IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 7904/2016 P

In the matter between:

LAWRENCE DUBE	First Applicant
SIBAHLE ZIKALALA	Second Applicant
MARTIN SIFISO MZANGWA	Third Applicant
MZWEBI REMIGIUS NGCOBO	Fourth Applicant
LINDIWE NOMALUNGELO BUTHELEZI	Fifth Applicant

and

SIHLE ZIKALALA	First Respondent
WILLIES MCHUNU	Second Respondent
SUPER ZUMA	Third Respondent
MLULEKI NDOBE	Fourth Respondent
NOMUSA DUBE-NCUBE	Fifth Respondent
MXOLISI KAUNDA	Sixth Respondent
BONGI SITHOLE-MOLOI	Seventh Respondent
LYDIA JOHNSON	Eighth Respondent
WEZIWE VIRGINIA THUSI	Ninth Respondent

ARTHUR ZWANE	Tenth Respondent
ESTHER QWABE	Eleventh Respondent
MKHAWULENI KHUMALO	Twelfth Respondent
SDUDUZO GUMEDE	Thirteenth Respondent
MAKHOSI ZUNGU	Fourteenth Respondent
MAKHONI NTULI	Fifteenth Respondent
ZANELE NYAWO	Sixteenth Respondent
KHULEKANI HADEBE	Seventeenth Respondent
LINDIWE MJOBO	Eighteenth Respondent
SPHINDILE ZONDI	Nineteenth Respondent
JABU KHUMALO	Twentieth Respondent
FIKILE KHUMALO	Twenty-First Respondent
MERVIN DIRKS	Twenty-Second Respondent
SIPHUMILE ZUU	Twenty-Third Respondent
SOLOMON MKHOMBO	Twenty-Fourth Respondent
MAGGIE GOVENDER	Twenty-Fifth Respondent
BHEKI MTOLO	Twenty-Sixth Respondent
VINCENT MADLALA	Twenty-Seventh Respondent
NOMAGUGU SIMELANE-ZULU	Twenty-Eighth Respondent
NONTEMBEKO BOYCE	Twenty-Ninth Respondent
MDUMISENI NTULI	Thirtieth Respondent
BHEKI SIBIYA	Thirty-First Respondent
CELIWE MADLOPHA	Thirty-Second Respondent

DUDU MAZIBUKO	Thirty-Third Respondent
SIPHO GCABASHE	Thirty-Fourth Respondent
RAVI PILLAY	Thirty-Fifth Respondent
MESHACK HADEBE	Thirty-Sixth Respondent
PROVINCIAL EXECUTIVE COMMITTEE AFRICAN NATIONAL CONGRESS-KZN	Thirty-Seventh Respondent
THE AFRICAN NATIONAL CONGRESS	Thirty-Eighth Respondent
THE ELECTORAL INSTITUTE OF SOUTHERN AFRICA	Thirty-Ninth Respondent

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Coram: Koen J (Balton et Chetty JJ concurring)

Heard: 16 and 17 August 2017

Delivered: 12 September 2017

O R D E R

1. The Eighth KwaZulu-Natal Provincial Elective Conference of the African National Congress held at Pietermaritzburg from 6 to 8 November 2015 and decisions taken at that conference are declared unlawful and invalid.
2. The Thirty-Eighth Respondent is directed to pay one half of the Applicants' costs of the application, such costs to include the costs of two counsel.

J U D G M E N T

KOEN J

INTRODUCTION:

[1] The eighth provincial elective conference ('PC') of the African National Congress ('ANC') for the Province of KwaZulu-Natal ('KZN') was held from 6 to 8 November 2015. Its propriety is the subject of dispute in this application.

[2] The First, Second, Fourth and Fifth Applicants ('the Applicants'), all members of the ANC, in their Notice of Motion seek the following order:

> '(a) That the 8th KwaZulu-Natal Provincial Elective Conference of the African National Conference held at Pietermaritzburg on 6 to 8 November 2015 and its decisions, resolutions and elections are declared unlawful and invalid and, as such, are set aside;
>
> (b) Declaring that the recognition, approval and/or endorsement by the ANC (the Thirty-Ninth Respondent) of the aforesaid Provincial Elective Conference, its decisions, resolutions and elections, are likewise declared unlawful, invalid and of no force or effect';
>
> (c) That's *(sic)* the costs of the application are to be paid by the Thirty Eighth Respondent, the ANC, jointly and severally with any other party unsuccessfully opposing it, including the costs of two counsel.'

[3] In *Ramakatsa and Others v Magashule and Others* ('*Ramakatsa*'), the Constitutional Court in regard to a similar attack on the propriety of the Free State provincial conference of the ANC held from 21 to 24 June 2012, said the following in regard to the relief claimed:

> '[124] In our view, a declaration that the provincial elective conference of 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.'

[4] No doubt influenced and guided by similar considerations, by the time this application came to be argued, the relief sought by the Applicants in the alternative to that originally sought in the Notice of Motion, as in *Ramakatsa*, was confined to an order that:

> 'The Eighth KwaZulu-Natal Provincial Elective Conference of the African National Congress held at Pietermaritzburg on 6 to 8 November 2015 and its decisions and resolutions are declared unlawful and invalid.'

[5] The basis for seeking the aforesaid relief, whether as initially couched or confined to the alternative, in broad terms is:

(a) That the holding of the PC was unlawful as, contrary to the requirements of rule 17.2.1 of the ANC constitution, it had not been requested by at least one third of all branches in the province of KZN; and/or

(b) That the PC was affected by various material irregularities which occurred during the pre-conference period and/or at the conference itself relating to the auditing of branch membership, branches being allowed inadequate time for remedying any errors found, insufficient time being allowed for appeals against findings of the auditing committee, discrepancies in the accreditation of delegates, and the manipulation of the voting results at the conference.

There are various material factual disputes arising in respect of the irregularities alleged by the Applicants referred to in sub-paragraph (b) above. Confronted with that reality, the Applicants have nevertheless elected to argue the application on the papers, accepting that material factual disputes must be resolved in favour of the Respondents in accordance with the test espoused in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.* This judgment proceeds on that basis.

BACKGROUND:

[6] The seventh provincial conference ('seventh PC') of the ANC in KZN was held from 11 to 13 May 2012.

[7] At the beginning of March 2015, the KZN Provincial Executive Committee ('PEC') proposed to commence preparations for a conference to be held from 25 to 27 September 2015, which the National Executive Committee ('NEC') refused. In August 2015, the PEC re-approached the NEC for permission to hold the PC on 6 to 8 November 2015. Such permission was granted by the NEC at its meeting of 18 to 20 September 2015.

[8] A document entitled 'WHAT CONSTITUTES A LEGITIMATE ANC CONFERENCE' relied on by the Applicants stresses the need to understand the fundamental processes and procedures that constitute a conference.

It inter alia provides in one part as follows:

'Tabulated hereunder are certain procedural challenges that might be encountered along the way when attempting to host a successful Conference. It is recommended that if the following primary principles are adhered to then such challenges may be averted.' (My emphasis)

In respect of the category of 'MEMBERSHIP', a sub-category of 'Members in good standing but not captured on membership roll' recommends, as a primary principle, that 'Branches should be given the membership roll two weeks before the BGM date to ensure that all members have been correctly captured.'

[9] The terms of that document are not dissimilar to a similarly titled annexure introduced by the Respondents in the answering affidavit as to what they contend constitutes a legitimate ANC conference, save that their document is more extensive in its terms and in places couches requirements in more peremptory terms. As the Respondents' version is the one to prevail in the case of any material conflict, it is the contents of that document which is reproduced more fully below. It provides:

‘KEY ELEMENTS CONSTITUTING THE CONFERENCE

PRE CONFERENCE PROCESSES

The ANC Conference is an outcome of logical steps in a process seeking to ensure organizational readiness, maintenance of legitimacy and integrity of such process. Such preconference processes have to meet the time lines set for each of the following steps.

Verification of Membership:
This checks the status of members in branches to ascertain if a member qualifies to be a member or to participate in the processes of the conference.

Status of Branches:
Membership and term of office of the BEC determines if the branch qualifies both to be a branch and therefore participate in the processes of the conference.

Corrections:
Branch is allowed to effect corrections and to change to improve its status.

Allocation of Delegates:
Delegates are allocated proportionally in terms of membership.

Convening of BGM’s & BBGM’s:
Convened within the time line set by higher structures.

Verifications of Constitutionality of BGM’s:
Checking if BGM’s met all constitutional requirements for BGM’s.

Correction period:
For minor shortcomings that may have occurred in BGM’s.

The conference is convened if there is a minimum of 70% branches that have successfully completed all steps in the pre process for the conference.

Running of intensive Political Education in preparation for conferences including allowing for policy proposals by branches.

CONFERENCE PROCEDURES

In order for a Conference to be deemed to have met requirements of staging an ANC legitimate conference, the following basic structural and content elements should underpin the activities of the conference:

Registration of Delegates & Invited Non-Voting Delegates:
(The number of leagues delegates is determined by the PEC/REC and have voting status.)

Quorum: the quorum of a Conference is determined on the total number of voting delegates expected to attend the conference.

Conference Committees: Conference needs to have various committees for performance of different roles for example steering committee; credentials committee; resolutions committee; disciplinary committee.

Conference Rules: Rules to guide conduct in the conference are adopted by the conference.

Conference Reports: the following reports from the primary reports to be presented to the conference for discussions and adoption.

Credentials
Political Report
Organisational Report
Financial Report

Commissions: the conference breaks into commissions where intensive discussions and recommendations are made to be presented to the conference for consideration and finalization as conference resolutions.

Elections & Elections Agency: election of leadership in the conference becomes a final stage of completing the processes that start from BGMs and it is normally conducted by the independent body i.e. the election agency.

Resolutions: resolutions are the decisions of the conference on various political and policy matters emanating from discussions in the plenary and from commissions.

Declaration: declaration is a statement summarizing the proceedings of the conference and comprising of key resolutions taken and highlighting major commitments that are binding to the organization going forward as adopted by the conference.'

Under the heading of 'KEY COMMON CHALLENGES AND PRINCIPLE TO BE PRESERVED FOR CONFERENCES' it records:

'Tabulated hereunder are certain common challenges that are often experienced when convening Conferences. The following primary principles <u>must be adhered to</u>, to avert the challenges.' (My emphasis)

In the category of 'MEMBERSHIP', under the heading 'CHALLENGES', regarding 'Members in good standing but not captured on membership roll', the 'Guiding Principle' stated to 'be adhered to' is that:

'Branches must be given the membership roll two weeks before the BGM date to ensure that all members have been correctly captured.'

[10] The Applicants rely on a document outlining the 'ANC National Audit Guidelines for Conferences'. That document is however disputed by the Respondents who contend that the audit guidelines which apply are contained in annexure 'SZ1' to the answering affidavit. Annexure 'SZ1', ex facie its content emanates from the 'Office of the Secretary General' ('SG'), and contains the 'ANC NATIONAL AUDIT GUIDELINES FOR CONFERENCES AND GENERAL COUNCILS'. The salient terms thereof include inter alia the following:

'The National Audit Team will visit each province and conduct an audit. The cut-off date of membership in BGM's will be determined by the Province with respect to preparations for Regional and Provincial Conference.

A mandatory pre-audit shall be conducted by the PEC, REC in order to prepare ANC branches for the national audit team.

- The pre-audit process must adhere to membership requirements;

In particular the team will establish the:

- Number of branches in good standing.
- Number of paid up and verified members per branch as at the cut-off date.
- Number and details of branches in good standing as at the cut-off date.
- Since the ANC Constitution refers to membership in general, all paid up members will be counted – even those from wards in which there are no ANC branches.
- However, only constitutionally launched ANC branches in good standing will be able to send delegates to conference.'

The audit guidelines next deal with 'MEMBERSHIP REQUIREMENTS' and 'BRANCH REQUIREMENTS.' It records inter alia the following:

'CONFIRMATION OF THE AUDIT FINDINGS

Following the completion of each region's audit, the National Audit team will provide the relevant Provincial Secretary with a copy of a preliminary audit report. The branches will then have five days within which to raise queries.

An ANC branch can appeal preliminary audit outcomes through its BEC following proper channels; starting at the Regional, Provincial and National through the office of the ANC Secretary General as final as arbiter.

The National audit team should then respond to any queries and make any necessary corrections. They may review any branch records, but should not consider documentation that was not submitted to the original audit team.

Once the audit has been completed the audit team should make available the

preliminary audit report to the Provincial Secretary. The final audit report shall be made available to the provinces once it has been signed off by the Secretary General.' (My emphasis)

[11] The procedures and rules contained in the aforesaid documents accord with what the Constitutional Court found in *Ramakatsa* to apply generally whenever a conference is planned. It is not in dispute that these procedures and rules need to be adhered to, although they are not rules contained in the ANC constitution.

[12] On 27 October 2015 the 'national officials through the SG' directed that the PC should not proceed on 6 to 8 November 2015. That decision was however reversed on 2 November 2015 when the conference was allowed to proceed.

[13] In anticipation of the PC the PEC developed a road map spelling out organisational and logistical tasks which were required in preparation for the conference, described as '… the roadmap towards the Provincial Conference'. It provided for:

> 'Membership verification, branches to confirm audit report by 6 September 2015.
> Status of branches, confirm branches that qualify based on audit report by 6 September 2015.
> Corrections and appeals, to allow branches to effect corrections and improve their status, by 10 September 2015.
> Allocation of delegates, PEC to decide on the formula of allocation based on the proportional of membership, by 5 September 2015.
> Convening of BGMs and BAGMs, to convene BGMs to elect delegates and deal with nomination process, by 12 September – 25 October 2015.
> Final correction, to give an opportunity for final corrections for branches, by 26 October to 28 October 2015.
> Final consolidation of credentials, to consolidate the final number of branches and delegates based on the number of qualified BGMs by 29 to 31 October 2015.
> Pre-registration process, to do pre-registration of all delegates and regions, by 26 to 31 October 2015.

RGC's (optional), in case the region was to convene an NGC in preparation for conference, by 30 and 31 October 2015.

Registration of all voting delegates, by 5 November 2015.

Convening Provincial conference, to convene the Provincial conference by 6 – 8 November 2015.'

In that report to the national officials on the state of readiness for the PC, under the heading 'Convening of the B/BAGMs', the following was reported:

> 'The BGMs started on the 12 September 2015 with the exception of eThekwini Region, which started earlier on the 8 September 2015; this was to ensure that the time lines for the Regional conference are aligned to those of the Provincial conference.
>
> The Province has 282 wards and therefore it has a potential of having 828 branches but after the audit by the National Audit team 752 qualified to convene BGMs.
>
> All branches held their BGMs as expected and there is no branch which was ever denied the opportunity to convene its BGM. The audit process took place simultaneous with the BGMs as it was with the NGC as well.
>
> According to the timeframe all branches should have convened the BGMs by the 25 October 2015. However, after consultation with the Secretary General it was agreed to push the time frame to the 01st November 2015 to accommodate more branches, especially from eThekwini Region.
>
> The preliminary report from the audit team indicated that the province has already reached the 70% of branches which are required for the Provincial conferences. The preliminary audit report is attached.'

[14] The final audit report was signed off by the SG and his Deputy on 3 November 2015.

[15] Conference pre-registration occurred on 4 November 2015. The provincial dispute resolution/appeals committee was still working on disputes and appeals on 4 to 5 November 2015.

[16] The National Dispute Appeals Committee ('NDAC') chaired by Ms Lindiwe Sisulu

commenced sitting late on 4 November 2015 to conduct the final dispute resolution. It delivered its final report during the night of 6 November 2015, which was the first day of the PC.

[17] Warm body verification of delegates was done overnight from 6 to 7 November 2015.

[18] Credentials of delegates were presented and were adopted on the morning of 7 November 2015.

[19] The voting process was started on the night of 7 to 8 November 2015 under the leadership and guidance of the Electoral Commission and EISA. It took the form of a secret ballot. While the voting process was still proceeding, a 'tweet' was allegedly disseminated at 22h23 on 7 November 2015 from the '*My ANC*' twitter account setting out the results of voting at the PC as follows:

> '1459 delegates voted, Senzo Mchunu receives 675 votes and Sihle Zikalala received 789 votes. 'Sihle is the Chairperson'.

[20] The voting process was however only finalised at about 03h00 on 8 November 2015. When the counting was complete and the results formally announced on the morning of 8 November 2015, the EISA official confirmed that indeed 1459 delegates voted, 4 ballots were spoilt, Senzo Mchunu received 675 votes and the First Respondent received the remainder, which would be 780 votes.

[21] Various complaints that the elections were not free and fair and had been manipulated and suffered from other irregularities were submitted to the SG with branches in question demanding that the PC be declared null and void. On 16 November 2015, as a result of (the applicants contend) no response being received to the complaints of the branches, representatives of branches marched to the provincial offices of the ANC and handed over a memorandum/petition in relation to the PC. This

memorandum was received by a NEC member, Mr Joe Paahla on behalf of the SG, who promised the members in question an answer by 30 November 2015.

[22] No such answer was given or was forthcoming. Members of branches again marched to the provincial offices to deliver a second petition relating to the PC on 30 November 2015 complaining inter alia that since the previous petition, no response had been forthcoming from Luthuli House, the ANC headquarters. This petition demanded that the NEC declare the PC null and void, and that certain other steps be taken. The ANC deployed a delegation to attend to various complaints and grievances relating to the petition, which delegation sat at the Coastlands Hotel on 12 December 2015 to hear grievances from a randomly selected number of Branch Executive Committees ('BECs'). This delegation from the NEC consisted of the National President Mr Jacob Zuma, Ms Jessie Duarte, Mr Joe Paahla, the SG Mr Gwede Mantashe, Ms Baleka Mbete, Mr Ncebisi Skwatshwa, Ms Lindiwe Sisulu and Dr Zweli Mkhize. Once the branches had presented their case, they were advised that they would receive a decision within five days. No response was however received by the branches.

[23] The Applicants contend that the concerned branches opted to allow these internal procedures to take place and patiently awaited the outcome. When no response had been received by May 2016 attorneys were instructed to request a response from the SG. A letter dated 28 April 2016 was addressed by Ramouthar Attorneys to the SG complaining of the fact that the NEC had failed to respond to the various disputes and objections of inter alia the Applicants, and drew attention to a failure to make a decision being capable of being construed in law as a refusal or rejection of the grievance or objection. A request was therefore made that the NEC give consideration to the grievances and objections and advise the attorneys of the outcome thereof by 14 May 2016. On 29 April 2016 the SG sent an email to the attorneys in reply stating:

> 'I am sure you will appreciate that we can't communicate to our branches through the lawyers. The difference will be when we deal with summons which will be handled by

our lawyers.'

[24] Shortly thereafter, between 18 and 20 May 2016, the SG visited KZN and conducted the formal induction of the present members of the PEC as 'elected' at the PC.

[25] By 15 July 2016 details of the new PEC members appeared on the ANC's official website in respect of KZN. This, the deponent to the founding affidavit states, indicated that 'quite plainly the NEC of the ANC has accepted the Eighth KwaZulu-Natal PC and all that flows from it as valid.'

[26] This application then was issued on 22 July 2016.

THE RESPONDENTS' OPPOSITION:

[27] The Respondents oppose the relief claimed by the Applicants on the following grounds:

(a) That the Applicants, being private individual members of the ANC acting without any authority from any of the branches of the ANC implicated in their alleged complaints, lacked the required locus standi in iudicio;

(b) That the Applicants are time barred from bringing the present application, which the Respondents construe as a review either under the Promotion of Administrative Justice Act ('PAJA'), or in the alternative, the common law;

(c) That the Applicants wrongly interpret and construe rule 17.2.1 of the ANC constitution, in the context that although the Respondents admit that no request by one third of the branches was made for the holding of the PC, no such request was necessary, and the PC accordingly was valid;

(d) That the alleged irregularities are not proven, but in any event there is a requirement of only 70% compliance in respect of qualifying branches in order to hold a valid conference, which requirement was met, and further that voting

irregularities are all subject to an internal audit process, and an appeal process thereafter, and a credentials process, which had all been concluded and are final and binding in the absence of any review thereof (when none has been sought); and

(e) That even if the Applicants were otherwise entitled to relief, it should be refused in the exercise of this court's discretion in view of the time that has elapsed since the PC was held because of the potential prejudice to the Respondents and other affected parties.

THE ISSUES AND THE SCHEME OF THIS JUDGMENT:

[28] The issues arising correlate to the aforesaid grounds of opposition raised by the Respondents. For convenience the order in which these will be dealt with will be as follows:

(a) Whether the PC falls to be set aside (alternatively be declared unlawful) because it was not convened at the request of one third of ANC branches in KZN;

(b) Whether the PC (and subsequent approval by the ANC) falls to be set aside (alternatively declared unlawful) because of alleged irregularities;

(c) The Applicants locus standi*;*

(d) Whether the relief claimed is time barred;

(e) What relief, if any, should be granted; and

(f) The issue of costs.

[29] Before discussing these seriatim it is necessary to comment very briefly on the organisational structure of the ANC, and to refer to the political rights of citizens.

THE ORGANISATIONAL STRUCTURE OF THE ANC:

[30] The organisational framework of the ANC is to be found in its constitution and rules and regulations adopted by the NEC, and in the context of provinces, the rules and regulations adopted by a provincial PEC. Rule 26 of the ANC constitution dealing with 'Rules and Regulations' provides:

> '26.1 The NEC may adopt Rules and Regulations for the better carrying out of the activities of the ANC.
>
> 26.2 The PEC's may adopt Rules and Regulations for the better functioning of the ANC in their respective Provinces;
>
> 26.3 …
>
> 26.4 …'

[31] The organisational structure of the ANC is best viewed as a pyramid, narrowing as it ascends from the members' level which constitutes the base and largest substratum of the pyramid, followed in order by the branch level, the regional level, the provincial level (where the provincial conference will elect the PEC), and finally at the apex of the pyramid, the national level, where branches send delegates to the National Conference ('NC') which elects the NEC, the highest decision making body of the ANC. The NEC comprises the President of the ANC, its Deputy President and various other officials and eighty additional members.

[32] The ANC is a democratic organisation. Although there is decentralized autonomy with various responsibilities at descending levels down the pyramid to the individual member level, the NEC still fulfils a powerful role. Rule 12.1 of the ANC constitution dealing with the NEC and its powers provides:

> 'The National Executive Committee is the highest organ of the ANC between National Conferences and has the authority to lead the organisation, subject to the provisions of this Constitution.'

Indeed, the Respondents contend that it is this provision which confers and contains the power to convene provincial conferences. Provincial conferences are thus convened at

the direction of the NEC. Although the powers of the NEC might be extensive, its powers are not unlimited and are always ‘subject to the provisions of this Constitution’.

THE POLITICAL RIGHTS OF EVERY CITIZEN:

[33] Section 19, contained in chapter 2 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’) 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;
>
> (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.’

[34] In the main, national, provincial and municipal elections contemplated in the Constitution are contested by political parties which determine the list of candidates (or candidates in respect of municipal elections) who may become members of these constitutional legislative bodies. Success for political parties in elections lie inter alia in the policies they adopt and put forward as a plan for addressing challenges and problems. Participation in the activities of a political party is thus critical to attain all of this and in giving effect to the rights in s 19 of the Constitution. In order to enhance this multi-party democracy the Constitution has accordingly enjoined Parliament inter alia to enact national legislation providing for funding of political parties.

[35] Section 19 of the Constitution does not however spell out how members of a political party should exercise their right to participate in the activities of their choice of party. Nor is this regulated in terms of legislation. As was commented in *Ramakatsa*:

> '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.'

[36] The ANC constitution regulates and facilitates how its members may participate in internal activities of the party. Rule 3 of the ANC constitution specifically provides that:

> 'Membership of the ANC shall be open to all South Africans above the age of 18 years, irrespective of race, colour and creed, who accept its principles, policies and programmes and who are prepared to abide by its Constitution and rules.'

[37] The ANC is a common law voluntary association created by the ANC constitution, which together with inter alia the 'Rules and Regulations' adopted by respectively the NEC and PEC (where applicable), such as the audit guidelines and any other rules, collectively constitute the terms of the agreement entered into by its members. It is a unique contract. As in the case of an ordinary contract if a provision thereof is breached 'to the prejudice of certain members, they are entitled to approach a court of law for relief'.

[38] In this case the Applicants' complaints arise by virtue of and in the context of their membership to the ANC qua members, not qua citizens in respect of election to legislative bodies provided for in the Constitution.

WAS THE PROVINCIAL CONFERENCE PROPERLY CONVENED - THE INTERPRETATION OF RULE 17.2.1:

[39] The portions of rule 17 of the ANC constitution material to this judgment inter alia provide:

'**Rule 17 PROVINCIAL CONFERENCE**

17.1 Subject to the decisions of the National Conference and the National General Council, and the overall guidance of the NEC, the Provincial Conference is the highest organ of the ANC in each Province.

17.2 The Provincial Conference shall:

17.2.1 Be held at least once every 4 (four) years and more often if requested by at least one third of all branches in the Province.

17.2.2 Be composed of:

(i) *Voting delegates* as follows: …

(ii) *Non-voting delegates* …

Provincial Conference shall:

17.2.2.5 Determine its own procedures in accordance with democratic principles and practices;

17.2.2.5 Vote on key questions by secret ballot if at least one third of the delegates at the Provincial Conference demand it; and

17.2.2.7 …

17.3 The Provincial Conference shall:

17.3.1 Promote and implement the decisions and policies of the National Conference, the National General Council, the NEC and the NWC;

17.3.2 Receive and consider reports by the Provincial Executive Committee, which shall include the Chairman's address, the Secretary's report, which shall include a report on the work and activities of the Veterans' League, Women's League and Youth League in the province, and the Treasurer's report;

17.3.3 Elect the Provincial Chairperson, Deputy Chairperson, Secretary, Deputy Secretary, Treasurer and the additional 30 (thirty) members of the Provincial Executive Committee, who will hold office for four (4) years. The Provincial

Secretary shall be a full-time functionary of the organisation;

17.3.4 Carry out and develop the policies and programmes of the ANC in the Province;

17.3.5 …

17.3.6 …

17.4 A member elected to the PEC shall resign from any position held in a lower structure in the ANC.'

[40] Rule 10.5 of the ANC constitution provides the following in regard to a NC:

'The National Conference shall be convened at least once every five years.'

[41] There is also a provision in the ANC constitution dealing with a 'Special Conference'. Rule 29 provides that:

'29.1 A Special Conference of the ANC may be convened by the NEC at any time or at the request of a majority of the Provinces for the stated purpose or purposes.

29.2 …

29.3 …'

[42] Rule 17.2.1 in its first part thus follows the wording of rule 10.5 (which applies to the NC) in exact terms, namely that conferences shall be held 'at least once every …' specified number of years – five years in the case of the NC and four years in the case of a provincial conference. There the similarity ends. Clause 17.2.1 continues with the qualification:

'… and more often if requested by at least one third of all branches in the Province.'

[43] Rule 17.2 appears to provide in peremptory terms, by virtue of the use of the word 'shall', for two eventualities, namely that:

(a) a provincial conference shall be held at least once every four years; and

(b) a provincial conference shall be held more often if requested by at least one third

of all branches in the Province.

[44] The issue is what is meant by 'at least once every 4 (four) years', similar to, in the case of the NC, 'at least once every five years.'

[45] The approach to be adopted to the interpretation of documents is that stated inter alia in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*:

'**Interpretation**

[10] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* the current state of our law in regard to the interpretation of documents was summarised as follows:
"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 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. 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", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[11] That statement reflected developments in regard to contractual interpretation in *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another*; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*; and *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*. I return to it and to those cases only because we had cited to us the well-known and much-cited summary of the earlier approach to the interpretation of contracts by Joubert JA in *Coopers & Lybrand and Others v Bryant*, that:

"The correct approach to the application of the golden rule of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract . . . .

(2) to the background circumstances which explain the genesis and purpose the contract, ie to matters probably present to the minds of the parties when they contracted. . . .

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."

[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process

> that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.' (Footnotes omitted).

In *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* it was said that:

> 'A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.'

[46] Although the interpretation of rule 17.2.1 did not feature specifically in *Ramakatsa*, it is in my view significant that having stated that '(the) Provincial Conference elects the PEC which holds office for four years' and having mentioned in the factual context of that matter that 'during 2008, at the town of Parys and in accordance with its constitution, the ANC in the Free State elected a PEC', the spontaneous and with respect natural response which followed was:

> '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.' (My emphasis)

That is also the most probable interpretation in the context of the ANC constitution which appeals to me. It would also be in line with for example time intervals in sporting codes regulating the Rugby World Cup, Soccer World Cup, Cricket World Cup and the like, being held once every fourth, or whatever number of years. ANC provincial conferences are three day events, the holding of which cannot be determined from time to time, with reference to a specific calendar day. Prima facie, concluding that a provincial conference must be held at least every fourth calendar year seems to be the most sensible and business-like or practical interpretation of rule 17.2.1.

[47] There is nothing specifically significant about the words 'at least once'. It means once. Mindful as I am that all words in an agreement should be accorded a meaning in the process of interpretation, these words appear to be largely superfluous. The words 'at least' simply indicate a minimum of 'once'. It conveys by necessary implication that provincial conferences may be held more 'often' than once every four calendar years, but that they may not be held at intervals greater than that, for example only once every five, six or more years.

[48] To that extent the position in regard to a provincial conference is no different to a NC. NCs have to be called at least once every five years. Unlike a provincial conference though, a NC may be called more often than once every five years, in the unfettered discretion of the NEC. That same power does not reside in the NEC in respect of convening provincial conferences. Whatever general power the NEC has in terms of rule 12.1 to convene provincial conferences, it is a power to be exercised '… subject to the provisions of this Constitution.' If a provincial conference is to be held 'more often' than 'once every 4 (four) years', rule 17.2.1 expressly requires that it must have been 'requested by at least one third of all branches in the Province.'

[49] This rider to rule 17.2.1 is not simply a residual power, which the NEC would have the option, if a request is made by at least one third of all branches in the Province to hold a provincial conference more often than once in every four years, to either give effect to, or to ignore. If requested by at least one third of all the branches in a Province, rule 17.2.1 requires that such provincial conference 'shall', not 'may', be held. The provision is not unlike that in rule 29.1 which provides that a Special Conference may be convened at any time by the NEC, but <u>also</u> when requested by a majority of the Provinces for a stated purpose or purposes.

[50] The Respondents applied for and were granted leave to file a fourth set of affidavits. It is not without significance that an annexure to that affidavit, being a 'Statement of the African National Congress following the meeting of the National

Executive Committee held on the 27 to 28 November 2015' issued by the SG records:

> 'The ANC in Mpumalanga will be hosting an early conference as decided by one third of its branches at its Provincial General Council held in March 2015'.

The Respondents were critical of this statement being taken out of context or in the absence of its correct context being explained. That is of course correct and I am very mindful of that danger. What the statement however does reflect is an acknowledgement of the notion of a provincial conference being held 'early' because that was, not simply requested, but indeed 'decided by one third of its branches…'. The document however does not deal with what is meant by 'early'.

[51] The issue in this case, more specifically, is whether the PC held from 6 to 8 November 2015 amounted to a provincial conference held more often than at least once every four years, thus being held 'early'. Plainly to answer that question one needs to consider how the four year period must be determined. Clearly it must be determined with reference to some event. The obvious point of reference to which the question must be answered and the four year period established, must be the previous provincial conference, that is the seventh PC, which was held from 11 to 13 May 2012.

[52] In accordance with the interpretation favoured by me above, with the seventh PC having taken place in 2012, the next provincial conference, not to fall foul of the requirement of rule 17.2.1 that at least one provincial conference shall be held once every four years, would have to be held in 2016. Holding the PC in November 2015 would on that construction amount to holding a provincial conference 'more often' than 'at least once every 4 (four) years …'. Holding it in the third year since the seventh PC would amount to the PC having been held 'more often' than 'once in every 4 (four) years'. Such 'early' provincial conference would require to have been 'requested by at least one-third of all branches in the Province', which it was not. Accordingly, it would be unlawful.

[53] My aforesaid construction did not find favour with the Applicants or the Respondents, although the Applicants immediately pointed out that even on my favoured construction, the PC would have been held ‘more often’ than ‘once every 4 (four) years’ and hence justify the relief claimed. In particular the Applicants resisted my interpretation as it could conceivably permit one hypothetical provincial conference being concluded on say 31 December of year one and the next provincial conference commencing on I January of year four, which would mean that barely a day more than three years would have elapsed in the interim. This they said would violate the goal contained in rule 17.3.3 of the ANC constitution, which provides that members of a PEC ‘will hold office for four (4) years’.

[54] The Applicants and Respondent basically each favour an interpretation of rule 17.2.1, specifically as to what is meant by ‘every 4 (four) years’, which involves a precise calculation of the four year period, with reference to the seventh PC. Where the Applicants and Respondents however differ is whether the seventh PC falls within or outside the four year period, that is whether the four year period commences to run from the first day of the seventh PC (the Applicants’ interpretation) or whether it starts to run only after the conclusion of the seventh PC (the Respondents’ interpretation). According to the Applicants the period must be calculated from the first day of the seventh PC i.e. 11 May 2012 according to the civil method of computation and to expire at midnight on 10 May 2016. According to the Respondents the period must be calculated from the first day after the seventh PC had been concluded i.e. 14 May 2012 and to expire on 13 May 2016. The significance of these different approaches lies in the seventh PC on the Applicants’ interpretation being the first provincial conference during that four year period and any further conference held during the four years ensuing amounting to one held ‘more often’ than once during that period, whereas the interpretation favoured by the Respondents will mean that the PC held on 6 to 8 November 2015 is the ‘first’ conference during that four year period and hence not require to have been requested by at least one third of all branches, but one which could be convened in the discretion of the NEC.

[55] On the Applicants' construction the eighth PC, at the election of the NEC, could only be held lawfully after 10 May 2016. If held earlier than that, as in fact occurred with the PC, it would have been held 'more often' than 'at least once every 4 (four) years.' That construction is certainly a purposive one consistent with rule 17.3.3 which provides for a term of office of the elected members of the PEC of four years. The drafters of the ANC constitution clearly contemplated that in the ordinary course a term of office approximating four years, or at least four years, should follow to allow sufficient time for the newly elected PEC to implement new policies etc, before the tenure of a different PEC elected at a subsequent provincial conference might commence. The four year term of office could never be guaranteed absolutely, because if at least a third of the branches requested an earlier conference than once in every four years, the term of office of those elected previously would inevitably be terminated earlier (unless re-elected). The Applicants accepted that the tenure of four years would be curtailed prematurely in those circumstances but then only as an inevitable consequence in accordance with the democratic process and the ANC constitution where dissatisfaction with the present incumbents cause at least a third of all branches in the Province to request an earlier provincial conference. The dilemma with the Applicants' interpretation however is that it is then unclear when the next provincial conference would be required to be held. If the 'first' one is the seventh PC from 11 to 13 May 2012 and the PEC elected holds office for four years thereafter until 10 May 2016, by when must the next provincial conference then be held? If held after 13 May 2016 then more than four years would have elapsed (calculated from 14 May 2012) without 'at least' one provincial conference being held. If it is to be contended that the period from 11 May 2016 would constitute a new self-contained independent four year period, then presumably a further conference could be held at any stage until 10 May 2020, which would be an absurd interpretation as the PEC could then hold office for almost eight years and a provincial conference would not have been held 'at least once every 4 (four) years'.

[56] If the calculation of the four years was only to commence after the seventh PC had been concluded on 13 May 2012, as the Respondents contend, then the next provincial conference had to be held, in order to be 'at least once every 4 (four) years',

at any stage before midnight on 13 May 2016. That would mean that the eighth PC held on 6 to 8 November 2015 would have been the 'first' provincial conference during that four year period, and hence not required to have been requested by at least 'one third of all branches in the Province.'

[57] The difficulty with the Respondents' interpretation is that it would mean that the next conference after the seventh PC, assuming one not requested by one third of all branches, could have been convened by the NEC at any stage from 14 May 2012 to 13 May 2016, even if it was a month or a year after the seventh PC concluded. This would obviously defeat the stated intention that the elected members of the PEC would 'hold office for four (4) years', as the NEC as the body which has the power and authority to convene provincial conferences could for whatever reason prematurely terminate the tenure of the elected PEC, irrespective of the wishes of branches.

[58] The construction contended for by the Respondents could also based on rhetorical questions posed below, result in certain absurdities. If, for example, the eighth PC could lawfully be held as early as one year after the seventh PC, the former then becoming the first provincial conference since the seventh PC, would the next four years after the eighth PC then be calculated from immediately after the conclusion of the eighth PC? If it did, then it would mean that the ninth PC could likewise be held, as the next 'first' conference within the next four years from the eighth PC, at any stage say within one year of the eighth PC, with these subsequent provincial conferences all occurring more often than once in a four year calendar period, but none having to be requested by at least one third of the branches. Or would, what would become the ninth PC require a request from at least one third of the branches in the Province, and if so, why? The hypothetical ninth PC could only become a 'second' or earlier provincial conference on that construction in relation to the eighth PC, if the calculation of the four years is done with reference to the holding of the seventh PC? But then why should the calculation be with reference to the seventh PC, if the eighth was the next 'first' conference in a cycle of four years within which the next provincial conference would have to be held? That construction also contradicts the purpose sought to be achieved

by rule 17.3.3, which should only be capable of being compromised by at least one third of branches seeking that an 'early' provincial conference be held.

[59] It seems to me on a proper construction of rule 17.2.1 of the ANC constitution in the context of the entire document, that my initial construction is the most plausible and preferred one. Consistent with the comments in *Ramakatsa* where the provincial conference was held in 2012, the next one would be required to be held in 2016. Whether it is held early or later in the year, hence whether it might result in a term of office for members of the PEC holding office of slightly less, or possibly a few months more than four years, is materially irrelevant. That is an inherent flexibility in having a provincial conference 'at least once every 4 (four) years'. If 'more often' than that, then a request by at least one third of all branches in the Province' is required.

[60] The ANC Provinces are decentralized to geographical areas corresponding largely to the nine Provinces established in terms of the Constitution. Provincial matters are dealt with at these decentralized lower levels. In the case of Provinces, the PEC elected at provincial conferences is very important. Their conduct may impact intimately on members of branches in the Province. Not surprisingly then, in the interest of continuity, sound governance (allowing time for policies that are devised by incoming PECs to be implemented), further provincial conferences should not be capable of being convened arbitrarily unless supported by an acceptable number of those subject to that PEC's rule wishing to see a change in the party political government of their Province. Holding a PC is furthermore a costly affair not only in time spent (usually it seems three days excluding the events before the actual conference) and energy spent, but also in actual financial costs (a figure of R12 million was mentioned to be the cost of the PC, including rental of a large enough venue, accommodation and food for delegates). It is not surprisingly then that rule 17.3.3 of the ANC constitution contemplated a four year period also for elected officials to hold office. That is the objective which the drafters of the ANC constitution sought to achieve. Its aims would however be defeated if the construction contended for by the Respondents was to be favoured and a second or 'more often' held provincial conference could have taken place within say a year of the

seventh PC.

[61] As it is common cause that there was no request by a third of the branches, the eighth PC was held in breach of rule 17.2.1 of the ANC constitution and is therefore unlawful.

IRREGULARITIES:

[62] My conclusion in regard to the interpretation of rule 17.2.1 above makes a consideration of the alleged irregularities strictly unnecessary. I shall however deal with the arguments advanced briefly. The Applicants have complained of a number of irregularities. They do not persist with those irregularities in respect of which material disputes of fact arise from the answers filed by the Respondents. They however maintain that the 'irregularities' canvassed below can be determined on the papers, and should be determined in the Applicants' favour.

[63] The alleged irregularities persisted with may be summarised as follows:

(a) That branches were not furnished timeously (stated to be two weeks before the BGM date) with pre-audit membership rolls, to ensure that all members of branches had been correctly captured;

(b) That branches were not given an adequate opportunity to appeal against the results of the audit, thus resulting in some branches being excluded from participating in the PC;

(c) That branches were excluded from being accredited, which entailed:

(i) That the credentials report was adopted at the PC whilst appeals were pending or underway;

(ii) That branches that had appealed successfully were not accredited at the PC; and

(d) That the voting process or results appeared to have been manipulated or influenced.

The aforesaid will be considered seriatim. Finally this portion of the judgment will be concluded by a consideration of the so called ‘70% rule’.

[64] That a time line of milestones within which important events are to occur and are to be achieved in the preparation for and holding of a legitimate provincial conference, is not in dispute. In *Ramakatsa* it was said that:

> ‘[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.’

Verification by branches of membership rolls – the two week requirement

[65] Reference has already been made above to the document entitled ‘WHAT CONSTITUTES A LEGITIMATE ANC CONFERENCE’, the ‘ANC National Audit Guidelines for Conferences and general councils’ and the ‘Roadmap’ adopted by the PEC with the dates specified therein.

[66] Although the Respondents during argument accepted that these documents contain rules and regulations governing the holding of conferences that had to be observed, that was not conceded in the answering affidavit filed. There the Respondents contended, with reference to the introductory words to the portion of the document headed 'WHAT CONSTITUTES A LEGITIMATE ANC CONFERENCE' detailing 'primary principles' such as that branches had to be given membership rolls 'two weeks before the BGM …', that these were simply 'recommended', the implication being that they were not obligatory. As mentioned however above in the version of that document submitted by the Respondents it is recorded that the 'primary principles' (although admittedly further down referred to as 'Guiding Principles'), 'must be adhered to …'. Having regard to that peremptory phraseology the approach adopted by the Respondents in argument is clearly to be preferred above that contended for in the answering affidavit. The time limits are in my view mandatory. But even if I am wrong in that interpretation and/or if a failure to adhere strictly to the time limits would not necessarily visit invalidity on the procedures leading up to and at the PC, then the time limits are nevertheless, as the document itself recognises, very important 'guiding principles' plainly indicative of what is reasonably required to ensure a transparent, fair and most importantly 'legitimate' conference. I shall proceed on that premise.

[67] The main difficulty with the time limits is that with the PC initially being planned during March 2015 for September 2015, that idea then being scrapped, the conference then during September 2015 being planned to be held from 6 to 8 November 2015, that idea being placed on hold at the end of October 2015, but then being reinstated, that the time limits which would normally be available, inevitably became truncated. In the First Respondent's answering affidavit he acknowledges that a provincial conference usually requires approximately six months preparation according to the 'Road Map' contained in his report of 2 November 2015.

[68] Ex facie that document, membership verification had to be done and the audit report confirmed by 6 September 2015. That was however already problematic as the PC was ultimately only given the go ahead by the NEC at its meeting of 18 to 20

September 2015, a date after the date on which the membership verification already had to be completed. The requirement that the preliminary audit regarding branches which qualified for the PC would meet the same deadline of 6 September 2015 meant that verification could not have proceeded upon the basis of the two weeks' notice stipulated in the ANC guidelines from the time that the go ahead was given.

[69] Factually this is also confirmed by the evidence of the Applicants that their branches received either no, or very much shorter than two weeks sight of their membership rolls before their BGMs. Indeed the Applicants' allegations include that each of them is a BEC member at their respective branches and that none of their branches received the branch membership roll as determined by the preliminary audit, two weeks before the date set for the BGMs. The time frames in respect of those branches from the time that the rolls were furnished to the holding of the BGMs varied from about four days, to one roll only being furnished by the regional deployee at the commencement of the BGM. Further, none of the regional offices in question called the relevant BECs as they allegedly should, to meetings at regional level, to be told the results of the pre-audit and to make available the branch rolls for correction.

[70] Specifically the Applicants allege that in a case of the Somkhele Branch, Mtubatuba sub-region, the regional office made no effort to convey the pre-audit results to the branch whether timeously or at all. Only following complaints and approximately four days before the BGM was scheduled, was a copy of the pre-audit membership roll for that branch procured. Similarly in respect of the Fourth Applicant's branch, Ward 57 eThekwini region, the pre-audit became available approximately three to four days before the scheduled BGM. Similarly in the Beyers Naude branch, Ward 22 Vryheid sub-region, although the regional office told the branch when the BGM was to sit, the official roll was only produced by the deployee upon arrival for the BGM. Informally members of that BEC had managed to procure a copy thereof, approximately three days before the meeting.

[71] The Respondents answer is simply to the effect that the Applicants complaints go

to the 70% rule which the main answering affidavit explains as:

> '…put differently as long as 70% of the branches in the region meet with the pre-conference processes then the conference can proceed. The remaining 30% no matter how valid their complaints, cannot prevent the Provincial Conference from proceeding, nor can they complain afterwards if it does.'

[72] More importantly, in my view, the Respondents further point out that although the Regional Committee may set deadlines by which BGMs have to take place, the ultimate responsibility for arranging the BGMs rest with the BEC as it has to organise its own members and invite them to the meeting. Accordingly, if there was any legitimate concern or complaint regarding too little time between receiving the members' voters roll and the BGMs, then the date for the BGM could simply be extended so as to allow the lapse of the two week period. The Respondents point out that there was no explanation by the Applicants why this 'simple expedient' was not followed. Finally, it was pointed out that the time limits for the holding of BGMs were extended in respect of those branches that had not held their BGMs timeously. In the report on the state of readiness the First Respondent recorded that:

> 'All branches should have convened BGM's by the 25 October 2015. However after consultation with the Secretary General it was agreed to push the time frame to 01st November 2015 to accommodate more branches, especially from the eThekwini region.
> The preliminary report from the audit team indicated that the Province has already reached the 70% of branches which are required for the Provincial Conference. The Preliminary audit report is attached.'

[73] It appears to me that on a strict reading the two week period between receipt of the membership rolls and BGMs was not always observed and was compromised. This certainly did not make for a good start to the run up to the PC. The point made by the Respondents that branches exercise control over the convening of BGMs and that these could be extended, is however a good one. Specifically the contention by the Respondents is that the time frame for branch verification was 'pushed out', if not

generally, then at least in respect of some branches in the eThekwini region. The Respondents' version being the one that prevails in the event of any dispute, I am not satisfied that the Applicants have clearly established a fatal irregularity in this regard which would nullify the entire conference process. BGMs could have been extended to allow sufficient time for the branch membership rolls to be considered properly, and steps taken to collect the rolls where they had not been supplied at all. Whether that would have given rise to problems down the line with insufficient time then remaining to complete other processes, and whether that would result in fatal irregularities cannot be answered on the papers, save insofar as it may be covered by the Applicants' further complaints which shall be considered below. The 70% rule, to which I shall return below, is however not an answer to these complaints.

Inadequate time for appeals

[74] The Applicants nevertheless complain, that whatever the position might be with them receiving the branch membership rolls less than two weeks before BGMs, that the branches were afforded at least one day less for corrections after the preliminary audit report, than is stipulated in the National Audit Guidelines. In those Guidelines, dealing with the requirement of 'Confirmation of the Audit Findings', it is provided that following 'the completion of each regions audit, the National Audit Team ("NAT") will provide the relevant provincial secretary with a copy of the preliminary audit report' where after '(t)he Branches will then have five days within which to raise queries'. An ANC branch 'can appeal preliminary audit outcomes through its BEC following proper channels starting at the Regional, Provincial, and National through the office of the ANC Secretary General as the final arbiter'. The NAT 'should then respond to any queries and make any necessary corrections. They may review any branch records, but should not consider documentation that was not submitted to the original Audit Team.' Once 'the audit is completed the audit team should make available the preliminary audit report to the Provincial Secretary. The final audit report shall be made available to the provinces once it has been signed off by the Secretary General'.

[75] The Applicants allege that the time allowed for final corrections (at best three days) was not only exceedingly short, but that on 27 October 2015 the SG had 'stopped the clock' resulting in the PC preparations remaining 'in limbo', presumably suggesting that this would have encouraged apathy, until the NEC was persuaded some time on 2 November 2015 to continue with the PC as planned for 6 to 8 November 2015.

[76] After the final audit report had been filed by the NAT, the First Respondent as the then Provincial Secretary states that it was communicated to those branches that had been disqualified that they were disqualified. He maintains that a final or confirmed audit was signed off in two tranches. The first, namely the audit of the branch membership, occurred by way of reports all dated 17 September 2015 and which are all signed by the SG. The second tranche are all dated 3 November 2015 and are signed by the SG, save for one signed by his Deputy, Ms Jessie Duarte. Regarding the Applicants' complaint that the documents signed off on 3 November 2015 were described as 'preliminary verification of BAGM's/BGM's' for the Province of KwaZulu-Natal Provincial Conference, it is said they were only preliminary until signed off by the SG or his Deputy and thereafter became final audit reports.

[77] The Respondents maintain that there was no obligation to make such final audit report available to the branches for final correction before the PC. Their version is that once the appeal process and final audit report is completed, presumably because the SG is the 'final arbiter', it became part of a platform upon which the credentials report is then compiled which in turn is then confirmed by the provincial conference, and that that is what happened. That construction cannot however be correct. The Audit Guidelines themselves recognise that following the appeal to the 'preliminary audit outcomes' through the office of the SG, the NAT 'should <u>then</u> respond to any queries' and '…may review any branch queries'. This clearly contemplates a further 'review', more correctly appeal process.

[78] Appeals could only proceed and the PC credentials prepared after the final audit report had been signed off on 3 November 2015.

[79] The knock-on effect of the final audit report only being signed off on 3 November 2015 is that the NDAC chaired by Ms Lindiwe Sisulu only commenced sitting on 4 November 2015. According to the post-conference report of the NEC's Mr Joe Phaahla annexed to the Respondents answering affidavit, the NDAC only received some of the final documentation which it required during the first day of the conference on 6 November 2015 and it made its report during the evening of 6 November 2015 after it had been persuaded by the NEC and PEC members to exclude four 'big membership' eThekwini branches from the PC which the NDAC had decided to afford the opportunity to produce documentation to reassess their audits (in which they had been failed for 'inconsistent signatures' of members).

[80] In the ordinary course the final credentials report should incorporate the results of the above appeal process, to comprise the final and definitive list of which branches and how many delegates were entitled to vote at the PC.

[81] The Applicants contend that this was unlawful and in breach of the ANC's constitutional procedures considering that the NDAC was the final arbiter of appeals and that it permitted a decision regarding the four eThekwini branches in question to be overridden and changed by the NEC and PEC members in the manner described in Mr Phaahla's report. Accordingly, the Applicants submit that the preparation time was clearly too short and the procedures too rushed and that whatever other prejudice there may be, it operated to deprive the numerous members of the four eThekwini branches in question of both their ANC constitution entitlement and their s 19(1)(b) right of participation. The issue however remains whether the Applicants can point to actual prejudice, at least in the sense of branches which wished to appeal and could not do so.

[82] In an attempt to demonstrate their prejudice the Applicants annexed copies of cover sheets for the regions Musa Dladla, Far North, Harry Gwala, Emalahleli, Moses Mabhida, Lower South coast, Inkosi Bhambatha and Ukhahlamba, signed by the SG or Deputy SG as annexures 'LD20.1' to 'LD20.11'. The Respondents however deny that

the documents 'LD20.1' to 'LD20.11' constitute a complete set of audit reports.

[83] It is not in dispute that a 'warm body verification process' was undertaken at the PC by all persons being evacuated from the conference venue and then allowed back in strictly on a names tag and list basis, so that the possibility of the recognition of delegates from non-qualifying branches could be excluded. The Respondents however dispute the correctness of the 'Verification Voters Roll' ('VVR') introduced by the Applicants. They attach what is termed the correct Updated Credentials report ('UCR') which was completed at the PC and which they contend is decisive.

[84] The Applicants prepared a comparison and analysis between the VVR and the UCR from which they seek to draw certain inferences. That comparison is however of no value in the light of the Respondents' rejection of the VVR. I am alive to the comments in *Ramakatsa* on the facts of that case with reference to the application of the rule in *Plascon-Evans*, where the following was said:

> '[94] …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.
>
> [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…'

[85] The present is in my view not such an instance, as the Respondents have not simply resorted to a bare denial but have endeavoured to explain their position with reference to the UCR.

[86] After all is said, the Applicants must point to irregularities on the Respondents' version that are material and that could have affected the outcome of the voting. The

Applicants made a comparison of the 'Report of the National Dispute Appeals Committee' and the UCR (as adopted) and seek to draw certain conclusions from that. I have made a comparison of the 'Final Audit Reports for the Provincial Conference', the 'Report of the National Dispute Appeals Committee' and the UCR. My comparison does not support all the 'discrepancies' the Applicants relied on in reply, but only those set out below:

(a) eThekwini Wards 6 (p1363/1444) and 55 (p1275, p1367 and p1444) qualified after their appeals to attend the PC, yet they do not appear in the UCR, and no delegates were allocated to them;

(b) Far North Region, Mtubatuba sub-region, Ward 4 qualified on appeal (p1373), yet it does not appear in the UCR and no delegates were allocated (p1466);

(c) Ward 79 eThekwini appears as having qualified (p1276 /1370), but does not appear in the UCR (p1445);

The above very strongly suggests that these three branches were denied the right, through their delegates, to participate in and vote at the PC, in breach of the ANC constitution and the s 19(1)(b) rights of their members.

[87] On the other hand, Ward 9, Musa Dladla region, Umlalazi sub-region appears in the final audit report as disqualified (p1309), yet it was seemingly erroneously allocated two delegates in the UCR (p1460) who presumably would have voted at the PC.

[88] The Respondents' reply to the above discrepancies is that the UCR is not conclusive and that the issue as to whether delegates attended and voted on behalf of branches at the PC can only really be answered with reference to the actual voters' rolls. That roll however has been mislaid.

[89] Regarding the mislaid voters' roll, the answering affidavit simply records that:

> 'The Respondents have attempted to locate the voters roll but have been unable to do

so.’

This is most unfortunate as it might have clarified certain issues. However how it came to disappear is not explained, nor is there any explanation of what efforts have been made to try and locate it.

[90] The UCR, as adopted, is accordingly the best evidence of who was permitted to vote. On the acceptance thereof and on the common cause facts, three branches were indeed excluded from participation in the PC, and one allowed to participate irregularly.

[91] The question however remains as to what impact this would have had on the PC. Plainly the voting might have been affected, and in addition, delegates from these Wards might have exercised some persuasive powers in debate (save that the affidavits are silent on this aspect). Accepting that the prejudice could at best result from the voting being affected, it is in my view significant that the number of delegates in each instance, having regard to the size of the membership of the Wards, and comparing it to similar sized Wards, would not have been sufficient to remotely dent the difference in the number of votes between the candidate Senzo Mchunu (675 votes) and the First Respondent (780 votes, being 1459 total votes less 4 votes spoilt less 675 votes cast in favour of Mr Mchunu), being 105 votes. I am therefore not persuaded that even accepting the aforesaid irregularities, that the outcome of the PC would have been affected materially, certainly not such as to cause it to be set aside.

[92] It is so that according to the ‘Report of the National Dispute Appeals Committee’, appeals from 28 Wards in the eThekwini area were outstanding and appeals were also still pending in respect of Mtubatuba and that notwithstanding these appeals being outstanding the audit was nevertheless finalised. In the answering affidavit no dispute is raised that there were such outstanding appeals and queries. However the affidavits are silent on the reasons why these appeals were outstanding, and whether the appeals would have been persisted with. As I understand the allegations in this regard, there is a lack of an evidential basis to find that these in fact amounted to irregularities on the

basis of which it can be said that the entire PC falls to be declared unlawful. The Applicants' contentions in this regard, because of the application of the *Plascon Evans* principle, simply are not established.

[93] I therefore conclude in regard to the irregularities complained of, that these were not established.

The tweet

[94] The voting process at the PC started on 7 November 2015 under the leadership and guidance of the Electoral Commission and EISA. The ballot was a secret one in terms of the ANC constitution and no results of the voting would be available until verified and released by the election agent.

[95] The voting process in respect of the provincial 'top 5' positions started on the evening of 7 November 2015. Whilst in process, a 'tweet' allegedly from the '*My ANC'* twitter account was disseminated at 22h23 on 7 November 2015 reflecting the results of the voting as 1459 delegates voted, Senzo Mchunu received 675 votes, the First Respondent received 789 votes. It recorded that 'Sihle is the Chairperson'.

[96] At that time the process of voting was still ongoing with the Moses Mabhida region still voting. The voting process was only finalised at about 03h00 on 8 November 2015 where after the counting of votes started, which was finalised at approximately 09h30. When the final results were announced, 1459 delegates had indeed voted, four ballots were spoilt, Senzo Mchunu had indeed received 675 votes, while the First Respondent received the remainder and would become the Chairperson. Expressing surprise at quite how such an accurate prediction could have been made before the voting was finished, the inference sought to be drawn by the Applicants is that the results were fraudulently predetermined. The coincidence between the results contained in the tweet, and the actual result of the voting is indeed remarkable.

[97] The First Respondent in answer however denies any knowledge of what he terms 'this fraudulent and mischievous tweet'. He denies any fraud and expresses the view that the Applicants' allegations are mischievous and not backed up by any sustainable evidence. He contends that the notion that the EISA could have been party to such fraudulent conduct, is not only absurd but defamatory.

[98] The Respondents also do not accept that the tweet was indeed sent at 22h23 on 7 November 2015, contending that any details could simply have been inserted in a fraudulent document, or that the tweet could have been manufactured after the event, once the actual results were known. Specifically they deny that the tweet is from the ANC twitter account and contends that as far as the ANC is concerned it is a fake 'tweet '.

[99] The inference sought to be drawn of electoral fraud, at the level of probability seeks to impute criminal conduct to an individual or individuals, albeit unidentified, which is not something that is lightly inferred as a probability. Motion proceedings are mainly suited to decide matters on the basis of common cause facts. On the approach to disputes of fact in motion proceedings and in the light of the dispute as to the authenticity and timing of the sending of the 'tweet' no inference of fraud can be drawn in these proceedings.

The 70% rule

[100] The 70% rule has its origin in amongst others the document 'WHAT CONSTITUTES A LEGITIMTE ANC CONFERENCE', where it is formulated thus:

> 'The conference is convened if there is a minimum of 70% branches that have successfully completed all steps in the pre-process for the conference.'

[101] As alluded to earlier, the First Respondent contends that 'as long as 70% of the branches in the region meet with the pre-conference processes then the conference can proceed. The remaining 30%, no matter how valid their complaints, cannot prevent the

Provincial Conference from proceeding, nor can they complain afterwards if it does.'

[102] As much as one can understand the practical and logistical difficulties which may arise in individual branches, the requirement is clearly one to operate constitutionally, and is more in the nature of a quorum requirement. All branches must be given a proper opportunity to qualify, which includes exhausting appeal procedures, and after having appealed successfully being accredited. However similarly, having been given such a proper opportunity to qualify, branches that then do not qualify cannot be accredited, and cannot complain. As long as 70% of the branches qualify having fully enjoyed the right to qualify to the highest appeal level, then the conference can proceed. That would be a proper application of the 70% rule.

[103] The constitutional rights and entitlement of members and branches cannot, for the purpose of demonstrating this principle, be violated in the run up to qualifying to participate in a provincial conference, and that violation then be justified on the basis that at least 70% of other branches had qualified. The application of the 70% rule to that situation would be misdirected, improper and irregular.

[104] The 70% rule will therefore not assist the Respondents in respect of the irregularities I have found to exist in paragraphs [86] and [87] above. Those irregularities however do not assist the Applicants' case for the reasons dealt with there.

LOCUS STANDI IN IUDICIO:

[105] The issue arising is whether, notwithstanding my above conclusions, the Applicants qua members of the ANC in their personal capacities have the required locus standi to claim (and be granted) any relief.

[106] Locus standi can either be established:

(a) at common law, requiring a legally recognisable interest; or

(b) in terms of s 38 of the Constitution.

[107] Section 38 of the Constitution provides:

> '**Enforcement of rights**
>
> 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.'

[108] The Respondents have contended that the Applicants, as branch members, have no right whatsoever to participate directly in a provincial conference and that their right is limited to voting as part of the branch. Accordingly that it is the branch, not the individual, who sends delegates to the provincial conference that would have locus standi. Reliance was placed on *Ramakatsa* paragraph 87 where it was said that:

> '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.'

[109] As much as members participate within their branches in the formulations of policy and the like, I do not read *Ramakatsa* as authority for the proposition that individual branch members can only complain provided they do so through their branches. *Ramakatsa* on my reading thereof in fact confirms that 'the ANC's Constitution regulates and facilitates how its members may participate in internal

activities of the party', further 'that the leadership of the party is accountable to its members in terms of the procedures laid down in its constitution.' Likewise following the introductory comments in para 79 the Constitutional Court held that:

> '… 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.'

[110] The constitution of the ANC and the rules governing its functioning collectively constitute the terms of an agreement amongst the members. Branches do not join the ANC, individual members do. When the constitution is violated, it is not a violation possibly of only rights of the branches, but the violation of rights of individual members. The constitution of the ANC simply gives effect to the political rights each member of the ANC has in terms of s 19 of the Constitution.

[111] When a provision of the ANC constitution or its rules is breached, the Applicants are denied the very political rights they are afforded in s 19 of the Constitution and they are entitled to apply to court to assert their rights, if not directly then at least indirectly, under s 19. This would bring them squarely within the parameters of s 38(a), particularly where s 38 requires a 'wide approach' or a 'generous approach' to matters of standing.

[112] The Applicants accordingly had the required locus standi.

IS THE APPLICATION TIME BARRED?:

[113] The Applicants presented their application for relief relying on contractual (the ANC constitution) and constitutional (s 19 of the Constitution) causes of action. In this regard they were no doubt guided by what was decided in *Ramakatsa* which recorded in respect of the applicants in that matter that:

> '[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.'

[114] *Ramakatsa* concerned itself mainly with the first two grounds, namely, whether the contractual rights of the Appellants as members of the ANC were breached specifically in the context where the complaints of the Appellants amount to an infringement of their right to participate in the activities of a political party. In the minority judgment Froneman J however held 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 …'

Moseneke DCJ and Jafta J in the majority judgment disagreed with Froneman J's characterisation of the appellants' case, as being inaccurate and incomplete. They, with respect correctly pointed out that:

> '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 s 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…'

The order granted by the Constitutional Court included that:

> '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.'

[115] Notwithstanding the above, the Respondents have contended that the relief claimed is, in true reality in the nature of a review (presumably as opposed to a simple declaratory order), which is governed by the provisions of PAJA, or if wrong in that

regard, in the alternative a review at common law. The significance of these submissions lies mainly, if not purely, in whether the relief claimed would then be time barred, the application having been launched on the 22 July 2016, that being alleged to be:

(a) More than 180 days after the date contemplated in s 7 of PAJA which provides:

> '**Procedure for judicial review.-**
>
> (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
>
> (*a*) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
>
> (*b*) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.
>
> (2)(*a*) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (*b*) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (*c*) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.
>
> (3) …'

There was no application for an extension of the 180 day period.

(b) Not within a reasonable time at common law.

[116] In what follows below I shall consider seriatim:

(a) Whether the application is in fact one for a review which falls under the provisions of PAJA (which will entail whether that argument can be invoked where the Applicants have eschewed PAJA and secondly whether the decisions in issue meet the definition of 'administrative action');

(b) Whether it is a review at common law, and if so what would be a reasonable time within which to pursue such relief; and

(c) From what date the time for bringing any such review would run.

Do the Applicants claim a review?

[117] The relief claimed by the Applicants is not couched in the form of a review identifying any particular decision which is sought to be reviewed, and claiming in addition, as is often but not necessarily the case, that the record in respect of such decision be produced (normally in terms of the provisions of rule 53 of the Uniform rules of court) or for such decision to be 'reviewed and set aside'. The submission advanced by the Applicants is that they particularly eschewed PAJA, accordingly that their claim must be judged according to the cause of action that they have chosen, as was done by the applicants in *Ramakatsa*.

[118] As indicated earlier, Yacoob J construed the relief sought in *Ramakatsa* as being 'premised on three inter-related grounds', which included judicial review under PAJA. However, he nevertheless confined the judgment 'to concern itself mainly with the first ground, namely, whether the contractual rights of the applicants as members of the ANC were breached.' The majority judgment also dealt with the matter independent of any application of PAJA. The final relief granted, which included inter alia an order that the provincial elective conference of the Free State was 'declared unlawful and invalid', was a declaration of rights.

[119] In my view, the Applicants, with reliance inter alia on *Ramakatsa*, were entitled to

formulate their claim free from any review in terms of PAJA. They were entitled to have their application adjudged according to the cause of action they had chosen, and not to be forced to have it adjudicated according to some other cause of action that might potentially have been available to them but which they deliberately eschewed. *Makhanya v University of Zululand* held that a court may not decline to entertain a claim brought by an Applicant simply because a different cause of action might have been available.

[120] The Respondents' retort however is that the principle given effect to in *Ramakatsa* has subsequently been qualified by the decision of the Supreme Court of Appeal in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*. This argument must be seen in its context. The starting point is s 33 of the Constitution, the material portions whereof provide that:

> '**Just administrative action**
> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) …
> (3) National legislation must be enacted to give effect to these rights, and must –
> (a) provide for the review of administrative action by a court …'

The Respondents' submissions following thereafter include that:

(a) PAJA is the legislation which was contemplated and promulgated in terms of s 33(3) to give effect to the rights in s 33;
(b) PAJA has its own legality provisions which provide that a court has the power to judicially review an administrative action if the administrator who took it was not authorised to do so by the empowering provisions, or if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with, or if the action was taken for a reason not authorised by the empowering provision.
(c) The Applicants were accordingly obliged to follow the provisions of PAJA.

(d) The Supreme Court of Appeal in *Gijima Holdings,* decided subsequent to the decision in *Ramakatsa*, held per Cachalia JA writing for the majority, in the context of a similar argument that the appellants in that matter maintained that they were entitled to avoid instituting review proceedings under PAJA by relying directly on the constitutional principle of legality to obtain declaratory relief against Gijima, that this was 'unacceptable'. The Court held:

> '[33] ….In short, if the unlawful administrative action falls within PAJA's remit there is no alternative pathway to review through the common law.
>
> [34] But the "burgeoning principle of legality" is arguably a greater threat to PAJA than recourse to the common law because it regulates the exercise of all public power. This includes, in addition to administrative decisions covered by s 33 and PAJA, power exercised by the legislature and the executive …
>
> [35] ….
>
> [36] But it is not a problem that can legitimately be avoided. For if a litigant or a court could simply avoid having to conduct the sometimes testing analytical enquiry into whether the action complained of amounts to administrative action, PAJA, in Professor Hoexter's words –
> "would soon become redundant, for no sane applicant would submit to its definition of administrative action (or to the strict procedural requirements of s 7) if he or she actually had a choice".
>
> [37] Put differently, the consequence of this would be that the principle of legality, unencumbered by PAJA's definitional and procedural complexities, would become the preferred choice of litigants and the courts – which is happening increasingly – and PAJA would fall into desuetude. This would be a perverse development of the law, one that the framers of the Constitution would not have contemplated when they drafted s 33(3) of the Constitution. Neither would the lawmaker have imagined this when enacting PAJA.

> [38] In my view, the proper place for the principle of legality in our law is for it to act as a safety net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or an alternative path to review, when PAJA applies. As this court said in *National Director of Public Prosecutions and Others v Freedom Under Law:*
> "The legality principle has now become well established in our law as an alternative pathway to judicial review *where PAJA* finds no application." [Emphasis added.]' (Footnotes omitted)

This followed after the Court recognised that 'it is at times difficult to work out whether the unlawful action complained of qualifies as administration action.'

[121] The parties are ad idem that the ANC is not an 'organ of state'. The Respondents contend further, with reference to the minority judgment of Cameron J in *My Vote Counts NPC v Speaker of the National Assembly and Others* that it is also not 'a private body.' The first part of the definition of 'administrative action' in s 1 of PAJA dealing with decisions taken or a failure to take a decision by an organ of state therefore does not apply, and need not be considered.

[122] The parties accepted that if PAJA was to apply, it would have to be on the basis that there had been an administrative action as contemplated in sub-paragraph (b) of the definition of 'administrative action', which reads:

> '…any decision taken, or any failure to take a decision, by –
> (a) …
> (b) a natural or juristic person, other than an organ of state, when exercising a public power of performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-
> (aa)…'

[123] The term 'empowering provision' is itself defined in s 1 of PAJA to mean:

> '… a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken'.

Although initially resisted, when this definition was pointed out to the Applicants they accepted, correctly in my view, that the ANC constitution would qualify as at least 'an agreement, instrument or other document.'

[124] The hotly contested issue which remained however in deciding whether there was 'administrative action' taken in respect of the ANC constitution, is specifically whether there was the exercise of a 'a public power' or the performance of ' a public function.'

[125] The decision which the Respondents contend was in issue, was the decision to hold or continue with the PC. It is not however clear from any express provision of the ANC constitution as to which person or body would take the decision to hold a provincial conference. It certainly appears from the factual allegations made that the PEC had requested approval from the NEC during 2015 to hold the PC. Such approval was granted, subsequently placed on hold, and then authorised by the SG. The Respondents contend that this power and hence the decision to hold the PC was the decision of the NEC based on the general omnibus power conferred in rule 12.1 of the ANC constitution. Accordingly they contend that the relief claimed was hence a review of the decision of the NEC to hold or continue with the holding of the PC.

[126] In the absence of an express rule of the ANC constitution conferring that power on the NEC, I am not certain that the submission is necessarily correct. For the purpose of this judgment it has however been accepted that the decision does lie with the NEC. That uncertainty might however very well be a justifiable reason for the Applicants to rather formulate their relief as declaratory relief, and might qualify as a circumstance which would justify seeking declaratory relief, rather than relief by way of a review, because it is 'at times difficult to work out whether the unlawful action complained of

qualifies as administration action' as said in *Gijima Holdings.*

[127] The crucial issue remains to determine what is meant by exercising 'a public power.'

[128] The Respondents have stressed the following for their contention that the exercise of a public power is involved:

(a) Under s 19(1) of the Constitution every citizen is free to make political choices which include the right to form a political party, to participate in the activities of, or recruit members for, a political party and to campaign for a political party or cause;

(b) Political parties receive public funds with which to operate pursuant to provisions of s 236 of the Constitution;

(c) Although not organs of state, the ANC is not a private body;

(d) The decisions sought to be attacked form part of the political process which is inherently a public function. The elective process of which the Applicants complain constitutes an integral and essential role in the political process and election of the ANC candidates as public officials; and

(e) In *Cape Town City v Aurecon SA (Pty) Ltd* a decision of the Constitutional Court subsequent to that of the Supreme Court of Appeal in *Gijima Holdings,* the latter was not referred to, meaning that it still holds as good law and binding precedent.

[129] The decision to convene a provincial conference, and even elect leadership, does not in my view constitute the exercise of a public power. The ANC is the party in government nationally, but in the context of this application its conduct and decisions are not attacked as part of Government/Executive but by members qua political party. Even though partly state funded, its decisions relating to the PC have no direct impact on the political process or the public generally. Its powers and decisions are governed entirely by the ANC constitution (not any statute or other legislation) and relate to and only affect its members, being the only persons that have a legal interest. If any non-

member of the ANC sought the relief claimed in this application, he/she would plainly be non-suited in respect of any such relief, because it would be the exercise of a 'power' which does not affect the 'public'. No public power or public function is in issue. The dispute revolves solely around the propriety of the PC. Even as much as political parties themselves derive their status from the Constitution and are part of the elective process affecting the National and Provincial Legislatures and the Executive, the decisions complained of by the Applicants are qua members of the ANC and not public in nature. The position in *Van Zyl v New National Party* which involved the recall of a member of the National Council of Provinces is clearly distinguishable.

[130] As was stated in *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others* in relation to the definition of an administrative action:

> 'The question whether action taken by a public official or authority is administrative is central to the enquiry. The focus of the enquiry is primarily upon the nature of the power being exercised, rather than the identity of the person or body exercising the power… As the judgment in *Grey's Marine* makes clear, it is a requirement, flowing from the definition of "decision" in PAJA that the decision be one of an administrative nature.' (Footnotes omitted)

[131] PAJA is concerned with the conduct of the administration. It is not concerned with the internal conduct of political parties, unless they directly affect the public or political process, such as the recall of a party's representative to the National Legislature, as in *Van Zyl v New National Party* where the New National Party sought to recall their representative to the National Council of Provinces. it was held by the Cape High Court that such a decision to recall failed to comply with the principle of legality and that it constituted a violation of the applicant's right to administrative justice.

[132] As also held in *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another:*

> 'A bargaining council, like a trade union and an employers' association, is a voluntary association that is created by agreement to perform functions in the interests and for the benefit of its members. I have considerable difficulty seeing how a bargaining council can be said to be publicly accountable for the procurement of services for a project that is implemented for the benefit of its members – whether it be a medical- aid scheme, or a training scheme, or a pension fund, or, in this case, its wellness programme.'

[133] In my view PAJA does not apply as the application does not concern 'administrative action'. Accordingly the time limitation in s 7 of PAJA is no bar to the relief claimed.

Is there an unreasonable delay at common law?

[134] If the Applicants' claim properly construed, is for a review at common law based on the principle of legality (as opposed to simply declaratory relief, or a review of administrative action as defined in PAJA), then it must be brought within a reasonable time.

[135] The first issue to consider however is from what date such reasonable period falls to be calculated.

[136] The PC was held from 6 to 8 November 2015.

[137] After the PC was concluded various representations were made and delegations deployed, details of which have been referred to above. Based on those, the Applicants submit that 'in keeping with ANC practice' they had to pursue their complaints with the NEC prior to pursing the litigious route. They maintain that it was quite proper to first give the NEC an opportunity to address the Applicants and other members grievances before approaching a court and that they were correct in waiting for a response from the NEC, particularly as it is not denied by the Respondents that the NEC was the highest body capable of invalidating the outcome of the PC.

[138] The Applicants contend that they were not only entitled to wait for the final word from the NEC but indeed were obliged to so wait.

[139] I have difficulty with the notion that they were obliged to wait as though elevated to the level of some formal internal appeal procedure which needs to be exhausted prior to an aggrieved party approaching a court of law. The ANC constitution is silent on any such internal remedies. Indeed the Applicants in reply concede that there is no formal appeals process available post-election. They however contend that post-conference grievances about irregularities and unlawful conduct affecting a conference can be addressed to the NEC which does have the power to intervene in the face of sustainable evidence thereof. This they contend is by virtue of inter alia rule 12 of the ANC constitution. They maintain that this has been done in the past for example in respect of the setting aside and re-running, at the behest of the NEC, of the February 2012 eThekwini Regional Conference. In support thereof they annex a document authored by the First Respondent whilst he was the provincial secretary, referring to such post-conference grievances as 'appeals'. These were not denied.

[140] Be that as it may, having regard to the steps that were taken, it seems reasonable that the Applicants awaited the outcome of the grievances which had been lodged and that even though those were not responded to within time periods within which responses were promised, that it was only manifestly clear when the NEC decided to proceed with the induction of the new PEC as late as in May 2016, that it became clear that any undertakings to address the Applicants' and others' grounds of complaint, would not be attended to.

[141] The application was launched within a period of two months thereafter. That cannot with regard to all the above surrounding circumstances be categorised as unreasonable, such as to constitute an absolute bar to the relief claimed, even assuming that the relief claimed was properly a review at common law and that the Applicants were not entitled to approach this court simply for a contractual remedy in the form of a declaration of rights.

THE RELIEF CLAIMED:

[142] The Respondents submit that even if the Applicants were otherwise to establish an entitlement to the relief sought, that this court would have a discretion as to whether or not to grant that relief taking into account all relevant factors in the exercise of that discretion. Primarily it is contended that 'matters have simply gone too far in the meantime, and cannot reasonably at this late stage be unravelled.' Attention was drawn to the fact that a delay ensued from the time that the PC was held and decisions were taken at that PC, and the time the present application was brought some time later. It was contended that there is prejudice and knock-on effects, which the deponent to the answering affidavit referred to. Referring to the further delays in the judicial process (and there was a dispute as to which side was responsible for this) it was pointed out some 21 months would have elapsed by the time this matter was heard during which period persons elected at the PC have occupied positions (in the case of the PEC from May 2016 when they were inducted) and various high ranking officials have been deployed to important governmental positions. Accordingly it is contended that it is simply not practicable or reasonable in the circumstances to attempt to unravel all of this, that the relief sought if granted would throw into uncertainty, and possible chaos, everything that has happened in the intervening 21 months, and to the extent that administrative decisions might have been taken, although they continue to exist in fact and in law, if they were taken by a person not lawfully authorised to take such decisions, they are vulnerable to being set aside on review by any interested party. Reliance was placed in this regard on s 6(2)(a) of PAJA. Attention was also drawn to the fact that even if no direct challenges are raised by way of review proceedings, if at some future stage a decision is sought to be enforced it might be faced by a collateral challenge which may succeed in preventing enforcement. Even if it does not succeed in preventing enforcement, the concern was that elected officials might be wary about seeking enforcement because of the potential of subsequent court challenges. Accordingly, it was submitted that the Applicants' approach in seeking the relief which they do, would be irresponsible and impractical.

[143] At common law, non-compliance with the peremptory provision of an agreement/constitution results in the setting aside of the conduct which flowed therefrom. Thus in *Matlholwa v Mahuma and Others* it was held that:

> 'As pointed out above, the power to expel a member may be exercised only by a body in which such power has been vested by the constitution expressly or by clear and unambiguous implication, failing which the purported expulsion will be *ultra vires* the constitution and void.'

[144] Section 172 of the Constitution provides:

> '**Powers of courts in constitutional matters**
>
> (1) 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;
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[145] As the ANC constitution simply gives effect to the political rights in s 19 of the Constitution, in deciding on the relief claimed this court is 'deciding a constitutional matter' as contemplated in s 172.

[146] A just and equitable order may be granted even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. In *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* it was held that:

> '[96] … In other words the order must be fair and just within a context of a particular dispute.

> [97] It is clear that s 172(1)(*b*) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s 172(1)(*b*) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(*a*). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution.' (Footnotes omitted)

In that matter an order was granted requiring the school governing board and the school to report to the Constitutional Court within a specified period of time on the reasonable steps it had taken in reviewing its language policy and on the outcome of the review process.

[147] The aforesaid was referred to with approval by Mogoeng J in *Minister of Safety and Security v Van der Merwe and Others,* were it was stressed that such a just and equitable order should be one 'structured in a way that avoids unnecessary dislocation and uncertainty' (in that matter in the criminal justice process).

[148] In *Zondi v MEC, Traditional and Local Government Affairs, and Others* it was held that:

> 'There is therefore much to be said for the view that common law, viewed in the light of s 173 of the Constitution, provides the power to extend the period of suspension of the declaration of invalidity as contended by the MEC. This will of course require us to consider whether common law should now be developed in the interests of justice to

bring it in line with the powers of this Court in deciding constitutional matters. However, in the view we take of the matter, it not necessary to do so. The MEC contended in the alternative that the power to extend the period of suspension is to be found in s 172(1) which deals with the powers of this Court in deciding a constitutional matter within its jurisdiction.'

[149] In *Ramakatsa* the delay from when the Free State provincial conference was held from 21 to 24 June 2012 until the Constitutional Court pronounced on the matter was considerably shorter than what it is in this application. However, there was little time from the judgment of the Constitutional Court until the next NC was to be held on 15 December 2012 in Mangaung. This resulted in the appellants in that matter arguing that it would be 'just and equitable for (the) Court to order the ANC to install an interim structure in terms of rule 12.2(d) of its constitution'. Rule 12.2 provides:

'12.2 Without prejudice to the generality of its powers, the NEC shall:

12.2.1 …

12.2.2 …

12.2.3 …

12.2.4 Ensure that the Provincial, Regional and Branch structures of the ANC function democratically and effectively. (The NEC may suspend or dissolve a PEC when necessary. A suspension of a PEC shall not exceed a period of 3 (three) months. Elections for a PEC, which has been dissolved, shall be called within 9 (nine months) from dissolution. The NEC may appoint an interim structure during the period of suspension or the dissolution of the PEC to fulfil the function of the PEC);

…'

[150] In support of an order, which it was contended would be just and equitable, reliance was also placed in *Ramakatsa* on rule 11.3 which empowers the NC with 'the right and power to review, ratify, alter or rescind any decision taken by any of the constituent structures, committees or officials of the ANC.' The order sought was that the Constitutional Court direct the NEC to reconsider the complaints of the appellants in that matter, or that the NEC consider the complaints at the start of the conference.

[151] It seems that the Constitutional Court in *Ramakatsa* in deciding the issue before it considered that it was 'deciding a constitutional issue' for the purpose of s 172 of the Constitution. It did not expressly say so, but it appears from the fact that it decided not to grant an order which to any extent would suspend its declaration of invalidity of the Free State conference, that it impliedly accepted that the issue it was called to decide was a 'constitutional issue'. The Constitutional Court stated, after having concluded that 'a declaration that the provincial elective conference of the ANC and the decisions taken at the conference are unlawful and void should suffice' and cautioning that 'the declaration of invalidity applies only to the Provincial Conference' and does not 'relate to or effect the rights of delegates who have been elected at properly constituted branch general meetings …to serve as delegates at any other conference of the party', that:

> [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.'

[152] Specifically in this case*,* the Respondents have argued that:

> 'The persons elected at the Provincial Conference (whom the Applicants now say have invalidly been elected) have continued to occupy those positions and it made numerous very important administrative and other decisions. Moreover as a result of that Provincial Conference, numerous high ranking officials (as Mr Zikalala has already set out) have been deployed to important Governmental positions and numerous important decisions have been taken by those persons in those official capacities.' Accordingly, that it is 'simply not practicable or reasonable in the circumstances to attempt to unravel all of this' and that any attempt to do so will '…throw into uncertainty, and possible chaos, everything that has happened in the intervening 21 months.'

Even acknowledging that administrative decisions that are taken continue to exist in fact and in law, the complaint was that if such decisions were taken by a person or entity that was subsequently found not lawfully authorised to take such decisions, that those

decisions would be vulnerable and liable to be set aside on review by an interested party. Even if no direct challenge was mounted in the form of review proceedings, the concern was that if any decision was sought to be enforced, the person against whom it was sought to be enforced could mount a collateral challenge in reaction to that attempt at enforcement, which may succeed in preventing enforcement. Finally, concern was expressed regarding damages claims which '…could conceivably lie against the ANC or indeed Government at the instance of interested third parties, consequent upon decisions having been taken by invalidly elected officials', which it was said was 'likely to cause chaos in local and national government affairs.'

[153] The Applicants' approach to an outright order of invalidity was accordingly categorised by the Respondents as 'irresponsible and impracticable and that it would not be in the interest of justice or lawful administrative action, or in the public interest, to grant the relief sought.' The Respondents' prayer accordingly was that '…even if the Applicants were otherwise to establish an entitlement to the relief sought, it is respectfully submitted that it ought not to be granted.'

[154] The issues in this application however have a narrow focus. The central issue is whether the PC was valid. Inevitably that will affect the issue whether the PEC should or should not be occupying office in terms of the prescripts of the ANC constitution.

[155] However, the setting aside of a principal act does not inevitably result in the invalidation of the subsequent acts. In *Democratic Alliance v President of the Republic of South Africa and Others* the Constitutional Court per Yacoob ADCJ held:

'However, in these circumstances, we should make an order that the invalidity of Mr Simelane's appointment will not by itself affect the validity of any of the decisions taken by him while in office as National Director. This will mean that all decisions made by him remain challengeable on any ground other than the circumstance that his appointment was invalid.'

[156] Generally however, an act contrary to a constitution is void, as held in inter alia *Matlholwa v Mahuma and Others.*

[157] I have given anxious consideration to whether any declaration of invalidity of the PC should be suspended and operate only prospectively from the date of the grant of this judgment. I have also given consideration to whether an order should be granted akin to that in *Democratic Alliance v President of the Republic of South Africa* that the invalidity of the PC will not by itself affect the validity of any of the decisions taken by or at that conference.

[158] The Respondents' complaints are largely verbalised in general conclusions of what might be a worst case scenario. The Respondent's complaints about the knock on effect a declaration of invalidity may have lack detail and might be overstated as regards the origin, complexity and the detrimental effect of the suggested 'knock on' and 'disentagling' problems. Ultimately, deployments and appointments of members are made by the ANC through the NEC and other structures, not provincial conferences. This court must be guided only by specific evidence of such prejudice.

[159] As in *Ramakatsa* this court should be disinclined to determine how the ANC should regulate its internal processes, given the powers in rules 11.3 and 12.2.4 of the ANC constitution providing for continuity. Consequences will follow from the declaration of invalidity which, going forward, are best dealt with by the ANC itself in regulating its internal processes.

<u>COSTS</u>:

[160] In *Ramakatsa* it was said:

> '[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.'

[161] The Applicants and Respondents respectively in support of their contentions argued that should their contentions be upheld that the other side should be ordered to pay their costs, such costs to include the costs consequent upon the employment of two counsel.

[162] In my view there is much to commend applying the same principles as faced the Constitutional Court in *Ramakatsa*. Specifically in relation to the interpretation of rule 17.2.1 of the ANC constitution, it involved a matter important to both sides and which was a novel issue open for debate. The formulation of the rule in question is however the responsibility of the Thirty-Eighth Respondent which had it within its powers to make it clear what was intended. The matter has however not only involved the interpretation of rule 17.2.1. The Applicants also sought to avoid the litigation, albeit in respect of different reasons to that on which they have now succeeded, by seeking to engage the ANC leadership. No meaningful reply was received. Indeed they were largely ignored. Instead the delays which followed from these attempts at reaching an amicable resolution, were subsequently invoked as constituting an unreasonable delay in pursuing the application and as a bar to this application. Not only did the Respondents in opposition persist with those defences, but in addition they also raised further procedural difficulties relating to locus standi and the like.

[163] It seems to me in those circumstances that the Applicants have raised issues and enjoyed a measure of success which would entitle them being indemnified, at least partially, in respect of a portion of their costs by the Thirty-Eighth Respondent. Having regard to all these circumstances I consider it appropriate that the Thirty-Eighth Respondent be directed to pay one half of the Applicants' costs of the application.

THE ORDER:

[164] The following order is granted:

1. The Eighth KwaZulu-Natal Provincial Elective Conference of the African National Congress held at Pietermaritzburg from 6 to 8 November 2015 and decisions taken at that conference are declared unlawful and void.

2. The Thirty-Eighth Respondent is directed to pay one half of the Applicants' costs of the application, such costs to include the costs of two counsel.

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KOEN J

I agree

____

BALTON J

I agree

____

CHETTY J

<u>Appearances</u>

For the Applicant:	TG MADONSELA SC with T NGCUKAITOBI, V SIBEKO and E RICHARDS
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For the Respondent:	G D HARPUR SC with K THANGO
Instructed by:	Berkowitz Cohen Wartski C/o J Leslie Smith and Company Inc. Ref.: Anusha Ganas/ Prisha Naidoo