expelled COPE members pending the conclusion of argument in the South Gauteng High Court in a matter involving COPE and Mbazima Shilowa. Accordingly, Kwelita maintained that he is still a member of COPE and leader of the party in the Eastern Cape.

[15] In her replying affidavit Carter pointed out that COPE is not a federal political party and that the power to institute proceedings lies with the CNC. She agreed that the issue of leadership of COPE was the subject matter of litigation in the South Gauteng High Court but referred to a judgment of Mathopo J in the South Gauteng High Court, delivered on 6 June 2010, declaring, *inter alia*, that Lekota was still the incumbent president of COPE.

[16] She accepted that Kwelita had lodged an appeal against his expulsion and that the appeal had not been finalised, but said that he had still been dismissed as a member of COPE. Further, so she stated, Kwelita is not a member of the CPC because the CPC was disbanded, a task team was formed, and Kwelita is not a member of the task team.

[17] The application for rescission was ostensibly brought in terms of Rule 42 (1) (a), on the basis that the order had been erroneously granted in the absence of the applicants. It was submitted that if Revelas J had been aware of Kwelita's expulsion she would not have granted the order. I am of the view that the circumstances of this case are not those envisaged in Rule 42 (1) (a). The issue of *locus standi* raised by the applicants is a defence to the main application. In *Lodhi 2 Properties Investments CC v Bondev Developments* 2007 (6) SA 87 (SCA) at para [27], Streicher JA said the following:

"Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."

[18] The applicant in the main application was procedurally entitled to the order. Rule 42 (1) (a) was therefore not of application.

[19] However I was of the view that the application could be considered as one at common law. The applicants purported to give an explanation for the failure to appear and oppose the application, and to set out the grounds of a defence.

[20] There was some carelessness on the part of Geraghty and Thobye in not bringing the application immediately to the attention of Carter and Lekota, especially considering their positions as personal assistants. However there is no reason to suspect that they were not honest in their affidavits. Moreover, the application for rescission was launched on 30 September 2011, very soon after the order was granted, which indicates in my view a *bona fide* intention to oppose the main application.

[21] There is clearly a dispute about Kwelita's current status in COPE and the disbandment or otherwise of the CPC's. These issues cannot be decided in an application for rescission. In my view, the applicants have set out sufficient averments, which, if established at a hearing, would enable them successfully to resist the application. If there was no CPC to authorise the institution of proceedings and Kwelita was not a member of COPE, then the "true" COPE was not before the court and the persons or association purporting to be the "true" COPE did not have *locus standi*. Further, there is no indication in COPE's

constitution that CPC's or provincial congresses have legal personality. Kwelita's assertion that the CNC's authority to institute proceedings in the name of COPE was not required, appears *prima facie* to be wrong. In my view the issue of national leadership which was raised falls outside the boundaries of this application.

[22] Lastly it was submitted on behalf of Kwelita that the application was academic because the funds directed by Revelas J to be paid, had in fact been paid. The specific decision of the Legislature to withhold funds which Revelas J set aside, was contained in a letter dated 22 August 2011 (and was repeated in a letter dated 30 August 2011). It was submitted that this decision related only to the quarterly payment then due and Revelas J's order pertained only to those funds. Because funds were paid quarterly, so it was submitted, a fresh decision regarding payment of funds would have to be made quarterly by the Legislature. The applicants' avenue of relief would be to apply for an order interdicting payment into the Standard Bank accounts each quarter. I do not agree with these submissions. The import of the letter dated 30 August 2011 was that in principle funding would be held in abeyance pending a resolution of the internal conflict in COPE. Further in my view, the import of Revelas J's reasons and order was that the Speaker and the Secretary were irregularly withholding payment of constituency and caucus funds, not just those immediately due, but those due in the future. According to Revelas J competing leadership in COPE was not a good reason for withholding funds. She specifically mentioned in her

judgment that after the further respondents were joined, no issue of competing bank accounts was raised. Carter and Lekota were not before Revelas J and the issues which they seek to raise are relevant to the main application.

[23] The application must therefore succeed. In view of the issues canvassed I am not of the view that the application was vexatiously opposed, and an appropriate costs order would be that the costs of this application should be costs in the main application.

[24] The following order will issue:

[24.1] The order granted by Revelas J under case number 377/2011 in this Court is rescinded.

[24.2] The applicants are ordered to deliver their answering affidavits in the main application within 15 days of the date of this order.

[24.3] The costs of the application for rescission are to be costs in the application.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv N Gqamana, instructed by Hutton & Cook Attorneys, King William's Town

For the 5th Respondent: Adv A de Silva, instructed by Squire Smith & Laurie Attorneys, King William's Town