

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 395/2022

In the matter between:

NKOSINATHI THELEDI

Applicant

and

POLICE AND PRISONS CIVIL RIGHTS UNION

First Respondent

ZIZAMELA ERNST MAKAZA

Second Respondent

MBONGENI JEFFREY DLADLA

Third Respondent

Heard: 27 February 2024

Delivered: 27 March 2024

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 27 March 2024.

JUDGMENT

PRINSLOO J

Background

- [1] The Applicant was elected as the First Respondent's (POPCRU) general secretary in 2009 and he remained in the said position until his dismissal in September 2021. He was dismissed following a disciplinary hearing, where he was found guilty of misconduct.

- [2] The Applicant appealed against his dismissal (the appeal) and in accordance with POPCRU's constitution, the appeal was to be decided by the Central Executive Committee (CEC). The CEC dismissed the Applicant's appeal at a CEC meeting held on 23 and 24 September 2021 (CEC meeting).
- [3] The Applicant subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and after the dispute was arbitrated, an arbitration award was issued on 9 March 2022. The Applicant's dismissal was found to be fair and his case was dismissed. He launched a review application to the Labour Court, seeking to set aside the arbitration award.
- [4] In April 2022 the Applicant filed an application wherein he sought declaratory relief in respect of the CEC's dismissal of his appeal against his dismissal. The relief sought is premised on the provisions of section 158(1)(e) of the Labour Relations Act¹ (LRA). Section 158(1)(e) provides that the Labour Court may determine a dispute between a registered trade union and any one of the members thereof about any alleged non-compliance with the constitution of the trade union.
- [5] The Applicant's case is that the dismissal of his appeal is unlawful and in contravention of POPCRU's constitution.

This application

- [6] The Applicant contends that the dismissal of his appeal was in contravention of POPCRU's constitution for three main reasons, which I will deal with in turn.
- [7] As a general principle, an applicant in an application must make out his or her case in the founding affidavit. Rule 7 of the Labour Court Rules² provides that an application must be supported by an affidavit, setting out the material facts on which the application is based and a statement of the legal issues that

¹ Act 66 of 1995, as amended.

² GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court.

arise from the material facts.

- [8] A new or different case cannot be made out in a replying affidavit or heads of argument. Rule 7(5)(b) provides specifically that the replying affidavit must address only those issues raised in the answering affidavit and may not introduce new issues of fact or law.

The first reason: Section 21(2) of the POPCRU constitution

- [9] The Applicant's case is that section 21(2) of the POPCRU constitution stipulates that the CEC shall be composed of specified delegates and that it should have 260 delegates. The CEC meeting convened in September 2021, which considered the Applicant's appeal, was attended by 600 delegates. The composition of the delegates at the CEC meeting did not comply with section 21(2) of the constitution in those 600 delegates, as opposed to 260 delegates, attended the CEC meeting and therefore the composition of the CEC meeting was unlawful and in contravention of POPCRU's constitution, as adopted at the 9th National Congress of POPCRU.
- [10] In its opposing affidavit, POPCRU denied that the applicable constitution was the one adopted at the 9th National Congress and submitted that the current applicable POPCRU constitution was the one adopted at the 8th National Congress, which had been certified by the Registrar of Labour Relations in accordance with the provisions of section 101 of the LRA. Section 21 of the said constitution does not provide as alleged by the Applicant.
- [11] The composition of the CEC meeting is defined in the constitution adopted at the 8th National Congress and section 11 thereof requires that the CEC meeting be attended by the national office bearers, national gender coordinators, all provincial office bearers, provincial gender coordinators, all heads of departments, communications officer and one representative for each 250 members per province.
- [12] It is common cause that POPCRU represents around 150 000 members across South Africa. The Respondents' case is that the composition of the

CEC meeting was constitutional and was convened in accordance with the applicable POPCRU constitution.

- [13] In his replying affidavit, the Applicant conceded that the constitution adopted at the 9th National Congress was not yet certified by the Registrar of Labour Relations and that the applicable POPCRU constitution is indeed the one adopted at the 8th National Congress and that section 11 thereof is the applicable section. The Applicant replied that the Respondents did not explain how many delegates attended the CEC meeting or in what capacity they attended, that the allegation that the CEC meeting complied with the POPCRU constitution is no more than a bald allegation and that this Court should draw an adverse inference from the failure to disclose the aforesaid information.
- [14] The difficulty in the Applicant's case is that he averred that the dismissal of his appeal is unlawful and in contravention of the POPCRU constitution specifically because section 21(2) stipulates how the CEC shall be composed and that it should have 260 delegates.
- [15] The Applicant failed to show that the CEC meeting of September 2021 was unlawful and in contravention of the POPCRU constitution because the *"composition of the delegates at the CEC meeting therefore did not comply with section 21(2) of the POPCRU constitution in that six hundred (600) delegates as opposed to two hundred and sixty (260) delegates attended..."* The Applicant relied on the incorrect constitution, and it is evident that the applicable section 11, makes no mention of 260 delegates.
- [16] This Court cannot find that the POPCRU constitution was contravened because 600 delegates attended the CEC meeting when there is no provision in the constitution that limits the number of delegates to 260, as per the Applicant's pleaded case.

The second and third reasons: voting procedures

- [17] The Applicant's second and third reasons why the dismissal of his appeal is

unlawful and in contravention of the POPCRU constitution are related to the method of voting adopted at the CEC meeting.

[18] The second reason is that it is evident from the transcript of the CEC meeting that the 600 delegates did not each cast a vote by show of hands or otherwise, to endorse or approve the decision to dismiss the Applicant's appeal. Instead, a provincial office bearer for each of the nine provinces confirmed that his or her province supported the decision to dismiss the Applicant. According to the Applicant, this method of voting adopted is in contravention of section 50(15) of the POPCRU constitution, which requires scrutineers to physically count the number of votes cast by a show of hands.

[19] The third reason is that the delegates should have voted to uphold or dismiss the appeal by a show of hands, which had to be counted or by casting a vote in a ballot box. The Applicant's case is that the failure to hold a ballot as contemplated in section 50(15) of the POPCRU constitution, renders the decision to dismiss his appeal unlawful and in contravention of the constitution.

[20] There is no section 50(15) in the constitution attached to the Applicant's founding affidavit and in the answering affidavit, the Respondents mentioned section 50(1) of the POPCRU constitution, which deals with ballots. The said section provides for a ballot as follows:

'A ballot shall be taken in addition to those cases in respect of which the taking of a ballot of members of the Union is required or the Constitution of the Union so prescribes.'

[21] It is evident that the same provision is contained in section 20(1) of the applicable POPCRU constitution.

[22] The Respondents' case is that it is practice that when voting in CEC meetings, the provincial delegates carry the mandate for their provinces. The method of voting by show of hands only becomes necessary when there is

opposition to the mandate given to the respective provincial delegates – it is only necessary where the nine provinces do not agree. *In casu*, after having deliberated on the appeal, all nine provinces agreed that the Applicant's appeal was to be dismissed. The decision to dismiss the Applicant's appeal was unanimous.

[23] The Respondents further submitted that the Applicant's reference to a ballot is misleading. Section 50(1) (or 20.1) of the POPCRU constitution provides for the taking of a ballot when members of the union are required to vote and if prescribed by the constitution, which is relevant in cases such as when the union contemplates embarking on strike action. The CEC meeting is not attended by all members of the union.

[24] In his replying affidavit, the Applicant denied the Respondents' version and stated that the applicable POPCRU constitution does not state nor imply that the normal voting procedures should not have been used when considering his appeal.

[25] In my view, the Applicant failed to show that the voting method adopted by the Respondents was unlawful and in contravention of the POPCRU constitution. He could not point to any specific section in the constitution to support his challenge to the lawfulness of the decision to dismiss his appeal, because each of the delegates did not cast an individual vote or because of the failure to hold a ballot.

[26] In the Applicant's heads of argument, reference is made to sections 20 and 21(4) of the applicable POPCRU constitution and submissions were made as to why this Court should find that the CEC's decision to dismiss the Applicant's appeal contravened the decision making procedure contemplated in section 21(4) of the applicable POPCRU constitution. These arguments cannot be accepted by this Court, as they are based on a case that had not been pleaded.

[27] The argument that section 21(4) of the applicable POPCRU constitution was

violated is not supported by any evidence from the Applicant. In fact, no such averment had been made in any of his affidavits before this Court. Arguments must be based on and be supported by a pleaded case – a new case, not pleaded by an applicant and not responded to by an opposing party, cannot be introduced in heads of argument for the first time.

Costs

[28] The last issue to be decided is the issue of costs.

[29] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[30] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and *mala fides*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[31] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*,³ the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[32] Mr Khomola for the Respondents submitted that a cost order should be made in favour of the Respondents. He submitted that the application had no merit and was opportunistic. Mr Khomola argued that it was filed only to frustrate the Respondents and because the CCMA proceedings did not find in favour of the Applicant. This application was only filed after the CCMA dismissed the Applicant's case. Mr Khomola argued that the Applicant could not refer to any

³ [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

specific section of the POPCRU constitution that was contravened and this application should not have been brought.

[33] Mr van As for the Applicant submitted that the application deals with a question of compliance with POPCRU's constitution and whether there is either compliance or not and in the event that the Court finds that the voting was irregular and that there was no compliance with the constitution, there is no reason why the cost should not follow the result. He further submitted that the Applicant was entitled to approach this Court, in addition to approaching the CCMA.

[34] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation.

[35] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*,⁴ it was emphasized that:

‘...unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.’

[36] In my view, this is a case where a cost order is warranted. This is more so as the Applicant was legally represented and did not approach this Court as an unrepresented layperson. When the Respondents' opposing affidavit was

⁴ [2012] ZALCJHB 17; (2012) 33 ILJ 2117 (LC) at para 176.

filed, it should have been evident to the Applicant and his legal representatives that the grounds for attacking the lawfulness of the Respondents' dismissal of the Applicant's appeal and the averments regarding the contravention of the POPCRU constitution were not sustainable or properly pleaded in that it relied on the incorrect constitution, yet this application was persisted with.

[37] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success. *In casu*, it is evident that the Applicant persisted with his application without any reflection as to the content of the answering affidavit and the possible prospects of success.

[38] The conduct of the Applicant forced the Respondents to oppose a meritless application and fairness dictates that they cannot be expected to endure enormous costs to defend this litigation.

[39] In the premises, I make the following order:

Order

1. The application is dismissed;
2. The Applicant is to pay the Respondents' costs.

Connie Prinsloo
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate M J van As
Instructed by:	Mashiane Moodley Monama Attorneys
For the Respondents:	Advocate M L Khomola
Instructed by:	Cawood Inc Attorneys

LABOUR COURT