

African National Congress



National Disciplinary Committee of Appeal (NDCA)

OFFICE OF THE CHAIRPERSON: CDE JEFF RADEBE

**IN THE NATIONAL DISCIPLINARY COMMITTEE OF APPEAL
(NDCA)
HELD AT ST GEORGES HOTEL, IRENE, PRETORIA
ON 19 SEPTEMBER 2014**

CASE NUMBER: 1/2014

In the appeal of:

**MMELI BIYELA
JABU DUBE
MANDLA HADEBE
TWO BOY HADEBE
SPHAMANDLA HLATSWAYO
SICELO KHUZWAYO
ZANELE KUBHEKA
LUCKY MABASO
JOMO RV NKOSI
KINGDOM SHONGWE
MANDLA RADEBE**

**1st Appellant
2nd Appellant
3rd Appellant
4th Appellant
5th Appellant
6th Appellant
7th Appellant
8th Appellant
9th Appellant
10th Appellant
11th Appellant**

and

AFRICAN NATIONAL CONGRESS

Respondent

FINDING

Background and proceedings before the PDC

1. The PEC in Kwazulu Natal instituted disciplinary proceedings against 26 members, including the 11 Appellants, for various acts of misconduct in terms of Rules 25.5(c), 25.5(i), 25.5(j), 25.5(k) and 25.5(o) aa.bb. and cc of the previous ANC Constitution.
2. It was alleged that the 26 members conducted a sit-in at the Respondent's regional office in Emalahleni in Kwazulu Natal on 7 and 8 September 2011, rendered the office dysfunctional by their conduct, issued press statements which brought the Respondent into disrepute, refused to accept instructions from the PEC and engaged in factional activity.
3. The Appellants were represented by comrade Muzi Ntshangase and the other charged members by comrade Sbonelo Mtshali.
4. The 26 members were suspended in terms of the ANC Constitution pending the finalisation of the disciplinary hearing.
5. The PDC hearing commenced on 24 October 2011 but was postponed by mutual agreement.
6. The PDC convened again on 12 December 2011 and the Provincial Presenter, comrade Roy Ainslie, led evidence. The matter could not be finalised and was postponed.
7. Thereafter the representatives of the charged members and the Provincial Presenter communicated with each other for the purpose of arranging a mutually acceptable date for the continuation of the disciplinary hearing.
8. According to the record, these communications continued until March 2012 when it was agreed that the PDC hearing would be held on 16 July 2012 at the ANC office in Durban.
9. On 16 July 2012 twelve of the charged members pleaded guilty to the charges except the charge that they made media statements. Another three of the charged members (Morgan Mlambo, Sizwe Khoza and Mlamule Kunene) also pleaded guilty to the charges including the charge that they made media statements which brought the ANC into disrepute. Their representative, comrade Sbonelo Mtshali, was present and confirmed the guilty pleas.

10. The PDC imposed the following sanction:-

10.1 That the charged members tender a written apology to the Respondent;

10.2 That the charged members were suspended for two years which was further suspended for a period of three years, subject to certain conditions;

10.3 That the charged members undergo a 3 month political education programme under the guidance of the PEC.

11. Except for comrade Zanele Kubheka (7th Appellant), the other Appellants and their representative did not attend the PDC hearing.

12. The PDC decided to re-convene on 23 July 2012 in Durban to continue with the hearing of the Appellants.

13. This was communicated by the PDC to the 7th Appellant, who was present, and subsequently by the Provincial Presenter to the Appellants' representative.

14. On 18 July 2012 the Appellants' representative wrote to the PDC Chairperson requesting that the PDC hearing be held in Newcastle for the convenience of the Appellants. The representative sent a follow-up email on 20 July 2012 to the Provincial Presenter. The request was denied.

15. On 23 July 2012 the PDC proceeded with the disciplinary hearing in Durban in the absence of the Appellants and their representative.

16. The PDC found the Appellants guilty and made the following Finding and imposed the following sanction:-

16.1 Mmeli Biyela (1st Appellant) was found guilty on all charges. The other Appellants were found guilty except for the charge of making media statements.

16.2 Mmeli Biyela (1st Appellant), Jomo RV Nkosi (9th Appellant), Lucky Mabaso (8th Appellant) and Zanele Kubheka (7th Appellant) were suspended for 3 years and had to undergo a 6 month political education programme under the guidance of the PEC.

16.3 Siphamandla Hlatswayo (5th Appellant), Two-Boy Hadebe (4th Appellant), Mandla Hadebe (3rd Appellant), Jabu Dube (2nd Appellant), Kingdom Shongwe (10th Appellant), Sicelo Khuzwayo (6th Appellant) and Mandla Radebe (11th Appellant) were suspended for 2 years and had to undergo a 3 month political education programme under the guidance of the PEC.

17. The eleven Appellants lodged an appeal with the NDCA on 13 August 2012.

Application of NDCA Rules of Procedure

18. Having perused the documents of record and the Appellants' Notice of Appeal, the NDCA was satisfied that this appeal could be adjudicated and finalised in terms of Rule 11.4 of the NDCA Rules of Procedure without the necessity of convening a formal appeal hearing.

Notice to the parties

19. The Appellant's representative and the Respondent were notified that the NDCA would be sitting on 19 September 2014 in Pretoria to adjudicate and finalise the appeal and the Respondent was invited to make written submissions by 14 September 2014.

20. The Respondent chose to abide by the decision of the NDCA.

Appellants' grounds of appeal

21. Appellants argued that the PDC hearing was procedurally unfair because, in terms of Rule 25.10 of the previous ANC Constitution, the PDC should have concluded the disciplinary hearing within 6 months. Since this time limit was not adhered to, the PDC Finding against the Appellants is null and void.

22. Although procedural in nature, the Appellants advanced the following 'substantive' arguments:-

22.1 That the charges were politically motivated;

22.2 That the Appellants were prosecuted in absentia;

22.3 That the PDC did not inform the Appellants that the proceedings would continue on 23 July 2012; and

22.4 That the PDC had no formal proof that the change of venue was formally communicated to the Appellants.

Appellants' argument that the PDC proceedings should be set aside in terms of Rule 25.10.

23. The NDCA agrees that Rule 25.10 under the previous Constitution placed an onus on the Respondent to deal with disciplinary proceedings expeditiously and complete the process within 6 months.
24. The rationale for the rule was to prevent the Respondent from instituting charges of misconduct against a member and then adopting a dilatory attitude towards finalisation of the disciplinary proceedings.
25. In the present case, there is evidence that the PDC commenced with the disciplinary hearing on 24 October 2011 and led evidence on 12 December 2011 with the intention of commencing and finalising the hearing. The proceedings were then postponed by mutual consent.
26. There is also evidence that the parties communicated with each other until March 2012 to set a mutually acceptable date for the continuation of the hearing.
27. In the circumstances no fault can be attributed solely to the Respondent for delaying the proceedings beyond the 6 month time limit prescribed by Rule 25.10 of the previous ANC Constitution.
28. Generally, the PDC is entitled to nominate any date for the expeditious finalisation of disciplinary proceedings. However, the date of 16 July 2012 was mutually agreed to by the parties.
29. In the view of the NDCA, where a charged member willingly agrees to dates beyond the 6 month limit prescribed by Rule 25.10 of the previous Constitution, he or she is deemed to have waived the right to invoke prescription as a defence.
30. Consequently, the Appellants' argument that the PDC Finding should be set aside because the 6 month time limit prescribed by Rule 25.10 was exceeded, is rejected.

Appellants' argument that the charges were politically motivated

31. The Constitution contains sufficient safeguards to prevent disciplinary proceedings from being used to settle political scores and personal vendettas. If such circumstances prevailed, it was open for the Appellants to apply for the charges or the proceedings to be set aside.
32. Although the Appellants suggested in their appeal that the charges could have been instituted to settle political scores, no cogent evidence was advanced in this regard to persuade the PDC.
33. Moreover, the NDCA finds it difficult to ignore the charge and the evidence that a sit-in did in fact take place to warrant the institution of the charges.
34. Consequently, the NDCA rejects the argument that the charges were politically motivated.

Appellants' argument that the Appellants were prosecuted in absentia

35. As pointed out by the PDC, the fact that the representative on 18 July 2012 requested the PDC to move the venue to Newcastle for the hearing on 23 July 2012 is adequate proof that the representative was aware that the PDC was sitting on 23 July 2012.
36. In the circumstances the representative had a duty to inform the Appellants of this date and to appear before the PDC himself.
37. If the PDC was not amenable to a change in venue, it was still the duty of the representative to appear before the PDC in Durban and persuade the PDC to move to a venue in Newcastle. In the view of the NDCA, his failure to do so prejudiced the Appellants.
38. The Appellants must also accept that their failure to appear before the PDC in Durban and without explanation, notwithstanding financial hardship, entitled the PDC to continue with the hearing in their absence.
39. Both the Appellants and their representative should have known that the ANC Constitution makes provision for disciplinary hearings to be conducted in absentia and that adverse findings could be made

against charged members.

40. Consequently, the NDCA rejects the Appellants' argument that they were prosecuted in absentia. The NDCA finds that the PDC acted within the ambit of the ANC Constitution on 23 July 2012.

Appellants' arguments that the PDC did not inform the Appellants that the proceedings would continue on 23 July 2012 and had no formal proof that the change of venue was formally communicated to the Appellants

41. It is common cause that the Appellants' representative was aware that the PDC was due to continue with the hearing on 23 July 2012 in Durban. As the chosen representative of the Appellants, it was his duty to communicate this information to the Appellants.
42. There was no duty on the PDC to inform the Appellants personally when they had a representative.
43. In the view of the NDCA, the Appellants must have known that the hearing was taking place in Durban on 23 July 2012 because the instruction to move the hearing to Newcastle could only have come from the Appellants.
44. Consequently, the NDCA rejects the Appellants' arguments that the PDC did not inform the Appellants that the proceedings would continue on 23 July 2012 and that there was no formal proof that the change of venue was formally communicated to the Appellants.

NDCA evaluation of the merits

45. All the Appellants were positively identified by the witnesses to have participated in the sit-in on 7 and 8 September 2011. The NDCA also notes that none of the Appellants denied that they were positively identified or put forward an alibi defence (that they were somewhere else on those days).
46. Consequently, the NDCA rejects the Appellants' grounds of appeal and confirms the PDC Finding on the merits.

NDCA evaluation of the sanction imposed by the PDC

47. The NDCA is of the view that the 26 charged members, including the

Appellants, were found guilty of very serious offences.

48. The ANC is a voluntary organisation and, as such, members have an absolute duty to maintain discipline within the organisation and obey instructions from elected office bearers who have the obligation to maintain discipline.
49. In the absence of discipline, the ANC will be put at risk of not achieving its strategic objectives as set out in the Constitution.
50. All members, including the Appellants, should be mindful of the membership oath they swore to when they joined the ANC, the character and values of the organisation and President Zuma's directive at the NGC in September 2010 that discipline would be enforced without exception.
51. The NDCA is of the view that the PDC erred in imposing a suspended sanction in the case of those charged members who pleaded guilty. The PDC placed too high a premium on the fact that they pleaded guilty and failed to accord due weight to the seriousness of the acts of misconduct.
52. In the view of the NDCA, those charged members who pleaded guilty should have been sanctioned to an effective term of suspension. However, since they have not appealed, the NDCA has no basis to interfere with the sanction imposed by the PDC.
53. The PDC also made a distinction in the sanctions imposed on the Appellants. Comrades Biyela, Nkosi, Mabaso and Kubheka were found to be the ring leaders of the group and were suspended for 3 years.
54. The NDCA was not able to find sufficient evidence to support the PDC Finding to make the distinction. In the NDCA's view, such a Finding could only have been made if evidence of pre-planning of the sit-in was placed before the PDC.
55. Although the Appellants did not have an opportunity to give evidence in mitigation, the NDCA has accepted that they were first offenders.
56. The NDCA is also not persuaded by the imposition of compulsory education programmes on the Appellants *after* serving their terms of suspension. If the PDC intended to rehabilitate the Appellants, then,

in the view of the NDCA, there was no reason for not conducting the education programme concurrently with the period of suspension.

57. The Finding of the PDC that the Appellants should undergo rehabilitation after serving their effective term of suspension had the effect of being punitive and, consequently, resulted in an outcome which could not have been intended by the PDC.
58. For the above reasons the NDCA finds sufficient grounds to vary the sanction imposed by the PDC as follows:-

58.1 All the Appellants are suspended for an effective period of two years.

58.2 All the Appellants are eligible to resume their membership of the ANC with effect from 1 August 2014 (two years after the date of the PDC Finding) upon payment of their membership fees.

59. Finally, the NDCA wishes to apologise to the Appellants and their representative for the delay in finalising this appeal. Due to the onerous duties placed on NDCA members in the preparation for the National Conference in Mangaung in 2012, the change in the membership of the NDCA and substantial amendments to Rule 25 of the ANC Constitution, this appeal was inadvertently overlooked.

Dated at Pretoria this 19th day of September 2014

J. Radebe

**JEFF RADEBE
CHAIRPERSON
NDCA**

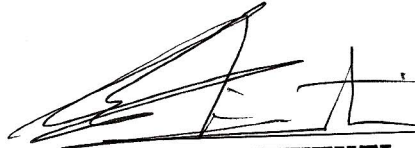
G. N. M. Pandor

**NALEDI PANDOR
MEMBER
NDCA**

**PRAVIN GORDHAN
MEMBER
NDCA**



**NGOAKO RAMATLHODI
MEMBER
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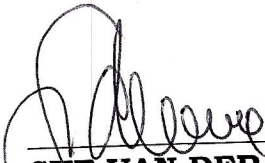
**GUGILE NKWINTI
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