

**IN THE NATIONAL DISCIPLINARY COMMITTEE OF THE AFRICAN
NATIONAL CONGRESS
(SITTING AS A COMMITTEE OF APPEAL)**

Case Number: 1/2014

between:

SABULONE MATABANE MPHOFELA

Appellant

and

AFRICAN NATIONAL CONGRESS

Respondent

FINDING

Proceedings before the Regional Disciplinary Committee (RDC)

1. On 19 November 2012 the Peter Mokaba Regional Executive Committee charged the Appellant with the following 2 (two) acts of misconduct in terms of the ANC Constitution:-
 - 1.1 Contravention of Rule 25(5) (j) for undermining the respect for or impeding the functioning of the structures of the organisation in that he defied Resolution No. 61 of the ANC National Conference in 2007, as well as the 3rd NGC Report in 2010 for taking the ANC to court without exhausting the internal processes; and
 - 1.2 Contravention of Rule 25(5)(c), 25(5) (o) (b) and 25(5) (o) (c) for behaviour which brings the organisation into disrepute or which manifests a flagrant violation of the moral integrity expected of members and public representatives or for conduct unbecoming that of a member or public representative in that on 13 October 2012 the Appellant was alleged to have assaulted and forcibly removed the BGM package from comrade Maria Thamaga, who was deployed to his branch to facilitate the BGM.

2. At the time the disciplinary proceedings were instituted, the Appellant was Chairperson of his branch in ward 29 Sefako Mapogo Sub Region and a proportionate representative (PR) councillor for the ANC in the Lepelle Nkumpi Municipality, Limpopo Province.
3. The disciplinary hearing subsequently took place on 16 February 2013 after due notice was given personally to the Appellant on 4 February 2013 and receipt was acknowledged by his representative in writing on 7 February 2013.
4. The REC Secretary, comrade Mafikeng Matome Johannes, and comrade Maria Thamaga testified before the RDC on behalf of the ANC.
5. After the guilt of the Appellant was proved on a balance of probabilities, the Appellant was suspended for 10 years (5 of which was further suspended subject to certain conditions) and the sanction was publicly announced on 1 March 2013.
6. The Appellant and his representative did not attend any sitting of the disciplinary hearing. In his Notice of Appeal the Appellant confirmed that he did not attend the disciplinary hearing because he believed he was being victimised and would not get a just and fair hearing.
7. The Appellant instituted an urgent application in the North Gauteng High Court in August 2012 and was reinstated as a PR councillor. According to the evidence of comrade Mafikeng, the ANC did not oppose the application.
8. It is public knowledge that in June 2013, after the disciplinary hearing, the Appellant was appointed as the Regional Task Team Co-ordinator of the Peter Mokaba Region.

Appellant's grounds of appeal

9. The Appellant raised the following grounds of appeal:-
 - 9.1 Disciplinary proceedings were instituted against him to settle political scores;
 - 9.2 The request by the REC that he resign as a PR councillor constituted an abuse of power;
 - 9.3 He had taken the ANC to the High Court to obtain procedural fairness;
 - 9.4 Comrade Maria Thamaga instituted a criminal charge of assault against him. Consequently, the REC should have waited for the criminal trial to be concluded in the Malips Magistrates' Court before instituting disciplinary action against him; and

9.5 The charge sheet contained the following procedural flaws:-

9.5.1 The charge sheet was not delivered 7 days before the disciplinary proceedings since the charge sheet was served on 19th November 2012 and the disciplinary proceedings was scheduled to take place on 23rd and 24th November 2012;

9.5.2 The Disciplinary Notice did not identify the Presenter;

9.5.3 The Disciplinary Notice did not inform the charged member of his right to be represented by a member in good standing, to have an interpreter present and to call witnesses in his defence.

9.5.4 The REC did not have the power to temporarily suspend the charged member; and

9.5.5 The charges were fatally defective.

NDC Evaluation of Appellant's refusal to attend the disciplinary proceedings

10. As correctly pointed out by the RDC, the maintenance of discipline in the ANC is necessary to provide a conducive environment for the organisation to flourish, maintain its character, uphold its values and create the space to achieve its aims and objectives.
11. All members, without exception, are subject to the disciplinary machinery of the ANC which is set out fully in the Constitution. Members join the ANC voluntarily and the membership oath demands respect for the Constitution from all members.
12. In the view of the NDC, any member who argues that he or she has no faith in any of the disciplinary structures of the ANC is in fact, by association, implying that he or she has no faith in the ANC.
13. The Appellant stated in his appeal that the REC instituted disciplinary proceedings to settle political scores and solving private problems. He also argued that the RDC had no jurisdiction over him.
14. The ANC Constitution in Rule 25.6 contains sufficient safeguards to protect members who could suffer prejudice at the instance of another member or structure of the ANC.
15. In the view of the NDC, the Appellant should have attended the disciplinary hearing and made out a complete case, coupled with relevant evidence, to support his belief that the REC was settling a political score or that the disciplinary hearing was set up to stifle

debate or solve private problems.

16. This approach would have given the NDC the benefit of deciding objectively, after studying the record, whether the belief of the Appellant was real and reasonable and whether the RDC had given due consideration to his fear.
17. Mere allegations to this effect are insufficient.
18. Consequently, the NDC rejects the Appellant's arguments that the disciplinary hearing was instituted to settle political scores or solve a private problem.

NDC Evaluation of the Appellant's procedural arguments

19. Rule 25.35 of the ANC Constitution grants a charged member the right to either appeal against or apply to review proceedings of a lower tribunal but not both.
20. The ANC Constitution was amended at the National Conference at Mangaung and came into effect on 21 December 2012.
21. The RDC made its Finding on 16 February 2013 and the Appellant noted his appeal on 7 March 2013. The acts of misconduct were committed before the amended Constitution came into effect.
22. Although not obliged to do so, the NDC has decided to consider the arguments raised by the Appellant both on the merits and on review solely because of the close proximity of his appeal to the date of amendment of the ANC Constitution.
23. The NDC takes the view that it could be possible that the Appellant may not have known of the amendment to the ANC Constitution and consequently should not be prejudiced.
24. The RDC dealt with the procedural issues raised by the Appellant and rejected the Appellant's preliminary arguments. The RDC also found that the Appellant and his representative should have attended the disciplinary hearing and raised these points in that forum.
25. The purpose of being given 7 days notice of disciplinary proceedings (now extended to 14 days in the amended Constitution) is to enable a charged member to prepare his defence. Had the disciplinary hearing commenced on 23rd November 2013, then the Appellant could have successfully argued that he was given short notice and did not have time to prepare his defence, arrange for a representative and call his witnesses.

26. In such event, the RDC would have had to postpone the hearing to a suitable date. In the present case the Appellant already had a representative and the disciplinary hearing only took place on 16 February 2013. Consequently, in the view of the NDC, the Appellant had sufficient time to prepare for the disciplinary hearing.
27. Rule 25.9 of the ANC Constitution empowers a REC to institute disciplinary proceedings. Consequently, the RDC had jurisdiction to discipline the Appellant who is a member of the Peter Mokaba Region.
28. However, the NDC finds that the REC did not have the power to temporarily suspend the Appellant. In terms of Rule 25.56 only the NEC, NWC, PEC or PWC may suspend a member. Consequently, the NDC finds that the temporary suspension of the Appellant by the REC was unlawful.
29. The failure to disclose the identity of the Presenter is not fatal and could have been rectified by the Presenter at the disciplinary hearing.
30. The NDC does not find the charges to be fatally defective. The NDC finds that both charges set out sufficient details which enabled the Appellant to have prepared his defence.
31. Based on its own evaluation, the NDC agrees with the Finding of the RDC that the procedural arguments were without merit, except for the temporary suspension of the Appellant which the RDC had no power to impose.

NDC Evaluation of the merits of the appeal

32. After perusing all the documents and listening to the tape recording of the RDC proceedings, the NDC is satisfied that the Appellant's appeal could be decided and finalised on the documents before it, as it is entitled to do in terms of Rule 11.2 of the NDC Rules of Procedure, without the necessity of convening a formal appeal hearing.

Appellant's argument that the request by the REC that he resign as a PR councillor constituted an abuse of power

33. The ANC takes into consideration a variety of factors when selecting candidates to represent the organisation as PR councillors in municipalities. These public representatives are not elected to office but represent the ANC at its behest. In other words, the relationship between the ANC and a PR councillor is the same as between an agent and a principal.

34. In terms of the principle of agency, an agent is hired by a principal for a particular purpose and his or her mandate can be revoked by the principal at any time during the term of the agency. In such event, the agent has no option but to stop representing the principal. The principal does not have to provide any reason for terminating the mandate.
35. Similarly, the ANC, as principal, may, in its sole discretion, terminate the mandate of any PR councillor by informing the Municipality concerned and the Independent Electoral Commission (IEC) without the requirement of instituting disciplinary action.
36. According to the evidence before the RDC, the Appellant was not authorised by the REC and the PEC to represent the ANC as a PR councillor. The placement of his name on the list submitted to the IEC was done by the previous secretary of the REC by unauthorised means after the Appellant failed to win the election as a ward councillor. Comrade Mafikeng testified that this was the first time that such a situation had occurred. The REC and the PEC took steps to rectify the situation by terminating the mandate of the Appellant and informing the municipality and the IEC.
37. However, the Appellant instituted an application in the North Gauteng High Court in Pretoria and was reinstated as a PR councillor after alleging that the REC did not allow him to exhaust his right of appeal before removing him as a PR councillor. The ANC did not oppose the application.
38. The Appellant was subsequently charged by the REC for indiscipline.
39. In light of the above, the NDC of the view that the REC had the power to terminate the mandate of the Appellant. Consequently, its action did not constitute an abuse of power.

Charge 1

40. Charge 1 was premised on the fact that the Appellant's act of misconduct was to take the ANC to court. Such action, according to the charge sheet, was in defiance of a resolution adopted at the 52nd National Conference in Polokwane in 2007 as well as the 3rd NGC Report in 2010. This was clearly spelt out by the RDC Chairperson in his Finding.
41. The NDC is of the view that a member, after exhausting all internal processes, would always have a right, although in very limited circumstances, to take any decision of the ANC or its structures (which affects him personally) on review to a court of law if such structure acted irrationally in arriving at a decision or if a final decision was taken before a member could exercise his or her right of

appeal and review in terms of the ANC Constitution.

42. In the present case, the Appellant should have been charged for failing, refusing or neglecting to carry out or execute an instruction or mandate (after his mandate to represent the ANC as a Councillor was terminated) and should not have been charged for taking the organisation to court.
43. Consequently, the NDC is of the view that the act of misconduct in Charge 1 was incorrectly formulated because it relied solely on the fact that a member cannot take the ANC to court under any circumstances. As shown above, this is not entirely correct.
44. Consequently, Charge 1, as formulated, cannot be sustained. The Finding of the RDC on Charge 1 is set aside and the Appellant is found not guilty.

Charge 2

45. The Appellant's defence to Charge 2 for assaulting a member and bringing the organisation into disrepute is that the REC should have waited for the outcome of the criminal proceedings instituted against him by comrade Maria Thamaga before disciplining him. In other words, his defence is that the REC acted prematurely.
46. In the view of the NDC this defence must fail for the following reasons:-
 - 46.1 The ANC and its structures are empowered by its Constitution to regulate the conduct of its members for acts of misconduct set out in Rule 25 and the authority to do so is not dependent on the outcome of any other external process. In other words, it was permissible for the ANC to sanction the Appellant as a member of the ANC;
 - 46.2 The criminal case is a matter between the Appellant and the State and is an entirely separate matter. The ANC is not a party to the criminal case. If found guilty, the court will impose a sentence which will have consequences for the Appellant as a member of society;
 - 46.3 The criminal proceedings do not constitute a pre-requisite for the ANC to discipline its own members for committing acts of misconduct in terms of Rule 25 of the ANC Constitution; and
 - 46.4 Even in his appeal, the Appellant did not deny the charge of assaulting comrade Maria Thamaga.
47. The NDC upholds the RDC's Finding that the Appellant is guilty on

Charge 2 and the appeal against this charge is dismissed.

NDC Evaluation of the sanction

48. The NDC is satisfied that the RDC took into consideration relevant factors in determining an appropriate sanction.
49. If the NDC had upheld the conviction on both acts of misconduct, the 10 years sanction (5 of which was suspended) imposed by the RDC would have been appropriate since both acts of misconduct were serious and brought the ANC into disrepute.
50. In determining its sanction, the RDC placed a high premium on the fact that the Appellant had breached the NEC resolution and brought the ANC into disrepute by approaching a court of law and, consequently, devoted the major part of the sanction to this transgression.
51. In light of its Finding of not guilty on Charge 1, the NDC is of the view that the sanction imposed by the RDC should be reduced.
52. In determining an appropriate sanction for the assault charge, the NDC took into consideration the following factors:-
 - 52.1 From the documents on record, it was apparent that the Appellant had the benefit of a representative who was a practising lawyer and was not acting as a lay person.
 - 52.2 The Appellant was prejudiced when he was unlawfully suspended by the REC and he was justified, in the circumstances, to approach a court of law for relief because the REC had already taken steps prematurely to have him removed as a PR councillor.
 - 52.3 The 6 month period – March to August 2012 - during which the Appellant was prevented from participating in the affairs of the ANC prejudiced him.
 - 52.4 The Appellant made a conscious decision not to attend the RDC proceedings and, in doing so, abandoned the opportunity to place mitigating factors before the RDC. Since no evidence of previous transgressions was placed before the RDC, the NDC believes it would be fair to treat the Appellant as a first offender.
 - 52.5 In his appeal, the Appellant offered a technical defence to the assault charge, which was found by the NDC to be incorrect in law, and made no effort to put up a defence to the substance of

the charge or place any mitigating factors, including remorse, before the NDC.

52.6 The ANC is very dependent on members who volunteer their time and expertise to achieve the aims and objectives of the organisation. Every member, especially female members, should feel safe when executing duties on behalf of the organisation and if the safety of any member is compromised, the ANC has a duty to act without fear or favour.

52.7 The Appellant submitted his appeal in March 2013 and his appeal was only considered some 10 months later due to an administrative oversight on the part of the ANC.

52.8 The NDC apologises to the Appellant for this delay and is of the view that such delay should not serve to prejudice him.

52.9 At the time, comrade Maria Thamaga was a REC member and President of the Women's League in the region. According to the evidence, some elderly female members in the meeting began to cry when the Appellant manhandled the comrade. In the view of the NDC, the reputation of the ANC is judged by the behaviour of its leaders, of which the Appellant is one.

52.10 In a voluntary association, as the ANC is, the evidence of forcibly removing documents from a member authorised to perform a lawful duty and manhandling that member are sufficient for an assault to have been committed. In an organisational context, these acts constitute misconduct of a serious nature.

52.11 The NDC has taken into consideration the 12 month effective sanction imposed by the NDCA in the case of cde Sindiso Magaqa for issuing a derogatory statement about an NEC member, cde Malusi Gigaba, and is of the view that the facts of the present case merit a more serious sanction.

53. For the above reasons and in light of its Finding of not guilty on Charge 1, the NDC considers it necessary and in the interest of fairness and equity, to vary the sanction imposed by the RDC, as it is empowered to do.

NDC Finding

1. The Appellant is found not guilty on Charge 1.
2. The RDC's Finding that the Appellant is guilty on Charge 2 is confirmed and his appeal against this charge is dismissed.

3. The sanction of 10 years imposed by the RDC is varied as follows:-

- 3.1 The Appellant is suspended for an effective period of 18 (eighteen) months, such suspension to operate retrospectively from 16 February 2013 and terminate on 15 August 2014;
- 3.2 By virtue of his suspension, the Appellant is required to vacate his position as Chairperson of his branch in ward 29 Sefako Mapogo Sub Region, his position as RTT Co-ordinator of the Peter Mokaba Region and any other position he currently holds in the ANC;
- 3.3 The Appellant's name is removed from the list which entitled him to represent the ANC in local government and he is required to vacate his position as PR Councillor in the Lepelle Nkumpi Municipality; and
- 3.4 During the period of suspension, the Appellant is precluded from exercising any right in terms of the ANC Constitution, is not able to participate in the affairs of the ANC in any manner and is not eligible for appointment to any office in the organisation.

Signed at Irene, Gauteng Province this 25th day of January 2014

NDC members
D. Hanekom Chairperson
L. Zulu
F. Xasa