REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2021/23795

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. NO

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SIGNATURE **DATE:** 9 July 2021

In the matter between:

ELIAS SEKGOBELO MAGASHULE	Applicant
And	
CYRIL RAMAPHOSA	First Respondent
JESSIE DUARTE	Second Respondent
AFRICAN NATIONAL CONGRESS	Third Respondent

JUDGMENT

KOLLAPEN, WEINER and MOLAHLEHI JJ

Introduction

[1] The dispute before this Court traverses a diverse range of legal issues which are set against a complex and detailed background. In essence, however, the dispute revolves around three broad imperatives: the common cause recognition by the parties of the scope and impact of corruption on the African National Congress (ANC) and the expressed need to act decisively against it; the recognition of the associational and political participation rights of the parties to the litigation and how those are deployed to achieve the vision and the objectives of the ANC; and the acceptance that the ANC must act consistently with its own constitution (the ANC constitution) and the Constitution of South Africa, and broadly in accordance with the values and the rights enshrined in it and in the spirit of fairness.

[2] Whilst it is not a condition precedent for the effective functioning of a democratic society, it is difficult to imagine a democracy without political parties. They are often the structures through which citizens express their right to political participation; the expression of their hopes and aspirations; their fears and uncertainties; and the articulation of the future they desire for themselves. In *My Vote Counts NPC v Speaker of the National Assembly and Others*, Cameron J stated:

"The founding premise of the applicant's argument is the unique role of political parties in our constitutional democracy. This is difficult to dispute. The electoral system the Constitution creates pivots on political parties and whom they admit as members. In the *First Certification* judgment, this Court noted that, '[u]nder a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate.'

Our constitutional order places the key to elective office and executive power in the hands of political parties. Members of the National Assembly and provincial legislatures are not directly elected. Nor is the President or the Deputy President. The same applies to provincial and national executives. Under the current electoral system, it is political parties, and parties alone, that determine which persons are allocated to legislative bodies and to the executive. …"[1]

[1] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC) at paras 32-33.

[3] In broad legal characterisation, a political party is a voluntary association where the relationship between the party and its members is regulated by contract, admittedly of a unique nature.[2] In other respects, political parties live in the public consciousness of a society as their work is so fundamentally public in nature and is, at least theoretically, meant to be aligned to the public good.

[4] The case before us is about a dispute within the ANC, the largest political party in South Africa. While in many respects it is a private dispute between members of a private organisation, in so many other respects it triggers questions about the scope and reach of our constitutional and legal order, suggesting that the line between privately exercised power and rights and publicly exercised power and rights cannot and should not be rigidly drawn and maintained – particularly in a constitutional democracy described as, and aspiring to be, transformative.

[5] At the same time, we are acutely aware that while this dispute takes us deep into the heartland of South Africa's political landscape, the constitutional and legal values and principles embedded in our law must be the primary tools we use to adjudicate the dispute.

The parties to the litigation; brief overview of the dispute; precise terms of the relief sought

The parties

[6] The applicant is Mr Elias Sekgobelo Magashule, who describes himself as the unlawfully suspended Secretary General (also referred to as the 'SG') of the ANC.

[7] The first respondent is Mr Matamela Cyril Ramaphosa, cited herein in his personal capacity and in his official capacity as the President of the ANC.

[8] The second respondent is Ms Yasmin Jessie Duarte who is the Deputy Secretary General (DSG) of the ANC.

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[2] See *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) at para 79.

[9] The third respondent is the ANC, a voluntary association and political party, registered in terms of the electoral laws of the Republic of South Africa.

The relief claimed

[10] The Notice of Motion describes the substantive relief Mr Magashule seeks as follows:

"2. Declaring:

2.1 The ANC step-aside rule or regime and/or Rule 25.70 of the constitution of the ANC to be unlawful, unconstitutional, invalid and null and/or void *ab initio*;

2.2 the suspension letter issued by the second respondent on 5 May (but dated 3 May) 2021 to be unlawful, unconstitutional, invalid and null and/or void *ab initio*;

2.3 the suspension of the first respondent to be valid and effective until lawfully nullified; and

2.4 the instruction announced by the first, second and/or third respondents for the applicant to apologise for issuing the suspension letter to the first respondent to be unlawful and unenforceable.

3. Setting aside and/or uplifting the suspension of the applicant from his position as ANC Secretary-General or any other position or status he held or enjoyed in the ANC as at 5 May 2021; …"

An overview of the dispute

[11] Mr Magashule, in pursuing the relief he seeks, contends that his suspension as Secretary General of the ANC was unlawful and unconstitutional in terms of both the ANC constitution as well as the Constitution of South Africa. In particular, he argues that his suspension violated the principles of natural justice, including the *audi alteram partem* principle, and violated a number of rights in the Bill of Rights, including the right to political participation (s 19 of the Constitution), the presumption of innocence (s 35 of the Constitution), the right to equality (s 9 of the Constitution) and the right to dignity (s 10 of the Constitution).

[12] The respondents, in opposing the relief sought, maintain that the interests and the integrity of the ANC in fighting corruption provided the overarching basis for the suspension of Mr Magashule. They further contend that the suspension was effected in accordance with the ANC constitution and deny that Mr Magashule's suspension, which they describe as precautionary as opposed to punitive, resulted in the violation of any of his rights under either the ANC constitution or the Constitution of South Africa. They submit that although adherence to the principles of natural justice is not required in relation to precautionary suspensions, it was nevertheless applied.

The applications to intervene

[13] Following the launch of this application, three separate applications seeking intervention were brought by members and branches of the ANC. The applications were those of:

(a) Mr Mutumwa Dziva Mawere;

(b) Mr Pule Patrick Nthene and Others; and

(c) Mr Ntandoyenkosi Nkosenthsha Shezi

[14] All the intervention applications were opposed by the respondents, while Mr Magashule adopted what his counsel described as a passive stance towards the intervention applications. Oral argument was heard in the application of Mr Mawere, while in the applications of Mr Nthene and Others, and that of Mr Shezi, the parties agreed that the matter could be considered and dealt with on the papers without the need for an oral hearing.

[15] On 24 June 2021 the Court, having concluded that no case was advanced to justify the urgency in respect of all three intervention applications, struck them from the roll with costs and also provided reasons for the orders given.

Background

Hierarchy of the ANC

[16] The position of Secretary General is the highest full-time position in the ANC. The SG is the chief administrative officer of the ANC. The specific powers of the SG are defined in Rule 16.6 of the ANC constitution.[3] Mr Magashule was elected as the SG of the ANC at the Conference held at Nasrec (the 54th National Conference) in Johannesburg from 15 to 20 December 2017.

[17] The second-highest ranking full-time position in the ANC is that of the Deputy Secretary General. The duties and responsibilities of the DSG are contained in Rule 16.9 of the ANC constitution.[4]

[18] The ANC is an organisation of branches. To be a member, a person must necessarily belong to a branch. The National Conference is made up of delegates, which means that every person who votes therein must have been delegated by one or other structure of the ANC. Ninety-percent of the delegates are mandated by branches. The National Conference is the supreme decision-making structure of the ANC, as provided for in Rule 10.1 of the ANC constitution.[5]

[19] The National Executive Committee (the NEC) is the highest decision-making structure between National Conferences. The National Working Committee (NWC), is a sub-committee of the NEC and is charged, *inter alia*, with the operation, processing and implementation of the decisions of the NEC. In terms of Rule 13.8 of ANC constitution, the NWC shall—

"13.8.1 Carry out decisions and instructions of the NEC;

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[3] "The Secretary General is the chief administrative officer of the ANC. He or she shall:
16.6.1 Communicate the decisions of all national structures of the ANC on behalf of the NEC;
16.6.2 Keep the minutes of the National Conference, the National General Council, the NEC, the NWC, as well as other records of the ANC;
16.6.3 Conduct the correspondence of the NEC and the NWC and send out notices of all conferences and meetings at the national level;
16.6.4 Convey the decisions and instructions of the National Conference, the National General Council, the NEC and the NWC to the Provincial Executive Committees and see to it that all units of the ANC carry out their duties properly;
16.6.5 Prepare annual reports on the work of the NEC and the NWC and such other documents which may, from time to time, be required by the NEC and the NWC;
16.6.6 Present to the National Conference and National General Council a comprehensive statement of the state of the organisation and the administrative situation of the ANC."

[4] Rule 16.9 is dealt with in more detail later in the judgment.

[5] Rule 10.1 of the ANC Constitution provides: "The National Conference is the supreme ruling and controlling body of the ANC…."

13.8.2 Conduct the current, work of the ANC and ensure that Provinces, Regions, Branches and all other ANC structures, such as parliamentary caucuses, carry out the decisions of the ANC; and

13.8.3 Submit a report to each NEC meeting."

[20] The ANC Integrity Commission (also referred to as the 'IC') was established under Rule 24 of the ANC constitution. Rule 24.2 provides that, "[t]he Officials and NEC may refer to the Integrity Commission any unethical or immoral conduct by a member which brings or could bring or has the potential to bring or as a consequence thereof brings the ANC into disrepute." The Integrity Commission plays a role in facilitating integrity and honesty, and in promoting the status of the ANC within the public arena. It seeks to ensure that members respect the ANC constitution and the Constitution of the country.

[21] The "Officials" referred to above, sometimes known as the "National Officials", are a reference to the people appointed to the following roles within the ANC: the President; the Deputy President; the National Chairperson; the Secretary General; the Deputy Secretary General; and the Treasurer General.[6]

Background to the dispute

[22] In November 2020, the National Prosecuting Authority (NPA) charged Mr Magashule with several criminal offences, including fraud, corruption and money-laundering relating to his tenure as former Premier of the Free State from 2009-2017. The DSG addressed a letter, dated 3 May 2021, to Mr Magashule in terms of which he was temporarily suspended, citing his indictment as the reason therefore. The DSG invoked Rule 25.70 of the ANC constitution as the basis of Mr Magashule's suspension.

[23] The validity and implementation of Rule 25.70 of the ANC constitution forms the basis of the applicant's case, and it has become central to the dispute. It provides that: -

[6] See "officials" as set out in the definitions section of the ANC Constitution.

"Where a public representative, office-bearer or member has been indicted to appear in a court of law on any charge, the Secretary General or Provincial Secretary, acting on the authority of the NEC, the NWC, the PEC or the PWC, if satisfied that the temporary suspension of such public representative, office-bearer or member would be in the best interest of the Organisation, may suspend such public representative, elected office-bearer or member and impose terms and conditions to regulate their participation and conduct during the suspension."

[24] Mr Magashule's attack on the constitutionality of the content of the Rule is two-pronged:

(a) First, that it offends the ANC constitution; and

(b) Second, that it infringes upon Mr Magashule's rights as enshrined in the Constitution of the Republic of South Africa.

[25] In this regard, Mr Magashule contends that the ANC constitution enshrines the principle of natural justice, applicable to all disciplinary procedures initiated in accordance with the ANC's constitution.[7] He argues that his suspension did not accord with the principles of natural justice.

[26] The respondents deny the assertions made by Mr Magashule in this regard, contending that, *inter alia*:

(a) Rule 25.70 is not inconsistent with the South African Constitution because the ANC constitution is a private contract "between members of the ANC" and the powers it confers "are contractual powers and not public powers"; and

(b) Rule 25.70 is only a "preventative" measure as opposed to a "punitive" measure and, therefore, the principles of natural justice (as outlined and relied on by Mr Magashule) are not applicable. It was further contended that these principles were, in any event, applied.

[7] Mr Magashule submitted that Appendix 3 to the ANC Constitution, in particular, embodies the principles of natural justice. Appendix 3 is discussed below in further detail.

[27] Mr Magashule principally seeks declaratory relief (in terms of s 172(1)(a) of the Constitution,[8] read with s 38 thereof,[9] and/or s 21(1)(c) of the Superior Courts Act 10 of 2013),[10] as well as an order setting aside or uplifting his unlawful suspension as the SG of the ANC. In addition, he seeks an order declaring his suspension of Mr Ramaphosa as valid (until lawfully nullified).

[28] In this regard, Mr Magashule invokes sections 2, 9, 10, 19, and 35(3) of the Constitution of the Republic to vindicate rights allegedly infringed by the respondents.[11]

[29] In order to understand the development of this dispute, it is necessary to traverse the ANC resolutions and consequences surrounding the dispute.

The resolutions and associated events

[30] In October 2015, the ANC's 4th National General Council (NGC) adopted a resolution that:

"ANC leaders and members who are alleged to be involved in corrupt activities should, where necessary, step aside until their names are cleared."

[31] The 54th National Conference of the ANC held at Nasrec in December 2017 dealt with the matter of the ANC's Credibility and Integrity in some detail, and it appears that it was a matter that weighed heavily with delegates. Deep concern was raised about the impact of corruption on the affairs of the ANC, its role and

[8] Section 172(1)(a) provides: "(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; …".
[9] Section 38 of the Constitution, titled 'Enforcement of rights' sets out the persons who are entitled to approach the courts for relief, including a declaration of rights, where it is alleged that a right contained in the Bill of Rights has been infringed or threatened.
[10] Section 21(1)(c) of the Superior Courts Act provides: "(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power— (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."
[11] Section 2 provides that: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' As previously stated, the rights contained in sections 9, 10, 19 and 35(3), relate to dignity, equality, political rights and accused's persons' rights to a fair trial, respectively.

sustainability as a political party, and the moral high ground it sought to hold. The following was noted by the 54th National Conference: -

- "That corruption robs our people of billions that could be used for their benefit.
- That the lack of integrity perceived by the public, has seriously damaged the ANC image, the people's trust in the ANC, our ability to occupy the moral high ground, and our position as leader of society.
- That the current leadership structures seem helpless to arrest these practices, either because they lack the means or the will, or are themselves held hostage by them.
- …
- That the ANC is endangered to the point of losing credibility in society and power in government.
- That our leadership election processes are becoming corrupted by vote buying and gatekeeping".

[32] Arising out of this, there was a general consensus that it was time for more decisive action to eradicate the scourge of corruption. It was resolved that the 2015 NGC resolutions, plus other existing and new measures, be implemented urgently by the NEC and Provincial Executive Committees (PECs). It adopted the following resolutions (the 'four resolutions') to give effect to the step-aside principle: -

"That the 2015 NGC resolutions plus other existing and new measures are implemented urgently by the NEC and PECs to:

1. …

2. Demand that every cadre accused of, or reported to be involved in, corrupt practices accounts to the Integrity Committee immediately or face DC processes. (Powers of IC under constitutional changes)

3. Summarily suspend people who fail to give an acceptable explanation or to voluntarily step down, while they face disciplinary, investigative or prosecutorial procedures."

[33] The 54th National Conference further resolved as follows: -

"9.2 (h) ANC should take decisive action against all members involved in corruption including those who use money to influence Conference outcomes.

…

9.2 (r) Reaffirm the 2015 NGC resolution that, ANC members who are alleged to be involved in corrupt activities, should, where necessary step aside until their names are cleared."

[34] At the NEC meeting held from 31 July to 2 August 2020, the NEC recorded as follows: -

"The NEC welcomed the steps taken by the ANC structures in Gauteng, KwaZulu-Natal, Eastern Cape and the Free State, in particular their insistence that those implicated should step aside while their cases are being investigated".

[35] The NEC further decided that: -

"Pursuant to the resolution that those accused of corruption and other serious crimes against the people, including those charged in courts, may be expected to step down from their positions or responsibilities, the National Officials be requested immediately to prepare an audited list of cases and submit this list within one month to the NWC and the NEC, with recommendations for action. In executing this task, the National Officials may call upon the assistance of the Integrity Commission or any other members who can be called upon to make a contribution".

[36] Pursuant to the NEC meeting, Mr Magashule issued a media statement on 4 August 2020, in which he mentioned the resolutions and stated that: -

"The NEC welcomed the steps taken by the ANC structures in Gauteng, KwaZulu-Natal, Eastern Cape and the Free State and commended those implicated for having volunteered to step-aside whilst their cases are expeditiously attended to by the relevant structures."

[37] Pursuant to the resolutions of the NEC, Mr Magashule addressed a letter to the provincial structures of the ANC, in which he annexed the terms of reference for the implementation of the step-aside rule. The terms of reference related to the implementation of the task given to the National Officials to provide a report on "members of the ANC who are criminally charged and need to step aside". It was also made clear that members who were criminally charged, and who do not step aside, would be suspended under Rule 25.70 of the ANC constitution.

[38] In the run-up to the NEC meeting to be held from 28 August 2020, Mr Ramaphosa addressed a letter to the members of the ANC on 23 August 2020. He made a plea for the ANC to take a stand against the scourge of corruption. He said *inter alia* that, to address corruption, the ANC must take steps to immediately implement the four resolutions taken at the National Conference.

[39] At its meeting from 28 to 30 August 2020, the NEC took steps towards the implementation of the 54th National Conference resolutions. It declared a "turning point" in the fight against corruption. It distinguished between the following categories of members for purposes of implementing the resolutions: -

(a) Those who are formally charged with corruption or other serious crimes. They must immediately step aside from all leadership positions in the ANC, legislatures or other government structures pending the finalisation of their cases. If they do not step aside, they must be instructed to do so.

(b) Those who are not formally charged but who have been reported to be involved in corruption and other serious criminal practices. They must appear before the ANC's Integrity Commission to explain themselves.Those who do not give an acceptable explanation, may be suspended.

(c) Those who have been convicted of corruption or other serious crimes. They must resign from leadership positions and face disciplinary action in line with the ANC's Constitution.

[40] The NEC mandated the National Officials to develop guidelines and procedures for the implementation of this resolution.

[41] It was not long thereafter that, in November 2020, as previously indicated, that the NPA charged Mr Magashule with several criminal offences.

[42] At its meeting on 6 to 8 December 2020, the NEC recommitted to the implementation of the step-aside resolution of the 54th National Conference. It: -

(a) Reaffirmed the position taken at its meeting of 28 to 30 August 2020;

(b) Noted legal opinions solicited by the Officials;

(c) Noted that while technical legal opinions are important as background information, the ANC, as a voluntary organisation, follows its constitution, Rules, Conference resolutions and NEC decisions, and operates within the Constitution and laws of the land;

(d) Urged the Officials to consider the political imperatives and intentions of the Conference, and to finalise the step-aside guidelines for the organisation as a whole, for consideration and adoption by the NEC at the beginning of 2021; and

(e) Noted the report of the Officials on the charges against the SG, and welcomed the SG's decision to voluntarily present himself to the Integrity Commission on 12 December 2020. The Officials would process the outcomes of this engagement and the determination of the Integrity Commission, and report to the NWC and NEC.

[43] Following his indictment, Mr Magashule appeared before the Integrity Commission on 12 December 2020. In the Integrity Commission's report, dated 14 December 2020, Mr Magashule stated, *inter alia*, that: -

(a) He was a disciplined cadre and made it clear that he was ready to perform any tasks given to him by the organisation;

(b) He was bound by the decisions of the collective;

(c) He would step aside if so instructed by the NEC; and

(d) He understood the ANC constitution, its Rules and Code of Conduct.

[44] The Integrity Commission compiled a report on its engagement with Mr Magashule, wherein it: -

(a) Noted that the SG, as the chief administrative officer, is duty bound to ensure that the procedures of the ANC are correctly followed without fear or favour. Disciplinary procedures with regard to disciplinary action are meticulously set out in the ANC constitution and need to be strictly followed. Decisions of the ANC and its conferences must apply without fear or favour;

(b) Recommended to the NEC the immediate implementation of the NEC Resolution of 6 to 8 August 2020:

> "'Cadres of the ANC who are formally charged for corruption or other serious crimes must immediately step aside from all leadership positions in the ANC, legislatures or other government structures pending the finalisation of their cases. The officials as mandated will develop guidelines and procedures on implementation and the next NWC meeting will review progress. In cases where this has not happened such individuals will be instructed to step aside."

(c) Noted that the NEC's attention was drawn to the last sentence of the recommendation; and

(d) Noted that the SG indicated that he would not resist the decision of the NEC, even if he might not agree with it. However, in the unlikely event of resistance to this, the NEC should consider suspension pending the finalisation of the criminal case against him in terms of Rule 25.70 of the ANC constitution.

[45] At its meeting on 13 to 14 February 2021, the NEC adopted the Guidelines developed by a task team led by the ANC Treasurer General, Mr Paul Mashatile. It was titled 'Guidelines and Procedures: Implementation of National Conference Resolutions on ANC Credibility and Integrity: Dealing with Corruption and on Fighting Crime and Corruption' (the Guidelines).

[46] The Guidelines distinguish, principally, between: -

(a) Members who have been indicted on charges of corruption or other serious crimes; and

(b) Members who are accused of corruption or other serious crimes, but have not been indicted.

[47] Paragraphs 3.1 to 3.3 of the Guidelines deal with members of the ANC indicted on charges of corruption or other serious crimes as follows:

(a) The member must immediately step-aside, pending the finalisation of his or her case;[12]

(b) If the member does not step-aside, the SG or NWC may refer the matter to the Integrity Commission for it to consider and make recommendations to the NEC.[13] The NEC then makes a decision on the matter;[14]

(c) A member who refuses to step down, after the NEC has decided that he or she must do so, may be suspended in terms of Rule 25.70;[15] and

(d) A member who has been so indicted, may also face disciplinary processes within the ANC for misconduct in breach of Rule 25.70 of the ANC constitution.[16]

[48] Members who face allegations of corruption or other serious crimes but who have not been indicted, are dealt with under paragraph 3.4 of the Guidelines. There is first an initial investigation (paragraphs 3.4.1.1 and 3.4.1.2)[17] and, depending on its

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[12] Paragraph 3.1.1 of the Guidelines provides: "A member, office-bearer, or public representative, who has been indicted to appear in a court of law on a charge of corruption or other serious crime must immediately step aside pending the finalisation of her or his case."

[13] Paragraph 3.1.6 of the Guidelines provides: "If a member, office-bearer or public representative fails to step aside, the SG or NWC, the PS or PWC, whichever the case may be, may refer the matter to the Integrity Commission for it to consider and make recommendations to the NEC or PEC."

[14] Paragraph 3.1.7 of the Guidelines provides: "The findings and recommendations of the Integrity Commission will be submitted to the NEC or PEC. Once the NEC or PEC has concluded its deliberations, and taken a decision, the matter will then be made public."

[15] Paragraph 3.1.10 provides: "Where a member, office-bearer or public representative refuses to step aside, notwithstanding a decision of the NEC or PEC that he or she should do so, the Organization shall invoke Rule 25.70 of the ANC Constitution."
Under the heading "3.2 Temporary suspension following indictment to appear in a court of law on criminal charges" are the following subparagraphs:
"3.2.1 The temporary suspension referred to in Rule 25.70 is effected by the Secretary General or Provincial Secretary acting on the authority of the NEC, the NWC, the PEC or the PWC.
3.2.2 The Secretary General or Provincial Secretary, acting on the authority of the NEC, the NWC, the PEC or the PWC, must be satisfied that the temporary suspension of such member, office-bearer or public representative would be in the best interest of the Organisation."

[16] Paragraph 3.3 of the Guidelines.

[17] Paragraph 3.4.1.1 provides: "Upon the Secretary or Secretary General becoming aware of an allegation of corruption, or serious crime against an ANC member, office-bearer of public representative ('the member'), the Secretary or Secretary General shall perform an initial investigation and submit a report to the appropriate structure (NEC / NWC / PEC etc). This report shall be submitted to the appropriate structure within 21 days of the Secretary or Secretary General becoming aware of such allegations."
Paragraph 3.4.1.2 states: "This report shall detail the allegations that have been received or that the Secretary or Secretary General has become aware of, the identity of the member/members with respect to whom such allegations apply and a decision as to whether the Secretary or Secretary General shall refer such a matter to the appropriate Integrity Commission. The decision to refer or not refer a matter to the Integrity Commission must be reasonable and objective."

outcome, a referral to the Integrity Commission (paragraphs 3.4.1.3 and 3.4.2).[18] The matter is thereafter handled in accordance with the decision of the Integrity Commission (paragraph 3.4.2.2).[19]

[49] On 26 to 29 March 2021, the NEC held a meeting which dealt with the implementation of the resolutions and Guidelines on stepping aside. It resolved that: -

"… [A]ll members who have been charged with corruption or other serious crimes must step aside within 30 days, failing which they should be suspended in terms of Rule 25.70 of the ANC constitution…."

[50] The meeting emphasised that the 30-day period was to enable the implementation of the decision in line with the Guidelines, not to review the decision. On 30 April 2021, the 30-day period expired.

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[18] In terms of paragraph 3.4.1.3, "The considerations that the Secretary or Secretary General takes account as to whether to refer a matter to the Integrity Commission shall include:
a) The nature of the alleged conduct with respect to the Code of Conduct, Conference Resolutions and Decisions of the Structures of the ANC;
b) The extent or frequency of such alleged conduct if it is a minor infraction;
c) The source of the allegation and the veracity of the allegation;
d) The number of independent sources that are consistent with the original source of the allegation;
e) The balance of interests of the member and the organisation in either having the matter deal in front of the Integrity Commission immediately or be delayed till some other process is completed or an imminent event occurs, as long as such delay is not so long as to be unreasonable;
f) The impact on perceptions and reputation of the organisation resulting from the alleged conduct should it be true;
g) Whether any proof other than a bare allegation was provided;
h) The role and standing of the member in the organisation or the State; and,
i) Specific referral requests by NEC/PEC/REC to deal with matters that result from agendas or matters arising of these structures."

[19] Paragraph 3.4.2.2, titled "IC Decision" provides:
"3.4.2.2.1 Upon completion of the submission of documentation and or the conclusion of the hearing or hearings, the IC shall deliberate on all evidence and argument heard and received and make a determination as to whether:
a) The Investigative Report identifies credible evidence of an infraction and the nature and detail of such infraction, or the Investigative Report does not identify credible evidence of an infraction;
b) The member has submitted an acceptable explanation and response to the Investigative Report and or allegations and as a result no further action is required;
3.4.2.2.2 If an adverse finding is made against the member, recommending that the NEC/NWC/PEC/PWC/REC/RWC/BEC should request the member to "Step Aside" or in the event that the member refuses, that they proceed with disciplinary action against the member; and
3.4.2.2.3 Advising that the NEC/NWC/PEC/PWC should consider suspending the member in accordance with Clauses 25.56 to 25.69 of the ANC Constitution, if disciplinary action is taken.
3.4.2.2.4 The IC shall then submit their decision to the NEC/PEC/REC/BEC as is appropriate, through the office of the Secretary or Secretary General."

[51] On 2 May 2021, Mr Magashule attended a meeting of the ANC Officials which was convened to prepare for a special NEC meeting. At that meeting Mr Magashule reported back on his consultations with Dr Phosa, former Presidents and others.

[52] Mr Magashule was invited to, and attended, an NWC meeting, on 3 May 2021, at which a report from the Officials' meeting was tabled by the Treasurer General, who was designated by the Officials to handle the step-aside issue. The NWC gave the instruction that letters of suspension must be written to all affected members.

[53] On 3 May 2021 the DSG prepared the letter of suspension of Mr Magashule. On the same date, Mr Magashule wrote a letter of suspension to Mr Ramaphosa, addressed to him in his capacity as President of the ANC.

[54] Both letters were delivered to their respective recipients on 5 May 2021. On the following day, Mr Magashule delivered his "appeal/review" letter to the DSG, pointing out 12 legal defects in respect of his suspension, and purporting to exercise the right to seek a review of the suspension decision for consideration by the NEC.

[55] Erroneously believing that such an appeal/review had the effect of suspending Mr Magashule's suspension, the DSG requested Mr Magashule to sign two letters authorising the holding of two regional conferences scheduled for 8 to 9 May 2021. Mr Magashule was invited to attend (and attended) a meeting held between ANC Officials and the NWC of the ANC Women's League and the NEC on 8 May 2021, in his capacity as the SG of the ANC.

[56] At the special NEC meeting of 8 May 2021, Mr Magashule was evicted from participating, on the ground that he was suspended, despite his purported appeal/review.

[57] At the meeting held on 8 to 10 May 2021, it was resolved that: -

(a) The step-aside Guidelines and procedures would be implemented;

(b) The suspension of Mr Magashule as the SG was confirmed and the NEC supported the suspension;

(c) The suspension of Mr Ramaphosa as President of the ANC was invalid;

(d) Mr Magashule's conduct was declared to be in violation of the ANC constitution; and

(e) In respect of the letter of suspension sent to Mr Ramaphosa, Mr Magashule was instructed to 'withdraw and apologise', failing which disciplinary steps were to be taken against him.

[58] On 10 May 2021, Mr Ramaphosa read out a statement on behalf of the NEC indicating, *inter alia*, that the NEC had:

(a) Confirmed Mr Magashule's suspension;

(b) Appointed the DSG to perform the tasks of the SG;

(c) Stated that the letter of suspension written to Mr Ramaphosa by Mr Magashule was written without any authority or mandate from any ANC structure, and agreed that Mr Magashule's conduct was "completely unacceptable and a flagrant violation of the rules, norms and values of the ANC"; and

(d) Instructed the Officials to advise Mr Magashule to withdraw the letter of suspension purporting to suspend Mr Ramaphosa and apologise for writing it.

[59] The DSG addressed a letter to Mr Magashule on 12 May 2021, calling upon him to publically withdraw Mr Ramaphosa's suspension letter and apologise.

[60] On 12 May 2021, Mr Magashule wrote to the DSG stating that his rights had been violated, he would not apologise, and he was seeking urgent redress in the courts. The present application was launched as a matter of urgency on 14 May 2021.

Preliminary issues

[61] There are numerous issues in dispute before this Court, both preliminary and on the merits. The preliminary issues will be addressed first, and relate to the following: -

(a) The application to strike out brought by Mr Magashule; and

(b) The respondents' application for condonation.

The application to strike out

[62] Mr Magashule filed a Rule 6(15) notice seeking to strike out:[20]

(a) Mr Ramaphosa's answering affidavit in its entirety on the basis that: -

(i) It does not contribute to the outcome of the application;

(ii) It addresses irrelevant matter concerning the ANC's organisational renewal, which has no bearing on the relief or facts relevant to the relief sought;

(iii) It misconstrues the basis for Mr Ramaphosa's suspension and advances defences that are not relevant to the application;

(iv) It seeks to justify the CR17 campaign and/or is repetitive and/or constitutes an abuse of process and/or is defamatory and/or is included with an intention to harass, embarrass or annoy Mr Magashule.

(b) Specified annexures to the first and second respondents' affidavits on the basis that they constitute duplications of the annexures to the founding affidavit and are irrelevant (the irrelevant documents).

(c) Annexures to Mr Ramaphosa's answering affidavit on the basis that they constitute duplications of the second respondent's annexures (the duplicated annexures).

(d) Specified annexures to the second respondent's answering affidavit on the basis that they are irrelevant and do not contribute to the outcome of the application and/or constitute an abuse of process and are defamatory and/or are included with an intention to harass, embarrass or annoy Mr Magashule (the specified annexures).

[20] Rule 6(15) provides that: "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client." The court may not grant the application unless it is satisfied that Mr Magashule will be prejudiced if the application is not granted.

Mr Ramaphosa's answering affidavit

[63] Mr Ramaphosa's answering affidavit was filed two days after the answering affidavit was filed by the second and third respondents (the main answering affidavit). It was argued, by Mr Magashule, that in preparing and filing his own answering affidavit, Mr Ramaphosa was fully aware of matters traversed in the main answering affidavit. Mr Ramaphosa should thus have been aware that there was no necessity to file a further affidavit, as all matters relevant to the application had been traversed in the main answering affidavit.

[64] It was argued that Mr Ramaphosa's affidavit added no value to the application and only served to "annoy and inconvenience" Mr Magashule and unnecessarily overburden the record. It thus had no relevance to the issues.

Allegations relating to Mr Ramaphosa's suspension

[65] The allegations contained in Mr Ramaphosa's affidavit in this regard are, contends Mr Magashule, irrelevant and do not address the charge advanced in the suspension letter. It was contended that Mr Ramaphosa's reliance on the absence of a guilty finding is totally misplaced and contributes nothing to the issues before the Court.

[66] In addition, Mr Ramaphosa explains in detail the review application between the Public Protector and him and the finding of the court in this matter. He annexes his full submissions to the Public Protector and the judgment of the Full Bench. He points out that the court held that he was under no obligation to disclose the donations to the CR17 Campaign in terms of s 96 of the Constitution, s 2 of the Executive Members Ethics Act 82 of 1998 and the Executive Ethics Code.

[67] Mr Magashule contends that the findings of the judgment are irrelevant to his suspension from the organisation and, in any event, the judgment is on appeal.[21]

[21] As appears below, judgment was handed down by the Constitutional Court in this matter on 1 July 2021 in *The Public Protector v President of the Republic of South Africa and Others* [2021] ZACC 19.

The striking out of annexures

[68] As appears above, Mr Magashule seeks to strike out the duplicated annexures and the specified annexures to Mr Ramaphosa's answering affidavit. For the reasons stated above, Mr Magashule contends that the record is unduly prolix and constitutes an inconvenience to both the Court and himself. He submits that Mr Ramaphosa annexed documents that not only fail to contribute to the outcome of the application, but are wholly unnecessary.[22] These documents, he contends, have no relevance and seek only to embarrass him.

Mr Ramaphosa's response

[69] Mr Ramaphosa's response to the striking out of his affidavit deals with: -

(a) The relevance of organisational unity and renewal in the ANC;

(b) Mr Ramaphosa's purported suspension;

(c) The duplication of annexures; and

(d) The specified annexures.

The relevance of the issue of organisational unity

[70] Mr Magashule deals extensively in his affidavit with the "factionalism" in the ANC and the unconstitutionality of various Rules of the ANC constitution and resolutions which deal with corruption.

(a) The various resolutions referred to in the affidavit of Mr Ramaphosa deal with and refute these allegations. The resolutions, which deal with corruption, demonstrated a clear determination by the membership of the ANC to

[22] These include the following documents: Overview by Mr Ramaphosa to the Meeting of the NEC – 28 August 2020; Provincial Reports: Criminal & Disciplinary Cases; NEC 28-30 August 2020; Indictment in the Matter of the State v 16 Accused in the Free State High Court; Letter to Provincial Secretaries and Co-ordinators of Interim Provincial Committees with annexures; Mr B Bongo suspension letter with annexures; Confirmatory Affidavit of Minister Pandor; Confirmatory Affidavit of Mr Mabuyakhulu; Supporting Affidavit of Mr Manana; Mr Ramaphosa's submissions to the Public Protector; Judgment: *President of the Republic of South Africa and Another v Public Protector and Others* [2020] ZAGPPHC 9; [2020] 2 All SA 865 (GP).

acknowledge the organisation's failings, to make a decisive break with corrupt practices and to initiate an ethical, political and organisational renewal and unity within the ANC.

(b) It was therefore logical that Mr Ramaphosa deal with such allegations. Mr Magashule's contention that this chapter of Mr Ramaphosa's answer is irrelevant, is ill-conceived.

Allegations relating to Mr Ramaphosa's suspension

[71] Firstly, Mr Ramaphosa contends that Mr Magashule "distorted" the facts relating to the CR17 campaign in his attempt to justify his suspension. Mr Magashule stated in the letter of suspension that Mr Ramaphosa had been reported to the Hawks for involvement in a corrupt practice relating to the CR17 Campaign and that it "is pending before our courts". He stated that he was thus entitled to suspend Mr Ramaphosa in terms of Rule 25.70. Mr Magashule contends further that Mr Ramaphosa need not have dealt with the lawfulness of his own suspension because the ANC had fully dealt with the matter. Mr Ramaphosa responded as follows:

(a) He was obliged to refute these allegations. He referred to the Public Protector's investigation and the hearing before the Gauteng Division of the High Court, which vindicated him, and which belied the basis for his "purported suspension";[23]

(b) Rule 25.70 only permits someone to be suspended if he has been indicted on a criminal charge; and

(c) The ANC dealt with the lawfulness of Rule 25.70, the step-aside rule and Mr Magashule's suspension. It specifically refrained from addressing Mr Ramaphosa's suspension, which Mr Ramaphosa was compelled to deal with.

[23] *President of the Republic of South Africa and Another v Public Protector and Others* [2020] ZAGPPHC 9; [2020] 2 All SA 865 (GP). This judgment was subsequently upheld on *this* issue in the Constitutional Court (see note 21 above) handed down on 1 July 2021. An issue raised by amaBhungane was remitted to the High Court.

[72] Thus the application to strike out Mr Ramaphosa's affidavit for lack of relevance cannot succeed.

The duplicated annexures

[73] Annexures A and B to Mr Magashule's application to strike out lists annexures to Mr Ramaphosa's answer and that of the main answering affidavit which either duplicate one another, or those in Mr Magashule's founding affidavit. He seeks to have them struck out because they are duplicates of documents already on record.

(a) Mr Ramaphosa's counsel argued that, in an urgent application, where affidavits are prepared under great pressure and, for different litigants working in different work streams, duplication of allegations and annexures may occur. There was no prejudice caused to Mr Magashule other than some costs wasted by the duplication of 78 (of over 2000) pages.

(b) In any event, it was argued that the duplication of a document that is relevant did not render the document irrelevant.

(c) This explanation is satisfactory and the striking out of these documents would, at this stage, serve no purpose.

The specified annexures

[74] Annexure C to Mr Magashule's strike out application targets the abovementioned annexures which, he says, are irrelevant.[24]

(a) Mr Ramaphosa contends that the political overview was a vital step in the process of giving effect to the National Conference resolutions. He refutes Mr Magashule's contention that it was a factional distortion aimed at him and his supporters.

(b) The provincial reports illustrate that the NEC applied the step-aside rule very broadly throughout the structures of the ANC, without discrimination. It again

[24] See footnote 22 above.

refutes Mr Magashule's factionalist accusation that the step-aside rule was designed to target him and his supporters.

(c) The inclusion of Mr Magashule's indictment: the specifics of the indictment are essential elements of the basis upon which Mr Magashule was charged. He stated that the charges were based solely on a lack of oversight on his part. The charge sheet demonstrated that this is untrue. Mr Magashule stated that unidentified "officials of the ANC" had come to the unanimous and correct conclusion "that the charges against me are frivolous and unsustainable". Mr Magashule's indictment, however, amply demonstrates that his description of the charges against him is false. It shows that he is being prosecuted on very serious charges of corruption, fraud and money-laundering.

(d) The inclusion of the letter to Provincial Secretaries: the NWC resolved at its meeting on 3 May 2021 to suspend Mr Magashule and all those liable for suspension in terms of the NEC's Guidelines. Mr Magashule contends that the decision particularly targeted him. Ms Duarte's letter to the Provincial Secretaries, however, refutes this contention in that it shows that very wide and indiscriminate effect was given to the NWC's decision to implement the Guidelines.

(e) The inclusion of Mr Bongo's letter of suspension: Ms Duarte addressed this letter of suspension to Mr Bongo on 3 May 2021, that is, at the time she addressed a similar letter of suspension to Mr Magashule. It also refutes his suggestion that he was a particular target of the NWC's suspension decision.

[75] Having regard to the responses of Mr Ramaphosa, we conclude that each element of the striking out application must fail. In regard to the costs relating to the duplicated documents, the Court may, in making a costs order, take this into account. It is a matter we will return to.

Condonation

[76] The application of Mr Magashule was set down for 1 June 2021 to be heard as a matter of urgency. The Notice of Motion, which was served on the respondents on

or about 13 May 2021, called upon the respondents to file their intention to oppose by 14 May 2021 and answering affidavits before 16h00 on 20 May 2021.

[77] Mr Magashule contends that the respondents ignored the dates in the Notice of Motion. The ANC filed its answering affidavit on 25 May 2021 and Mr Ramaphosa filed his on 27 May 2021. Mr Magashule submits further that the respondents failed to file an application for condonation. Prejudice is alleged but not elaborated upon.

[78] In his heads of argument, the following is submitted by Mr Magashule:

"The position of the applicant regarding the failure of the respondents to even bother to apply for condonation and thereby showing utter disdain and disrespect for this court and its processes deserves the most serious censure and judicial frown. In the likely event that the court is not prepared to go as far as regarding the impugned answering affidavits *pro non scripto* due to the public interest issues raised in this matter, then at the barest minimum, the respondents ought properly to be mulcted with a punitive cost order so as to display the court's disapproval of such conduct and to discourage all those who might be tempted to follow the bad example set by the respondents."

[79] In his answering affidavit, Mr Ramaphosa states that he is aware that the respondents' attorneys had communicated to the applicant's attorneys that the respondents would aim to file their answering affidavits by 25 May 2021. He states that: -

"As matters turned out, between when I was on 25 May 2021 presented with what would have been the final affidavit to be filed, and the time that I ultimately signed the affidavit, I had certain concerns with the draft, which had to be reworked. I unfortunately, due to other pressing commitments in between, only found the opportunity to sign the affidavit a day or two later than 25 May 2021. I seek this Court's condonation for this delay and not having filed my affidavit with that deposed to by the Deputy Secretary General."

[80] It is relevant that on 18 May 2021, the respondents' attorneys wrote to Mr Magashule's attorney stating that: -

"3. In relation to the filing of the answering affidavits, kindly note that in order for our clients to comprehensively answer to your client's founding affidavits, our clients have a wide range of ANC officials to consult with and possibly get affidavits from. Our clients and the legal team are working as much as they can to have our clients' answering affidavits ready as soon as

possible. At this stage, our clients do not think that we will be able to file the answering affidavit by Thursday 20 May as required in your clients' Notice of Motion.

4. As you might be aware, the First Respondent is out of the country due to state/government work commitments and is only scheduled to return back in the country on Thursday, 20 May 2021.

5. We are progressing nonetheless with the preparations and consultations with our clients and counsel and hope to revert shortly on when we estimate to be filing our answering affidavits, following further consultations with the Respondents and the Third Respondent's officials/representatives.

6. We have discussed further with our counsel on the mooted timetable discussion between counsel of the two parties. Our counsel would prefer to discuss after further consultations with our clients when they have a better sense of when our client will able to file the papers."

[81] On 21 May 2021 the respondents' attorneys wrote again to Mr Magashule's attorneys, referring to the letter of 18 May 2021 "as well as the conversation of even date between your Mr. Eric Mabuza and the writer hereof." The letter further set out as follows:-

"2. We write to confirm that we are busy drafting our client's answering papers and are working around the clock to finalise same as soon as possible. We are Planning to file our clients answering papers by Tuesday, 25 May 2021.

3. We further confirm that our counsel will contact your client's counsel to discuss the logistical issues relating to the exchange of further pleadings, heads of argument and special allocation."

[82] There was no response to the letters from Mr Ramaphosa's attorneys and it was assumed, which it was not unreasonable to do, that Mr Magashule's attorneys did not have any objection to the answering affidavits being filed on 25 May 2021.

[83] To that extent, it must follow that no condonation application in respect of the filing that took place up to 25 May 2021 was necessary. Mr Ramaphosa's affidavit was filed two days later, for which there is an application for condonation which sets out the reasons for the two-day delay.

[84] We are satisfied that a proper case has been made out for the condonation that has been sought and, further, for the reasons given, that no condonation application was necessary in respect of the period of 20 May to 25 May 2021.

[85] Mr Magashule relied on *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* in his argument that the dates set by the applicant for filing of affidavits in an urgent applicant must be adhered to.[25] However, that case is only authority for the proposition that if the respondent does not follow the timetable set by the applicant, it runs the risk of a default judgment. That was not the case here.

[86] It should be noted that a case management meeting took place on 28 May 2021 before ADJP Sutherland. Dates were set for the hearing and for the filing of the replying affidavit and heads of argument. Mr Magashule's legal representatives did not raise the issue of condonation or prejudice at the time.

[87] We are of the view that there was no "arrogant disregard" for the Rules of Court or the timetable set by Mr Magashule. The correspondence, to which reference has been made, and the application for condonation demonstrate otherwise.

[88] Mr Magashule's allegations and submissions are thus totally refuted by these events. No prejudice was suffered by Mr Magashule. His request that a punitive costs order be made against the respondents in this regard is unfounded and ill-conceived.

The issues on the merits

[89] There are five substantive issues that arise for determination on the merits, and they are: -

(a) Whether Rule 25.70 is unconstitutional in relation to the ANC constitution and the Constitution of South Africa;

(b) The constitutionality and validity of the ANC's step-aside rule;

[25] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A).

(c) Whether the suspension of Mr Magashule as SG of the ANC is invalid and should be set aside;

(d) Whether the suspension of Mr Ramaphosa as the President of the ANC is valid; and

(e) Whether the letter sent to Mr Magashule requesting him to withdraw (and apologise for) the letter purporting to suspend Mr Ramaphosa is valid.

Is Rule 25.70 unconstitutional in relation to the ANC Constitution and South African Constitution?

[90] The ANC is a voluntary association founded in contract and its constitution reflects the terms of the contract concluded between it and its members. This includes Mr Magashule, as well as Mr Ramaphosa and Ms Duarte. This was articulated by the SCA in *Matlholwa v Mahuma and Others*:

"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. …"[26]

[91] It is trite and not in dispute that a political party can only act within the parameters of its own constitution, which would ordinarily provide for the extent and the limits of its powers. In addition, however, the conduct of a political party is not insulated from the supreme law which is the Constitution.[27]

[92] In *Ramakatsa and Others v Magashule and Others* (*Ramakatsa*) the Constitutional Court said: -

"What this means is that constitutions and rules of political parties must be consistent with the Constitution which is our supreme law."[28]

[93] It is perhaps for that reason that the relationship between a voluntary association and its members, which operates at one level through the lens of its own

[26] *Matlholwa v Mahuma and Others* [2009] ZASCA 29; [2009] 3 All SA 238 (SCA) at para 8.
[27] *Ramakatsa* (note 2 above) at paras 57 and 72.
[28] Ibid at para 72.

constitution, while at another level is subject to the scrutiny of the Constitution, was described as a unique one in *Ramakatsa*.[29] There is therefore an internal and external dimension to the validity of the constitution of a voluntary association and the conduct ensuing from that constitution.

[94] It is within this internal and external framework that Mr Magashule locates his challenge, as he contends that Rule 25.70 contravenes the ANC constitution. He further contends that the inclusion of Rule 25.70 within the ANC constitution results in that constitution being inconsistent with the Constitution of South Africa. We proceed to examine these two separate but related challenges.

[95] Our law recognises the principle that, in some instances, a private organisation may exercise public powers and in so doing subject themselves to the constraints that go with exercising public power.[30] In the context of the dispute before the Court it is clear, however, that notwithstanding that the actions of the ANC may often generate public interest and curiosity, the decisions which are the subject of the relief in these proceedings are private in nature, do not derive their source from any public power, nor are they the manifestation of the exercise of public power. Accordingly, the principles that find application in the exercise of public power by private bodies have no application.

Rule 25.70 is in conflict with the ANC Constitution

Inconsistency with the rest of Rule 25 and Appendix 3 of the Constitution

[96] The thrust of Mr Magashule's argument is that Rule 25.70, which is located in the chapter of the ANC constitution dealing with "Managing Organisation Discipline", is inconsistent with the other provisions of the chapter. In particular, he argues that Appendix 3 of the ANC constitution applies generally to all disciplinary processes, including a decision to suspend – and not only to disciplinary proceedings. Mr Magashule submits that it must therefore apply to a decision taken in terms of

[29] Ibid at para 79.
[30] C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 189 - 193.

Rule 25.70. Appendix 3 provides that the fair trial objectives that are sought to be achieved in disciplinary proceedings require the following: -

(a) That there is a formal procedure;

(b) That there is a just and fair procedure;

(c) A member is presumed innocent until proven guilty;

(d) A member has a chance to defend himself or herself;

(e) A member has the right of appeal; and

(f) A charge must be made within a reasonable time after the violation or misconduct was allegedly committed.

[97] Mr Magashule characterises Rule 25.70 as disciplinary in nature and says that to this extent, it should have provided for the same procedural and fair process safeguards as contained in Appendix 3; to the extent that it does not, it is inconsistent with the ANC constitution and is therefore unlawful, unconstitutional, invalid and null and/or void *ab initio.*

[98] Before considering the nature of whether the action of suspension contemplated in Rule 25.70 is disciplinary or otherwise, it may be useful to have regard to Appendix 3 to the ANC constitution. It is headed “Procedure for the Conduct of Disciplinary Proceedings” and provides that “The objective of disciplinary procedure is to ensure that in all disciplinary proceedings…” the six fair trial objectives, to which reference has been made, are achieved.

[99] What is clear is that Appendix 3 is only concerned with disciplinary proceedings and deals exclusively with them from their commencement to their finalisation, including covering matters such as the charge sheet, the plea, the presentation of evidence, the verdict, and the post-verdict process. It seeks to ensure that the disciplinary proceedings to which Appendix 3 relates, will be conducted in compliance with the guarantees that usually attach to a fair trial or hearing.

[100] There is nothing in Appendix 3 that suggests that it is applicable to a decision taken outside of the context of disciplinary proceedings and, in particular, there is no

reference to a decision to suspend taken either in terms of Rule 25.70 or any other rule. Mr Magashule's insistence that Appendix 3 applies to decisions taken in terms of Rule 25.70 is therefore without foundation.

[101] A decision in terms of Rule 25.70, whatever its characterisation may be (disciplinary or precautionary), is not a disciplinary proceeding and does not trigger the application of Appendix 3, simply because it falls within the matrix of Rule 25. It could never have been contemplated that fair trial procedures can automatically have application outside of the setting of a trial or a hearing. By their very nature, the specific fair trial guarantees which Mr Magashule relies upon, by reference to Appendix 3, are designed for and can only have practical application in a trial or in disciplinary proceedings.

[102] Of course, that does not mean that the principles of natural justice do not have application in dealing with Rule 25.70, but rather it is simply inappropriate and legally unsustainable to seek to automatically incorporate fair trial procedures and guarantees into what is essentially a decision to suspend. A decision to suspend is not a trial, nor is it a disciplinary proceeding.[31]

[103] What renders the argument even more unsustainable is that Rule 25.70 does not contemplate disciplinary proceedings in any manner, and the decision to suspend is not causally connected to any existing or contemplated future disciplinary proceedings. Invoking Appendix 3 under those circumstances unduly strains the scope of what Appendix 3, given its ordinary meaning, was intended to cover.

[104] In this regard, we are reminded that a voluntary organisation must act in terms of its constitution, and the attempt to clothe a decision to suspend with the character of a disciplinary proceeding is offensive to the language and intent of the ANC constitution.

[105] On this basis, the contention that Rule 25.70 stands to be struck down because it is in conflict with the ANC constitution (in particular, Rule 25 as read with Appendix 3) stands to be dismissed.

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[31] *Mashego v Mpumalanga Provincial Legislature and Others* [2014] ZALCJHB 285; (2015) 36 ILJ 458 (LC) at para 10–11.

Exclusion of the audi alteram partem principle in Rule 25.70

[106] Mr Magashule says that Rule 25.70 is susceptible to attack because it does not provide for the application of the rules of natural justice, including *audi*, in its formulation and therefore falls foul of the Constitution of South Africa.

[107] The extent to which the reach of the courts was excluded in enquiring into the decisions of tribunals established by voluntary associations was considered by the then Appellate Division in the matter of *Turner v Jockey Club of South Africa* (*Turner*) where the court quoted and relied on the principle which was expressed in the case of *Jockey Club of South Africa and Others v Feldman* as follows: -

"'[N]o statutory provisions come into play; it is a case of agreement to be bound by certain rules, namely the rules of the Jockey Club. Though these rules do not state expressly that the decision of the race-meeting stewards in regard to the conduct of a jockey in riding a horse shall be final, in my view they imply that, subject to a right of appeal to the local executive stewards and the Head Executive Stewards, such decision shall be final as regards the merits of questions enquired into, and that as regards such merits the jurisdiction of Courts of law to interfere with action taken in accordance with such decision shall be excluded. The exclusion of the jurisdiction of the Courts of law on the merits is not contrary to public policy, and our Courts have recognised that the decisions of such tribunals on the merits are final; but if the tribunal has disregarded its own rules or the fundamental principles of fairness, the Courts can interfere".'[32]

[108] Clearly private tribunals are obliged to apply the principles of fairness as part of their own rules, either expressly or by implication. In *Turner*, the court referred to the test to be applied in determining whether the fundamental principles of fairness are implied as follows: -

"The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in a contract.... The test is, of course, always subject to the expressed terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified."[33]

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[32] *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645C-E, quoting from *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 350-351.
[33] *Turner* (note 32 above) at 646A-B.

[109] While the law as expressed in *Turner* still holds good, it must of course be considered in the context of both the supremacy of the Constitution and the imperative expressed in *Ramakatsa* that the constitution of a voluntary association, such as the ANC, must be consistent with the Constitution of South Africa.

[110] It is not a proposition that sits comfortably in our constitutional dispensation that the obligation to observe the principles of natural justice can ever be excluded in disciplinary proceedings, even those that take place in private or contractual settings. To do so would undermine the commitment to fairness and natural justice which has become an integral part of our law. In *Modise and Others v Steve's Spar Blackheath*, Zondo AJP (as he then was), stated that "[t]he *audi* rule is part of the rules of natural justice which are deeply entrenched in our law."[34]

[111] The above approach deals largely with the operation of the principle of natural justice in the setting of disciplinary proceedings, as opposed to a decision to suspend as contemplated in Rule 25.70. For the reasons we have already given, a decision to suspend is not a disciplinary proceeding and therefore does not automatically attract the operation of the principles of natural justice.

[112] It would appear that *audi* would apply to a decision to suspend that is punitive in nature and not to a decision to suspend that is precautionary. Our law distinguishes between what is referred to as a "punitive" as opposed to a "precautionary" suspension. In *Long v South African Breweries (Pty) Ltd and Others* the Constitutional Court dealt with the precautionary suspensions as follows: -

"In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one. This is supported by *Mogale*, *Mashego* and *Gradwell*. Consequently, the requirements relating to fair disciplinary action under the LRA cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.

In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there

[34] *Modise and Others v Steve's Spar Blackheath* [2000] ZALAC 1 at para 15.

is a fair reason for suspension and secondly, whether it prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally, where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound."[35]

[113] While *Long* deals with precautionary suspensions in an employment context, precautionary suspensions within a political party were dealt with on a similar basis in *Lewis v Heffer and Others* in which the court held:

"But then comes the point: are the NEC to observe the rules of natural justice? In *John v Rees* ([1969] 2 All ER 274 at 305, [1970] Ch 345 at 397) Megarry J held that they were. He said:

'… suspension is merely expulsion *pro tanto*. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Accordingly, in my judgment the rules of natural justice prima facie apply to any such process of suspension in the same way that they apply to expulsion.'

Those words apply, no doubt, to suspensions which are inflicted by way of punishment, as for instance when a member of the Bar is suspended from practice for six months, or when a solicitor is suspended from practice. But they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply…."[36]

[114] We also do not understand the respondents to suggest that the principles of natural justice do not apply generally to Rule 25.70; they accept that it may, in

[35] *Long v South African Breweries (Pty) Ltd and Others* [2019] ZACC 7; (2019) 40 ILJ 965 (CC) at paras 24-25.
[36] *Lewis v Heffer and Others* [1978] 3 All ER 354 at page 364.

appropriate circumstances, be implied as a term of the agreement between the ANC and its members as evidenced by the ANC constitution and depending on the nature of the suspension.

[115] It must therefore follow that Rule 25.70 cannot be struck down as unconstitutional on the basis that it is silent on the principles of natural justice. The answer to that assertion is simply that where, on the one hand, the decision to suspend is taken in terms of Rule 25.70 is punitive in nature, the Rule may well require the applicability of the principles of natural justice. On the other hand, a precautionary suspension does not attract the principles of natural justice and cannot be rendered open to attack when those principles are not applied. This is the state of our law as expounded by the Constitutional Court in *Long*, and we deal later in this judgment with the question of whether the suspension of Mr Magashule was punitive or precautionary.

[116] That being the case, it also cannot be contended that Rule 25.70 is open to attack and may be declared to be inconsistent with the ANC constitution. It is open to the application of the rules of natural justice and in particular does not, at the level of principle, exclude the operation of those principles as Mr Magashule has sought to assert.

[117] The challenge to the constitutionality of Rule 25.70 must fail on this ground as well.

Reconciling Rule 25.70 with the Constitution of South Africa

[118] Mr Magashule also seeks the striking down of Rule 25.70 on the basis that it offends, and is in conflict with, various provisions of the Constitution. He submits in particular that: -

(a) It violates and/or limits the right to participate in political activity provided for in s 19 of the Constitution;

(b) It violates the principles of natural justice in that it does not provide for the right to be heard before the action is taken;

(c) It violates the principles of natural justice in that it does not provide for the right to an appeal;

(d) It violates the presumption of innocence guarantee in terms of s 35(3)(h) of the Bill of Rights in that it provides for a suspension before the determination of guilt or innocence; and

(e) It violates the rights to equality and human dignity in terms of s 9 and s 10 of the Bill of Rights.

[119] In dealing with this leg of the challenge, it may be useful to begin with the injunction in *Ramakatsa* that a voluntary association is not only obliged to observe and give effect to its own constitution, but also that its own constitution must be consistent with that of the country's Constitution.[37] On that basis we proceed to deal with the challenge in its various components.

The section 19 argument

[120] Section 19 of the Constitution provides as follows: -

"**19. 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; and

(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."

[37] *Ramakatsa* (note 2 above) at paras 16 and 72.

[121] Section 19 is critical in giving expression to the self-determination and associational rights of citizens, and allowing them to express their political will in joining the party of their choice and participating in its activities.

[122] In *Ramakatsa* this seminal right was recognised in the following terms: -

"… It cannot be gainsaid that success for political parties in elections lies in the policies they adopt and put forward as a plan for addressing challenges and problems facing communities. Participation in the activities of a political party is critical to attaining all of this."[38]

[123] Rule 4 of the ANC constitution deals with the procedure by which one can apply for and become a member, and generally provides that membership of the ANC shall be open to all South Africans who: are above the age of 18 years, irrespective of race, colour and creed; accept its principles, policies and programmes; and are prepared to abide by the ANC constitution and rules.

[124] Rule 5 deals with the rights and duties of members and provides in part as follows: -

"5.1 A member shall be entitled to:

5.1.1 Take a full and active part in the discussion, formulation and implementation of the policies of the ANC;

5.1.2 Receive and impart information on all aspects of ANC policy and activities;

5.1.3 Offer constructive criticism of any member, official, policy pregame or activity of the ANC within its structures;

5.1.4 Take part in elections and be elected or appointed to any committee, structure, commission or delegation of the ANC; and

5.1.5 Submit proposals or statements to the Branch, Province, Region or NEC, provided such proposals or statements are submitted through the appropriate structures."

[125] The same rule also provides some detail with regard to the duties that rest on its members. It says they shall, amongst other things: -

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[38] *Ramakatsa* (note 2 above) at para 66.

"5.2.1 Belong to and take an active part in the activities of his or her branch;

5.2.2 Take all necessary steps to understand and carry out the aims, policies and programmes of the ANC;

5.2.3 Explain the aims, policies and programmes of the ANC to the people;

5.2.4 Deepen his or her understanding of the social, cultural, political and economic problems of the country;

5.2.5 Combat propaganda detrimental to the interests of the ANC and defend the policies, aims and programme of the ANC;

5.2.6 Fight against racism, tribal chauvinism, sexism, religious and political intolerance or any other form of discrimination or chauvinism;

5.2.7 Observe discipline, behave honestly and carry out loyally the decisions of the majority and decisions of higher bodies."

[126] In terms of Rule 4.16, every member of the ANC on becoming a member must make the following solemn declaration:

"I, […], solemnly declare that I will abide by the aims and objectives of the African National Congress as set out in the Constitution, the Freedom Charter and other duly adopted policy positions, that I am joining the Organisation voluntarily and without motives of material advantage or personal gain, that I agree to respect the Constitution and the structures and to work as a loyal member of the Organisation, that I will place my energies and skills at the disposal of the organisation and carry out tasks given to me, that I will work towards making the ANC an even more effective instrument of liberation in the hands of the people, and that I will defend the unity and integrity of the Organisation and its principles, and combat any tendency towards disruption and factionalism."

[127] Rule 5.2.7 in turn obliges every member to, "[o]bserve discipline, behave honestly and carry out loyally the decisions of the majority and decisions of higher bodies."

[128] There are also extensive provisions in the ANC constitution that provide mechanisms for the ANC to hold its members accountable to the standards expected of them; to discipline them when necessary; and, in accordance with proper fair trial processes, to impose upon them a range of possible penalties which includes the payment of a fine, suspension or even expulsion.

[129] In addition to the above, provision is also made in Rule 25.70 for the temporary suspension of a member under circumstances other than those where disciplinary proceedings are contemplated.

[130] Thus, what emerges is that the ANC constitution clearly spells out how to seek and obtain membership of the ANC, and then having done so, how the rights of membership falls to be exercised. It must be so, and it was not disputed, that a political party has the right to take action against its' members in terms of its disciplinary and other processes, and that such action may well result in the suspension and or the expulsion of a member.

[131] Apart from the rights to political participation found in s 19 of the Bill of Rights, many voluntary associations also locate their formation and existence both philosophically and legally in the right of freedom of association found in s 18 of the Constitution which provides that "[e]veryone has the right to freedom of association," – something which was recognised in *Ramakatsa*.

[132] The learned authors Currie and de Waal describe these associational rights and their importance as follows: [39]

"Associational rights enable political parties to provide a bridge from individual citizenship to representative democracy. Associational rights secure the space for those intimate associations we deem crucial to our self-understanding and prevent the state from exercising too totalising an influence over decisions about who to love and how to love them. Associational rights similarly safeguard primordial religious and cultural attachments from undue state interference. Associational rights advance the goal of substantive equality by freeing labour to bargain with capital on a more equal footing, by freeing woman to form institutions suited to their particular needs, and by freeing historically disadvantaged groups to pursue shareholder equity through broad-based black economic empowerment initiatives.[40]

…

There is something about the very structure of association that makes them worth protecting: capture. Capture is a function of—one might even say a necessary and logical consequence of—the very structure of associational life. In short, capture justifies the ability of associations

[39] I Currie, J de Waal *The Bill of Rights Handbook* 6 ed (2013).
[40] Ibid at 397-398 (footnotes omitted).

to control their association through selective membership policies, the manner in which they order their internal affairs, and the discharge of members or users. Without the capacity to police their membership and dismissal policies, as well as their internal affairs, associations would face two related threats. First, without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Secondly, and for similar reasons, an association's very existence could be at risk. Individuals, other groups or a state inimical to the value of a given association could use ease of entrance into, and the exercise of voice in, an association to put that same association out of business.[41]

[133] In the context of political associations, Currie and de Waal go on to say that: -

"There are at least two likely situations in which the interest behind the restrictions might trump an organisation's associational freedom. The first situation is one in which the state wishes to alter the internal affairs of political parties. Generally, the state will attempt to justify its interference by arguing that the close relationship political parties and the state requires intervention in the party's internal affairs to ensure that the party serves its representative function in a representative democracy. For example, in some jurisdictions representative democratic politics demands that the members of political parties elect the candidates of their political party to represent them in elections.

The second situation is one in which the state attempts to open up restrictive party membership policies. The state might argue that democracy requires that political demands are made by representative groups of interested individuals…."[42]

[134] The sharp question that arises is whether a suspension of a member in terms of Rule 25.70 constitutes a violation or a limitation of the right in s 19 to participate in the activities of a political party or whether, as the ANC contends, it is a vital and important component of recognising the self-determination of a political party to regulate how participation is given effect to.

[135] In *Ramakatsa* the Constitutional Court, beyond articulating the importance of the rights contained in s 19 of the Bill of Rights, said the following in respect of the approach that must be taken in dealing with the validity (or otherwise) of the constitution of a political party in relation to s 19:

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[41] Ibid at 400 (footnotes omitted).
[42] Ibid at 406 (footnotes omitted).

"This right may be limited only on authority of a law of general application. … What this means is that constitutions and rules of political parties must be consistent with the Constitution which is our supreme law.

…

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."[43]

[136] Can it then be said that the ANC constitution is inconsistent with s 19 of the Constitution? A political party represents the coming together of people who share a common vision and a commitment to work together in advance of common objectives and values. The ANC constitution reflects its commitment to unite South Africa and work towards its liberation as well as social and economic justice for its people.

[137] Clearly the organisation is entitled to manage its membership to ensure that it admits only those that subscribe to what it stands for. Having done that, it is also (as *Ramakatsa* reminds us) entitled to internally regulate that membership and its participation in accordance with the broad objectives of the organisation. That is, in fact, the essence of what its associational rights and the recognition of its autonomy requires, and accords in all respects with *Ramakatsa* when it says that these are matters internal to political parties and that they are best placed to regulate them.

[138] The ANC constitution provides in the fullest manner for both membership and participation of its members in the affairs and activities of the ANC – as is evidenced by Rule 4 and 5 thereof. The language of both Rule 4 and Rule 5 do not constitute any limitation on the right of members to participate. The scope of the right in s 19 of the Constitution does not create a constitutional bar to the suspension and/or expulsion of a member. The general tenor and terms of the contract between the ANC and its members clearly contemplated that the ANC would give effect to and regulate how

[43] *Ramakatsa* (note 2 above) at para 72-73.

membership was to be exercised. In this regard, there are many examples of how this "giving effect to" takes place: -

(a) The ANC constitution provides that where a member or a branch has not paid dues for a specified period, they cease to be members of a branch in good standing as the case may be. This in turn affects the level and extent of their participation in the ANC. This is no more than an incidence of membership agreed upon in advance between the ANC and its members, and not a violation or a limitation of the right;

(b) The ANC constitution spells out with some detail the circumstances under which disciplinary processes may be initiated and the sanctions that may be imposed. This, again, is an incidence of membership agreed upon in advance and not a violation or a limitation of the right to participate; and

(c) The ANC Constitution, in Rule 25.70, sets out in clear terms the jurisdictional requirements that must be met before a suspension can be effected. This again is an incidence of membership and not a violation or a limitation of the right to membership and participation.

[139] To suggest that every attempt to regulate and give effect to how participation is to be effected would constitute a violation or a limitation of s 19, would not do justice to *Ramakatsa*, which reminds us that these are matters best left to the agreement between the party and its members (provided, of course, it passes the scrutiny of the Constitution).[44] Such an approach would also make unacceptable inroads into the associational rights of the ANC and its members, which include Mr Magashule, Mr Ramaphosa, Ms Duarte and many others.

[140] In line with the *dicta* in *Ramakatsa*, a court must take care not to second-guess the intention of the parties to the unique contract which represents the relationship between a political party and its members. Provided the constitution is not in conflict with that of the country and the organisation complies with its own constitution, how

[44] *Ramakatsa* (note 2 above) at para 73.

the right to participate is internally regulated and given effect to, is largely an internal matter and is best left to the party and its members to decide.[45]

[141] In doing so, they reflect what suits the structure and functioning of their organisation, and what is best suited to the character of the organisation and the values they have collectively committed themselves to. In this regard, the right of an organisation to discipline, suspend and/or expel its members in defined circumstances does not stand in competition to the right to participate, but rather goes to the heart of how a voluntary association regulates the right to participate in accordance with its own autonomy and the associational rights it and all its members enjoy – as *Ramakatsa* reminds us.[46]

[142] Mr Magashule relies on Brickhill and Babiuch who state: -

"…[t]he purpose of … s 19(1) is to ensure that citizens are able freely to align themselves with the political cause or party of their choice without fear of adverse consequences."[47]

[143] The same authors, however, take the view that:

"…In so far as the constitutions of the various political parties constrain members of political parties or other individuals from participating, … s 19(1) will be of limited assistance. It will not enable applicants to challenge admission criteria or members to dispute intra-party decision-making mechanisms or disciplinary procedures.…"[48]

[144] In any event, there was no suggestion that acquisition of membership in the ANC did not carry with it the understanding that such membership was the subject of internal regulation carefully spelt out in the ANC constitution. Furthermore, there is nothing objectionable about the manner in which the participation of the members of the ANC is regulated. We have already dealt with the application of the rules of natural justice in the context of Rule 25.70 and will later deal with how the jurisdictional requirements of Rule 25.70 must also be complied with, all of which point compellingly in the direction that, even when a voluntary association deals internally with the

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[45] Ibid.
[46] Ibid.
[47] J Brickhill and R Babiuch 'Political Rights', in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 03-07) at 45-30.
[48] Ibid at 45-34.

regulation of participation including the suspension of a member, it is not at liberty to do as it pleases. It must still act lawfully.

Rule 25.70 violates the right to be heard

[145] We have already dealt with this argument in the context of the internal challenge to Rule 25.70 and the same argument and conclusions will apply with equal force to this leg of the challenge. The question therefore is whether there should be *audi* and, if so, whether there was *audi*. The first question has already been answered in that *audi* could have application and cannot therefore be invoked as a basis for attacking the constitutionality of Rule 25.70. The second question as to whether *audi* was given effect to, will be dealt with in the part of this judgment that deals with the attack on the letter of suspension.

Rule 25.70 violates the right of appeal

[146] Mr Magashule contends that Rule 25.70 is unconstitutional to the extent that it does not provide for a right of appeal against any suspension effected in terms of the rule and argues that it "amounts to a separate breach of the constitutional rights of the applicant, albeit under the general rubric of *audi.*"

[147] The right of appeal upon which Mr Magashule relies is to be located in Appendix 3 which we have already dealt with, as well as in s 35(3)(o) of the Constitution. Section 35(3)(o) provides as follows: -

"(3) Every accused person has a right to a fair trial, which includes the right— (o) of appeal to, or review by, a higher court."

[148] For the reasons already given, Mr Magashule cannot call into aid Appendix 3, as its scope and application is expressly intended to cover disciplinary proceedings and the process under Rule 25.70 is not a disciplinary proceeding.

[149] The reliance on the Constitution is also misplaced as the right of appeal arises in the context of criminal proceedings and is part of the rights afforded to accused persons in terms of s 35(3). Mr Magashule is not an accused person facing criminal proceedings within the ANC, and he does not enjoy a right of appeal against the

decision to suspend him. The ANC constitution does not create such a right in the context of Rule 25.70; nor can it be said that such a right should exist because, simply put, our law does not recognise an automatic right of appeal as part of the principles of natural justice. The Constitution recognises such a right in s 35(3), but does so in the limited context of a criminal trial and not beyond that.

Presumption of innocence

[150] Mr Magashule says that Rule 25.70 applies to persons who are charged and not convicted and that accordingly, it violates the presumption of innocence as it seeks to visit a sanction on someone who is entitled to the benefit of the presumption of innocence. The argument goes that the suspension of an innocent person stands in contrast to the presumption of innocence, is a violation of the presumption, and therefore falls to be set aside as being unconstitutional.

[151] The presumption of innocence is an important principle in ensuring fundamental fairness in the process of determining guilt or innocence, and it understandably has been a hallmark of what would constitute fair trial hearing. Appendix 3 affirms its importance in the context of disciplinary proceedings, while s 35(3)(h) of the Bill of Rights entrenches it in criminal proceedings.[49] Beyond that, there is no principle that suggests it finds application in civil proceedings. This right regulates the conduct of criminal proceedings. Its operation is confined to those proceedings. Currie and de Waal make the point that, "…the presumption of innocence is a specified constitutional right that arises only in the context of an accused's right to a fair trial."[50]

[152] If Mr Magashule were correct, the presumption of innocence would preclude any disciplinary proceedings or, indeed, any civil litigation against the perpetrator of a crime. That, according to the respondents, would be an obvious absurdity.

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[49] The relevant provision in s 35(3), which deals with arrested, detained and accused persons, provides as follows:
"(3) Every accused person has a right to a fair trial, which includes the right— (h) to be presumed innocent, to remain silent, and not to testify during the proceedings; …"

[50] Currie and de Waal (note 39 above) at 755.

[153] The presumption of innocence does not, therefore, attach to him in that context and it can neither stand in the way of the operation of Rule 25.70, nor constitute a violation of his rights when Rule 25.70 is invoked.

[154] In *Prinsloo v Van der Linde* the Constitutional Court specifically considered the application of the presumption outside of criminal proceedings and concluded as follows: -

"…an *onus* in a civil case cannot be equated with the overall onus of proof in criminal cases. In *Mabaso v Felix* the Appellate Division described the fundamental difference between the incidence of the *onus* of proof in civil and criminal cases in the context of assault as follows:

'In its anxiety that no accused should be punished for a crime without proof of his guilt our common law deliberately places the burden of proving every disputed issue, save insanity, on the prosecution. But in civil law . . . considerations of policy, practice, and fairness *inter partes* may require that the defendant should bear the overall *onus* of averring and proving an excuse or justification for his otherwise wrongful conduct.'

There is indeed nothing rigid or unchanging in relation to the question of the incidence of the *onus* of proof in civil matters, no established 'golden thread' like the presumption of innocence that runs through criminal trials. As Davis AJA, quoting *Wigmore*, put it:

'. . . all rules dealing with the subject of the burden of proof rest "for their ultimate basis upon broad and undefined reasons of experience and fairness".

As long as the rules relating to the *onus* are rationally based, therefore, no constitutional challenge in terms of s 8 will arise."[51]

[155] It is for these reasons that it is also not open to Mr Magashule to seek to challenge the validity and the constitutionality of Rule 25.70 on the basis that the presumption of innocence was not afforded to him. The attempt to apply it in the context of Rule 25.70 is misplaced and not sustainable.

The challenge located in s 9 and s 10 of the Bill of Rights

[51] *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC) at paras 35-38.

[156] Mr Magashule contends that his suspension results in the violation of his rights to equality and dignity located in s 9 and s 10 of the Bill of Rights, and that he is entitled to the relief he seeks on those grounds as well.[52] Whilst the right to dignity is central in our constitutional order, and at the level of principle, lawful and unlawful collateral conduct may often have the effect of impairing the dignity of a person, it has often been recognised that while lawful conduct may have the effect of impairing the dignity of a person, it is often an inevitable and unavoidable consequence of the exercise of power or rights and obligations. In *Makwanyane* for example, the Court accepted that although imprisonment inevitably impairs a person's dignity, the State has the power to impose imprisonment as a form of punishment.[53] Similarly, a lawful eviction, or for that matter a lawful suspension, may well impair the dignity of those affected but that cannot stand in the way or serve as an insurmountable obstacle to the eviction or the suspension as the case may be.

[157] Accordingly, if the suspension of Mr Magashule accords with the ANC's constitution and the jurisdictional requirements set out therein, then it can hardly be contended that it stands to be set aside because its effect may be to infringe upon the dignity of Mr Magashule. If that were to be the case, then all lawful conduct would stand to be challenged on this basis alone and the right to dignity would invariably trump the lawful exercise of public and private power including contractual rights and obligations. Simply put, if Mr Magashule's suspension is found to be lawful in all respects, then he cannot call into aid the right to dignity. We deal later with the lawfulness or otherwise of Mr Magashule's suspension.

[158] In so far as the equality challenge is concerned, neither Rule 25.70 nor the step aside resolution constitutes discrimination in the sense that there was an irrational differentiation made between different categories of persons.[54] In particular, we

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[52] Section 9(1) provides:
"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms…
(3) … (5)"
Section 10, titled "Human dignity" provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."
[53] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC) at para 142.
[54] In *Prinsloo* (note 51 above at para 24), the CC noted:
"It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday

conclude that the categories of persons who fall to be dealt with by the NEC resolutions is both rational and properly justified, and in accordance with the resolutions of the 54th National Conference. The challenge on this basis must also fail.

The step-aside rule

[159] The issue relating to the step-aside principle arose from the resolutions adopted by both the National Conference in 2017, the 54th National Conference of the ANC (the four resolutions) and those of the NEC meeting of 31 July to 2 August 2020.

[160] The resolutions of both the 54th National Conference and the NEC deal with the issue of ANC members accused of, or alleged to be involved in corrupt activities, and having to step aside from their positions in the party for that reason.

[161] The validity of the 54th National Conference's four resolutions is not in dispute. As indicated earlier, they provide, under the heading "ANC Credibility and Integrity" for members accused of or reported to be involved in corrupt activities to account for their conduct to the Integrity Commission. Failure to subject themselves to the processes of the Integrity Commission would result in disciplinary action by the party. They may also be suspended if they fail to provide a satisfactory explanation, or voluntarily step aside pending the outcome of the disciplinary, investigative or criminal proceedings.

[162] The other two resolutions, under the heading "Fighting Crime and Corruption", impose an obligation on the ANC to take decisive action against all members involved in corruption including those who use money to influence conference outcomes. The second resolution requires of leaders and members who are alleged to be involved in corruption to, "where necessary, step aside," pending clearance of their names in connection with the allegations.

[163] The issue raised by Mr Magashule concerns the validity of the NEC resolutions. His case is that the NEC's resolutions narrowed down the resolutions of the 54th National Conference and are, therefore, *ultra vires* the powers of the NEC. In essence,

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life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element. . . ."

the contention is that the NEC's resolutions amended the 54th National Conference's resolutions, even though it was not empowered to do so.

[164] Mr Magashule contended that the first amendment by the NEC which had the effect of "narrowing down" the four resolutions happened at the meeting held on 31 July to 2 August 2020.

[165] Mr Magashule contended that the second amendment, having the effect of limiting the four resolutions, was done at the NEC meeting held between 28 and 30 August 2020.[55] The NEC decided that members who were formally charged with corruption or other serious crimes were required to immediately step aside. In contrast, those who were reported to be involved in corruption and other serious crimes, but who were not formally charged, were not required to immediately step aside. Instead, they would be provided with an opportunity to explain themselves before the Integrity Commission – it was only if they were unable to provide an acceptable explanation that they might face suspension.

[166] It was argued that the NEC, in its resolutions, impermissibly made the step-aside principle peremptory only against members formally charged with corruption or serious crimes, and absolved those who were "alleged to be involved in corrupt activities". Those who were involved in corrupt activities were only required to appear before the Integrity Commission, according to Mr Magashule.

[167] It is argued in the heads of argument, on behalf of Mr Magashule, that the consequences of the alleged narrowing of the 54th National Conference's resolutions are the following:

"84.1. Anyone accused of involvement in corrupt activities would be absolved from the application of the step-aside rule;

84.2. All those accused of corruption and other serious crimes against the people, including those charged in courts, are directed to step aside without more;

84.3. All those facing disciplinary and investigative procedures will be absolved from the rule;

[55] See paras [32] above, which sets out the resolutions in detail.

84.4. The right to proffer an acceptable explanation by those who face or [sic] prosecutorial procedures as guaranteed in resolution 3 was removed in its entirety;

84.5. Those charged in court who fail to step aside must be suspended in terms of Rule 25.70. In so doing the NEC repurposed the constitutionally prescribed process set out in Rule 25.70. Whereas suspension in terms of the rule is not mandatory, the NEC overrode that and replaced it with a mandatory requirement to suspend."

[168] It was further argued that the amendment or "narrowing down" of the resolutions also impacted Rule 25.70 of the ANC constitution.

[169] It is common cause that only the National Conference, as the highest structure of the ANC, can amend its resolutions. In other words, the NEC does not have the power to amend the resolutions of the National Conference.

[170] The respondents argued that the NEC did not amend or narrow down the 54th National Conference's resolutions. The NEC resolutions, according to them, were in the form of guidelines intended to "put flesh to the bones of the principles adopted by the National Conference."

[171] From a reading of the 54th National Conference resolutions, it is apparent that they were formulated as broad and general principles. They do not constitute a rule or determine the procedure to be followed in each case. For instance, paragraph 2 of the four resolutions makes reference to those, "accused of, or reported to be involved in, corrupt practices...".[56] It does not provide the specifics as to who would report the corruption, what form the report would take, and to whom the report would be made. Similarly, paragraph 3 refers to people who "face disciplinary, investigative or prosecutorial procedures."[57] It does not state who should provide the explanation, nor does it indicate to whom the explanation must be made. What is clear, is that these are principles reflecting the concern with the scourge of corruption within the ANC. The 54th National Conference's report reflects that the ANC had taken an unequivocal stand in dealing with corruption and sought to eradicate it.[58]

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[56] See para [32] above.
[57] Ibid.
[58] See para [31] above.

[172] It seems clear that the 54th National Conference adopted a principle but did not formulate the procedures or guidelines. It left it to the NEC to give substance to the principle and implement it by the adoption of appropriate rules. The NEC then adopted the Guidelines in February 2021.

[173] Turning to the development and the formulation of the Guidelines by the NEC, we disagree with Mr Magashule that the Guidelines should be read as an amendment, repurposing, or narrowing down of the 54th National Conference's resolutions.

[174] As alluded to earlier, in giving effect to the step-aside principle, the NEC developed the implementation guidelines, which distinguished between: (a) those members formally charged with corruption or other serious crimes; (b) those not formally charged but accused of involvement in corruption and criminal activities; and (c) those convicted of criminal offences.

[175] There can be no doubt from a reading of the minutes of the NEC meeting of 13 to 14 February 2021 that, in adopting the Guidelines developed by a team led by the Treasurer General, the NEC intended to do nothing more than establish procedures to implement the four resolutions of the 54th National Conference. Accordingly, the minutes of the meeting show that the NEC intended the Guidelines to give proper effect to the 54th National Conference resolutions in that: -

(a) The NEC reaffirmed the 54th National Conference resolutions; and

(b) The NEC adopted the Guidelines which it described as "the guidelines on implementing resolutions of the 54th National Conference".

[176] The Guidelines are what they purport to be, and their purpose appeared in the analysis of the 54th National Conference's report wherein the resolutions were intended to give effect to the step-aside principles, this was also recorded in the minutes of the NEC.

[177] The other point made by Mr Magashule in support of his contention that the Guidelines amounted to a "repurposing" of the 54th National Conference resolutions, is that the Guidelines excluded certain categories of members envisaged in the 54th National Conference resolutions. In this regard, the Guidelines distinguished between

members who had been charged with corruption or other serious crimes, and those who had been accused of such, but not indicted. They thus did not exclude any persons that were accused of being involved in any form of corruption.

[178] The distinction in the categorisation and approach in dealing with the two groups, in our view, is logical and rational. The Guidelines do not change the substantive aspects of the resolutions of the 54th National Conference. What the Guidelines do, is to introduce two distinct procedures to deal with the implementation of the four resolutions. For those who have been indicted, formal investigations have already been conducted by the NPA, and a decision made to proffer formal charges against them. The allegations against them at this stage are elevated to the level of formal criminal proceedings before a court.

[179] As set out earlier in the judgment, the Guidelines provide that members who are indicted are required to immediately step-aside, pending the finalisation of their case. Where they fail to do so, the SG or NWC may refer the matter to the Integrity Commission, who considers the matter and makes recommendations to the NEC. The NEC makes a decision after deliberating the recommendation. In the event that the NEC directs the member to stand down, and they fail to do so, they may be suspended in terms of Rule 25.70. Furthermore, the Guidelines provide that a member who has been indicted may also face disciplinary processes within the ANC for misconduct in breach of Rule 25.70.[59]

[180] In respect of members facing the allegations of corruption or other serious crimes, but who have not yet been indicted, the Guidelines prescribe a separate procedure. An initial investigation is conducted, then, depending on the outcome of the investigation, the matter may be referred to the Integrity Commission, which may provide a report with recommendations to the NEC (or other relevant body). The NEC will consider the report and, guided by the recommendations of the Integrity Commission, make a determination as to how the matter should be dealt with going forward.[60]

[59] In terms of paras 3.1 – 3.3 of the Guidelines. See para [47] above.
[60] In terms of para 3.4 of the Guidelines. See para [48] above.

[181] In light of the above analysis, we believe that Mr Magashule's contention that the Guidelines do not give full and proper effect to the step-aside principle is unsustainable. In our view, the validity of the Guidelines would not be substantially impacted negatively, even if it was found that they did not give full and proper effect to the step-aside principle. If that was the case, then the remedy would not be to invalidate the Guidelines, but rather to supplement them or compel the NEC to implement those parts of the resolutions that the Guidelines may have left out.

[182] The contention of Mr Magashule is also not sustainable when regard is had to the fact that Rule 25.70 of the ANC constitution limited its application to those members who had "been indicted to appear in a court of law" on any charge. The authority of the NEC and the power it exercised in adopting the guidelines is clear; it had to, out of necessity, calibrate its Guidelines with the provisions of the ANC constitution. It is to be noted that the resolutions of the 54th National Conference did not have the effect of amending Rule 25.70 and thus the ANC was itself bound by its constitution. Mr Magashule's suspension accordingly falls squarely within the provisions of the Rule.

[183] It is important to note that, as one of the Officials, Mr Magashule participated in the process of the development and adoption of the Guidelines. There is no evidence that he ever challenged the extent of or the validity of the Guidelines during this process. The issue of the validity was also not raised during the meeting with the Integrity Commission. He instead informed the Integrity Commission that he would comply with the step-aside principle.

Mr Magashule's suspension

[184] Reverting to the issue of whether *audi alteram partem* applies automatically in cases of precautionary suspension, it is clear that previously some authorities, such as *Muller v Chairman, Ministers' Council, House of Representatives*,[61] supported the approach that it was required. In that case, the court held that the interests of fairness demanded a hearing before suspension.[62] It should be noted that the court in that case

[61] *Muller and Others v Chairman, Ministers' Council, House of Representatives, and Others* 1992 (2) SA 508 (C).
[62] Ibid at 523H.

granted an urgent interdict in which the applicants were officers in the public service.

[185] In holding that *audi* was required in suspension cases, the court in *Muller* rejected the approach which had been adopted in the English case of *Lewis v Heffer and Others,*[63] that *audi* did not apply in cases of suspension provided for in the relevant legislation.

[186] The correct approach to adopt currently is set out, as stated earlier, in *Long v South African Breweries*,[64] where the Constitutional Court upheld the decision of the Labour Court that an employer was not required to give an employee an opportunity to make representation prior to a precautionary suspension. The approach in *Long* would apply to Mr Magashule's case as his suspension was precautionary. The suspension was in the interests of the ANC to address the risk which, on the facts, it faced. The 30-days' notice to step aside served as an additional advantage to Mr Magashule which he could have used to make his representations as to why he believed the suspension was inappropriate.

[187] In the circumstances, we find that *audi* was not required prior to the suspension of Mr Magashule. It should be noted that it was not Mr Magashule's case that the suspension was not warranted on the basis that there were no justifiable reasons for it.

[188] In the event it is found that Mr Magashule, on the facts and the circumstances, was entitled to *audi*, we find, for the reasons appearing below, that he was afforded a hearing before his suspension.

[189] The question of a hearing, in the context of a suspension, entails whether Mr Magashule was given information underlying the reasons for the proposed suspension and whether he was afforded an opportunity to make representations as to why he should not be suspended.

[190] The answer as to whether he was afforded a hearing before the suspension has to be found in the nature of *audi* as an aspect of natural justice. In its application, it is a flexible rule that does not require rigid and formalistic procedures. In this respect,

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[63] *Lewis v Heffer* (note 36 above).
[64] *Long v South African Breweries* (note 35 above).

the Labour Court in *Mabilo and Another v Mpumalanga Provincial Government and Others* accepted that there is a need for flexibility when considering the one facet of the rules of natural justice, being, *audi alteram partem*.[65] Thus, in assessing whether a person was afforded a hearing, the court has to consider the totality of the facts and circumstances of each case. In this respect, author Cora Hoexter states in *Administrative Law in South Africa*:-

"Procedural fairness in the form of *audi alteram partem* is concerned with giving people an opportunity to participate in the decisions that will affect them, and — crucially — a chance of influencing the outcome of those decisions."[66]

[191] The learned author further states that: -

"Fairness is a highly variable concept. In South African law what makes a hearing 'fair' has always depended on the circumstances, and that holds true today. Our courts readily accept that fairness is not something that can be reduced to a one-size-fits-all formula. While placing emphasis on fundamentals such as notice of threatened action and an opportunity to make representations to the relevant administrator, they have refused to lay down rigid rules concerning the content of fairness."[67]

[192] In our view, whilst the above is set out in the context of administrative law, the same principles apply in the broader context.

[193] In considering the facts and circumstances of this case, it is clear that Mr Magashule was indeed afforded a hearing before he was suspended. He participated in all the processes relating to the development, formulation, and adoption of the resolutions of the 54th National Conference regarding this matter, including the resolutions of the NEC that resulted in the formulation of the Guidelines on the implementation of the step-aside principle.

[194] In considering the above, it cannot be said that Mr Magashule was not aware that he was a "candidate" for suspension. He was aware, or ought to have been aware, that he fell into the category of members of the ANC who had been indicted for serious criminal offences, and that he would be expected (in the first instance) to voluntarily

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[65] *Mabilo and Another v Mpumalanga Provincial Government and Others* [1999] ZALC 62; (1999) 8 BLLR 821 (LC) at paras 20-21.
[66] Hoexter (note 30 above) at 363.
[67] Ibid at 363-365.

step aside within 30 days from the date of the resolution, failing which he would be suspended.

[195] The above analysis clearly reveals that Mr Magashule was fully armed with the information that his failure to step aside voluntarily would possibly lead to his suspension. He was aware of, and knew, that the reason for his suspension would be that he was indicted for serious offences, including corruption. The question that then arises in the context of assessing whether he was afforded a fair hearing before his suspension, is whether he was afforded an opportunity to show cause why he should not be suspended.

[196] In our view, the totality of the facts and circumstances of this case do not support the proposition that Mr Magashule was not allowed to state the reasons why he should not be suspended. He was afforded ample opportunity, at various levels of the process leading to his suspension, to make representations as to why he should not be suspended. He had a chance to state his case on 12 December 2020 when he appeared before the Integrity Commission. In this respect the report of the Integrity Commission indicates that he participated fully in the meeting, was well prepared, thorough and that his presentation was comprehensive.[68] It should be recalled that the Integrity Commission recommended that he be suspended, and also that he had informed it that he would step aside if the NEC required him to do so.

[197] The suggestion by Mr Magashule's counsel that the report of the Integrity Commission is irrelevant because the decision-maker suspending him was the NEC is unsustainable. The ANC runs most of its affairs through structures and subcommittees. The Integrity Commission is one of such structures whose responsibility it is to deal with the integrity of the ANC members that may, amongst others, be indicted to appear in court on the issue of corruption.

[198] Mr Magashule was present when the Guidelines for the step-aside principle were adopted. There seems to be no doubt that he would have appreciated during the

[68] The opening paragraph of the Integrity Commission is informative and apposite of the issue of whether Mr Magashule had the opportunity to make out his case as to why he should not be suspended. It states: "[t]he Secretary General met with the Integrity Commission on Saturday 12 December 2020. It was a long meeting and the SG covered many issues, His brief to the IC was thorough and comprehensive. He came to the meeting very well prepared and offered to share with the IC all the documentation to which he referred, which he later did."

deliberations that he would be suspended once the Guidelines were adopted, unless he was to step aside voluntarily.

[199] The opportunity to make representations about his suspension availed itself again at the NEC meeting of 26 to 29 March 2021. The most important aspect of this meeting is a resolution that the step-aside principle should be implemented. As stated earlier, the resolution unequivocally required members who had been charged with corruption or other serious crimes to step aside within 30 days, failing which they should be suspended in terms of Rule 25.70 of the ANC constitution. The only reasonable inference to draw from this resolution is that Mr Magashule was aware that he would be suspended if he did not voluntarily step aside.

[200] Mr Magashule had a further opportunity to make representations regarding the suspension on 12 April 2021, when the NWC confirmed that those indicted for corruption for serious offences would be suspended if they did not voluntarily step aside within 30 days of the date of that resolution.

[201] In addition to the above, Mr Magashule had the opportunity to make a representation regarding his suspension at the following meetings:

(a) The meeting with the DSG and the Treasurer General during the first or second week of April 2021, where he was advised to step aside.

(b) The meeting with Officials on 2 May 2021. The purpose of that meeting was for Mr Magashule to give feedback on his meeting with the former leaders of the ANC regarding the issue of stepping aside, and what their views were regarding him being required to step aside. The DSG states in the main answering affidavit that, “[w]e gave him [Mr Magashule] audience.” There is no evidence as to why he did not use that opportunity to make representations as to why he believed that suspension would be inappropriate in the circumstances.

(c) The last meeting which Mr Magashule attended before his suspension was that of the NWC on 3 May 2021, where it was resolved that the step-aside resolution would be implemented. It was specifically resolved at the meeting that those who have been charged with corruption or other serious crimes would be suspended in terms of Rule 25.70 of the ANC constitution. At this meeting, the

NWC instructed Officials to issue letters of suspension to the affected persons. It was clear at the end of the meeting that the decision to suspend him was taken, and a letter to that effect would be sent to him.

[202] In addition to the above, it is important to note that at the NEC's special meeting of 8 to 10 May 2021 it recorded the following:

"26. The NEC noted that the Terms of Reference and Rules of Procedure of the Integrity Commission provide that any member may appeal against a decision of the Integrity Commission to the NEC and that the NEC is the final arbiter of appeals against Integrity Commission decisions.

27. Furthermore, the Guidelines and Procedures on Stepping Aside provide that: *'When a member, office-bearer or public representative wishes to appeal the findings and recommendations of the Integrity Commission, the NEC or PEC may establish an independent committee to review the findings and recommendations of the Integrity Commission, and to report to the NEC. Once this process has been exhausted the NEC shall take a final decision on the matter.'…."*

[203] It is important to note that there is no evidence that Mr Magashule took any of the steps mentioned above.

[204] In conclusion, not only do we find that if Mr Magashule was for any reason entitled to *audi*, he was indeed afforded same, we also find that in the circumstances of his case, taking into account his position in the ANC; the serious nature of the charges against him; the interests of the ANC in ensuring that corruption is acted upon swiftly and efficiently; and that the ANC decided that its interests would be adversely affected if he was to remain in his position, we are satisfied that the suspension was both fair and lawful. We also find that any prejudice that Mr Magashule may have suffered was ameliorated by the fact that his suspension is with pay as envisaged in *Long*.

The DSG's authority to suspend Mr Magashule

[205] The other two grounds upon which Mr Magashule challenges his suspension are: (a) non-compliance with Rule 25.70; and (b) non-compliance with Rule 16.9 of the ANC constitution. He contends, in this regard, that Ms Duarte did not have the power

to suspend him, because there was lack of compliance with the provisions of both Rule 25.70 and Rule 16.9 of the ANC constitution.

[206] Rule 16.9 sets out the powers of the DSG and provides as follows:

"The Deputy Secretary General shall assist the Secretary General, deputise for him or her, when necessary, and carry out the functions entrusted to the Secretary General by the National Conference, the National Council, the NEC, or the NWC and shall be an *ex-officio* member of the NWC."

[207] Mr Magashule contends, in relation to the provisions of Rule 25.70, that it is only the Secretary General acting under authority of the NEC and the NWC at national level that is authorised to suspend members. At the provincial level, it is the Provincial Secretary acting on the authority of the PEC and the PWC who can suspend members. The power to suspend, according to him, rests exclusively in the Secretary General.

[208] He argues further that neither the NEC nor the NWC has the power to authorise any official or individual to exercise the power to suspend. Put in another way, no one except the Secretary General has the power to suspend in terms of the ANC constitution. This means, that in suspending him in terms of Rule 25.70, the DSG acted *ultra vires* the ANC constitution.

[209] In our view, the above contention has no merit. Mr Magashule's suspension must be understood within the context where the NEC, at its meeting of 26 to 29 March 2021, resolved that all its members who had been charged with corruption or other serious crimes must step aside within 30 days – failing which they would be suspended in terms of Rule 25.70 of the ANC constitution.

[210] It is not in dispute that Mr Magashule is one of the members who had been charged with corruption. He was, accordingly, one of the members of the ANC who was expected to step aside or face a suspension.

[211] The decision that members charged with corruption should step aside or be suspended was confirmed by the NWC at its meeting of 12 April 2021.

[212] The NWC, further at its meeting of 3 May 2021, confirmed the decision of the NEC of 26 to 29 March 2021, that those accused of corruption should step aside or

face suspension. It was also decided to implement that decision and issue an instruction, "…that the necessary letters must be written to the affected members…" by the office of the Secretary General.

[213] The DSG implemented the decision of the NEC and NWC and issued the letter suspending Mr Magashule.

[214] In the answering affidavit, deposed to by the DSG, Ms Duarte states that she issued the letter of suspension following the decision of the NWC that it was in the "best interest" of the ANC that Mr Magashule should be suspended. She further stated that she was "equally satisfied" that it was in the best interest of the ANC to suspend Mr Magashule. Mr Magashule did not dispute that it was in the best interest of the ANC that he should be suspended. This in our view, satisfies the jurisdictional requirements under Rule 25.70 of the ANC constitution.

[215] The contention by Mr Magashule that his suspension was unlawful for lack of compliance with the requirements of Rule 25.70 has no merit and thus stands to be rejected.

[216] We now turn to Mr Magashule's contention that in terms of Rule 16.9 of the ANC constitution it is only him and him alone, as the SG of the ANC, that can affect suspension of members of the ANC.

[217] In terms of Rule 16.9 of the ANC constitution, the DSG may deputise the SG when necessary and may carry out the functions of the SG so entrusted by either the NEC or NWC. The respondents contended that the power of the DSG in general, is to "deputise for the SG, to stand in, or to act as a substitute for the SG."

[218] It is clear on the facts of this case that the NEC or the NWC could not issue the instruction that Mr Magashule should suspend himself. This would have placed him in a situation of conflict of interest - as was found in *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another*.[69] In this respect the court in that case held that "[u]nder common law a director may not place herself in a position in which she has, or can have, a personal interest, which conflicts or possibly

[69] *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another* [2015] ZAWCHC 113; 2015 (6) SA 338 (WCC) at para 59.

conflicts with her duties to the company."

[219] Similarly in *President of the Republic of South Africa v Office of the Public Protector and Others*,[70] the court found that although the President had the power to appoint the judicial commission of inquiry into the allegations of State capture, he could not do so as he was implicated in the improper conduct referred to in the Public Protector's remedial action. The court agreed with the Public Protector's remedial action that although, in law, the power to appoint commissions of inquiries vested with the President, he was so conflicted that it would be improper for him to exercise the power. In this respect the court said: -

"The President has a clear personal interest in the outcome of the commission. The President is implicated in the "State Capture" Report and is at the centre of the allegations regarding the Gupta family's involvement in the appointment of Cabinet Ministers. Moreover, his son's business interests are heavily implicated by the allegations regarding the award of contracts by SOEs to Gupta-owned businesses."[71]

[220] The discretion to delegate the power and authority to issue the letter of suspension rested with the NEC and the NWC. Accordingly, the DSG had the authority and power to issue Mr Magashule with the letter of suspension once so delegated by the relevant structures. The suspension of Mr Magashule cannot be set aside on this ground.

Whether the suspension of Mr Ramaphosa is valid until set aside

[221] Mr Magashule issued Mr Ramaphosa with a letter of suspension on 5 May 2021. The respondents challenged Mr Magashule's authority to suspend Mr Ramaphosa, contending that he was not authorised to do so by the NEC or NWC.

[222] In this letter Mr Magashule made two claims: -

(a) The first was that he acted on the authority of the NWC; and

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[70] *President of the Republic of South Africa v Office of the Public Protector and Others* [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP).
[71] Ibid at para 142.

(b) The second was that he suspended the President of the ANC in terms of Rule 25.70.

[223] He stated in his founding affidavit that he acted reluctantly "and only out of a sense of duty" because the NWC had instructed him to do so. This was untrue.

[224] Mr Ramaphosa contends that Mr Magashule's purported suspension of him as the President of the ANC under Rule 25.70 was fatally flawed for the following reasons:-

(a) Mr Ramaphosa has not been indicted on any charge. He was accordingly not eligible for suspension under Rule 25.70;

(b) Neither NEC nor the NWC authorised Mr Ramaphosa's suspension as required by Rule 25.70;

(c) Mr Magashule failed to exercise the discretion required by Rule 25.70;

(d) Mr Magashule's purported suspension of Mr Ramaphosa was done in bad faith and with the ulterior purpose of retaliation. The President put it as follows:

> "The circumstances and manner of his suspension of me made it quite clear that the applicant acted out of vengeful spite against the decision of the NWC that he be suspended together with all those members who had been charged with corruption and other serious offences but had failed to step aside."

[225] Thus, Mr Ramaphosa contends that Mr Magashule's purported suspension of Mr Ramaphosa was fatally flawed.

[226] In Mr Magashule's replying affidavit, heads of argument and his submissions to the Court, Mr Magashule changed course and contended that he, in fact, suspended Mr Ramaphosa under authority delegated to him by the NEC on 18 January 2018. At such meeting it was resolved that: -

"The NEC delegates to the Secretary General and the National Officials the power to take all steps Necessary or warranted for the due fulfilment of the aims end objectives of the ANC and the due performance of the NBC's duties and to provide reports to the NEC from time to time in this regard".

[227] Mr Magashule relies on *Latib v The Administrator, Transvaal*,[72] which he argues entitles him to jettison his old case and adopt a new one in this way. The court stated in *Latib*—

"…where there is no direction in the statute requiring that the section in terms of which a proclamation is made should be mentioned, then, even though it is desirable, nevertheless there is no need to mention the section and, further, that, provided that the enabling statute grants the power to make the proclamation, the fact that it is said to be made under the wrong section will not invalidate the notice."[73]

[228] Mr Ramaphosa contends that reliance on *Latib* is ill-conceived. As Justice Cameron stated in *Howick District Landowners Association v Umngeni Municipality*: -

"The doctrine does not validate action taken in deliberate reliance on a provision that does not authorise it, even where another provision exists that may warrant it…. Nor can an original, general power to act cure an invalid exercise of a specific power…. In *Harris*, as in *Quid Pro Quo*, there was no question of a mere administrative error or oversight: the decision-maker deliberately chose to act in terms of a provision that did not authorise what was sought to be done. In dealing with an argument based on *Latib*, the CC pointed out that its applicability 'must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting'. Applying *Quid Pro Quo*, the CC held that it was not open to the decision-maker now to rely on a different provision to validate what had been invalidly done under the provision invoked: the otherwise invalid notice could not be rescued by reference to powers the decision-maker might possibly have had but failed to exercise. I do not read *Harris* as putting *Latib* in doubt, but as confirming the proper scope of its application." [74]

[229] Mr Ramaphosa contends that, in any event, Mr Magashule's new case is fatally flawed for the following reasons:

(a) First, an applicant may not raise a new cause of action in reply;[75]

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[72] *Latib v The Administrator, Transvaal* 1969 (3) SA 186 (T).
[73] Ibid at 190H-191A.
[74] *Howick District Landowners Association v Umngeni Municipality and Others* [2006] ZASCA 153; 2007 (1) SA 206 (SCA) at para 22.
[75] *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* [2019] ZACC 38; 2020 (1) SA 368 (CC) at paras 18-19; *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; 2021 (3) SA 593 (SCA) at paras 60-61.

(b) Second, because Mr Magashule only raised his new case in reply, without proof that the NEC indeed delegated powers to him as he claims, and whether the delegation is still in force;

(c) Third, whatever the scope of the NEC's delegation, it could not and did not vest Mr Magashule with a power to override the decisions of the NEC and the NWC as he purported to do in this case. His purported suspension of Mr Ramaphosa flew in the face of their decisions. They could not authorise him to act in defiance of the authority of the NEC and the NWC. Such a delegation would be wholly unconstitutional; and

(d) Fourth, Mr Magashule did not purport to act under the delegated powers. They allowed him only "to take all steps necessary or warranted for the due fulfilment of the aims and objectives of the ANC and due performance of the NEC's duties….". However, when he suspended Mr Ramaphosa, Mr Magashule purported to act under Rule 25.70 and not under this delegated power. He therefore did not, at the time, apply his mind to the question of whether the suspension of Mr Ramaphosa was "necessary or warranted for the due fulfilment of the aims and objectives of the ANC and the due performance of the NEC's duties…." He accordingly cannot claim to have acted under that power.

[230] Mr Magashule contends that Mr Ramaphosa did not seek to declare his suspension invalid. He thus contends that that the suspension must be deemed to be valid and effective until set aside. He relies, in this regard, on *Oudekraal Estates (Pty) Ltd v City of Cape Town*[76] and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*,[77] where it was stated that "…even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

[231] This contention is ill-conceived. The principles elucidated in *Oudekraal* and *Kirland* only apply to administrative action, that is, the exercise of public power by

[76] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 26.
[77] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty)* Ltd [2014] ZACC 6; 2014 (3) SA 481 (CC) para 101.

organs of the state. This was made clear in *Oudekraal* in a passage cited with approval by the Constitutional Court in *Kirland*:

"The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."[78]

[232] Mr Magashule's suspension of Mr Ramaphosa, on the other hand, was the exercise of a private contractual power on behalf of a private voluntary association. It was accordingly not subject to the *Oudekraal/Kirland* rule. There was thus no obligation on Mr Ramaphosa to apply for his suspension to be declared invalid.

[233] It is Mr Magashule who seeks a declarator of validity in respect of Mr Ramaphosa's suspension, and the Court is obliged to enquire into the lawfulness of the action in question in respect of which the declarator is sought. To that extent there is no substance to the view advanced by Mr Magashule that, in the absence of a challenge by Mr Ramaphosa to his suspension, the Court is obliged to grant the declarator. If that were so, the Court would be compelled to grant a declarator in respect of conduct that is not lawful, and not administrative action as set out in *Oudekraal* – this is indeed a startling and unsustainable proposition.

The withdrawal and apology

[234] Mr Magashule asks in prayer 2.4 of his Notice of Motion for an order declaring that the "instruction" that he apologise for his purported suspension of the Mr Ramaphosa be declared "unlawful and unenforceable". He contends that if the relief sought at prayer 2.3 is granted, it will follow that the purported instructions to withdraw and/or apologise were baseless and ought to be declared unlawful.

[235] He submits further that the letter was written in the *bona fide* belief that it was lawful. The only theory in support of alleged *mala fides* is the "retaliation" theory. He

[78] *Oudekraal* (note 76 above) at para 26*; Kirland* (note 77 above) at para 101.

also contends that the NEC was aware of the nature and extent of the authority delegated to him on 18 January 2018.

[236] Having rejected his submissions in relation to Mr Ramaphosa's suspension, his contentions in this regard are obviously flawed and there is no basis to grant any relief under this head.

[237] The respondents contend that the letter the DSG addressed to Mr Magashule on 12 May 2021 was headed '*Request to withdraw and apologize*'. The body of the letter also made this clear: -

"The NEC directed the National Officials to request you to withdraw your purported 'letter of suspension' to the President and to apologize publicly to the ANC, its structures and members within a set timeframe with the proviso that your failure, refusal or neglect to do so will constitute misconduct and the ANC should institute disciplinary action against you in accordance with the ANC Constitution.

On the directive of the National Officials, you are requested to withdraw your purported 'letter of suspension' to the President and to apologize publicly to the ANC, its structures and members within 48 hours from the date of this letter."

[238] The respondents argue that: -

"The NEC had the authority to make the request. It is the highest organ of the ANC between National Conferences and has the authority to lead the organisation, subject to the provisions of the ANC Constitution. It may discipline any member, including the Secretary General.

…in terms of rule 4.16 of the ANC Constitution, Mr Magashule took an oath as a member of the ANC to inter alia 'respect the Constitution and the structures and to work as a loyal member of the Organisation'. He is also required by rule 5.2.7 of the ANC Constitution to observe discipline, behave honestly and carry out loyally the decisions of the majority and decisions of higher bodies. The NEC is one such higher body.

Respecting the ANC Constitution and its structures, especially higher bodies, include respecting the NEC and the request that it issued when the ANC Constitution is breached by a member, such as Mr Magashule. Mr Magashule breached the ANC Constitution when he unlawfully attempted to suspend the President."

[239] Having found that the purported suspension of Mr Ramaphosa was in conflict with the ANC's constitution, there is no basis to grant relief setting aside the request to withdraw and apologise. We are not called upon to determine the appropriateness of any action the ANC may wish to take arising from this and do not so. Having dismissed Mr Magashule's arguments on Mr Ramaphosa's suspension, it follows axiomatically that prayer 2.4 cannot be granted.

Conclusion

[240] In concluding, we have interrogated Mr Magashule's claim to the relief he seeks against both the largely undisputed facts as well as the applicable legal framework to which reference has been made. Reverting to the three imperatives that we set out in the introduction to this judgment, it is clear that the recognition by the ANC of the nature and the extent of corruption and its impact on society (and on the ANC), triggered the need for decisive action by the party. On this score, there appears to be no dispute between the parties, and the call for decisive action in any event resonates with the objectives of the ANC as set out in its constitution, in particular, the commitment to social justice and the elimination of inequality.

[241] Secondly, the important associational and participation rights found in s 18 and s 19 of the Bill of Rights create the necessary space for the ANC to bring together its leadership and members in the pursuit of a common vision and common objectives. In doing so the ANC, through its constitution, created the model and mechanisms best suited to its structure and needs. Provided that such a model, evidenced by the ANC's constitution, is consistent with the Constitution of South Africa and further, provided that the ANC is loyal to its own constitution, it is largely left to the ANC to best regulate its internal functioning. This is what all members of the ANC sign on to when they elect to be a part of the ANC and this is the glue, as it were, that binds them together. It is a choice the Court must respect within the limits we have described, but it is also a choice that has consequences for each such member in the context of their associational rights.

[242] Finally, we are satisfied, for the reasons that we have given, that the ANC constitution is consistent with that of the country and that the decision to suspend Mr Magashule was: (a) effected in terms of the ANC constitution; (b) was

precautionary in nature; and (c) complied with the law relevant to precautionary suspensions. However, in fairness to Mr Magashule, we have also satisfied ourselves that his suspension accorded with the principles of natural justice in the event that we may have erred in characterising his suspension as precautionary. In finding that there was no basis to confirm the purported suspension of Mr Ramaphosa, we pointed out that the mandatory requirements to effect such a suspension in terms of Rule 25.70 were absent. There could therefore be no basis to activate Rule 25.70 as Mr Magashule purported to do in support of his decision to suspend Mr Ramaphosa.

[243] It is for these reasons, which are fully dealt with in this judgment, that the relief sought must be refused.

[244] The application accordingly falls to be dismissed. Mr Magashule has not made out a case for the relief he seeks and, in particular, has not shown that: -

(a) the ANC step-aside rule or regime and/or Rule 25.70 of the ANC constitution is unlawful, unconstitutional, invalid and null and/or void *ab initio*;

(b) the suspension letter issued to him by the DSG, Ms Duarte, on 5 May 2021 is unlawful, unconstitutional, invalid and null and/or void *ab initio*;

(c) the suspension of Mr Ramaphosa should be considered valid and/or effective until lawfully nullified; and

(d) the request for him to apologise for issuing the suspension letter to Mr Ramaphosa, and to withdraw the letter, is unlawful and unenforceable and should be set aside.

Costs

[245] There is no reason to depart from the principle that costs should follow the result and all the parties take the view, with which we agree, that the nature of the matter and the legal issues involved warrant the costs of three counsel. These costs should, however, exclude the duplicated documents which we have dealt with in the application to strike out.

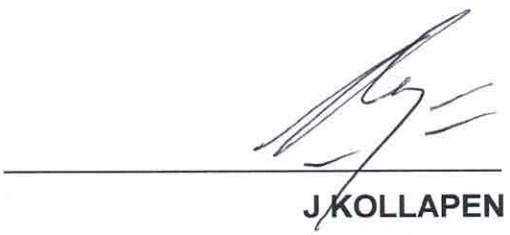
Order

[246] We accordingly make the following order: -

1. The application to strike out is dismissed with costs, including the costs of three counsel, which costs are to exclude the costs of the duplicated documents as set out more fully in Annexures A and B to the Notice in terms of Rule 6(15).

2. The application for condonation by Mr Ramaphosa in respect of the late filing of his answering affidavit is granted.

3. The application incorporating the relief sought in paragraphs 2.1 – 3 of the Notice of Motion, is dismissed with costs, including the costs of three counsel.



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Date of hearing:	24-25 June 2021
Date of judgment:	9 July 2021

Appearances:

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