IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

CASE NO: 4211/2022

In the matter between:

ANDILE LUNGISA **Appellant**

and

AFRICAN NATIONAL CONGRESS **First Respondent**

MEMBERS OF THE EASTERN CAPE EXECUTIVE COMMITTEE OF THE AFRICAN NATIONAL CONGRESS **Second Respondent**

JUDGMENT: URGENT APPLICATION FOR INTERIM RELIEF

LOWE J

INTRODUCTION

1. Under cover of a certificate of urgency and a directive from the duty Judge, this matter came before me as an urgent application in which applicant seeks urgent interdictory interim relief that pending the finalisation of a final interdict process, in essence, his suspension as a member of the second respondent be in turn suspended. Whilst the notice of motion is considerably more detailed than this, it comes down to exactly that as submitted by applicant's counsel.

2. The essence is then interim relief operating with immediate effect returnable, so says the notice of motion, on 7 February 2023.

3. Although bought on an extremely stringent time line, first and second respondents gave notice of intention to oppose and filed substantial answering affidavits in support of their opposition.

4. In due course, and having been given an opportunity by myself to do so, applicant filed a short replying affidavit.

5. The matter having stood down to enable applicant to do so, and to enable applicant's counsel to file heads of argument, the matter proceeded on the day allocated for the matter and full argument was heard, I reserving judgment on the issue of interim relief.

6. The matter is, so say the least, hotly contested, having regard to the urgency of the matter, applicant requested that the judgment be produced as a matter of the greatest urgency in that context. There is some merit in the question of urgency, certainly applicant and respondents make common cause in that regard. In the circumstances, I produce this judgment as a matter of urgency and though I would have preferred more time to do so, the issues being in instances complicated and argument having been extensive, I am confident that my decision is fully motivated and indeed justified sufficiently on what I set out hereafter.

THE APPROACH TO INTERIM RELIEF

7. An interdict is a remedy of a summary and extraordinary nature suitable in cases where a person requires protection against an unlawful interference, or threatened interference, with that person's rights.

8. An interlocutory interdict is one which is granted *pendente lite*.[1] It is a provisional order given to protect the rights of the applicant pending an action or application to be brought to establish the respective rights of the parties. It does, of course, not involve a final determination of the rights and does not affect such determination.

9. It is trite that the requirements for an interim interdict are the following[2]:

    9.1 A prima facie right;

    9.2 A well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted;

    9.3 A balance of convenience in favour of the granting of the interim relief; and

    9.4 The absence of any other satisfactory remedy.

10. As was pointed out in argument in cases such as **Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton**[3], the "*sliding-scale"* test as pronounced in a **Limphic Passenger Service (Pty) Ltd v Ramlagan**[4] is applied, being the stronger the prospects of success, the less need for the balance of convenience to favour the applicant; the weaker the prospects, the greater the need for the balance of convenience to favour applicant.[5]

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[1] **Pikolli v President of the Republic of South Africa** 2010 (1) SA 400 (GNP) at 403H.
[2] Setlogelo v Setlogelo 1914 AD 221 at 227; RS v MS and others 2014 92) SA 511 (GJ) [26] to [28].
[3] 1973 (3) SA 685 (8); See also **Marinpine Transport (Pty) Ltd v local Road Transportation Board, Pietermaritzburg** 1984 (1) SA 213 (N) at 234C.
[4] 1987 (2) SA 382 (D).
[5] SA Securitisation (Pty) Ltd v Chesane 2010 (60 SA 557 (GSJ) at 565D – F.

11. In this case it is relevant to deal more fully with the prima facie right requirement. In most interlocutory interdict cases a clear right may well not be established upon the affidavits, being met by counter-allegations or denials and, as the matter is interlocutory and the relief granted temporary, not decisive of either parties' rights, the degree of proof required is not as stringent or exacting as that required for the grant of final relief.

12. In determining the prima facie right issue the court must look not only at applicant's allegations but also at the respondent's affidavits as set out in[6] **Webster v Mitchell,** most recently stated in **Bombardier Africa Lions Consortium v Lombard Insurance Company**.[7]

13. This comes down to the fact that the right relied on need not be shown to exist on a balance of probabilities, it being sufficient if it is "prima facie established though open to some doubt". To decide this the applicant's facts are considered together with any facts set out by respondent which the applicant cannot dispute and then the court to consider whether, having regard to the inherent probabilities and the ultimate onus, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by respondent should then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed as the right prima facie established may be open to some doubt.

14. This was somewhat diluted in **Gool v Minsiter of Justice**[8] where the court said that this statement was too favourably expressed towards the applicant and the

[6] 1948 (1) SA 1186 (W) at 1189.
[7] 2021 (1) SA 397 (GP) at [12]; Eskom Holdings SOC Ltd v Lekwa Rate Association [2022] 1 All SA 642 (SCA) at [21].
[8] 1955 (2) SA 682 (C) at 688 D – E.

criteria on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial.

15. In the result the test laid down in **Mitchell** (*supra*) as refined in **Gool** (*supra*) is the test usually applied to interim interdicts. This of course applies to a dispute which is one of fact. If the dispute is one of law a final decision can be reached and the court may grant a final interdict.[9]

16. To expand somewhat the prima facie right requisite is prima facie proof of facts that establish the existence of a right in terms of substantive law.[10] The degree of proof of the right referred to can be prima facie established even if open to some doubt.

17. In **National Treasury v Opposition to Urban Tolling Alliance**[11] the Constitutional Court held that there was no need to fashion a new test for the grant of interim interdict as the Setlogelo test continues to be a handy and ready guide to the bench in the granting of interdicts. The comment made, however, was that the test must be applied cognisant of the normative scheme and democratic principles that underpin the Constitution, the court considering whether to grant an interim interdict must do so in a way that promotes the objects, spirit and purport of the Constitution.

18. Turning to the balance of convenience issue the court must weigh the prejudice to applicant if the relief sought is refused against prejudice to respondent if it is

[9] Zulu v Minister of Defence 2005 (6) SA 446 (D) at 460D – 461C.
[10] LAWSA Vol 5 Civil Procedure Para 15: CIPLO Medipro (Pty) Ltd v Aventis Pharma SA (treatment Action Compaing as amicus curiae) 2012 JOL 29165 SCA [40].
[11] 2012 (6) SA 223 (CC) at 231C –E.

granted. As already suggested this requires a consideration of the prospects of success in the main proceedings on the sliding scale test.[12]

19. The court possesses a general and overriding discretion whether to grant or refuse interlocutory relief and in so exercising a discretion, which must be exercised judicially, all the relevant elements of interlocutory relief should be considered cumulatively.[13]

20. In this matter, the issue of a prima facie right and the balance of convenience, were those predominantly addressed by the parties.

THE BAKCGROUND TO THE APPLICATION

21. Applicant is a member of second respondent (the "ANC").

22. He relies, amongst other things, on rights which are contained in the Constitution and the constitution of the ANC which he refers to as political and association rights.

23. The issues which arise commenced in 2018 at which time applicant was a member of the mayoral committee at the Nelson Mandela Metropolitan Municipality. Respondents allege that the ANC instructed him to resign this position which instruction he "*disobeyed."* Respondents allege that on 30 January 2020 applicant was reminded to submit his resignation letter to the secretary of the ANC by no later than 3 February 2020 which, it is alleged, he

[12] This most recently set out in **South African informal traders forum v City of Johannesburg** 2014 (4) SA 371 (CC) at 380 d which approved Ferreira v Levinno 1995 (2) SA 813 (W) at 832D – 833h.
[13] **Breedenkamp v Standard Bank of Sourh Africa Ltd** 2009 (5) SA 304 (GSJ) at 314H.

failed to do. Respondents regarded this as an act of misconduct and applicant was charged accordingly with such misconduct.

24. The "*charge sheet*"[14] relates to the Provincial Disciplinary Committee (PDC) of the ANC for the province of the Eastern Cape – case no 2/2020. This refers to applicant. It records that applicant was "*deployed*" by the ANC as a municipal councillor and mayoral committee member at the Nelson Mandela Metropolitan Municipality. It records that by letter dated 30 January 2020 applicant was advised of the decision and directive of the ANC Provincial Executive Committee (PEC) (of the Eastern Cape), confirmed by the National Executive Committee, that he must resign his position in the mayoral committee and submit his resignation by 3 February 2020. It was alleged that he had failed so to do and that he was consequently charged with four charges related to his failure to adhere to the directive to resign, having breached Rule 25.17.6 of the ANC constitution; essentially failing to execute or comply with the PEC resolution, behaving in a manner which brought the ANC into disrepute and which breached his membership oath in contravention of Rules 25.17.37; 25.17.5; 25.17.1 of the ANC constitution.

25. It is clear from the charge sheet, that the charges emanate from his alleged failure to abide the instruction to resign from the mayoral committee, and do not relate to conduct underlying that resignation instruction.

26. Put differently, respondents allege that it was applicant's "*persistent defiance*" (that is not to resign), as an act of misconduct for which he was charged.

[14] AA-1 page 190 dated 14 July 2020

27. Respondents allege that during pre-hearing procedures relevant to the charges applicant was requested to present his resignation letters against the withdrawal of the charges, which in fact eventuated, the PEC recording on 18 October 2020, its acceptance of his letter of resignation from his position on the mayoral committee of the Nelson Mandel Bay Metropolitan Municipality and the charges withdrawn.

28. On 18 January 2021 applicant was again charged by the PEC of the ANC for the province of the Eastern Cape with charges set out in AA3[15] with a charge relating to the fact that it is alleged that on 17 April 2018 he was convicted of assault with intent to do grievous bodily harm and subsequently sentenced to a term of imprisonment, without the option of a fine. It was alleged that this constituted a violation of the ANC constitution, he facing a charge which reads as follows:

> "That by your conduct as set out in paragraph 3 above (the conviction of assault) you were convicted in a court of law and being sentenced to a term of imprisonment without the option of a fine for any offence and by so doing, breached/violated Rule 25.17.2 of the ANC constitution."

29. It was said that the matter would be heard by the Provincial Disciplinary Committee (PDC) on 7 February 2021.

30. On 7 February 2021, and applicant being absent, the disciplinary committee in considering the notice confirming receipt of the charge sheet by respondent, found that it had not been served on respondent personally and the matter was then removed from the roll of cases to be heard for the purpose that respondent

[15] Page 198

be "*properly served and be given sufficient notice of 14 days to appear before the PEC*".

31. The same charges were then served upon the applicant relevant to proceedings to occur on 16 May 2021, applicant appearing in person. The PDC on the same day found applicant guilty on the merits as set out below.

32. Accepting the conviction alleged with consequent sentence against which appeal proceedings were unsuccessful, and having heard applicant, the PDC found applicant guilty as charged in respect of a contravention of Rule 25.17.2, postponing the proceedings for sanction to be considered on 16 June 2021. This conviction related to:

> "25.17.2 Conviction in a court of law and being sentenced to a term of imprisonment without the option of a fine, for any offence."

33. Applicant did not attend the sentencing or sanction proceedings, the PDC then issuing a sanction that applicant should attend an anger management course for a period of twelve months, and that "*the membership of the respondent in the African National Congress is hereby suspended for a period of 18 (eighteen) months, effective from 6 June 2021.*"

34. Applicant's right to appeal or review the sanction, to the National Disciplinary Committee, within 21 days is set out in the PDC findings and reasons (AA-5).

35. In due course applicant lodged an appeal/review to the National Disciplinary Committee (NDC) against both the finding of guilty and the sanction imposed. This appeal/review was upheld by the NDC on 7 September 2021.

36. The ANC then appealed this outcome at the NDC to the NDCA (National Disciplinary Committee of Appeal of the ANC) which appeal was purportedly upheld on 7 September 2022. The applicant's founding affidavit attaches the proceedings before the NDCA as AL2 which he refers to as the purported latest NDCA judgment which is attached, unsigned and not, he points out, on the ANC's letterhead. He alleges that he has been suspended on the face of an NDCA judgment "*that does not exist".*

37. Respondents contend, however, that on 21 September 2022 applicant appealed to the National Executive Committee of the ANC (NEC), annexure AA-9[16], which ends with the applicant's name and states "*in the light of the above, I will request this matter to be corrected by the NEC or the legal units/division further*". The email/letter records the earlier charge of misconduct by the applicant, before the ECPDC which were withdrawn, recharged and found guilty on 6 June 2021, and sets out the sanction recorded. The subsequent history that this was challenged before the NDC and a subsequent appeal on 28 September 2021 to the NDCA is set out. It is recorded that on 16 September 2022 the NDCA announced that it was overturning the decision of the NDC upholding the appeal, the email/letter then goes on to record that it is applicant's view that this was irregular thereby seeking that the finding be corrected by the NEC.

38. It would seem, thus, that although applicant contends that the NDCA decision does not exist, and that this is referred to as unsigned and that respondents

[16] Page 262.

have failed to produce a "properly produced NDCA judgment" as this does not exist, he wished to appeal against the said decision.[17]

39. It is respondents' contention that the appeal proceedings, one after the other, suspended the sanction imposed previously, which suspended applicant's membership of the ANC for eighteen months.

40. During October 2022 the deponent to the answering affidavit, the Secretary of the ANC in the Eastern Cape Province, says that he received the outcome of the appeal to the NEC and that it was dismissed. He states, "*a copy of an extract from the minutes of the meeting of the NEC, containing the ruling of the appeal, concerning the applicant is attached and marked as such AA-10*."

41. AA-10 dated 6 December 2022 is a letter from the Treasurer General on behalf of the Secretary General's office of the ANC, recording an extract from the minutes of the meeting of the NEC, which minute purportedly at 157.4 found that all the convictions and reasons for doing so by the ECPDC were upheld and confirmed entirely in respect of applicant's matter 02/2021.

42. It is thus respondents' contention that the sanction then came into operation.

43. On a proper reading of annexure AA-10 referred to above, it is perfectly clear that the applicant's submission that the decision was something that came after the launch of the application cannot be correct, as it is properly explained that whilst the communication is on the 6 December 2022, it is the extract of the minutes of the earlier proceedings of the NEC.

[17] This is contradicted by AA-9 of applicant's appeal to the NEC against the decision of the NDCA.

44. I will deal further with the above as far as necessary relevant to the submissions that were made, both ways. I note applicant's allegation that the NDCA judgment in terms of which he was suspended "does not exist" and his challenge to respondents'' to produce it with his submission that they have failed to do so, he stating that the purported judgment AL2 is unsigned, is not on the ANC's letterhead, that respondents have "refused" to produce a proper judgment.

45. Put otherwise, it is applicant's contention that the only ruling decision was that of the NDC upholding his appeal against his conviction and sentence and that accordingly his purported suspension was set aside.

46. It is respondents' contention that this was dealt with properly and fully by the NDCA, contends that the appeal succeeded as per AL2, that applicant then appealed this to the NEC which appeal was dismissed.

47. It goes almost without saying that in reply applicant does not contest that his appeal was made to the NEC (AA-9), and in his reply the relevant paragraph 12 of the answer is not dealt with. It is certainly not denied that this was his appeal, and one may ask why, if the decision did not exist, applicant appealed same. What he does allege is that the deponent to the answer "*misleadingly claims to have received the NEC rejection of his appeal during October 2022*" and attaches a letter in support dated 6 December 2022. This is fully explained on a proper study of the papers and annexures, not to mention the answering affidavit as I have already referred to above.

48. Applicant makes the second point that the reference to having received the decision in October 2022 cannot be correct as the document AA-10 refers to a meeting of 11 – 13 November 2022.

49. Whilst it may certainly be so that the deponent erred relevant to his reference to October 2022, this is not significant as it is clear from the extracts of the NEC minute that, considering the issue in November 2022, the appeal/review was dismissed – applicant being unable to join issue on the facts relevant to the dismissal of his appeal prior to the launch of these proceedings and thus bringing his suspension, which had been suspended due to the appeals, into operation.

50. It is also clear that until such time as the appeals were finally dealt with, and having regard to the suspension of the sanction imposed, applicant was certainly entitled to participate in the proceedings of the ANC as a fully functional member thereof.

51. In his founding affidavit, applicant at paragraph 17 states "*the NDCA upheld that appeal". "Inexplicably, despite many attempts to source the record and judgment of the NDCA in terms of which I was purportedly suspended, I have not been provided with them.*" He then says that he is "*advised in confidence that they do not exist …*" without giving any details as to where, when and what circumstances and by whom he was so advised, this falling far short of what is required to be set out if relying on hearsay evidence in urgent applications.

52. Applicant attaches AL3 stating that he received a letter (dated 4 October 2022) from the ANC provincial secretary stating that the provincial office had received the judgment from the NDCA regarding the appeal upholding the sanction

imposed by the PDC of suspension of applicant's membership, the sentence being a suspension of applicant's membership in the ANC for a period of two years, with immediate effect, with one year of such suspension being suspended for a period of five years on condition that he be not convicted of any act of misconduct during the period of suspension and pay a fine of R5 000,00 by 30 October 2022. It continued to say that effectively applicant's membership in the ANC was suspended to 16 September 2023.

53. A reading of the very lengthy appeal document from the National Disciplinary Committee, (NDCA), discloses that there were twenty-nine respondents of which applicant was twenty seventh. The document is 121 pages in length, all of which are attached, and at page 59 applicant's "*review*" is considered.

54. There is then a detailed exposition of some 13 paragraphs covering seven pages and which clearly and in detail is linked to what had gone before me in respect of applicant.

55. The finding at paragraph 110 of the NDCA was that the charged members, including applicant, had failed to show any material procedural irregularity in the ECPDC proceedings which rendered the hearing unreasonable or unfair.

56. This is followed thereafter by the NDCA order/directive setting aside the decision or finding of the NDC in applicant's review, the convictions of the ECPDC being upheld and confirmed.

57. Although unsigned, at the end thereof, the detail, references and finding are clearly established and relate to applicant's matter, and the probabilities are remote that this document is not a decision of the NDCA. The document itself

discloses that the judgement was released on 7 September 2022[18], and accords with the time line adverted to above in sequence.

58. The letter AA-10 previously referred to dated 6 December 2022, refers to a meeting of the National Executive Committee of second respondent of 11 – 13 November 2022 and not to the judgment of the NDCA. It considered a report from the NEC which amongst other things, dealt with the work of the NDCA. The findings and conclusions of the NDCA were dealt with by way of extracts of the minutes, the NEC simply noting the report.

59. On that analysis it is clear that the alleged deficiency in the time line contended for by applicant is unsubstantiated.

60. Applicant in his papers, and further advanced in argument, contends that in a letter from the ANC to the NDCA chairperson on 24 May 2022 it was recorded that applicant's case was similar to that of another member, Mnqwazi, where the NDCA refused to hear the appeal on grounds of jurisdiction. It continued to say that for the PEC to move forward and "*to be certain of which steps to be taken next, we need a full judgment from the NDCA on this matter*". It is argued that this indicates that the NDCA had already taken a decision that it had no jurisdiction to entertain applicant's matter and was thus thereafter *functus officio*.

61. The difficulty with this argument is, however, that the letter to which I have just referred, is not a decision of the NDCA at all but in fact a letter from the Provincial Secretary, the deponent to the founding affidavit, which he says he

[18] Page 36 of the papers.

drafted to the chairperson of the NDCA demanding the outcome in the appeal the ANC had lodged against the decision of the NDCA.

62. On the face of it on the papers there is merit in the response hereto and there is no sustainable submission that the NDCA had declined to hear the applicant's matter for want of jurisdiction, other than in the case of another member and not applicant.

63. In support hereof respondents annex AA-11, a communication from the chairperson of the NDCA, dated 20 August 2021 referring to the NDCA decision "*on the OR Tambo Councillors" in which the NDCA in that matter (not applicant's matter) advised the ECPDC to appeal directly to the NEC through the "SGO*".

64. The above exposition deals substantially with the facts relevant, the allegations and counter allegations. I have already set out the approach to be adopted at the interim interdict stage and the extent to which regard may be had to the allegations and counter allegations on the papers.

65. In this matter, much is common cause as to the background, with islands of factual dispute here and there, particularly the issue of whether there is an NDCA decision relevant at all, and as to whether the NDCA previously took a decision that they had no jurisdiction.

66. Applying the approach which I have set out above, and upon the factual allegations both ways, and my analysis thereof, I now turn to the requisites which applicant must establish at the interim interdict stage to succeed as fully set out above.

THE INTERIM INTERDICT REQUISITES

67. As to a prima facie right to the relief sought, even if it is open to some doubt, I have fully and comprehensively dealt with the facts, the allegations and counter allegations.

68. On the papers, and as already dealt with fully above, on the appropriate test and approach at this stage, applicant's argument cannot be sustained that there was no NDCA decision relevant to applicant's position on the merits of the matter imposing the sanction to which I have referred above. In my view, on applicant's own papers when analysed against the annexures, he fails to establish prima facie proof of facts which establish the existence of a right to the extent required, as what is put up on his behalf in this regard discloses considerable difficulty in the argument, and there is far more than "*some doubt*" as to the correctness and veracity of the submissions, allegations and argument. It hardly needs be repeated that applicant himself appealed against the decision of the NDCA which he alleges now does not exist, and in that appeal/review dated 21 September 2022 he specifically states "*on 16 September 2022 the NDCA announced that it has overturned the decision of the NDCA and upheld the appeal.*" Applicant then sets out shortly the basis of his appeal against the decision of the NDCA, this inconsistent with the suggestion that there is no decision against which applicant even needed to appeal if he was of the view that the NDCA decision does not exist. It is that appeal (of the NDCA) which was dismissed by the NEC as referred to in their minutes attached in document AA-10.

69. In the result, in respect of the first requisite, a prima facie right established, though open to some doubt, applicant has failed to establish the existence of such right, prima facie relevant to the non-existence of the NDCA decision.

70. In respect of the prima facie right argument there is the further submissions that the charges against him were simply a duplicate set of charges brought in respect of the same matter, but in two separate proceedings, the second set of charges which formed the crux of this matter then being impermissible and, secondly, that the NDCA was *functus officio* as set out above, and thirdly an argument as to waiver.

71. I have, in respect of all the above, already set out the facts and time line relevant on the proper approach to the papers. It is more than clear that the two charges, are entirely different the first relating to applicant having declined to follow the instructions of the ANC that he resign his position as a member of the Mayoral committee at the Nelson Mandela Metropolitan Municipality. This was finally resolved as I have set out by applicant tendering his resignation which was accepted. The second charge, during February 2021, as I have also set out in detail, related to the actual relevant event and alleged assault with intent to do grievous bodily harm and a finding in the courts of guilt in this regard and a sentence of imprisonment being imposed, forming the basis of the charge which proceeded before the PDC.

72. It is apparent from the facts and the reading of the charge sheets and the allegations made, even on applicant's papers viewed alone, that the two charges were by no means the same in any way, although their origin all

surrounded the events relevant to the mayoral committee procedures and assault referred to above. The one clearly related to applicant's refusal to follow an instruction of the ANC to resign, the second related to the actual events and his conviction on a charge of assault with intent to cause grievous bodily harm. Thus once again no prima facie right whatsoever is made out in this regard.

73. In respect of the jurisdictional argument already set out above in respect of the NDCA, once again in my view, on the papers and the common cause facts, this has not been established.

74. Finally, in respect of waiver, this appears to rely on the argument that after a finding in the PEC's favour by the NDCA, the PEC in full knowledge thereof permitted applicant to exercise his membership rights representing to applicant that it had waived its reliance on the determination of the NDCA. It is more than apparent on the papers that the sequence of events and facts which I have outlined above, that second respondent permitted applicant to exercise his membership rights at all times when there were appeals pending against findings against applicant from one successive appeal body to another, this being, so it is alleged, and not seriously contradicted, relying on the tradition and practice of the ANC, put otherwise, that whilst there are appeal proceedings pending, members in their own interests are permitted to exercise their membership rights even though those decisions impact upon the suspension of those membership rights.

75. As was pointed out in **Mcoyi and others v Inkhata Freedom Party, Magwaza-Msibi v Inkhata Freedom Party**[19] it is not only permissible but required of an

[19] 2001 (4) SA 298 (KZP) [43].

organisation to follow established and well known practices this being part and parcel of the terms and conditions accepted by members who join a particular association. In **Mgabadleli and others v ANC**[20] the court held that in principle there is no reason for not accepting that an established or well-known practice in use in the ANC can form part of the terms of the relationship between the parties and its members.

76. It seems to me, that it is this practice that has been applied, this to the benefit of the applicant during the period over which his appeals were being determined and is certainly not a waiver such as is contended. Waiver is a question of fact and in this matter there is no prima facie proof of facts establishing the right contended for.

77. Thus, once again, no prima facie right is established in this regard whatsoever.

INTERPRETATION

78. It must be emphasised, and always remembered, that in the current day, interpretation of a document, including a statute, requires careful regard to context. When a court determines the nature of the party's rights and obligations in a contract it is involved in an exercise of contractual interpretation. There is now a settled approach to the interpretation of contracts, documents and indeed statutes.[21] In that matter the following was said:

> "[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to

[20] EL 1303/2017 [2017] ZAECHC 131 (12 December 2017) at para 24.
[21] **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA).

add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.* The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[15] The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',[16] read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

79. As was emphasised this approach to interpretation requires that from the outset one considers the context and language together, with neither predominating over the other.

80. In **Chisuse v Director - General Director of Home Affairs**[22] (at paragraph 52) the Constitutional Court speaking in the context of statutory interpretation held that this "*now settled*" approach to interpretation, is a "*unitary*" exercise. This means said the court in **University of Johannesburg v Auckland Park Theological Seminary and another**[23] that interpretation is to be approached holistically: simultaneously considering the text, context and purpose. To make it clear, it has been explicitly pointed out in cases subsequent to Endumeni that context and purpose must be taken into account as a matter of course whether or not the words used in the contract (or statute) are ambiguous.[24]

81. In **Cool Ideas 1186 CC v Hubbard**[25] the court in dealing with the interpretation of statutes said the following:

> "[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
> (b) the relevant statutory provision must be properly contextualised; and
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."

THE RELEVANT PORTION OF THE ANC CONSTITUTION IN CONTEXT (ANCC)

[22] 2020 (6) SA 14 (CC).
[23] 2021 ZACC 13 at [65].
[24] **Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA).
[25] 2014 (4) SA 474 (CC).

82. The ANCC in Rule 25, has carefully set out organisational disciplinary structure[26].

83. All members of the ANC are subject to this disciplinary structure.

84. Once instituted the disciplinary proceedings are a "*one-stage inquiry*".[27]

85. One of many "*acts of misconduct*" is the conviction in a court of law of any offence and being sentenced to a term of imprisonment without the option of a fine. [28]

86. The "officials", the NEC, the PEC, the PWC amongst others may institute disciplinary proceedings ("invoke").[29]

87. The Provincial Disciplinary Committee (PDC), the National Disciplinary Committee (NDC), the National Disciplinary Committee of Appeal (NDCA), the National Executive Committee (NEC) and the National Conference has disciplinary or appeal/review authority as is more fully referred to hereafter.

88. The ANC generally has jurisdiction to discipline any member in respect of Rule 25.17 in respect of misconduct as per Rule 25.4.

89. The PDC has jurisdiction to hear and adjudicate any act of misconduct referred to it by the PEC.[30]

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[26] Rule 25.
[27] Rule 25.11
[28]Rule 25.17.2
[29] Rule 25.9
[30] Rule 25.33

90. A member found guilty has a right of appeal/review to the next higher disciplinary committee within 21 days of a public announcement of the ruling and sanction.[31]

91. The words “appeal” and “review” are defined in the ANCC as follows:

“Appeal”: “Means to resort to or apply to a higher authority in the ANC structures for a decision”;

“Review”: “Means to consider the acceptance or refusal of;”

92. The decision of the disciplinary committee adjudicating the appeal or review is said to be “final”.[32]

93. Disciplinary proceedings shall be disposed of expeditiously and within a reasonable time, failing which the member may apply for the withdrawal of the charge or that the proceedings be stopped.[33]

94. The NDC has both original and appeal/review jurisdiction in respect of cases adjudicated by the PDC.[34]

95. Where the NDC acts as a tribunal “of first instance” a review/appeal is to the NDCA.[35]

96. The NDCA has jurisdiction to adjudicate appeals/reviews in matters determined by the NDC and appeals bought to it in terms of the ANCC.[36]

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[31] Rule 25.34; Rule 25.38.
[32] Rule 25.41
[33] Rule 25.48 – 25.52.
[34] Rule 25.20 – 25.23.
[35] Rule 25.24.
[36] Rule 25.26.

97. Reviews by the NEC relate to the review of a decision of the disciplinary committees as to procedural fairness.[37]

98. In this matter the initial proceedings were to the PDC as a committee of first instance, then on appeal/review to the NDC on 7 September 2021 where the applicant was successful. These were appeals/review proceedings and applicant's suspension was uplifted.

99. This finding was later appealed by the PDC to the NDCA which upheld the appeal. The matter then came before the NEC on appeal/review brought by applicant and was dismissed, as I have already set out above.

100. Applicant contends that the appeal from the NDC to the NDCA was by implication, on interpretation of Rule 25.24, out of order as "*by implication appeals and reviews of the NDC cannot serve before the NDCA as an appeal or review body*". It is argued that the finding of the NDC on appeal/review was thus final and was in applicant's favour, referring to Rule 25.41 in addition which sets out that the decision of the appeal or review committee shall be final.

101. I have carefully considered the ANCC in its entirety, and applying the proper approach to interpretation I have also had regard to the Rules relevant to this matter in their context. Having done so I do not agree with the interpretation urged upon me, which is vigorously challenged by respondents.

102. On a careful analysis of the relevant rules in context and approaching the interpretation in the manner that I have set out carefully above under interpretation, it is clear that all decisions of first instance, and reviews/appeals

[37]Rule 25.29

are subject to a cascade of appeals/review opportunities through to the NEC and then the National Conference.[38]

103. It makes no sense in the overall context of the ANCC to suggest that Rule 25.24 limits the appeal process at the NDC level, save and unless it is a tribunal of first instance. Indeed, all it does is to make it clear that an appeal/review as of first instance from the NDC is to the NDCA and does not, clearly in my view, suggest (or even say) that if the NDC decides a review/appeal that is the end of appeals and reviews so that the remaining structures at a higher level are disentitled from deal with same.

104. The interpretation sought by the applicant also, in my view, flies the face of the NDCA jurisdiction as set out in Rule 25.26, which refers to appeals and reviews in matters determined by the NDC. The argument also ignores the subsequent review by the NEC.

105. It is clear accordingly, in my view, that on a proper interpretation in context the NDCA has appeals/review jurisdiction in respect of the appeals/reviews decided by the NDC, as in this matter.

106. Indeed, it is plain from the papers, that this was also at least originally applicant's view. He launched an appeal against the decision of the NDCA to the NEC, without challenging the authority of the NDCA to decide the original appeal/review from the NDC.

107. Applicant's argument then in this regard has to be rejected.

[38]Rules 10 and 11 and particularly 11.3.

IRREPARABLE HARM

108. As to the next requisite, of irreparable harm, the question is whether a reasonable man confronted by the facts, would apprehend the probability of harm, requiring the court to decide on the basis of the facts it presented whether there was any ground for the entertainment of a reasonable apprehension of harm by applicant.[39]

109. I am prepared to accept that on the face of it that if in fact applicant is entitled to participate in the ANC and the upcoming affairs, he will suffer at least potentially and perhaps even on the probabilities, the harm which he apprehends. On the other hand, if he is not entitled to participate in the affairs of the ANC, his participation may well impact upon the outcome of the affairs of the ANC, but this goes rather to the balance of convenience than to the apprehension of harm.

BALANCE OF CONVENIENCE

110. As to the balance of convenience, I have set out the test and approach to be applied. On the sliding scale, and as I have set out above, applicant has no or at best remote prospects of success on the approach to be adopted at the interim interdict stage, and thus the greater the need would be required in respect of the balance of convenience to favour him as opposed to applicant. It seems to me, that the balance of convenience in this matter is evenly balanced on the allegations set out in the papers. However, having regard to

[39] **Minister of Law and Order v Nordien** 1987 (2) SA 894 (A) at 896 H – I; **National Council of Societies for the Prevention of Cruelty to Animals v Openshaw** 2008 (5) SA 339 (SCA) at 347D – E.

the extremely weak prospects of success enjoyed by applicant, at least on the test at this stage, this too must be resolved predominantly against applicant.

NO OTHER SATISFACORY REMEMDY

111. In respect of the requirement of no other satisfactory remedy, it is certainly so that the applicant has no other remedy than to continue to pursue the internal appeal processes of the ANC over the next period. This then is one aspect to be resolved in applicant's favour.

DISCRETION

112. As I have already set out above, I have a discretion in this regard and all the elements relevant to the determination of interlocutory relief must be viewed cumulatively.

113. In my view, it flows from what I have already set out above that viewed cumulatively in my judicial discretion, the applicant has entirely failed to demonstrate any basis for interlocutory relief such as he claims in the notice of motion. Not only has he failed to establish a prima facie right on the appropriate test to the extent required, but further the balance of convenience at best evenly balanced stands against relief being granted in the matter viewed cumulatively.

114. I have taken into account the submissions made for applicant relevant to the constitutional entitlement that applicant has in terms of section 18 of the Bill of Rights that every citizen is free to make political choices which include the right to participate in the activities of all recruit members for a political party. I also take note of the argument for applicant that his children whose best interests this court must maintain, have been equally affected, applicant having no

income as a result of his having been asked to resign by the ANC. That is, of course, however, not the end of the matter, and the proper approach and interpretation of relevant issues raised must be considered in the light of the constitutional imperatives. I am also mindful and have regard to the applicable principles in the ANC's constitution.

115. My analysis, however, of the allegations relevant, read with supporting documents even taking into account the constitutional and rights in the ANC Constitution as referred to above, do not change the conclusion and the basis therefor which I have reached in this matter.

116. That the applicant has continued to fight his suspension over a four-year period, and whilst I take note of Rule 25.48 of the ANC Constitution, and that disciplinary proceedings shall be disposed of expeditiously and in a reasonable time, delays on the papers were as much due to successive appeals/reviews as the issues which eventuated.

117. There is in my view, no merit in the argument advanced for applicant that the matter before the PDC was a "*review*" and not an appeal this being so it is argued deliberately mislabelled in order to found jurisdiction of the NDCA. The concept of review and appeal in the ANC Constitution seems to me to effectively be used without the distinction drawn between these two kinds of proceedings in the courts of law, as against their definition and in any event this in my view takes the matter no further.

118. I have applied the principles applicable to the interpretation of documents set out below.

THE RESULT

119. Accordingly, and in the circumstances, applicant has failed to make out a case for interim interdictory relief in this matter, and the application falls to be dismissed as appears from the order below.

COSTS

120. In respect of costs, no sustainable reason was advanced as to why applicant, should he be unsuccessful, should not pay the respondents' costs, bar that he was attempting to enforce his constitutional rights.

121. In my view, there is no reason to depart from the well-established rule that costs follow the result.

122. In **Biowatch Trust v Registrar, Genetic Resources and Others** [40] it was pointed out that generally in constitutional litigation against the State, the successful litigant should not be ordered to pay the costs. This is a judicial discretion having regard to all relevant considerations, and only if not frivolous, vexatious or manifestly inappropriate.

123. In this matter if a genuine Constitutional issue arose for consideration in the merits Biowatch may well be of application, but as I see it this is not the case.

124. The usual rule that a successful party should be awarded costs in any event is always subject to judicial exercise of the Court's discretion. Where constitutional issues are raised *bona fide* this must necessarily be taken into account in respect of an appropriate just and equitable costs order. The judicial discretion has been described as *"very wide"* or *"overriding"*[41]. Judicially in this

[40] 2009 (6) SA 232

[41] ***K & S Dry Cleaning Equipment (Pty) Ltd and Another v South African Eagle Insurance Co Ltd and Another*** 2001 (3) SA 652 (W) at 668; ***Griffiths v Mutual & Federal Insurance Co Ltd*** 1994 (1) SA 535 (A); ***Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*** 1996 (2)

context means *"not arbitrarily"* one must consider the circumstances, weigh the various issues that have a bearing on costs and make an order that is fair and just between the parties[42].

125. It seems to me that in all the circumstances and having regard to the above considerations, and **Biowatch** and in my general costs discretion, and further on the basis of justice and equity it is justified to order that Applicant pay respondent's costs.

126. The costs of two counsel are usually allowed where this is regarded as a "*wise and reasonable precaution*", and where this is not regarded as "*luxury*".

127. In this regard, as generally in respect of costs, the Court has a discretion[43].

128. In **De Naamloze Vennootschap Alintex v Von Gerlach** 1958 (1) SA 13 (T) 13 the Court (referring to the previous authorities) mentioned the following factors as some warranting the granting of costs of the second advocate; the length of the hearing or argument, the importance of questions of principle or of law involved and the number of legal authorities quoted.

129. In my view and in the Court's discretion the decision turns on the circumstances of each individual case.

130. Put otherwise, was it proper and reasonable to brief two counsel in the circumstances relevant to the matter, but the costs of two counsel should never be allowed as some kind of penalty analogous to an award of attorney and client costs.[44]

131. As examples, the costs of two counsel may not be allowed where the matter is of no unusual difficulty, or straight forward on the papers, or where the whole case turns on simple issues of fact where little law is involved or where the matter is of no great difficulty or complexity.

SA 621 (CC) para [3].

[42] Cilliers on Costs 2.01 to 2.04

[43] **International (Pty) Ltd v Lovemore Brothers Transport CC** 2000 (2) SA 408 (SE) 413H.

[44] **Rand Townships and Small Holdings (Pty) Ltd v Griebenow** 1956 (2) SA 42 – 45.

132. It goes without saying that the lengthy application brought in this matter was both difficult and complicated.

133. In the circumstances the costs of two counsel in this matter should be allowed.

134. In the circumstances, in my view, there is no reason why the usual approach to costs should not be adopted and that they follow the result.

135. In this matter, a very substantial application was brought as a matter of extreme urgency, the papers in the end exceeding 280 pages, and it is in my view in those circumstances just and equitable were respondents to be afforded the costs of two counsel, this being most certainly a wise and reasonable precaution.

ORDER

136. In the result the following order issues:

1. The application for urgent interim relief is dismissed.
2. Applicant is to pay first and second respondents' costs including the costs of two counsel.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant:	Adv. Ka-Siboto, instructed by Mabuza Attorneys, c/o Mgangatho Attorneys.
Appearing on behalf of the Respondent:	Adv. Bodlani together with Adv. Mashiya, instructed by Sakhela Inc.

Date heard:	8 December 2022.
Date delivered:	14 December 2022.