CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 109/12
[2012] ZACC 31

In the matter between:

MPHO RAMAKATSA	First Appellant
TUMISO MBETHE	Second Appellant
MAJORO MPURU	Third Appellant
ELISHA MBANGULA	Fourth Appellant
CECILIA CHAKA	Fifth Appellant
NTSHIWA MOROLLOANE	Sixth Appellant
and	
ELIAS MAGASHULE	First Respondent
THABO MANYONI	Second Respondent
WILLIAM BULWANA	Third Respondent
MAMIKI QABATHE	Fourth Respondent
MSEBENZI ZWANE	Fifth Respondent
TATE MAKGOE	Sixth Respondent
BUTANA KHOMPELA	Seventh Respondent
OLLY MLAMLELI	Eighth Respondent
SISI MABE	Ninth Respondent
SAM MASHINENE	Tenth Respondent
FEZI NGUMBENTOMBI	Eleventh Respondent

MALEWATLE NTHEDI	Twelfth Respondent
SEBENZILE NGANGELIZWE	Thirteenth Respondent
MANANA TLAKE	Fourteenth Respondent
SISI NTOMBELA	Fifteenth Respondent
MANANA SECHOARA	Sixteenth Respondent
SARAH MOLELEKI	Seventeenth Respondent
MADALA NTOMBELA	Eighteenth Respondent
JACK MATUTLE	Nineteenth Respondent
MEGGIE SOTYU	Twentieth Respondent
MATHABO LEETO	Twenty-First Respondent
JONAS RAMOGOASE	Twenty-Second Respondent
GERMAN RAMATHEBANE	Twenty-Third Respondent
MAX MOSHODI	Twenty-Fourth Respondent
MADIRO MOGOPODI	Twenty-Fifth Respondent
AFRICAN NATIONAL CONGRESS	Twenty-Sixth Respondent

Heard on	:	20 November 2012 and 29 November 2012
Orders granted	:	21 November 2012 and 14 December 2012
Reasons for judgment	:	18 December 2012

REASONS FOR JUDGMENT

YACOOB J (Mogoeng CJ concurs in the judgment in its entirety; Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J and Zondo J concur in the judgment except for [37]):

Introduction

[1] This case came before us as an urgent application for leave to appeal directly to this Court against a judgment of the Free State High Court.[1] That court dismissed an application aimed at, amongst other things, challenging the propriety of the Free State Provincial Conference of the African National Congress (ANC). The conference was held during the period 21-24 June 2012. The High Court did not consider the merits of the application but dismissed the application on the basis that the case was not properly before it because of procedural defects.

[2] We heard the urgent application on 20 November 2012 and, on 21 November 2012 made the following order:[2]

> "1. Leave to appeal is granted.
>
> 2. The merits of the substantive application before the Free State High Court, Bloemfontein in case number 3453/2012 are set down for hearing on Thursday 29 November 2012 at 10h00 or so soon after 10h00 as the matter can be heard.
>
> 3. All the respondents who would have opposed the application in substance in the High Court are required to file their full opposing affidavits, if any, in this Court by Monday 26 November 2012.

[1] *Ramakatsa and Others v Magashule and Others* [2012] ZAFSHC 207.

[2] CORAM: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J, Yacoob J and Zondo J. Cameron J formed part of the quorum on the application for leave to appeal only. Van der Westhuizen J did not form part of this quorum but was part of the quorum that heard the appeal on the merits.

4. The applicants must file their replying affidavits, if any, by Tuesday 27 November 2012.

5. The applicants and any of the respondents wishing to present oral argument to the Court on Thursday 29 November 2012 must file their written argument by 12h00 on Wednesday 28 November 2012.

6. Written reasons will be provided in due course."[3]

We heard argument on the appeal on the scheduled date.

[3] This judgment therefore does two things: it provides reasons for the order granting leave to appeal and expresses a view on the appeal.[4]

[4] Consequent upon the granting of leave to appeal, the applicants in the High Court and in the application for leave to appeal are now the appellants. The respondents in the High Court and in the application for leave to appeal are the respondents in the appeal.

[5] The six appellants[5] are members of the African National Congress (ANC) in the Free State province. The first two appellants are from ANC Branches described as Wards 25 and 46 respectively, which are in the Motheo Region of the Free State; the third appellant is from the Branch described as Ward 3 Branch in the Thabo

[3] The Order wrongly states that Froneman J concurred in it. It is a patent error that will be corrected.

[4] It must be noted that the Court was differently constituted when the application for leave to appeal was heard and during the appeal. Van der Westhuizen J did not hear the application for leave to appeal and Cameron J was not present during the appeal.

[5] Mpho Ramakatsa, Tumiso Mbethe, Majoro Mpuru, Elisha Mbangula, Cecilia Chaka and Ntshiwa Morolloane.

Mofutsanyana region and lives in Ladybrand; the fourth appellant is from the Branch described as Ward 30 in the Lejweleputswa region and lives in Welkom; and the fifth and sixth applicants are both resident in Zastron and are members of the Branch described as Ward 1 of the Xhariep region. All the applicants are from four of the five regions of the ANC in the Free State province and from five of its 316 Branches. There is no appellant before us from the fifth region of the Free State ANC, Fezile Dabi.

[6] The application is aimed essentially at setting aside as invalid the Free State Provincial Conference of the ANC and all its outcomes on the basis that there were irregularities in many of the Branch meetings that elected delegates to the Provincial Conference.

[7] Twenty five of the twenty six respondents are the people who were elected to constitute the Provincial Executive Committee (PEC) of the ANC in the Free State province. It is the validity of this conference which is, amongst other things, challenged. The first two respondents are the provincial chairperson[6] and deputy chairperson[7] respectively; the third and fourth respondents are the provincial secretary[8] and deputy provincial secretary;[9] the fifth respondent is the treasurer in the

[6] Elias Magashule.

[7] Thabo Manyoni.

[8] William Bulwana.

[9] Mamiki Qabathe.

province;[10] and the sixth to twenty fifth respondents are the twenty additional members of the PEC elected at the disputed Conference.[11]

[8] The twenty-sixth respondent is the national formation of the ANC.

[9] Before dealing with the application for leave to appeal and the appeal, however, the facts and the broad basis of the applicants' claim must be set out. The applicants say that they bring this claim in terms of section 38 of the Constitution[12] on the basis that their right to participate in the activities of a political party[13] have been infringed. They claim to act in their own interest, and also on behalf of and in the interests of the class of persons who are members of the ANC as well as in the public interest. They attach (and this is not disputed for present purposes) documents containing 2250 signatures of members of the ANC and 2520 voting citizens of the Republic of South Africa, resident in the Free State.

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[10] Msebenzi Zwane.

[11] Tate Makgoe, Butana Khompela, Olly Mlamleli, Sisi Mabe, Sam Mashinene, Fezi Ngumbentombi, Malewatle Nthedi, Sebenzile Ngangelizwe, Manana Tlake, Sisi Ntombela, Manana Sechoara, Sarah Moleleki, Madala Ntombela, Jack Matutle, Meggie Sotyu, Mathabo Leeto, Jonas Ramogoase, German Ramathebane, Max Moshodi and Madiro Mogopodi.

[12] Section 38 of the Constitution:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

[13] In terms of section 19 of the Constitution.

[10] The relief sought was premised on three inter-related grounds: (a) common law contractual grounds; (b) constitutional rights in terms of section 19(1)(b) which had been infringed; and (c) judicial review under PAJA.[14] This judgment will concern itself mainly with the first ground, namely, whether the contractual rights of the applicants as members of the ANC were breached. This will be done in the context of whether complaints of the applicants amount to an infringement of the right to participate in the activities of a political party.

The High Court

[11] No opposing affidavits were filed in the High Court. Instead, the first twenty five respondents filed affidavits taking certain technical objections.

[12] The High Court, in upholding each of the objections raised by the respondents, held that—

a) publication of the notice of motion in a newspaper without court authorisation rendered the notice itself invalid;[15]

b) it was impermissible to require that people who wish to oppose the application be given copies of the papers only if they should choose to oppose the application;[16]

[14] Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[15] Above n 1 at paras 54-5.

[16] Id at paras 58-60.

c) there had not been proper service on the national formation of the ANC or on the Free State PEC;[17]

d) there had been improper service on all the respondents except the first respondent;[18]

e) the failure to cite each of the 316 Branch Executive Committees or, at least, those Branch executive committees whose meetings were contended to have been irregular was fatal to the application;[19]

f) each of the delegates of the Branches whether elected regularly or irregularly had a right to be joined in the proceedings;[20]

g) the action was premature because the decision by the ANC to approve the proceedings at the conference of the PEC was taken on 14 September 2012, about three and a half weeks after the proceedings had been instituted in the High Court;[21] and

h) the applicants had not exhausted their internal remedies.[22]

Reasons for the grant of leave to appeal[23]

[13] This Court will grant leave to appeal if the appeal raises a constitutional issue and if it is in the interests of justice to do so.

[17] Id at paras 69-73.

[18] Id at para 66.

[19] Id at para 87.

[20] Id at para 88.

[21] Id at paras 96-8.

[22] Id at para 108.

[23] As will appear later, Froneman J did not concur in the order granting leave to appeal.

[14] In my view, the appeal did indeed raise a constitutional issue. As already indicated the Constitution confers upon all citizens the right to participate in the activities of a political party. The appellants contended in the application for leave to appeal that this right has been denied to them or has been infringed because the irregularities that were complained of went so far as to prevent them from participating in the activities of the ANC appropriately and properly. Their argument was that their right to participate in a political party included a right to be governed by properly elected members of the ANC in the province.

[15] The system of proportional representation provided for in our Constitution means that a political party is entitled to representation in Parliament in proportion to the number of votes it obtains in an election relative to the total number of votes cast. In other words, of the 400 members of the National Assembly, a political party that succeeds in securing the vote of, say, 60% of the electorate will have 240 of 400 seats in the National Assembly.

[16] I do not think that the Constitution could have contemplated political parties could act unlawfully. On a broad purposive construction, I would hold that the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution. This means that our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party. The case does raise a constitutional matter.

[17] I have also come to the conclusion that it is in the interests of justice to hear the appeal. The appellants make serious allegations of irregularity and impropriety against a political party. The allegations go to the core of the propriety of the election in the Free State province. If it turns out that the appellants are right in their allegations, the political party in the whole of the province will be governed over the next four years by an irregularly appointed provincial leadership. And the size of the political party is not necessarily decisive. Suffice it to say that the political party we are concerned with here cannot be said to be insignificant. The importance of the requirement that members of political parties should not be governed by an irregularly elected leadership cannot be over-emphasised.

[18] The appellants were denied the opportunity to have the merits of their application heard on the basis of technical, procedural grounds. We have come to the conclusion that these grounds were incorrectly relied upon by the High Court. I now proceed to evaluate each of these grounds.

Service grounds

[19] The service grounds fall in to two categories: the first concerns the publication of the notice in the press and its consequences while the second is about lack of proper service on the respondents.

[20] As far as the first category is concerned,[24] the High Court was of the view that service of the application on the members of the ANC and the public was essential and that service could not have been properly effected if the publication had been made without a court order. In my view, this is to put form above substance. Firstly, no relief is being claimed against all the members of the ANC or against the people of South Africa. Secondly, nothing prevented the appellants from causing the notice of motion to be published. It was prudent for the appellants to have published the notice to inform the general public in case someone wished to oppose the application. It is of no consequence that the notice was published without a court order.

[21] The second leg of the publication objection was that people who requested copies of the application were told that they would be given copies only if they indicated their intention to oppose and were not provided with them simply upon request. To evaluate the finding that this aspect should contribute to the reason for dismissing the application on technical grounds, it must first be understood that the application was voluminous:

a) the appellants' founding affidavit and annexures ran into three volumes and consisted of more than 278 pages;

b) Bundle A which contained the nearly 2300 signatures referred to earlier spanned almost 4 volumes and about 260 pages; and

[24] Described at [12] a) and b) above.

c) other documents relied, and a further 2520 signatures were contained in Bundle B in about 3 volumes and a little under 300 pages.

[22] In the circumstances, the decision of the appellants to make copies of the papers available only to those who genuinely wished to oppose the application was beyond criticism and should not have been held against them.

[23] The second category of service grounds concerning service on the respondents[25] must be evaluated on the basis that the first twenty five respondents, who were members of the PEC, were represented by the same legal team and that the national formation of the ANC had already filed a notice of intention to oppose when the application was heard. The High Court had difficulty with the following:

a) the members of the PEC were served one day after an urgent court order had been obtained;

b) the ANC had not been given sufficient notice in order to oppose the application bearing in mind that its office was in Johannesburg, outside the jurisdiction of the Free State High Court; and

c) only the chairperson of the PEC and the national formation of the ANC had been served with a copy of all the papers while the remaining respondents had not been served with Bundles B and C referred to earlier.

[25] Described at [12] c) and d) above.

It is self-evident that these could not constitute part of the reason not to hear the application on its merits bearing in mind that the PEC members were all before the High Court and that the national ANC had not only filed notice of intention to oppose the application but had also lodged an affidavit which will be referred to later to found the contention that the application was premature.

The failure to cite Branch Executive Committees and elected provincial conference delegates[26]

[24] No relief was sought against the Branches or the delegates. In any event, the interests of the Branches whose meetings had been contended as being irregular as well as the delegates of those Branches to the provincial conference were precisely the same. Neither the Branches nor the delegates were essential parties to the dispute. Indeed, to require service of this kind would be an almost impossible bar to the application being brought. In the circumstances, this reason too ought not to have been relied upon by the High Court for its conclusion.

The application is premature[27]

[25] As I have pointed out, the High Court concluded that the application was premature because the decision by the national formation of the ANC to approve the holding of the provincial conference was taken weeks after the application had been launched. The first difficulty with this finding is that it left out of account the

[26] See [12] e) and f) above.

[27] Described in [12] g) above.

circumstance that there was also a prayer for the setting aside of the provincial conference. There was nothing premature about that prayer.

[26] The second difficulty was that on the papers as they then stood it was not disputed that the ANC had conducted itself on the basis that the PEC which had been elected at that provincial conference was validly elected:

a) the members of the committee had been invited to the national policy conference of the ANC held towards the end of June 2012;

b) the letters of complaint sent to the ANC had not been responded to;

c) the letters by the then provincial secretary, Mr Besani, to the ANC, complaining about potential irregularities had been ignored; and

d) on 30 July 2012 the Secretary-General of the ANC had said to a person who had handed him a dossier of complaints that the ANC was satisfied with the outcome of the provincial conference and no further action would be taken.

In all the circumstances the appellants were entitled to assume that some decision had been made somewhere to approve the conference. They did not know what that decision was. The date on which they brought the application could not be part of a reason not to hear the case.

Failure to exhaust internal remedy[28]

[27] When the application was heard by the High Court, there was unopposed evidence before it that the letters of complaint in relation to various irregularities had gone unattended and that the Secretary-General had already said that the ANC would do nothing more about the matter. This seemed to indicate that the internal remedies had been closed. In any event, by the time the High Court heard the case, the National Executive Committee of the ANC had already "endorsed" the PEC and the proceedings of the Provincial Conference. In the circumstances there was no other internal remedy left to it but to approach the national conference which commenced on 16 December 2012. But the appellants' very objective was to be represented by a properly elected PEC as well as properly elected delegates from the Free State. That could not happen if the alternative remedy had been pursued instead of issuing proceedings in a court. On the papers, as they stood at the time, the appellants were neither obliged to, nor could, avail themselves of this alternative remedy as this course would have irremediably negated the very purpose of their application.

[28] In the light of the papers before it at that time, the High Court was not right when it decided not to hear the merits of their application on the procedural grounds referred to. Indeed, the failure to hear the merits of the dispute between the parties seriously compromised the appellants' right to have a justiciable dispute determined in a fair hearing before a court. The underlying justiciable dispute was whether the provincial executive committee was properly elected. That dispute was never heard

[28] See [12] h) above.

let alone unfairly heard. And, what is more, not heard on unsustainable grounds. The High Court ought to have heard the merits of the dispute.

[29] The final decision this Court had to make concerning the application for leave to appeal was whether it should hear the appeal or whether the Supreme Court of Appeal should first consider it after the High Court had heard an application for leave to appeal. In my view the circumstances of this case justified leave to appeal being granted directly to this Court. In other words, the Supreme Court of Appeal should be by-passed. The application before us was launched on 7 November 2012 and was considered by us on 20 November 2012. It would by that date have been almost impossible for this Court to consider any appeal or application for leave to appeal if both the High Court and Supreme Court of Appeal had later refused leave to appeal before 15 December 2012.

[30] We must remind ourselves that if we had refused leave to appeal on the basis that the Supreme Court of Appeal should first consider it, there would have been need for an application for leave to appeal to the High Court and, if that application had been refused, an application for leave to appeal to the Supreme Court of Appeal. We also bore in mind that the Supreme Court of Appeal would be in recess from the end of November and that there would be difficulty in convening a Full Court of judges to hear the appeal. The problem would have been compounded if the High Court and the Supreme Court of Appeal had successively refused leave to appeal and if the Supreme Court of Appeal had done so without reasons shortly before 15 December 2012. This

would in all probability have happened too late to enable this Court to do anything. In the circumstances it was just and equitable for us to hear the appeal.

The appropriate relief

[31] The Court hearing the application for leave to appeal also made an order requiring the parties to file further papers and argument on the merits. The reasons for this decision follow.

[32] It will be recalled that the respondents had filed no papers on the merits and had taken only the technical objections, all of which have been overturned in this judgment, on the application for leave to appeal. If we heard the appeal without affording the parties an opportunity to file further papers on the merits of the applications, the respondents would have been prejudiced because the prospects of the application being granted, as the papers then stood was reasonable. And this would have happened without the respondents having being heard. Although this would to a large extent have been of the respondents' own making, this factor was in my view not in itself enough to deny the respondents an opportunity to be heard. It was just and equitable for the respondents to be given an opportunity and for this Court to determine the merits of the application once and for all.

[33] This would mean of course that this Court would be the court of first and last instance as far as the merits are concerned. Although this consequence was unfortunate it was, in my view, necessary to go this route to achieve justice. If we did

not hear the appeal, the merits of the application would hardly have been considered by any court before 15 December 2012. There were also difficulties in the way of referring the matter to the High Court to deal with the merits of the application because it would have been inappropriate, in the circumstances, to issue directions to the High Court. In addition, the time-lines were so tight that mere referral back to the High Court without directions as to the filing of affidavits, argument and hearing would not have suited the exigencies of the circumstances. The attainment of justice taken together with the right of access to courts guaranteed by section 34 of the Constitution required us to hear the application on its merits as a court of first and last instance.

[34] The costs of the application had to be reserved for determination in the appeal because there was not enough on the papers to determine a just costs award.

[35] These are the reasons for the order made by this Court on 21 November 2012.

[36] The basis on which the application for leave was granted meant, in effect, that the judgment of the High Court cannot stand. A formal order setting aside the judgment of the High Court was made on Friday, 14 December 2012.

The appeal

[37] In so far as the appeal is concerned, I agree with Froneman J, that it should be dismissed whether leave had been properly granted or not.

FRONEMAN J (Mogoeng CJ and Yacoob J concurring (except for [39] to [45])):

Introduction

[38] This is a minority judgment. It sets out the reasons why I did not concur in the order granting leave to appeal and why I consider that the appeal should have been dismissed.

Leave to appeal

[39] I accept that a constitutional issue relating to the exercise of political rights under section 19 of the Constitution, in particular the right to participate in the activities of a political party,[29] arises in this matter, and that reasonable prospects of success on appeal exist. But I do not think that it was in the interests of justice for this

[29] Section 19 provides:

> "**Political rights**
>
> (1) Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) *to participate in the activities of*, or recruit members for, *a political party*; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office." (Emphasis added.)

Court to have heard the matter on the basis of urgency and, in effect, as a court of first instance.

[40] This Court is not well-geared to hear urgent matters. Urgency may afford grounds for engaging this Court directly, but in order for it to do so an applicant must establish that a delay in securing a definitive ruling "would prejudice the public interest or the ends of justice and good government."[30]

[41] The urgency in this matter stems from the fact that the national conference of the African National Congress (ANC), the twenty-sixth respondent, was scheduled for mid-December. In the founding papers in the Free State High Court, Bloemfontein (High Court) the appellants stressed that the national conference would elect a leader who will also become the President of South Africa in due course. That may well be the practical reality of the political situation in the country at present, but it raises no issue that needs urgent constitutional clarification in the national or public interest. The Constitution provides that the President of the country is elected by the National Assembly.[31] The outcome of this case will have no legal or constitutional impact on that process.

[42] The ordinary urgency of the matter may well have justified expedited appeal hearings by either a Full Court of the High Court or the Supreme Court of Appeal, but

[30] *Transvaal Agricultural Union v Minister of Land Affairs and Another* [1996] ZACC 22; 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 19.

[31] Section 86(1) of the Constitution.

the appellants instead chose to approach this Court for direct leave to appeal. In *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*,[32] this Court restated the considerations that are relevant for deciding whether to grant leave to appeal to this Court directly from a high court:

> "Leave to appeal directly to this Court will be granted if it is in the interests of justice to do so. Each case is considered on its own merits. The factors relevant to a decision whether to grant an application for direct appeal have been listed as including whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue and the prospects of success. These must be balanced against the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the Supreme Court of Appeal (SCA) is bypassed."[33] (Footnotes omitted.)

[43] The principal constitutional issue raised here is of course important, but it is hardly contentious. There should be little doubt that the right to participate in the activities of a political party imposes a duty on every political party to act lawfully and in accordance with its own constitution. Nor is the permissible legal extent of participation the crucial issue that needs to be determined here. None of the parties disputed the right to participation. What was disputed was whether this accepted right had been factually breached, a question of application of constitutional principle to the facts that could as easily and appropriately have been done by either a Full Court of the High Court or the Supreme Court of Appeal.

[32] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC).

[33] Id at para 21.

[44] Lastly, although it is understandable that it would have served practical purposes better had the disputed issues been decided before the national conference was held, it would not have been the end of the road, legally, if this were not done. If it transpired that the election of provincial delegates tainted the national conference, it would have remained open to approach a court to declare the subsequent results invalid.

[45] For these reasons I considered that leave to appeal should not have been granted.

Merits of the appeal

[46] The appellants sought to review the lawfulness of the Free State regional conference and the decision of the ANC to accept the outcome of that conference. The factual basis for the review was that the ANC ignored and failed to investigate the alleged irregularities that they set out in their founding papers. That is apparent from the introduction to the categories of irregularities that the appellants alleged took place:

> "In the present instance, there are at least seven respects in which the 2012 provincial conference was tainted by such breaches, resulting in illegality. *More specifically, these violations or irregularities were brought to the attention of the 26th as well as the provincial executive committee via the provincial secretary, who all nevertheless made a conscious decision either to go ahead and hold the provincial conference in question and/or to act upon and give recognition to its outcomes.*" (Emphasis added.)

[47] This was a recurrent theme of the founding affidavit:[34]

> "The 26th respondent *also deliberately turned a blind eye to these discrepancies, which were brought to its attention on numerous occasions*. The reasons for this is that the aforesaid undemocratic faction is favoured by inter alia the current secretary-general, whose own political fortunes are intertwined with the political survival of the said faction.
>
> . . .
>
> Comparing these actions of the 26th respondent *to its inexplicable failure and refusal to act in the face of literally hundreds of irregularities and fraudulent activities in the Free State, it must follow that its decisions and indecisions are motivated by ulterior and improper motives and in bad faith.*" (Emphasis added.)

[48] The first part of the relief sought by the appellants was for an interdict pending the finalisation of the review application. In the founding affidavit the appellants asserted that they had exhausted all internal remedies, but that the ANC had "made it abundantly clear that no measures will be taken to address the concerns of the applicants."

[49] The appellants' application for review was thus based on the ANC's alleged failure to investigate the alleged irregularities and its acceptance of the results of the provincial conference that flowed from this failure. It is apparent from the founding papers that the appellants knew that there were internal processes to rectify alleged irregularities, but they argued that the ANC failed to allow these.

[34] Apart from the quoted parts, similar statements appear in paras 86, 87, 106 and 128 of the founding affidavit in the High Court.

[50] As explained in Yacoob J's judgment, the peculiar circumstances of the matter necessitated an order requiring the parties to file further papers on the merits of the original application before the High Court.[35] This meant that this Court would be the court of first and last instance insofar as deciding the substantive merits of the original application. It is thus important to appreciate that the decision on the merits is one on the substantive merits of the original application in the High Court, and not the usual inquiry on appeal of whether the High Court's decision on those merits was correct or not.

[51] The ANC only filed an opposing affidavit on the substantive merits in this Court. In it the Secretary-General of the ANC makes it abundantly clear that the appellants' allegation in their founding papers, that no consideration was given to their complaints and that there was no internal review of their complaints, is without foundation. A task team was sent to the Free State province. It investigated the alleged irregularities, made recommendations in relation to them and these recommendations were acted upon, settling the grievances in accordance with the internal procedures of the party.

[52] If the contents of this affidavit and the report annexed to it, giving details of the investigation, recommendations and outcome, are to be accepted, the basis for the appellants' review against the ANC in its founding papers falls away. And *Plascon-*

[35] At [31]-[35] above.

Evans[36] tells us that for the purposes of deciding the matter on the papers before us, the contents of the opposing affidavit must be accepted as correct. In my view that puts paid to the appellants' case in the High Court.

[53] That case was based on a review of the ANC's decision to allow the provincial conference to go ahead and countenance its outcome without having considered the alleged irregularities. It is now clear that the basis for that review – the alleged failure to investigate the irregularities and to conduct an internal review of them – was unfounded.

[54] I have difficulty understanding on what basis this Court can pronounce on the merits of the alleged irregularities in the absence of some further ground that shows that the ANC was somehow remiss in its own assessment of the irregularities. The appellants' founding papers make out no case of this kind, particularly when read with the ANC's opposing papers.

[55] The case the ANC had to meet was that it ignored the appellants' attempts to have the alleged irregularities investigated. In my view it has met that case and it would be unfair to find against it on the basis that its assessment of the irregularities was in some way deficient. In *Theletsane*[37] a similar kind of argument was rejected:

[36] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634G-635C (*Plascon-Evans*).

[37] *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A) (*Theletsane*).

"Part of the reasoning in the main judgment may, for ease of reference, be stated as follows: the appellants were not specifically required to deal with the form of the hearing given, but they chose to deal fully with the events of the day in question, not only to show that the respondents had been afforded a hearing, but also that the hearing had been a proper and fair one; consequently they will not be disadvantaged or prejudiced if their affidavits are relied upon to determine not only whether a hearing took place, but also the nature and ambit thereof; and in considering the appellants' affidavits the test is whether they are reasonably capable of being interpreted in such a way that they raise a valid defence to the relief sought by the respondents, ie that the respondents were given a fair hearing in relation to why they should not be dismissed. With respect, I am wholly unable to subscribe to this manner of approaching the appellants' affidavits. It was not for the appellants to show that the respondents were given a proper hearing; they were called upon only to meet the specific allegations put forward by the respondents in support of the relief claimed. *The appellants were required to answer a case founded on the allegation of fact that the respondents were not given a hearing; they were not called upon in any other way to raise a valid defence to the relief sought. In particular, for instance, the question whether the hearing given was unduly limited in its scope was not an issue to which the appellants' deponents were required to address their minds. It is not permissible to consider the appellants' affidavits in isolation, divorced from the context of the case which they were answering*."[38] (Emphasis added.)

And further:

"It is clear, in my view, that the room for deciding matters of fact on the basis of what is contained in a respondent's affidavits, *where such affidavits deal equivocally with facts which are not put forward directly in answer to the factual grounds for relief on which the applicant relies, if it exists at all, must be very narrow indeed*."[39] (Emphasis added.)

[38] Id at 195I-196E.

[39] Id at 197C-D.

[56] The majority found that on the ANC's own papers a number of irregularities did in fact occur. On the authority of *Theletsane* I think that approach is not without problems. But even if it were justified it seems to me that more is required. What must be shown further is that the ANC was in some way or another reviewably remiss in relation to these irregularities. And I can find no further remissness of this kind on the ANC's own papers, or elsewhere in the record.

[57] If the kind of irregularities alleged in the papers did occur it would indeed be a profoundly disturbing feature of our body politic. This judgment does not signify that the conduct of the ANC or any other political party may not be subject to scrutiny under the Constitution. All it says is that on the papers in this case it would be inappropriate to make final and definitive findings on factually disputed issues and the manner in which the ANC handled these disputes.

[58] For these reasons I would have dismissed the appeal.

MOSENEKE DCJ AND JAFTA J (Khampepe J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

The appeal

[59] The appellants, acting in their personal interests and also in the interests of a class of persons made up by members of the African National Congress (ANC) and voters resident in the Free State,[40] sought an order setting aside the Provincial Conference held at Parys from 21 to 24 June 2012, including all decisions and resolutions taken during the Conference. In addition, they asked for rescission of the decision taken by the ANC to recognise the Provincial Executive Committee (PEC) elected at the impugned Conference. For convenience we will refer to the members of the ANC, on whose behalf this application was instituted, collectively as the appellants.

[60] The appellants premised their claim for relief on three grounds. First, they contended that their rights flowing from the ANC's constitution read with its audit guidelines have been infringed. This was referred to as a contractual claim, arising from the appellants' membership to the ANC. Second, the appellants argued that their constitutional right to participate in the activities of the ANC was breached as a result of a number of irregularities that occurred before the challenged conference was held.[41] Third, they asserted that their right to lawful and procedurally fair administrative action was violated when the irregularities complained of were committed.

[40] Section 38 of the Constitution of the Republic allows a claim based on the Bill of Rights to be brought on behalf of others.

[41] This right is entrenched in section 19 of the Constitution, the full text of which appears in [63] below.

[61] Following a careful consideration of the matter, we are satisfied that the established facts sustain the first two grounds on which the appellants rely. This, in our view, entitles them to some remedy. Whether they should be granted the relief sought, is a question that we consider later when we reach the remedy aspect of the judgment. The finding we reach on the two grounds renders the consideration of the third ground unnecessary.

[62] In setting out the reasons for the finding we make and the conclusion we reach, we commence with an analysis of the constitutional framework and, in particular, section 19 of the Constitution of the Republic of South Africa (Constitution) as it is the source of the right sought to be enforced. We then proceed to consider the interplay between the constitution of the ANC (ANC's constitution) and section 19. This analysis will reveal the legal principles relevant to the resolution of the dispute placed before us by the appellants. The analysis will be followed by the application of these principles to the proven facts. We conclude by determining the appropriate remedy.

Constitutional framework

[63] One of the complaints raised is that the appellants have been prevented from participating in the activities of a political party of their choice. The appellants contend that this violates their political rights enshrined in section 19 of the Constitution. This section confers political rights exclusively on the citizens of this country. It reads:

> "(1) Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[64] The scope and content of the rights entrenched by this section may be ascertained by means of an interpretation process which must be informed by context that is both historical and constitutional. During the apartheid order, the majority of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Nor could they vote for those who were eligible to be members of Parliament. Differently put, they were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them. Many organisations whose objectives were to advance the rights and interests of black people were banned.[42] These organisations included the present ANC. Participation in the activities of these organisations constituted a serious criminal offence that carried a heavy penalty. The purpose of section 19 is to prevent

[42] Under the Unlawful Organisations Act 34 of 1960 the ANC, Pan Africanist Congress and the South African Communist Party were banned.

this wholesale denial of political rights to citizens of the country from ever happening again.

[65] The other context relevant to the construction of section 19 is provided by the Constitution itself. In our system of democracy political parties occupy the centre stage and play a vital part in facilitating the exercise of political rights. This fact is affirmed by section 1 of the Constitution which proclaims that "[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness" are some of the values on which our state is founded.

[66] In the main, elections are contested by political parties. It is these parties which determine lists of candidates who get elected to legislative bodies.[43] Even the number of seats in the National Assembly and provincial legislatures are determined "[b]y taking into account available scientifically based data and representations by interested parties".[44] It cannot be gainsaid that success for political parties in elections lies in the policies they adopt and put forward as a plan for addressing challenges and problems facing communities. Participation in the activities of a political party is critical to attaining all of this.

[67] In order to enhance multi-party democracy, the Constitution has enjoined Parliament to enact national legislation that provides for funding of political parties

[43] Part 3 of the Electoral Act 73 of 1998 (Electoral Act).

[44] Id at Schedule 3 item 1(1).

represented in national and provincial legislatures. Public resources are directed at political parties for the very reason that they are the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy.

[68] Our democracy is founded on a multi-party system of government.[45] Unlike the past electoral system that was based on geographic voting constituencies, the present electoral system for electing members of the national assembly and of the provincial legislatures must "result, in general, in proportional representation".[46] This means a person who intends to vote in national or provincial elections must vote for a political party registered for the purpose of contesting the elections and not for a candidate. It is the registered party that nominates candidates for the election on regional and national party lists.[47] The Constitution itself obliges every citizen to exercise the franchise through a political party. Therefore political parties are indispensible conduits for the enjoyment of the right given by section 19(3)(a) to vote in elections.[48]

[69] Therefore, the interpretation of section 19 must not lose sight of the importance of the rights it enshrines. Consistent with this approach, in *August and Another v Electoral Commission and Others*,[49] Sachs J reaffirmed the importance of one of the rights in section 19 in these terms:

[45] Section 1(d) of the Constitution.

[46] Sections 46(1)(d) and 105(1)(d) of the Constitution.

[47] Annexure A of Schedule 6 of the Constitution.

[48] Section 19(3)(a) provides that "[e]very adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret".

[49] [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

> "Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement."[50]

[70] Moreover, section 39(1) of the Constitution obliges us to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom" when we interpret a provision of the Bill of Rights.[51] It is by now well-settled that the text of a section in the Bill of Rights must be read generously and purposively in order to give the right-holders the full protection afforded by the guaranteed right. This is the setting in which section 19 must be read and understood.

[71] In relevant part section 19(1) proclaims that every citizen of our country is free to make political choices which include the right to participate in the activities of a political party. This right is conferred in unqualified terms. Consistent with the

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[50] Id at para 17.

[51] Section 39(1) provides:

> "When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law."

generous reading of provisions of this kind, the section means what it says and says what it means. It guarantees freedom to make political choices and once a choice on a political party is made, the section safeguards a member's participation in the activities of the party concerned. In this case the appellants and other members of the ANC enjoy a constitutional guarantee that entitles them to participate in its activities. It protects the exercise of the right not only against external interference but also against interference arising from within the party.

[72] This right may be limited only on authority of a law of general application. But even then only to the extent that the limitation is reasonable and justifiable in "an open and democratic society based on human dignity, equality and freedom".[52] As no law of general application has been invoked to justify the limitation here, it follows that if any limitation is established by the appellants it will be unjustifiable. What this means is that constitutions and rules of political parties must be consistent with the Constitution which is our supreme law.

[52] Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

The interplay between the ANC's constitution and section 19

[73] Section 19 of the Constitution does not spell out how members of a political party should exercise the right to participate in the activities of their party. For good reason this is left to political parties themselves to regulate. These activities are internal matters of each political party. Therefore, it is these parties which are best placed to determine how members would participate in internal activities. The constitutions of political parties are the instruments which facilitate and regulate participation by members in the activities of a political party.

[74] It bears repeating that political parties may not adopt constitutions which are inconsistent with section 19. If they do, their constitutions may be susceptible to a challenge of constitutional invalidity. We point out, however, that the present is not such a case. The validity of the ANC's constitution is not under attack. What needs to be mentioned for present purposes is that the ANC's constitution regulates and facilitates how its members may participate in internal activities of the party. Rule 3 of its constitution confers on members the power to determine and formulate the party's policies. It also stipulates that the leadership of the party is accountable to its members in terms of the procedures laid down in its constitution.[53] Echoing the Electoral Act this clause further states that the ANC contests elections as a registered political party and it shall, in its composition and functioning, be democratic.[54] More importantly, "[m]embership of all bodies of the ANC will be open to all men and

[53] Rule 3.2 provides: "Its policies are determined by the membership and its leadership is accountable to the membership in terms of the procedures laid down in this Constitution."

[54] See subrule 3.3 and 3.4 of the ANC's constitution.

women in the organisation without regard to race, colour and creed" and this clause guarantees freedom of speech and free circulation of ideas and information.[55]

[75] Rule 5 sets out the rights of a member of the ANC. These include a full and active participation in the "discussion, formulation and implementation of the policy of the ANC." Members are also entitled to "[t]ake part in elections and be elected or appointed to any committee, structure, commission or delegation of the ANC." According to rule 23 the exercise of these rights first takes place in the branches. Every member of the ANC is required to belong to a branch. Rule 23 states that the branch is the place where members exercise their basic democratic rights to discuss and formulate policy. It concludes by stipulating that the quorum for annual branch meetings and other meetings, where a branch nominates candidates for election within the ANC or takes decisions in relation to policy, shall be 50% plus one of the total paid-up members of the branch.

[76] Another clause of the ANC's constitution that is relevant for present purposes is rule 26 which empowers its National Executive Committee (NEC) to "adopt rules and regulations for the better carrying out of the activities of the ANC."[56] Acting in terms of this rule, the Committee adopted Membership Audit Guidelines in May 2011. The guidelines establish a National Audit Team whose function is to conduct audits of membership in each province. The guidelines oblige both the Regional Executive Committees (RECs) and the PECs to prepare interim audit lists of paid-up members in

[55] See subrule 3.7 and 3.8 id.

[56] Rule 26.1 id.

each branch as well as lists of branches in good standing. These guidelines also set out requirements which must be met by a branch that needs to be in good standing. Only constitutionally launched branches which are in good standing are allowed to send delegates to conference.

[77] Whenever a conference is planned, whether it is a regional or provincial conference, the PEC must determine a cut off date for purposes of conducting an audit process. Once that date passes, the National Audit Team must verify paid-up members of each branch intending to send delegates to the conference. It must also determine if the branches are in good standing. On completion of an audit for a region, the team must submit a copy of the preliminary audit report to the relevant provincial secretary. The audited branches are afforded five days within which to raise queries. The National Audit Team should respond to every query and where necessary, make corrections to the preliminary report. If a branch is still not satisfied, it may appeal, presumably, to the Regional Executive Committee or the PEC or to the Secretary-General of the ANC who is the final arbiter.

[78] All of this constitutes the terms on which the second complaint of the appellants was based. They claimed that some of these rules were breached in the preparatory stages of the impugned conference. As a result, they contended that the Provincial Conference was vitiated by the irregularities in question.

The relationship between the ANC and its members

[79] Before demonstrating that some of the irregularities raised were established it is necessary to outline the nature of the legal relationship that arises from membership of the ANC. At common law a voluntary association like the ANC is taken to have been created by agreement as it is not a body established by statute.[57] The ANC's constitution together with the audit guidelines and any other rules collectively constitute the terms of the agreement entered into by its members. Thus the relationship between the party and its members is contractual. It is taken to be a unique contract.

[80] As in the case of an ordinary contract, if the constitution and the rules of a political party, like the ANC, are breached to the prejudice of certain members, they are entitled to approach a court of law for relief. In *Saunders v Committee of the Johannesburg Stock Exchange*,[58] the Court said:

> "There is no doubt that rules and regulations of a body like the Stock Exchange, just like the rules and regulations of an ordinary club, or the Articles of Association of a Company constitute a contract between its members and that is the reason why any particular member, if the contract is broken to his disadvantage, has the right to come to the Court for the appropriate remedy."[59]

[81] We have set out in detail specific clauses in the ANC's constitution and its audit guidelines which the appellants claimed were violated. It emerges from the papers

[57] *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) and *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).

[58] 1914 WLD 112.

[59] Id at 115.

that the appellants relied on two types of irregularities. The first type relates to what was done in breach of section 19 of the Constitution. The second arises from the breach of the audit guidelines and the ANC's constitution. Proof of both types of irregularities entitles the appellants to relief. But before we consider the remedy which the appellants ought to obtain, it is necessary to show the irregularities established by evidence on record.

The irregularities

Background

[82] Before we review specific averments of irregularities related to the Free State Provincial Conference of June 2012, it is necessary to sketch briefly the background against which the present dispute is located.

[83] The structures of the ANC are divided into provinces which coincide strictly with the provincial boundaries demarcated by the Constitution.[60] In turn provinces are made up of regions with a cluster of branches. A provincial conference is held at least once every four years and is composed of voting delegates. At least 90% of the delegates must be from branches and elected at properly constituted branch general meetings. A branch is entitled to a number of delegates in proportion to its paid-up membership. However, a branch in good standing is entitled to at least one delegate.

[60] Rule 9.

The remaining 10% of delegates is drawn from the ANC's Veterans League, Youth League and the Women's League.[61]

[84] The Provincial Conference elects the PEC which holds office for four years. The PEC is the highest organ in a province between provincial conferences and bears the authority to lead the organisation within the province. It is made up of a provincial chairperson and a deputy, a secretary and a deputy, treasurer and 20 members. The provincial secretary must be a full time officer of the organisation. During the hearing the appellants described a provincial secretary as the chief administrative officer of the province whose responsibilities within a province track those of the Secretary-General.[62] All members of the PEC are by virtue of their office (ex officio) members of the Provincial Conference.

[85] During 2008 at the town of Parys and in accordance with its constitution, the ANC in the Free State elected a PEC. The first respondent, Mr Elias Magashule, was re-elected as provincial chairperson. Mr Thabo Manyoni, the second respondent, was elected deputy chairperson and Mr Sibongile Besani was elected provincial secretary. It is well accepted by all that his was a full-time position and that he was the foremost administrative officer responsible for the day-to-day running of the political party in the province. Both the provincial chairperson and secretary also serve as ex officio members of the NEC of the ANC. The fourth respondent, Ms Mamiki Qabathe was

[61] Rule 17.1 and 17.2.

[62] The duties of the Secretary-General are tabled in rule 16.6.

elected deputy secretary and Mr Mxolisi Dukwana was elected as treasurer along with 20 other additional members of the PEC.

[86] The four-year term of the PEC was due to expire during the course of 2012. This meant that an elective provincial conference had to be convened. On all accounts, during January and February 2012, the five regions making up the Free State and their branches started preparations leading towards the regional conferences and provincial conference. These also entailed convening branch general meetings directed at electing branch members in good standing as delegates to the Provincial Conference.

[87] Delegates to an elective provincial conference are democratically elected and drawn from properly constituted branch general meetings. Thus every member of the ANC exercises his or her right and entitlement within the ANC through the medium of branch decisions and resolutions. Branch members are represented in the elective provincial conference by delegates who must have been properly and democratically elected as representatives of their branches.

[88] The depositions before us point to certain difficulties within branches and regions which are meant to play a significant role in identifying delegates to the Provincial Conference. These difficulties are reported extensively in a series of letters to the NEC written by the provincial secretary, Mr Sibongile Besani, during May and June 2012. We will revert to this correspondence later.

[89] From 21 to 24 June 2012, and again at the town of Parys, the ANC convened a Provincial Conference, elected a provincial executive committee and adopted several resolutions. The appellants impugn the lawfulness of the Provincial Conference and its outcomes on several grounds.

[90] The material grievances concern the question whether the delegates to the elective Provincial Conference had been properly accredited and audited as required by the ANC's constitution and its Membership Audit Guidelines. The appellants have tabulated at least seven respects in which the Provincial Conference was tainted. The appellants enumerate the following categories of irregularities:

> "(a) Delegates who participated in the provincial conference, whereas they had not been duly mandated or elected 'at a properly constituted branch general meeting' of ANC members in good standing.
>
> (b) The manipulation of the membership numbers in specific branches, enabling them to send delegates to the provincial conference or to send a different number of delegates than they would lawfully be entitled to or even to purportedly make a quorum or fail to quorate, as the case may be.
>
> (c) The exclusion of bona fide delegates who had been elected at properly constituted branch general meetings and/or the decision to disallow members in good standing from participating in the election of delegates.
>
> (d) The establishment of parallel structures and the decision to allow and sanction the participation at the provincial conference of 'delegates' from parallel structures in respect of which disputes had not been resolved, as well as permitting more than one parallel branch to qualify for the provincial conference.
>
> (e) The failure to give branches an opportunity to query the audit findings, in breach of the audit guidelines.

(f) The failure to give recognition to nominations legitimately made by ANC branches in respect of the membership of the provincial executive committee.

(g) A cluster of other miscellaneous violations which appear from the papers and which will be dealt with in argument."

[91] The primary defence of the respondents including the ANC has two parts. First, they say the irregularities that were reported to the Secretary-General of ANC, were resolved before the provincial conference to the satisfaction of the provincial secretary.

[92] In the second instance, the Secretary-General contends that the irregularities that had not been raised with him before are disputed. Both the PEC and the Secretary-General "deny the allegations and [the] applicants are put to the proof thereof". In particular, they deny that the Provincial Conference of the ANC in the Free State was tainted by any illegality and/or any breach of the ANC's constitution. Both deny that any branch delegate not authorised to do so attended the provincial conference and that any branch delegate entitled to attend was denied the opportunity to do so.

[93] In our view these particular bare denials of the respondents do not rise to the level of disputes of fact. The denials are generic and were made and directed at disputing the appellants' categories of irregularities and the legal conclusion that the provincial conference was tainted with irregularities. The denials are not directed at facts that support the classes of irregularities. This is particularly so because where

later in the founding affidavit the appellants adduce facts which support the categories of irregularities, region by region, they are not seriously disputed.

[94] The proper approach to determining whether an applicant in motion proceedings has made out a case for the relief sought in a case where some of the allegations are disputed by the respondent was pronounced in *Plascon-Evans.*[63] According to the *Plascon-Evans* rule the applicant would succeed if the admitted facts alleged by it, together with the facts alleged by the respondent, justify the relief sought. However, it must be pointed out that where a respondent raises a bare denial to an allegation made by an applicant, the denial is not regarded as raising a genuine dispute of fact. In such a case the allegations made by the applicant may be taken into account in deciding whether the order sought is justified, unless the respondent has requested that the applicant's deponent be subjected to cross-examination.[64]

[95] Because affidavits in motion proceedings constitute pleadings and evidence, the failure to respond to allegations made by an applicant is taken to be an admission of those allegations. In assessing whether the appellants have made out a case for the relief they seek, we will apply these principles.

Specific irregularities

[96] It is now convenient to look at each category of irregularities more closely. The affidavits are prolix. They are made even longer by extensive attachments. The

[63] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) (*Plascon-Evans*).

[64] Id at 634G-635C.

appellants have chosen to rely on examples of categories of irregularities they contend for. A selection of 'extreme' examples is supported by a bundle of documents referred to as "Bundle C". It contains correspondence from branches to the provincial secretary, sworn statements verifying complaints of branches, preliminary regional audit reports, final audit reports and correspondence from the provincial secretary to the national leadership of the ANC. It is expedient to track the allegations of irregularities region by region rather than by categories of irregularities. Many overlap and are linked. The correspondence of the foremost administrative officer of the PEC is as good a place as any to start.

[97] However, before we do so, it is necessary to mention again briefly the audit guidelines which are an integral part of the governance instruments of the ANC. The ANC national Membership Audit Guidelines for conferences and general councils provide that a mandatory pre-audit must be conducted by the PEC or REC in preparation for the national audit that is conducted by the National Audit Team in each province within a cut off date determined by the province. The National Audit Team shall establish the number of paid-up and verified members per branch, and the number and details of branches in good standing at the cut off date. All paid-up members will be recognised as members and only constitutionally launched ANC branches in good standing will be able to send delegates to the conference. Branches are required to provide valid membership forms and their latest Bi-AGM report and attendance register.

Correspondence of the provincial secretary

[98] Barely four weeks before the Provincial Conference the provincial secretary wrote four letters to the Secretary-General, to NEC deployees and to PEC officials of the ANC. He decried certain difficulties amongst members of the ANC within the province and catalogued several and material irregularities related to the state of readiness of the branches to participate in provincial conferences and the reliability of audits related to branch membership. The last letter is dated 22 June 2012, a day after the registration of delegates to the provincial conference had started. He announced that he would not participate in the conference and warned that he found it "extremely unacceptable" that even on the registration day, 21 June 2012, he could not "access or be availed with reports of delegates to the conference".

[99] The 1st to 25th respondents pleaded that they have no knowledge whether this correspondence were received by the Secretary-General. What they do not say is whether they received the letters directed to PEC leaders too. During oral argument their counsel informed the Court that the 1st to 25th respondents did not dispute the veracity of the contents of the letters of the provincial secretary. The Secretary-General readily admits receipt of the letters from the provincial secretary and that he took steps to resolve the grievances. It is true that the provincial secretary has not filed a confirmatory affidavit. That does not avail the respondents because none of them dispute the correctness of the grievances in the correspondence. What they do is to suggest that he had aligned himself with the appellants who were seeking a regime change in the provincial leadership. And yet, in the same breath, the respondents

claim that he attended the conference and was satisfied with how the conference was conducted even in the face of his letter written on the morning of 21 June 2012.

[100] The correspondence referred to, catalogued numerous irregularities committed in the process leading up to the Provincial Conference. The Secretary-General averred that irregularities brought to his attention were resolved to the satisfaction of the provincial secretary. Although this is denied by the appellants, we have to accept that the respondents have raised a genuine dispute of fact on this issue. According to the *Plascon-Evans* rule, the irregularities which were submitted to the Secretary-General should not be taken into account in determining whether the relief sought is justified.

[101] However, this does not mean that the appellants' application must be dismissed. Their case was not confined to irregularities which were referred to the Secretary-General only. They raised irregularities which were not addressed at all. In his response, the Secretary-General admitted that "the bulk" of irregularities set out in the appellants' papers were not resolved because they had not been referred to him. He asserted that these irregularities were raised for the first time in these proceedings. We now consider the specific irregularities.

[102] The significance of the undisputed contents of the letters is that they furnish the backdrop and evidentiary support to the factual allegations that the appellants make in support of the specified irregularities they rely on in the regions. The letters in

themselves may not be proof that the irregularities occurred. They are, however, proof that shortly before the Provincial Conference the chief administrative officer of the ANC in the province was deeply concerned about the division within his party's, leadership contestations and the irregularities that were likely to taint the lawfulness of the elective conference. Therefore, even if we were to accept, as we must, what the Secretary-General states, namely, that he took steps to try and resolve these irregularities as he became aware of them, that is no answer to the specific irregularities that occurred in the regions, particularly shortly before the provincial conference. To that matter we now turn.

Motheo region

[103] The appellants put up a number of grievances related to the final audit of branches eligible to participate in the Provincial Conference. The first is that the final audit report records that the region is composed of 49 branches and that 38 met the membership audit requirements that allowed them to participate in the provincial conference. The region was also declared eligible to hold its own conference on the basis that it had reached the threshold number of 34 branches in good standing. The appellants assert that Bloemfontein (Ward 19) and Botshebelo (Ward 32) should not have been counted in the tally of 36 branches because their meetings were not properly constituted for want of a quorum.

[104] The respondents appear to have offered a complete answer to this complaint. The final audit report refutes the suggestion that Botshebelo (Ward 32) or Bloemfontein (Ward 19) were not quorate.

[105] The next irregularity put up by the appellants is that the final audit was completed on 21 June 2012 when the registration of delegates was being finalised. They complain that they had no opportunity to question, verify or make submissions on the correctness of the preliminary report or the final audit report before the start of the Conference as required by the Membership Audit Guidelines. This must be accepted because the final audit is dated 21 June 2012 and the respondents do not deny the allegation. All they say is that the final audit report cannot be queried because the preliminary audit report is meant to afford branches an opportunity to challenge its accuracy. However, the respondents failed to deal with the allegation that before the stage of a final audit, the appellants were not afforded any or an adequate opportunity to question or make submissions on the accuracy of the preliminary audit report or of the final audit report before it became final.

[106] The appellants cites three examples which point to an audit process inconsistent with the audit guidelines. In the *Moses Mabhida* branch an elective bi-annual general meeting was held on 22 April 2012 and was convened without a quorum. Also 10 members were disallowed from participating and two non-members were allowed to participate. A meeting was arranged with the national audit team for 13 and 14 May 2012 but did not happen because a regional deployee failed to attend the

meeting. The respondents' answer to this is no more than to state that "to the best of [their] knowledge, this is not true. [We] shall endeavour to obtain an affidavit from the branch chairperson or secretary."

[107] It is so that given the tight timelines it may have been difficult to obtain an affidavit. We do not accept that in the face of sworn confirmatory affidavits of card-carrying members stating that they are in good standing that this denial raises a dispute of fact. This is particularly so because the deponent accepts that he has no personal knowledge of the events complained of. In our view, the appellants have shown that at least 10 members of the *Moses Mabhida* branch were disallowed from participating in the elective bi-annual general meeting held on 22 April 2012. This constituted a breach of the right to participate in the activities of the ANC. This right is entrenched in section 19(1)(b) of the Constitution.

[108] Another example raised by the appellants relates to the *Fidel Castro* branch. The appellants claim that a properly elected chairperson and branch secretary requested the PEC that they participate in the audit process and complained about the creation of a parallel branch to theirs. No response was received from the PEC. The respondents' answer to this allegation is that an audit could not be carried out because members of the "regime change group" seemingly wanted their own membership file audited. One thing is clear, no audit was conducted nor is it suggested that members of the *Fidel Castro* branch are not entitled to have their membership numbers audited only because they support the so-called regime change. In our view, the members of

the *Fidel Castro* branch were entitled to have their membership audited to assess their good standing and failure to do so amounts to conduct inconsistent with the Membership Audit Guidelines and is thus any irregularity.

[109] Lastly, Mr Ramakatsa, the main deponent to the application, claims that his branch, the *Joyce Boom* branch (Ward 25) held a legitimate branch meeting on 6 May 2012; that the meeting was quorate and that branch delegates were properly elected to represent the branch at regional and provincial conferences. His branch also nominated some of its members for membership of the PEC. He has attached annexure "FA6", which is a full report of that meeting. The report sets out in remarkable detail credentials of deployees, branch membership numbers, audited membership in good standing, the quorum required and the members who were present at the meeting. The report records the outcome of the election of a new branch executive committee, nominations for the REC as well as nominations for PEC leadership. Annexure "FA6" was sent by the branch secretary to the regional office and was passed on by the regional office to the provincial secretary. His complaint is that his branch was excluded from the Provincial Conference and persons nominated for PEC leadership were not even placed on the ballot at the Provincial Conference. He further points out that there was no parallel branch structure in competition with the *Joyce Boom* branch.

[110] To this detailed complaint, the respondents say no more than that the branch meeting never took place on 6 May 2012. The answer also states that the membership

of the branch was not audited in time for the branch to have delegates at the regional and provincial conferences. In effect, the answer admits that this branch and its members were not entitled to and did not participate in the conference. Other than the bare denial, the respondents do not furnish even the slightest evidence that the meeting did not take place or of the invitations they sent to the branch to submit to audit. Going by annexure "FA6", the respondents in effect disenfranchised members of a branch in good standing. This conduct is inconsistent with the requirements of the ANC's constitution.[65] But more importantly, this conduct is inconsistent with section 19(1)(b) of the Constitution.

Thabo Mofutsanyane region

[111] The appellants allege that most of the irregularities which occurred within the branches of the region could only have been cured by a "re-run" of elective processes in the branch. They add that the National Audit Team had determined and ruled that more than 20 branches ought to conduct re-runs. The appellants furnish names of several NEC members of the national audit team who were deployed to branches, dates on which the fresh meetings were to be held and the branches at which they were to be held. However, on the agreed dates for fresh branch meetings, the NEC members failed to attend the meetings. As a result, the meetings did not take place. This failure had the effect of denying the affected branches representation at the Provincial Conference. However, the appellants say, the branches which were due to have fresh electoral meetings, were represented by 'delegates' at the Provincial

[65] Including rule 17.2(b)(i)(aa) of the ANC's constitution.

Conference. This in turn means that the 'delegates' represented the branches concerned in a manner inconsistent with the ANC's constitution because they were not elected at a properly constituted branch general meeting.

[112] The respondents' answer is simply that "re-runs" are preferable, but could, for various reasons, not be done in all instances. The respondents do not deny that the NEC members concerned failed to attend meetings. They however refer to four branch meetings which were held between 2 and 17 June 2012. In our view, the respondents do not meet head-on the complaint put up by the appellants that fresh elections were not conducted in several branches. The appellants are correct in complaining that this led to a disenfranchisement of several members of the branches concerned. These include *Caleb Mothabi*, *Joe Nhlanhla*, *Joe Slovo*, *Govan Mbeki* and *Phuthaditjaba* in regard to which no averments are made by the respondents that proper re-runs had been conducted in the face of a claim that this was not so.

[113] In the founding affidavit the appellants say that the branches of *Caleb Mothabi*, *Joe Nhlanhla*, *Joe Slovo*, *Govan Mbeki*, *Bodibeng* and *Phuthaditjaba* were reflected in the final audit as having conducted quorate meetings when in fact that was not the case. The respondents dispute this only in respect of *Joe Slovo* and *Phuthaditjaba* and do not dispute it in respect of the other branches. The respondents make the bald allegation that only delegates who had been duly elected at duly held meetings were permitted to attend the provincial conference. They do not disclose what procedure was adopted at the conference to ensure that people who had not been duly elected to

attend the Provincial Conference were excluded. The deponent to the answering affidavit also does not say that he had personal knowledge of the screening of delegates at the conference.

Lejweleputswa region

[114] Here, too, the appellants raise several irregularities which relate to branch meetings that were not reconvened to overcome prior irregularities. We refer to one matter only. The appellants complain that the final audit of the branches in the region was produced on 15 June 2012, five days before the Provincial Conference and that they were not granted an opportunity to query it or raise objections before the report became final. The nub of the complaint is that there was never an opportunity to view and make submissions on a preliminary report. The respondents' answer is simply that a final audit report could not be subjected to queries. The answer does not deal with the nub of the complaint that the final report became final before the appellants were given an opportunity to comment and verify its accuracy. This, in our view, alone is an irregularity which is at odds with the requirements of the Membership Audit Guidelines.

Xhariep Region

[115] The appellants also say that in the *Dora Tamane* branch, the Bi-AGM was called off by the provincial deputy secretary, Ms Qabathe and Mr Morule, a member of the NEC and national audit committee, due to the possibility of violence and this meeting was never reconvened. Yet this branch was represented by 'delegates' at

both the regional and provincial conferences. The respondents do not deny this. Accordingly, there is no dispute of fact here. There is thus no reason why the allegations by the appellants should not be accepted.

[116] And lastly members of the *Lovemore Koto* branch Petrusburg (Ward 3) allege that they were never presented with a preliminary or final audit report relating to their branches as required by the audit guidelines. They say the final audit report was signed on 22 June 2012, the second day of the Provincial Conference. They complained that 'delegates' from their region had already been registered for the conference. The response to these serious allegations by the respondents amount to no more than that "receipt of the final audit was not a pre-requisite for a provincial conference". There is no denial that no preliminary audit report was presented to these branches. Nor do the respondents deal with the serious allegation that the provincial conference was attended by delegates who were not duly elected by the branches concerned.

[117] The appellants state that the *John Rasmeni* branch and the *Albert Nzula* branch did not hold Bi-AGMs or BGMs and yet they had 'delegates' who attended the Provincial Conference. The respondents do not deny this.

[118] As stated earlier, the irregularity that occurred in the *Moses Mabhida* branch in respect of 10 members who were prevented from participating in a branch meeting and the exclusion of the *Joyce Boom* branch from the Provincial Conference, establish

conduct that is inconsistent with section 19 of the Constitution. Once an inconsistency with the Constitution is proved, this Court is obliged by section 172 to declare that the conduct in question is invalid,[66] unless it finds that the inconsistency is justifiable in terms of section 36 of the Constitution. The respondents have not advanced any justification for the conduct. It follows that it must be declared invalid.

[119] The remaining irregularities tabulated above constitute the violation of the ANC's constitution and its Membership Audit Guidelines which amount to the terms of the agreement between it and its members. No explanation or justification was furnished for these serious breaches which adversely affected members of the party. The affected members are therefore entitled to appropriate relief.

[120] It follows that the appeal must succeed.

[66] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (*a*) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (*b*) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

See also *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

Remedy

[121] The appellants have submitted that should we hold that the Provincial Conference and decisions made pursuant to it are unlawful and void, it would be just and equitable for this Court to order the ANC to install an interim structure in terms of Rule 12.2(d) of its constitution. The appellants draw our attention to the fact that there may be insufficient time to organise and conduct a lawful provincial conference before the National Conference which was due to be held on 15 December 2012 in Mangaung. It is so that the conference was due to be held shortly after the order on the merits was granted.

[122] The relevant part of rule 12.2(d) provides that:

> "The NEC may suspend or dissolve a PEC where necessary. A suspension of a PEC shall not exceed a period of three months. Elections for a PEC which, has been dissolved, shall be called within nine months from dissolution. The National Executive Committee may appoint an interim structure during the period of suspension or the dissolution of the PEC to fulfil the functions of the PEC."[67] (Emphasis added.)

[123] The ANC submitted too that a just and equitable remedy would be for this Court to direct its NEC to reconsider the complaints of the appellants or that the National Conference of the ANC, its highest decision making organ, consider the complaints at the start of the conference. The ANC drew our attention to rule 11.3

[67] Rule 12.2(d) of the ANC's constitution.

which empowers the National Conference "to review, ratify, alter or rescind any decision taken by any of the constituent bodies, units or officials of the ANC".[68]

[124] In our view, a declaration that the provincial elective conference of the ANC and the decisions taken at the conference are unlawful and void should suffice. We emphasise that the declaration of invalidity applies only to the Provincial Conference. The declaratory order we make does not relate to or affect the rights of delegates who have been elected at properly constituted branch general meetings of the Free State province to serve as delegates at any other conference of the party.

[125] We are disinclined to determine how the political party concerned should regulate its internal process in the light of the declaration made by this Court. We are satisfied that the ANC's constitution confers on the NEC or the National Conference adequate authority to regulate its affairs in the light of the decision of this Court.

Costs

[126] The appellants have had substantial success in the application for leave to appeal directly to this Court and in the appeal. They urge us to follow the ordinary practice that costs should follow the result. They add that they were compelled to come to this Court in order to vindicate constitutional rights.

[68] Rule 11.3 of the ANC's constitution states that the National Conference shall have the right and power to review, ratify, alter or rescind any decision taken by any of the constituent bodies, units or officials of the ANC.

[127] It is so that, ordinarily, a party that successfully vindicates a constitutional right is awarded costs. That is so particularly if the respondent is a public body that bears an obligation to uphold the Constitution. The present dispute amounts to not much more than a power struggle within provincial structures of the same political party. If these rifts are to heal, in time, the parties will have to talk to each other. A costs order may make the healing and reconciliation more difficult for those concerned. The second relevant consideration is that this is a class action against, in addition to the ANC, several individual provincial and branch office bearers. A cost order against the personal estates of one or more of them may not be just and equitable. We accordingly make no order as to costs.

Minority judgment

[128] Relying on *Theletsane*[69] the minority judgment holds that the appellants' case has been adequately refuted by the respondents. Reference is made to the affidavit of the Secretary-General of the ANC to illustrate that complaints of irregularities were addressed by setting up a task team which investigated and made recommendations on how the grievances raised could be settled. The ANC, acting in accordance with its internal procedures, states the minority, acted upon the recommendations and settled the grievances. Relying further on the *Plascon-Evans* rule, the minority holds that the entire case must be decided on the basis of the averments made by the respondents.[70]

[69] *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) (*Theletsane*).

[70] Minority judgment [52] above.

[129] We disagree. In our view the minority approaches the case on an incorrect footing. It proceeds from the premise that:

> "The appellants sought to review the lawfulness of the Free State regional conference and the decision of the ANC to accept the outcome of that conference. The factual basis for the review was that the ANC ignored and failed to investigate the alleged irregularities that they set out in their founding papers."[71]

[130] In our view this characterisation of the appellants' case is inaccurate. It is incomplete. The review claim was one of three causes of action. The other causes of action were those which we find were established, namely, that their right to participate in the activities of the ANC was violated when they were prevented from taking part in meetings of the ANC. This is a constitutional claim based on the right entrenched in section 19 of the Constitution. The second cause of action is contractual. It is based on the breach of the ANC's constitution and its audit guidelines. The irregularities referred to above establish both these causes of action. None of them is dealt with in the minority judgment.

[131] The fact that the Secretary-General stated that all the complaints that were referred to him were resolved by the task team is not an answer to the facts supporting the two causes of action. This is so because the Secretary-General does not say that all irregularities supporting these two causes of action were resolved. In fact he says the opposite. In relevant part he states:

[71] Id [45] above.

> "The bulk of the complaints which are raised by the applicants in their founding papers are raised with the ANC for the first time in this Court papers. The ANC was never given an opportunity to deal with the complaints which the applicants raised for the first time in the Court a quo and in this application before this Honourable Court."

[132] What is significant is the fact that the Secretary-General does not specify which irregularities constitute "the bulk" of complaints that are raised for the first time in these proceedings. In view of this, the principles in both *Theletsane* and *Plascon-Evans* are not helpful. As indicated in our judgment, the finding that the appellants have established two causes of action is based on irregularities that were either not disputed at all or in respect of which bare denials were raised. It is axiomatic that bare denials do not raise a genuine dispute of fact.

Order

[133] It was for these reasons that the following order was made on 14 December 2012:

1. The appeal is upheld.
2. The order of the High Court dismissing the application is set aside.
3. The provincial elective conference of Free State province of the African National Congress held at Parys on 21 – 23 June 2012 and its decisions and resolutions are declared unlawful and invalid.
4. There is no order as to costs.

For the Appellants:	Advocate DC Mpofu, Advocate M Lekoane and Advocate JM Berger instructed by Bezuidenhout Attorneys.
For the First to Twenty-Fifth Respondents:	Advocate MH Wessels SC and Advocate N Snellenburg; Advocate W van der Linde SC and Advocate K McLean instructed by Gous Vertue and Associates Inc.
For the Twenty-Sixth Respondent	Advocate T Motau SC and Advocate M Zulu instructed by Bomelas Attorneys.