



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 207/08

No precedential significance

MASEGO ROCHESTER MATLHOLWA

Appellant

and

ISAAC RAMMUSI MAHUMA

1ST Respondent

**MANAGEMENT COMMITTEE OF THE
UNITED CHRISTIAN DEMOCRATIC PARTY**

2ND Respondent

UNITED CHRISTIAN DEMOCRATIC PARTY

3RD Respondent

Neutral citation: *Matlholwa v Mahuma and others* (207/2008) [2009]
ZASCA 29(30 March 2009)

Coram: Farlam, Nugent, Lewis, Van Heerden, Maya JJA

Heard: 19 March 2009

Delivered: 30 March 2009

Summary: Voluntary association – expulsion of member from political party – whether authorised and empowered by constitution.

ORDER

On appeal from Mmabatho High Court (Mogoeng JP sitting as a court of first instance).

- 1 The appeal succeeds with costs, such costs to be paid by the third respondent.
- 2 The order made by the court a quo is set aside in its entirety and replaced with the following order:
 - ‘(a) The decision by the second respondent to expel the applicant from the third respondent, taken on 27 August 2007, is set aside.
 - (b) The third respondent is ordered to pay the costs of this application.’

JUDGMENT

VAN HEERDEN JA (Farlam, Nugent, Lewis, Maya JJA concurring)

[1] The question that arises in this appeal is whether the purported expulsion of the appellant, Mr Masego Matlholwa, from the third

respondent, the United Christian Democratic Party ('the Party'), was lawful.

[2] The appellant had been a member of the Party since 1999. In May 2005, he was deployed by the Party as one of its representatives to the North West Provincial Legislature in Mafikeng, whilst another member of the Party, a Mr Tlhagale, was deployed by the Party to the National Council of Provinces in Cape Town.

[3] Two years later, in about May 2007, Mr Tlhagale's deteriorating state of health led the Party to decide that the appellant and Mr Tlhagale should switch seats. It was thus suggested that each should resign his seat and thereafter take up the other's position in the North West Provincial Legislature and the National Council of Provinces, respectively. The appellant initially agreed to do so, albeit reluctantly, as he first sought to be reassured by the Party that the envisaged switch would not cause him any prejudice, particularly in respect of his salary and other privileges. However, despite repeated requests by the Party – after having furnished him with the requisite assurance – to resign his seat, the appellant failed to do so by the final deadline of 24 August 2007.

[4] On 27 August 2007, a committee that had been established by the Party, which called itself the 'Management Committee' of the Party (cited as the second respondent), held a special meeting at which it purported to expel the appellant from the Party as also from the North West Provincial Legislature with immediate effect, allegedly on the grounds of his failure to comply with the instructions of the Party despite having agreed to do so. The appellant was informed of this decision in a letter of the same date, addressed to him by the first respondent, Mr Mahuma, the Party's Deputy Secretary Administration.

[5] In motion proceedings instituted in the Mafikeng High Court, the appellant challenged his expulsion. He contended that the 'Management Committee' that had purported to expel him was not a properly constituted structure of the Party and therefore, to use the words of the appellant, was 'non-existent'; alternatively any such management committee as may have purported to expel him did not have the power in terms of the Party's constitution to do so. Accordingly, so the contention went, his expulsion was not lawful.

[6] The application, which by the time of the hearing was limited to an order that his expulsion from the Party be 'declared null and void ab initio' or alternatively set aside, was dismissed with costs by the court

below. Notwithstanding the absence of a counter-application (and despite the fact that such orders were not sought), Mogoeng JP purported to confirm the appellant's expulsion from the Party, as well as his expulsion from the North West Provincial Legislature. With the leave of this Court, the appellant now appeals against the judgment of the learned Judge President.

[7] Despite the stance adopted by the appellant in his founding and replying affidavits – that the Management Committee (the second respondent) which purported to expel him was 'constitutionally non-existent' – it was common cause before us that the Management Committee in question that purported to do so was in fact the Federal Council Management Committee (the FCMC) referred to in clauses 9.2 and 10.1 of the constitution of the Party (see further below). The decisive issue in this appeal is thus whether the FCMC was authorised and empowered by the constitution to expel the appellant in the manner in which it purported to do.

[8] As was correctly emphasised by the court below, a political party is a voluntary association founded on the basis of mutual agreement. Like any other voluntary association, the relationship between a political party and its members is a contractual one, the terms of the contract being

contained in the constitution of the party.¹ In construing the provisions of the Party's constitution for the purposes of this appeal, it is important to bear in mind that expulsion is the most drastic form of punishment which a voluntary association can impose on its members and the power to do so must consequently appear expressly or by necessary implication from the provisions of its constitution. In the words of Van Winsen J in *Conrad v Farrel & others*:²

'Our Courts, in common with the English Courts, have adopted the view that a voluntary association's right to expel a member must be stated expressly or by necessary implication in the constitution and that, in the absence of such a statement, there is no inherent right residing in the association to take action to expel a member.

....

The Courts have repeatedly taken up the attitude that if the power to terminate membership is not expressly given then the association can only enjoy that power if it appears as a clear and unambiguous implication from the terms of its constitution, read as a whole, that it was the intention to afford it such a power.'

Members may thus be expelled only by a structure of the voluntary association entrusted with the power of expulsion expressly or by 'clear and unambiguous' implication. A purported expulsion by a structure

¹ See *Yiba & others v African Gospel Church* 1999 (2) SA 949 (C) at 960D-961B and the authorities there cited.

² 1974 (2) SA 200 (C) at 202F-203E.

other than one in which this power is vested in terms of the constitution will be *ultra vires* and unlawful.³

[9] According to the answering affidavits deposed to by the Deputy National Leader of the Party, its Chairperson and the first respondent, the FCMC consists of 23 persons elected by the Federal Council of the Party (the Council) to manage the affairs of the Party on a day to day basis when the Council is not sitting. The FCMC is the *de facto* executive arm of the Council (which consists of about 200 members). It is authorised by the Council to act on the latter's behalf when it is not in session. Its authority includes the power to discipline and ultimately, to expel a member from the Party. With reference to the minutes of certain meetings of the FCMC, annexed to the answering affidavits, the deponents point out that nine elected members of the top leadership structure of the Party (the National Leader, the Deputy National Leader, the Chairperson, two Deputy Chairpersons, the National Secretary, two Deputy National Secretaries and the National Treasurer, all of whom sit on the Council) are also members of the FCMC. It is further alleged that the appellant himself had been a member of this Committee since 1999.

³ See, eg, the *Yiba* case at 961D-G and further in this regard G J Pienaar 'Associations' in 1 *Lawsa* 2 ed (2003) para 633 and the other authorities there cited.

[10] In coming to the conclusion that the appellant's expulsion from the Party was lawful, the court a quo reasoned as follows:

[27]. . . . On a preponderance of probabilities, the Party does have a Management Committee which has, over the years, been dealing with issues such as the possible sale of its farm worth about R1.5m, projects, Human Rights Day celebrations, salaries of permanent staff members of the Party, traditional leadership, deployment, the Party's youth, religious affairs, etc. By any standards, these are the issues expected to be discussed and addressed by a supreme structure which is responsible for the running of all the important affairs of the Party, and that is what the Management Committee is said to be.

[28] The only Management Committee mentioned in the constitution of the Party is the Federal Council Management Committee. The Federal Council generally meets at intervals of 6 months. Obviously, a lot would ordinarily have to be done in a month let alone 6 months, and the need for a structure that has to look after the day-to-day affairs of the Party requires no motivation. That structure can only be the Federal Council Management Committee. I think this Committee was purposefully named the Management Committee since its responsibility is to do a whole lot more than just convene meetings of the Federal Council and of the Federal Congress and determine the date and the place for the meeting. It has to manage the Party. After all, that is the duty of the Federal Council for which the Management Committee is filling in. Common sense and logic dictates that the Federal Council Management Committee is the same Management Committee, whose meetings the Applicant attended in the past, and that it is also the same Management Committee which expelled him from the Party.

[29] On the probabilities, the version of the Deputy National Leader, the Chairperson and the Deputy Secretary Administration of the Party that the Applicant was expelled from the Party by the Federal Council Management Committee is the correct one and not that of the Applicant. The duties entrusted to the Management Committee are so important that they cannot be left to an *ad hoc* committee to handle. It would also be absurd to accept the Applicant's contention that the entire top leadership of the Party, whose names appear on the first page of the minutes of the meetings of the Management Committee, is part of an *ad hoc* committee, which according to the Applicant, is led by the Deputy Secretary Administration. I am satisfied that the Party did establish the Federal Council Management Committee. It then clothed it with the powers of the Federal Council.'

[11] I am afraid that I cannot agree with this reasoning. It is true that there is authority for the proposition that the constitution of a voluntary association should, in appropriate circumstances, be interpreted 'broadly and benevolently and not in a carping, critical and narrow way',⁴ adopting 'a practical, commonsense approach to the matter'.⁵ However, this 'principle of benevolent construction' does not apply to a situation such as the one forming the subject of this appeal.⁶ 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

⁴ *Garment Workers' Union v De Vries & others* 1949 (1) SA 1110 (W) at 1129.

⁵ *Motaung v Mukubela & another NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 626H-627A.

⁶ *Oosthuizen v Building Workers' Industrial Union of South Africa & another* 1950 (3) SA 834 (W) at 840C-G.

unambiguous implication, failing which the purported expulsion will be *ultra vires* the constitution and void.

[12] It is thus to the provisions of the Party's constitution that we must look. Unfortunately, this document is by no means a model of clarity or coherence. Clause 5, headed 'Membership', provides that membership of the Party will cease, inter alia, 'in the event of a member's expulsion from the Party by the Provincial Committee' (clause 5.1.4.2) or in the event of 'the withdrawal by the Provincial Committee of the membership of any individual' (clause 5.1.4.3).⁷ Neither the grounds upon which a Provincial Committee may expel a member from the Party or withdraw membership, nor the procedure to be followed in that regard, are spelt out in the constitution.

[13] The only other body upon which the power to expel a member from the Party is expressly conferred is the Federal Council. In this regard, clause 13 of the Constitution, headed 'Disciplinary Procedures', provides:

'13.1 *The Federal Council may, in its discretion and for whatever reason and in the interest of the Party;*

⁷ Clause 8 provides for the election of a Provincial Executive Committee for each province, which committee must 'act as liaison between the Federal Council, and the Regional and the Branches' (clause 8.4.1.2).

13.1.1 *ban any member of the Party upon which his/her membership is automatically terminated;*

....

13.2 The Federal Council can give written notice to any person or body of its proposed consideration to ban, dissolve or suspend such person or body, hear any person or body or receive any proof with regard thereto, and give reasons for its decision, which decision will be final and binding.

13.3 Every member of the Party, who is also a member of either the National Assembly or a Provincial Legislature must respect each decision by the Federal Council, the Federal Congress and the Parliamentary Caucus must execute such decisions. The National Leader or the Deputy National Leader in the event of clause 11.2 or 11.3 being applicable, can after consultation with the Federal Council give written notice to a member who has deviated from such decisions, to the effect that his membership of the caucus of the Party is terminated; and

13.4 *Every member of the Party who deviates from a decision of the Federal Congress, the Special Congress, the Federal Council or the Parliamentary Caucus makes himself/herself liable for expulsion from the Party by the Federal Council.* (Emphasis added.)

In terms of clause 13.3, therefore, the National Leader or the Deputy National Leader may under certain circumstances terminate a member's membership of the parliamentary caucus of the Party.

[14] Clauses 9 and 10 of the constitution deal with the composition and powers of the Federal Council and the Federal Congress, the top governing structures of the Party. To the extent here relevant these clauses read:

‘9 FEDERAL COUNCIL

9.1 The Federal Council meets and attends to urgent matters which otherwise would have been attended to by the Federal Congress and consists of . . .

9.2 The Federal Council will meet as often as may be necessary, practical or as urgency demands, but notwithstanding in intervals of not less than six months during the two year intervals of the sessions of the Federal Congress, *on a date and place as is determined by the Federal Council Management Committee;* and

9.3 Notwithstanding any proviso to the contrary, the Federal Council shall when in session:

9.3.1 be the highest governing body of the Party; and

9.3.2 will perform and exercise all such powers, functions and duties as [are] given to the Federal Council in terms of this Constitution;

. . . .

9.4 The Federal Council shall formulate the procedure for the nomination of National and or Provincial Parliamentary Candidate to represent the Party during elections.

9.5 Provincial leadership shall be constituted by the Federal Council.’

‘10 FEDERAL CONGRESS

10.1 The Federal Congress is the highest governing body of the Party and shall meet in [sic] biannually upon a date and place as determined by the Federal Council Management Committee:

10.1.1 provided that the National leader or the Deputy National Leader in the event of clause 11.2 and 11.3 being applicable *in consultation with the Federal Council Management Committee* may convene a special sitting of the Federal Congress or instead thereof the Federal Council when he deems fit; and

10.1.2 *the Federal Council Management Committee convenes a special sitting of the Federal Congress, if so requested, by 50% plus one member of each Provincial Committee,*

10.2 ...

10.3 The Federal Congress shall:

.....

10.3.3 have the authority to take decisions except decisions regarding the amendment of the Constitution; concerning all aspects of Party policy, organisation, finances and discipline by majority vote, which decisions will be binding on the Party, its bodies and members.

10.3.5 Ratify the decisions and or actions of the Federal Council.’

(Emphasis added)

[15] In terms of clauses 9.2 and 10.1 – the only clauses in the entire constitution in which the FCMC is mentioned – the powers conferred on the FCMC are limited. They go no further than determining the date and

place of meetings of the Federal Council and the Federal Congress and, in specified circumstances, in convening special sittings of these two bodies. There is nothing in the constitution of the Party that confers any disciplinary powers on the FCMC, much less the power of expulsion. The constitution also does not provide for any delegation of powers to the FCMC. Even if one were to assume in favour of the Party, without deciding, that the Federal Council could indeed delegate its power of expulsion to the FCMC (as was contended by counsel for the respondents), there is nothing on the papers before us to show that any such delegation ever took place.

[16] It follows that, in my view, it has not been shown that the FCMC was either authorised or empowered by the constitution of the Party to expel the appellant and that its decision of 27 August 2007 in this regard cannot stand.

[17] As regards the orders of the court a quo confirming the appellant's expulsion from the Party and from the North West Provincial Legislature, as I have already stated no such orders were sought. The learned Judge President misdirected himself in making those orders and they should in any event be set aside.

[18] It follows that the appeal must succeed with costs. For some reason, two counsel were involved in drafting the appellant's heads of argument in the appeal. It was submitted on the appellant's behalf that the complexity of the matter was such that this extra cost could be justified. I do not accept this contention. It was also common cause that the Party was in truth the only respondent properly before both the court a quo and this court and that any costs order should be made against the Party alone.

[19] In the result, the following order is made:

- 1 The appeal succeeds with costs, such costs to be paid by the third respondent.
- 2 The order made by the court a quo is set aside in its entirety and replaced with the following order:
 - '(a) The decision by the second respondent to expel the applicant from the third respondent, taken on 27 August 2007, is set aside.
 - (b) The third respondent is ordered to pay the costs of this application.'

B J VAN HEERDEN

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