

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case No. : 2567/2008
5614/2008

In the matter between:-

VAKELE MAYEKISO AND 7 OTHERS

Applicants

and

ELIAS MAGASHULE AND 132 OTHERS

Respondents

HEARD ON: 26 FEBRUARY 2009

JUDGMENT BY: KRUGER, J

DELIVERED ON: 19 MARCH 2009

I Nature of Application

[1] The applicants seek a number of declaratory orders flowing from conduct by the respondents relating to the implementation of a court order of 7 December 2007. They allege that the respondents have not complied with the terms of the court order. The relief relates to elections of committees and resolutions taken by such committees, as well as to the suspension of the first applicant and disciplinary steps against him. The respondents contend

that in the applicants' case there is a dearth of admissible evidence and that the relief sought has become academic and would have no practical effect.

II Abbreviations used

[2] Several abbreviations are used in the papers:

ANC -	African National Congress
BEC -	Branch Executive Committee
NEC -	National Executive Committee
NWC -	National Working Committee
PEC -	Provincial Executive Committee
PWC -	Provincial Working Committee
REC -	Regional Executive Committee
RTT -	Regional Task Team

III The Parties

[3] There are eight applicants and 133 respondents. The applicants are members of the African National Congress (ANC) associated to branches of the ANC in the regions of Lejweleputswa, Fezile Dabi and Motheo in the Free State. They are part of a grouping of the ANC in the Free State

opposed to the grouping led by the first respondent. The second applicant has resigned from the ANC.

- [4] (i) The first respondent is the provincial chairperson of the ANC in the Free State. He is chairperson of the ANC's Free State Provincial Working Committee (PWC) and of its provincial Executive Committee (PEC).
- (ii) The first to tenth respondents are members of the PWC. They are also members of the PEC.
- (iii) The first to 33rd respondents are all politicians working at the provincial office of the ANC in Bloemfontein.
- (iv) The 34th to 49th respondents are persons who have been appointed by the PEC to the Regional Task Team (RTT) for Lejweleputswa Region.
- (v) The 50th to 67th respondents comprise the RTT for the Fezile Dabi Region.
- (vi) The 68th to 84th respondents comprise the RTT for the Motheo Region.
- (vii) The 85th to 127th respondents are members of various Branch Executive Committees in the three regions of Lejweleputswa, Fezile Dabi and Motheo.

- (viii) The 128th respondent is the African National Congress (ANC).
- (ix) The 129th respondent is Gwede Mantashe NO, the Secretary General of the ANC, who is also cited on behalf of the National Executive Committee (NEC) of the ANC.
- (x) The 130th respondent is Dr Zola Skweyia in his capacity as chairperson of the ANC's National Executive Committee (NDC).

The three respondents who were joined later (131st to 133rd respondents) are members of the Provincial Executive Council, having been elected to the PEC at the Provincial Conference held on 24 July 2008 (a date after the main application was launched).

IV Chronology of main litigation steps

[5] 6 December 2007: Settlement Agreement

Following three court applications which respectively the third, fourth and fifth applicants (together with other persons) had brought against the first respondent and others, a settlement of those applications was reached. The settlement agreement made provision for the Regional

Executive Committees (REC) in Motheo, Letjweleputswa and Fizele Dabi regions to be disbanded with immediate effect and replaced by interim structures in the form of Regional Task Teams (RTT). The order of court provided: “The Regional Task Teams should be composed in a manner which ensures broad representation of all interested groups”.

[6] 2 June 2008: Notice of Motion and Founding Affidavit

The applicants allege that the 1st – 33rd respondents, the members of the ANC’s Free State Provincial Executive Committee failed to comply with the settlement agreement and that they failed to properly constitute RTTs for the three regions mentioned. Other issues raised were the suspension of the first and second applicants, and the fact that branch meetings were not properly advertised or held.

[7] 2 July 2008: Third Respondent’s Affidavit raising law points

The third respondent’s first response to the application was to file an affidavit in terms of Rule 6(5)(d)(iii), raising points of law:

- (i) The Notice of Motion is defective because it does not reflect a date on which the application will be moved in the event of it not being opposed.
- (ii) The 57th, 128th, 129th and 130th respondents reside beyond the borders of the area of jurisdiction of this court and should have been allowed 21 days to enter an appearance to defend as contemplated in section 27 of the Supreme Court Act 59 of 1959. The respondents in question are described as follows in the founding affidavit:

57: Moji Lydia Moshodi, purportedly appointed by the Provincial Executive Committee to the Regional Task Team (RTT) for the Fezile Dabi region.

128: The African National Congress.

129: Gwede Mantashe NO (In his capacity as Secretary General of the African National Congress and on behalf of its National Executive Committee).

130: Zola Skweyiya NO (In his capacity as Chairperson of the ANC's National Disciplinary Committee).

The third respondent contends that the court cannot condone non-compliance with the provisions of the Supreme Court Act. Because service has not been effected in accordance with section 27 of Act 59 of 1959 the court cannot entertain the application.

[8] Notice of Application to Join and Amend (Case no 5614/08)
26 August 2008

The applicant launched under case 5614/08 an application to join respondents 131, 132 and 133. That application was not opposed. In the application under case no 5614/08 the applicant sought relief in two parts.

Part A sought the joinder of 131st - 133rd respondents. In the affidavit in support of the joinder application applicant stated that it is appropriate and necessary to join those respondents by virtue of the fact that they had purportedly been elected as members of the Provincial Executive Council at the recent Provincial Conference, the validity of which the applicants seek to set aside.

Part B of the relief sought made reference to certain amendments to the Notice of Motion.

- (i) Paragraph 19 of the Notice of Motion was amended to include reference to the Provincial Conference held on 24 July 2008.
- (ii) Paragraph 19.1 was amended to insert a *proviso* stating that the structures to be established should have “equal representation for the grouping of ANC members associated with the present applicants and the grouping of ANC members associated with the 1st to 33rd respondents”.
- (iii) Prayer 19A was inserted, declaring that the meeting of 24 July 2008, purporting to be a provincial conference was null and void.
- (iv) In respect of the 57th, 128, 129 and 130th respondents, they be given 21 days to oppose the application.
- (v) The date hearing of the application, if unopposed was inserted as 6 November 2008.

[9] 10 October 2008: Answering Affidavit

- (a) No objection was raised to the joinder.
- (b) As to the proposed amendments no objection was raised if moved at the hearing and the main case was then postponed.

- (c) The answering affidavit to the main founding affidavit was included.

[10] 6 November 2008: Joinder

On 6 November 2008 the court ordered joinder on an unopposed basis.

[11] 20 February 2009: Replying Affidavit

On 20 February 2009 the applicants' replying affidavit was filed.

[12] 26 February 2009: Hearing

The matter was set down for hearing on 26 February 2009.

V The Settlement Agreement of 6 December 2007

- [13] During 2007 the applicants and other members of the ANC, being unable to resolve their difficulties within the internal structures of the ANC, brought three separate High Court applications. One application was argued on 6 December 2007 and the court granted an order setting aside invalidly composed branch and regional structures. Thereafter settlement negotiations were held in order to settle all three

applications. Several representatives of the two sides were involved, including the first and second applicants and the first respondent. Although the first and second applicants were not applicants in the three applications they throughout played a coordinating and leadership role.

[14] A settlement was reached and made an order of court on 6 December 2007. Included in the settlement agreement was a clause disbanding the Regional Executive Committees in the three regions:

“5 The current Regional Executive Committees in Motheo, Letjweleputswa and Fezile Dabi shall be and are hereby disbanded with immediate effect and shall by **Monday 10 January 2008** be replaced by interim structures in the form of Regional Task Teams. These will be established by the Provincial Executive Committee after consultation with all interested groups and the National Executive Committee’s employees. The Regional Task Teams shall be composed in a manner which ensures broad representation of all interest groups. They shall fulfill the functions of Regional Executive Committees until the new Regional Executive Committees are elected by **31 May 2008** in terms of paragraph 2 above.”

Membership would be determined in accordance with the data recorded in the National Office's membership records:

“7 For the purposes of meetings of the branches and the regions referred to above, the question of who qualifies as members in good standing of the ANC shall be determined in accordance with the current membership data as already recorded and audited by the National Office of the ANC.”

Applicants contend that the meaning of paragraph 5 of the settlement was to achieve roughly equal representation in the RTTs by their grouping on the one hand and the respondents' grouping on the other hand. The respondents say the applicants are a small off-shoot. In these proceedings applicants seek orders declaring that the respondents caused the settlement agreement not to be properly implemented, and consequential relief.

The time frame to implement the settlement agreement of 6 December 2007

(a) *Branch and Regional Conferences*

In terms of the settlement agreement, by not later than 28 February 2008 each branch in the three regions in question was to hold Branch General Meetings on which new Branch Executive

Committees had to be elected. By no later than 31 May 2008 Regional Conferences were to be held.

(b) *Creation, composition and life span of RTTs*

By 10 January 2008 the Regional Executive Committees in the three regions, which were disbanded on 6 December 2007, had to be replaced by Regional Task Teams to be composed by the Provincial Executive Committee to ensure broad representation of all interest groups. The RTTs fulfil the functions of the Regional Executive Committees until the new Regional Executive Committees are elected by 31 May 2008. The life span of RTTs therefore ended on 31 May 2008.

VI Relief Sought

At the hearing the applicants abandoned certain of the relief sought. One part of the relief claimed relates to the suspensions of the first and second applicants. Because the second applicant has now resigned from the ANC, no relief is sought by him in relation to his suspension, and the prayers have been adapted accordingly. The other part of the relief claimed relates to the alleged breach of the settlement agreement of 8 December 2007, and in consequence thereof improperly constituted RTTs and

Branch, Regional and Provincial meetings, leading to unlawful resolutions. Each prayer is summarized in italics before it is quoted. The prayer numbers of the Notice of Motion are retained.

A Suspension

1. *Declaring Suspension of First Applicant Unlawful:*

“1 Declaring that the notice of suspension of membership of the African National Congress furnished to the first applicant and dated 10 March 2008, purportedly issued by the Free State Provincial Working Committee (“PWC”) of the African National Congress (“ANC”), was and is unlawful and invalid.”

2. *Declaring Conditions of Suspension Unlawful:*

“2 Declaring that the imposition of the conditions set out in the notice of suspension of the first applicant are unlawful and invalid.”

3. *Declaring that the First Applicant is a bona fide Member of the ANC:*

“3 Declaring that the first applicant remains a *bona fide* member of the ANC, entitled to exercise all rights

conferred on members in terms of the ANC's Constitution."

4. *Interdicting First to Thirty Third Respondents from Interfering with First Applicant:*

"4 Interdicting the first to thirty third respondents from interfering with or restricting the exercise by the first applicant of his rights as a member of the ANC under its constitution."

6. *First to Tenth Respondents to furnish a Report in terms of ANC Constitution 25.12(g) on the Suspension of the First Applicant:*

"6 Directing the first to tenth respondents, and the one hundred and thirtieth respondent, within five days of the issuing of this order, to furnish to the applicants' attorneys a copy of such report as the Free State Provincial Executive Committee ("*PEC*") or the PWC may have prepared and forwarded to the NDC as required by paragraph 25.12(g) and/or (j) of the ANC's Constitution, alternatively, if no such report was prepared or forwarded to the NDC, directing the first to tenth respondents to furnish reasons for their failure to submit such a report to

the NDC as required by paragraph 25.12(g) and/or (j) of the ANC's Constitution."

7. *Declaring Notice of Disciplinary Proceedings Invalid:*

"7 Declaring that the notice of the institution of disciplinary proceedings against the first applicant, issued by seventh respondent, in his capacity as the convener of a disciplinary committee, on behalf of the PWC, dated 31 March 2008, is unlawful and invalid."

B Settlement Agreement, RTTs and Branch Meetings

11 *Declaring that the First to Thirty Third Respondents (Being members of the Free State Provincial Executive Committee (PEC)) failed to comply with the Settlement Agreement dated 7 December 2007:*

"11 Declaring that the members of the ANC's Free State PEC, being the first to thirty third respondents have failed to comply with the terms of the settlement agreement dated 6 December 2007, which was made an order of this court on that date, in case numbers 4413/2007, 3106/2007 and 2543/2007, in particular in that they have:

(i) *RTT not having Broad Representation:*

11.1 failed, by the required date of 10 January 2008 or at all, to properly constitute Regional Task Teams (“RTTs”) for the regions of Lejweleputswa, Fezile Dabi and Motheo and in particular failed to ensure that the composition of the RTTs ensures broad representation of all interest groups and in particular the group represented by the applicants;

(ii) *Failed to ensure the holding of Branch Meetings:*

11.2 failed to take all necessary steps to ensure that all branches in the three regions as aforesaid hold branch general meetings at which new branch executive committees were required to be elected by 28 February 2008;

(iii) *Failed to ensure the holding of Regional Conferences:*

11.3 failed to take all necessary steps to ensure that regional conferences would be held and lawfully convened in the regions of Lejweleputswa, Fezile Dabi and Motheo by no later than 31 May 2008, to elect through lawful means new regional executive committees and for such regional conferences and

elections to involve the participation of lawfully elected representatives of branches in the said regions and lawfully elected branch executive committees in such regions; and

(iv) *Failed to apply the National Data list of ANC*

Members:

11.4 failed to take all necessary steps to ensure that, as required by paragraph 7 of the settlement agreement and court order of 6 December 2007, for purposes of meetings of the branches and the regions as aforesaid, the question of who qualifies as members in good standing of the ANC shall be determined in accordance with the current membership data as already recorded and audited by the National Office of the ANC.”

13 *Declaring appointments of members of RTTs unlawful:*

“13 Declaring that the appointment of the members of the Regional Task Teams for the regions of Lejweleputswa, Fezile Dabi and Motheo, by the first to thirty third respondents, in their capacity as members of the ANC’s Free State PEC, is unlawful and invalid.”

14 *Declaring all Decisions of RTTs have no Force or Effect:*

“14 Declaring that all decisions and actions taken by the Regional Task Teams as appointed by the PEC for the said three regions have no lawful force or effect.”

17 *Declaring Branch Meetings Unlawful and Invalid:*

“17 Declaring that the Branch General Meetings held, and the Branch Executive Committees elected, pursuant to the processes set up by the RTTs in the three regions aforesaid are unlawful and invalid, and setting aside all decisions by such Branch Executive Committees.”

18 *Declaring Regional Executive Conferences Unlawful and Setting Aside all Their Decisions:*

“18 Declaring that the Regional Conferences held and the election of Regional Executive Committees pursuant to the processes set up by the RTTs in the three said regions are unlawful and setting aside all decisions taken by such Regional Executive Committees.”

19 *Director General to place before the National Executive Committee (NEC) or the National Working*

Committee (NWC) the failure to hold meetings so that NEC or NWC can decide (Amended prayer):

“19 Directing the one hundred and twenty ninth respondent, in his capacity as the Secretary General of the ANC, to place before the NEC or the NWC, as soon as reasonably possible after the granting of this order, the matter of the failure to hold proper and lawful Branch General Meetings, elections for Branch Executive Committees, Regional Conferences and the election of Regional Executive Committees in the three regions as aforesaid and the holding of a Provincial Conference and the election of a Provincial Executive Committee and a Provincial Working Committee for the Free State Province and for the NEC or the NWC to take such decisions, in terms of the ANC’s Constitution, as such body considers it appropriate, for:

19.1 the setting up of appropriate structures to conduct the process required to remedy the deficiencies as aforesaid provided that to the extent that the NEC or NWC establishes such structures to include ANC members in the Free State Province, proper allowance should be made to ensure that there is equal representation for the grouping of ANC members associated with the present applicants

and the grouping of ANC members associated with the first to thirty third respondents;

19.2 determining such other processes and steps as may be required to remedy the aforesaid deficiencies;

19.3 determining such steps and structures as may be necessary for the compilation or verification of membership lists, to ensure that for purposes of admitting members to meetings for branches and regional structures in the three said regions, the question of who qualifies as a member in good standing of the ANC shall be determined in accordance with the current membership data as already recorded and audited by the ANC's National Office;

19.4 determining appropriate steps to ensure, in the event that it is decided by the NEC or the NWC or its duly authorised delegate to undertake an audit of membership, that the processes for such audits are conducted in a fair, proper and transparent manner and in particular to ensure that members in the various branches or regions affected are

given proper notice of the outcome of such audits, the reasons for the conclusions reached in such audits, and an opportunity to have any objections thereto lodged, properly considered and decided and publicised;

19.5 taking appropriate steps to ensure that the processes for the holding of general meetings for branches and for the regions as aforesaid, and the elections for Branch or Regional Executive Committees at such meetings, are convened and conducted in terms of the ANC Guidelines for the Preparations for the Holding of Branch Annual General Meetings as issued by the National Secretaries Forum of the ANC on 5 October 2006, and in accordance with the provisions of the ANC's Constitution."

19A *Declaring Provincial meeting of 24 July 2008 was not validly held* (Added prayer):

"19A Declaring that the meeting held on or about 24 July 2008 and purporting to be the provincial conference of the ANC in the Free State was not validly constituted or convened and in consequence thereof:

- 19A.1 It is declared that the meeting purporting to be the Free State provincial conference held on 24 July 2008 was null and void;
- 19A.2 All resolutions purportedly taken at the said meeting are declared to be unlawful, null and void and are accordingly set aside;
- 19A.3 In particular, it is declared that the purported election at the said meeting of the members of the Provincial Executive Committee of the ANC for the Free State is set aside as unlawful and invalid;
- 19A.4 Declaring as unlawful and invalid, and setting aside, all resolutions and actions taken by the purportedly elected members of the new PEC pursuant to their invalid election as such;
- 19A.5 Interdicting the purportedly but invalidly elected members of the PEC from taking any further resolutions or actions pursuant to their purported but invalid election as such.”

C Costs

“20 Ordering the first to tenth respondents jointly and severally, the one paying the other to be absolved, to pay the costs of this application.”

VII Background facts

[15] For some time there has been disunity and tension within the Provincial Regional and Branch structures of the ANC in the Free State. There are political divisions with various groupings. The third respondent says the disunity and tensions have been caused by a relatively small number of members who do not accept that they have lost support within the party. One grouping is led by the first respondent, the Provincial Chairperson of the ANC in the Free State, and the eight applicants are associated with another group. They say their group enjoys considerable support in the Free State, but the third respondent contends that they are a small group. From August 2007 the first applicant was the Chairperson of the ANC's Bram Fischer Branch in the Lejweleputswa region. He was nominated for re-election, and also nominated as a candidate for a post on the Regional Executive Committee (REC). The first applicant

says that during 2007 tensions and divisions within the province surfaced. He says there was a campaign, led by the first to tenth respondents aimed at suppressing and undermining other political groups, especially that comprising the applicants and their supporters. The third respondent admits that there is some disunity and tension within the party, but he is not aware of any irregularities or a campaign to suppress and undermine any groups within the ANC.

[16] There are five regions in the Free State. Three are relevant: Lejweleputswa, Fezile Dabi and Motheo. Each is divided into Branches. Branches are required biannually to elect Branch Executive Committees. Branches elect representatives to attend Regional Conferences every three years. The regions in turn elect representatives to the provincial structures. The election of Branch and Regional Executive Committees is an important part of the democratic structures and processes of the ANC in the province.

[17] The applicants contend that the composition of the RTTs , as appointed by the Provincial Executive Committee, was flawed in that there is gross over-representation of members

of the group led by the first respondent, and gross under-representation of members of the applicants' group. They also allege that the convening and holding of Branch Meetings was flawed due to inadequate advertising and notice, and due to the fact that persons who were entitled to attend those meetings were excluded.

[18] The second main tier of applicants' case relates to the suspension and disciplinary steps taken against the first and second applicants.

[19] The issues of the composition of the RTTs and the holding of Branch meetings, as well as the suspension of the first applicant are discussed below.

VIII Application for Amendment and Condonation

[20] First it is necessary to deal with formal aspects relating to the amendment of the Notice of Motion and condonation.

(a) **The Amendments in the Notice of Motion relating to the date of set down if unopposed**

[21] The Notice of Motion does not contain the last sentence of Form 2(a) as contained in the First Schedule to the Uniform Rules of Court: “If no such notice of intention to oppose be given, the application will be made on the (date) at (time)”. Form 2 is referred to in Rule 6(4)(a) which states that the notice shall “be as near as may be in accordance with Form 2 of the First Schedule”. Even in cases where no notice of intention to oppose is given, the registrar will not set the matter down for hearing on the date stated at the end of the Notice of Motion. A notice of set-down is required. If a respondent who has not noted an intention to oppose wishes to attend the hearing, he or she can enquire from the registrar or the applicants’ attorney when the matter is on the roll. All that is in any event academic in this case, because the third respondent filed a notice of opposition on 11 June 2008. There was no prejudice to any of the respondents by the omission of a date at the end of the notice of motion, and the applicants’ action in not complying to the letter with Form 2(a) should be condoned, insofar as that may be necessary.

(b) Amendment of Prayers 19 and 19A in the Notice of Motion (relating to the Provincial Conference of the ANC on 24 July 2008)

[22] Prayer 19 calls upon the 129th respondent, Gwede Mantashe NO, in his capacity as Secretary General of the ANC and on behalf of its National Executive Committee, to place before the National Working Committee (NEC of the NWE) the matter of the failure to hold proper and lawful –

- (i) Branch General Meetings and the elections for Branch Executive Committees;
- (ii) Regional Conferences and the election of Regional Executive Committees in the three regions in question;

In the Notice of Amendment filed under case no 5614/2008 the applicants seek to amend prayer 19 of the Notice of Motion by adding a reference to the holding of a Provincial Conference and elections at that meeting by die addition of paragraph (iii):

- (iii) A Provincial Conference and the election of a Provincial Executive Committee and a Provincial Working Committee for the Free State Province.

The Notice of Amendment adds a *proviso* to prayer 19 stating that, to the extent that the National Executive Council

(NEC) of the National Working Committee (NWC) establishes such structures, they should ensure “equal representation for the grouping of ANC members associated with the present applicants and the grouping of ANC members associated with the first to thirty third respondents”.

[23] The proposed prayer 19A declares the Provincial Conference held on 24 July 2008 not validly constituted, null and void and all resolutions taken there unlawful.

[24] In the affidavit in support of the proposed amendments, the first applicant states the following:

“5 The event of particular concern which has arisen since deposing to the founding affidavit is the purported holding of a Provincial Conference convened, organised and conducted by the grouping led by the first to thirty third respondents.

6 This purported conference was held on or about 24 July 2008 in Tumahole, Parys. It was widely reported throughout the media.

- 7 The convening of a provincial conference of the ANC requires the involvement and participation of delegates from the various regional and branch structures of the ANC, in particular the Regional Executive Committees (RECs) and the Branch Executive Committees (BECs).
- 8 As will be seen from the notice of motion and founding affidavit previously filed in this matter, the grouping led by the first to thirty third respondents has been responsible for the irregular holding of branch and regional meetings and the purported election of RECs and BECs in the regions of Legweleputswa, Mothe and Fezile Dabi, and the various branches which make up those regions. I point out that these three regions constitute three out of the five regions of the Free State Province. The ANC membership in the three regions constitutes a substantial majority of ANC membership in the Free State Province as a whole.
- 9 The relevant respondents proceeded to convene and hold these provincial conferences with full knowledge of and in spite of the application to this honourable Court which is currently pending, for the relief set out in the notice of motion filed previously. The service of the founding papers was effected upon the relevant respondents well before the purported provincial conference was convened and held.

- 10 It is respectfully submitted that by proceeding with the purported provincial conference, involving hundreds of delegates from the purportedly elected RECs and BECs, despite the serious court challenge to the validity of those RECs and BECs is a demonstration of a blatant disregard by those respondents of the current legal proceedings and borders upon, if not constitutes, contempt of this honourable Court and a manifest disregard for the rule of law.
- 11 If this honourable Court upholds the application by granting the relief sought in the notice of motion, and in particular by setting aside the purported election of the BECs and the RECs, this would have the necessary consequence that the holding of what purported to be the provincial conference, convened with participation and involvement of members of those RECs and BECs which should be found to be invalidly constituted, would itself be unlawful.
- 12 In consequence, whatever occurred at the purported provincial conference, and in particular the election of a new Provincial Executive Committee (PEC) and would likewise be unlawful and invalid, as would any actions and decisions taken by the new purported PEC, including the

appointment by the PEC of a new Provincial Working Committee (PWC).

13 It is accordingly appropriate for the applicants to seek additional relief, as set out in the notice of amendment to which this affidavit is attached, to set aside the convening of the purported Provincial Conference, the decisions taken at such purported Conference, including the purported election of the PEC and the decisions and actions taken by the PEC, and to interdict them from taking any further action as members of the PEC or PWC.”

[25] Mr Wessels, for third respondent, points out that the Notice of Motion in which the proposed amendment of prayer 19 and the addition of prayer 19A are contained, states that the main application will be set down for hearing on 6 November 2008. He says the main application was not on the roll that day.

[26] If it is of any significance, 6 November 2008 was the day the Joinder was moved and granted, after the third respondent had initially filed a notice to oppose case no 5614/2008 on 9 September 2008. Because of the notice of opposition, the date of the 6th of November 2008 fell away.

[27] The third respondent filed his answering affidavit to the main application and to application no 5614/2008 which embodied the proposed amendments on 1 October 2008. In response to paragraph 8 quoted above, the third respondent denies any allegations of irregularity. In response to paragraph 9 where the applicants allege that the relevant respondents convened and held provincial conferences with full knowledge and in spite of this pending court application, the third respondent states:

“AD PARAGRAPH 9 THEREOF:

16 I verily belief and humbly submit that the PEC was entitled, if not obliged, to arrange and hold the provincial conference in spite of the pending application and which had been launched on behalf of a small minority of members of the **ANC** in the Free State Province who are not prepared to accept and abide by democratic policies and processes pursued and employed by the **ANC**.”

The third respondent says the provincial conference was held because the main application is without merit, and the greater good and circumstances demanded that it be held.

[28] The relief sought by the applicants in paragraph 19A of the Notice of Motion flows from the relief sought in the initial application. Prayer 19 is amended to bring in the provincial conference and to make prayer 19 conform to applicants' view of equal representation of the two groupings. These issues have been fully canvassed in the affidavits and argument and the amendments to prayers 19 and 19A should be allowed.

(c) **Time allowed to give notice of intention to oppose where service took place outside the area of jurisdiction of this court**

[29] Service of the Notice of Motion and founding affidavit on the 128th respondent, the African National Congress, 129th respondent, Gwede Mantashe NO, cited in his capacity as the Secretary General of the ANC and on behalf of its Executive Committee, and the 130th respondent Zola Skweyiya, cited in his capacity as the Chairperson of the ANC's National Disciplinary Committee, took place at Luthuli House Johannesburg on 18 June 2008. The 57th respondent, Moji Lydia Moshodi is cited in her capacity as a person appointed on the Regional Task Team for the Fezile

Dabi Region. The address for service on the 57th respondent given in the Notice of Motion is at 1450 Chris Hani, Edenvale. That is outside the area of jurisdiction of this court.

- [30] The third respondent, in his answering affidavit under Rule 6(5)(d)(iii) states that these respondents reside beyond the borders of the area of jurisdiction of this court and should have been allowed the period provided in section 27 of the Supreme Court Act 59 of 1959, namely 21 days. He also states that this court cannot condone non-compliance with the provisions of the Supreme Court Act. In support of this contention Mr Wessels, for the third respondent, refers to **SHIELD INSURANCE CO LTD v VAN WYK** 1976(1) SA 770 (NC). The **SHIELD** case concerned an urgent application brought in terms of section 24(2) of the Compulsory Motor Vehicle Insurance Act 56 of 1972. The Road Accident Fund Act 56 of 1996 now deals with compulsory third party motor insurance. Section 24 of Act 56 of 1972 dealt with prescription of claims and gave the court the power to allow a claim after the prescribed period had elapsed. The court of first instance allowed the short notice in the exercise of its

discretion under rule 6(12) (at 771H). It later appeared that the insurance company indeed intended to oppose, but there was some misunderstanding between its Cape Town and Kimberley attorneys (771F – G). The full bench in **SHIELD** held that rule 6(12) only applies to a period laid down by the rules, i.e. in respect of intra-jurisdictional service (at 772G – H). In **TURQUOISE RIVER INCORPORATED v McMENAMIN AND OTHERS** 1992(3) SA 653 (D) the court distinguished **SHIELD** because only a *rule nisi* was sought in **TURQUOISE**, and because in **SHIELD** it was not argued that the Notice of Motion was invalid, but the point was simply taken that the insurance company needed the time in which to consider the matter (at 657B - D). In **TURQUOISE** the court allowed the short service (at 657C – E). **SCOTT v HOUGH** 2007(3) SA 425 (O) was an application under rule 6(12)(c) of the Uniform Rules of Court – an application for reconsideration of an order granted in the absence of the party seeking relief under rule 6(12)(c). Rampai J in **SCOTT** could see no reason in principle or logic why the court could not relax the rules as to service in urgent matters also in respect of persons residing outside the court's jurisdiction (par [15], [29]). Harms, **Civil Procedure of the Supreme**

Court Service Issue 35 par B6.31 at B-50 states that failure to allow the period prescribed by statute cannot be condoned except in applications for a *rule nisi*, because such an application remains by its nature an *ex parte* application.

[31] Mr Kennedy, for applicants, meets the attack in respect of short notice in two ways. First by means of the notice of amendment of the notice of motion, and second by looking at the substance of the matter. As to the first basis, the notice of amendment is incorporated in part B of the Notice of Motion under case no 5614/08, stating that at the hearing of the main application, applicant will move for an order amending the Notice of Motion to state:

“save that in the case of the 57th, 128th, 129th and 130th respondents such notice of intention to oppose must be delivered within 21 days of the service of the notice of motion and the founding affidavit.”

The applicants chose not to avail themselves of the procedure for amendment under rule 28 which also applies to a notice of motion (see Erasmus, **Superior Courts Practice** Service issue 30 at B1 – 177 at footnote 2). Where an extensive amendment is sought, it is desirable that such

amendment be done in terms of Rule 28. It is not incompetent for the court to consider an application for amendment other than under Rule 28 (see **GOUWS v VENTER & CO** 1961(2) SA 329 (D) at 344D – G). The hearing of the main application took place on 26 February 2009. Should the amendment relating to the period allowed for service of the notice of intention to defend be granted, the period of 21 days will only take effect, at best, from the date of this judgment. As Mr Wessels points out, the amendment will only take effect once it has been effected (**MINISTER VAN WET EN ORDE v JACOBS** 1999(1) SA 944 (O) at 951A – B).

Mr Wessels raised no objection to the amendment, merely stating that the main application would have to be postponed if the amendment is granted. In view of the fact that the amendment will only take effect once granted, and the 21 day period will have to run from then, this course of action does not assist the applicant.

- [32] The second ground advanced by Mr Kennedy for condoning the short service is that the court must look at substance, not

form. The rules are made for the court, not the court for the rules (**ROBINSON v RANDFONTEIN ESTATES G.M. CO., LTD** 1925 AD 173 at 198; **SHILL v MILNER** 1937 AD 101 at 105). “[T]echnical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits” (per Schreiner JA in **TRANS-AFRICAN INSURANCE CO LTD v MALULEKA** 1956(2) SA 273 (A) at 278F – G).

- [33] In terms of section 173 of the Constitution, High Courts have the inherent power to protect and regulate their own process. The view that the court cannot condone non-compliance of an obligation to serve process in terms of section 27 of the Supreme Court Act 59 of 1959 is, especially in the light of section 173 of the Constitution, too broadly stated. There is no reason why a court should be able to condone non-compliance with the rules of court, but not non-compliance with a provision, which, by historical accident, is taken up in a statute. Rule 27(3) provides “The court may, on good cause shown, condone any non-compliance with these rules”. The authorities referred to by Mr Wessels, cited

above, all dealt with urgent applications under rule 6. They all dealt with single respondents, not as here, respondents who are all members of the same political party the 128th respondent, the ANC. Further, because of the urgency of all those matters, the point was taken immediately, not as here, more than six months after service. It cannot seriously be contented that any one of these four respondents, and in particular the ANC, if it knew it had 21 days to oppose would now suddenly wake up, after having “ignored” the service which took place on it more than six months ago. Also, no direct relief is sought against the four respondents in question, not even a costs order. In such circumstances it would be inappropriate not to condone the non-compliance with the time periods prescribed by section 27. These are all members of the same political party; the applications were served on respondents more than six months ago. It would serve no useful purpose to demand re-service in circumstances where one can safely assume that all interested parties are aware of these proceedings and there is no prejudice. The short service on the 57th, 127th, 128th and 129th respondents should be condoned.

IX Suspension of and Disciplinary Steps against First Applicant

(a) Declaratory Relief

[34] The relief sought under this heading is in the nature of a declarator. A High court has the power to determine any existing, future or contingent right or obligation, notwithstanding that the person seeking the order cannot claim any relief consequential upon the determinations (section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959). The court's power to issue a declarator is discretionary (**PRESTON v VREDENDAL CO-OPERATIVE WINERY LTD AND ANOTHER** 2001(1) SA 244 (E) at 248A). The court will not issue a declarator which can produce no tangible result beyond the bare declaration (**J T PUBLISHING (PTY) LTD AND ANOTHER v MINISTER OF SAFETY AND SECURITY AND OTHERS** 1997(3) SA 514 (CC) par [15]).

[35] Mr Wessels, for the third respondent, contends that the suspensions of the first and second applicants have lapsed and any relief pertaining thereto has become academic and should not be granted. He refers to a number of authorities. In **RAJAH & RAJAH (PTY) LTD AND OTHERS v**

VENTERSDORP MUNICIPALITY AND OTHERS 1961(4)

SA 402 (A) a declarator was refused because the town council seeking it could show no prejudice, as representing the public interest (407F - 408A). **NAPOLITANO v**

COMMISSIONER OF CHILD WELFARE,

JOHANNESBURG AND OTHERS 1965(1) SA 742 (A)

concerned the review of an order finding a child not be in need of care. It was held (by the High Court and in the Appellate Division) that the court will not interfere if satisfied that the applicant has suffered no prejudice (at 745H). In **DU**

PLESSIS v PROKUREURSORDE, TRANSVAAL 2002(4)

SA 344 (T) an attorney brought an application to review and set aside the Law Society's application to strike him off the roll. Because the application to strike him off was already before court, the applicant's application could have no effect and it was dismissed (350G – 351C). The last case Mr Wessels referred to on this point is **SEBENZA KAHLE**

TRADE CC v EMALAHLENI LOCAL MUNICIPAL

COUNCIL AND ANOTHER [2003] 2 All SA 340 (T) where the declarator sought concerned a tender and the contract under the tender had already been completed. The order sought on review setting the tender aside would thus be

meaningless and have no practical effect (348b – c).

[36] Mr Wessels says events have overtaken the application to such an extent that it would be a *brutum fulmen* to grant the relief which applicants seek, with reference to **COETZEE v MEINTJIES** 1976(1) SA 257 (T) where the court refused to make an order that a child should not contact the respondent because such order would be fruitless because the son would undoubtedly on his own initiative contact the respondent (at 262H). He also referred to **BEF (PTY) LTD v CAPE TOWN MUNICIPALITY AND OTHERS** 1990(2) SA 337 (C) at 345 A – F, where building work had been halted by means of an interim interdict. The court held that the interim interdict did serve a useful purpose (345E – F).

[37] Mr Kennedy, for the Applicants, points out that the ANC is not merely a political party but also a voluntary association with a written constitution. That constitution constitutes a contract between the association and its members and between its members among themselves which regulates their rights (**JOCKEY CLUB OF SOUTH AFRICA AND OTHERS v FELDMAN** 1942 AD 340 at 350 – 351; **TURNER**

v JOCKEY CLUB OF SOUTH AFRICA 1974(3) SA 633 (A) at 645B – E; **NATAL RUGBY UNION v GOULD** 1999(1) SA 432 (SCA) at 440F – G).

[38] Mr Kennedy submits that there is manifest prejudice to the applicants in this case. The applicants, as citizens of South Africa have a right under section 19(1)(b) of the Constitution 1996 “to participate in the activities of ... a political party”. Section 172(1)(a) of the Constitution provides:

“When deciding a constitutional matter within its power, a court –
 (a) must declare that any ... conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”.

Regarding unconstitutional conduct, the Constitution (section 172(1)(a)) is prescriptive in that the court must declare such conduct unconstitutional. The prime source for applications under section 172(1) relating to conduct would relate to conduct of a person or an institution bound by the Constitution (section 2 read with section 172(1) of the Constitution, as stated by Currie and De Waal, **THE BILL OF RIGHTS HANDBOOK**, 5th ed (2005) 199). Section 2 of the Constitution states that conduct inconsistent with the Constitution is invalid. The applicants seek an order

declaring that the conduct of the respondents is inconsistent with the constitution, in particular by not allowing them to make free political choices in participating in their political party as contemplated by section 19(1) of the Constitution. A member of an association (like a political party) is entitled to be treated fairly by the management and members in positions of power in that association.

(b) Suspension and Disciplining of First Applicant

[39] On 10 March 2008 the first and second applicants received notices of temporary suspension, based on their alleged actions to create divisions within the ranks of the ANC membership and their alleged involvement in numerous high court applications. Specific conditions were imposed:

- “You may under no circumstances participate in any activity and/or meeting of any structure of the ANC.
- You may not be elected to any leadership position of any structure of the ANC or participate in such election process.
- You may not mobilise, incite and /or influence any member of the ANC which might have a negative impact on the functioning of the ANC.

- You may under no circumstances provide any information to the media or make statements in the media, i.e. newspapers, television and radio.”

[40] About these conditions of suspension the first applicant says:

“88 The terms and conditions of our suspension are particularly onerous and punitive. They effectively preclude us from engaging in meaningful participation in the political activities of the ANC and exercising our rights, both under the Constitution of the Republic of South Africa and the ANC Constitution, to engage in free political activity, *inter alia* in the structures of the ANC and in the processes of election of its office bearers.

89 The timing and practical importance of the suspension of the second applicant and myself are significant. They occur at a time when the PWC and the PEC have refused to comply with the settlement agreements of 6 December 2008 and 8 January 2008, requiring the proper and balanced composition of the RTTs. Their clear intention is to sideline us, as leaders with a considerable support base, from these processes. Their intention is to ensure that we cannot influence or participate in those processes or secure election to branch or regional structures. As indicated above, both the second applicant and I have

previously chaired our respective branches. We are both candidates for positions on the REC for our regional of Lejweleputswa. The conditions imposed in terms of our suspension notices would preclude us from having any involvement in such processes or being elected.”

The response of the third respondent is contained in paragraph 87 of the answering affidavit:

“AD PARAGRAPH 88 AND 89 THEREOF:

The effect of and consequences for those applicants were considered, but the conditions were deemed appropriate under the particular circumstances and at the particular time. The suspensions were affected and the conditions were imposed after deliberations and based upon the conduct of the first and second applicants and in the hope of reducing tension within the **ANC** and of preventing violence. As I have already said, there were found to be exceptional circumstances.”

[41] The first and second applicants were not given an opportunity to be heard before the suspension. Such suspension is allowed only in exceptional circumstances:

“25.12(c) Exceptional circumstances, as determined by the NWC or National Disciplinary Committee or PWC, as the case may be, may warrant an immediate decision of temporary

suspension of a member without eliciting the comment of such member, as provided for in paragraph (b).”

(Rule 25.12(c) of the ANC Constitution).

[42] As to the exceptional circumstances the third respondent states the following in his answering affidavit:

“AD PARAGRAPH 87 THEREOF:

86.1 The exceptional circumstances were, amongst other things:

86.1.1 The necessity to obtain calm and, possibly, consensus amongst members of the **ANC** at, particularly, branch level and the first and second applicants endeavors to make that impossible;

86.1.2 The first and second applicants false accusations (perpetuated herein) directed at members of the PEC and, particularly, the first respondent;

86.1.3 The first and second applicants’ disregard for the **ANC’s** Constitution and democratic processes.

86.2 I respectfully remind this Honourable Court thereof that the deponent, repeatedly, stated that he and the second applicant are senior members of the **ANC** and they were, therefore in the position to influence new and/or naïve

members of the **ANC** by means, amongst other things, of false accusations and information.”

[43] The first applicant wrote to the Secretary General of the ANC, the 129th respondent, on 15 March 2008 seeking his intervention. That was not done.

[44] The first applicant makes the point that the provincial structures could not lawfully set up a disciplinary process in which their members were personally involved:

“92 The PWC and the PEC could not lawfully and fairly set up a disciplinary process using the provincial structures of the ANC in a dispute in which they and their members personally were involved. They also acted in bad faith in utilising the disciplinary process to settle what was (and remains) in essence a political rather than a disciplinary matter.”

The third respondent washes his hands of the matter, simply stating that the matter now rests with the national structure:

“AD PARAGRAPH 92 THEREOF:

The first and second applicants’ suspicions and objections were given due consideration and the matter referred to the NDC. The matter now rests with the National Disciplinary Committee.”

[45] The disciplinary hearings of the first and second applicants were scheduled for 16 April 2008. Those were subsequently rescheduled for 10 and 11 May 2008. The first applicant attended at the designated venue at the appointed time but no-one from the provincial structures attended. Third respondent states that the first and second applicants were informed that the disciplinary hearings could not take place on those dates due to unforeseen circumstances.

[46] The third respondent says because the disciplinary proceedings and the suspensions have lapsed, this matter has become academic. That was also the approach adopted by Mr Wessels. The third respondent offers no explanation as to why the disciplinary proceedings never took place, or why the suspensions were allowed to lapse. He is the person who initiated the suspension by virtue of his letter dated 10 March 2008 in his position of Acting Provincial Secretary of the ANC. The third respondent does not state what harm would have been done if he gave the first applicant a hearing as is provided in Rule 25.12(b) namely that a decision is taken to discipline “only after the accusations have been put to him or her for comment”. The

ANC Constitution provides in Rule 25.2(a) that disciplinary proceedings shall not be used as a means of stifling debate, or denying members their basic democratic rights. The first applicant contends that the use of disciplinary proceedings against him was in contravention of Rule 25.2(a) and were instituted for the purpose of stifling debate by him at a time when the PWC and REC were refusing to comply with the terms of the settlement agreement of 6 December 2007.

(c) Conclusion

[47] The circumstances and events around the disciplinary steps and suspension, namely –

- (i) the timing of the suspension at the time when RTT structures were being set up, at a time when there was disagreement between the grouping led by the first respondent and the group led by the applicants;
- (ii) the fact that stringent conditions of suspension were imposed, in particular that the first applicant may not “participate in any activity and/or meeting of any structure of the ANC”;
- (iii) disciplinary steps were dropped without any explanation given to the first applicant;

- (iv) the suspension was allowed to lapse without any explanation given to the first applicant;
- (v) the third respondent now simply describes this as an academic question

establish that the suspension and disciplinary steps instituted were unlawful and invalid.

The question remains, however, whether this is an appropriate case where a declarator should be made. The suspension and disciplinary steps have lapsed. It is like a tender wrongly granted, but the work under the contract completed, as in the **SEBENZA KAHLE** case above.

The fact that a constitutional right has been infringed does not mean that such declarator should in all cases be issued. Where a government department of the state has performed an unconstitutional act, e.g. by not providing adequate facilities to which citizens are entitled under the Bill of Rights, a declarator can be issued stating that, so that remedial steps can be taken. On the other hand, for example the Constitution states that everyone is entitled to fair labour practices (section 23(1)). That does not mean that an unfair

labour practice will give rise to a declarator order under the Constitution in all cases.

Although there appears to have been an infringement of first applicant's rights, a declarator by this court will not have any practical effect, and cannot be granted.

X Compliance with Court order of 6 December 2007 in establishing RTTs and holding Branch meetings

(a) Establishment of RTTs

[48] Mr Kennedy submits that the composition of the Regional Task Teams (RTTs) and Branch Executive Committees (BEC) is a live dispute: the question is whether there is a valid BEC, Regional Executive Committee (REC) or Provincial Executive Committee (PEC). Lists are being prepared. The applicants are trying to ensure that proper lists exist. Regarding the establishment of the RTTs, a meeting was held on 8 January 2008 between the first and second applicants, and the fourth respondent, Mxolisi Dukwana who is cited as the treasurer of the ANC in the Free State. In his affidavit Dukwana says that he is a member of the Provincial Executive Council's Provincial Working Committee. He met with the first and second

applicants three times early in January 2008. Dukwana says the meetings were informal and no formal minutes were held. He attended the meetings at the request of the PEC to obtain the views of the first and second applicants as representatives of a particular interest group. He says he was not authorised by either the PEC or the PWC to enter into any agreements with or give undertakings to those who attended the meetings. The applicants attach the minutes of the meeting which state “There was a strong view that the RTTs be composed on a 50/50 basis in order to foster the spirit of consensual decision making”. This “strong view” is not minuted under “Decision”. It was decided that the size of an RTT would be between 12 and 16.

- [49] After that meeting the applicants gave Dukwana a list of their nominees for the RTTs, containing ten names for each of the three regions. The applicants anticipated that approximately half (6 - 8) would be appointed by the PEC from that list of 10 names. On 11 January 2008 attorneys acting for first and eighth respondents sent a letter to applicants’ attorneys, attaching a list of persons appointed to RTTs. The names for Lejweleputswa region included only three persons whose

names had appeared on applicants' list, out of the total number of members of the RTT of about 22. In respect of Fezile Dabi region, applicants had one name, and for Motheo, two. The applicants say the respondents failed to comply with the court order, and third respondent says the respondents made every endeavour to comply with the court order and be fair. The third respondent says the first and second applicants were not on any RTT because their suspensions or expulsions were a real possibility. Applicants say that almost all the individuals appointed by the PEC to the RTTs are prominent supporters of the group led by the first to tenth respondents. Third respondent denies that the membership of the RTTs was biased towards or against any grouping.

[50] A meeting was held on 21 January 2008 between representatives of both sides, including the first applicant. The composition of the RTTs was raised as a matter of concern by the applicants. First applicant says no meaningful response was received from the respondents. Third respondent says it was "informally" resolved that it was

not expedient or necessary to change the compilation of the RTTs.

[51] On 24 January 2008 first applicant wrote to the Secretary General of the ANC, the 129th respondent, seeking his assistance. That request for intervention did not yield results.

[52] The first applicant says that because the RTTs are not properly constituted, and for other reasons, ANC members in the various branches are being denied the opportunity of democratic processes and representation. The third respondent answers that the applicants seem to believe that every member of the ANC is entitled to his or her representative, which is not the case.

(b) Irregularities in arranging and holding Branch Meetings

[53] During about May 2008 RTTs arranged branch meetings at most of the branches in the three regions. The applicants contend that there were two main forms of irregularity. The first is that the meetings were not properly advertised. Applicants refer to the Guidelines for the holding of Branch

AGMs, which requires that the holding of a AGM should “be openly advertised in public notices, individual invitations to members, confirmations or any other way possible”. The applicants attach a notice sent by Ms Lobe, the 16th respondent, to all Branch and Regional Secretaries, confirming the need to comply with ANC guidelines for Branch AGMs. Applicants say that the Branch meetings were convened by supporters led by the first to tenth respondents on a secretive and selective basis. The third respondent points out that, due to the publicity which led to the court order of 6 December 2007 members of branches knew that branch meetings had to be and would be held. He does concede that due to time constraints meetings were not always as extensively advertised as would normally have been the case, and RTTs exercised their discretion according to prevailing circumstances. First applicant alleges that the Branch General meetings and the election of Branch Executive Committees were invalid on the ground that they were not properly convened. Third respondent says that these are sweeping allegations of which the first applicant does not have personal knowledge.

[54] Applicant refers to instances where members who are supporters of the group associated with the applicants were unlawfully excluded from meetings. The general pattern was that such persons were excluded because their names did not appear on the branch register of members. First applicant says those branch registers excluded numerous names of persons who are members of the ANC in good standing. As an example of irregularities in the holding of branch meetings, first applicant cites the situation of Aubrey Makgome, the acting chairperson of the Bram Fischer Branch in Lejweleputswa, who only became aware of the branch meeting the night before the meeting was held.

[55] In the answering affidavit the third respondent points out that no explanation is offered why Ms Mokgome only became aware of the meeting the night before; she might have been out of the country. In the replying affidavit the first applicant states that the third respondent's answers do not properly address the points raised in the founding affidavit, but no further evidence is presented by the first applicant as to how the respondents were at fault.

[56] Applicant refers to 27 ANC members in good standing who were excluded from attending the Branch General Meetings. Annexures AA1 – AA27, according to the first applicant, “set out details of members who have submitted such reports to us”. The first applicant says the persons referred to in Annexures AA1 – AA27 were excluded from Branch General Meetings held in their branches during the period 2nd to 10 May 2008 in respect of Ward 7. There are several other such lists.

[57] All these statements appear to be hearsay. Annexures DD1 – DD120 also contains names of persons who were excluded. Annexure DD2 is a joint declaration by three persons stating that they were excluded from a meeting despite being members in good standing of the ANC. It is not under oath; Annexure DD7 contains three names, also not on oath. Annexure DD12 contains 12 names; also not on oath. So it carries on. There are numerous such statements, all not on oath. That is not evidence. There was no obligation on the third respondent to deal with them.

(c) Evaluation of Evidential Material

[58] In a trial the evidence is presented *viva voce*. In motion proceedings the evidence is given in the form of statements signed and sworn to be the witnesses, called affidavits (Herbstein and Van Winsen, **The Civil Practice of the Supreme Court of South Africa** 4th Ed (1997) 230). Statements not on oath are not evidence.

[59] The affidavits in motion proceedings must contain factual averments that are sufficient to sustain the applicants' cause of action (**DIE DROS (PTY) LTD AND ANOTHER v TELEFON BEVERAGES CC AND OTHERS** 2003(4) SA 207 (C) par [28]). In motion proceedings courts decide on common cause facts. Motion proceedings are not designed to determine probabilities (**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA** (573/08) [2009] ZASCA 1 (12 January 2009) par [26]). It is generally undesirable to settle disputes of fact on the probabilities disclosed by the affidavit evidence (**DA MATA v OTTO, NO** 1972(3) SA 858 (A) at 865H). Final relief on motion (as the applicants seek here) can only be granted if the facts as stated by the respondent, together with the admitted facts in the applicants' affidavit, justify such an order (**STELLENBOSCH**

FARMERS' WINERY LTD v STELLENVALE WINERY

(PTY) LTD 1957(4) SA 234 (C) at 235 E – G). Mr Kennedy contends that the denials by the third respondent are far-fetched and untenable, justifying rejection on the papers

(PLASCON-EVANS PAINTS LTD v VAN RIEBEECK

PAINTS (PTY) LTD 1984(3) SA 623 (A) at 635 C).

(d) Conclusion

[60] The first building block of applicants' case is the settlement agreement of 6 December 2007, and in particular the following sentence in paragraph 5 thereof:

“The Regional Task Teams shall be composed in a manner which ensures broad representation of all interest groups”.

The applicants contend that there were only two major interest groups, namely the grouping led by the first to tenth respondents on the one hand, and the grouping led by the applicants on the other hand. The third respondent says the applicants are a small grouping which has lost support. It is true that the parties to the settlement agreement were the grouping of the applicants and the grouping of the respondents. The applicants contend that the split in support is approximately 50/50, but there is no evidence to back this

up. These being motion proceedings, the version of the respondent can only be rejected if it is clearly untenable. That cannot be said here in respect of the respective support of the two groups. The probabilities point to a conclusion that the support for the applicants' group is more than the 10% allowed by the PEC in the RTTs, but firmer evidence is needed to reject the third respondent's allegations as to support and composition of the RTTs. Further, the applicants were aware of the settlement agreement and the phrase "broad representation of all interest groups" is used. Not only the group led by the applicants and that led by the respondents were envisaged, but other interest groups as well.

[61] The first applicant alleges in the founding affidavit that the improperly constituted RTTs organised branch meetings during the weeks preceding the launching of the application. The premise is that the RTTs were improperly constituted. Perhaps (even probably) they were, but that cannot be accepted for purposes of these motion proceedings, because there is no admissible evidence of irregularities, only

statements not on oath and hearsay allegations as to the advertisements.

[62] The applicants have failed to establish that the settlement agreement of 6 December 2007 says what they say it does. That is their first problem. The second problem is that the applicants failed to place admissible evidence before the court which called for an answer.

[63] An obligation to answer only arises when there is a case (on admissible evidence) to meet, evidence which “calls for an answer” (EX PARTE THE MINISTER OF JUSTICE: IN RE REX v JACOBSON AND LEVY 1931 AD 466 at 479). In other words, is there, in the absence of a response, evidence on which the court might to give judgment in favour of the applicant (see GASCOYNE v PAUL AND HUNTER 1917 TPD 170 at 173). The fact that inadmissible evidence is repeated does not make it better. Ten pieces of inadmissible evidence are just as inadmissible as one. In relation to the Branch meetings, several statements (not on oath) alleging irregularities are attached to the papers. There is no obligation on a respondent to answer to inadmissible

evidence. The denials by a respondent do not become bold or untenable if there was no admissible evidence to respond to.

- [64] The applicants have failed to establish non-compliance with the settlement agreement of 6 December 2007 by the respondents and they are not entitled to the consequential relief of setting aside elections and decisions.

XI Costs

- [65] The applicants seek costs only against the first to tenth respondents, being the members of the Provincial Executive Committee (PEC) and the Provincial Working Committee (PWC). Although the applicants have failed to establish most of their claims because of a lack of evidence sufficient to justify an order in motion proceedings, they were forced to come to court because of an unwillingness by the respondents to resolve these issues internally.

- [66] The suspensions of the first and second respondents were simply allowed to lapse, with no explanation given. The suspensions were bad in law and invalid. The report on the

disciplinary proceedings which is required by Rule 25.12(g) of the ANC's Constitution has not been furnished to the first applicant, despite the fact that the third respondent stated in his answering affidavit filed on 1 October 2008: "I do not oppose the relief provided for in paragraph 5 and 6 of the Notice of Motion in the main application". Yet no such report has been furnished to the first applicant. The applicant has been forced to obtain an order of court to that end.

[67] The third respondent took points which were bad in law and consumed court time which was of no assistance to resolve the real dispute between the parties. The alleged defects in the Notice of Motion were of no significance, and the point as to service outside the area of this court's jurisdiction was equally without merit. (See Herstein and Van Winsen, **The Civil Practice of the Supreme Court of South Africa** 4th Ed 714 footnote 72.)

[68] The applicants have not been successful in obtaining any substantive relief. But it must be borne in mind that this litigation concerned the constitutional rights of the applicants to exercise their political rights under section 19(a) of the

Constitution. This case concerns the governance of a political party, it is a matter of public interest.

[69] Neither party has achieved substantial success and it would be fair and just to make no order as to costs.

XII Order

- [70] 1. The applicants' application for amendment contained in Part B of its Notice of Motion under case number 5614/2008 dated 26 August 2008 dealing with amendments to the Notice of Motion in case number 2567/2008 dated 2 June 2008 is granted.
2. The applicants' non compliance with the provisions of section 27 of Act 59 of 1959 in respect of service of the Notice of Motion and founding papers on the 57th, 128th, 129th and 130th respondents is condoned.
3. The first to tenth respondents, and the one hundred and thirtieth respondent, are directed, within five days of the issuing of this order, to furnish to the applicants' attorneys a copy of such report as the Free State

Provincial Executive Committee (“*PEC*”) or the PWC may have prepared and forwarded to the NDC as required by paragraph 25.12(g) and/or (j) of the ANC’s Constitution, alternatively, if no such report was prepared or forwarded to the NDC, directing the first to tenth respondents to furnish reasons for their failure to submit such a report to the NDC as required by paragraph 25.12(g) and/or (j) of the ANC’s Constitution.

4. No order as to costs is made.

A KRUGER, J

On behalf of applicants:

Adv. P. Kennedy S.C.
Instructed by:
Mphafi Khang Inc.
BLOEMFONTEIN

On behalf of third respondent:

Adv. M. H. Wessels S.C.
Instructed by:
Gous Vertue & Associates Inc.
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