



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between

Case No: 6821/2015

MICHAEL TSHISHONGA

APPLICANT

and

**THE SPEAKER OF THE NATIONAL
ASSEMBLY**

1st RESPONDENT

AGANG SA

2nd RESPONDENT

ANDRIES TLOUAMMA

3rd RESPONDENT

LILY WILLIAM MOKHOLOANE

4th RESPONDENT

BEAUTY MOHLALA

5th RESPONDENT

MERVIN GOVENDER

6th RESPONDENT

LERUMO MPAHLELE

7th RESPONDENT

KOEKOE MAHUMAPELO

8th RESPONDENT

TSHEPO SETLAI

9th RESPONDENT

SUZANNE HARVEY N.O.

10th RESPONDENT

Coram: ROGERS J

Heard: 24 AUGUST 2015

Delivered: 8 SEPTEMBER 2015

JUDGMENT

ROGERS J:

Introduction

[1] This is another round in the unedifying tussle between opposing factions of Agang South Africa ('Agang'). The applicant ('Tshishonga') seeks, in summary, to have set aside (i) decisions taken by the purported National Executive Committee ('NEC') of Agang on 22 December 2014 and 28 February 2015 on the basis that the meetings were unlawful; (ii) the resultant disciplinary action against him, culminating in his expulsion from Agang. He was represented before me by Mr Papier.

[2] The first respondent is the Speaker of the National Assembly. She has filed a notice to abide. The second respondent is Agang. The third to ninth respondents are the persons who purportedly met as the NEC on 22 December 2014 and 28 February 2015. (I shall refer to the second to ninth respondents as 'the respondents' and to the third to ninth respondents as 'the individual respondents'.) Mr Osborne, instructed by De Klerk & Van Gend ('DKVG'), appeared for the respondents though there was a belated challenge to their authority to represent Agang. The tenth respondent is Ms S Harvey ('Harvey'), who presided at the disciplinary hearing and recommended Tshishonga's expulsion. She abides the court's decision.

The facts

[3] In the general election of 7 May 2014 Agang, a political party founded by Dr Mamphela Ramphele ('Ramphele'), gained two seats. Ramphele declined to take up a seat, and they were filled by Tshishonga and the third respondent ('Tlouamma'). There was a falling out between Dr Ramphele and another faction of the party's leadership. Tshishonga and Tlouamma were part of that other faction. At an

emergency National Congress of the party held on 29 June 2014 a new NEC was elected, with Tshishonga as Acting President and Tlouamma as Deputy President. Ramphela brought proceedings to have the meeting declared invalid. On 4 August 2014 Davis J dismissed this challenge and ruled that Agang's NEC was the one elected on 29 June 2014. He also determined that Agang's binding constitution was the one dated 27 April 2013. Ramphela then fell out of the picture.

[4] Shortly thereafter a rift emerged between factions led by Tshishonga and Tlouamma respectively. In September 2014 Tlouamma's faction launched proceedings to have Tshishonga removed as the signatory on Agang's bank accounts. In October 2014 Tshishonga instituted an application to restrain Tlouamma from holding himself out as Agang's leader at a proposed meeting with President Zuma. He also applied for declaratory relief regarding the current composition of the NEC. The applications were consolidated and referred to oral evidence. The evidence was mainly directed at determining the current membership of the NEC. On 19 December 2014 Potgieter AJ delivered judgment, finding that the current NEC comprised the 12 persons listed in para 44 of his judgment. These included Tshishonga and Tlouamma (their membership of the NEC had not been in dispute). Potgieter AJ also made an order removing Tshishonga as the signatory on Agang's bank accounts and directing that he be substituted by new signatories to be appointed by the NEC.

[5] The ink was barely dry on Potgieter AJ's judgment when both factions gave notices of a meeting of the NEC. Tshishonga gave his notice for 23 December 2014 (his notice and agenda, if any, are not in the record). Tlouamma's faction gave notice for 22 December 2014. The latter notice, dated 20 December 2014, was issued by the sixth respondent, who was the party's Deputy Secretary General. As at 20 December 2014 the position of Secretary General was vacant.

[6] Seven members of the NEC attended the meeting of 22 December 2014. They were all members of Tlouamma's faction. Since the members in attendance represented more than 50% of the NEC, the meeting was regarded as quorate. Among the decisions taken were (i) the adoption of a motion of no confidence in Tshishonga as Acting President and as an Agang MP; (ii) that disciplinary action be

instituted against Tshishonga and that Mr Peter Makwela ('Makwela') be appointed as chairperson of the disciplinary committee to oversee disciplinary action against Tshishonga; (iii) appointing Tlouamma as the Acting President of the party; (iv) appointing the seventh respondent to the vacant position of Secretary General; (v) appointing new signatories for the party's bank accounts.

[7] Tshishonga's proposed meeting of the NEC on 23 December 2014 did not take place.

[8] On 31 December 2014 Makwela wrote to Tshishonga informing him that the NEC had removed him as Acting President and as a member of the NEC and advising him that the NEC had mandated that 'you be subjected to disciplinary action and, to the extent you are found guilty, expelled from the party'. The disciplinary charges were listed. Tshishonga was notified that the hearing would take place at the Southern Sun Hotel in Pretoria on 12 January 2015 and that the disciplinary panel would be communicated to him in due course. Makwela stated that he would prosecute.

[9] Tlouamma's faction convened a further NEC meeting on 4 January 2015. Tshishonga's faction did not attend. The NEC approved and adopted the minutes of 22 December 2014. (Although no point was made of this, it appears from the minutes that only six NEC members were present at the meeting of 4 January 2015. Tshishonga is listed as one of five persons absent. It seems that, despite Makwela's letter of 31 January 2014, Tshishonga was being treated at this stage as still part of the NEC, though no longer party leader, and was invited to attend the meeting. In the circumstances, the meeting was probably not quorate.)

[10] On 6 January 2015 DKVG notified Tshishonga that Harvey, a member of the Cape Bar, would be the presiding officer at the disciplinary enquiry and that Mr Osborne (also of the Cape Bar) would prosecute.

[11] On 7 January 2015 Tshishonga's attorney, Mr Nkome of Nkome Inc ('Nkome'), wrote to DKVG. Nkome's letter is not in the record. On 8 January 2015 DKVG replied. After addressing the matters raised by Nkome, DKVG concluded by

attaching a list of documents and witnesses to be used at the disciplinary hearing. It was recorded that Tshishonga had all of these documents in his possession but that they would be supplied on request.

[12] On 9 January 2015 Tshishonga launched an urgent application in the South Gauteng High Court challenging the validity of the meeting and decisions of 22 December 2014. On 11 January 2015 Wright J struck the matter from the roll as not urgent. Tshishonga has not taken steps to prosecute that application though he has apparently not withdrawn it.

[13] Tshishonga did not attend the disciplinary hearing on 12 January 2015. Nkome made an appearance at the start of proceedings to hand in a medical certificate stating that Tshishonga had been examined (by an unidentified doctor from a general practice of 14 doctors) on 11 January 2015 and would not be fit for work from 12 to 16 January 2015. (This certificate is not in the record.) Nkome stated that he was merely a messenger and was not representing Tshishonga. After hearing submissions from Mr Osborne, Harvey ruled that the hearing should continue on the basis that a transcript be made available to Tshishonga and that he would be entitled to cross-examine the witnesses on a future occasion. Tlouamma and one Aubrey Plaatjies then gave evidence.

[14] On 15 January 2015 Tshishonga was given notice by email that the hearing would continue in Cape Town on 21 January 2015. On the following day the transcript was provided to him.

[15] Tshishonga did not appear on 21 January 2015. Mr Osborne informed Harvey that on the previous day a further medical certificate had been emailed to DKVG. The certificate stated that Tshishonga had been examined on 16 January 2015 and that 'according to my knowledge/as I was informed he/she was unfit for work from 19 January 2015 to 23 January 2015'. Harvey was not satisfied that Tshishonga had a valid reason for being absent. She heard argument on the merits and reserved her decision.

[16] Despite the medical certificates, Tshishonga had not been altogether inactive. On 20 January 2015 his faction called a Special National Congress for 31 January 2015. His faction also purported to hold Gauteng and Free State provincial meetings on 24 January 2015. These developments prompted Tlouamma (in his own name and that of Agang) to launch an urgent application in the South Gauteng High Court to interdict the proposed National Congress and to declare the two provincial meetings unlawful. On 30 January 2015 Spilg J granted this relief but declined certain other relief which he described as intended to elevate Tlouamma's faction as Agang's rightful leadership. He handed down his reasons on 9 February 2015. He said the following regarding the relief he declined to grant:

'[49] The history of convening meetings demonstrates that since at least September each group has purported to convene meetings at which the other does not participate and is either barricaded from attending... or precipitated the other to hold a rival meeting. In my view the situation has deteriorated, that having regard to the [party's] constitution and its proper interpretation where there is a lacuna, neither group can or will of their own accord be able to convene a competent or valid meeting. Neither represents the party. They represent their own self-interests and convene meetings to further their own ends.

[48] The only basis upon which any valid meeting can be convened is once an NEC is voted in by a properly convened meeting of verified members in good standing....

[49] It is therefore the ratio of this court which will constitute an issue estoppel if transgressed, that neither party is capable of convening a meeting until there has been a proper meeting convened of the membership and the membership has elected the office bearers to the highest decision making body or bodies after duly constituted provincial congresses as required by the constitution. The only basis upon which that can occur in law is if the two [groups]¹ reach consensus on the process otherwise the intent and purpose of the constitution will be incapable of implementation.'

[17] Agang and Tlouamma have appealed this part of Spilg J's judgment.

[18] Harvey issued her decision on 16 February 2015. In summary she made the following adverse findings against Tshishonga: (i) that he had made public pronouncements at odds with Agang's official policy; (ii) that he had used his signing powers to obstruct Agang's access to its funds; (iii) that he had failed without

¹ The typed judgment says 'grounds' but that is a typographical error.

explanation to attend the majority of parliamentary and committee meetings that he was obliged to attend;(iv) that he had attended a whips committee meeting regarding the Nkandla issue despite the fact that Tlouamma was the duly appointed party whip, and had embarrassed the party by overruling Tlouamma's nomination in respect of the committee's chairperson and instead tabling his own nomination; (v) that he had misappropriated over R80 000 by way of unauthorized payments from Agang bank accounts; (vi) he and two other members of the NEC as determined by Potgieter AJ had purported on 28 December 2014 to disband the said NEC and establish new structures. She regarded the misconduct as very serious and recommended that the NEC terminate Tshishonga's membership of the party.

[19] On 24 February 2015 the sixth respondent, acting on behalf of the seventh respondent (who on 22 December 2014 had been appointed Secretary General), gave notice of an NEC meeting for 28 February 2015. One of the agenda items was to consider Harvey's findings and recommendation and to debate and decide whether to accept her findings on the merits and her recommendation as to sanction. Seven NEC members, being Tlouamma and his faction, attended. Tshishonga and the other four members of his faction were given notice of the meeting but did not attend. The meeting adopted the minutes of 4 January 2015 and confirmed that the party's National Congress would take place on 28 March 2015. The meeting accepted Harvey's findings and recommendation and decided that Tshishonga's membership of the party be terminated with immediate effect. It was further resolved that Tlouamma be the Acting President.

[20] Tshishonga was notified of this decision in a letter dated 4 March 2015. On the same day Tlouamma, as Agang's leader and whip, notified the Speaker of Tshishonga's expulsion and said that the party would notify her of his replacement in due course. In a further letter dated 16 March 2015 Agang requested the Speaker to ensure that Tshishonga was not permitted to participate in Parliament's business. On the same day Agang wrote to Tshishonga instructing him to cease holding himself out as an Agang member and as an MP.

[21] In a letter dated 14 April 2015 the Speaker informed Tshishonga that he had ceased to be an MP by virtue of the provisions of s 47(3)(c) of the Constitution.

Procedural history

[22] Tshishonga issued the present application on 17 April 2015, giving notice that on 7 May 2015 he would seek urgent Part A relief pending the determination of final Part B relief. The interim relief was a declaration that he had not lost his Agang membership or his seat as an MP and an interdict preventing the Speaker from swearing in any person in his place. The Part B relief was the final relief I have summarised in para 1 above. He was represented by new attorneys, Venfolo Attorneys ('Venfolo').

[23] The respondents filed their answering papers on 6 May 2015. Tshishonga delivered a replying affidavit and the matter came before Nuku AJ. On 12 May 2015 he struck the application for Part A relief from the roll and ordered Tshishonga to pay the wasted costs on the basis that he had created urgency by delaying the institution of proceedings.

[24] By way of an agreed order on 15 May 2015 the application for the Part B relief was postponed to 17 June 2015 with a timetable. In terms thereof Harvey was to deliver the disciplinary record by 22 May 2015, whereafter Tshishonga had until 27 May 2015 to deliver a supplementary founding affidavit.

[25] In the meanwhile there were developments on the parliamentary front. On 18 May 2015 Agang nominated the eighth respondent to fill the allegedly vacant seat. On the same day DKVG notified Venfolo thereof. Following further urgent correspondence, Tshishonga on 19 May 2015 filed a supplementary affidavit together with a notice setting the matter down on 20 May 2015 for the urgent determination of Part B. On 20 May 2015 the matter came before Savage J. By that stage Parliament had advised that the eighth respondent's swearing-in was imminent. It appears that Mr Papier did not press for final Part B relief but for an interim order similar to the previous Part A. On 22 May 2015 Savage J dismissed the urgent application with costs. She was satisfied that the matter was urgent. She

rejected an argument for the respondents that the matter was moot because the vacancy had been filled by the eighth respondent's mere nomination. However, she found that there was no irreparable harm because the status quo could be restored if, following the eighth respondent's swearing-in, it transpired that Tshishonga had not been validly expelled as a member of Agang and thus as an MP.

[26] Shortly thereafter the eighth respondent was sworn in as an Agang MP.

[27] Reverting to the Part B proceedings, the disciplinary record was duly delivered but Tshishonga failed to serve his supplementary founding affidavit by 27 May 2015, only doing so on 5 June 2015. This delayed the filing of the respondents' supplementary answering papers (which occurred on 12 June 2015) and the heads of argument. The matter was thus not ripe for hearing when it came before Ndita J on 17 June 2015. She expressed displeasure and required Venfolo to file an explanatory affidavit, which he did the following day. Ndita J postponed the application to 24 August 2015, with costs to stand over for later determination.

[28] Included in Tshishonga's supplementary founding papers of 5 June 2015 was an affidavit by the fourth respondent dated 2 June 2015. This was naturally a surprising development, since hitherto the fourth respondent had appeared to be in Tlouamma's camp and was one of the respondents represented by Mr Osborne and DKVG. From the respondents' supplementary answering papers it appears that the fourth respondent has indeed defected. However, the bulk of what he says has been placed in issue.

[29] On 28 July 2015 the respondents filed an affidavit in response to Venfolo's explanatory affidavit. This bears only on the question of the wasted costs of 17 June 2015.

The application to receive further evidence

[30] The matter came before me on 24 August 2015, heads of argument having been duly filed on both sides. Shortly before the start of proceedings Mr Papier delivered to my chambers an application by Tshishonga that further evidence, in the

form of another affidavit by the fourth respondent, be received. The fourth respondent's new affidavit dealt with an alleged meeting of Agang's NEC on 31 July 2015, attended by six persons, being four members of Tshishonga's faction and two persons – the fourth and seventh respondents – who had formerly been part of Tlouamma's faction. It was claimed that this meeting was quorate, given that Tshishonga's expulsion had left only 11 members on the NEC. (This is of course inconsistent with Tshishonga case in the present proceedings, where he claims a declaration that all the decisions taken on 22 December 2014 are unlawful and invalid.) The meeting of 31 July 2015 supposedly resolved (i) to suspend five members of the NEC, including Tlouamma; (ii) to appoint Tshishonga as the party's President; (iii) to declare the meeting of 22 December 2014 null and void; (iv) to 'review and set aside' the resolutions of 22 December 2014 and 28 February 2015; (v) to advise DKVG that they did not represent Agang in any litigation and terminating their mandate; (vi) that 'the litigation between [Tshishonga] and the party be withdrawn as the process to establish the disciplinary hearing was illegitimate'.

[31] When the matter was called I indicated to Mr Papier that I was disinclined to receive the supplementary evidence. Firstly, I found barely credible Tshishonga's assertion that he had only learnt of the meeting of 31 July 2015 and its resolutions on 22 August 2015, particularly since the meeting had supposedly appointed him as the party's President. Second, the validity of the meeting and its decisions would almost certainly be placed in issue, leading to a postponement. (iii) Third, even if Mr Osborne and DKVG could no longer act for Agang or for fourth and seventh respondents (who had apparently defected), they could still act for Tlouamma and the remaining individual respondents. Agang was not the applicant but merely one of a number of respondents.

[32] Mr Papier did not press the application to receive further evidence, and I refused it. Mr Osborne nevertheless asked to be permitted to hand up an opposing affidavit on which the respondents and their legal representatives had worked overnight. I received the affidavit insofar as it might be relevant to costs. I have not read the opposing affidavit and have disregarded the supposed facts alleged in the application to adduce further evidence. If any person considers that the supposed

meeting of 31 July 2015 has legal effect, that will have to be asserted by way of separate proceedings.

The issues

[33] Mr Papier advanced submissions in support of the following conclusions (i) that Harvey's appointment to preside over the disciplinary enquiry was invalid; (ii) that Mr Osborne's appointment to prosecute in the disciplinary enquiry was invalid; (iii) that Tshishonga's expulsion was invalid because it was a 'foregone conclusion'; (iv) that the disciplinary hearing was unfair because of Harvey's supposed misapprehension about the NEC's power to rescind her decision and because Tshishonga was supposedly unaware of the hearing on 21 January 2015 or had a valid reason to be absent ; (v) that the meetings of 22 December 2014 and 28 February 2015, and thus the decisions made at them, were invalid in the light of Spilg J's judgment and in any event in the light of certain procedural shortcomings.

[34] Mr Osborne, apart from disputing these conclusions, argued that I had a residual discretion to refuse relief, which I should exercise in the light of delay, subsequent developments and Tshishonga's conduct in general.

Agang's constitution

[35] It appears sensible to start with Mr Papier's attack on the meeting of 22 December 2014. Before I do so, I must refer to Agang's constitution. It is terse. Article 4 proclaims that Agang consists of four levels of governance though six are then listed, namely the National Congress, the NEC, the National Management Team, the Provincial Congress, the Provincial Executive Council and Branches.

[36] Article 5 states that the National Congress is the party's supreme policy-making and governing body. It is required to meet every two years. It takes decisions on all aspects of policy, leadership, organisation and finances. Article 5.4 states that the constitution and exact membership of the National Congress will be defined at a later date but 'generally will be comprised of national and provincial

political leadership, key national and provincial party leadership, [and] representatives from branches’.

[37] Article 6 states that the NEC is the party’s second-highest collective decision-making body and ‘is tasked with implementing the policies, programmes and direction of’ the party. It has ‘general responsibility for the affairs of [the party] between Congresses’. Clause 6.2 provides that the constitution and exact membership of the NEC will be defined at a later date ‘but generally will be comprised of national and provincial political leadership as well as key national and provincial party leadership’.

[38] Articles 7, 8 and 9 deal with the National Management Team, Provincial Structures and Branches respectively.

[39] Article 10 states that during the party’s ‘founding phase’ a body called the Founding Cabinet shall be the party’s highest decision-making body and ‘shall be vested with all powers, authorities and responsibilities’ until such time as the Founding Cabinet abrogates article 10 through a two-thirds majority vote of ‘all members of the founding executive’. Article 10.1 provides that the Founding Cabinet may delegate its powers, authorities and responsibilities to the structures envisaged in article 4 ‘for the purpose of building the structures of [the party] in an organic way’. Article 10.5 stipulates that the Founding Cabinet shall consist of at least three and not more than 25 members. Article 10.8 describes the Founding Cabinet’s role as being to lead the party ‘through the fragile and fraught founding phase’, a phase intended to last until June 2016. In terms of article 10.12 the founding members of the Founding Cabinet were Ramphele and three other named persons, none of whom appears to be currently involved with the party. As a fact there has not been a Founding Cabinet for many months.

[40] Article 11 deals with membership. In terms of article 11.3, and subject to article 13, a person’s membership may be cancelled should he or she ‘not adhere to or behave in a manner consistent with the principles, policies and programmes and constitution and rules of’ Agang. Membership can be ‘annulled’ by the Founding Cabinet during the founding phase or by the Provincial Executive Council.

[41] Article 13 (obvious typographical errors corrected) reads thus:

‘Any member who does not adhere to or behave in a manner consistent with the principles, policies and programmes and Constitution and Rules of Agang SA may be summoned to appear before the founding cabinet to answer to any charges set out in the notice. The member may not be legally represented but may be represented by another member in good standing. In any hearing, the member’s right to be heard shall be respected. If found guilty on the charges, the penalties which may be imposed can include cancellation of membership. A member in good standing may be appointed by the founding cabinet to act as prosecutor in the proceedings.’

[42] Article 14 is the concluding provision of the constitution and deals with the auditing of Agang’s books of account.

The meeting of 22 December 2014

[43] I do not think that Spilg J’s judgment compels me to find that Tlouamma’s faction could not lawfully convene the NEC meeting of 22 December 2014. Neither side placed before me the papers in that case. I do not know the exact relief Agang and Tlouamma claimed or the competing factual allegations which caused Spilg J to reach the conclusions he did. Apart from the fact that the effect of his order has been suspended by the application for leave to appeal, it must be remembered that, whereas Agang and Tlouamma were applicants before Spilg J, they are respondents in the present proceedings. I must determine this application on the evidence before me and on the basis that genuine factual disputes must, in accordance with the *Plascon-Evans* rule, be determined in favour of the respondents.

[44] Agang’s constitution does not specify how meetings must be called. It is obvious that, following Potgieter AJ’s judgment, the NEC needed to meet promptly, not least to appoint new signatories to the bank accounts. This is borne out by the fact that both factions convened NEC meetings on relatively short notice (the one for 22 December 2014, the other for 23 December 2014). It is conceivable that the right to call an NEC meeting did not vest exclusively in one person or one combination of

persons. All I need decide is whether the meeting called for 22 December 2014 was validly called.

[45] The post of Secretary General was vacant. The sixth respondent as Deputy Secretary General called the meeting of 22 December 2014. It is clear on the evidence that this action carried the support of at least seven of the NEC's 12 members, including the party's Deputy President.

[46] Tshishonga has not provided satisfactory evidence that he or the other members of his faction were unable to attend the meeting on 22 December 2014. He attached to his founding affidavit an affidavit he had made in support of his urgent application in the South Gauteng High Court in which he baldly claimed that he and the other members of his faction were unable to attend but sent proxies who were refused entry by the security guards. An affidavit by one of those proxies was apparently filed in the South Gauteng proceedings but no such affidavit was produced in the present application. The respondents, who accept that proxies were by practice allowed (as was telephonic participation), denied that Tshishonga or the other absent NEC members sent proxies or that anyone was barred access. Tlouamma's faction would have had no reason to refuse to allow Tshishonga's faction or their proxies to attend, because Tlouamma's faction knew they held the majority.

[47] If it would not have been unreasonable to hold a meeting on 23 December 2014, I do not think I can find it was unreasonable to do so on 22 December 2014. Apart from the urgent need to appoint new signatories, a majority of the NEC apparently considered that a vote of no confidence should be moved against Tshishonga and that disciplinary action against him should be considered. It is most unlikely that Tshishonga would have convened a meeting to consider such business.

[48] Tshishonga's attack on the validity of the meeting of 22 December 2014 is not, in the present proceedings, supported by any of the other members of his then faction. They have not joined him as applicants nor have they filed affidavits in support of the relief he claims.

[49] In these circumstances, I conclude that the sixth respondent was entitled to call the meeting of 22 December 2014. The agenda sufficiently notified NEC members of the business to be transacted. To the extent that Tshishonga claims to have been prevented from attending by proxy (his evidence to that effect is sketchy and unsatisfactory), there is a genuine dispute of fact which cannot be resolved in his favour in these proceedings. I may add that he has not alleged that he could not have participated telephonically.

[50] Mr Papier submitted that the NEC's practice was (i) that its Chairperson, or in his absence the President and General Secretary, determined the agenda; (ii) that the General Secretary thereafter invited members to the NEC meeting; (iii) that at least five days' notice should be given; (iv) that proxies were allowed to represent members. In response to allegations to this effect in the founding papers, the respondents said that, while some of these procedures had been recognised in the past, they were not the invariable practice.

[51] The procedures in question are not contained in Agang's constitution. For the reasons I have explained, and in the unusual circumstances which prevailed following Potgieter AJ's judgment, I do not think it was impermissible for Tlouamma's faction to convene an NEC meeting for 22 December 2014.

Harvey's appointment

[52] Mr Papier submitted that Agang's constitution did not permit a non-member to be appointed to preside over a disciplinary enquiry. His argument proceeded on the basis that article 13 should now be read as referring to the NEC rather than the Founding Cabinet. He accepted that it would not be practical to require the NEC itself to conduct a disciplinary enquiry but submitted that the NEC could not delegate this function to someone other than a member of Agang. He cited *Crouwkamp v Civic Independent & Others* [2014] ZASCA 98 as authority for the proposition that strangers to an organisation are not allowed to participate in its affairs.

[53] The *Crouwkamp* case is distinguishable. The objection there was that one Damons, who was not a member of the political party's NEC, had been permitted to

participate in an NEC meeting as if he were a member. What was worse, he had actually proposed the motion of no confidence against the appellant, Crouwkamp. The court did not hold that a duly constituted NEC could not have assigned some or other function to an outsider. In that case an outside attorney had been appointed to preside over Crouwkamp's disciplinary hearing. The contention was not that such an appointment was impermissible but that the NEC meeting which gave rise to the appointment was invalid because of Damons' involvement.

[54] The present case is also distinguishable from *Gründling v Beyers & Others* 1967 (2) SA 131 (W), to which reference was made in *Crouwkamp*. In *Gründling* the trade union had a very detailed constitution from which certain prohibitions limiting the appointment of paid officials were necessarily implied. The union's executive committee's decision, appointing one Beyers to a well-paid position with wide powers to supervise and reorganise the union and attend council and committee meetings, was found to be ultra vires the union's constitution (at 149G-151E). That being the case, he could not lawfully as a stranger be co-opted to attend and participate in those meetings; this was implicitly forbidden by the union's constitution (151F-153C). In the present case, by contrast, one has a very terse constitution. The affairs of Agang could not properly and fairly be conducted without allowing considerable latitude in regard to matters not expressly regulated. The approach of looking at the rules of a voluntary society 'broadly and benevolently and not in a carping, critical and narrow way' (see *Garment Workers' Union v De Vries & Others* 1949 (1) SA 1110 (W) at 1129) has much to commend it in the case of Agang's constitution (see also *Theron & Others v Food and Allied Workers Union & Others* (1997) 18 ILJ 1046 (LC) at 1054A-G; *Shilowa & Others v Lekota NO & Others* Case 15650/2010 WCHC para 6; *Matlholwa v Rammusimahuma NO* [2007] ZANWHC 47 paras 20, 30 and 33).

[55] Although article 13 is formulated with reference to the Founding Cabinet, it is probably correct that one should as far as possible adapt its language to the factual circumstances which now prevail. However, once it is accepted that the NEC cannot practically be expected to conduct a disciplinary hearing itself, I do not think one is bound to conclude that the hearing must be conducted by a member of the NEC or even by a member of the party. The NEC was divided. There was bound to have

been an objection to the appointment of any of its members to preside over the disciplinary hearing. Tshishonga would not have accepted one of Tlouamma's faction as the presiding officer while Tlouamma's faction could not reasonably have been expected to nominate one of Tshishonga's faction. Conceivably there was a party member with the requisite stature and whom both sides would have accepted as neutral but that possibility was not canvassed in the papers.

[56] In the circumstances, and bearing in mind that the ultimate decision was still reserved to the NEC, I do not think Harvey's appointment was objectionable. On the contrary, it was a prudent step (cf *Khula Enterprise Finance Ltd v Madinana & Others* (2004) 4 BLLR 366 (LC) at 369F-H, where Kennedy AJ rejected a complaint about the use of an independent advocate to chair a disciplinary hearing; see also *Garten Enterprise Propeller v Mbatha & Others* [2007] ZALC 143 paras 17-22). She is a member of the Cape Bar and a former commissioner of the Commission for Conciliation, Mediation and Arbitration. She could be expected to approach her task objectively and with professional skill. Tshishonga does not allege that she was not in principle a suitable choice. Furthermore, he did not, at or in advance of the hearing, raise an objection to her appointment. Had this been done, Tshishonga's concerns could have been timeously considered and potentially accommodated.

[57] Mr Papier argued that, even if Harvey's appointment was not in principle impermissible, the NEC had not in fact resolved to appoint her. The decision taken on 22 December 2014 was to appoint Makwela as chairperson of the disciplinary committee.

[58] According to the respondents, Makwela was not appointed to chair Tshishonga's disciplinary hearing. He was appointed to head the party's disciplinary committee and in that capacity became a member of the NEC. Insofar as disciplinary proceedings against Tshishonga were concerned, Makwela was appointed to 'oversee disciplinary action against' him. This seems to be borne out by the minutes and resolutions.

[59] In the discharge of this mandate, Makwela, after consulting Tlouamma and the ninth respondent, appointed Harvey as the presiding officer. In my view, this was

within the scope of his delegated function to oversee the disciplinary action against Tshishonga. In any event, the NEC at its meeting on 28 February 2015 adopted Harvey's findings and recommendation and by necessary implication ratified her role as the presiding officer. While ex post facto ratification might have been impermissible if Tshishonga had declined to attend the disciplinary hearing because her appointment was not authorized, Tshishonga did not in fact object to her appointment. There can thus be no unfairness in allowing any defect in her appointment to be made good by ratification.

Mr Osborne's appointment

[60] Mr Papier raised two objections to Mr Osborne's appointment as prosecutor. The first is that the appointment was irregular as Mr Osborne had been Tshishonga's advocate in previous litigation relating to the Agang leadership battle and had also represented Tlouamma in other litigation. In the respondents' supplementary answering papers they say that, although Mr Osborne had previously acted for Tshishonga and Tlouamma in their dispute with Dr Ramphela, this did not in itself preclude Mr Osborne from acting as the prosecutor in the disciplinary proceedings.

[61] I do not think that this objection has merit. Tshishonga has not alleged facts to show that Mr Osborne, when he represented Tshishonga, came into possession of confidential information which has any bearing on the disciplinary charges. An advocate is not precluded from acting against a person merely because such person was previously his client (*LAWSA 2nd Ed Vol 14(2) para 136 at p 145*).

[62] Mr Papier's other submission was that article 13 of Agang's constitution only permitted a member in good standing to act as prosecutor. Mr Osborne submitted, on the other hand, that article 13 was in this respect permissive and did not preclude Agang from appointing an outside prosecutor.

[63] Article 13 states that the member may not be legally represented but may be represented by a member in good standing. Although article 13 does not explicitly state that Agang may not appoint a lawyer to prosecute, an interpretation which

allowed Agang to be legally represented in the prosecution while disallowing legal representation on behalf of the accused member would give rise to obvious unfairness. One should not attribute such an intention to the drafters of the constitution.

[64] It does not follow, I think, that in an appropriate case an accused member could not be permitted legal representation. In *Hamata & Another v Chairperson, Peninsular Technikon Internal Disciplinary Committee, & Others* 2002 (5) SA 449 (SCA) Marais JA observed that, at least in relation to tribunals with jurisdiction to decide important issues, a rule which absolutely forbade legal representation might not pass legal muster (para 12). However, he did not find it necessary to strike down the rule under consideration in that case, because he was satisfied that the rule, while expressly conferring a right to be represented by a fellow student or member of staff, did not thereby exclude a discretion on the part of the disciplinary committee to allow legal representation.

[65] Article 13 not only states that the accused member may be represented by another member in good standing but states that he or she may not be legally represented. Although this may appear to distinguish the present case from *Hamata*, I do not think it precludes a similar interpretation. The sentence in question can be construed as meaning that the member does not have a right to legal representation but does have a right to be represented by another member in good standing. The rule considered in *Hamata* by necessary implication excluded a right to legal representation but did not preclude the recognition of a discretion nevertheless to allow it.

[66] I thus consider that, although Tshishonga did not have a right to legal representation, the presiding officer at his disciplinary hearing would have had a discretion to allow it. If that is so, I do not see why the last sentence of article 13, which does not in terms exclude legal representation, should be construed as absolutely prohibiting the appointment of an external lawyer as the prosecutor. The charges were serious and were levelled against a senior officer-bearer. Their proper presentation was a matter of importance. Indeed, an in-house prosecutor, such as Makwela or other NEC appointee, might well have been viewed by Tshishonga as

biased. Mr Osborne, by contrast, was under a duty to adhere to the standards of his profession. Furthermore, the presiding officer, as an advocate and a former CCMA commissioner, was there to ensure that Tshishonga was not unfairly prejudiced by prosecutorial conduct.

[67] Of course, once an external lawyer was permitted to present the charges, it is difficult to see how Tshishonga could fairly have been denied legal representation had he wanted it. Makwela's letter of 31 January 2014 informed Tshishonga of his right to be represented by a member in good standing. At that stage it was envisaged that Makwela himself would prosecute, and indeed the letter so stated. In DKVG's letter of 6 January 2015 Tshishonga was informed that Mr Osborne would prosecute and was asked to state by whom he would be represented. The letter did not in terms state that Tshishonga could not be legally represented. By 8 January 2015 DKVG was corresponding with Tshishonga's attorney, Nkome.

[68] If Tshishonga had appeared at the hearing on 12 January 2015, personally or through a lawyer, and stated that he wanted to be legally represented, I have little doubt that Harvey could not fairly have refused it. But I have no reason to think that she would have refused. As a fact, Tshishonga did not request permission to be legally represented. Instead he had his attorney deliver a sick-note. The same holds true for the resumed hearing on 21 January 2015.

[69] If Tshishonga was concerned that there was an inequality of arms, he should have raised his objection timeously. The matter could then have been addressed and resolved. There is no evidence that Tshishonga was unfairly prejudiced by Mr Osborne's appointment as prosecutor or that the outcome would have been different if a party member had presented the charges (cf *Garment Workers' Union* supra at 1123).

Result a 'foregone conclusion'

[70] Mr Papier's argument that the outcome was a foregone conclusion is based on Makwela's statement in the letter of 31 December 2014 that the NEC had mandated that Tshishonga be subjected to disciplinary action 'and, to the extent you

are found guilty, expelled from the party'. That statement, read together with the minutes of the meeting of 22 December 2014, was said to justify the conclusion that Tlouamma's faction had decided to terminate Tshishonga's membership of the party come what may.

[71] It may well be that Tlouamma's faction was convinced that Tshishonga had been guilty of egregious misconduct such as would justify termination of his membership. I do not think, however, that Makwela's letter should be understood as conveying that Tshishonga's membership would be terminated regardless of what transpired at the disciplinary hearing. Importantly, and subsequent to that letter, Makwela, in consultation with others, decided to appoint an external advocate to preside at the hearing. This meant that the evidence would be investigated and assessed by an impartial professional, who would also make what she regarded as an appropriate recommendation as to sanction. Harvey's appointment is inconsistent with the proverbial 'stitch-up'.

[72] Nothing adverse to the NEC can be inferred from the fact that in the event the NEC decided to terminate Tshishonga's membership of the party. That decision was in accordance with Harvey's findings and recommendation. Tshishonga does not suggest that the recommended expulsion was not justified by Harvey's findings on the merits. Furthermore, and significantly, he has not said one word in criticism of her findings on the merits.

Fairness of disciplinary hearing

[73] One of Mr Papier's submissions on the supposed unfairness of the disciplinary hearing arose from a passage in Harvey's personal note of the hearing of 21 January 2015. The question was being debated between herself and Mr Osborne whether the hearing should proceed in Tshishonga's absence. It is difficult to tell which part of the note reflects Mr Osborne's submissions and which part her own thoughts. Although a transcript of the hearing apparently exists, neither side placed it before me. Be that as it may, Harvey's concluding note, before inviting Mr Osborne to proceed with his argument on the merits, was: 'I rule that the tribunal will proceed because [Tshishonga] has a remedy (the NEC can rescind its decision)'.

[74] Mr Papier submitted that since Agang's constitution did not provide for an internal appeal or internal review there was no possibility of the NEC rescinding a decision to expel Tshishonga and that Harvey had thus misdirected herself.

[75] In the decision which she issued on 16 February 2015, Harvey did not touch on the cryptic note I have quoted. She justified her decision to proceed on 21 January 2015 on the basis that Tshishonga had not explained his absence, the emailed medical note being unsatisfactory and vague. I am satisfied that she would not have proceeded with the hearing on 21 January 2015 but for this view. Her private note to the effect that the 'NEC can rescind its decision', whatever it may mean, does not point to an unfairness in the procedure she followed. I expect she meant no more than that, if she were to find against Tshishonga on the merits and recommend a sanction, Tshishonga might nevertheless be able to persuade the NEC that he had had a good reason not to attend on 21 January 2015 and that the NEC should thus not accept Harvey's findings and recommendation. This is indeed something Tshishonga could have tried to do at the NEC's meeting of 28 February 2015.

[76] Mr Papier's other attack on the fairness of the disciplinary process was a submission that, contrary to Harvey's assumption, Tshishonga did not have knowledge of the hearing of 21 January 2015. Harvey reached a contrary conclusion based on the following: (i) Notice of the resumed date was emailed to Tshishonga's email address on 15 January 2015. This email address had worked on previous occasions. (ii) Mr Osborne's attorney, Mr Hill, received a call from Tshishonga on 16 January 2015 saying that he had received the email but that there was a problem with its attachment. Mr Hill re-sent the email to Tshishonga and to his attorney. (iii) Tshishonga emailed a medical certificate to Mr Osborne's attorney on 20 January 2015 which purported to certify that Tshishonga was medically indisposed over the period 19-23 January 2015.

[77] When Tshishonga launched the present application on 17 April 2015 he was aware that Harvey had conducted her hearing on 12 and 21 January 2015. He annexed her decision of 16 February 2015 to his founding affidavit. He was thus aware of her reasons for proceeding in his absence. He did not allege in his

founding affidavit that he had not received notice of the hearing of 21 January 2015. He also did not do so in his replying affidavit filed in the first half of May 2015 (it is undated) or in his affidavit of 19 May 2015 for urgent relief.

[78] This point first saw the light of day in his supplementary founding affidavit of 9 June 2015.² Even then, Tshishonga takes the point in an evasive fashion. Although the heading to this part of his affidavit suggests that it will show that he did not have knowledge of the hearing on 21 January 2015, he does not in terms allege, in the paragraphs which follow, that he lacked such knowledge. After referring to the inferences made by Harvey, he submits that Harvey ‘impermissibly and arbitrarily determined that I had intentionally absented myself from the 12 and 21 January 2015 disciplinary hearings’ whereas he had produced medical certificates to validate his absence and was in fact indisposed to attend those hearings. He does not deal with the material from which Harvey inferred that he had knowledge of the date.

[79] Mr Papier’s submissions suffer from essentially the same defects. This part of his heads of argument has the same heading as Tshishonga used in his replying affidavit and then paraphrases the allegations I have just summarised. It is thus unclear whether there is a positive assertion that Tshishonga did not know that the hearing was to proceed on 21 January 2015 or whether the complaint is only that the hearing should have been adjourned because of the medical certificate.

[80] In my view Harvey was entitled to conclude that Tshishonga had knowledge of the hearing on 21 January 2015. Even if there were a genuine factual dispute on that score, it could not be resolved on the papers in Tshishonga’s favour.

[81] As to the medical certificates, both were unsatisfactory for the reasons given by Harvey. It is not in dispute that Tshishonga was present and apparently well at the hearing before Wright J on 11 January 2015, the date on which he was supposedly examined and found to be sick. The medical certificate (which is not in the record but is summarised in Harvey’s decision) was signed by an unidentified doctor on a form which listed the name of 14 general practitioners. The certificate

² Paras 19-26 record 304-306.

stated that Tshishonga was being treated ‘for medical reasons’. In any event, insofar as 12 January 2015 is concerned, Tshishonga’s rights were preserved by the procedure Harvey followed. Regarding 21 January 2015, Tshishonga should have been aware that a second medical certificate would be viewed with scepticism. The second certificate was again manifestly inadequate. There is no evidence that it was in truth signed by a doctor. If it was, it is not apparent on what basis an examination of Tshishonga on 16 January 2015 could lead to the conclusion that he was medically indisposed over the period 19-23 January 2015 and would only be fit for work on 26 January 2015. The note does not assert the doctor’s own opinion of such a medical indisposition. Presumably some part of the pre-printed words, ‘According to my knowledge/as I was informed he/she was unfit for work’, should be deleted when the certificate is completed but that was not done in this case. The doctor might thus simply have been going on Tshishonga’s say-so. In the part of the form for insertion of the ‘nature of the illness/operations/injury’ appear the meaningless words ‘medical condition’.

[82] Tshishonga himself has provided no evidence as to the nature of his medical indisposition on either the first or second occasion. Furthermore, and despite knowing the gravity of the charges against him, he followed the contemptuous course of emailing the second certificate to DKVG without further or formal request for a postponement. In these circumstances, and as in *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA), it cannot be said that Harvey acted in a procedurally unfair manner by continuing with the hearing in Tshishonga’s absence.

Conclusion

[83] it follows that the application must fail. In regard to costs, it was Tshishonga’s non-compliance with the order of 15 May 2015 that resulted in the postponement of 18 June 2015. In his late supplementary affidavit of 5 June 2015 Tshishonga said that during the period 25-31 May 2015 there had been ‘a family emergency and death in my family’ which had prevented him from applying his mind and consulting with his legal representatives, something he was only able to do on 2 June 2015. Even if one overlooks the absence of particularity, the fact remains that the non-compliance was attributable to him, not the respondents (cf *Grobbelaar v Snyman*

1975 (1) SA 568 (O)). On this basis alone he should pay the wasted costs. However, at best for him the costs of the postponement would be costs in the cause, in which case he would in any event have to pay them.

[84] I thus make the following order: The application for the relief in Part B of the notice of motion is dismissed with costs, such costs to include those arising from the postponement of 17 June 2015.

ROGERS J

APPEARANCES

For Applicant

Mr GR Papier

Instructed by

Venfolo Attorneys

6th Floor, 36 on Long Street

36 Long Street

Cape Town

For 2nd – 9th Respondents

Mr M Osborne

Instructed by

De Klerk & van Gend

3rd Floor, Absa Bank Building

132 Adderley Street

Cape Town