PAC

Reg No. 31/1/2/26

PAN AFRICANIST CONGRESS OF AZANIA

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Secretary General

03 October 2017

To: **The Parliament of the Republic of South Africa**

Att: **Honourable Lechesa Tsenoli**
The Acting Speaker of the National Assembly
Email: speaker@parliament.gov.za

C/o: **Collin Mahlangu**
Email: cmahlangu@parliament.gov.za

Re: Follow up on NEC resolution.

We refer to the above and confirm that we are still awaiting the outcome of legal opinion or advise following the confirmation by the majority of the members of the NEC and NDC that they are indeed the once who took decision to expel Mr Luthando Mbinda in terms of the provisions of the constitution of the party.

The opinion has taken longer than expected.

For what it may worth we attach the judgement of Judge Gildenhuys J. which was widely quoted by many other senior judges in their critical judgements. Inclusive of Judge Davies, Meer and Koen.

We would further wish to bring to your attention that there has never been a judicial challenge of the NEC decision by Mr Mbinda.

In this case in the Oudekraal Estates(Pty)Ltd vs The city of Cape Town judgement which has now became a caselaw. Until the decision of the NEC has been successfully challenged in a court of law it is effective and binding and cannot be disregarded.

The PAC would have assisted your legal department with relevant information if we were informed what they were specifically asked to consider. We however don't doubt that the legal department of parliament is consist of professional legal people who understand the implications and meaning of the above submissions.

The sooner we receive the legal opinion and its basis the better.

We trust you will find the above in order.

Regards

Narius Moloto
Secretary General

IN THE HIGH COURT OF SOUTH AFRICA
(Witwatersrand Local Division)

Heard on: 20 July 2007
Decided on: 3 August 2007

CASE NUMBER: 2007/15271

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED ✓

3 August 2007 _____
DATE SIGNATURE

In matter between:

PHEKO, DR SALZWEDEL ERNEST MOTSOKO Applicant

and

PAN AFRICANIST CONGRESS OF AZANIA Respondent

JUDGMENT

GILDENHUYS J

[1] The applicant in this matter is an erstwhile President of the PAN AFRICANIST CONGRESS OF AZANIA (the "PAC"). The applicant holds a seat in parliament as a PAC representative. The respondent in this application is the PAC. The applicant was expelled from the PAC after a disciplinary hearing held in June 2007.

[2] The applicant applied in the urgent Motion Court for an Order as follows:

"2. An Order for reviewing and setting aside the decision of the National Disciplinary Committee of the Respondent of 20 June 2007 convicting the Applicant on four charges leveled against him in terms of a notice of a disciplinary enquiry dated 11 June 2007;

3. An Order reviewing and setting aside the decision of the National Executive Committee of the Respondent on 30 June 2007 endorsing the National Disciplinary Committee's decision to convict the Applicant of four charges leveled against him in terms of a notice of disciplinary hearing dated 11 June 2007;

4. Reinstating the Applicant as a member of the Respondent;

5. An order interdicting the Respondent from removing or attempting to remove the Applicant from his seat as a member of Parliament;

6. Interdicting the Respondent from disciplining or attempting to discipline the Applicant in respect of the Sobukwe Foundation;

7. Granting the Applicant the costs of this application;"

[3] The applicant became a member of the PAC during 1960. He was elected Deputy President of the organization during 1995. In 1999, he became a member of the National Assembly. He was elected President of the PAC during 2003.

[4] As President of the PAC, the applicant had control of a bank account known as the Sobukwe Foundation Account. The precursor of the account is the Friends of Bishop Stanley Magoba account. Bishop Magoba is a previous President of the PAC. According to the respondent, Bishop Magoba established the account to

receive funds raised by him for the PAC during a visit to the United Sates of America and North Africa. The name of the account was later changed to the Sobukwe Foundation Account. Although the respondent says that all the funds donated to the respondent which found their way into the account became the funds of the respondent, the exact nature of the account and the identity of the account holder is unclear. It is common cause that the President of the PAC could operate on the account for the benefit of the PAC and its members.

[5] During the applicant's tenure of office as President of the PAC, the applicant received two cheques from ABSA Bank. The first, a cheque for R50 000.00, was deposited in the Sobukwe Foundation account on 5 April 2004. The second, a cheque in favour of the respondent for R100 000.00, was deposited in the Sobukwe Foundation Account on 19 July 2005. ABSA donated the funds to the respondent because the respondent at the time had three seats in Parliament. The respondent was informed by ABSA that such donations are made to all political parties which have three or more seats in Parliament.

[6] The applicant's term of office as President came to an end at the September 2006 National Congress of the PAC, held at Qwa-Qwa. The administration of the PAC was handed over to the newly constituted National Executive Committee on 3 October 2006.

[7] The respondent considered itself entitled to an accounting by the applicant of the Sobukwe Foundation funds. During April 2007 it asked for an accounting by letter. The letter did not reach the applicant. It would seem that he avoided receipt

thereof. On 23 April 2007 however, he reported in writing to the incumbent President of the PAC on several matters, *inter alia* the Sobukwe Foundation account. He declared that substantial funds could not be raised for the account, and then continued:

> "d. Recently the Bank raised the technicality that the Account could not function as SOBUKWE FOUNDATION Account unless it had a constitution or Articles of Association. Due to the nature of the account, it became necessary to either formalize the account and set up a trust or dissolve it. Since there was very little going into this account, as I became the sole contributor after President Mogobo left, there was no point in pursuing the possibility of a constitution to register the Sobukwe Foundation.
>
> e. This Account was closed. The remaining funds were paid out for legal costs and pending cases."

[8] At a special meeting of the National Executive Committee held on 29 April 2007, it was resolved that a disciplinary hearing be instituted against the applicant for his failure to account to the respondent for the funds paid into the Sobukwe Foundation account, which was exclusively under his control during the period 2003 to 2006. A National Disciplinary Committee was duly constituted by the National Executive Committee.

[9] The disciplinary committee by letter dated 11 June 2007 called upon the applicant to attend a disciplinary hearing on Wednesday 20 June 2007. The letter reads as follows:

> "You are hereby served this notice to attend a disciplinary hearing in terms of section 24 of the

PAC constitution.

The alleged misconduct is based on the following matters:

1. Non disclosure of Sobukwe Foundation Account and performed transactions during the handover meeting in October 10, 2007 which is the contravention of subsection 28.7 of the PAC constitution;
2. Closure of Sobukwe Foundation Account on January 27, 2007 without the knowledge of the current PAC National Executive Committee which is the contravention of subsections 29.1 and 28.10 of the PAC constitution;
3. Failure to account to the current PAC National Executive Committee on Sobukwe Foundation Account existence and its performed transactions which is the contravention of subsection 28.12 of the PAC constitution and;
4. Performed unauthorized PAC National Executive Committee duties, namely making transaction on Sobukwe Foundation Account though you are not a member of the PAC National Executive Committee of the day, which is the contravention of subsections 8.1, 8.7 and 28.10 of the PAC constitution and subsection 16.1 of the PAC Disciplinary Code.

The hearing will be held at the PAC Head office at 10th Floor Renaissance Building, Gandhi Square, Johannesburg on Wednesday June 20, 2007 at 9h00. If you cannot attend and cannot provide reasonable grounds for failing to attend, the hearing will be held in your absence.

A fellow member from the Pac may represent you at the hearing. You may give evidence at the hearing and adduce evidence in the form of documents or through witnesses. You are entitled to question any witness called by the PAC.

If the presiding officer finds that you are guilty of misconduct, you may present any other relevant circumstances, which you may wish to be taken into account by the presiding officer in determining the sanction."

[10] The applicant did not attend the disciplinary hearing on 20 June 2007. The National Disciplinary Committee found that there was sufficient evidence on the charges preferred against the applicant. The applicant was accordingly found guilty on all charges leveled against him, and expelled from the PAC and all its structures. The finding and expulsion was endorsed by the National Executive Committee on 30 June 2007. After being apprised of the decisions and of his expulsion, the applicant launched these proceedings on an urgent basis for a review of the decisions.

[11] The applicant did not avail himself of the procedure set forth in Rule 53 of the Uniform Rules of Court when bringing his review application. That is not necessarily irregular. Rule 53 was not intended to be the sole route through which the validity of the decision to expel the applicant can be attached. See *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661F-662C and *South African Football Association v Sandton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* 2003 (3) SA 313 (SCA) at 319F-G.

[12] There are many factual disputes in the papers before me. There was no application that any of the disputed issues be referred to evidence, or that the matter be referred to trail. Since the applicant applies for final relief, I will have to decide the application in accordance with the principles set forth in the well-known case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A).

[13] The applicant stated in his founding affidavit that on 27 January 2007 and in his capacity as former President of the PAC, he caused the balance of the funds in the Sobukwe Foundation account to be deposited in the trust account of attorney Van Leeve of the firm Vassen Abrahams and Van Leeve of Cape Town. He took the

position that:

> "...although the Foundation concerned the Respondent, the Foundation was not an asset of the Respondent. That I caused the banking account to be closed is, I submit, not a matter which is within the purview of the Respondent or any of its structures. I state that I was never at any stage obliged to account to the Respondent or any of its structures for the operation and conduct of the Foundation account."

This allegation is disputed by the respondent, and can hardly be correct.

[14] In paragraph 61 of the respondent's answering affidavit the deponent says:

> "The management of the funds deposited in the Sobukwe Foundation account, without necessarily changing its character, remain the funds belonging to the respondent but controlled by the president of the respondent."

The applicant in his reply did not respond to this allegation. I must therefore accept it as correct, also in accordance with the principles laid down in the *Plascon-Evans* case (*supra*).

[15] The respondent is a voluntary association. The relationship between a voluntary association and its members is a contractual relationship. The constitution of the voluntary association together with all rules and regulations (if such exist) collectively constitute the agreement entered into by its members. See *Yiba and Others v African Gospel Church* 1999 (2) SA 949 (C) at 960D-961H. The applicant's claim for review arises from breach of contract, *ie* the breach of an implied contractual obligation of the respondent to afford the applicant a fair hearing at the

disciplinary enquiry. See *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645H-646B and *Blacker v University of Cape Town and Another* 1993 (4) SA 402 (C) at 406I-J.

[16] Courts can interfere in the decisions of domestic tribunals which have disregarded their own rules or the fundamental principles of fairness. See *Klein v Dainfern College and Another* 2006 (3) SA 73 (T) at 80A. In *Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 626H-627A, M T Steyn J emphasized that-

> "In considering whether there has been a material breach of the constitutional provisions of a voluntary association, a Court of law should not, however, view the matter as if under a strong magnifying glass and should not carpingly ferret out and unduly enlarge every minor deviation from the strict letter of the constitutional provision being examined. Much rather should it adopt a practical, commonsense approach to the matter, constantly bearing in mind that the persons called upon to administer such a constitution are usually laymen who are unversed in the ways of the law."

[17] It was held by Friedman J in *Yates v University of Bophuthatswana and Others* 1994 (3) SA 815 (BGD) at 846G-847H that, amongst others, the following principles are relevant and apply to hearings before statutory, quasi judicial and disciplinary bodies:

> "(d)(i) It is a fundamental principle in the interests of the administration of justice, particularly where a Declaration of Human Rights exists, that a person appearing before a statutory or quasi-judicial or disciplinary tribunal be accorded every opportunity of putting his/her case clearly and concisely. Inherent in this principle is that the said person is entitled to engage someone trained in the law to put his/her case to the tribunal concerned, in that the person trained in the law is better able to put the case

than the person involved. This is the basis of legal representation;

(d)(v) The fairness of the proceedings before a tribunal must be determined and pronounced upon in each particular case, taken as a whole. An opportunity must be given to each party to put his/her case and to comment upon that of the opponent without affording any of the parties' preferential treatment to the detriment of the other."

[18] It was held by Zulman J (as he then was) in *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W) at 47G-H that there is no *onus* on the body whose actions are subject to review to justify the actions. On the contrary, the applicant bears the *onus* to satisfy the Court that good grounds exist to review the conduct complained of. In conducting a review, the Court will examine any irregularities which there might be in the conduct of the disciplinary committee, insofar as they be sufficiently serious to constitute a failure of justice. If there was no failure of justice, the Court will not interfere. See *Davies v Chairman, Committee of the Johannesburg Stock Exchange* (*supra*) at 48E-F.

[19] Mr Van Niekerk, who appeared for the applicant, submitted that the National Executive Committee was not properly elected, as required by the constitution, since only the first seven members (including the president) were elected and the other seventeen were appointed by the elected chairperson. The National Congress passed a resolution authorising the chairperson to do so, since there was no time left for further voting. The constitution, however, makes no provision for such a procedure, and requires that all members (except *ex officio* members) must be elected. The new Committee can therefore take no valid decisions, including a decision to appoint the National Disciplinary Committee.

[20] I will assume, without so deciding, that the formation of the new National Executive Committee in September 2006 was flawed. The applicant submitted that all its proceedings are therefore legally void and of no force and effect. Yet there can be no doubt that the Committee was in *de facto* existence and functioning. This was acknowledged by the applicant in his remarks at the handing over of the PAC administration to the new president, Mr Letlapa Mphahlele. The applicant said:

> "Congratulation to our President and the new administration. The purpose of this meeting is to officially hand over the administration of our Party to the new leadership. Our Constitution according section 7.2.27 requires the NEC be elected by the National Congress by majority vote. This did not happen. However, I wish you all the success."

Up to the time of his expulsion, the applicant continued associating himself with the newly constituted Committee. He considered it "politically inappropriate" to do otherwise.

[21] The applicant submitted that, as result of the flaws in its formation, the National Executive Committee had no authority to appoint the National Disciplinary Committee. The Disciplinary Committee which it appointed therefore had no authority to hear and decide upon the complaint against him. There exists, however, a long-standing doctrine that a collateral challenge of a decision by a committee on the basis of a flaw in its formation will not necessarily be allowed in review proceedings. The acts of such a committee may be held to be valid in law, despite its formation being flawed. The logic of annulling all the acts of the committee has to yield to the desirability of upholding them where the committee acted in the belief that it was competent to perform the acts. See Warde & Forsyth, *Administrative Law*, 9th

ed at pages 284-288.

[22] The apparent anomaly that an unlawful act can produce legally effective consequences was considered by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA). Howie P *et* Nugent JA, who delivered the judgment of the Court, referred to an article by Christopher Forsyth, '"The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law', published in *Essays on Public Law in Honour of Sir William Wade QC* and said (in par [29] at 243A-B):

> "In our view, the apparent anomaly - which has been described as giving rise to 'terminological and conceptual problems of excruciating complexity' - is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth. Central to that analysis is the distinction between what exists in law and what exists in fact. Forsyth points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts."

The learned judges thereupon concluded as follows (in par [31] at 243H-244A):

> "Thus the proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court."

[23] In the case of *City of Cape Town v Mgoqi and Another* 2006 (4) SA 355 (C), Van Zyl J considered a similar issue. The City of Cape Town applied for an order setting aside a decision of the then executive major of Cape Town to extend the

appointment of Dr Mgoqi as municipal manager. After his appointment was extended, a new council was elected. Under the applicable legislation the municipal manager had to chair the inaugural meeting of a newly elected council. Dr Mgoqi did so during the extended period of his contract. In Court, Dr Mgoqi argued that if the extension of his contract was invalid, the subsequent proceedings of the new council's inaugural meeting which he chaired, including the election of the speaker and the major, would likewise be invalid. The result would be that the council's resolution to bring an application to review and set aside Dr Mgoqi's appointment as city manager would also be invalid. Van Zyl J referred to Wade & Forsyth (*op cit*) and to the *Oudekraal* decision (*supra*) and said (in paragraphs [126] and [127] at 392B-F):

> "In the present matter, Dr Mgoqi presided over the inaugural meeting of the council on 15 March 2006, some two weeks after his contract, and hence his term of office, had already expired. At that stage, he and all the members of the council were probably under the mistaken impression that he was empowered to chair the meeting, even though his reappointment on 16 February 2006 had been questioned. It could be argued that the fact that a defect attached to his reappointment had no bearing on the validity or otherwise of the proceedings of 15 March 2006. He was, to all intents and purposes, the ostensible, de facto municipal manager and was carrying out his duties and obligations as such. For present purposes, it is not necessary to decide this issue. Neither Dr Mgoqi nor any other person has, to date, challenged the election of the mayor or speaker. Mr Arendse mentioned this issue in his heads of argument, but at no stage was a judicial challenge brought before this Court. In the circumstances, this seems to be an impermissible collateral challenge in the sense explained in the Oudekraal decision and other authorities cited above."

[24] The members of the National Executive Committee, although alerted by the applicant that the appointment of 17 of its members does not accord with the PAC

constitution, clearly acted on the basis that the National Executive Committee was properly constituted. Even in his argument before me, Mr Ncongwane, who appeared for the respondent, argued that:

> "... the seventeen members of the NEC were appointed to their portfolios in terms of the resolutions passed by the National Congress, in consequence of that resolution, the National Executive Committee was properly constituted and authorised to conduct the affairs of the Respondents in accordance with Respondent's constitution."
> (par 42 of his Heads of Argument)

[25] Mr Ncongwane submitted that the resolution passed at the September 2006 conference is within the ordinary meaning of the word "elect" as used in the PAC constitution, and relied on *Yiba and Others v African Gospel Church* 1999 (2) SA 949 (C) at 959F-J in support thereof. I need not decide whether Mr Ncongwane's submission on this issue is correct or not. Fact is, the National Executive Committee members believed that the Committee was properly constituted. There has been no direct judicial challenge of the constitution of the committee. The collateral challenge by the applicant in these proceedings should, in my view, not be permitted. I might add, in passing, that the election of a National Executive Committee in 2000 was conducted in a similar fashion (*ie* some of its members were appointed, not elected). That Committee served its full term of office without any challenge to the legitimacy of its formation and the validity of its decisions.

[26] The applicant did not attend the disciplinary hearing. Mr Van Niekerk, on behalf of the applicant, said that the letter calling upon the applicant to attend the hearing "is nothing more than an invitation to a mugging". He submitted that the

outcome of the hearing was a foregone conclusion and that there would have been no purpose in the applicant attending. The alleged bias on the part of the Committee members which would make the outcome of the hearing "a foregone conclusion" was, however, not demonstrated in the papers before me. It must be remembered that the applicant bears the *onus* to establish facts which show a real likelihood of bias on the part of the National Disciplinary Committee or the National Executive Committee. See *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W) at 54H. No such facts were established. I am not persuaded that there was good reason for the applicant not to attend the disciplinary hearing.

[27] The applicant complained that, when he asked further particulars of the charges against him, he did not receive the particulars. It has been held that where a person complains that a notice calling on him to attend a disciplinary hearing lacks sufficient particularity, the Court ought not to examine the notice "too particularly and too meticulously" – *South West Africa National Union v Tjozongoro and Others* 1985 (1) SA 376 (SWA) at 386E. In my view the letter calling on the applicant to attend the disciplinary hearing contains sufficient particularity to enable the applicant to put his case.

[28] The applicant then raised a number of procedural objections against the disciplinary process. I will deal with them shortly.

(a) Paragraph 23.1.2 of the Constitution provides that the chairperson of the National Disciplinary Committee "shall be an *ex officio* member of

the National Executive Committee." Mr Van Niekerk submitted that the National Disciplinary Committee is invalidly constituted because its chairperson is not a member of the National Executive Committee. In my view, this submission is based on an incorrect reading of paragraph 23.1.2. It is not required that the Chairperson of the National Executive Committee must be appointed from the ranks of existing members of the National Executive Committee. Paragraph 23.1.2 provides that the chairperson, upon his appointment, becomes an *ex officio* member of the National Executive Committee.

(b) The applicant says that he was entitled to 14 days notice of the disciplinary hearing, and he received only 9 days notice. Paragraph 24.1 of the constitution requires that the Disciplinary Committee-

> "...shall forthwith inform the member in writing of the allegations against him/her and convene a hearing within 14 days after so informed the member." (my emphasis)

The applicant seems to have misread paragraph 24.1. The hearing must take place within 14 days after the member was informed of the charge, not after 14 days. The hearing did in fact take place within fourteen days.

(c) The applicant contends that there is a two step notice requirement for a disciplinary hearing under paragraph 24.1 of the constitution. First, the member must be informed in writing of the allegations against him and

thereafter he must be informed of the date of the hearing. I fail to see why both cannot be done in the same letter.

(d) An external prosecutor was appointed for the disciplinary hearing. The applicant says the constitution does not sanction the appointment of an external prosecutor. It was not explained by the applicant why the introduction of an external prosecutor would be irregular.

(e) The letter calling upon the applicant to attend the disciplinary hearing contains the following statement:

"A fellow member of the PAC may represent you at the hearing."

The applicant alleges that, according to this statement, he was deprived of his right to external legal representation. The respondent, on the other hand, argues that the right to be represented by a PAC member does not exclude external legal representation. The statement in the letter is manifestly ambiguous. The applicant did not, however, ask the Disciplinary Committee to allow him external legal representation.

(f) The applicant says there is an unwarranted splitting of the charges against him. According to him, charges 1 and 3 and also charges 2 and 4 are essentially identical. In my opinion the applicant had not been prejudiced by the splitting, assuming there was a splitting.

[29] I get the impression that most, if not all the procedural objections are afterthoughts. The applicant should have raised them before or at the disciplinary

hearing. He chose not to attend the hearing. In my view, none of the procedural shortcomings, if indeed they are shortcomings, resulted in an unfair hearing or an unfair result.

[30] It is significant that the applicant does not take the respondent and the Court into his confidence and disclose how the funds of Sobukwe Foundation were spent. I have no doubt that the respondent is entitled to an accounting. The funds are clearly PAC funds. This is amply demonstrated by the fact that the amounts of R 50 000.00 and R100 000.00 which were paid by ABSA found their way into the account. In his report of 23 April 2007, the applicant said that the money in the account at the time when it was closed "were paid out for legal costs and pending cases". Paragraph 133 of the applicant's replying affidavit contains the following very significant statement:

> "There were other reasons why I caused the proceeds of the banking account to be deposited in the trust account of attorney van Leeve. Both Bishop Mogoba and I have been summonsed by the liquidators in the Travelgate matter. The National Executive Committee which held office until the September 2006 National Congress approved payment of legal expenses in respect of both Bishop Mogoba and I with respect to the civil action's instituted against us. The incumbent National Executive Committee reneged on that undertaking, and accordingly I took steps to ensure that the original purpose of the Sobukwe Foundation was fulfilled."

[31] In my view, the applicant did not discharge the onus resting on him to show that the finding of the National Disciplinary Committee or the endorsement thereof by the National Executive Committee should be reviewed. The application for review can therefore not succeed.

[32] In the Heads of Argument presented by Mr van Niekerk, he requested that certain portions of the answering affidavit which he submits are scandalous, vexatious or irrelevant, be struck out. There was no formal striking-out application. The parts of the affidavit which Mr Van Niekerk wants to have struck out are of very little relevance to the conclusion which I have reached. It is therefore not necessary for me to give further consideration to the request. I should point out, however, that Heads of Argument is not a proper place for an application to strike out.

[33] For the reasons set out above, the application is hereby dismissed with costs.

A Gildenhuys
Judge of the High Court

Appearences:
For the applicant:
Mr W van Niekerk
Wayne van Niekerk Inc

For the respondent:
Mr A T Ncongwane
Instructed by
Raphela Incorporated