

REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 13/19023

(1)	REPORTABLE: <u>YES</u> / (NO)
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / (NO)
(3)	REVISED.
2013-06-14	
DATE	SIGNATURE

In the matter between:

MPHAHLELE, LETLAPA

First Applicant

PAN AFRICAN CONGRESS OF AZANIA

Second Applicant

and

MOLOTO, NARIUS

First Respondent

DHLAMINI, PHILLIP

Second Respondent

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] The applicants have approached this Court on an urgent basis for orders:

- 1.1 Condoning the applicants' non-compliance with the rules relating to service and time periods and dealing with this application on 4 June 2013 as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court, and insofar as may be necessary, permitting this application to be brought on shorter notice than is provided for in Rule 6 of the Uniform Rules of Court.
- 1.2 Declaring the meeting of 11 May 2013 convened by the first respondent as well as all resolutions taken thereon or thereat invalid.
- 1.3 Reversing and/or setting aside the alleged or reported suspension and/or expulsion of the first applicant as member and/or President of the second respondent.
- 1.4 Dissolving the so-called PAC National Executive Committee ("*NEC*") constituted in or at the meeting of 11 May 2013.
- 1.5 Ordering the respondents to pay the costs of this application jointly and severally, the one paying, the other being absolved.
- 1.6 Further and/or alternative relief.

[2] The application became opposed when an answering affidavit from the respondents was filed during the morning of 4 June 2013 at 09h50. I allowed the matter to stand down until Thursday 6 June 2013 to afford the parties the opportunity to exchange whatever further documents and/or other communications they could or would like to exchange. The main issue was that both sides should be ready to argue the matter on 6 June 2013.

THE PARTIES

[3] The first applicant, Letlapa Mphahlele, is an adult male person and president of the second applicant, resident at E.118, Parliamentary Village, Acacia Park, Goodwood, Cape Town, Western Cape Province. He is launching this application in his personal capacity as well as in his representative capacity as the purported legally recognised president of the second applicant.

[4] In support of the above, the first applicant attached to his affidavit a "*resolution of the Pan African Congress of Azania*" ("*PAC*") sponsored and/or signed by one Walter Toboti, giving himself forth as "*PAC National Chairman*" and one Vakele Mkandawire, who gave himself forth as an NEC member of the PAC.

[5] The second applicant, the PAN Africanist Congress of Azania ("*PAC*") is a duly registered political party, being recognised and registered as such in terms of the Electoral Act 1998 (Act 73 of 1998), as amended, as read with

the Electoral Commission Act, 1996 (Act 51 of 1996) as amended; with its registered office or head office situated at 5th Floor, Marble Towers, Corner Von Wielligh and Jeppe Streets, Johannesburg, Gauteng Province.

[6] The first respondent, Narius Moloto, is an adult male person who is said to be a person whose full and further particulars are to the applicants unknown but whose offices are situated at No. 79 Eloff Street, 4th Floor, Standard Bank Building, Johannesburg.

[7] The second respondent, Phillip Dhlamini, is an adult male person whose full and further particulars the applicants say are unknown to them.

ISSUES IN DISPUTE

[8] From my reading of the papers herein in their totality, the issues to be decided are:

8.1 Whether or not the first and/or second respondent were within their delegated powers or authority in terms of the Constitution of the PAC to call a meeting that had powers to suspend or recall or dismiss the sitting president of the PAC.

8.2 Whether or not the meeting of 11 May 2013 called by the first respondent was constitutional when regard is had to the Constitution of the PAC.

- 8.3 Whether or not the resolutions passed at the meeting of 11 May 2011 are valid or enforceable.
- 8.4 Whether or not the NEC constituted or appointed or elected at or during the meeting of 11 May 2013 was regularly and validly constituted, appointed or elected.
- 8.5 Whether or not the purported suspension and/or dismissal of the first applicant as the president of the PAC stands to be reversed set aside.
- 8.6 Whether or not the matter is urgent enough to deserve a hearing in this Court pursuant to Rule 6(12) of the Rules of Court.

POINTS IN LIMINE RAISED BY RESPONDENTS

[9] The respondents, in addition to dealing with the merits of the application, raised four points *in limine*, namely, urgency, *locus standi*, non-joinder and failure to exhaust internal remedies.

BACKGROUND TO APPLICATION AS PUT FORWARD

[10] It is a fact that a meeting purportedly convened by the first respondent, who is the secretary-general of the PAC, took place on 11 May 2013. According to a document marked "LM2" in the applicants' founding affidavit, a notice for this meeting was issued on 6 May 2013, the venue therein being the NACTU Head Office main boardroom. It is also common cause that the first applicants was not present at that meeting.

[11] The proposed agenda for this meeting is so material to a decision in this application that I feel it is necessary to quote it "*verbatim*". It states the following:

"OFFICE OF THE SECRETARY GENERAL

06 May 2013

NOTICE OF PAC EXECUTIVE COMMITTEE MEETING IS HEREBY GIVEN

DATE : 11 May 2013

VENUE: NACTU HEAD OFFICE MAIN BOARD ROOM

TIME : 10am

The normal NEC meeting dates and months were announced by the President in our last NEC meetings. This notice is in compliance with the agreement.

DRAFT AGENDA

- Procedural matters*
- Opening and welcome*
- Apologies*
- Quorum*
- Confirmation of the agenda*
- Minutes of the previous meeting*
- Matters arising from the minutes*

ADMIN, STRATEGY AND GOVERNANCE MATTERS

- Admin report*
- Annual national conference*

- *Preparation for 2014 National elections*

CONSTITUTIONAL COMPLIANCE – NWC AND NEC PORTFOLIOS

- *National programme of action*
- *Strategy, objectives and deliverables of each portfolio*
- *Special pension, medal awards reports and discussion*
- *Corruption within APLAMVA*

PRESIDENTIAL AND PARLIAMENTARY REPORT

- *Recent legislation and party inputs in those legislation*
- *Secrecy bill – party input and position*
- *Multi party forum PAC position and input*
- *Parliamentary party funding*
- *Local government and councillors report*
- *Result of recent by-election*
- *Performance of party councillors as full time*

FINANCIAL, PARTY ACCOUNTS AND ACTIVITIES

- *Payroll*
- *Number of officials on parliamentary payroll*
- *Total cost before and after Butterworth congress*

COMPONENT STRUCTURES REPORTS

- *APLA MVA*
- *PASMA*
- *PAYCO*

PROVINCIAL REPORTS

- *Mpumalanga*
- *Limpopo*
- *Eastern Cape*

YEAR TO DATE ACTIVITY REPORT

- *Sobukwe month*
- *Shapville/Langa day*
- *May Day*

Organisational, Political and ideological debate

NEC members' constituencies

Policy debate"

[12] Although the aspect of office bearers of the second respondent was not on the agenda for the above meeting, it appears as if the first respondent's position in the PAC was in fact discussed because the South African Broadcasting Corporation ("SABC") news bulletin of the evening of 11 May 2013 carried a report that the first applicant had been suspended. Similarly, the Sowetan Newspaper of Monday 13 May 2013 also carried such a report.

[13] On the last-mentioned date, i.e. 13 May 2013 the first applicant received an e-mail from the first respondent purportedly notifying him that charges had been preferred against him and that he would be informed of the date of his disciplinary enquiry. The document setting the above out is attached or annexed to the papers as Annexure "LM4".

[14] Only on 14 May 2013 did the first applicant receive a document dated that day notifying him of the resolution of the 11 May 2013 meeting to suspend him and prefer charges in view of disciplinary proceedings. For completeness sake this document, marked "LM5" reads as follows:

"OFFICE OF THE SECRETARY GENERAL

14 May

To : Letlapa Mphahlele

Suspension – NEC Decision

The NEC meeting sitted(sic) on the 11 May 2013 decided to suspend you pending the outcome of the disciplinary hearing on charges against you. In the event this was not clear, we now specifically state that you are suspended from any party activities.

Should you continue to defy the NEC and call meetings or claim to represent PAC, we shall have no option but to approach High Court to interdict you. Such action may lead to your expulsion from the organisation.

Confirm in writing by not later than midday 12pm tomorrow whether you are going to proceed or comply.

Unless we receive an undertaking we shall proceed with the application to interdict you.

The National Disciplinary Committee has been established they will be in contact with you in due course.(sic)

We trust you will find the above in order

Regards

(Sgd) Narius Moloto

Narius Moloto

Secretary General"

It is common cause that first applicant never responded as order yet, no legal proceedings as threatened were instituted at the expiry of the deadline given, in this court.

[15] On this same date the first applicant received a document marked Annexure "LM6" to the papers herein titled, "ALLOCATION OF NEC MEMBERS TO CONSTITUENCIES PER PROVINCES AS PER NEC DECISIONS". The document was purportedly sent out by a Mr Alton Mphethi, Acting President, PAC. 16 (Sixteen) portfolios are allocated to 16 (sixteen) people therein. Without setting out their portfolios, the people involved or assigned positions are Simphiwe Nofuma, Tebogo Rakoma, David Mabitsela, Mohlomphezi Mphahele, Betty Nkoana, Justice Mvakali, Mashudu Radamba, Matome Lekgema, Basie Kamana, Mkhandawire Vakele, Joseph Ndlovu,

Anwar Adams, Bauba Matlala, Mrs Toboti, Thamsanqa Komsana and Joseph Maqhekeni.

[16] In spite of what had already happened as set out above, on 15 May 2013 the first applicant received an e-mail from Naidu Richen Attorneys who represented themselves to him as being the second applicant's attorneys, reminding him of the dispatch to him of the letters dated 14 May 2013 relating to his "*suspension*" and impending disciplinary hearing. This letter unsolicitedly also enunciated the following, among others:

16.1 That their (attorney's) client was willing to afford him until 10h00 on Thursday 16 May 2013 to confirm whether he (first applicant) intended disregarding the decision made by the National Executive Committee and that,

16.2 Should he respond in the affirmative to the question posed above, or fail to provide a response within the time limit afforded him above, an urgent court application would be launched or brought against him to confirm his suspension pending a disciplinary hearing with an accompanying punitive cost order on a scale as between attorney and client.

The threats were again never followed through in this court.

[17] According to the first applicant these attorneys although professing to represent the second applicant, were in fact the respondents' personal attorneys, i.e. not engaged by or retained by the PAC.

[18] On 21 May 2013 the first applicant received a letter issued by the second respondent professing to be acting as such in a capacity as or of the Chairperson, National Disciplinary Committee of the PAC ("NDC"). Therein, the said Mr Phillip Dhlamini (the second respondent), introduced himself to the first applicant as the newly appointed Chairperson of the PAC's NDC. The letter also set out the following charges as having been preferred against him the first applicant:

18.1 Misappropriation of PAC funds.

18.2 Undermining and attempting to split the PAC.

18.3 Appointing people into the NEC of the PAC through unconstitutional means.

18.4 Violating a court order dated 17 May 2013 as well as an undertaking by him (first applicant) not to organise or hold a meeting on 18 May 2013, thus placing or bringing the PAC into disrepute.

18.5 Undermining the decisions of the NEC, thereby attempting to split the PAC.

18.6 Conducting a meeting against or contrary to or in violation of a court order.

18.7 Acting contrary to the interests of the PAC by signing misleading documents that purported to originate from the business or deliberations of the PAC's NEC well knowing that they were not.

[19] The letter further notified him that his disciplinary hearing would be held at the PAC's head office or headquarters the following day, i.e. 22 May 2013 at 10h00. It also informed him that:

" ...

6. *Furthermore, take note that you have the right to be represented at your own expense at the Disciplinary hearing in terms of clause 24.3;*
7. *Take note that should you fail to attend the hearing, the sitting will continue in your absence and will arrive at the [sic] verdict unopposed."*

[20] This letter was unsigned. Furthermore, it was only delivered to first applicant on the purported date of hearing.

[21] On 22 May 2013 the first applicant's attorneys of record, Messrs Ngeno and Mteto Inc, wrote to the second respondent requesting a signed version of the letter dated 21 May 2013. Instead, the first applicant's attorneys received another letter from the purported Pan Africanist Congress of Azania (PAC) National Disciplinary (*sic*) Committee (NDC) dated 22 May 2013 notifying him

of the postponement of the purported disciplinary hearing to Friday 24 May 2013. A signed copy of their letter of 21 May 2013 was attached to this latest letter.

[22] This letter (by second respondent) further states that this signed letter dated 21 May 2013 was forwarded or communicated to the first applicant by e-mail on 20 May 2013, i.e. meaning that the letter was communicated to the latter before it was even written. Furthermore, it (letter of 22 May 2013) was only delivered to the first applicant on 24 May 2013 at 10h16. This is 16 minutes after the time the alleged disciplinary hearing was to be held on 24 May 2013.

[23] The first applicant only learnt of the "*expulsion*" from the PAC from an SABC news broadcast on the evening of Sunday 26 May 2013. This was confirmed to him when he saw the same news in the Monday 27 May 2013 issue of The Citizen newspaper.

[24] The outcome of the meeting that according to the first applicant masqueraded as the PAC National Disciplinary Committee was forwarded to him on 27 May 2013 at 17h45.

[25] The respondents' answering affidavit also elicited further background information.

[26] Attached to the answering affidavit is an attendance register showing the names of the people who attended or constituted the meeting of 11 May

2013. There were 15 in number. By names, Justice Mvakali, Joseph Ndlovu, Mohlomphezi Mphahlele, Mapula Nkoana, Simphiwe Nofuma, Shikwane (Bauba) Matlala, Thabani Zondo, Senyane Mphethi, Bennet Joko, David Mabitsela, Narius Moloto (first respondent), Uanjana Wandisile, Matome Lekgema, Richard Maoka and Teboho Rakoma.

[27] Save for a few names, this list is similar to the one where people were allocated portfolios as set out in paragraph 15 of this judgment.

[28] The trigger point of all issues that led to the purported or alleged suspension and ultimately the "*disciplinary hearing*" that led to the purported or alleged dismissal of the first applicant, depending on where on the side of the imaginary centre-line one is standing, is the meeting of 11 May 2013. The notice calling for this meeting is dated 6 May 2013. There is no indication on the notice itself or on any other document if or whether this notice ever came to the notice of the first applicant or those members of the NEC who did not attend it. The notice indicated that the meeting was to be held at the board room of trade union NACTU at its head office, which according to the papers herein is situated at 4th Floor, Standard Bank Building, 79 Eloff Street, Corner Street, Johannesburg. It was not held at the second applicant's head quarters which are situated at the 5th Floor, Marble Towers, Cnr Von Wielligh and Jeppe Streets, Johannesburg.

[29] The words preceding the draft agenda of that meeting read as follows:

"The normal NEC meeting dates and months were announced by the President in our last NEC meeting. This notice is in compliance with the agreement."

[30] This Court was not favoured with the minutes of the last NEC meeting the notice was referring to or any affidavit or acceptable evidence setting out what the President, (who is most probably of the PAC) decreed or announced at that last meeting. My understanding of the above words in the above proposed agenda or notice is that the first applicant, who was the President of the PAC before the meeting of 11 May 2013 was in attendance at the NEC meeting previously held immediately preceding the meeting of 11 May 2013. If the above words are alleged to mean anything different, then the papers herein do not support such different meaning. Secondly, the second sentence as set out above from the notice of the meeting of 11 May 2013 talks about "*compliance with the agreement*". No such agreement was attached to the papers herein or the terms, express or implied or tacit thereof set out in the papers. No argument or submission was made in court explaining what this agreement is all about.

THE PARTIES' VIEWS ON STRUCTURAL AND DUE PROCESS COMPLIANCE

[31] According to the applicants clause 5.1 of the PAC's Constitution, it describes or decrees the National Congress of the party ("*PAC*") as the supreme organ of the organisation. Such a National Congress is held very three years. All the parties are agreed that the last National Congress of the

PAC was held at Butterworth in the Eastern Cape Province on 14 and 15 July 2012 and the second respondent's leadership, which can only be elected by the National Congress, was elected there.

[32] The NEC (elected leadership) is the organ or collective membership that appoints the NDC and the chairperson of the NDC is an *ex-officio* member of the NEC. The NEC and the NDC hold office for a period of three years.

[33] According to the first applicant the chairperson of the NDC as on or at 11 May 2013 was and still is one Jongikhaya Gwe. According to the respondents Jongikhaya Gwe is not the NDC chairperson but the first applicant's lawyer.

[34] The applicants consequently averred that the meeting called by the respondents for 11 May 2013 never quorated as the requisite 50% membership of the recognised and/or elected NEC was not present thereat. Consequently the appointments made at that meeting, especially that of the NDC as well as that of the second respondent as chairperson of that "NDC" are invalid, unconstitutional as well as *ultra vires* and of no force and/or effect. The meeting of 11 May 2013 itself is, according to the applicants unlawful, and so were the discussions or deliberations conducted thereat. They challenge the validity of its resolutions.

[35] The applicants, especially the first applicant further contended that substantial non-compliance with imperative and prescriptive provisions of the PAC Constitution was missing.

[36] The respondents on the other hand contend that the meeting of 11 May 2013 was correctly called in terms of the PAC Constitution and that it was aquorating hence it proceeded to adopt resolutions that they contend are valid and constitutional. They further contend that the NDC was constituted in terms of the requisite prescripts and that its procedures were as required by the Constitution of the PAC, making the deliberations and decisions thereof valid and binding.

THE PAC CONSTITUTION

[37] The operative Constitution of the PAC or second respondent was amended and re-adopted at the 6th National Congress of the party held at Ga-Matlala on 7 to 9 April 2000. The respondents' counsel handed in a copy of the Constitution to the court at the beginning of argument in this matter.

[38] Clause 4.3 of the Constitution (of PAC) recognises as component structures of the organisation the following structures for as long as the Annual National Conference has not terminated their membership:

38.1 Pan Africanist Women's Organisation (PAWO);

38.2 Pan Africanist Students Organisation (PASO);

- 38.3 Pan Africanist Youth Organisation (PAYCO);
- 38.4 Pan Africanist Student Movement (PASMA);
- 38.5 APLA Veterans Association (APLAMVA); and
- 38.6 Pan Africanist Labour Forum (PALF).

Two members of each of the above component structures are ex officio members of the NEC of the PAC.

[39] Clause 5.1 of the Constitution decrees, as already stated above, that the National Conference shall be the supreme organ of the organisation and shall lay down policies and programs of the PAC and its decisions shall be binding on all members, components and organs of the PAC.

[40] Clause 5.2 decrees as follows:

“5.2 The Annual National Conference shall be held every 12 months and the Annual National Conference held in the year of elections of the NEC shall become the National Congress. The National Congress shall be held every third year from the last one.”

[41] These provisions are peremptory.

[42] It is also clear or apparent that there is a difference between the National Conference and the National Congress.

[43] When regard is thus had that the last National Congress of the PAC was held in July 2012 at Butterworth, it is common cause that its period of

office of the office bearers thereof or thereby elected will expire in July 2015 on the 15th of that month. As the National Congress of the PAC is the only elective gathering of the party, it goes without saying that under normal circumstances the next NEC, NDC and other component members stand to be elected and/or appointed on the date of the Annual Conference of July 2015 which will become the next National Congress of the party.

[44] Delegates to the National Conference come from branches of the organisation which are in good standing and the criterion determining numbers per branch is, in terms of clause 5.4, one delegate for every 20 members.

[45] Clause 5.5 of the Constitution makes provision for the NEC to convene a special National Conference if in its opinion, an emergency which warrants such a conference, has arisen or if a requisition signed by one-third of the number of the branches represented at the previous National Congress is received calling for same. However, such a requisition by branches for a Special Annual Conference shall stipulate the subject matter of their concerns which they want to place before such a special Annual Conference, which requisition as set out above should have been lodged with the Secretary General of the party within a period of 30 days after the last day of the previous congress.

[46] It is so that the meeting of 11 May 2013 was not a special annual conference but a normal or scheduled NEC meetings as unambiguously stated so by the respondents.

[47] Clause 5.7 of the Constitution reads as follows:

"5.7 At least eight weeks before the date of the holding of an Annual Conference, the NEC shall give a notice of a date and place of such conference and shall circulate the agenda to all component structures and organs of the PAC."

[48] In terms of clause 5.10 of the Constitution the Annual National Conference shall consider and may adopt among others, the following:

- 48.1 The annual Presidential Address;
- 48.2 Presidential Report;
- 48.3 The annual report of the Secretary General;
- 48.4 The combined Annual Reports of the respective Secretaries of the NEC, Audited Financial Statements and Accounts presented by the NEC;
- 48.5 The National Organiser's report;
- 48.6 Minutes of the previous conference or congress; and
- 48.7 Reports from component structures.

[49] Clause 5.11 states as follows:

"5.11 The National Congress shall elect the President, Deputy President and members of the NEC tri-annually."

THE NEC OF THE PAC

[50] In terms of clause 7.2 of the Constitution of the PAC, the NEC shall be constituted as follows:

- 50.1 The President;
- 50.2 The Deputy President;
- 50.3 The Secretary General;
- 50.4 The Assistant Secretary General;
- 50.5 The Secretary for Finance;
- 50.6 The National Organiser;
- 50.7 The Secretary for Publicity and Information;
- 50.8 The Secretary for Foreign Affairs;
- 50.9 The Secretary for Political and Pan African Affairs;
- 50.10 The Secretary for Legal and Constitutional Affairs;
- 50.11 The Secretary for Labour;
- 50.12 The Secretary for Education and Human Resources;
- 50.13 The Secretary for Culture, Sports and Recreation, Science and
Technology;
- 50.14 The Secretary for Health;
- 50.15 The Secretary for Economic Affairs and Development, Planning,
Trade, Commerce and Industry;
- 50.16 The Secretary for Projects and Development, Minerals and
Energy;

- 50.17 The Secretary for Youth Affairs, Chairman of PAYCO;
- 50.18 The Secretary for Environmental Affairs and Tourism;
- 50.19 The Secretary for Religious Affairs;
- 50.20 The Secretary for Social Welfare;
- 50.21 The Secretary for Local Government, Housing and Civil Affairs;
- 50.22 The Secretary for Transport;
- 50.23 The Secretary for Land and Agricultural Affairs;
- 50.24 The Secretary for Post and Telecommunication;
- 50.25 Two (2) Members nominated by each component structure
provided that at least one member of each shall be a woman;
- 50.26 Provincial Chairpersons shall be *ex officio* members of the NEC.

[51] Clause 7.2.27 decrees that –

“7.2.27 A number of National Executive Members equal to the portfolios set out in paragraphs 7.2.1 to 7.2.24 (of the Constitution) which are paragraphs 50.1 to 50.24 of this judgment) shall be elected at the National Congress by majority vote.”

[52] Clause 7.3 states that the allocation of specific portfolios or departments referred to in 7.2.7 to 7.2.24 (50.7 to 50.24) of this judgment) shall be done by the Presidency. In terms of clause 7.4:

“ ...

7.4 The President, after consultation with the Deputy President, may from time to time, and notwithstanding the provisions of 7.3 herein above, allocate to any member of the NEC any portfolio

or department; and may co-opt not more than five persons into the NEC on the basis of the expertise that they possess."

[53] Clause 7.6 decrees that no elected member of the NEC shall hold office in any Province, Region or Branch Component Structure.

[54] Clause 7.7 decrees that the NEC shall meet in a plenary session at least once every three months.

[55] Clause 7.8 provides for a National Chairperson who is elected at the National Congress. His duties are purely ceremonial and he may be delegated any duty by the Presidency and/or the NEC. He is thus not a member of the NEC.

[56] In short, the NEC, in terms of the Constitution, consists of the following number of persons:

56.1 24 members elected directly by or at the tri-annual National Congress (clauses 7.2.1 to 7.2.24);

56.2 12 members from the component structures (clause 7.2.25);

56.3 A number (which I cannot ascertain) which is equivalent to the Provincial Chairpersons, which means 9 Provincial Chairpersons. They are *ex officio* members of the NEC;

56.4 5 members which the President may allocate NEC portfolios to, due to their specific expertise as authorised by clause 7.4.

56.5 The chairperson of the NDC who is an ex officio member of the NEC.

[57] At the most, the constitutionally allowable number of members of the NEC of the second applicant is 50 (fifty) members. With the *ex officio* membership of the chairperson of the NDC, they can go up to being 51.

[58] Before I proceed to interrogate what the actual members are which constitute the NEC, I will first set out what the duties or powers are that the Constitution of the PAC assigns to the NEC. These are set out in clause 8 of the Constitution which provides as follows:

"8. DUTIES OF THE NATIONAL EXECUTIVE COMMITTEE

8.1 *The duties of the NEC shall among other [sic] be:*

8.1.1 *To act as the supreme of the PAC between congresses/conferences.*

8.1.2 *To carry out the aims, objectives of the PAC and to implement policies and programmes of the party as well as implementing the resolutions and directives of the National Congress/Conference.*

8.1.3 *To organise, supervise and co-ordinate all the activities of the party; and to this end, it shall co-ordinate the activities of the provinces, regions and branches.*

8.1.4 *To ensure that the political education workshops on Pan Africanism as well as on the vision, mission and the aims and objectives of the*

organisation are conducted by all the structures of the organisation.

8.1.5 To conduct a strategic [sic] workshop for its members within three months after the beginning of each new term of office to ensure unanimity to its members on Pan Africanism as well as on the vision, mission and aims and objectives of the organisation.

8.1.6 To take final decisions on all disciplinary decisions/recommendations and to act as the organ of appeal.

8.1.7 To act as the custodian of all assets of the party and to present to congress an inventory of party assets."

The suspension or removal of the President of the PAC is not mentioned as one of those duties. No arguments were advanced to this court explaining how this NEC meeting of 11 May 2013 acquired the powers to do so.

THE NATIONAL WORKING COMMITTEE (NWC)

[59] This organ is authorised by clause 9 of the Constitution. In terms of clause 9.1, the NWC shall –

"... be the main sub-organ of the NEC and shall consist of the President, Deputy President, and Heads or Secretaries of the following departments or portfolios: Secretary General, Assistant Secretary General, National Organiser, Finance Secretary, Legal and Constitutional Affairs, Publicity and Information, Political and Pan African Affairs, Foreign Affairs and two nominees of PAWO, and one of PASO and PAYCO, PASMA, APLA Veterans & PALF, provided that at least one nominee of each component structure is [sic] woman."

[60] The NWC thus should consist of 17 members.

[61] This body or organ is tasked with the duties, subject to the supervision of the NEC, of executing the decisions and resolutions of the National Congress and the NEC. Its duty also entail the control and supervision of the administrative machinery of the organisation on a National, Provincial, Regional and Branch level and is empowered to take such administrative measures that it may deem meet or fit or necessary to enforce the decisions and programs of the organisation. The validity of decisions taken by this NWC would them emanate from a validity constituted NEC mandate.

[62] Its term of office runs concurrently with that of the NEC (clause 9.4 of the Constitution).

[63] In terms of clause 9.5 of the Constitution the NWC –

"9.5 The NWC shall meet in a plenary session(s) at least once every month provided that if an emergency relevant to the aims, objects and policies and programs of the organisation should arise, the NWC shall meet as often as such emergency situations reasonably require, to safeguard the existence, aims, objectives and basis programmes of the organisation."

[64] The NWC is enjoined to take and execute all emergency administrative decisions and report such decisions that it may have been occasioned to take to the NEC provided such decisions do not impinge on policy (clause 9.6).

THE DISCIPLINARY STRUCTURE OF PAC

[65] In terms of clause 23.1 the National Disciplinary Committee of the second respondent consists of a chairperson, deputy chairperson and three other members who are appointed as such by the NEC. The Chairperson of the NDC is an *ex officio* member of the NEC.

[66] There are Provincial and Regional Disciplinary Committees as well.

[67] The procedure when a matter is referred to a disciplinary procedure is governed by clause 24 of the Constitution of the PAC.

[68] Whenever a matter is referred to the Disciplinary Committees, the latter shall forthwith inform those members being referred to the Committee in writing of the allegations against them and then convene a hearing within 14 days after having so informing the member

[69] The effect of the above provisions of clause 24 in my view comes down to the following:

69.1 Once the Disciplinary Committee receives a complaint against any member of the PAC deserving of a hearing, it must inform that member in writing of the essence of that complaint and provide such member with such further details and/or particulars relating to that complaint that the member is aware what he is facing, who is the complainant, and which provisions or

processes or rules or regulations of the party he/she is alleged to have transgressed.

69.2 Such member to be charged should then have sufficient time and opportunity to seek guidance from peers or legal representatives so as to decide what he/she intend doing to defend himself/herself.

69.3 That member to be charged has at least 14 days to decide what he/she may do when a date is set for the hearing.

69.4 The Disciplinary Committee can only furnish or set a date of hearing after the initial 14 days have expired. This is implicit in the following words in clause 24.1:

"... the latter shall forthwith inform the members in writing of the allegations against him/her and convene a hearing within 14 after having so informed the member." (my underlining)

[70] It is consequently my considered view and finding that the respondents' counsel's contention that there are no time frames set when a notice should be issued and whereafter after how long the disciplinary hearing should be held cannot be correct.

[71] A member to be charged must be given an opportunity to make representations why the charges should not be proceeded with. The Disciplinary Committee should also be afforded the opportunity to evaluate those representations. Any representations a member to be charged can make will depend on the exact nature of the charges, the accompanying documentation that would be giving meat to the bare bones which would be the misconduct charge sheet. The Committee should again respond to the representations. If it still decides to continue with the disciplinary hearing, it will then serve the member with a formal charge sheet or confirm to the member that whatever was served on him to respond to was the charge sheet such member would be facing at the disciplinary hearing.

[72] The charged member should then be afforded enough time between formal service of a charge to him or her to decide whether to engage the services of a legal representative or make use of the services of a fellow comrade in the party to represent him.

Not doing the above may be a denial to the members charged, of a fair hearing and due process.

WHAT THE RESPONDENTS DID IN THIS MATTER

[73] As the chronology of events as set out above indicate, there was a meeting of certain persons whose status and authority or mandate within the PAC is disputed by the first applicant on behalf of the second applicant.

[74] On 6 May 2013 the first respondent in his capacity as the elected Secretary General of the PAC issued a notice calling a meeting of the NEC for 11 May 2013 at 10h00.

[75] The said notice categorises this meeting as a normal NEC meeting.

[76] A draft agenda as set out above under paragraph [11] of this judgment was part of that notice. As stated above also, the respondents did not explain when this notice was served on the first applicant. But be that as it may, members of the PAC's NEC had 4 days to prepare for this meeting and then attend it on the 5th day.

[77] It is at this meeting where the decisions that precipitated these proceedings were taken.

WERE/WAS MEETING OF 11 MAY 2013 REGULAR OR DID IT QUORATE?

[78] It is common cause that the members who professed to be members of the NEC who gathered for the meeting of 11 May 2013 must have firstly been members elected at the PAC elective national conference held on 14 to 15 July 2012 to be recognised as such.

[79] Those elected to the NEC of the PAC on that date are set out in a document attached to the respondents' answering affidavit compiled by the body that the PAC had tasked and mandated to conduct those elections. Its names are EISA for Electoral Institute for Sustainable Democracy in Africa. The names of those who were directly elected to the NEC appear from this document marked Annexure "NM4" appearing at pages 120 to 128 of the paginated papers herein. This list is corroborated by an in-house publication of the PAC called Azanian Brief of November 2012 purportedly emanating from the office of the first respondent – the Secretary General. This publication is part of the papers as Annexure "LM13" at page 66A of the paginated papers. The only difference is that Andiswa Mjali appearing in the in-house publication does not appear in the election report by EISA. Another elected NEC member is agreed between the parties herein as having passed away

[80] I am inclined to accept the data contained in the report by EISA which reports about the following directly elected NEC members:

- 80.1 Letlapa Mphahlele (first applicant) – President;
- 80.2 Senyane Alton Mphethi – Deputy President;
- 80.3 Narius Moloto (first respondent) – Secretary General;
- 80.4 Bennet Khonkwane Joko – Deputy Secretary General
- 80.5 Leonie Arries – Secretary, Finance;

80.6 Wandile Montjane – National Organiser;

80.7 Waters Toboti – National Chairperson.

17 Additional Members of MEC

80.8 Simphiwe Nofuma;

80.9 Anwar Adams;

80.10 Basie Kamana;

80.11 Betty Nkwana;

80.12 David Mabitsela;

80.13 Joseph Ndlovu

80.14 Justice Mvakali;

80.15 Mashudu (Radamba);

80.16 Matome Lekgema;

80.17 Mkhawire Vakele;

80.18 Motlogeli (Mohlomphezi) Mphahlele;

80.19 Nakaphala (Bauba) Matlala;

80.20 Nomathemba Sithole;

80.21 Pumla Toboti;

80.22 Queen Magazi;

80.23 Tebogo Ramaoka;

80.24 Thamsanqa Komsana.

[81] As can be seen the directly elected members of the NEC are 24 in number. When the deceased member is excluded, they are 23 in number.

[82] In addition to the above directly elected NEC members the following *ex officio* members of the NEC should be added to the list constituting NEC members for quorum purposes:

- 82.1 Takalani Ligego – Limpopo Province;
- 82.2 Mzwanele Nyhontso – Eastern Cape Chairperson;
- 82.3 Richard Maoka – Mpumalanga Chairperson;
- 82.4 Pitso Mphasha – PAYCO;
- 82.5 Mudini Maivha – APLAMVA Secretary General;
- 82.6 Phumzile Nomnga – PASMA President;
- 82.7 Lerato Lephatsa – PASMA Secretary General.

[83] It is not clear whether the President of the PAC ever exercised his presidential discretion in terms of clause 7.4 to assign duties to 5 members with special expertise. As such, I will not take the 5 into account when determining whether a quorum was made.

[84] However, it is my considered view and finding that the 12 members of the component structures clearly set out in paragraphs 38.1 to 38.6 of this judgment should be counted when a quorum is determined because the PAC Constitution grants them that prerogative of sitting in the NEC as *ex officio* members. Their presence or absence at a meeting will either strengthen or weaken the regularity and/or constitutionality of any meeting in so far as quorum is concerned.

[85] From what the PAC elective conference of 14 to 15 July 2012 elected to do, I accept that although South Africa has 9 provinces, the PAC chose to recognise only those representatives that it specifically mentioned as set out in paragraph [82] (82.1 to 82.7) of this judgment. They are 7 in number, not 9.

[86] Consequently, it is my finding that as on 11 May 2013 a quorum for any or the held NEC meeting should have been at least 30 members and at most 43.

ATTENDANCE AT NEC MEETING OF 11 MAY 2013

[87] At the meeting of 11 May 2013 of the 15 people who attended only 14 were recognised or known members of the NEC of the PAC as so elected or nominated or appointed pursuant to the elective National Congress of 14 to 15 July 2013. A quorum for that meeting, if the minimum NEC membership of 30 was anything to go by ought to have been 15 members. If the total NEC membership was supposed to be 43, a quorum should have been constituted by 21½ members – rounded to 21 at best and 22 at worst.

[88] Either way, the total membership of those present who were allowed to take decisions at an NEC meeting of the PAC did not constitute a quorum to pass any valid and constitutionally permissible resolutions at the meeting of 11 May 2013. Those present did not reach the 50% required to quorate at

that meeting. Consequently, all deliberations at this meeting as well as all and any resolutions adopted or taken thereat are *null and void, ab initio* and thus invalid.

[89] The “*Executive Committee*” appointed at that meeting is also *pro non scripto* and invalidly appointed. So was the National Disciplinary Committee appointed by that illegitimate National Executive Committee.

[90] It comes down to the simple fact that the suspension by the committee elected at that meeting of 11 May 2013 of the first applicant cannot stand or be lawful, constitutional and valid. It stands to be set aside. Equally, the disciplinary committee appointed by the said meeting had no mandate, power or authority to institute disciplinary proceedings against the first applicant. His suspension and subsequent dismissal thus also stands to be set aside as it is legally and factually a non-event when the Constitution of the second respondent is anything to go by.

REGULARITY OF PROCESSES LEADING TO DISCIPLINARY HEARING

[91] For the sake of completeness as well as for future directives it is my view and finding that I should say something about the lead-up to the so-called disciplinary hearing that led to this application, more-so that the parties spent much time on them during argument

[92] The purported notice calling for the NEC meeting of 11 May 2013 dated 6 May 2013 was too short for a meeting of such a magnitude. Those attending that meeting should have known that the time frames are set out as above. In this case only 4 to 5 days were allowed between date of issue of notice and date of meeting. This period does not include service or receipt of such notices by members of the NEC. It is my finding that the period allowed between notice and the meeting was so woe-fully inadequate that it can safely be categorised as unreasonable.

[93] What was worse, the so-named notification to the first applicant of disciplinary proceedings against him was such that it did not suit a big organisation like the PAC. A letter is sent to the first applicant by or on the instructions of the second respondent on 21 May 2013 notifying him of possible or impending disciplinary proceedings to be levelled at him. Those hearings were scheduled for the following day, i.e. 22 May 2013 at 10h00. However, in the body of that notification the time of hearing is given as 11h00. The letter notifying him was unsigned. When the first applicant's attorneys demand a signed copy, the so-called NDC unilaterally postpones the hearing to 24 May 2013. I have set out the inconsistencies and ostensible improbabilities in paragraphs 18 to 24 of this judgment.

[94] The procedures followed by this body calling itself the PAC's NDC were not those set out in the Constitution of the PAC. The respondent also stated that they had in their possession 41 documents which formed the core and gist of their case against the first respondent. However, he was never

served with those documents. When asked to comment on this ostensible *lacuna* or omission, counsel for the respondents stated that it was incumbent on the first applicant to write to or approach the NDC and ask what further documents are there that accompany the charge.

[95] I find the last-mentioned attitude not only unreasonable but also an above average display of ignorance and arrogance.

[96] The time frames given to the first applicant, even if for argument sake the NEC at the meeting of 11 May 2013 had quorated, were woe-fully inadequate and are tantamount to denying the first applicant a right to a fair hearing. The application could still fail under those circumstances.

CONCLUSION

[97] From the totality of the facts and circumstances herein shown, the meeting of 11 May 2013 that purported to deal with some stakeholders of the second applicant is a nullity. All decisions taken thereat are invalid and should be set aside.

[98] The leadership of the PAC, i.e. second applicant remains as it was after the National Congress dated 14 to 15 July 2012. What happened on 11 May 2013 is of no force or effect.

[99] The first applicant remains the President of the PAC and the NEC remains as constituted after the July 2012 National Congress. The NDC constituted pursuant to the meeting of 11 May 2013 is a nullity *ab initio*. Whatever it purports to have done, i.e. subjecting the first applicant to a disciplinary hearing has no force or effect and is of no consequence.

[100] I am satisfied that the applicants, especially the first applicant has made out a case for the grant of the orders sought.

[101] It is so that costs must follow the results.

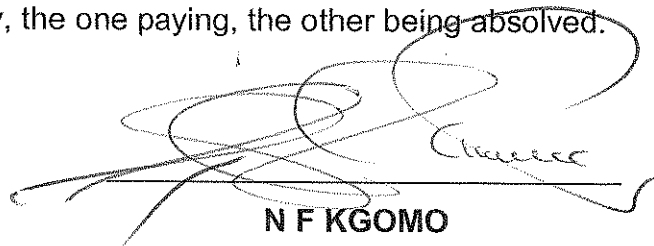
[102] The respondents raise four points *in limine*. I have looked at them critically. They have no merit. This matter was sufficiently urgent to be heard. The first applicant cannot be expected to negotiate or place his being in the hands of an illegitimate body or group of persons. Most of them are members of the NEC of the PAC. However, they did not organise enough to be able to constitute a quorum, for that meeting to be allowed to adopt valid resolutions.

[103] The respondents did not impress. As trusted members of the PAC they ought to have known better. There are enough sub-committees of the second respondent that could have been resorted to before such a step affecting the head of the organisation was embarked upon. Without making it a finding, I dare allude that a special conference or congress could have been called once this meeting group found it was necessary to impeach their President.

ORDER

[104] The following order is made:

1. The meeting held on 11 May 2013 convened by the first respondent is declared invalid and unconstitutional *vis-à-vis* the Constitution of the PAC.
2. All resolutions and/or decisions adopted or made at the abovementioned meeting of 11 May 2013 are declared invalid and are set aside.
3. The suspension and subsequent or ultimate dismissal of the first applicant is set aside. The first applicant remains the President of the second applicant.
4. The body of persons purported to be the NEC of the second applicant constituted pursuant to the meeting of 11 May 2013 is dissolved forthwith as their election is set aside.
5. The respondents are ordered to pay the costs of this application jointly and severally, the one paying, the other being absolved.



N F KGOMO

FOR THE APPLICANTS	JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG ADV T E MATANDA
FOR THE RESPONDENTS	ADV
DATE OF ARGUMENT	6 JUNE 2013
DATE OF JUDGMENT	14 JUNE 2013