

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

Application No. : 568/07

Application No. : 1329/07

Application No. : 1637/07

In the application between:-

MODISE PETRUS MOHAPI

1st

Applicant

MMAMOKI BERNICE SETSHIRO

2nd

Applicant

TSOTETSI JONES CHABELI

3rd

Applicant

TSHEDISO RHASEED MAJOLA

4th

Applicant

GEORGE POGISHO HELEPI

5th

Applicant

JABULANI VELAPHI MAZIBUKO

6th

Applicant

MAMOITHERI LUCY HELEPI

7th

Applicant

and

ELIAS MAGASHULE

1st

Respondent

MADIEPETSANE CHARLOTTE PHEKO-LOBE

2nd

Respondent

STEVEN TSHABALALA

3rd

Respondent

SIZWE MBALO

4th

Respondent

JIHAD MOHAPI

5th

Respondent

CORAM:

VAN ZYL J

HEARD ON:

24 MAY 2007

JUDGMENT BY:

VAN ZYL J

DELIVERED ON:

4 JUNE 2007

[1] The hearing of the application on 24 May 2007 was the yet further extended return date of a rule *nisi* issued on 16 February 2007. On the said date I reserved judgment until today, 4 June 2007, and I also postponed the return date of the rule *nisi* to today.

[2] I consider it necessary to set out a short history of this application:

1. First to fourth applicants first approached Court on 9 February 2007 for an urgent interim interdict. After Wright J removed their application from the roll, they amended their papers and approached this Court yet

again for urgent interim relief on 10 February 2007 and I granted a temporary order maintaining the status quo, pending the postponement of the application to 16 February 2007 in order for respondents to file answering papers and the filing of subsequent replying papers. Costs were to stand over.

2. The respondents failed to file answering papers and on 16 February 2007 I consequently granted the present rule *nisi*, returnable on 8 March 2007, in the following terms:

1. A rule *nisi* is issued, calling upon the respondents to put forward reasons, if any, on Thursday, 8 March 2007 at 9h30, or as soon thereafter as the matter may be heard, why the following orders should not be granted:

- 1.1 that the implementation of the resolutions and decisions taken including the election and/or appointment of office bearers at the regional conference of the African National Congress held on **9 to 11 February 2007** at Orangeville are suspended pending the final outcome of an application for the review of those resolutions,

decisions and elections;

1.2 that the office bearers in office at the time immediately preceding the said conference remain in office pending the adjudication and final decision of the review proceedings to be instituted;

1.3 that first, second, third, fourth and fifth respondents are ordered to pay the costs of this application jointly and severally, payment by the one the other to be absolved.

2. The orders in paragraphs 1.1 and 1.2 shall operate as interim orders with immediate effect pending the final outcome of this application.

3. The application for review to be instituted within seven (7) days of date of the final order in this application.”

I ordered the respondents to pay the costs of the day.

3. On 8 March 2007 it transpired that respondents had filed what they called “sworn affidavits” in which they raised certain technical points pertaining to a notice of

discovery which they had in meantime filed and which allegedly had not been complied with by first to fourth applicants, and they also disputed the *locus standi* of first to fourth applicants on the basis that they were not members in good standing of the ANC. The respondents did not address the merits of the application in those affidavits. They had in the meantime also filed a notice in terms of rule 7 requesting the first to fourth applicants' attorney to provide them with his power of attorney, which were duly complied with. The day preceding the hearing, the respondents also filed a notice of application to strike out certain parts of first to fourth applicants' founding papers. After having heard submissions from both parties on that day, leave was granted to the respondents to file supplementary answering affidavits. The application was subsequently postponed to 29 March 2007 and ancillary orders made relating to the filing of affidavits by the parties. The costs were to stand over for later adjudication.

4. On 29 March 2007 it transpired that respondents had filed supplementary answering affidavits on the merits and first to fourth applicants filed their replying affidavits. Theoretically speaking the application was right for argument on the merits thereof. However, first to fourth applicants filed an application for joinder of 17 further persons, being the members of the newly elected Regional Executive Committee ("REC") at the conference of 9 to 11 February 2007 (in addition to the newly elected persons who were already parties to the application, being third, fourth and fifth respondents) and possible other unidentifiable persons and/or entities, who *prima facie* had a direct and substantial interest in the proceedings and who should have been joined at the outset. The respondents also filed a second notice of application to strike out on 27 March 2007, which was a more amplified version of the notice originally filed on 7 March 2007. The result of the aforesaid circumstances was that the application could

again not be adjudicated on the merits thereof. After having heard lengthy and technical arguments and submissions on behalf of both first to fourth applicants and respondents, I reserved judgment until 4 April 2007.

5. On 4 April 2007 I handed down my judgment in this application (and certain concurrent interlocutory applications) (hereinafter referred to as “my previous judgment”). For the sake of officiousness, I consider it appropriate to cite the order that I granted in my previous judgment (hereinafter referred to as “my previous order”):

“[18] Consequently the following order is made:

1. With reference to the notice of application to strike out:
 - 1.1 The application to strike out in terms of paragraphs 1, 2, 3, 4, 5 and 17 thereof, is dismissed.
 - 1.2 The application to strike out in terms of

paragraph 7 thereof, is dismissed with regard to the substantive and independent allegations contained in the said affidavit.

1.3 The application to strike out in terms of paragraphs 6, 9, 11, 13 and 15 thereof, is granted.

1.4 The application to strike out in terms of paragraph 7 thereof, is granted with regard to the first sentence of paragraph 2 contained in the said affidavit.

1.5 Leave is granted to the applicants to have the affidavits referred to in paragraphs 6, 7, 9, 11 and 13 re-drawn (in similar wording than the current affidavits) and re-attested, which newly drawn and attested affidavits are to be filed on or before 23 April 2007.

1.6 Conditional leave is granted to the applicants to have the affidavit referred to in paragraph 15 re-drawn (in similar wording than the current affidavit) and re-attested, subject to the condition that the applicants file an affidavit setting forth a reasonable explanation to the satisfaction of the Court explaining the date of attestation thereof

considering that the said date was after the date of filing of the replying papers at Court.

The said re-drawn affidavit, as well as the explanatory affidavit, is to be filed on or before 23 April 2007.

1.7 Leave is granted to the respondents to respond to the aforesaid explanatory affidavit, should they so wish, which affidavit in response is to be filed on or before 10 May 2007.

1.8 Paragraphs 8, 10, 12, 14 and 16 stand over to be adjudicated on 24 May 2007.

2. The application for joinder issued under application number 1329/2007 is granted on the following terms:

2.1 The applicants are ordered to serve the Notice to interested and affected persons and entities, attached to this Court order and marked "X" (or such an amended notice as I deem necessary after having heard all interested parties hereto), in terms of the Court rules on the 17 persons identified in prayers 1.1 to 1.17 of the Notice of Joinder,

on or before 17 April 2007.

2.2 The applicants are ordered to effect publication of the said Notice to interested and affected persons and entities, attached to this Court order and marked "X" (or such an amended notice as I deem necessary after having heard all interested parties hereto), once in The Volksblad and once in The Star on or before 17 April 2007.

2.3 Should any answering affidavit(s) be filed subsequent to the service and publication of the aforesaid notice, the applicants are to file their replying affidavits in response thereto, if any, on or before 17 May 2007.

3. The return date of the rule nisi issued on 16 February 2007 is postponed to Thursday, 24 May 2007 at 9h30.

4. All of the aforesaid orders are granted with costs, including the costs of two counsel, in favour of the respondents, which costs are to be paid by the applicants' attorney of first instance, Mr. Sizephe of MJD Sizephe Attorneys, Welkom, *de bonis propriis*; alternatively, by the applicants on an

attorney and client scale, the determination of which (between the aforesaid two alternatives) stand over for adjudication on 24 May 2007.

5. For purposes of the order granted in 4 above, leave is granted to Mr. Sizephe to advance reasons, if any, under oath on or before 23 April 2007 why the following orders should not be made:

- 5.1 That he is to pay the costs of the respondents occasioned by the postponement on 29 March 2007 *de bonis propriis*, which costs are to include the costs of two counsel.

- 5.2 That he is to pay the respondents' costs of the application to strike out, including the consequential costs occasioned by the granting thereof, *de bonis propriis*, which costs are to include the costs of two counsel.

- 5.3 That he shall not be entitled to recover any of the costs in respect of the application for joinder from the applicants."

It is essential to point out that at the time when I issued

my previous order, first to fourth applicants were the only applicants before court.

6. Immediately preceding the handing down of my previous judgment, fifth to seventh applicants launched an urgent application to intervene as applicants and to be joined as such in the main application under application no. 568/07. After I heard argument on behalf of first to fourth applicants, first to fifth respondents and the intervening applicants, it was evident that all parties were *ad idem* that the intervening applicants were to be joined. However, because they did not at that stage know what my judgment in the main application was going to be, they left it in my discretion whether to first give judgment and then to join fifth to seventh applicants or *vice versa*. For the reasons already advanced on that day, I then ordered that I was going to give judgment in the main application before joining the intervening applicants as fifth to seventh applicants in the main

application.

7. Subsequent to the handing down of my previous judgment in the main application, I granted the following order by agreement between the parties in the joinder application under application no. 1444/07:

“By agreement between the parties:

1. Condonation is granted for the non-compliance with the rules of court and the application is heard as one of urgency in terms of Rule 6(12).
2. The following persons are given leave to intervene as applicants and are joined as such in application no. 568/2007 as applicants 5, 6 and 7 namely
 George Pogisho Helepi
 Jabulani Velaphi Mazibuko
 Mamoitheri Lucy Helepi
3. Fifth, sixth and seventh applicants are granted leave to file their founding affidavits under application no. 568/2007 on or before 17 April 2007.
4. The respondents in application no. 568/2007 are to file their answering affidavits in response to the aforesaid founding affidavits on or before 10 May 2007.
5. First to seventh applicants are to file their replying affidavits, if any, on or before 17 May 2007.
6. No order as to costs.”

[3] The hearing on 24 May 2007 was therefore consequent upon

my previous order made in my previous judgment on 4 April 2007.

[4] At the outset of the hearing of the application on 24 May 2007, it was unfortunately clear that my previous order had not properly and duly been complied with, as a result of which certain procedural deficiencies still existed in the application that to be addressed.

[5] I consider it efficacious to deal with the situation of the first to fourth applicants separately from the situation of the fifth to seventh applicants.

FIRST TO FOURTH APPLICANTS:

[6] The main reason why I gave such a detailed order in my previous judgment was in an attempt to ensure that all procedural deficiencies in the first to fourth applicants' application will be rectified so that the application can (at last) be right for adjudication on the merits thereof on 24 May 2007. This unfortunately did not materialise. Despite my previous order and despite the history of the remissness of first to fourth applicants and/or their attorney of first instance as documented in my previous judgment, the following transpired from the papers currently before court:

1. In terms of paragraphs 1.5 and 1.6 of my previous

order, the re-drawn and re-attested affidavits, as well as the explanatory affidavit referred to in paragraph 1.6 of my previous order, were to be filed by the first to fourth applicants on or before 23 April 2007. These affidavits were however only filed on 24 April 2007.

2. In terms of paragraph 4 of my previous order first to fourth applicants' attorney of first instance, Mr. Sizephe, was to advance reasons under oath on or before 23 April 2007 why he should not be ordered to pay the costs *de bonis propriis* referred to in paragraph 5 of my previous order. These reasons are contained in the same affidavit referred to in point 1 above, which was only filed on 24 April 2007.

3. In terms of paragraph 2.1 of my previous order first to fourth applicants were ordered to serve the notice referred to therein (hereinafter referred to as "the notice to interested parties") in terms of the court rules on the seventeen persons identified in respondents notice of joinder (hereinafter referred to as "the seventeen persons") on or before 17 April 2007. It appears from the returns of service (which incidentally were also only handed to me from the Bar and not filed timeously in the court file in terms of the practice of this court) that of the seventeen persons, service was affected in terms of the court rules and timeously in terms of my previous court order on only five of those persons. On five of

the other persons service was affected in terms of the court rules, but not on or before 17 April 2007 as stipulated in my previous order. On seven of the seventeen persons there was attempted service but without success.

4. In terms of paragraph 2.2 of my previous order first to fourth applicants were ordered to effect publication of the notice referred to therein once in the Volksblad and once in The Star on or before 17 April 2007. Although the said notice was published in The Star on 17 April 2007, the notice in the Volksblad was only published on 18 April 2007.

5. First to fourth applicants' heads of argument, like the heads of argument of the other parties, should have been served and filed in terms of the well-known practice of this court on or before 15h00 on 22 May 2007. The first to fourth applicants' first set of heads of argument was in fact filed at court on 22 May 2007, but only after 15h00. During the hearing of the application I was informed by Mr. Wessels, assisted by Mr. Fischer, appearing on behalf of the respondents, that the said heads of argument was never served upon respondents' attorney of record. Respondents' attorney of record only received a facsimile copy of the said heads of argument and also only at 15h07, hence also after 15h00 on 22 May 2007.

6. First to fourth applicants filed an application for condonation in which condonation was requested in the following terms:

“(a) That the late publication of the notice to the interested parties published in the Volksblad of 18 April 2007 be condoned;

(b) That the late delivery of the affidavit of Mr. Sizephe be condoned.”

This application for condonation was however only filed at court by means of receipt thereof by my clerk on 23 May 2007 at 14h50. It is evident from the said application that it was served upon the respondents' attorneys of record on 23 May 2007 at 13h00.

[7] As mentioned herein earlier, I dealt extensively with the procedural deficiencies and irregularities in the application papers of first to fourth applicants in my previous judgment. I also recorded my displeasure with the way in which the applicants and/or the applicants' attorney of first instance, Mr. Sizephe, has been handling this application up to that stage. In this regard I consider it necessary to refer to certain extracts from my previous judgment, which dealt with these issues:

“In this application it is in my view in the interests of justice that the following principles reiterated in **SULIMAN v RAJARATHENAM AND OTHERS** 1964 (3) SA 262 (NPD) at 265 G – H should prevail:

“...in the absence of prejudice,

‘technical objections to less than perfect procedural steps should not be permitted to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits’

per Schreiner, J.A. in *Trans-African Insurance Company Ltd v Maluleka* 1956 (2) SA 273 (AD) at p. 278

and to enable litigants, without formalism,

‘to come to grips with the real issues between them’ per Herbstein J in *Prudential Assurance Company Ltd v Crombie* 1957 (4) SA 699 (C) at p. 702.”

(See my previous judgment, p.30 –31)

“As recorded earlier, I considered it in the interests of justice to have taken a lenient approach with regard to the “condonation” thereof in deciding the application to strike out. However, I have to express my dismay, and actually my shock, with the ineptitude, carelessness, gross negligence and total lack of conscientious conduct which is reflected by the poor state of the condition of the application papers filed on behalf of the applicants.

The whole of the hearing on Thursday was spent on presenting and hearing arguments pertaining to issues which resulted as a direct consequence of the late filing of the joinder application and the severe and numerous procedural shortcomings in the

application papers filed on behalf of the applicants. In fact, the necessity for this very judgment is also only and exclusively as a result of the aforesaid conduct on behalf of the applicants.”

(See my previous judgment, p.43)

[8] The type of conduct of the first to fourth applicants’ attorney, Mr. Sizephe, recorded in points 1 to 6 above, is similar to the very conduct with which I expressed my utmost displeasure in my previous judgment.

[9] The question which I now have to address and adjudicate is whether the aforesaid procedural deficiencies and/or irregularities which now still exist in the first to fourth applicants’ application papers and/or are additional consequences as a result of first to fourth applicants’ (or rather their attorney’s) failure to properly adhere to my previous order and/or the rules of court and/or the rules of practice in this Division, can and/or should be tolerated and/or condoned any further.

[10] Like reflected in my previous judgment, the court is reluctant to penalise a party for its attorney’s conduct. However, where failure to comply with the rules is due to neglect on the part of that party’s attorney, there are limits beyond which a party cannot escape the results of its attorney’s lack of diligence.

[11] In **SALOOJEE AND ANOTHER, NNO v MINISTER OF COMMUNITY DEVELOPMENT** 1965 (2) SA 135 (AD) at 141

B – H the relevant principles were stated as follows:

“In *Regal v African Superslate (Pty.) Ltd.*, 1962 (3) SA 18 (AD) at p. 23, also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court....The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or

enquiry to his attorney and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case.”

The aforesaid principles were again confirmed in

ADMINISTRATEUR, TRANSVAAL v VAN DER MERWE

1994 (4) SA 347 (AA) at 357 G – H:

“Die kumulatiewe effek van die opeenvolgende vertragings en swak bestuur van die appèlverrigtinge deur appellant se prokureur laat die vraag ontstaan of hierdie nie 'n gepaste geval is waar die appellant die spit moet afbyt vir sy prokureur se gebrek aan vaardigheid nie.”

[12] It should be mentioned that in the last mentioned matter of

ADMINISTRATEUR, TRANSVAAL v VAN DER MERWE

the application for condonation was granted despite the

continuous remissness in the attorneys' handling of the matter, which decision in favour of the condonation was based on the following dicta at 357 I of the said case report:

“Na veel aarseling, meen ek dat die meriete van die appèl in hierdie geval maar die deurslag moet gee. Teenoor die verwyt wat ongetwyfeld voor die deur van appellant se prokureur gelê moet word, staan die feit dat appellant nie 'n private instansie is nie. Appellant beheer openbare fondse, dit wil sê belastingbetalers se geld, en daar is 'n element van openbare belang op die spel. Ook is die beantwoording van die vrae wat in hierdie aangeleentheid na vore kom, kwessies wat die openbare belang raak.”

The last mentioned considerations are similar to the considerations that compelled me in my previous judgment to have condoned the conduct of the applicants' attorney to the extent I did. However, the important difference in the current circumstances is the fact that the applicants' attorney again showed conduct that resulted in the non-compliance with the court order and/or the court rules and/or the practice of this court despite the displeasure and dissatisfaction that I

showed with this type of conduct in my previous judgment.

[13] However, in order to come to a proper decision it is necessary to look at the nature and extent of the respective failures to comply with time limits and/or procedures and the explanations, if any, for such conduct. I do not necessarily intend to deal with it in the same order as it was listed in paragraph 6 above, because I consider it expedient in the circumstances to first deal with the application for condonation, after which I will deal with the other failures and consequent deficiencies.

[14] As previously indicated, the application for condonation which requests condonation for the late publishing of the notice to interested parties in the Volksblad and the late delivery of the affidavit of Mr. Sizephe regarding the re-attested affidavits and the reasons he should not be ordered to pay certain costs *de bonis propriis*, was only filed and served on the afternoon of 23 May 2007, hence, the afternoon immediately preceding the hearing of this application. This is despite the fact that the respondent already raised first to fourth applicants' aforesaid non-

compliance with my previous order in their answering affidavits which they filed in response to fifth to sixth respondents' founding affidavits and which answering affidavits were filed on 10 May 2007 already. Therefore, despite having been pertinently made aware of their aforesaid failures to comply with the time limits set out in my previous order, first to fourth applicants, and more particularly their attorney, only attested to the affidavit filed in support of the application for condonation on 22 May 2007, which application was only served and filed on 23 May 2007.

- [15] It is trite that an application for condonation should be filed as soon as a party realises that it had not complied with a specific rule and/or court order and/or time period. (See **DE BEER EN 'N ANDER v WESTERN BANK LTD** 1981 (4) SA 255 (A) at 257 A – B.) In this instance first to fourth applicants (and their attorney) provided no reason whatsoever for the late filing of the application for condonation as such. In this regard it should be recorded that Mr. Wessels indicated that respondents wish to oppose

the application for condonation by the filing of appropriate answering affidavits, but due to the late filing of the application, they have not had such an opportunity.

- [16] In addition to the aforesaid, it is a well-known principle that condonation for the non-observance of the rules of court and/or time periods stipulated in a court order is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause for excusing him from compliance. (See **MEINTJIES v H D COMBRINCK (EDMS) BPK** 1961 (1) SA 262 (AD) at 264.)

- [17] In this instance the explanation that was given by Mr. Sizephe for the late filing of his affidavit and the attachments thereto, only refers to alleged limited available time due to time spent on the preparation of a similar application than the current one. Without expressing my view of the allegation that close to nineteen hours per day were worked for almost three weeks for purposes of the preparation of the other similar application, it suffice to say that in my view the

explanation contained in this affidavit is not even “remotely satisfactory”. In addition to this, there is no explanation by or on behalf of the first to fourth applicants themselves to explain that the conduct of their attorney can or should not be imputed to them, especially considering the previous similar conduct of the said attorney. In my view this is also a situation where the explanation for the failure to observe the relevant time limits is so unsatisfactory that not even the possible good prospects of success can save the application for condonation under these particular circumstances. In

IMMELMAN v LOUBSER EN ‘N ANDER 1974 (3) SA 816

(AA) at 824 C – G this principle was cited as follows:

“Redelike vooruitsigte op sukses by appèl is natuurlik ook 'n belangrike oorweging. Maar hoewel dit 'n belangrike oorweging is, is dit nie noodwendig in elke geval 'n deurslaggewende oorweging nie....

In die huidige geval was daar, aan die kant van een of ander van die applikant se prokureurs, in 'n heel aantal opsigte gebrek aan nakoming van die Reëls van die Hof wat 'n lang versuim tot gevolg gehad het. Daarby is ook die omstandigheid dat geen voldoende verduidelikings aangebied is nie, hetsy vir die fout wat begaan is met die aantekening van appèl hetsy vir die versuim wat daar was om afskrifte van 'n volledige oorkonde betyds in te dien nadat die getikte oorkonde bekom is. Boonop is daar nie behoorlik aansoek gedoen om kondonاسie van die applikant se versuim om betyds die Griffier in kennis te stel dat sekuriteit vir die respondente se koste verskaf is nie, en geen rede

is aangebied waarom daar in hierdie verband versuim was nie. Onder genoemde omstandighede kon daar nie verwag word dat hierdie Hof toeskietlik moes wees op grond van beweerde belowende vooruitsigte op sukses by appèl nie.... Die applikant se aansoeke is gevolglik, om die redes hierbo genoem, afgewys.”

[18] For the aforesaid reasons, in addition to the late filing of the application for condonation without any explanation for it, I have no other option but to dismiss the application for condonation for the late filing of Mr. Sizephe's affidavit and the annexures thereto.

[19] With regard to the explanation tendered for the late publication of the advertisement of the notice to interested parties in the Volksblad, the application for condonation referred to the explanation set out in Mr. Sizephe's affidavit dated 18 May 2007. This affidavit is an affidavit that was filed as part of replying papers in response to answering papers that respondents filed simultaneously with the answering papers that they filed in response to the founding papers of fifth to seventh applicants. As will be evident hereinafter, the respondents were not allowed to file those further answering papers. That is probably also why the first to fourth applicants' indicated on the filing sheet of the said affidavits that it is filed to oppose the filing of further papers by the respondents, but should the respondents' answering papers be allowed, the said papers of first to fourth applicants should be considered to be replying papers. Consequently, for purposes of the merits of the application regarding first to fourth applicants, the further replying affidavits that were filed by first to fourth applicants were also not allowed and cannot be considered.

I should also mention that first to fourth applicants were entitled to file replying affidavits in response to the answering affidavits that respondents filed on 10 May 2007 in terms of the order I granted in the application for intervention by fifth to seventh applicants. However, if the aforesaid affidavit of Mr. Sizephe was intended to have been filed in reply to those answering papers, in terms of the order I issued in the application for intervention, the replying papers were supposed to have been filed by 17 May 2007, whilst this affidavit of Mr. Sizephe was only filed on 18 May 2007 – late again. It can therefore also not be considered on this

basis.

However, even if I were willing to consider the explanation tendered by Mr. Sizephe in his further replying affidavit of 18 May 2007 regarding the late publication of the notice solely for purposes of the application for condonation, it will still make no difference. It is evident from the explanation advanced that despite the fact that my previous order was issued on 4 April 2007, Mr. Sizephe's office only approached the offices of the Volksblad regarding the proposed advertisement on 10 April 2007. Despite having received a quotation on 10 April 2007 already, nothing further was done regarding this advertisement before 16 April 2007 when he personally made contact with the Volksblad. Only then further arrangements regarding payment etc. were made. It is therefore evident that once again there was a failure to attend timeously to the arrangements to effect timeous publication.

[20] For the same reasons I have already recorded regarding the explanation pertaining to the late filing of Mr. Sizephe's

affidavit and the newly attested affidavits attached thereto, I do not consider this explanation to be satisfactory under the circumstances. This factor, in addition to the late filing of the application for condonation without any explanation therefore, necessitates me to also dismiss the application for condonation regarding the late publication of the notice in the Volksblad.

[21] Considering the aforesaid dismissal of the application for condonation, the affidavit of Mr. Sizephe dated 23 April 2007, together with the annexures thereto, filed on 24 April 2007, cannot be considered to be part of the application papers before court. This has the consequent result that the newly attested affidavits filed together with Mr. Sizephe's aforesaid affidavit, should be considered to be *pro non scripto*. This has the result that the objections raised in paragraphs 8, 10, 12, 14 and 16 of respondents' previous application to strike out and which in terms of paragraph 1.8 of my previous order stood over for adjudication on 24 May 2007, are to be successful and the application is to be granted.

[22] With regard to the late and/or non-service on the seventeen persons, there is no application for condonation with regard to this failure of the first to fourth applicants. The only reference made to this in the application for condonation was one paragraph that reads as follows:

“In conclusion I also want to draw the attention of Honourable Court the fact that ANNEXURE “X” to the judgment of this Honourable Court dated 4 April 2007 was send and received by the respective sheriff on/or before the 16 April 2007 to be served on the affected and interested parties.” (*sic*)

In my view this paragraph adds insult to injury. I understand this paragraph to mean that despite the fact that the court order was issued on 4 April 2007 already, Mr. Sizephe once again delayed in taking action in ensuring that service takes place timeously in that he apparently only provided the sheriff with the instruction to serve on 16 April 2007. This inference is actually confirmed by the details appearing on the returns of service to which I referred earlier. The earliest date, on which any of the successful service and/or attempted service took place, was on 17 April 2007. In those instances where service and/or the first attempt to serve did not take place on 17 April 2007, it took place on even later dates such as 18 April 2007, 20 April 2007, 27 April 2007 and even so late as on 8 May 2007. Had the instructions been given to the respective sheriffs at an earlier date, any problems with service could and would have been ascertained also at earlier dates and then there probably would have been time for first to fourth applicants to still have attempted to resolve difficulties with correct addresses, possibly approach court with an application for substituted service etc. But due to the late instruction given to the respective sheriffs there was no time to attend to the problems that were incurred during attempted service. Be that as it may, paragraph 2.1 of my previous order was therefore also not properly and/or timeously complied with, without any explanation for it.

[23] With regard to the failure to timeously publish the notice in the Volksblad as ordered in paragraph 2.2 of my previous order, I have already dismissed the application for condonation with the regard to this failure. Therefore this part of the said order was also not adhered to by first to fourth applicants.

[24] As already indicated above Mr. Sizephe's explanatory affidavit in which he was to provide reasons why he should not be ordered to pay certain costs *de bonis propriis* which was supposed to have been filed by 23 April 2007, was only filed on 24 April 2007. I have already determined that the application for condonation for the late filing thereof is to be dismissed and therefore it is to be considered that no such reasons have been advanced. However, I will again deal with this aspect when I deal with the issue of costs.

[25] With regard to first to fourth applicants late and improper filing of their heads of argument, Mr. Wessels referred me to the case of **GENERAL ACCIDENT INSURANCE CO SOUTH AFRICA LTD v ZAMPELLI** 1988 (4) SA 407 (C) at

409 D – H, which judgment dealt with Rule 49(15) regarding the delivery of heads of argument in appeals from the Supreme Court. Based on this judgment, read with Rule 4(aA) and the definition of deliver in Rule 1, he submitted that not only was the heads of argument filed late at court, but the manner in which it was received by the respondents' attorneys of record is also not acceptable and not in accordance with the Rules of Court and the accepted practice in this division. I agree with this contention. However, it is a well known principle that heads of argument are mainly there for the convenience of the court. Therefore, although there is no application for condonation regarding the late and improper filing and delivery of the heads of argument, I am still willing to consider the said heads of argument in support of the first to fourth applicants' case. But this does not detract from the fact that only once again there was a lack of timeous attention and/or conscientious conduct in the handling of the application on behalf of first to fourth applicants, which unfortunately, has been evident throughout these proceedings.

[26] Considering the remissness on the part of first to fourth applicants, and more specifically their attorney, Mr. Sizephe, as documented in my previous judgment, read together with their continuing and seemingly perpetual remissness for which they, and more specifically their attorney, failed to ask, alternatively failed to show good cause for condonation, have reached the point where first to fourth applicants can no longer escape the results of their attorney's lack of diligence. The remissness, ineptitude, carelessness and total lack of conscientious conduct in the handling of this application by Mr. Sizephe, have unfortunately resulted in a situation where first to fourth applicants' prospects of success can no longer save their application. (See **IMMELMAN v LOUBSER EN 'N ANDER**, *supra*, at 824 C – G)

[27] In **MAKUWA v POSLSON** 2007 (3) SA 84 (TPD) at 88 F the following applicable principle was also again confirmed:

“Finally, there appears to be a growing prevalence of failure to

comply with the Rules of Court and having a total disregard for the practice in this Division as enjoined by the Manual. Coetzee J, in *Reitmann v Jansen van Rensburg* 1984 (2) SA 174 (W) at 179 H, said:

‘Rules are made to be followed and Rules are there so that rights and duties flow; in the event of non-compliance legal results flow.’”

[28] Whilst in my previous judgment I considered it in the interests of justice and of all relevant parties to be lenient towards the procedural defects in order to come to a point where the merits of the application can be adjudicated, the proceedings between first to fourth applicants and respondents have now come to a point where it will be a travesty of justice should I further condone and tolerate the manner in which this application has been handled on behalf of first to fourth applicants. Mr. Danzfuss, assisted by Mr. Edeling, acting on behalf of first to fourth applicants, also duly conceded after the taking of instructions that he cannot responsibly submit that the aforesaid failures and deficiencies should be condoned and he also conceded that the rule *nisi* should be discharged as between first to fourth

applicants and the respondents.

[29] The legal result that flows from the aforesaid is that I have no other option but to discharge the rule *nisi* currently in place as between first to fourth applicants and respondents. By doing this, the doors of the court will in any event not be closed to first to fourth applicants as they will still be entitled to institute their proposed application for review.

[30] Although I do not have to adjudicate the merits of this part of the application anymore due the aforesaid necessitated discharge of the rule *nisi*, I do consider it apposite and in fact necessary in the circumstances of this application to remark that if my previous order had been properly complied with to the extent that the procedural deficiencies had been rectified, I would have confirmed the rule *nisi* as between first to fourth applicants and respondents. In my view they duly made out a *prima case* for purposes of obtaining the interim relief. The alleged irregularities in the meetings that lead up to the election of the REC, are of very serious nature.

[31] I will deal with the issue of costs at the end of this judgment.

FIFTH TO SEVENTH APPLICANTS:

[32] As previously indicated herein, fifth to seventh applicants were joined in these proceedings immediately after the handing down of my previous judgment on 4 April 2007. My intention with the order of intervention and subsequent joinder which I issued under application number 1444/07, was that the rule *nisi* which I issued on 16 February 2007 was also to operate in favour of fifth to seventh applicants. As furthermore indicated herein earlier, the aforesaid order was granted by agreement between the parties and my distinct impression from all relevant parties was that they were *ad idem* that the rule *nisi* previously issued, was also to operate in favour of fifth to seventh applicants. This is also in accordance with the legal position, which is stated as follows in **Superior Court Practice**, Erasmus, at B1–104:

“When leave to intervene is granted by the Court, the party

given it is placed in the same position as and is clothed with the same rights as the parties, unless of course such rights are specifically curtailed.”

[33] Therefore, in my view the rule *nisi* which I issued on 16 February 2007 is still in place as between fifth to seventh applicants and respondents despite the proposed discharge thereof as between first to fourth applicants and respondents.

[34] The particular question that now has to be addressed is whether this rule *nisi* should now be discharged, extended or confirmed.

Joinder and service:

[35] Like I have already indicated herein earlier, when my previous judgment was handed down, fifth to seventh applicants were not yet parties to these proceedings. In their application for intervention they also only cited first to fifth respondents. Technically speaking their application had the same procedural problems than the main application of first to fourth applicants regarding non-joinder of interested parties as respondents. However, this issue was not raised by any of the parties at the time when the application for intervention by fifth to seventh applicants was heard. This is probably because at the time when I granted

the order allowing them to intervene and consequently joining them as fifth to seventh applicants, all parties hereto, and myself, had the reasonable expectation that first to fourth applicants will comply with my previous order which would have had the result that any procedural defects that existed at the time when fifth to seventh applicants intervened, would then have been rectified. My previous order did not place any obligation on fifth to seventh applicants to take any steps pertaining to service of the notice to interested parties on the seventeen persons and/or the publication of the said notice in the two newspapers. This obligation rested squarely and solely on the shoulders of the first to fourth applicants. First to fourth applicants' failure to have complied with this obligation, did however also affect the fifth to seventh applicants' application. The question arises whether first to fifth applicants' failure to comply with my previous order pertaining to service and publication of the notice to interested parties is now also fatal to fifth to seventh applicants' application with regard to the question of non-joinder.

[36] It should immediately be emphasised that fifth to seventh applicants' current position is totally different from the position in which first to fourth applicants found themselves during the hearing on 29 March 2007 and also again during the hearing on 24 May 2007 as a result of their failure to comply with certain parts of my previous order. In this regard I wish to point out the following:

1. When fifth to seventh applicants intervened, they found the papers as they stood at that time, hence, without the seventeen persons having been joined as respondents. They did not initiate the main application with the initial failure to cite the said seventeen persons.
2. My previous order did not put any obligation on them to take any steps regarding the non-joinder of the seventeen persons and

they were consequently not the parties who failed to comply with certain provisions of my previous order.

3. They have up to now not been remiss in any way in the manner in which they have been conducting this application. Although they intervened at quite a late stage of the proceedings, the reason for this late intervention was duly and properly explained in their application for intervention (see application for intervention, application no. 1444/07, par. 2 to 3, p. 7 to 8).

4. At the time of the previous hearing on 29 March 2007, no publication of any sorts inviting any potential parties who may have an interest in this application, to intervene as respondents, has yet been effected. The current situation is that in the meantime the notice to interested parties had been published in two newspapers, one of which has regional circulation and one of which has national circulation.

[37] I consequently have to decide whether under the current circumstances I am satisfied that the adjudication of this application can proceed without any further service and/or notice to any persons and/or entities, or whether such further notice and/or service is necessary. Even should I decide that further notice and/or service is in fact necessary, I will

not dismiss the application of fifth to seventh applicants like I intend doing with first to fourth applicants' application. Because of the reasons already listed above, fifth to seventh applicants should then be granted a fair opportunity of their own to rectify and cure such procedural defect, like I did in favour of first to fourth applicants in my previous order. Should I however find that for purposes of fifth to seventh applicants' application as it currently stands I am satisfied with the notice and/or service that had been effected up to now, I will obviously continue to address the other remaining issues.

- [38] As previously pointed out, fifth to seventh applicants did not fail to comply with any court order pertaining to publication and/or service of the notice. The fact that publication in the Volksblad was effected one day later than what my court order prescribed, is therefore in my view irrelevant for purposes of fifth to seventh applicants' situation. The fact that service of the notice to interested parties on the seventeen persons that I ordered in my previous order was

not fully complied with, also does not reflect negatively in any manner on fifth to seventh applicants. The only question which needs to be addressed is whether or not I am satisfied at this stage of the proceedings with the effectiveness of the service that has occurred, in the sense that I must be satisfied that persons and/or entities who have or might have a direct and substantial interest in the current application had been duly informed of their right to intervene as respondents and of the fact that their failure to do so will have the implication that they will be bound by my judgment. I am of the view that I am not bound by the instructions pertaining to service that I gave in my previous order and I am entitled to review those in the current circumstances considering that:

1. my previous court order did not put any obligation pertaining to the effecting of service and/or publication on fifth to seventh applicants;
2. two publications of the notice had in the meantime been effected in two newspapers;
3. further information regarding the feasibility of service upon the seventeen persons have been forthcoming since the previous hearing; and

4. the totality of the circumstances of this application.

(See **EX PARTE OPTIMAL PROPERTY SOLUTIONS**

CC 2003 (2) SA 136 (CPD) at 141 G to 142 E.

Although in that case the court on the return date of a rule *nisi* was not satisfied with a particular form of service that had previously been sanctioned by the court and ordered additional and better service, I am of the view that the principle, being that the court can reconsider the adequacy of service at the return date of a rule *nisi*, will also be applicable in an instance such as this application where there have been changed circumstances in the meantime.)

[39] Before I continue to consider the adequacy of service which had been effected in this application, I deem it necessary to clarify my previous judgment in one respect which was raised and questioned during argument in court on 24 May 2007. There seems to be uncertainty amongst the parties as to my intention with the order that is reflected in paragraph 2

of my previous order pertaining to the application for joinder. When this issue was raised during argument, I was, for the moment, also unsure about the implication of that order, which uncertainty was only due to the fact that at that stage I had not again read my previous judgment since the day it was handed down. The apparent uncertainty is whether the order which I issued meant that the seventeen persons were in fact joined as sixth to twenty-second respondents or not. From a proper reading of my previous judgment it is clear that the seventeen persons had in fact not been joined as respondents and that it was never my intention to have done so by means of the order which I granted in paragraph 2 of my previous order. In this regard I wish to refer to an extract from my judgment appearing on pages 40 to 41 thereof, which reads as follows:

“In my view the said respondents cannot be joined as respondents in the absence of service upon them of the application. I therefore intend to provide in my order for appropriate service upon them, pursuant to which they can decide whether they wish to intervene as respondents or not.”

This intention with and meaning of my order is furthermore confirmed by the fact that the notice to interested parties which I ordered should be served upon the seventeen persons, stated, *inter alia*, that:

“... are hereby invited to intervene as respondents in the abovementioned application. Should you wish not to intervene as respondents, you will be considered to abide by the decision of the Court.”

The seventeen persons were therefore not joined as respondents, but were invited to intervene as respondents, should they so wish, in the absence of which they will be considered to be bound by the decision of court. When I used the words “the application for joinder issued under application number 1329/2007 is granted on the following terms” I did not mean that the seventeen persons are in fact being joined as respondents. If I had intended that, I would have made an order as part of paragraph 2 of my previous order that they in fact are being joined as sixth to twenty-second respondents, as prayed for in prayer 1 of the Notice of Motion in the application for joinder. By using the aforesaid words my intention was to say that the orders that I grant in the application for joinder were the orders contained in subparagraphs 2.1, 2.2 and 2.3 of my previous order.

[40] The seventeen persons had therefore not been joined as respondents.

[41] From the information currently before Court, more particularly so from the returns of service which was handed to me from the Bar on behalf of first to fourth applicants, it is evident that service could not be effected on all seventeen persons. This

appears to have been mostly because either the specific person was unknown at that particular address or the premises at the particular address was found to be unoccupied. From a comparison between the returns of service and the report of the tracing agents attached to first to fourth applicants' application for joinder as annexure P5, it appears that even some of the addresses which were provided by the said tracing agents, were apparently incorrect in that those premises were found to be unoccupied.

[42] It is furthermore evident from the aforesaid report of the tracing agents that problems were encountered in their attempts to obtain the addresses of the seventeen persons in that they did not receive the co-operation of the officials from whom they made enquiries. It therefore appears that not only will it be a time-consuming and costly exercise to again order service upon the seventeen persons in terms of the court rules, but on probabilities it will in any event not be practically possible to do so considering the lack of information regarding their residential and/or work addresses.

[43] The substituted service by means of the publication of the notice to interested parties in two newspapers have however taken place and although the advertisement in the the Volksblad was one day late, any person who wished to intervene as respondent would still have had enough time to do so. I deem it necessary to consider to what extent the said publications can be considered to have been effective service under the circumstances, both for purposes of the seventeen identified persons and for unknown and unidentified persons and/or entities.

[44] In **AMALGAMATED ENGINEERING UNION v MINISTER OF LABOUR** 1949 (3) SA 637 at 651 and 653 the following dicta appear:

“We are not, of course, dealing with judgments *in rem*, such as

decrees of divorce, or with cases in which the Court, by the publication of a rule *nisi*, gives all parties who may consider themselves interested an opportunity of appearing to oppose the granting of an order, with the implication that they should be bound by it if they fail to do so.”

and

“It is, of course, a well-known practice of our Courts to issue a rule *nisi* in appropriate cases, calling upon parties not before the Court to show cause why an order which may affect them, should not be made.”

In **EX PARTE SENGOL INVESTMENTS (PTY) LIMITED**

1982 (3) SA 474 (TPD) at 478 A to E the aforesaid approach was reconfirmed:

“It follows that the State is a necessary party and should be joined in these proceedings unless I am satisfied that the State has unequivocally waived its right to be joined and undertaken to be bound by any decision the Court may make.
Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 367 (A). ...

In stating the rule that a Court should not make an order that may prejudice

the rights of parties not before it, FAGAN AJA, [in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A)] who delivered the judgment in the latter case, expressly excluded the case where a rule *nisi* issued, in these words (at 651):

'We are not...dealing with cases in which the Court, by the publication of a rule *nisi*, gives all parties who may consider themselves interested an opportunity of appearing to oppose the granting of an order, with the implication that they should be bound by it if they fail to do so.'

(See also at 653.)

A rule *nisi* is a judicial invitation to join issue and the failure to appear after proper notice thereof is regarded as a waiver of the right to be joined and a submission to the order of the Court. In these circumstances service of the rule *nisi* which I will order will obviate the joinder of the State."

The Appeal Court (as it then was) endorsed the aforesaid expedient process in **EDEN VILLAGE (MEADOWBROOK) (PTY) LIMITED v EDWARDS** 1995 (4) SA 31 (AD) at 47 C to 49 C where the following relevant extracts appear:

"In the light of the dicta contained in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) and the cases there referred to, it seems to me that this attitude was justified in the present instance. In view of the fact that the objection had only been taken in this Court, and not in the Court *a quo*, and in the light of the tenuous nature of the interest, Mr. Cooper submitted, however, that we should adopt the expedient process

referred to in the *Amalgamated Engineering Union case supra* at 663 ...

This would not only expedite the decision in this matter, but it would also avoid causing the parties unnecessary expense and delay. Mr. Slomowitz agreed with this submission.

We accordingly issued a direction to the respondents' attorneys to notify all the residents of Eden Village of these proceedings and of the declaratory order granted by the Court *a quo*; and to publish this order in a conspicuous place in the village. Residents were called upon, within a period of two weeks from such notification and publication to indicate to the registrar whether or not they consented to be bound by the judgment of this Court, notwithstanding the fact that they had not been cited as parties to the proceedings. ...

This direction was complied with by respondents' attorney, and an affidavit confirming this was filed by him. ...

The attorneys have now informed the registrar that, on reconsideration, their clients had decided to abide by the decision of the Court. This appeal may therefore be considered on the basis that all the residents of Eden Village are bound by our decision, despite the fact that they had not formally been joined as parties to the suit."

[45] Considering that on probabilities it is evident that fifth to seventh applicants will not be able to serve the said notices upon the seventeen persons in terms of the court rules,

strictly speaking they should bring an application for substituted service (see **OLIVIER v AHRENS** 1964 (1) SA 178 (OPD)). They were not in a position to have brought such an application before the hearing of this application on 24 May 2007, as they could not have ascertained whether the notice to interested parties had in fact been served timeously or at all on the seventeen persons, considering that the returns of service were only handed to me from the Bar on the day of the hearing. In order to enable them to bring such an application, this application will have to be postponed again. Considering the information currently before court, they will probably be successful with such an application for substituted service. In my view it is nonsensical to insist upon such a formal application, only to then authorise substituted service and order publication of a similar notice to interested parties than the one that had already been published in two newspapers. A repetition of this process will serve no purpose.

[46] The notice to interested persons clearly and unequivocally stated that the application was to be heard on 24 May 2007. Any

person and/or entity who had the intention to intervene and who might have had problems obtaining copies of the application papers as alleged in respondents' answering affidavits, could have attended the proceedings on 24 May 2007. During the hearing on 24 May 2007 no such persons and/or entities were present. I also find it significant that not one of the three persons whose affidavits were attached to the respondents' answering affidavits alleges that they wish to intervene as respondents. In fact, two of those persons specifically state that they have decided not to pursue the matter. Whether they have done so on the basis of legal advice received, on the advice of some ANC officials and/or on account of their own decision, is irrelevant. The fact remains that they made that decision at their own peril after having been duly informed by the notice to interested persons what the consequences will be should they decide not to intervene as respondents.

[47] For purposes of service on unknown and unidentified persons and/or entities who might have a direct and substantial interest in the outcome of this application, I consequently find that the publication of the notice in the two newspapers constituted effective service upon them.

[48] In so far as the seventeen identified persons are concerned, I take into consideration, in addition to the aforesaid considerations, the fact that their interest in this application is actually a group interest in their capacity as the members of the newly elected Regional Executive Committee ("REC") at the conference of 9 to 11 February 2007 (in addition to such newly elected members who are already parties to the application, being third, fourth and fifth respondents). Having said that it is so that it is evident from the first to fourth applicants' application for joinder that the application for

joinder had previously been served upon the ANC regional offices at 102 Southern Building, Fichardt Street, Sasolburg as a form of substituted service on each and every one of the seventeen persons. First to fourth applications had furthermore been successful in serving the notice in terms of the court rules on ten of the seventeen identified persons. Three members of that very same newly elected REC have been parties to this application from the outset hereof, being third, fourth and fifth respondents. Considering the nature and effect of the rule *nisi* which has been effective since 16 February 2007 with the result that the aforesaid newly elected members of the REC have been prevented from performing their duties in their capacities as such, they must surely be aware of the pending application. In view of all these circumstances I am satisfied that on probabilities the seventeen persons are not only aware of and have proper knowledge of the pending application, but moreover I am satisfied and based upon probabilities convinced that the publication of the notice in the two newspapers constituted proper and effective substituted service upon the seventeen

identified persons. The said notices to interested parties duly and properly advised them what the consequences will be should they decide not to intervene as respondents.

[49] Without hesitation I definitely consider it substantial justice in the particular circumstances of this case that this application is not to be postponed again for purposes of further service and/or publication that in any event will probably be futile.

[50] Considering the contents of the notice to interested persons which was published, the aforesaid case law and the applicable legal principles referred to, I am consequently of the view that under the circumstances I can proceed to adjudicate this application on the basis that the identified seventeen persons and other persons/entities who might have a direct and substantial interest in the outcome of this application, are and will be bound by my decision which I make in this application, despite the fact that they had not formally been joined as parties (respondents) to the application.

Locus standi:

[51] Both the first to fourth applicants as well as the fifth to seventh applicants have based their *locus standi* to have launched and/or intervened in the current application on the allegation that they are legitimate members in good standing of the ANC. It has throughout been the contention of the respondents that both sets of applicants do not have *locus*

standi because they are not *bona fide* members of the ANC as their membership was not acquired in terms of the Constitution.

[52] In their founding affidavits, fifth to seventh applicants attached their ANC membership cards as *prima facie* proof of their allegation that they are *bona fide* members in good standing of the ANC. In addition to that they also attached copies of the membership reports of their respective wards/branches, being ward 12 (otherwise known as Phomolong-Moqhaka branch), ward 4 (otherwise known as Itumeleng branch) and ward 6 (also known as Matseki Majoro branch). It should be noted that the heading of these branch membership reports reads “Membership in Good Standing ...”. With regard to the status of these reports, the fifth to seventh applicants alleged in their founding affidavits that these reports are the only authentic lists of members in good standing of the ANC within a specific branch and that they represent the national list referred to in rule 4(10) of the Constitution of the ANC. For a person to be listed on these

lists, such person must have attained status of full membership. They furthermore explained that there is a process of accessing or retrieving such membership reports from the website of the ANC, but in order to do so one needs an accredited pin code or password. Only officials of the ANC internally, with accredited pin codes or passwords, can access these membership reports.

[53] I have already dealt in my previous judgment with the admissibility of such reports as evidence. For the reasons already recorded in my earlier judgment, on pages 36 to 39 thereof, I also consider the current membership reports as admissible evidence.

[54] When considered in *vacuo*, the aforesaid allegations pertaining to their membership, as supported by the membership cards and the branch membership lists, fifth to seventh applicants in my view made out a *prima facie* case pertaining to their *locus standi*.

[55] The aforesaid allegations by the said applicants are being denied by the respondents. In their attempted rebuttal of this *prima facie* case, the respondents relied on a letter from the Secretary General of the ANC, Mr. Kgalema Motlanthe received by the respondents on 28 February 2007, which letter has been attached to the answering papers filed in response to the first to fourth applicants' founding papers as annexure C, and in which letter Mr. Motlanthe confirmed the following:

“Membership of the ANC is determined by rule 4 of the ANC Constitution as adopted at the 51st National Conference, December 2002 at page 6. Any person who does not comply with this rule in its entirety does not become a *bona fide* member of the movement even if he produces a purported membership card.”

In addition thereto, the respondents have now filed an affidavit of the said Mr. Motlanthe as part of their answering papers in response to the founding papers of fifth to seventh applicants. I consider it expedient to record the contents of the said affidavit herein:

“1.

I am a major male Secretary General of the African National

congress (ANC) based at Luthuli House in Johannesburg and as such duly authorised and able to depose to this affidavit as the contents hereof, unless otherwise indicated, fall within my personal knowledge and are, to the best of my belief, both true and correct.

2.

I have, over the past several months, and in my capacity aforementioned, expressed great reservations both orally and in writing regarding the practice of individuals obtaining membership cards through what has become known as parallel recruitment procedures and which entail joining the ANC and obtaining membership cards contrary to the provisions of the Constitution of the ANC.

3.

As recently as the weekend ending 18 March 2007 and at a National Executive Committee meeting of the ANC, the problem was raised in a discussion document in which the importance was emphasized of recruitment and registration of membership through a particular branch and, thus, as provided for in and in accordance with the provisions of the ANC.

4.

My attention has been drawn to the names and identities of the four (initial) applicants as well as the three applicants that joined at a later stage, in the pending application serving before the

High Court of South Africa, Free State Provincial Division under case number 568/2007 and I can state unequivocally that these individuals obtained their membership cards by means of the so-called parallel recruitment procedure and not in terms of rule 4 of the Constitution of the African National Congress.

5.

I can furthermore state unequivocally that their applications for membership were never considered at branch level and, more specifically, at the branches situated in the wards in question.

6.

These seven individuals are, accordingly, not legitimate members of the African National Congress.

7.

Because of the parallel recruitment procedure, the lists of members of the ANC published on the internet do not correctly reflect who are legitimate members and who are not and those lists are, therefore, not reliable and information therein contained cannot be accepted and relied upon.”

[56] In response to the aforesaid denial of fifth to seventh applicants’ *locus standi*, they elaborated on their *locus standi* in reply. I am of the view that in the circumstances applicants were entitled to have done so. (See: **MSUNDUZI**

MUNICIPALITY v NATAL JOINT MUNICIPAL

PENSION/PROVIDENT FUND AND OTHERS 2007(1) SA

142 at 147 G to I.

Fifth applicant conceded that his application for membership was not considered at branch level. He however appealed to Rule 4.5 of the Constitution in terms whereof membership need not be considered at branch level only. He explained that when he wanted to join the ANC it was just after the demarcation and for some time there was no ward in the vicinity where he lived. A ward only came into existence shortly after he became a member of the ANC in September 2005. He then set out elaborately how he attained membership by having applied at Luthuli House in Johannesburg. After having paid his subscription fee, the ANC accepted his membership. He also referred to Rule 4.9 of the Constitution in terms whereof the Secretary General may rule that membership might be rejected if it was invalidly obtained. Such a ruling has not been made regarding his membership. He has been a member in good standing of the

ANC since September 2005 and his membership will only expire on 29 June 2010.

Sixth applicant explained that he applied for membership and that his membership had been accepted otherwise he would not have been issued with a membership card. His application for membership and/or his membership as such have not since then been rejected by the Secretary General and therefore he persists that he is a legitimate member of the ANC. He joined the ANC in November 2006 and his membership is valid until 7 November 2008.

Seventh applicant avers in reply that she obtained membership at branch level in 2002. Her subscription thereafter fell in arrears in 2003, which resulted in her remaining a member but not in good standing. During January 2007 she paid all the arrear amounts at Luthuli House and was again since then regarded as a member in good standing. Pursuant to this a new membership card was issued to her at Luthuli House. She has therefore been a member of the ANC since 2002 and her membership will expire on 16 October 2009.

[57] Fifth to seventh applicants also applied for Mr. Motlanthe's affidavit to be struck out as inadmissible hearsay evidence.

In the alternative Mr. Danzfuss, assisted by Mr. Benadé, appearing on behalf of fifth to seventh applicants, contended that if Mr. Motlanthe's affidavit is not struck out as inadmissible, I should in any event take a "robust, common sense approach" and find that Mr. Motlanthe's affidavit does not refer to facts or adduce evidence of such a nature as to

throw into judicially cognisable doubt the applicants' claim to membership. Mr. Wessels, assisted by Mr. Fischer, appearing on behalf of the respondents, pointed out that fifth and sixth applicants in fact concede that their membership applications were never considered at branch level as envisaged in the Constitution. He furthermore submitted that the denial of membership is supported by one of the most senior members of the National Executive Committee of the ANC which is the highest organ of authority in terms of the Constitution and that I ought not to be dismissive of what is claimed by the Secretary General, having regard to his powers and duties as set out in the Constitution.

- [58] It is trite that when it is not evident from an affidavit that the facts therein are within the personal knowledge of the deponent thereto, such statement must be supported by facts showing how the information was obtained or on what grounds the deponent's belief of the truth and correctness of the contents thereof are based. See **BRIGHTON FURNISHERS v VILJOEN** 1947 (1) SA 39 (GW) at 41:

“The petition and the verifying affidavit are signed by the applicant's attorney who affirms that all and singular the allegations of fact contained in the petition are true to the best of his information, knowledge and belief. This statement is not supported by any facts showing how the information was obtained or on what grounds the belief is based, nor are any reasons given which would justify me to disregard the general rule that the basis of the knowledge or belief must be disclosed.”

In **GIANOTES v GIANOTES** 1947 (2) SA 512 at 514 to 515 the principle was also stated as follows:

“It will be noticed that the petitioner fails to give the source of her information or the grounds of her belief. In **GRANT-DALTON v WIN AND OTHERS** (1923, W.L.D. 180), it was laid down that the court will not admit statements of belief and information in interlocutory matters unless the grounds of such information and belief are set out ...Mr. Justice Krause at page 186 said, *inter alia*:

‘The grounds of the deponent’s belief must be stated so as to show that he has reasonable and proper cause for making the statement, and has not shown merely to raise an issue. The Court of Appeal England In re Young manufacturing Co., Limited

(1900, 2 Ch. 753), held that an affidavit of information and belief not stating the sources of information of belief is irregular, and therefore inadmissible as evidence, whether on an interlocutory or a final application; and a party or solicitor attempting to use such an affidavit will do so at his own peril as to costs.”

(Also see **THE MASTER v SLOMOWITZ** 1961 (1) SA 669 (TPD) at 672 A – C and 673 D – E.)

[59] Mr. Wessels submitted that it is evident from Rule 16.6 (a) of the Constitution that Mr. Motlanthe in his capacity as Secretary General is the chief administrative officer of the ANC and in his capacity as such he keeps all records of the ANC. On the basis of this Mr. Wessels contended that I should accept that the national membership list referred to in Rule 4.10 of the constitution is also under the control of Mr. Motlanthe and that he based his allegations in his affidavit on these records under his control. I cannot agree with this contention. If Mr. Motlanthe perused the national membership list for purposes of ascertaining whether fifth to

seventh applicants are members in good standing of the ANC, he should have stated that fact; even better, he could have attached the relevant lists which he claims are the correct lists. The mere fact that he has the relevant documentation under his control, does not necessitate an inference that he in fact perused the said documents. He provides no basis for his bold statement that he can “unequivocally” state that fifth to seventh applicants are not legitimate members of the ANC and that they obtained their membership cards by means of the so-called parallel recruitment procedure (which alleged procedure he does not even attempt to explain). The mere fact that fifth and sixth applicants in fact concede that their membership applications were not considered at branch level does not change the hearsay nature of these allegations made by Mr. Motlanthe. He also provided no proper factual basis for his statement that the membership lists published on the internet do not correctly reflect who are legitimate members and who not.

[60] I am consequently of the view that paragraphs 4, 5, 6 and 7 of the Mr. Motlanthe’s affidavit should be struck out. For the further reasons hereinafter, I do not even consider it necessary to make a

formal order with regard to the aforesaid striking out.

[61] With those allegations struck out I am of the view that I only need to consider the aforesaid *prima facie* allegations made by the applicants in their founding papers, which are now only met by a bare denial by the respondents. I consequently find that based on these allegations, the fifth to seventh applicants have *prima facie* established their *locus standi*.

(See **MSUNDUZI MUNICIPALITY v NATAL JOINT MUNICIPAL PENSION/PROVIDENT FUND**, *supra*, at 147 H to I.)

[62] Even if I am wrong in my aforesaid conclusion regarding the hearsay nature of the relevant allegations contained in Mr. Motlanthe's affidavit, and I am to consider the whole of Mr. Motlanthe's affidavit in response to fifth to seventh applicants' allegations made in their founding papers, read with the replying papers, my conclusion regarding the establishment of their *locus standi* is the same.

[63] When Mr. Motlanthe's affidavit is considered, it appears that

he refers to, what he calls, “parallel recruitment procedures” which “entail joining the ANC and obtaining membership cards contrary to the provisions of the Constitution of the ANC”. Mr. Motlanthe unfortunately nowhere explains how it happens that the ANC issues membership cards without the correct procedures in terms of the Constitution having been followed; moreover, how the ANC can apparently accept membership fees from them but then deny that very member’s alleged membership. His statement to the effect that fifth to seventh applicants obtained their membership cards by means of such parallel recruitment procedure and that they are accordingly not legitimate members in good standing of the ANC, is also just a bold statement without him explaining how he gained this information and on what facts these allegations are based. Similarly, in paragraph 7 of the affidavit, he again makes a bold statement to the effect that because of the parallel recruitment procedure the lists published on the internet do not correctly reflect who are legitimate members and who are not and that those lists therefore are not reliable, without any attempt to explain how

it happens in practice that members' names appear on lists which appear to be the lists of members in good standing within particulars branches, whilst those members are allegedly not legitimate ANC members. This failure to explain is once again very significant considering the allegations that only officials of the ANC have access to these membership lists published on the internet. Mr. Motlanthe's failure to refer to facts or adduce evidence as basis for these allegations have the consequent result that I consider these allegations as bare denials of fifth to seventh applicants' alleged *locus standi*.

[64] Therefore, in my view the allegations in Mr. Motlanthe's affidavit have no proper evidential value.

[65] In **SOFFIANTINI v MOULD** 1956 (4) SA 150 (E) at 154 G to H the following approach was followed in similar circumstances:

"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, the motion proceedings are worthless, for a respondent can also defeat or

delay a petitioner by such a device.

It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavit.”

In addition to the aforesaid it should be remembered that the current application deals with an interim interdict in which instance the applicant only needs to make out a “*prima facie* case though open to some doubt”. (See: **WEBSTER v MITCHELL** 1948 (1) SA 1186 (WLD) at 1189.)

Also see **LADYCHIN INVESTMENTS v SOUTH AFRICAN NATIONAL ROADS AGENCY AND OTHERS** 2001 (3) SA 344 (NPD) at 353 D – C:

“The principles established by the cases where an interim interdict is sought where there are conflicts of fact are as follows:

1. ...
2. ...
3. Even if there are material conflicts of fact the Courts will still grant interim relief. The proper approach is to take the facts as set out by the applicant, together with any facts set out by the respondent, which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at

a trial.

4. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he should not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to 'some doubt'.

5. If there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the mean time, subject of course to the respective prejudice in the grant or refusal of interim relief."

[66] Applying the aforesaid principles to the question regarding fifth to seventh applicants' *locus standi*, I am of the view that even if I take the whole of Mr. Motlanthe's affidavit into consideration, the applicants have *prima facie* still established their *locus standi* in their founding papers.

[67] When I go further and consider fifth to seventh applicants' further explanations in their replying affidavits, more specifically fifth and sixth applicants' explanation that their applications for membership were in fact not considered on branch level, those allegations, in my view, do not negate their *prima facie locus standi*. On my interpretation of Rule 4.5 of the Constitution it is evident that applications for membership may also be considered by other structures in that Rule 4.5, *inter alia*, specifically provides as follows:

“The branch executive committee, the regional executive committee, or such interim structures as the Provincial Executive Committee or the NEC may create from time to time to decide on applications, may accept or refuse any application for membership provided such acceptance or refusal shall be subject to review by the next higher organ of the ANC.”

(Own underlining)

There is nothing currently before me that throws serious doubt on fifth and sixth applicants’ allegations that the process which they followed to obtain membership were legitimate processes in that it fell within the ambit of “interim structures” as provided for in Rule 4.5. On probabilities this is moreover so considering that the process followed by fifth applicant entailed an application which was made at the ANC headquarters in Johannesburg at a certain floor where a department of the ANC has specifically been created by the ANC to process applications for membership.

[68] For the sake of completeness I also wish to point out that *prima facie* seventh applicant’s application for membership was made and considered at branch level and therefore,

even should it be found during the review application that fifth and sixth applicants did not have *locus standi* to have launched the current application, such finding will not negatively affect seventh applicant's alleged *locus standi*.

[69] I consequently find that, whether or not paragraphs 4, 5, 6 and 7 of Mr. Motlanthe's affidavit are struck out, fifth to seventh applicants' *locus standi* have *prima facie* been established.

[70] I deem it necessary to make some remarks about the *locus standi* of first to fourth applicants, considering that they were the initial applicants who obtained the rule *nisi*. Firstly I wish to point out that respondents were not entitled to have filed any further opposing affidavits in the part of the application as between first to fourth applicants and respondents as they apparently opportunistically attempted to do by also making allegations in Mr. Motlanthe's affidavit pertaining to the membership of first to fourth applicants. That set of affidavits filed on 10 May 2007 cannot be taken into

consideration for purposes of the part of the application as between first to fourth applicants and respondents.

When the principles and considerations that are applicable to the allegations pertaining to the *locus standi* of fifth to seventh applicants and which I dealt with at length above, are applied to the allegations pertaining to first to fourth applicants' *locus standi*, I am satisfied that first to fourth applicants' *locus standi* have also *prima facie* been established.

Merits of the application/alleged constitutional irregularities:

[71] Fifth to seventh applicants' application for the interim relief and their proposed application for review are based on the following allegations of irregularities in the branch general meetings of wards 12, 4 and 6, which led to the alleged irregular election of the new REC members:

1. The branch general meetings that were held to elect

delegates to be sent on behalf of the respective branches to the regional conference were not properly constituted, in that, *inter alia*, no proper notice of the said meetings was given and the required quorum of 50% plus one member was not met. Ward 12, for example, had 142 members in good standing, but only approximately 35 members attended the branch general meeting. Ward 4 had 142 members in good standing whilst only 7 members attended the branch general meeting.

2. With exclusion of one delegate, the delegates so elected to attend the Regional Conference were not ANC members in good standing (they weren't members of the respective wards/branches) and therefore not constitutionally qualified to represent those wards/branches.

3. The said delegates were nominated to attend the regional conference by non-ANC members. In fact during the branch general meeting held in ward 12, ANC membership forms were handed out by third respondent to people and they completed the forms during the meeting, subsequent to which they were apparently considered to be ANC members for purposes of the meeting. In striking contrast to the aforesaid, persons who are in fact members in good standing of the ANC were prevented from participating in the said meetings.

4. The currently elected REC members were therefore elected by a meeting consisting of not properly delegated persons and persons who at that stage were not members of the ANC in good

standing.

5. Some of the currently elected REC members and thus serving on the REC are not even members of the ANC, or their membership have expired, or they have not been a member for at least a year.
6. Fifth to seventh applicants therefore contend that the reasons for the irregularities are that the respondents wanted to manipulate the results of the elections at the regional conference to ensure a predetermined outcome, being the election of those who are “fanatically loyal” to the first respondent and furthermore their own friends.

[72] Despite the fact that the respondents filed answering affidavits to the fifth to seventh applicants’ founding affidavits, the respondents have not touched upon the merits and have not made one single allegation in rebuttal of the said allegations of fifth to seventh applicants. Considering the very serious nature of the aforesaid allegations, I find it

significant that respondents did not attempt to rebut the said allegations of the fifth to seventh applicants.

[73] The requirements, which an applicant for an interim interdict has to satisfy, are the following:

- “(a) A *prima facie* right;
- b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- c) A balance of convenience in favour of the granting of the interim relief; and
- d) The absence of any other satisfactory remedy.”

See: **SUPERIOR COURT PRACTICE**, Erasmus, at E8-9

[74] The aforesaid *prima facie* right has been explained in the well-known case of **WEBSTER v MITCHELL**, *supra*, at 1189:

“If the phrase used were 'prima facie case' what the Court would have to consider would be whether the applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right. In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my

view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required."

[75] When applying the aforesaid test to the averments made by the fifth to seventh applicants, especially in the absence of any contradictory averments made by the respondents, I am satisfied that the applicants have established a *prima facie* right as required for purposes of an interim interdict; if not even a "clear right". The aforesaid events not only constitute severe irregularities contrary to the ANC Constitution, but more importantly the said irregularities prima facie seriously violated and impeded upon fifth to seventh applicants' rights as members in good standing of the ANC in terms of Rule 5 of the Constitution.

[76] With regard to the requirement of an apprehension of

irreparable harm, I am of the view that because fifth to seventh applicants have in fact established a clear right and not only a *prima facie* right, it is not even necessary for them to establish an apprehension of irreparable harm. (See **SETLOGELO v SETLOGELO** 1914 AD 221 at 227).

However, the applicants in my view have in any event established the requirement of irreparable harm should the interim relief not be granted. (See the founding affidavit, p. 86 to 88, par. 9.1 to 9.1.5).

[77] I am furthermore satisfied that fifth to seventh applicants have established that the balance of convenience favours them, especially considering the said applicants' strong prospects of success with the proposed review application.

(See **LADYCHIN INVESTMENTS v SOUTH AFRICAN NATIONAL ROAD AGENCY AND OTHERS**, *supra*, at 353 G.)

[78] With regard to the requirement of no alternative remedy, I am *prima facie* convinced that the applicants would not have

been able to effectively make use of the internal remedies provided for in the Constitution in order to resolve this dispute. Where the very basis of fifth to seventh applicants' possible entitlement to even make use of the internal procedure is disputed, namely their ANC membership, I am convinced that the internal dispute resolution provided for in the Constitution, *prima facie* would not have constituted an alternative remedy, let alone an effective alternative remedy. (See **SORENSEN v EXECUTIVE TRAMWAY WORKERS UNION** 1974 (2) SA 545 (CPD) at 552 E – F)

[79] I consequently conclude that the applicants have satisfied all the requirements for an interim interdict pending the proposed review proceedings and are therefore entitled to confirmation of the rule *nisi* issued on 16 February 2007.

COSTS:

[80] I now turn to the question of costs. All parties were *ad idem* that all costs orders should include costs of two counsel. I consider it convenient to again deal with the two “sets” of

applicants separately.

Costs - first to fourth applicants/ respondents:

[81] There are two aspects contained in my previous order of 4 April 2007 which stood over for adjudication on 24 May 2007 and which has a bearing on costs. The first hereof is respondents' application to strike out in terms of paragraphs 8, 10, 12, 14 and 16 of their notice of application to strike out. As indicated herein earlier, in paragraph 21, *supra*, this application is to be granted. In my view there is no reason why it should not similarly to the other parts of that application which I have already granted, be granted with costs in favour of the respondents, including the costs of two counsel, and furthermore subject to the payment thereof as set out in the following paragraph.

[82] The other aspect which stood over is whether the order as to costs which I granted in paragraph 4 of my previous order dated 4 April 2007, should be paid by Mr. Sizephe or by the first to fourth applicants on an attorney and client scale. In

paragraph 5 of my previous order I ordered that should Mr. Sizephe wish to advance reasons why he should not be ordered to pay the relevant costs *de bonis propriis*, he should file such reasons under oath on or before 23 April 2007. As indicated herein earlier in paragraph 24, *supra*, the said affidavit of Mr. Sizephe was only filed on 24 April 2007. I have also already indicated that first to fourth applicants' application for condonation with regard to the late filing of the the said affidavit is to be dismissed. This has the result that I cannot take any cognisance of the reasons or explanations advanced by Mr. Sizephe in the said affidavit. I can however add that even if I take that affidavit of Mr. Sizephe into consideration only for purposes of considering the issue of costs, and I accept those explanations as true and correct, I am of the view that they are in any event not sufficient to excuse him from being held liable for such costs. His conduct which I fully dealt with in my previous judgment and the degree of ineptitude, carelessness, gross negligence and total lack conscientious which was reflected by his conduct, cannot be excused on the basis of the reasons advanced by

him. The mere fact that the very same affidavit in which he was to explain his conduct was again filed a day late is in my view indicative of a total disregard of and lack of respect for the court, compliance with court orders and compliance with time limits.

I therefore intend to order Mr. Sizephe to pay the costs referred to in paragraphs 5.1, 5.2 and 5.3 of my previous court order.

[83] With regard to the dismissal of first to fourth applicants' application for condonation dated 23 May 2007 and the dismissal of first to fourth applicants' (main) application against the respondents, it is evident from the reasons already recorded earlier in this judgment that the dismissal of both these applications again resulted as a direct consequence of the continuing and perpetual remissness on the part of Mr. Sizephe. Despite the potential order of costs *de bonis propriis* which was at the time hanging over his head, he continued with similar unacceptable conduct which again is not only indicative of his continued remissness, but in my view it shows a continued, blatant and flagrant

disrespect for and disregard of court rules, court orders and time limits which are suppose to be complied with. Like I have also indicated earlier, if it had not been for the said failure of Mr. Sezephe to properly comply with my previous order and his subsequent failure to properly and timeously apply for condonation, the *rule nisi* would also have been confirmed in favour of first to fourth applicants.

[84] In my view I consequently have no other option but to again show my dismay, displeasure and actually my shock with his conduct by means of a punitive costs order. Like previously, the blame for the aforesaid conduct and failures to comply with court orders and time limits, do not lie with first to fourth applicants. Although pursuant to my previous judgment they could and maybe should have reconsidered their position with regard to their choice of attorney, I am still of the view that they cannot be faulted for the aforesaid reprehensible conduct of their attorney.

[85] In my previous judgment I referred to the cases of **WAAR v LOUW** 1977 (3) SA 297 (O) at 304 D and **MACHUMELA v SANTAM INSURANCE COMPANY LIMITED** 1977 (1) SA 660 (A) in which the basis for an order of costs *de bonis propriis* were comprehensively explained. Those principles are again applicable in this instance.

In addition to the aforesaid cases I also wish to refer to

IMMELMAN v LOUBSER EN 'N ANDER, *supra*, at 825 E –

C:

“Die Hof het die applikant se advokaat die vraag gestel of die applikant se prokureurs nie beveel moet word om self die applikant se koste te dra nie vanweë hulle nalatige en gebrekige optrede. Sy antwoord was dat die Hof, in die afwesigheid van die applikant se plaaslike prokureur, mnr. Briel, en sy Pretoriase prokureurs, en sonder dat hulle geleentheid gehad het om aangehoor te word, nie so 'n bevel sou maak nie.

Indien hierdie Hof in staat sou gewees het om op die stukke voor hom vas te stel welke van applikant se prokureurs verantwoordelik was vir een of meer van die vele foute wat begaan is en vir die gebreke wat daar in die aansoeke was, sou die Hof, na my mening, met regverdiging so 'n bevel kon gemaak het, en dit selfs sonder om die betrokke prokureur/s aan te hoor.”

(Also see **WEBB AND OTHERS v BOTHA** 1980 (3) SA 666

(NPD) op 673 D – F)

[86] I will obviously grant Mr. Sizephe the opportunity to be heard before I make my decision. Because this application will not again be adjudicated in open court, I intend granting him an opportunity to file written representations, should he so wish, as to why he should not pay respondents the aforesaid costs

of the first to fourth applicants' application for condonation and of their main application *de bonis propriis*. After the consideration of his written representations I will issue an order pertaining to the said costs.

[87] As dealt with herein earlier, the respondents were not entitled to file any further affidavits in the main application between first to fourth applicants and respondents. The respondents are therefore not entitled to claim any costs in this application pertaining to their "further opposing affidavits" that had been filed on 10 May 2007 from either the first to fourth applicants or Mr. Sezephe (depending on who is eventually to pay the costs of the application pursuant to the order which I am still to give in this regard).

[88] The last relevant issues pertaining to costs which need to be referred to, is the two costs orders which previously stood over for later adjudication, being the costs of 10 February 2007 and 8 March 2007 respectively. The postponement on 10 February 2007 was due to the fact that respondents indicated that they wished to be granted an opportunity to file answering affidavits in response to the applicants' founding papers. The postponement on 8 March 2007 was in order to grant respondents the opportunity to file supplementary affidavits in opposition of the application of first to fourth

applicants. *Prima facie* it seems to me that the wasted costs of 10 February 2007 should be costs in the main application between first to fourth applicants and the respondents, whilst the wasted costs occasioned by the postponement on 8 March 2007 should be borne by the respondents. However, because the first to fourth applicants' and respondents' counsel have not had the opportunity of addressing me on these two costs orders, I intend to let them stand over and grant both the first to fourth applicants and the respondents the opportunity, should they so wish, to file written submissions regarding the aforesaid costs, after the consideration of which I will issue an order with regard to those costs.

Costs - fifth to seventh applicants/ respondents:

[89] With regard to the confirmation of the rule *nisi* as between fifth to seventh applicants and the respondents, there is no reason why the costs of the said application should not follow the success and that respondents should therefore be ordered to pay the costs of fifth to seventh applicants' main

application.

[90] Consequently the following order is made:

1. As between first to fourth applicants and respondents:

1.1 The application for condonation dated 23 May 2007 is dismissed, with costs, including the costs of two counsel.

1.2 The respondents' application to strike out in terms of paragraphs 8, 10, 12, 14 and 16 of their notice of application to strike out, dated 27 March 2007, and which application in terms of paragraph 1.8 of the order granted on 4 April 2007 stood over adjudication on 24 May 2007, is granted with costs, including the costs of two counsel.

1.3 The rule *nisi* issued on 16 February 2007 is discharged as between first to fourth applicants and respondents, with costs, including the costs of two counsel, but subject to 1.6 and 1.8, *infra*.

1.4 The aforesaid orders as to costs granted in 1.1, 1.2

and 1.3 above are to be paid by the first to fourth applicants' attorney of first instance, Mr. Sizephe of MJD Sizephe Attorneys, Welkom, *de bonis propriis*; alternatively, by the first to fourth applicants, the determination of which (between the aforesaid two alternatives) stand over to be determined in a court order to be issued on or before 29 June 2007.

1.5 For purposes of the order granted in 1.4 above, leave is granted to Mr. Sizephe to file written representations, should he so wish, on or before 20 June 2007 as to why he should not pay the costs referred to in 1.1, 1.2 and 1.3 above *de bonis propriis*.

1.6 The costs occasioned by the postponements of the main application on 10 February 2007 and 8 March 2007 respectively, and which costs stood over for later adjudication, stand over to be determined in a court order to be issued on or before 29 June 2007.

1.7 For purposes of the order granted in 1.6 above, leave is granted to both first to fourth applicants'

counsel and respondents' counsel to file written submissions, should they so wish, on or before 20 June 2007 regarding appropriate orders pertaining to the said costs.

1.8 The respondents are not entitled to claim any costs in this part of the application pertaining to their "further opposing affidavits" filed on 10 May 2007.

1.9 With regard to the orders as to costs in terms of paragraphs 4 and 5 of the order of 4 April 2007 which stood over for adjudication on 24 May 2007, the following orders are made:

1.9.1 First to fourth applicants' attorney of first instance, Mr. Sizephe of MJD Sizephe Attorneys, Welkom, is to pay the costs of the respondents occasioned by the postponement on 29 March 2007 *de bonis propriis*, which costs are to include the costs of two counsel.

1.9.2 The said Mr. Sezephe is to pay the respondents' costs of the application to strike out, including the consequential costs occasioned by the granting thereof, *de bonis propriis*, which costs are to include the costs of two counsel.

1.9.3 Mr. Sezephe shall not be entitled to recover any of the costs in respect of the application for joinder from the applicants.

2. As between fifth to seventh applicants and respondents:

2.1 The rule *nisi* issued on 16 February 2007 is confirmed with costs, including the costs of two counsel, which costs are to be paid by the respondents, jointly and severally, payment by the one the other to be absolved.

C. VAN ZYL, J

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