



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 44983/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 28 MARCH 2022

SIGNATURE

In the matter between:

GERHARD VOSLOO NO

First Applicant

THE SOUTH AFRICAN MEDICAL

ASSOCIATION TRADE UNION (under administration) Second Applicant

and

THE SOUTH AFRICAN MEDICAL

ASSOCIATION NPC

First Respondent

THE REGISTRAR OF LABOUR RELATIONS

Second Respondent

J U D G M E N T

This matter has been heard in open court and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

For many years the First Respondent, being the South African Medical Association (SAMA) has been collecting membership fees, subscriptions and the like by utilizing the procedure created by section 13 of the Labour Relations Act 66 of 1995 (the LRA). This section caters for the deduction of trade union dues from the salaries of medical practitioners who are government employees via the PERSAL/PERSOL payroll system. The South African Medical Association Trade Union (SAMATU) to which some of the medical practitioners in government employ belong, has been placed under administration. It was previously fully administrated by SAMA. SAMATU's Administrator demanded payment of all the amounts which had historically been deducted via the PERSAL/PERSOL system and paid over to SAMA. When this demand was not met, the Administrator applied to finally wind up SAMA.

[2] The SAMA/SAMATU relationship

- 2.1 SAMA was established in 1927. It is registered as a non-profit-company. It is run as a voluntary association with currently some 16 000 members. The practitioners who are members have been referred to by various epitaphs in the papers, but mostly the term "doctor" was used as the applicable generic description. I shall continue to do so.
- 2.2 Prior to the advent of the LRA, SAMA also sought to represent its members who were in government employ (the employed doctors) in employer/employee negotiations. In fact, its memorandum of incorporation stated that it was "*... committed ... to fulfill the role as a trade union to represent the labour interest and rights of all medical doctors who are employees ...*".

2.3 As a member of SAMA, doctors receive the following services and benefits (irrespective of whether they are employed doctors or not):

- individual and collective representation aimed at influencing medical and health legislation, regulation and policies;
- updates on legislation, medical ethics, labour relations, continuing professional development and coding products and practice tools;
- representation for individuals and groups in all matters affecting the profession;
- industrial relations assistance, support and representation;
- private practice assistance and medical coding support services;
- Continuing Professional Development services, including access to advice, information, recording systems and point-earning opportunities;
- a monthly hard copy of the South African Medical Journal (SAMJ), incorporating Continuing Medical Education (CME).

2.4 With the advent of the LRA and, in the words used in the Heads of Argument delivered on behalf of the Administrator, “...*in order to better represent the medical profession ... SAMA perceived a need ... to register as a trade union*”. This gave rise to the birth of SAMATU which was registered as a trade union in terms of section 96(7)(a) of the LRA. It was initially known as MASA trade union.

2.5 Although trade unions are required to be independent, as a result of the historical facts referred to above and while SAMA continued to exist as a

voluntary association, it exercised administration and control over SAMATU, which was treated as an operating division of SAMA.

- 2.6 On 7 October 2002, MASA trade union changed its name to SAMATU. All other aspects of administration and control remained unchanged and over the years SAMATU concluded various collective bargaining agreements with employers, other trade unions and bargaining councils. It also partnered with another trade union, DENOSA, representing the nursing profession to obtain more organisational rights in terms of the LRA.
- 2.7 After SAMATU had obtained organisational rights in the public sector, it put in place stop order facilities in order to collect trade union subscriptions from the PERSAL/PERSOL payroll system in respect of doctors employed by the government. It needs to be noted that doctors in private practice would have no need to belong to a trade union (and might be precluded from membership) while doctors in government employ might opt for membership of either or both SAMATU and SAMA. Trade union membership is not compulsory. There are therefore doctors in government employ who might opt to only be a member of SAMA and not of SAMATU. The figures reflecting these options became apparent only after litigation had ensued and will be referred to hereunder.
- 2.8 On 10 October 2019 SAMATU was placed under administration.
- 2.9 Up to the date immediately prior to SAMATU being placed under administration, its administration was in totality conducted by SAMA. This included the receipt of trade union dues and bargaining counsel fees into SAMA's bank account, but it also included the covering of SAMATU's expenses as well as collective bargaining expenses from this

same account. There appears to have been a complete *commixtio* of funds and administration.

[3] The “Van Niekerk judgment”

- 3.1 Dissatisfied with the level of co-operation (or level of obstruction) received from SAMA in respect of the Administrator’s efforts to “*take control of all assets owned, held or administered by or on behalf of the Trade Union*”, the Administrator obtained an order on the Labour Court under case number J1973/19.
- 3.2 The Administrator, for purposes of the current application, relies on the following extract of the judgment given in the Labour Court by Van Niekerk J: “[24] ... *Given that the stop order deductions in place in respect of the doctors employed in the public sector were deductions made in terms of section 13 of the LRA solely for the benefit of the union, the union is entitled to a declaratory order to that effect, as well as a declaratory order to the effect that all employees in respect of whom such stop orders were and are being made, are union members, at least for as long as they have not terminated their membership of the union*”.
- 3.3 Pursuant to the above finding, the learned judge in the Labour Court made the following declarations as part of the order issued by him: “2. *It is declared that all amounts deducted in favour of the second applicant (SAMATU) on the PERSAL payroll system pursuant to the right to the deduction of trade union subscriptions and levies in terms of section 13 of the Labour Relations Act, were remitted in terms of section 13(3) to and for the account of the second applicant 3. It is declared that in the absence of any proof to the contrary, all SAMA members in respect of whom such a stop order deductions were and continued to be made through the PERSAL system, are and remain members of the second applicant*”.

- 3.4 What must also be understood, both in relation to the Administrator's case, as well as the declarations made in the Labour Court, is that it is the individual employee or doctor who has the authority to determine what may or may not be deducted, via the PERSAL system, from that individual's salary (either in terms of section 13 of the LRA or otherwise, except as statutorily prescribed).
- 3.5 Pursuant to the judgment in the Labour Court, this exercise of personal authority resulted in the following: the Administrator utilized the judgment to proceed from the premise that every doctor who had used the PERSAL system to pay money to SAMA/SAMATU, was by default a SAMATU member and not a SAMA member at all. Once this view was made clear to the doctors, 4 000 of the employed doctors indicated that they wished to remain SAMA members only. They have shifted the payment of their SAMA membership from the PERSAL stop order system to direct debit orders. This constitutes "*proof to the contrary*" as contemplated in paragraph 3 of the Labour Court order.
- 3.6 Apart from the 4 000 employed doctors who have already elected to cease PERSAL payments, a further number of doctors have expressed a desire to remain members of SAMA and are in the process of changing their PERSAL instructions.
- 3.7 Even if one were to rely on rounded off figures, of the 16 000 members of SAMA, 8 000 are doctors in private practice and of the remaining 8 000 members, 4 000 chose to remain SAMA (and not SAMATU) members, leaving only 4 000 members of SAMATU falling in paragraph 3 of the declaration issued in the Labour Court, i.e 25% of the initial total membership.

- 4.1 It is against the above backdrop that the Administrator's claim must be adjudicated. It is for an amount of some R307 million. It encompasses the total of all the PERSAL deductions historically made in terms of section 13 of the LRA. It does not, however, account for the portion of those amounts intended by the payers thereof, being the individual doctors, to be in respect of their SAMA membership (irrespective of the mechanism whereby the funds have been deducted or paid over and whether this had been statutorily permitted or not). Neither does it account for a calculation of what portion of those funds have since been disbursed in respect of SAMATU's expenses. It also does not take into account what portion of those funds have been disbursed in respect of collective bargaining expenses incurred by SAMATU.
- 4.2 SAMA had commissioned a forensic investigation to be conducted by Adams and Adams Forensic Investigative Services (Pty) Ltd. An affidavit by a Dr Van Romburgh, a Chartered Accountant, together with a detailed report by him has been produced. Both the report and the affidavit are extensive. The attempt made by these documents was to "unscramble the omelette" or to separate the *commixtio* of funds referred to in paragraph 2.9 above which has occurred due to all the deducted funds having been paid into SAMA's account. The result of this detailed exercise was that, once contributions and expenses have been properly apportioned between SAMA and SAMATU and the respective members, SAMATU, representing the employed doctors, may be indebted to SAMA, representing its other members being the private doctors, in an amount of more than R 15, 5 million.
- 4.3 Even if this amount may be open to some doubt and even if the Labour Court judgment is taken as the justification for an initial starting point of a claim for the gross amount of historical deductions, once an accounting

exercise is done as to the nett amount actually accrued in favour of SAMATU as intended by those doctors who had authorized the deductions or a calculation has been made of what amount may be due by SAMATU to SAMA, it cannot be found that it been established with a preponderance of probabilities that SAMATU (or the Administrator) is a creditor of SAMA.

[5] The legal position and the application thereof

- 5.1 Section 81(1)(c)(ii) of the Companies Act, 71 of 2008, provides that a court may order a solvent company to be wound up if one or more of the company's creditors have applied to court for a winding-up order.
- 5.2 The Administrator further relies on the deeming provision created by section 345(1)(iii) of the "old" Companies Act, 61 of 1973. Read with section 344 of that Act, it provides that a company is deemed to be unable to pay its debts as they become due and payable if such a company has failed to pay, secure or compound a creditor's claim for three weeks after it has been served with a written notice to do so.
- 5.3 However, the deeming provision is reliant on the existence of an undisputed claim, for in the absence thereof, there can be no creditor entitled to rely on the deeming provisions or entitled to claim a winding-up of the company.
- 5.4 The case law is further clear that, where the claim is disputed on *bona fide* and reasonable grounds, a winding-up order should not be granted. A company need not prove the absence of a claim, but merely the disputing thereof on those grounds. This principle is known as the "Badenhorst Rule" after the decision in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348C.

- 5.5 The application of the Badenhorst Rule, particularly at the stage where a final winding-up order is sought, requires the Administrator to convince the court on a balance of probabilities of the existence and extent of his claim, in the case of it being disputed. This comprises of a two-stage enquiry. The first stage is the enquiry into the *bona fides* of the dispute and the second is that of the determination of the reasonableness of the dispute regarding the claim itself. See *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 218F – 220C.
- 5.6 In respect of the first stage, both parties accuse each other. The Administrator complains that SAMA is obstructive and disregards the contents of the Labour Court declarations and on the other hand SAMA accuses the Administrator of abusing the process of this court in pursuing a termination of a voluntary association as an ulterior purpose to seeking a winding-up of a non-profit company for liquidation purposes. On the papers before me, I am unable to find that the disputing of the claim has been raised *mala fide* by SAMA.
- 5.7 In respect of the second stage, one must appreciate that the minutiae of the disputes regarding the calculation of the actual amounts run into an extensive number of pages. It is not only not the kind of dispute which should be determined by way of motion proceedings, but the extent thereof indicate that the simplistic application of the declarations made by the Labour Court, in the fashion that the Administrator seeks to do, is not only inappropriate but does not reflect the true or correct extent of SAMA's liability. Put differently, a serious dispute of fact has been raised in respect of the Administrator's claim. Even if the dispute may only in the end relate to the extent thereof, that dispute impacts on the question of whether the court is dealing with a solvent or insolvent company. The dispute has not been raised without foundation and, despite the Labour Court's declarators,

it strikes at the heart of the Administrator's *locus standi* as creditor. See also in this regard the *locus classicus* of *Kalil v Decotex* 1988 (1) SA 943 (A). I am therefore similarly convinced that the "defence" has been made on sufficiently reasonable grounds to satisfy the Badenhorst Rule. The result is that a winding-up order should not be granted.

5.8 Even if I may be wrong in either or both of the above conclusions, the court has an overriding discretion to exercise in respect of the granting of a winding-up order, particularly in circumstances where the Administrator, in the alternative ground relied on, claims that it is just and equitable that SAMA be wound-up.

5.9 In considering the judicial exercise of the discretion vested in this court, the following are taken into account:

- despite the declarations made in the Labour Court, the current situation was one brought about by the acquiescence by SAMA, SAMATU and their respective or joint members over a number of years;
- during those years, the administration and the discharging (or support in the discharging) of SAMATU's objectives and obligations had been done by SAMA;
- these historical facts indicate that there was over the years no such pressing urgency regarding the claims now advanced by the Administrator that they need be resolved in a winding-up application, rather than by way of an action (or mediation or settlement). The refusal of a winding-up order would not finally determine SAMATU's claims, if any, and would therefore not prejudice it, save for whatever delay may result as a consequence;

- there is no dispute that all future union dues to be deducted in terms of section 13 of the LRA would go to SAMATU and SAMATU only. There is therefore no continuing prejudice, should a winding-up order not be granted.
- on the other hand, the winding-up of SAMA would prejudice a great number of doctors, including members of SAMATU and would deprive them of benefits they currently receive. A winding-up of SAM would terminate all the doctors' access to services beyond that which SAMATU provides, including continued medical education;
- the doctors who would be prejudiced by a winding-up order are innocent in respect of the creation of the preceding events or the current dispute.

5.10 Based on the aforesaid, I cannot find that it would be just and equitable to wind up SAMA. I therefore exercise the court's discretion, based on the facts set out earlier and the considerations mentioned above, against the granting of a winding-up order.

5.11 Having regard to the respective contentions, I am of the view that this is one of those cases where costs should not follow the event, but that each party should pay its own costs.

[6] Order

1. The application is dismissed.
2. Each party is to pay its own costs.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 8 March 2022

Judgment delivered: 28 March 2022

APPEARANCES:

For Applicant:	Adv PA Swanepoel SC together with Adv DJ Groenewald
Attorney for Applicant:	Serfontein Viljoen & Swart, Pretoria
For the 1 st Respondent:	Adv DM Fine SC together with Adv MJ Cooke
Attorneys for the 1 st Respondent:	Welman & Bloem Inc, Pretoria