



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

Case No: 17896/2020

In the matter between:

PAN AFRICAN CONGRESS OF AZANIA	1 st Applicant
THE NATIONAL COMMITTEE OF THE PAN AFRICAN CONGRESS OF AZANIA ELECTED AT BLOEMFONTEIN	2 nd Applicant
MZWANELE NHYONTSO	3 rd Applicant
NTSIRI APAA POOE	4 th Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY:	
MS THANDI RUTH MODISE	1 st Respondent
NARIUS MOLOTO	2 nd Respondent
PHILLIP DHLAMINI	3 rd Respondent
MR BENNETT NJOKO	4 th Respondent

Date of hearing: 26 February 2021

Date of Judgment: 26 May 2021 (delivered via email to the parties' legal representatives)

JUDGMENT

PANGARKER, AJ

1. The applicants applied on 1 December 2020 as a matter of urgency for the following relief:
 - (2) *Reviewing and setting the First Respondent's decision to terminate the membership of the Third Applicant as a Member of Parliament and representative of the Second Applicant dated 24 November 2020.*
 - (3) *Pending the outcome of proceedings in the North Gauteng under case number 60975/2020 and the related appeals, declaring that the Third Applicant is the lawful representative of the Second Applicant in the National Assembly.*
 - (4) *Alternatively, that pending the finalisation of the application instituted by the applicants in the North Gauteng High Court Division, under case number 60975/2020, the Third Applicant, shall remain the representative of the Pan Africanist Congress of Azania in the National Assembly.*
 - (5) *That pending the finalisation of the application instituted in the North Gauteng High Court Division referred above, that the First Respondent be and is hereby interdicted and restrained from swearing in the Fourth Respondent as a Member of Parliament and the parliamentary representative of the Pan Africanist Congress of Azania.*
 - (6) *That the Second and Third Respondents are interdicted and restrain from representing that he is a member of the Second*

Applicant entitled to represent the PAC in its parliamentary affairs as their membership was lawfully terminated¹.

2. Prayers (1), (7) and (8) were prayers related to urgency, costs in the event of opposition and further and/or alternative relief. Any reference to page numbers, unless otherwise indicated, is a reference to the record in this application.

3. On 3 December 2020, Lekhuleni AJ granted the following orders:²

1. *That the urgent application is postponed for hearing to Monday, 15 February 2021 or as directed by the Honourable Court;*
2. *The costs of the postponement be reserved for later determination;*
3. *Pending the final determination of the application as directed by the Honourable Court, the notice of termination of the Third Applicant's membership of the National Assembly is set aside and the Speaker is directed to reinstate Mzwanele Nyhotso as a member of the National Assembly representing the Pan Africanist Congress (PAC) with immediate effect³;*
 ...
8. *Pending the finalisation of this application, the respondents will not interfere in any manner whatsoever for the constitutional status of Mr Mzwanele Nyhotso to represent the PAC in any parliamentary forums.⁴*

¹ See Notice of Motion, pages 1-5

² Page 241 – paragraphs 4 to 7 relate to a timetable for filing of affidavits and heads of argument

³ My emphasis

⁴ My emphasis

9. *This order be emailed to the Speaker of the National Assembly for her attention and compliance.*

4. Subsequent to the abovementioned interim order, on 15 February 2021⁵ the Judge President postponed the matter for hearing of the main application to 26 February 2021, with paragraphs 3 and 8 of Lekhuleni AJ's order to remain in place until finalisation of the main application.

5. The initial application heard in December 2020 and the main application were opposed by the 2nd to 4th respondents. The 1st respondent is the Speaker of the National Assembly, Ms Modise, who abides the Court's decision but has filed an explanatory affidavit on the advice of Parliament's legal advisors. The political party in the centre of this application is the Pan Africanist Congress of Azania (PAC).

6. The facts as summarised are as follows:

6.1 There are factions in the PAC involved in applications in the High Court and currently pending in the North Gauteng High Court under case number 60975/20.

6.2 On the one hand there is the group headed by the 3rd and 4th applicants, and on the other hand, that headed by the 2nd to 4th respondents.

6.3 On 8 March 2019, in terms of an order granted by consent by Mavundla J in case number 11224/19 in the Gauteng Local

⁵ The Court file indicates that the matter was not properly allocated to 15 February and/or that the file was received late for allocation

Division, Pretoria⁶, the leadership structure of the PAC would be as follows⁷: the 2nd respondent (Mr Moloto) is the president of the PAC, the 3rd applicant (Mr Nyhontso) is the deputy president, the 4th applicant (Mr Pooe) is the secretary general, the 4th respondent (Mr Njoko) is the deputy secretary general and the 3rd respondent (Mr Dhlamini) is the national chairman of the party. It was also ordered that the PAC would be led and governed by a joint National Executive Committee (NEC) under the leadership of, *inter alia*, the PAC members referred to above. The 3rd applicant would be the PAC representative in Parliament, and the national congress was to be held on 31 August 2019.

- 6.4 On 9 June 2019, the 2nd respondent invoked clause 14.2 of the Disciplinary Code of the PAC's Constitution, wherein he apparently acted in an emergency and removed all members of the NEC and appointed other office bearers and suspended the party's Constitution. Furthermore, the 2nd respondent decreed that the national conference which was due to be held from 29 to 31 August 2019, would be held on 24 August 2019 at Marble Hall, Limpopo. The PAC applied urgently to the Gauteng Division, Pretoria in case number 46162/19 to set aside his decision. Millar AJ found that there was no emergency, no basis for invoking clause 14.2 of the PACs constitution and that decisions taken by NEC on 18 May 2019 were validly taken and remained in effect. In the result, Millar AJ set aside the 2nd respondent's unilateral invocation of clause 14.2 of the PAC's Disciplinary Code and all decrees issued by him from 9 June 2019 to date of his order, which were inconsistent with the NEC's resolutions taken in May 2019.

⁶ MN2, page 25

⁷ I have excluded the remaining three members simply as they are not parties to this application – no disrespect is intended to them by this omission

- 6.5 On 12 August 2019, the 4th applicant as PAC secretary general, informed the 2nd respondent in writing that he was expelled as a member of the PAC with immediate effect⁸. On my understanding from the correspondence, this was pursuant to a resolution adopted by the NEC in August 2019. Prior to the aforementioned correspondence, the Secretary of the National Assembly sent MN5⁹ to the 4th applicant acknowledging notification of the suspension of the 2nd respondent as president of the PAC. On 16 October 2019, the 3rd respondent was informed by the 4th applicant that he was expelled from the PAC¹⁰.
- 6.6 The applicants held a congress in Bloemfontein on 29 and 31 August 2019, and the 2nd respondent held a congress at Marble Hall on 24 August 2019, the validity of which the applicants dispute in the pending North Gauteng High Court application under case number 60975/20. In summary, the 3rd applicant was elected as the president of the PAC at the 29 – 31 August congress, while the 2nd respondent was elected as president of the PAC on 24 August 2019 – hence the reference to the two factions within the PAC.
- 6.7 On 23 August 2019, leave to appeal the Millar AJ judgement was granted in favour of the 2nd respondent to the Supreme Court of Appeal (SCA) and in addition thereto, an order for execution of the judgement appealed against in terms of section 18 (3) of the Superior Courts Act¹¹. The 2nd respondent invoked section 18 (4) of the Act and exercised his automatic right of appeal, in terms of which the Millar AJ order was suspended, pending the outcome of such appeal.

⁸ MN4, page 41

⁹ Page 42

¹⁰ MN11, page 56-7

¹¹ 10 of 2013

- 6.8 On 1 September 2019, the 3rd applicant was informed that his membership of the PAC is terminated pursuant to a resolution taken at a meeting of the PAC's NEC¹². Therein, he is informed of the provisions of section 47(3)(c) of the Constitution. In PD5¹³, he is reminded that he is to vacate his seat in the National Assembly.
- 6.9 On 30 October 2020, the Chief Registrar of the SCA addressed correspondence to the legal representatives for the PAC and the 2nd respondent (who is the appellant in SCA) on instruction from the presiding Judge, that given that a national congress was held on 24 August 2019, and that clause 14.2 of the PAC Constitution was amended, the SCA raised a query whether its decision by the SCA would have any practical effect and whether the parties were not better advised to seek an agreement on the way forward and settle their differences rather than through a pending appeal. The registrar wrote that the parties were required to consider seriously whether the appeal should be persisted with and an urgent response was required¹⁴. In MN13B, and again on the instruction of presiding Judge, the Chief Registrar addressed the parties, indicating that the *"warring factions continue to be in dispute about who the PAC's legitimate representatives should be"* and that *"...that issue should be contested in a fresh approach to the high court"*¹⁵.
- 6.10 On 3 November 2020, the 2nd respondent's attorney' removed the application for leave to appeal from the SCA's roll¹⁶.
- 6.11 On 20 November 2020 under case number 60975/20 in the North Gauteng division of the High Court, Pretoria, the PAC, its NEC

¹² PD3, page 472

¹³ Page 474-5

¹⁴ MN13A, pages 645

¹⁵ MN13B, page 66

¹⁶ MN12, page 58

elected in Bloemfontein, and the 3rd and 4th applicants applied for relief that the NEC held on 24 and 25 August 2019 (which found the 2nd respondent to be the president of the PAC), is to be declared unlawful and invalid; and that the NEC of the PAC held at Bloemfontein on 29 and 30 August 2019, comprises the legitimate leadership of the PAC. It furthermore sought an order setting aside the election of 2nd respondent as the president of the PAC and all decisions and resolutions taken by the NEC on 24 and 25 August 2019.

- 6.12 In a further matter under case number 012/2019 in the Electoral Court at Bloemfontein, that Court was not prepared to make any decision regarding the PAC until the SCA ruled on the matter and the appeal pending before it.
- 6.13 On 2 September 2019, the 3rd respondent addressed a letter, TM1¹⁷, to the 1st respondent setting out the history of events, the Millar AJ orders and the pending appeal to the SCA. A further letter dated 6 September 2019¹⁸, informs the 1st respondent that the 4th respondent is the nominated PAC member for the National Assembly and that the 3rd applicant had ceased to be a member of the PAC. The letter refers to section 47 (3)(c) of the Constitution. There was a request that the 3rd applicant be relieved from occupying the PAC Parliamentary position as from 2 September 2019. On 2 November 2020, the 3rd respondent addressed TM3¹⁹ to the 1st respondent, indicating that the appeal in the SCA was removed from the roll and that the attached note/letter from the SCA's registrar provided direction that the PAC Congress held on 24 August 2019 could only be set aside by a further application to Court, and there was thus no reason

¹⁷ Page 231-2

¹⁸ TM2, pages 233-4

¹⁹ Pages 236-7

why the 4th respondent should not be sworn in as a member of Parliament representing the PAC.

- 6.14 Pursuant to the above correspondence, the 1st respondent on 24 November 2020 in a letter which forms the subject matter of this application and addressed to the 3rd applicant²⁰, stated the following:

“Dear Mr Nyhontso

LOSS OF MEMBERSHIP OF THE NATIONAL ASSEMBLY

A letter was received from Mr P Dhlamini, the Secretary General of the Pan Africanist Congress of Azania (PAC), dated 2 November 2020, confirming the removal of an appeal relating to the leadership of the PAC from the supreme Court of Appeal roll on 3 November to by agreement, and a copy of the letter is attached

I am advised that the effect of the removal of the matter from the Supreme Court of Appeal is that the decision to terminate your membership of the PAC is valid and lawful, unless it is challenged successfully in a court.

As you are aware, section 47(3)(c) of the Constitution provides that “[a] person loses membership of the National Assembly if that person ceases to be a member of the [political] party that nominated that person as a member of the Assembly”.

In light of the above, you have ceased to be a member of the National Assembly with immediate effect.

...”

²⁰ MN6, page 43

Reviewing and setting aside the 1st respondent's decision – Prayer 2

7. The order sought seeks a review and setting aside of the 1st respondent's decision to terminate the membership of the 3rd applicant as a member of the National Assembly and representative of the 2nd applicant by virtue of the letter dated 24 November 2020, MN6. The 3rd applicant's case is that while he was elected president of the PAC and its sole representative in the National Assembly, he received a call from one of the secretaries in Parliament bringing MN6 to his attention. Subsequently, he held discussions with the Secretary General of the PAC and it was agreed that the Speaker's decision was unlawful and should be challenged. He submits that the resolution of the NEC permits him and the 4th applicant to institute the application on behalf of the PAC. The applicants' attorneys requested the 1st respondent to retract her termination letter but in the absence of a response from her, the urgent application was then launched.

8. The 3rd applicant has not availed himself of the procedure in terms of rule 53 but brought the application by way of Notice of Motion. The question is whether the 1st respondent made a decision²¹ to terminate the 3rd applicant's membership of the National Assembly, and whether this amounts to an administrative action which may be set aside. Only the 2nd to 4th respondents oppose the relief sought. The averments by the respondents are essentially similar and not set out in any great detail in this judgment in light of my ultimate finding on the matter. In summary, they submit that the 1st respondent did not make a decision to terminate the 3rd applicant's membership of the National Assembly but that by operation of the law, section 47

²¹ My emphasis

(3)(c) of the Constitution applied, and in the circumstances therefore, the 3rd applicant's case for the relief in prayer 2, is not competent²².

9. It is common cause between all the parties that the determination of membership of the National Assembly is premised upon the nominated person/member being a member of the particular political party which has a seat in the National Assembly. Furthermore, and specifically with regard to this matter, the PAC has one seat in the National Assembly. All the parties in this matter including the 1st respondent are *ad idem* that it is the political party which decides which of its members shall represent the party in the National Assembly. In My Vote Counts NPC v Speaker of the National Assembly and Others²³, on the question as to whether information on political parties' private funding was required for the exercise and protection of the right to vote, Cameron J writing for the minority, stated as follows at paragraph 33 of the judgment, which referred to section 47 (3)(c) of the Constitution²⁴:

“Our constitutional order places the key to elective office and executive power in the hands of political parties. Members of the National Assembly and provincial legislatures are not directly elected. Nor is the President or the Deputy President. The same applies to provincial and national executives. Under the current electoral system it is political parties, and parties alone, that determine which persons are allocated to legislative bodies and the executive. If you cease to be a member of the party that nominated you, you lose your membership of that legislature²⁵. ...”

²² See section 1 of the Promotion of Administrative Justice Act (PAJA) 3 of 2000

²³ 2016 (1) SA 132 (CC)

²⁴ See Footnote 68 of the My Vote Counts judgment

²⁵ My emphasis

10. Section 47(3) of the Constitution states as follows:

- (3) *A person loses membership of the National Assembly if that person-*
- (a) *ceases to be eligible;*
 - (b) *is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or*
 - (c) *ceases to be a member of the party that nominated that person as a member of the Assembly*²⁶.

11. In order to determine whether prayer 2 is competent, it necessitates a finding as to whether the 1st respondent's conduct in relation to MN6, constitutes an administrative action which may be reviewed and set aside. In terms of section 1 of the Promotion of Administrative Justice Act (PAJA), an '**administrative action**' is defined, unless the context indicates otherwise, as follows:

any decision taken, or any failure to take a decision, by-

- (a) *an organ of state, when-*
 - (i) *exercising a power in terms of the Constitution or a provincial constitution; or*
 - (ii) *exercising a public power or performing a public function in terms of any legislation; or*
- (b) *a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include...*²⁷

²⁶ My emphasis

²⁷ The list of exclusions at paragraphs (aa) to (ii) are not relevant

12. The prerequisite for an administrative action requires the taking or making of a decision, or the failure to make a decision. The noun '*decision*' may be defined as follows: '*a conclusion or resolution reached after consideration; the action or process of deciding something or resolving a question; the ability or tendency to make decisions quickly; decisiveness*²⁸; *a choice that you make about something after thinking about several possibilities*²⁹. Thus, for the termination of the 3rd applicant's membership of the National Assembly to constitute a decision taken by the 1st respondent as Speaker of the National Assembly, the latter must have been seized with one or more choices or possibilities of action and reached a resolution which she then expressed in MN6.

13. MN6 comprises of at least four paragraphs and a few separate sentences. In the first paragraph, the 1st respondent informs the 3rd applicant that she received a letter from the 3rd respondent, the Secretary General of the PAC, dated 2 November 2020, which confirmed the removal of an appeal relating to the leadership of the PAC from the court roll of the SCA on 3 November 2020 by agreement. A copy of the letter is attached for the attention of the 3rd applicant. The second paragraph indicates to the 3rd applicant that she (the 1st respondent) is advised that the effect of the removal from the SCA's court roll is that the decision to terminate the 3rd applicant's membership of the PAC is valid and lawful unless it is challenged successfully in a court. I pause to point out that in this paragraph, the 1st respondent does not state who advised her; and she certainly does not allude to the 3rd respondent being the person who advised her. However, the facts indicate that after receiving

²⁸ Oxford Languages online on Google.com

²⁹ See dictionary.cambridge.org

correspondence from the 3rd respondent, the Speaker sought legal advice. This is apparent from paragraphs 3.1 and 19 of her explanatory affidavit³⁰. Clearly, based on the legal advice she obtained after receipt of TM3 and TM4³¹, she addressed MN6. In paragraph 3 of the letter, the 3rd applicant's attention is drawn to section 47(3)(c) of the Constitution which, it is indicated, the 3rd applicant is aware of. Section 47(3)(c) is set out, and in paragraph 4, the 1st respondent informs the 3rd applicant that in light of the 'above', he (has) ceased to be a member of the National Assembly with immediate effect.

14. On further consideration of MN6, it is apparent that the 1st respondent does not indicate that she had decided or concluded that the 3rd applicant's membership ceased. My understanding of her reference to 'in light of the above' in paragraph 4, is a reference to the letters received, the legal advice received and the provision of section 47(3)(c) of the Constitution. Quite importantly, the 1st respondent states that the loss of membership of the National Assembly in terms of section 47(3) (c) is not a decision taken by her but occurs by operation of the law, and that her role is to inform the member of his or her loss of membership in the National Assembly once the final and certain loss of membership to the party is confirmed. In his reply, the 3rd applicant takes issue that the 1st respondent only decided to remove him as a member after false submissions by the 2nd and 3rd respondents' to her and had failed to engage him on the matter³². It is imperative to note that while the 1st respondent became aware with the passage of time, of leadership disputes and factions within the PAC, it was clearly not her role to become involved in intraparty politics, nor to decide on the

³⁰ It is noted that the commissioned affidavit is to be found in the leave to appeal bundle in the Court file, not forming part of the index of the urgent and main applications

³¹ TM4

³² Page 487

legitimacy of one structure of the PAC claiming leadership over the other. Furthermore, the fact that she obtained legal advice negates the view held by the 3rd applicant that the 1st respondent should have engaged him prior to sending MN6.

15. During the proceedings, the applicants' legal representative sought to hand up a notice of application in the SCA case 1176/2019 in relation to the Millar AJ judgment which indicates that the appeal was to be reinstated and that the late filing of the appeal record be condoned. Submissions and heads of argument were received and considered. The affidavit deposed to and attached to the notice of application in the SCA seeking the reinstatement of the 3rd respondent's appeal in that matter is dated 17 June 2020. I appreciate that this occurred during the period of strict lockdown during the course of last year but the probabilities indicate that the application was filed in mid-2020 at the SCA. That being the case, it begs the question why these documents were not attached as annexures to the founding affidavit herein. Secondly, given the time period between mid-2020 and the November 2020 letter, it seems for all intents and purposes that at the very least, from the Chief Registrar's communication to the parties, that there was a pending appeal at the time MN6 was sent. Hence, I agree particularly with the 2nd to 4th respondents' views that the removal from the roll does not equate with a withdrawal of the matter from the SCA's roll, as indicated in the founding affidavit. While I am inclined to accept the notice and affidavit mainly in the interests of justice³³, and notwithstanding that it should have been included in the application from the outset, the acceptance thereof does not change the outcome of the matter.

³³ Copies are placed in the Court file

16. The above leads me to conclude that at the time the information regarding the appeal was relayed to the Speaker, the position regarding the appeal was correct. Based on legal advice obtained, she was satisfied that the 3rd applicant's membership of the party had been terminated. In addition thereto, and with reference to section 47(3)(c) which was drawn to the attention of the 3rd applicant in her letter, the 1st respondent had to satisfy herself that the 3rd applicant's membership had been terminated, and from her affidavit, I accept that she was indeed so satisfied. Furthermore, I agree with the respondents' views that MN6 amounts to correspondence informing the 3rd applicant of the provisions of section 47(3)(c), and that the consequences of his termination of membership of the PAC automatically led, by operation of the law, to him ceasing to be a member of the PAC in the National Assembly. My finding is thus that no decision was taken by the 1st respondent when she addressed MN6 - the termination of the 3rd applicant's membership flowed from the provision of section 47(3) (c)³⁴.

17. In light of the above findings, and the absence of a decision by the 1st respondent, it cannot be found that any administrative action in terms of PAJA occurred which warrants a review or setting aside by this Court³⁵. In the result, prayer 2 must fail. In addition, the latter part of prayer 2 seeks a review and setting aside of the 1st respondent's decision to terminate the 3rd applicant's membership as representative of the 2nd applicant³⁶. This relief is wholly incompetent as the 1st respondent has nothing to do with the 3rd applicant's membership of the NEC of the PAC. This issue falls full square within the purview of the powers of the PAC.

³⁴ Frans v Grootbrakrivierse Munisipaliteit en andere 1998 (2) SA 770 (C)

³⁵ See Democratic Alliance and Others v Oudtshoorn Municipality and Others; In re Democratic Alliance and Another v Oudtshoorn Municipality [2014] ZAWCHC 132

³⁶ My emphasis

Declaratory relief in prayers 3 and 4

18. The applicants seek declaratory relief in prayer 3, and alternatively prayer 4 of the Notice of Motion. Section 21(1) (c) of the Superior Courts Act grants the High Court the discretion to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. It is common cause that prior to the 29 August 2019 congress by the breakaway PAC group in Bloemfontein, the applicants recognised the 2nd respondent as the president of the PAC, and the 3rd and 4th respondents as the members in leadership positions in the PAC. What transpired on 1 September 2019, and at the time that the 3rd respondent was a recognised member and Secretary-General of the PAC, is that the membership of the 3rd applicant was terminated, and subsequently on 25 September 2019, he was advised that he should vacate the PAC Parliamentary seat with immediate effect ³⁷. The issue of termination of his membership was never take up with the PAC.

19. The 2nd to 4th respondents question whether the applicants are entitled to declaratory relief. I note with interest that the 1st applicant is cited as the *Pan African Congress of Azania* on the Notice of Motion as well as the founding and supplementary affidavits. However, at paragraph 3 of the 3rd applicant's founding affidavit³⁸, he cites and refers to the 1st applicant as the *Pan African National Congress of Azania (the PAC)* with its offices at 203, 2nd floor, 20 Kruger Street, The Main Change building in Maboneng, Johannesburg. It is also noted that in very early correspondence of the

³⁷ PD3 and PD5, pages 472-5

³⁸ Page 7

PAC in May 2019, its address is at 10th floor, office 1005, Romi-Lee Building, Cnr Eloff and Marshall Streets, Marshall Town, Johannesburg. In the early correspondence, the website is www.pac.org.za, while the website on communication sent by the 4th applicant³⁹ is www.pacofazania.org.za. The problem I have is that in referring to the 1st applicant as the PAC, various concerns arise: firstly, the political party in question is the *Pan Africanist Congress of Azania*, often referred to as the PAC; secondly, the 1st applicant, as illustrated earlier in this paragraph, seems to be a different group or party, to wit, the *Pan African Congress of Azania*; thirdly, the description or citation of the 1st respondent changes again in paragraph 3 to the *Pan African National Congress of Azania*, and while the letterhead may seem to be the same, the address, contact details and website are different to that of the PAC⁴⁰. These differences are not explained by the 3rd or 4th applicants and in this regard, I must agree with the 3rd and 4th respondents particularly, that the cited 1st applicant, is not the *Pan Africanist Congress of Azania*, otherwise known as the PAC.

20. It would have been prudent and correct to cite as a party, the *Pan Africanist Congress of Azania*. I cannot simply be asked to assume or accept that the PAC is before the Court in this application, and in the absence of a joinder of the *Pan Africanist Congress of Azania* as a party in the application, the applicants have problems with the relief sought. In my view, as the membership of the 3rd and 4th applicants of the PAC was terminated in September 2019, the question as to what direct and substantial interest they would have in the subject matter of the application, being the representation of the PAC in the National Assembly, must be asked. Secondly, as to

³⁹ MN4, page 41; MN15B, page 71

⁴⁰ As per its May 2019 letterhead

an existing, future or contingent right or obligation, my view is that as the 3rd applicant's membership of the PAC was terminated, any right he would have had as a representative of the party and thus a member of the National Assembly would have ceased; it would only have arisen when he becomes a member of the PAC, and as indicated, section 47(3)(c) of the Constitution operates automatically.

21. In my view, prayer 3 cannot be granted in view of the pending litigation in the North Gauteng High Court on the disputed conference and leadership issues, but more importantly, the provisions of section 47(3)(c) of the Constitution. Furthermore, prayer 4, for all intents and purposes even though raised as an alternative, seems to be similar relief as prayer 3. It would also be contrary to section 47(3) (c) to grant such an order. In addition, it is also unclear which party's or group's interests the 3rd applicant would represent, particularly in light of the discrepancies I highlight above as to the citation or description of the 1st respondent. In my view, prayers 3 and 4 should be dismissed.

Interim interdict (prayer 5)

22. An applicant who seeks an interim interdict is required to show a *prima facie* right, a reasonable apprehension of irreparable or imminent harm, that the balance of convenience favours the granting of the interdict and that there is no other satisfactory alternative remedy available⁴¹. It must be remembered that the 1st respondent made no decision which terminated the 3rd applicant's membership in the National Assembly. By operation of section 47(3)(c), the termination of membership in the

⁴¹ Setlogelo v Setlogelo 1914 AD 221

National Assembly was automatic, and there is simply no basis for the submission that the 1st respondent committed a harm or that there is imminent harm to the applicants if she fulfils her constitutional role or duties as required of her as Speaker in the National Assembly. Furthermore, in circumstances where the 3rd applicant lost membership of the National Assembly, by operation of section 47(3)(c), it cannot be said that he has a *prima facie* right to interdictory relief. As to an alternative remedy, the 3rd and 4th applicants could have exhausted their remedies within the structures of the PAC but failed to do so as no challenge was mounted to the termination of their membership. In my view, the balance of convenience does not warrant the granting of prayer 4 even as an alternative relief, and my finding is that no case is made out for the granting of prayers 3 and/or 4 for any of the applicants.

Final interdict (prayer 6)

23. In respect of a final interdict, the threshold is higher as the applicants need to show a clear right⁴² (as opposed to a *prima facie* right), an injury actually committed or reasonably apprehended, and the absence of a similar alternative remedy. I have already stated earlier that prior to the August congresses, the picture which prevailed within the PAC was that the 2nd, 3rd and 4th respondents were in recognised leadership roles. In their capacities in the leadership roles, the 2nd and 3rd respondents were entitled to act as they did and notified the 1st respondent of changes within the PAC structure. The applicants would have to overcome a greater hurdle by showing that there exists a clear right which warrants the granting of a final interdict as requested. In my consideration, prayer 6, notwithstanding the requirements needed

⁴² See Setlogelo v Setlogelo

for a final interdict, is with respect, confusing or badly structured. I say so because the 2nd applicant is the NEC congress elected at Bloemfontein and an interdict is sought preventing the 3rd and 4th respondents from representing the 2nd applicant in its parliamentary affairs. Once again, it turns on the legitimacy of which congress is the lawful or legitimately elected NEC of the PAC, which is a determination pending in another Court. The very detailed submissions of the respondents are accepted and in my view, there is simply no basis for a final order in terms of prayer 6 and the evidence indicates that the requirements for a final interdict are in any event, not fulfilled.

Conclusion

24. A few days prior to delivery of this judgment, I requested from the registrar to enquire from the applicant's attorneys as to the status of the matter in the North Gauteng High Court and was informed that the judgment has been reserved⁴³. It is so that at the outset of the proceedings on 26 February 2020 it was submitted that this application may become academic or moot once there is a judgment in the North Gauteng High Court determining the true leadership of the PAC. The issues as to the disputed leadership of the PAC, and which congress is lawful, are not matters which I can comment on, yet when I have regard to the applicants' case, it seems that I am expected to make a pronouncement that the 2nd applicant is the legitimate or lawful NEC of the PAC.

25. While the matter was brought as an urgent application in early December 2020, it was at a time when the applicants knew that there was a pending matter which some

⁴³ Correspondence is placed in the Court file

of the applicants had launched in the North Gauteng High Court. Rather than await the outcome of that matter, the applicants embarked on this application, and obtained interim orders on the premise that the 1st respondent took a decision terminating the 3rd applicant's membership in the National Assembly. The entire application is premised on the view that it is the applicants who/which are the leaders of the PAC, and this is stated as a fact. Furthermore, notwithstanding the fact that the *locus standi* of the 2nd applicant was placed in dispute, and confusion and a lack of clarity as to the 1st applicant reigns, the applicants persisted with the application. In my view, they should have been alive to the fact that in terms of the Plascon-Evans⁴⁴ rule, where factual disputes arise, relief should only be granted if the facts stated by the respondents, together with the admitted facts in the applicants' affidavits, justify the orders sought. This was most certainly not the case in this matter, and in the result, the application falls to be dismissed.


Orders

26. In the result, I grant the following orders:

26.1 The interim orders granted on 3 December 2020 are set aside.

26.2 The application is dismissed, with costs, including reserved costs referred to in paragraph 2 of the order of 3 December 2020.

⁴⁴ Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623

**M. PANGARKER****ACTING JUDGE OF THE HIGH COURT**

For applicants:	Adv. T Masuku SC Adv. Mtsweni
Instructed by:	Ndumiso Attorneys
For 2 nd respondent:	Att. Mr L J Van Rensburg
Instructed by:	Van Rensburg & Co.
For 3 rd Respondent:	Mr P Dlamini In person
For 4 th Respondent:	Att. Mr C M Baartman
Instructed by:	CMB Attorneys