IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

REPORTABLE

FIRST APPLICATION: **CASE NO.: 5449/2010**

In the matter between:

SIMINGAYESONKE WISEMAN MCOYI **FIRST APPLICANT**

NHLANHLA GOODMAN KHAWULA **SECOND APPLICANT**

SYDNEY THOKOZANI ZULU **THIRD APPLICANT**

NTHUTHUKO CROMWELL GUMEDE **FOURTH APPLICANT**

and

INKATHA FREEDOM PARTY **RESPONDENT**

SECOND APPLICATION: **CASE NO.: 8622/2010**

In the matter between:

VERONICA ZANELE MAGWAZA-MSIBI **APPLICANT**

and

INKATHA FREEDOM PARTY **RESPONDENT**

JUDGMENT

—

PATEL DJP

Introduction:

[1] Two applications served before me on the opposed motion roll. By agreement both were argued together and the relief sought in both the matters and the grounds for opposition is substantially similar if not identical. In the first application the first three applicants, viz., MR SIMINGAYESONKE WISEMAN MCOYI; MR NHLANHLA GOODMAN KHAWULA and MR SYDNEY THOKOZANI ZULU were former members of the INKATHA FREEDOM PARTY ("IFP"), a political party duly constituted according to law, and the respondent in both the matters. The fourth applicant, MR NTHUTHUKO CROMWELL GUMEDE is a member in good standing of the IFP. They shall be collectively referred to as the applicants in the first application. In the second application, the applicant is Ms VERONICA ZANELE MAGWAZA-MSIBI ("Magwaza-Msibi"), the National Chairperson of the Respondent.

[2] In the first application the applicants seek the following amended relief as set out in the amended order handed up by their Counsel at the hearing, namely:

"1. It is declared that :

(a) The purported expulsions of the first, second and third applicants from respondent during May 2010 are void and of no force or effect.

(b) The National Council and the National Executive Committee of respondent have never been extant.

(c) *Alternatively to (b)* The terms of office of respondent's National Council and its National Executive Committee have expired and a more than reasonable time has elapsed since such expiry as at May 2010.

(d) The terms of office of the President, the National Chairperson, the Deputy National Chairperson, the Secretary General and the Deputy Secretary General have expired but they remain in office, under clause 3.6 of respondent's constitution, solely for the purpose of convening and holding an elective general conference of respondent as directed in this Order.

2. The office-bearers of respondent, namely the President, the National Chairperson, the Deputy National Chairperson, the Secretary General and the Deputy Secretary General are directed to convene and hold an elective conference of respondent by or before the ……..day of ……2010.

3. The deponents to the opposing affidavits are directed to pay the costs of this application, such costs to include those costs consequent upon the employment of two Counsel."

[3] Whereas in the second application Magwaza-Msibi seeks the following relief as set out in the Notice of Motion:

"2.1 That the Resolution of the National Council on 2 October 2010 as annexed hereto, marked "A" is hereby set aside.

2.2. That any adverse finding concerning the applicant on 30 October 2010 in terms of Section 10.9 of the respondent's Constitution be set aside.

2.3. That the respondent holds an elective Annual General conference and hold elections within a period of one month of the date of the final order of the Court herein.

2.4. That the respondent be ordered to pay the costs of this application.

3. That the respondent be interdicted with immediate effect from giving effect to the Resolution in "A" hereto or to any decision taken in terms of Section 10.9 of its Constitution adversely affecting the applicant pending the finalization of this application in this Court.

4. That an independent and credible company conduct elections for the Party.

5. That the Court grant such further and/or alternative relief to the applicant as it deems meet."

[4] By agreement both the matters were argued on the papers although there are many pertinent disputes of fact in both the applications. The parties having elected not to refer any issue for the hearing of oral evidence, the test applicable is that laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635 (this test was affirmed by the Constitutional Court in *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others* 2005 (2) SA 359 (CC) para 53) namely, a final order can only issue if those facts averred in the applicants' affidavits which have been admitted by the IFP, together with the facts alleged by the IFP, justify such an order provided that the denial of any fact by the IFP of facts alleged by the applicants' does not raise a real, genuine or *bona fide* dispute of fact.

Background

[5] As pointed out earlier, the first, second and third applicants in the first application were formerly members of the IFP, but were expelled by the National Council, on 9 May 2010 for alleged divisive behaviour arising from their conduct as part of a faction outside the structures of the IFP that called itself '*The friends of VZ*' (VZ is the abbreviated name for Magwaza-Msibi). At the expulsion meeting 58 votes were counted in favour of the expulsion with no dissension which meant that the vote was unanimous. Magwaza-Msibi participated in the deliberations and voted in favour of their expulsion.

[6] In the first application, the expelled applicants challenged the lawfulness of their expulsions on the basis that the National Executive Committee and the National Council of the IFP, and its office bearers,

were not validly in office at the time of the expulsions. This meant that at the time of the hearings they did not have the power to suspend members.

[7] The applicants in the first application submitted that the IFPs constitution creates structures and clause 4.1 provides for a National Council which shall consist of one hundred members. The term of the National Council is three years. One of the functions of the Council, as provided for in clause 4.22, is to exercise final control over all officials. The National Executive Committee consists of certain office bearers and persons appointed by the President of the IFP. Clause 4.7 provides that the term of the National Executive Committee shall coincide with that of the office bearers. The argument that the applicants in the first application make is that the lifespan of the National Council and the National Executive Committee is therefore limited.

[8] The applicants in the first application raised the following points:

8.1 that the National Council did not lawfully exist in that it did not have one hundred members, as required by clause 4.1 of the IFPs constitution. The word '*shall*' as used in clause 4.1 was peremptory in nature and should be interpreted in a manner consistent with the way that it was used in other parts of the IFPs constitution.

8.2 the expiry date of the National Council, if it in fact did lawfully exist, would have been in June 2007 because the Council was elected in July 2004. However at the hearing of the matter, by agreement with Counsel, the first application proceeded on the

basis that the Council was elected in October 2006 with the term of office expiring in September 2009. This was also the position adopted by Counsel for the applicant in the second application.

8.3 the National Council and the National Executive Committee did not enjoy the protection of clause 3.6 of the IFPs constitution which provided that '*any elected Committee/Officer of the Party shall remain in office for a reasonable period after the expiry of their term to allow for the next election to take place*'. The applicants in the first application submitted that the purpose of clause 3.6 was to save certain party structures and officials for the purpose specified in clause 3.6. Their argument was that because the National Council was neither an elected committee nor an officer of the IFP it did not enjoy the protection of clause 3.6. They further submitted that the National Executive Committee was formed by the National Council, which in turn was elected. Thus the National Executive Committee could not be said to be an elected committee and did not enjoy the protection of clause 3.6.

8.4 if one did accept that the National Executive Committee was protected by clause 3.6 then it must be asked whether more than a reasonable period had passed since the expiry of the Committee's term of office as well as that of its office bearers, since the protection afforded by clause 3.6 only operated for a reasonable period after the expiry of the term of office. The office bearers of the Committee were elected in 2004 and their term of office would have expired in June 2009. Applicants submitted that this meant that a year had already passed and this

amounted to more than a reasonable period.

8.5 the fact that the applicants, at their hearings, did not raise the jurisdictional point *in limine* that the National Council was an illegitimate structure, ought not be held against them. If the National Council was not a legitimate structure at the time of the hearings it did not mean that the structure became legitimate simply because the jurisdictional point was not raised. In any event the fourth applicant would, at this stage, be able to now challenge the legitimacy of the National Council.

[9] For all the above reasons the applicants in the first application submitted that the National Council did not lawfully exist at the time of the expulsions and that the expulsions must accordingly be found to be unlawful and void.

[10] With regards to the elective conference the applicants in the first application contended that if this court finds that the National Council is not in lawful existence then a conference is required because the period for the existence of the power structures of the IFP would have expired. Applicants submitted that the IFPs constitution provides for structures and if those structures were not lawfully in place then members of the IFP could demand that such structures be put in place through elections.

[11] It was also submitted that the group that is currently in power within the IFP do not want to hold the elective conference. According to the applicants there is no accountability within the IFP and those in power have an autocratic approach. Those in *de facto* control of the IFP, so it

was put, were characterised by 'despotism and intolerance of competition'. The first applicant had even sent an open letter to the President of the IFP wherein he noted his concerns about the leadership of the party, but there was no response to his letter. The applicants expressed concern that the elective conference would not take place due to the fact that the conference had already been postponed several times since June 2009.

[12] It was further submitted that a contract existed between a member and the party. It would therefore be an implied right that if relevant structures are not present, a member, as a contracting party, can enforce the contract and request an election. In the present situation, implying a term would assist members to hold the party leadership accountable to its electorate. All that the applicants seek is that the court directs the IFP to honour its contractual obligations to its members.

[13] In the second application Magwaza-Msibi's contentions, albeit in a nuanced form, were similar and can be summed up as follows:

13.1. that Section 10.9 of the IFP'S constitution (see infra) does not empower the National Council of the IFP to hear and decide, as a disciplinary authority, whether a member of the IFP has contravened a disciplinary rule as set out in Section 10.20 of the IFP'S Constitution, since all that Section 10.9 allows the National Council to do is to impose a sanction after the requirements of Section 10.9 are fulfilled. Accordingly the charges preferred against Magwaza-Msibi by resolution dated 2 October 2010 has its genesis in an invalid resolution and falls to be set aside.

13.2. further that the National Council as presently constituted cannot hear the charges pursuant to the aforesaid resolution.

13.3. Magwaza-Msibi is entitled to an order that the IFP should schedule and hold an Annual General Conference to elect the National Council members generally and its National office bearers and that she not be required to attend any disciplinary enquiry until such time as this exercise is realized.

Respondent's argument in both the applications:

[14] The first point made by the IFP in the first application was that the relief sought by the applicants was contradictory. Firstly, it would not be possible for the court to direct the IFP to hold an elective conference if the National Council was found to be an illegitimate structure. And secondly, the applicants seek declaratory relief to operate from the time that the court grants such an order, but the declaratory relief in respect of the National Council is linked to the declaratory relief with regards to the expulsions, which took place in 2009. This was untenable.

[15] The IFP further submitted in the first application that the applicants chose to freely attend their hearings and were expelled in terms of clause 10.9 of the IFPs constitution. Clause 10.9 provides: *'Notwithstanding anything else in this Constitution in its absolute discretion by resolution adopted by two-thirds of its members present, and after having received a report on the relevant facts and heard the affected Member, the National Council may impose any disciplinary sanction against such Member, including but not limited to his or her*

immediate expulsion from the Party or may revoke or commute any sanction imposed by any Disciplinary Committee'. Clauses 2.8 and 2.7 of the IFPs constitution provide that a member should promote the unity of the party and uphold the principles of the party. Even though the constitution did not make provision for a faction, clause 2.9(c) provided a member with the right '*to criticise any shortcomings in the Party at its meetings when there are due reasons and grounds*.'

[16] The applicants in the first application were supporters of Magwaza-Msibi and arranged a gathering outside the structures of the IFP. These actions caused disunity in the party. Magwaza-Msibi had even remonstrated with them for creating disunity in the IFP. It was therefore necessary for the IFP to take steps against the applicants and discipline them. The IFP submitted that there was nothing in the papers to suggest that the first three applicants in the first application were unfairly or unlawfully expelled. It was further submitted that a court should not interfere in a decision taken by a political party which is aimed at disciplining its members.

[17] Further the expelled applicants in the first application were all represented by the same attorney, *Mr Oosthuizen*. The first applicant only raised the jurisdictional point that the National Council was an illegitimate structure after being given the decision of his expulsion. At that stage the attorney for the IFP informed the first applicant and *Mr Oosthuizen* that such a jurisdictional point should have been taken as a point *in limine*. Despite being told this, the second and third expelled applicants chose not to raise any jurisdictional points at their hearings. The expelled applicants failed to do anything else and did not record any displeasure after the hearings.

[18] The IFP submitted that a member of a voluntary association may waive his right to complain of an alleged irregularity by his participation in proceedings of the association. Counsel for the IFP argued that the applicants cannot choose to abide by a process and then argue that it was unlawful. The applicants have in fact, through their conduct, demonstrated an abandonment of the right to complain that they were subjected to a disciplinary process by an unlawfully constituted National Council. However even if the National Council was not properly constituted the applicants have not shown that they were prejudiced.

[19] With regard to the National Council having a hundred members, as provided for in clause 4.1, Counsel for the IFP argued that the applicants reading of the clause was rigid. The word '*shall*', it was submitted, ought to be interpreted benevolently. Although the founding fathers of the IFP had anticipated having structures in all nine provinces, the IFP does not have structures in all nine provinces and therefore it becomes practically impossible to have a hundred members. This court was urged to favour a construction of the word '*shall*' that would result in a more convenient result. In any event during argument it became apparent that in terms of the constitution, the National Council did not at any time have 100 members, for reasons which are not germane, but that this *status quo was* allowed to remain without demur by any of the applicants in both the applications. Magwaza-Msibi had participated in the National Council over the years and in particular had not only deliberated but voted in favour of the expulsion of the first three applicants in the first application.

[20] The IFP disputed the second argument that at the time of the expulsions the National Council's term of office had expired. According to the IFP the National Council was elected in October 2006, which meant that its term expired in October 2009. Whilst clause 4.5 provided that the term of the National Council shall be three years clause 3.6 provided that an officer shall remain in office for a reasonable period after the expiry of his or her term. Due to problems within the IFP and the inability to hold an elective conference, it had become necessary for the members of the National Council to remain in office. The IFP was in any event willing to hold a conference as soon as a proper political climate existed. The IFP therefore submitted that the jurisdictional points raised by the applicants were without merit and that the arguments raised by the applicants were not valid.

[21] With regards to the elective conference, according to the IFP, there is no express obligation in its constitution to hold an elective conference. Reference was made to *Lukhele and others v IFP and others* (Case number 7768/2010), a decision of this court, where IFP members brought an application to compel the party to hold an elective conference. The court dismissed the application with costs. This judgment does not however provide much guidance in this matter other than to confirm that there is no express provision in the constitution of the IFP for the holding of an elective conference. With reference to the violation by the IFP in the first application of the applicants s19 constitutional rights, the IFP submitted that the Constitution of the Republic of South Africa viewed a political party as a voluntary association of individuals united for a common political purpose. The IFP had given good reasons for postponing the elective conference and it did intend holding the conference late last year. The rights of the

applicants have not been violated but have merely been held over until a further date. It is common cause that it took the first, second and third applicants in the first application from 9 May 2010 to 16 July 2010 to launch an urgent application challenging their expulsions. In my view since the matter was not heard on an urgent basis and although the applicants in both the applications may have been less than circumspective in bringing the applications on an urgent basis, no real prejudice has been occasioned to the respondent in the manner in which both the applications were argued and the time I have taken in considering this matter and giving my judgment. I accordingly need not say anything more on the question of urgency nor does it matter, in view of the position I take.

[22] The respondent's essential argument in the second application as to whether Section 10.9 allows the National Council to conduct a disciplinary enquiry and impose a sanction on Magwaza-Msibi and whether the National Council as presently constituted can hear the charges pursuant to and in terms of its resolution of 2 October 2010, is that both these issues are premature and constitutes, what Counsel for the respondent in second application described as, a pre-emptive strike. Further that Magwaza-Msibi's contention that the term of office of the National Council and the National Executive Committee has expired is disingenuous since in one breath she, in her papers, accepts that she is the National Chairperson of the IFP and in the next breath she argues that her term of office has expired. This approbation and reprobation is not tenable in law and the interpretation she constrains for of the relevant provisions of the IFP's Constitution is incorrect and impractical.

Application of the law

[23] A court should be reluctant to interfere in what are essentially political questions and therefore it is not necessary to go into details of the events leading to the first, second and third applicants expulsion from the IFP, suffice to say that from the papers it is clear that there is an internecine conflict going on in the IFP. The schism is manifest in two rival factions and despite Magwaza-Msibi's protestation the schism is between those of her supporters and what has been described, whether charitably or not, as the 'old guard'. The struggle between the factions is for mastery of the soul and membership of the IFP and hence the pejorative terms used by one to describe the other. I do not want to dwell on these tendentious appellations by the one of the other or on the obloquy hurled by the one side onto the other as manifest from the various annexures attached to the papers, since such issues should best play itself out in the political arena. I shall therefore through the process of interpretation determine the proper meaning of the relevant clauses of the IFP's Constitution.

The legitimacy of the National Council

[24] It must be mentioned at the outset that this court finds it strange that the expelled applicants did not have a problem with the legitimacy of the National Council prior to their disciplinary hearings but only choose to attack the legitimacy of the Council after their expulsions. *Mr Oosthuizen* further chose not to raise any jurisdictional points *in limine* at the hearing of the second and third applicants. Applicants submitted that their attorney '*did not raise the issue again because he was already told it was too late to do so*'. This reasoning is simply

illogical.

[25] Clause 4.1 of the IFPs constitution provides that:

> 'there shall be National Council of the Party, which shall consist of one hundred (100) members, seventy five (75) of whom shall be elected by Party Structures'.

It is not disputed that at the time of the expulsions the National Council did not consist of a hundred members. Even the first applicant conceded that the National Council '*has never had 100 members since the election in 2004)*. In any event, as will become apparent, Magwaza-Msibi has been a member of long standing and at no time did she object to the *status quo* and participated fully in all the deliberations of the National Council.

[26] Both parties then asked this court to interpret the word '*shall*', as found in clause 4.1, differently. Applicants favoured a strict approach whilst the IFP wanted a benevolent approach. In *Garment Workers' Union v De Vries and others* 1949 (1) SA 1110 (W) the basic principles and manner of approach were expounded as follows at 1129:

> 'In considering questions concerning the administration of a lay society governed by rules, it seems to me that a Court must look at the matter broadly and benevolently and not in a carping, critical and narrow way. A Court should not lay down a standard of observance that would make it always unnecessarily difficult - and sometimes impossible to carry out the constitution. I think that one should approach such enquiries as the present in a reasonable commonsense way, and not in the fault finding spirit

> that would seek to exact the uttermost farthing of meticulous compliance with every trifling detail, however unimportant and unnecessary, of the constitution. If such a narrow and close attention to the rules of the constitution are demanded, a very large number of administrative acts done by lay bodies could be upset by the Courts. Such a state of affairs would be in the highest degree calamitous - for every disappointed member would be encouraged to drag his society into Court for every trifling failure to observe the exact letter of every regulation.'

Where certain provisions in a constitution are fairly open to two constructions the one having the more convenient result will be followed (see *Deutsche Evangelische Kirche zu Pretoria v Hoepner* 1911 TPD 218 at 232). Similarly in *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) at 500I-501C it was held that in cases of doubt the constitution of a voluntary association should be interpreted so as to lead to preservation of rights rather than their destruction and to a result convenient to its members.

[27] In this case it is clear that there would be chaos if one had to interpret clause 4.1 as being peremptory. The IFP and its members would be thrown into a state of disarray and this would not be a wise thing to do. The better option might be for the IFP to amend its constitution so as to provide clarity in this regard. Presently there is no provision made in the constitution for non-compliance with clause 4.1.

[28] The matter also proceeded on the basis that the term of office of the

National Council expired in October 2009. Clause 3.6 makes reference to a '*reasonable period*' and once again this court must decide on the interpretation of a clause contained in the IFPs constitution. '*Reasonable*' is a relative term and what is reasonable depends upon the circumstances of each case. Even though the term of office of the National Council and its office bearers expired in 2009 the IFP did not have much of a choice other than to retain the office bearers that it had in place at that time. If it did not do so then more turmoil would have resulted within the party. It could not have been the intention of the drafters of the IFPs constitution, that upon the expiry of three years that the National Council would cease to exist. Having regards to the circumstances of this case it must be found that the National Council and its office bearers have been preserved by clause 3.6 since the relevant committee/officers will have to have their necessary powers until the next election in order that relevant decisions relating to the governance of the IFP can be taken on a daily basis.

[29] The applicants have not shown that the illegitimacy of the National Council resulted in them being prejudiced at their hearings. In *Garment Workers' Union v De Vries* supra the following was said at 1123:

> 'Assuming, however, that I am wrong in these conclusions, there is still not a jot or tittle of evidence to prove that the petitioner suffered any prejudice by the selection of the wrong date. In *Spiliopoulos and Another v The Hellenic Community of Johannesburg and Others* (1938 WLD 160 at p. 166) Greenberg, J, pointed out, in a case similar to the present, that an applicant must show that its rights have been violated "by a diminution of the effect of its votes through the voting of a substantial number of persons who were not entitled to vote" - and perhaps I might

> add: or by the failure of persons to vote who were entitled to vote, by reason of the irregularity complained of and who affirm that they would have supported the petitioner's nominee. Nothing of the kind has even been alleged, much less proved.'

At the hearing of the first three applicants in the first application there was a unanimous vote (58) in favour of the expulsions. Therefore no prejudice arose and the applicants have further failed to show that they suffered any prejudice other than that they personally will not be able to vote. Magwaza-Msibi will only know her fate once she attends a disciplinary meeting. Until such time she is a member of the IFP.

Elections

[30] A political party is a voluntary association, and a voluntary association is founded on the basis of mutual agreement which entails an intention to associate and consensus on the essential characteristics and objectives of the association (see *Yiba and others v African Gospel Church* 1999 (2) SA 949 (C). As to the relationship between a party and its members this court was referred to the decision of *Matlholwa v Mahuma and others* [2009] 3 All SA 238 (SCA) where it was observed at para 8 that the relationship is a contractual one, the terms of the contract being contained in the constitution of the party.

[31] The fact that a political party is a voluntary association raises the question as to whether a court has jurisdiction to interfere when the party expels one of its members. In *Snyman v Vrededorp Electoral Division Committee of the National Party of the Transvaal* 1929 WLD 138, the court held that members of the political party did not enjoy any

proprietary interests in the party. The court also held that the membership benefits were limited to the right to associate with the other members in meetings together with the eligibility of holding certain honorary offices. The court found that benefits of this kind are not rights that the court could enforce either by specific performance or by injunction. The court dismissed the application with costs.

[32] The applicant must demonstrate to the court that he or she stands to lose some proprietary interest if he or she is expelled from the party. Proprietary interest has been established in cases where the party members were also municipal councillors by virtue of their membership of the party (see *Sibiya & others v Inkatha Freedom Party & others* [2006] JOL 17118 (N); *Shunmugam and others v The Newcastle Local Municipality and others; The National Democratic Convention v Mathew Shunumugam and others* [2008] 2 ALL SA 106 (N)). Proprietary interest has also been established in cases where the affected party member was also a member of the provincial legislature (see *Max v Independent Democrats and others* 2006 (3) SA 112 (C) at 115G – H; *Diko and others v Nobongoza and others* 2006 (3) SA 126 (C) at 127E – F; *Matlholwa* supra). In all the above matters the applicants held public positions that were external to the party to which they belonged. In the present matter, Mgwaza-Msibi alleged that she is a member of the IFP and is its National Chairperson. She has not alleged that she holds any position outside her party's structures. Furthermore, the IFP constitution provides for subscriptions from members but it does not indicate that the members enjoy shares in the subscription fund. Accordingly, like the first three applicants in the first application, Magwaza-Msibi only stands to lose benefits such as her right to associate with her fellow party members and her eligibility to

hold offices such as National Chairperson. It is submitted that these benefits are not rights that a court can enforce by means of injunction.

[33] Members of the IFP have their rights spelt out in clause 2.9 of its constitution. Two such rights include the right to criticise and the right to request the party to consider any petitions or requests. The first applicant only wrote a letter to the IFP President in June 2010, in which he openly criticised the leadership of the party.

[34] In this case one must take into account the reasons for the elections not taking place. Some of the reasons include the lack of preparedness of the party's branches, the failure of the branches to meet the deadline for inauguration as well as the disunity that prevailed within the party. Further, and this is an extremely important point, namely, that the President of the IFP has been informed by the National Commissioner of Police that the political climate is not right for the holding of a conference because the National Commissioner fears that there will be a violent internecine conflict. If there is a dispute about this very important fact, an application of the *Plascon-Evans* test will result in such dispute being resolved in favour of the IFP.

[35] Nowhere does the constitution make reference to a clear right to an elective conference. The applicants would like this court to imply such a right. In *Jacobs v Old Apostolic Church of Africa and another* 1992 (4) SA 172 (Tk) the court dismissed an application for an order directing the respondents to make the books of account and financial records of the Church available to a member, where the court held that it was clear that a member of the Church, under its constitution, did not enjoy the right to inspect its books of account and financial statements

and that it could not be inferred by necessary implication from the constitution, that the applicant enjoyed such a right.

[36] Whether or not such a right can be inferred is to be determined in accordance with the principles applied in *Union Government (Minister of Railways and Harbours) v Faux, Ltd* 1916 AD 105 where Solomon JA said the following at 112:

> 'Now it is needless to say that a Court should be very slow to imply a term in a contract which is not to be found there. . . . The rule to be applied by a Court in determining whether or not a condition should be implied, is well stated by Lord Esher in the case of *Hamlyn & Co. v Wood & Co.* (1891) 2 Q.B.D 491, as follows:
>
> > "I have for a long time understood that rule to be that a Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

[37] And in *Kelvinator Group Services of SA (Pty) Ltd v McCulloch* 1999 (4) SA 840 (W) at 844A-G Nugent J pointed out that a term, to be imputed, must not merely be reasonable or convenient, but necessary, and that 'there can be no room for such a term if it would be in conflict with the express provisions of the agreement'. Lewis JA re-emphasised this line of reasoning in *Transnet Ltd v Rubenstein* 2006 (1) SA 591

(SCA).

[38] Taking the above considerations into account, this court finds that a term entitling the applicants to demand an elective conference cannot be implied in the IFPs constitution. The result of doing so would be undesirable. At the end of the day the applicants voluntarily bound themselves to the party and its constitution.

[39] The applicants in the first application have not shown that there has been a violation of any of their rights, as contemplated in either s19 of our Constitution or clause 2.9 of the IFPs constitution. In any event, in argument before me, Counsel in the first application did not persist with any argument that the rights of these applicants in terms of s19 of our Constitution had been violated.

[40] As far as the second application is concerned, I am in agreement with Counsel for the IFP that Magwaza-Msibi, having been charged to appear before the National Council under Section 10.9, has the right to appear and submit as a point *in limine* that the National Council does not have any jurisdiction. The principle reason advanced by her for the National Council not having power under Section 5.10.9 to charge her, was that Section 10.9 only applies to the issuing of a sanction and further that the National Council, as presently constituted, may not hear the charges against her. One should not anticipate the outcome of the hearing.

[41] The National Council is the plenary body of the IFP to which all

committees, including the committees dealing with disciplinary matters report. Magwaza-Msibi is no ordinary member but the Chairperson of the IFP and thus the National Council, logistical considerations aside, cannot only bring the charges, but can also hear her and impose the necessary sanction. Both by express language used in Section 10.9 and if needs be by implication, the National Council may so act. A practical and common sense approach to the interpretation of Section 10.9 is that it allows for the National Council, in appropriate cases, to make findings on both guilt and sanction and not sanction only. To hold otherwise would mean that the National Council would, irrespective of any defects in the disciplinary hearing or further representations made by a person who has been the subject to disciplinary proceedings, be bound to impose a sanction once the disciplinary committee has made a finding of guilt. Section 10.9 presents in clear language, the right of an affected member to a hearing before the National Council. This purposive interpretation accords with what actually happened as regards the hearing of the three applicants in the first application. Furthermore Magwaza-Msibi participated fully in this hearing in terms of Section 10.9. Accordingly therefore for Magwaza-Msibi to approach this court at this stage is premature.

[42] Further Section 10.9 specifically states, "*Notwithstanding anything else in the Constitution and at the National Council's complete discretion a resolution may be passed.*' The language of Section 10.9 clearly allows the National Council at its complete discretion; to receive a report containing evidence about a members conduct; hear the member's response thereto; to take a resolution as to whether such member is guilty or as the case may be, not guilty; and if found guilty to impose a sanction. By no stretch of the imagination can it be said that the

National Council acts merely as a rubber stamp to the finding of guilt by a disciplinary committee.

[43] Moreover it is relevant when interpreting a constitution which is akin to a contract, to understand how the parties have applied the terms in the past and how they have interpreted these terms (see *Dettman v Goldfain and another* 1975 (3) SA 385 (A) 399 and *MTK Saagmeule (Pty) Ltd vs Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A) 12. A customary practice which has developed in the application of a constitution or provision is a good guide as to what the drafters intended. In *Lewis v Heffer and others* [1978] 3 ALL ER 354 (CA) Lord Ormrod who concurred with Lord Denning, had the following to say about the interpretation of rules of a political party at 367:

> 'Rules of association of this kind ultimately derive their legal effect from the acceptance, by the members, of the terms and conditions of the association when they join the group. *Where there is an established and well-known and unquestioned practice in use in the association it is some evidence, and indeed it may be strong evidence, that this practice too is part of the terms and conditions which are accepted by persons joining the association*. Consequently there are sound reasons for including such a practice as suspension by the NEC in the rules by a process of implication. If one adopted the contrary view, *it must require an extraordinarily strong and clear case to justify the court in holding a well-established practice like this to be unconstitutional or ultra vires*, more particularly where the organisation concerned is a voluntary, unincorporated and essentially informal body.'(my emphasis)

Lord Denning on the other hand in his opinion found at 363 that:

> 'The NEC have exercised disciplinary powers over the local Labour Parties or their members. When there have been dissensions within a local party, the NEC have held enquiries and reorganised them. They have expelled members and suspended them. All these measures have been reported to the annual party conference and no exception has been taken to them, or no serious exception as far as I can see. *In a body like this, rules are constantly being added to, or supplemented by, practice or usage: and, once accepted, become as effective as if actually written*.'(my emphasis)

[44] As I have stated before Magwaza-Msibi accepted the interpretation accorded by the officials of the IFP until she was charged and this application was brought. It may well be that she sought legal opinion and realized that her interpretation was incorrect and that there was a lacuna in the constitution. This court cannot for that reason re-write the constitution for the IFP. Section 10.9 gives the National Council discretion to pass a resolution, including the resolution passed charging Magwaza-Msibi. Such a resolution must be passed by a two-thirds majority of members of the National Council present. This requirement provided the first three applicants in the first application, and will provide Magwaza-Msibi, with the necessary protection, should she be tried against any particular bias or one sided approach to her hearing. If Magwaza-Msibi would have this court believe that until she sat in the hearing of the first three applicants in the first application, the National Council was properly constituted and unbiased, I find it difficult to

understand how the same members of the National Council would become biased when her matter is to be heard. Even if her complaint is premised on bias of some members of the National Council then she can ask for their recusal. In any event, even if her perception is that her hearing in terms of Section 10.9 will be procedurally unfair, then and in that event she has the necessary remedies both before and after the hearing of the matter. Her approach to court is in my view premature.

[45] In conclusion I might mention that it will not be politically or legally expedient for the IFP to delay the conference for any length of time since an inordinate delay may provide the applicants in both applications with a further opportunity to challenge the decision of the IFP in delaying the holding of the conference.

Order

[46] In the event I make the following order:

46.1 Both the applications are dismissed with costs such costs to include the costs of two Counsel.

PATEL DJP

DATE OF HEARING: **12 NOVEMBER 2010**

DATE OF JUDGMENT: **17 JANUARY 2011**

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