

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5173/2008

In the matter between:-

PAN AFRICANIST CONGRESS OF AZANIA

Applicant

and

THAMI KA PLAATJIE

1st Respondent

BENNY ALEXANDER AKA KHOISAN X

2nd Respondent

CLARENCE MLAMLI MAKWETU

3rd Respondent

MAWABO SIJILA

4th Respondent

MANELISI LUXANDE

5th Respondent

NATIONAL COORDINATING COMMITTEE

6th Respondent

CHARGEIN MABASO

7th Respondent

HEARD ON:

18 SEPTEMBER 2008

JUDGMENT BY:

RAMPAI, J

DELIVERED ON:

9 OCTOBER 2008

[1] These motion proceedings came by way of an urgent application on Tuesday 31 July 2008. My brother Cillié J granted a provisional order in favour of the applicant against the seven respondents. The rule *nisi* was returnable on Thursday 29 August 2008. On the return day my brother Wright J extended the rule *nisi* to Thursday 18 September

2008. The matter was argued before me on the extended return day.

[2] Mr. Matanda argued the matter on behalf of the applicant. He submitted that the applicant had made out a case that entitled it to the relief sought. Therefore, he urged me to confirm the rule *nisi* with costs.

[3] Mr. Sotshongaye argued the matter on behalf of the respondents. Contrary to the foregoing submission, he submitted that the applicant had failed to make out a case that justified the grant of the redress sought. Therefore, he urged me to discharge the rule *nisi* with costs.

[4] On or about Thursday 24 July 2008 Mr. Mfanelo Skwatsha, the applicant deponent, received a notice issued by Mr. Mawabo Sijila under the banner of the Pan Africanist Congress. Writing in the name of the PAC and in his representative capacity as its provincial secretary, Mr. Sijila invited all the rank and file members of the PAC to attend a provincial gathering of the organisation's branch which was to be held at Driftsands Community Centre in the Western

Cape on Sunday 27 July 2008. The purpose of the gathering was to get the members in a state of readiness to elect a new leadership at the 9th National Congress of the PAC to be held in Bloemfontein on Saturday 2 August 2008 to Sunday 3 August 2008.

[5] It was the aforesaid circular which triggered off these proceedings. The purpose of the case was threefold: *viz* to restrain the respondents firstly, from holding any gathering or meeting under the banner or name of the PAC; secondly, from holding out that they were assembling as the PAC at the Mangaung Municipality Hall or at any other venue in Bloemfontein over the aforesaid weekend and thirdly, from holding any press conference or issuing press statements alleging or purporting or holding out to be the leadership of the PAC.

[6] The papers show that there is a deep rift in the PAC. Although there is one applicant and seven respondents cited in the formal heading of the notice of motion, in reality there are only two parties. Each of the two grouping claims to be the Pan Africanist Congress. In order to avoid confusion,

when I refer to the applicant in the course of this judgment, I must be understood to mean the grouping led by Mr. Letlapa Mphahlele, which I shall simply describe as PAC – Mphahlele. This is the applicant party. Its deponent, Mr. Mfanelo Skwatsha, is its secretary general. *Brevitas causa* I shall refer to the several respondents collectively as PAC-Plaatjie. Mr. Plaatjie has been cited as the first respondent. He was also described as the provincial chairperson of the PAC in the Gauteng Province. His group is the respondent party. His deponent, Mr. Clarence Mayekiso, is its acting secretary general. I intend to offend nobody by characterising the parties in this fashion.

- [7] The historical background of the events appears to be necessary. The history of the undivided PAC as a liberation movement is fully documented elsewhere. It is not my aim to recite it here. It was formed in 1959. It was formed as a breakaway group from the African National Congress. Its founding father was the late Smangaliso Robert Sobukwe. In 1994 it participated in the first democratic general elections as a registered political party.

- [8] Last year there were three individuals who represented the party in the national parliament. A year or so ago its deputy president, Mr. Themba Godi, led a breakaway from the party. The 2007 breakaways organised themselves into a new political party now known as African People's Convention. Two of the three PAC members of parliament crossed the floor during September 2008 and became members of the breakaway, in other words, APC.
- [9] The president of the PAC, Mr. L. Mphahlele, was deeply troubled by the foregoing developments. After the breakaway, the party was left with only one member of parliament in the national assembly. The president perceived those developments as a crisis. On 22 September 2007 he reacted to the perceived crisis by suspending the constitution of the party. Moreover, he also disbanded its national executive committee, the NEC, on the same day. For almost nine months the president ran the affairs of the organisation alone by presidential decree.
- [10] Six months or so later, on 28 March 2008, to be precise, the president, Mr. L. Mphahlele, issued an internal memo to all

the branches of the PAC. He notified the branches about the annual national congress of the PAC to be held at Fort Hare University, outside Alice in the Eastern Cape Province from Friday 4 June to Sunday 6 June 2008. Among the items on the agenda were constitutional proposals, national general elections 2009 and Dr. Motsoko Pheko's appeal.

[11] On Thursday 5 June 2008, approximately nine months after the Godi breakaway, another monster of a further breakaway reared its head. The house of the PAC showed the symptoms that it was beginning to crack yet again. Two members of the PAC, obviously sympathetic to the PAC-Plaatjie camp, if not its members, launched an urgent application in the Tranvaal Provincial Division of the High Court against the PAC president, the same Mr. Letlapa Mphahlele, N.O. The matter was filed under case number 27276-08.

[12] The order sought against the PAC president in the Pretoria High Court included the following forms of relief:

- “2.1 Declaring the decision taken by the respondent in a meeting held on 22 September 2007, suspending the constitution of the Pan Africanist Congress of Azania, ‘PAC’, and disbanding the entire National Executive Committee, ‘NEC’, of the PAC unlawful, unconstitutional and of no force and/or effect;
- 2.2
- 2.3 Directing the respondent to comply with the constitution of the PAC and call a National Conference within 60 days from the date of the finalization of this application;
- 2.4 Directing the respondent to re-instate the National Executive Committee of the PAC, forthwith;
- 2.5
- 2.6 Directing the respondent to re-instate the Secretary for Finance of the PAC, Charge-In Mabaso, within 7 days from the date of the granting of this order;”

[13] The rule *nisi* was issued on Tuesday 10 June 2008 returnable on Thursday 26 June 2008. The urgent application was opposed. On the return day the rule *nisi* was discharged. It will be readily appreciated that the abortive attempt to have the suspension of the constitution and the dissolution of the national executive committee of the PAC nullified and its proposed annual general conference

prohibited, failed in the Pretoria High Court seven days prior to the holding of such conference at Alice.

[14] On Friday 4 July 2008 the applicant party assembled at the University of Fort Hare where they started with a gathering they called the annual national conference. In the founding affidavit the applicant party's deponent alleged that about 500 delegates attended the annual national conference; that the new leadership, in other words, the National Executive Committee, consisting of 44 members, was elected; that the co-leaders of the applicant party were:

- "a). Letlapa Mphahlele as the President
- b). Mfanelo Skwatsha as the Secretary General;
- c). Andiswa Mjali as the Deputy Secretary General;
- d). Frank Ngidi as Treasurer General; and"

The annual national conference ended on Sunday 6 July 2008. During the course of the conference the 2000 PAC constitution was amended and the constitution so amended was adopted as the new 2008 constitution of the Pan Africanist Congress of Azania.

[15] On or before Thursday 24 July 2008 the applicant party's deponent came across a notice issued by the fifth respondent, Mr. Manelisi Luxande, on behalf of the sixth respondent, the National Coordinating Committee, addressed to all Africanists informing them about the national conference to be held in Bloemfontein from 2 - 3 August 2008. Although the word "Azania" appeared twice in the notice, the name in dispute, namely: Pan African Congress or its acronym PAC, did not. The theme of the national conference was to reposition the Africanists to take the centre stage in the politics of Azania.

[16] On Thursday 24 July 2008, 18 days after the annual national conference at Alice, the applicant party's received another notice. On this occasion the invitation was issued by the fourth respondent, Mr. Mawabo Sijila. Its heading was:

**"PAC 9TH NATIONAL CONGRESS AT BLOEMFONTEIN ON
AUGUST 2-3, 2008"**

It addition to what I have already said about this invitation in paragraph [4], *supra*, I hasten to remark that the name in dispute, in other words, the word PAC features on no less

than 12 times in annexure MS6. The first respondent, Mr. Thami Ka Plaatjie, and the second respondent, Mr. Khoisan X, were described as candidates for the presidency of the PAC of Azania. The fourth respondent described himself as the provincial secretary general of the PAC. It would appear that before 22 September 2007 he was recognised as the provincial chair of the PAC branch in the Western Cape.

- [17] On Monday 28 July 2008 an article by a journalist called Monako Dibetle appeared in the Mail & Guardian. Under that article with the heading:

“PAC to split again over ‘power grab’”

the journalist reported about the media interview he had with the first respondent, described as the provincial chair of the PAC in the Gauteng Province, who confirmed that the PAC-Plaatjie was going to hold its own congress in Bloemfontein in August. The respondent party voiced a few serious concerns pertaining to Mr. Mphahlele’s rule by decree.

[18] On Tuesday 31 July 2008 the applicant party brought an urgent application against the respondent party. The rule *nisi* issued and prohibited the respondent party, among others, from going ahead with the national congress in Bloemfontein as planned.

[19] On Saturday 2 August 2008 the respondent party went ahead with its national congress of the Pan Africanist Congress at Nicro Hall, Section B, Botshabelo in the Free State Province. These then are common cause facts plus facts which are not seriously disputed.

[20] The question in the case is whether the applicant party has established, on a balance of probabilities, the requisites for the grant of a final interdict. In order to have the rule *nisi* confirmed, the applicant has to prove all the requisites of a final interdict. **SETLOGELO v SETLOGELO** 1914 AD 221 on p. 227.

[21] As regards the first requirement, the applicant has to establish a clear right. Here the starting point is that the authority and the designation of Mr. Mphahlele as the

president of the undivided PAC were never in doubt. He was elected as the president by the legitimate structure of the PAC apparently at its eighth national congress. As on 22 September 2007 he was still the undisputed president of the PAC.

[22] On 22 September 2008 he suspended the constitution of the PAC. At the same time he also disbanded the national executive committee of the PAC. However, he did not relinquish his position as the president of the organisation. Instead, he gained immense powers on account of the suspension of the constitution and the dissolution of the national executive committee.

[23] In the answering affidavit the respondent party's deponent, Mr. Clarence Mayekosi, accused Mr. Mphahlele of hijacking the PAC and using divisive tactics to pursue selfish interest. He further alleged that Mr. Mphahlele suspended the constitution and dissolved the national executive committee of the PAC with the sinister intention of usurping power for his personal gain. He went on to say that Mr. Mphahlele had divided, confused and threatened the members. He further

blamed the same gentleman for dismembering certain rightful members of the organisation by directing the applicant party's deponent not to process their application forms for the renewal of their membership. By so doing, so claimed the respondent party's deponent, and by creating new branches of the PAC, the underlying reason for all the actions of the president was a grand strategy to execute an internal take-over of the organisation without any opposition at the University of Fort hare.

[24] The respondent party alleged further that the militaristic, autocratic and dishonest tendencies by the applicant party were to blame for the 2007 breakaway. Therefore, the respondent party lastly alleged that the applicant party lacked openness and good governance in general but in particular in its dealings with public funds allocated to the PAC as a political party by the Independent Electoral Commission. In its replying affidavit the applicant denied all the accusations levelled at it by the respondent party.

[25] Clause 14 of the Disciplinary Code of the PAC provides as follows under the heading "Democratic Centralisation":

“14.1 This means that the power of directing the PAC is centralised in the NEC which acts through the President (sic) who wield (sic) unquestioned (sic) powers as long as he acts within the grounds laid by the decisions of the organisation which must have been democratically arrived at. it (sic) means a centralisation of directive, and executive implementation of a decision. If PAC wants to forge ahead, it must adopt and carry out this principle with firmness and thoroughness.

14.2 The President shall have emergency powers, which he may delegate, to suspend (sic) the entire constitution of the PAC so as to ensure that the movement emerges intact through a crisis. At that time, he directs the Movement by decree, and is answerable for his actions to the National Conference or National Congress”

[26] It was contended on behalf of the respondent party that the president acted unconstitutionally in suspending the constitution of the PAC. The contention failed to impress. Clause 14.2 of the Disciplinary Code empowers the president to suspend the entire constitution if there is a crisis. It is not open to any member to argue that the president acted unlawfully in suspending the constitution because there was no crisis. Whether the PAC faces a crisis or not, is not open for any democratic debate. The enquiry is not

whether a reasonably informed member of the PAC would, in given circumstances, have objectively thought that the PAC was in a political crisis or not. On the contrary, the enquiry is whether the president subjectively believed that the PAC was in a crisis regard being had to the prevailing circumstances. It is a prerogative which is exclusively entrusted to the president. It resides squarely within the subjective province of his own mind. It follows, therefore, that even if the president's reading and assessment of the situation is shown to be objectively wrong, it cannot, for that reasons, be challenged.

- [27] It is a matter of democratic centralisation of emergency powers in the president. He wields unquestionable powers in terms of clause 14.1. On 22 September 2007 he was of the opinion that the crossing of the floor by $\frac{2}{3}$ of his party's members of parliament, coupled with the immediate breakaway from his party, together boiled down to a real crisis. Apparently there had never been such a rebellion in the history of the party as a liberation movement or as a registered political party. During the state of emergency the president was empowered to rule the movement alone by

decree – clause 14.2. Implicitly he could lawfully dissolve any structure including the national executive committee. For his actions during the crisis he was obliged to answer only to the national conference or congress.

[28] In the circumstances I am not persuaded that Mr. Mphahlele unlawfully suspended the constitution; that he unlawfully dissolved the national executive committee; that he usurped the powers of any elected leader of the PAC or that he acted improperly in convening the Alice conference. The fact of the matter is that he has been leading the PAC as its duly elected president all along.

[29] It is now quite clear that certain members of the PAC particularly those who have been singled out as the respondents in this case, have not taken kindly to the way their president exercised his extensive emergency powers from 22 September 2007 until 6 July 2008. Two unhappy PAC members attempted to have the suspension of the constitution and the dissolution of the national executive committee by the president declared unlawful and invalid. However, such an application failed in the Pretoria High

Court on 26 June 2008. Now, unless and until any decisions taken or any actions performed by the president since 22 September 2007 to date, are set aside by a court of law in a formal review application, such a decision or action exists as an accomplished fact. Accordingly the suspension, the dissolution and the Alice conference have legal consequences that cannot simply be ignored because the respondent party reckons they are tainted with illegality.

[30] In the case of **OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS** 2004 (6) SA 222 (SCA) at 242A Howie P and Nugent JA said the following:

“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.”

Although the court in that case was concerned with an administrative action there can be no logical explanation why, by analogy, the same principle should not apply to any act, private or political, as in the instant case.

[31] It is not the respondents party's case that it has even taken any positive legal steps to have the decisions of the man they, until 22 September 2007, recognised as their president with unquestionable powers, set aside or that any application is pending to have such decisions or acts set aside. According to the answering affidavit, the respondent party is still considering the matter and an application for leave to appeal will be launched. The answering affidavit was signed on 21 August 2008. However, notwithstanding their alleged intention to take the matter on appeal, when the current application was argued before me, 28 days since the signing of the answering affidavit, no application for leave to appeal had been filed in the Pretoria High Court in connection with the case that the respondent party lost 11 weeks earlier.

[32] Where the respondent has not taken appropriate steps to have an act, it claims to be invalid, judicially reviewed and set aside, the respondents is precluded from raising the collateral attack on the validity of such an act in the subsequent proceedings for the grant of a final interdict.

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195 (TPD) per Bosielo J. Therefore, the respondent party in this case is debarred from contending that, because it considered the applicant's actions unlawful, *viz* the actions whereby the PAC constitution was suspended and its national executive committee disbanded, the respondent party was not bound by such acts.

[33] The right of the applicant party is perfectly clear. It is led by the president who was democratically elected at the national congress. He has remained in actual control and leadership position of the PAC. He ascended to that position by perfectly valid and popular vote. Throughout the crisis he retained his title as the president and the sole leader of the PAC. He never relinquished such a title and active functional role. Now, he is entitled to be protected against any person who, against his will, forcibly or otherwise endeavours to oust him from such position. Since the applicant party is the original and legitimate public face of the PAC, it is entitled to be protected against any disenchanted dissidents attempting to project themselves as the real or old PAC.

[34] The rest of the respondent party's allegations are wild and emotional claims. The entire answering affidavit is riddled with vagueness and baseless accusations. I am still in the dark as to the precise details: of how much funds of the PAC Mr. Mphahlele has abused or embezzled for his personal gain; of members who applied for renewal of the membership but were never provided with the requisite membership cards; of the members who travelled to the University of Fort Hare but were prevented from participating in the deliberation because they did not have membership cards; of non-members who were shipped to the University of Fort Hare to masquerade as delegates whereas they were not; of the new branches that were created for the purpose of purging the applicant party's supposed deponent. All these claims were extremely vague and embarrassing. Virtually all of them were not substantiated by any credible and reliable factual allegations.

[35] Mr. Sotshongaye contended that the applicant party had no right to create new branches, design new membership cards and to convene gatherings in the name of the PAC during the period of the suspension of the constitution. The

contention that nobody could organise such activities in the name of the PAC before the suspension of its constitution had been uplifted, is erroneous and absurd.

- [36] The national executive committee of the PAC is ordinarily the structure that executes the decisions of the national congress, implements the policies and reinforces the programmes and sees to it that the disciplinary rules are followed and the constitution obeyed. In short, it is the general responsibility of the national executive committee to organise the activities of the applicant party during times of peace, in other words, in accordance with the constitution. However, when the operations of the constitution are stayed during extraordinary and troubled times, the structures cannot function in accordance with a suspended constitution. But the activities of the PAC do not come to a standstill on account of the suspension of its constitution or the disbanding of its national executive committee. The applicant party has the right, through its president, to carry on organising its activities or affairs in accordance with the directives from time to time decreed by the president.

[37] If the suspension of the constitution also entailed the automatic freezing of any form of organising the activities, it would certainly have deepened the crisis. The suspension would have aggravated the situation. The real purpose of the suspension together with the unquestionable emergency powers exclusively centralised in the president were designed to ensure that the PAC survives the crisis. The president believed that the existence of the PAC was imperilled by the rebellion. The president was obliged by the code which, I was made to understand, is one of the five basic documents of the PAC, to ensure not only that the struggle movements survives, but also that it emerges stronger when the turmoil is over than it was when it began.

[38] I have, therefore, come to the conclusion that the applicant has a clear right, embodied in the president: to mobilise the followers; to replace the old membership cards with new ones; to create new branches; to convene gatherings anywhere at any time and above all these, to take such steps and perform such acts as he, in his free and unfettered discretion, considered necessary to effectively and decisively deal with the factors that precipitated the crisis. It follows,

therefore, that if this clear right is violated or threatened the applicant is entitled to an interdict to have it protected. To contend, as the respondent party does, that because of the suspension of the constitution, the applicant party was barred from organising such activities under the banner of the PAC, is flawed.

[39] As regards the second requisite for the grant of a final interdict, it is incumbent upon the applicant to prove that it has a reasonable fear or apprehension of irreparable harm if the respondent is not finally restrained. Since the applicant party has a clear right to organise and to assemble under the banner of the PAC, it accordingly expects everyone to respect its right, which is protectable by law. Anyone who infringes another's right commits a delict, in other words, a civil wrong. Such a violation has certain adverse legal consequences against the perpetrator. To ascertain whether the applicant's apprehension of harm was reasonable, the actions of the respondent party about which the applicant has complained, have to be scrutinised.

[40] The respondent party invited the Africanists to a national convention to be held in Bloemfontein from 2 – 3 August 2008 and to deposit an amount of R150,00 per person into a bank account with the name of “Africanist Cause” account held at the Tableview Branch of the First National Bank in Cape Town. The notice was issued by Mr. Manelisi Luxande, the fifth respondent, on behalf of the National Coordinating Committee, the sixth respondent.

[41] The author indicated that he was an Africanist dedicated to the struggle for the total liberation of Azania. The two words “Africanists” and “Azania” are an integral part and parcel of the name in dispute - “Pan Africanist Congress of Azania”. Although the fifth respondent belongs to the PAC-Plaatjie, he did not use the name PAC in the notice – annexure MS5. This omission is not without significance. In my view, it strengthens the contention of the applicant party that the respondent party was not entitled to the use of the name PAC or to assemble under its banner. Even though the applicant party did not react to this notice, it certainly must have seen red lights flashing again since the Pretoria case.

[42] The bank account name was apparently something new that did not exist prior to 22 September 2007. The organisational structure of the PAC did not have a structure called a National Coordinating Committee, the sixth respondent. This too was something new which the respondent party possibly created during the state of the crisis. Notwithstanding the respondent party's obvious caution not to convene their national conference in the name of the PAC, there were aspects in the fifth respondent's notice which should have made the applicant party somewhat apprehensive as to what the obscure Africanists were really up to.

[43] The notice of 23 July 2008 issued by Mr. Changein Mabaso stated in no uncertain terms that the national conference which was to be held in Bloemfontein on 2 – 3 August 2008 was organised by the National Coordinating Committee under the banner of and in the name of the PAC. Unlike the cautious previous notice by the fifth respondent, the notice by the seventh respondent made a direct claim to the name of the PAC under its recognised flag. The notice stated:

“The congress will also assist the PAC in reversing the serious damage caused by irresponsible acts of the PAC President.”

Vide MS6(1).

- [44] The seventh respondent convened the PAC national conference in his representative capacity as the national secretary for finance. Where and when such a structure was formed, does not appear. Besides the seventh respondent's and possibly the fifth respondent's names, the rest of its members, if any, do not appear. It is rather obscure as to where the structure precisely fits in the PAC organisational hierarchy of structures recognised by the constitution. The fact that it was suspended at Botshabelo on 2/3 August 2008 suggests that it was formed subsequent to 22 September 2007 in response to the alleged irresponsible acts of the PAC president, Mr. Letlapa Mphahlele. Since the constitution did not make provision for the formation of any new structure during the crisis, or the suspension of the constitution by anyone other than the president, the National Coordinating Committee was not a legitimate structure of the PAC, in my view. It was therefore impermissible for its members to organise and to operate in a domain exclusively reserved for the president. As I have already indicated it is

not open to any PAC member to contend that the members of the National Coordinating Committee were entitled to do so because there was no crisis. In the opinion of the PAC president there was.

- [45] It follows from the foregoing finding about the illegality of the National Coordinating Committee formed by the respondent party, that the applicant party feared, on reasonable grounds, that the national congress which the illegal structure, with no fixed physical address, according to the respondent party's deponent, was planning to hold in Bloemfontein on 2 August 2008 in the name of the PAC, would cause a great deal of confusion among its members in particular and its supporters and the public in general. The holding of the second national conference, planned at it were less than four weeks after the first national conference both in the name of the same party, therefore, created a serious state of political confusion that could have adverse impact on the PAC at the time when it is supposed to be preparing for the general elections of the country next year.

[46] On 24 July 2008 the fourth respondent issued and circulated yet another notice in the name of the PAC. The notice was strikingly similar to that of the seventh respondent in certain respects. In the name of the PAC the fourth respondent also invited the members of the party in the Western Cape Province to a provincial gathering which was to be held at Driftsands. He informed the members that they had to prepare “to elect a new, legitimate, visionary, mass-based and visible leadership at its Bloemfontein PAC 9th National Congress on 2 – 3 August 2008”.

[47] In the same notice, annexure MS6, the fourth respondent went a step further and stated:

“There will also be a press conference consisting of senior party leaders, former PAC presidents, and candidates for presidency comrades Thami ka Platjje and Khoisan X respectively, formerly known as Bennie Alexander, to adopt a draft programme of action for 2009 and beyond, as seen by the incoming PAC leadership, subject to ratification by congress.”

Nowhere in the answering affidavit could I find any averment by Mr. Mfanelo Mayekiso, the respondents’ deponent, to the

effect that the fourth and seventh respondents were entitled to circulate such notices because the applicant party's had uplifted the suspension of the constitution. In the absence of such an averment, concerning the upliftment of the constitution which would signify the end of the state of the crisis and the end of the emergency powers of the president it cannot be said that the fourth and the seventh respondents acted lawfully in circulating such notices.

- [48] It must also be borne in mind that seeing that the applicant party's national conference at Alice was never legally challenged and declared unlawful by a court of law and not a disgruntled faction of its members, it remains valid and binding upon all notwithstanding the alleged procedural and constitutional defects complained of. Therefore, any gathering and press conference held in the name of the PAC which undermines the Alice conference and anything done there endangers the interest of the applicant party. Since the unlawful notice by the fourth respondent was potentially harmful to the PAC, the applicant party's apprehension was justified. The political feuding between the two groupings

using the same name may have very serious repercussions for the PAC as a whole.

[49] On 28 July 2008 the first respondent, Mr. Thami Ka Plaatjie, in a press statement which was attributed to him was reported to have said:

“That’s why we are having our own congress in Bloemfontein next month.”

The averments made in the article were substantially not denied save the reporter’s comment that the first respondent had added that after the Bloemfontein conference in August there would be two PACs. According to the article the first respondent complained about what had transpired at the Alice conference of the PAC. He complained, among others, that *bona fide* members were excluded from that congress. I did not find any averment in the answering affidavit that any of the six respondents ever attended any branch meeting where delegates were elected to attend the Alice conference. Similarly, I could find no averment that any of the six respondents indeed attended the National Congress at Alice and that they were turned away. This is the general

complaint of the respondents. However, no specific factual allegations of any sort were given in the answering affidavit.

[50] Although the newspaper remark about a PAC split was denied in the answering affidavit, the undisputed phrase “our own congress in Bloemfontein” and the election of “a new and visible leadership” as the fourth respondent put it, in my view, justified the reasonable apprehension that the sixth respondent operating through its members, particularly the seventh, the fifth and the first respondents was on a brazing trail spreading an unfortunate gospel that the PAC was on the brink of another breakaway. The launching of these urgent proceedings to restrain the respondent party from projecting their group as the genuine guardian of the true “traditions and principles of the real PAC”, was well founded. Such press statements were damaging to the applicant’s party. In my view, such a press statement or newspaper article, issued as it was in the name of the PAC, seriously threatened the applicant party’s very foundation of its cohesive existence by insinuating that the PAC-Mphahlele unlike the PAC-Plaatjie was not the genuine face of the party. The harm which such a press statement can cause, if

it is later shown to be incorrect, cannot be accurately measured. Bearing in mind the role which the PAC had played over the years for the liberation of this country, our budding democracy will be poorer should the PAC fade away from the political scene. There is no hope for the group of a party so bedevilled by squabbles for leadership.

[51] For the reasons enumerated above, I have come to the conclusion that the applicant party has shown a likelihood of detrimental and harmful confusion resulting from the respondent party's parallel use of the name – Pan Africanists Congress of Azania. The foregoing multiple acts of interference committed by the respondent party, have probably caused the applicant party actual injury or at least reasonable apprehension of injury. This disposes of the second requisite for the grant of a final interdict.

[52] At this juncture, before I proceed to consider the third requisite; I pause to reflect of the actions on the four respondents I have just analysed. The analysis reveals a striking contrast between the first, fourth and seventh respondents, on the one hand, *vis-a-vis* the fifth respondent,

on the other. The crux of the contrast is that the latter, unlike the former, absolutely stayed away from advertising the Bloemfontein or more correctly the Botshabelo conference under the name and banner of the PAC. What this fundamental contrast shows, is that among the members of the National Coordinating Committee or shall I say the respondent party there was no common conviction that the respondent party was entitled to organise itself under the banner of the PAC and to hold itself out as the true PAC. This important difference which was not at all explained in the answering affidavit fortifies the contention that the respondent party had no right to use the name of the PAC. This aspect appropriately bolsters my conclusion under the first requisite.

- [53] As regards the third requirement the applicant has to establish that it had no other ordinary remedy to avert the harm posed by the respondent party's conduct. **SETLOGELO v SETLOGELO**, *supra*. I deem it unnecessary to labour this requirement. The respondent party contended that the applicant party's president, Mr. L. Mphahlele, should first have held a consultative meeting with

the third and other stalwarts and ex-presidents of the PAC before he resorted to the legal process. Of course, an amicable and mutual solution would have been a preferred option, in my view, for settling this political dispute. However, the argument is like a sword with two edges. If the respondent party itself really believed that, through the mediation of the former presidents, the rift between the two camps could have been narrowed and the dispute resolved, they should have given such a mediation process ample opportunity to get the two sides to the negotiating table instead of organising their own conference, as they did.

- [54] It takes the matter nowhere to argue that the mediation efforts were frustrated by the applicant party. For as long as the two camps carry on apportioning blame, this painful dispute will continue to plague their organisation. However, it must be borne in mind that none of the parties was legally obliged to embrace the idea of having the dispute mediated. There was no suggestion that such mediation was obligatory in terms of the constitution or the code. Therefore, I find that the applicant party had no other ordinary remedy to afford it

a similar protection of its right to the legal protection a court interdict can afford.

[55] As regards the fourth requirement, the applicant has to establish that the balance of convenience favours the grant of the final interdict. The stronger the right, the less important this requirement becomes. The PAC is a registered political party. It receives funding from the State. Currently the applicant party is in control of such public funds. In addition to that, the three banking accounts of the PAC at the First National Bank as would more fully appear from annexure MS4, p. 31 of the record, are also controlled by the applicant party. The applicant party is led by the person who was elected before 22 September 2007 as an undisputed president of the undivided PAC. Since then he has remained the public face of the PAC. He exercised his emergency powers as the president of the PAC. In the final analysis it has been shown that the respondent party has no clear right to use that name. In the light of all these factors I am of the view that the balance of convenience favours the applicant party.

[56] In the circumstances I am inclined to confirm the rule *nisi* seeing that the applicant has established all the requisites for the grant of the final interdict.

[57] I grant this discretionary and extraordinary remedy mindful that it does not follow, as a matter of course, that the remedy always has to be granted once all its requisites have been proven. The court has a discretion, even in such a situation, not to grant the remedy. Where the applicant established all the requisites, as in the instant case, there must be some very compelling reasons why he, she or it should be deprived of the protection the remedy ordinarily affords to those whose clear rights have been infringed.

[58] I am of the firm view that, in all the circumstances of this case, no such compelling reasons exist. Because they do not, if I were to discharge the rule *nisi* in these circumstances, my decision would not be compatible with the proper exercise of judicial discretion. The essence of the remedial measure I am moved to grant in favour of the applicant party is not to gag the respondent party by denying them their fundamental right to assemble or associate.

[59] By all means they are at liberty to organise themselves under one umbrella; to constitute themselves in any lawful manner; to convene any meeting, congress, conference or gathering anywhere at any time provided they refrain from projecting themselves as the leaders of the PAC of Azania and by holding out or purporting to hold out that whatever organising structure they form, the notices they circulate among their followers, the media statements they release and the gatherings, congresses, conferences and meetings they attend, are held under the banner of the PAC. In brief, the order outlaws nothing but prohibits everything done by the respondents in the name of the PAC.

[60] The continued and sustained repetition of such acts of interference orchestrated by the respondents against the applicants coupled with public denunciation of its legitimacy will cause irreparable harm to the applicant. On the contrary, the discontinuance of such acts of interference will cause the respondents no irreparable harm. They have not been expelled from the PAC. The first three respondents are countrywide known politicians. Together with the current leadership, they are collectively capable of solving the

problems in a way that no court order can ever do. They can only do so if, and only if, they let the genuine interests of the PAC prevail over their individual ambitions. However, I hasten to add that it is perfectly natural for persons to be ambitious. The positive force of their ambitions should, first and foremost, be constructively employed to advance and to promote the general interest of the collective rather than the particular interests of the individuals who now wrongly see themselves as rivals.

[61] The liberation movement for which so many have sacrificed so much, is lately plagued by a leadership crisis. Perhaps I am guilty of oversimplifying the real problem. In case I am wrong, I apologise. The movement is now on a hazardous course. It is precariously hanging on the verge of a very high cliff. If it falls from that precipice it may finally disintegrate. Even if it survives it may be crippled for ever. In a soccer match when a referee blows a final whistle, the match comes to an end. The players shake hands with their opponents. As a judge I am a different kind of a referee. As I give this final order I am uncertain whether it will really bring an end to the contest. I can only hope that unselfish men and women

of conscience from both sides of the battle line, will rise up with courage, conviction and common purpose to save the soul of the PAC.

[62] I am now through with the merits of the application. Now I turn to the points *in limine*. Both parties raised certain preliminary objections to each others papers. The fact that I have started dealing with the substantive issues of the case first instead of the procedural or technical issues thereof indicates the view I took. In my view, none of the points *in limine* raised by either of the parties, was not dispositive of the dispute. This explains why I shelved such preliminary points for last.

[63] On behalf of the applicant it was contended that the deponent to the answering affidavit was not duly authorised by the respondents to oppose these proceedings. The document, annexure MC1 attached to the answering affidavit, p. 62 of the record, contains four resolutions of the respondent party which were adopted at Botshabelo on 2 or 3 August 2008. Indeed none of the four resolutions authorised the deponent, Mr. Clarence Mayekiso, to defend

this application on behalf of the respondents. As a matter of fact, there is virtually no mention of these proceedings in the annexure concerned.

[64] On behalf of the respondent it was similarly contended that the deponent to the founding affidavit was not duly authorised by the applicant to institute these proceedings. There was simply no resolution whatsoever to back up the deponent, Mr. Mfanelo Skwatsha's allegation that he was authorised to do so.

[65] On the one hand Mr. Matanda asked me to dismiss the answering affidavit and to grant a final order against the respondents on that ground alone. On the other hand Mr. Sotshongaye asked me to dismiss the entire application on that ground alone. None of the submissions persuaded me. Firstly, both were guilty of the same transgression. The omission by one neutralised the omission by the other. Secondly, the case has generated such a great deal of public interest that it is now of paramount importance to decide it on its substantive grounds rather than inconclusive technicalities which, quite often, merely delay the expeditious finalisation

of the case. Accordingly I rule that both are precluded from objecting about each others failure to attach the requisite resolution indicating that their respective deponents were authorised to act on behalf of the parties.

[66] The second point *in limine* raised by counsel for the applicant was that the respondents went ahead with their national congress at Botshabelo on 2 – 3 August 2008 in flagrant disregard of the provisional court order, issued by Cillié J which outlawed and prohibited such a gathering. The applicant contended that they perceived the conduct of the respondents as unlawful, disrespectful and contemptuous – par. 3, replying affidavit, p. 144 of the record.

[67] Counsel for the respondents admitted on behalf of the respondent that the Botshabelo annual national congress was held as his clients had originally planned. However, he contended that the respondents did not deliberately defy the provisional court order. They averred, counsel said, that they were not aware of it, because it was never served on them.

[68] The provisional court order was granted on Thursday 31 July 2008. The very next day, on Friday 1 August 2008, an article appeared in the newspaper called “The Mercury”. The article reads:

“The fight for the soul of one of the country’s oldest liberation movements, the PAC, has intensified with party stalwarts saying they are pressing ahead with their planned national conference this weekend in the face of a court order forbidding this and a court battle today to stop the party’s sole remaining MP being stripped of his seat.

.....

While the ‘genuine PAC’ group, led by Gauteng-based PAC activist Thami KaPlaatjiem **vowed to defy Thursday’s successful court interdict**

.....

Skwatsha’s comment came after his party successfully won an interim order in the Bloemfontein high court on Thursday that the other (KaPlaatjie) group must ‘not meet under the banner and/or name of the applicant (PAC)’.

.....

.....

‘We have been vindicated that the PAC had a legitimate congress at Fort Hare and therefore nobody else can gather under the guise of the PAC. The people gathering in

Bloemfontein are either former members of the PAC or non-members. The judgment alluded to the fact that they have a right to freedom of association, but not under the banner of the PAC,' said Skwatsha.

.....

But KaPlaatjie said the conference would go ahead and they intended to reinstate the party's constitution and elect a new leadership.

.....

'We are determined to go ahead with the conference come rain or shine because they (the Mphahlele group) have no jurisdiction over us.'

.....

.....”

- [69] The article, unless it is false, attributes certain comments to Mr. Thami Ka Plaatjie, the first respondent. The newspaper reports that he vowed that the conference would go ahead. From the Bar, counsel for the respondents, took instructions from time to time. During the course of his argument he denied some allegations and admitted others. The article suggested that at least a day before their national congress, the first respondent was well aware that such a gathering had been prohibited.

- [70] The sheriff returns of service, annexure MS9(1) – MS9(7) of the replying affidavit, show that the copies of the provisional court order were served by affixing.

“On this 02-Aug-2008 at 11:23 I properly served this COURT ORDER by affixing a copy thereof to the outside or principal door, security gate at NICRO HALL SECTION B, BOTHSAELO of the SIXTH RESPONDENT’s meeting venue on instruction of MR GWF and PAC Correspondent MR ARTHUR from the first up to the seventh respondent they were evading service.”

- [71] The respondents denied, according to Mr. Sotshongaye, that they received the provisional court order. They, however, admitted that the national congress was held at the venue as specified in the sheriff’s returns. It was not contended on behalf of the respondents that anyone of them was not at the national congress. The sheriff stated in the returns that the respondents evaded him which was why he affixed the seven copies of the court order to the main security gate or the main door of Nicro Hall. If the newspaper article is anything to go by, it was estimated that about 1200

delegates would attend the national congress of the respondents.

[72] Now bearing in mind the number of delegates, it seems quite unlikely that no-one in such a huge gathering had seen any of the seven copies of the provisional court order conspicuously affixed to the main door of the hall in which the respondents had gathered. On the facts it can be legitimately deduced that all the six natural respondents were present at the national congress; that they were in the hall or on the premises at the time the sheriff was struggling to have the provisional court order served on them; that they evaded the sheriff on purpose; that their followers were probably instructed not to point them out to the sheriff; that nobody should receive the provisional court order on their behalf; that they schemed to evade the sheriff because they knew that their national congress was prohibited.

[73] There are high probabilities which strongly militate against their claim that they only became aware of the provisional court order after their national congress through the media. My findings are that they first became aware of the

provisional court order before the national conference through the media and that at 11h35 or soon thereafter on the first day of their national congress they saw the seven copies of the provisional court order which the sheriff had affixed to the main door. Accordingly the excuse of unawareness is not available to them. They have to be constructively deemed to have received the provisional court order.

“With or without a court interdict we are proceeding with the conference.”

.....

See annexure “MS8” – replying affidavit.

- [74] Such a public and defiant press statement by a leading politician of the stature of Mr. Thami Ka Plaatjie is disturbingly inappropriate and indeed irresponsible. This sort of contemptuous incidences, where outstanding public figures defiantly rubbish the courts of the land, appears to be on the increase. It is very perturbing indeed. The judges have to act firmly and decisively to eradicate this disrespectful tendency. Unless this is done the country might sink deeper and deeper in a state of lawlessness.

Since the national congress of the respondents held at Botshabelo on 2 – 3 August 2008 was prohibited, it was an unlawful gathering. The legal consequences flowing from an unlawful act, are clear. They are adverse in nature. No lawful act emanates from an unlawful gathering. Since the gathering was illegal, the election of the new leadership there was tainted with illegality. Because it was so tainted, the law nullifies it *ab initio*. Such elections are not legally recognised because they should never have taken place in the first place. On account of their collective defiance alone, I was tempted to ignore the answering affidavit and to proceed with the matter as if it were unopposed.

[75] The applicant also applied *in limine* to have portions of the answering affidavit struck out. The first of these appears in par. 5 and reads:

“..... I aver that Mr. Skwatsha together with his attorney Mr. Gwe are pathological liars.”

The second passage complained of appears in par. 25 and reads as follows:

“Needless to say that Mr. Mphahlele is a former Apla commander who has refused to appear before the Truth and Reconciliation Commission (TRC) and can be facing prosecution by the National Prosecuting Authority (NPA) anytime.”

[76] The applications to strike out are governed by Rule 6(15). The rule empowers the court to strike out from any affidavit any matter which is scandalous, vexatious or irrelevant. The three offensive matters, in other words, scandalous matter, vexatious matter and irrelevant matter were elucidated in the case of **VAATZ v THE LAW SOCIETY (NAMIBIA)** 1991 (3) SA 563 (NHC) at 566C – E per Levy J.

“The context in which they are used can lead to variations of meaning but basically they have the meanings allotted to them by The Shorter Oxford English Dictionary.

In Rule 6(15) the meaning of these terms can be briefly stated as follows:

Scandalous matter - allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

Vexatious matter - allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

Irrelevant matter - allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.”

[77] I am persuaded that the two passages complained of were indeed scandalous, vexatious and irrelevant. Accordingly the application to strike out was well grounded and granted with costs.

[78] The applicant has been successful. The general rule is that the successful party is entitled to have its costs paid by an unsuccessful party. Therefore in this case the applicant must reap the fruits of its success. Moreover, I am of the view that the respondents have to be penalised to demonstrate that our civilised nation frowns upon people who have no respect for the due process of the law and the authority of the courts of the land.

[79] Accordingly I make the following order:

79.1 The rule *nisi* is confirmed as a final order.

79.2 The respondents are directed to pay the applicant's costs relating to this application, jointly and severally, the one paying, the others to be absolved.

79.3 The respondents are directed to pay such costs on the scale as between attorney and client.

M. H. RAMPAL, J

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