



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1048/13

In the matter between:

GERALDINE DAWN ELSDON

Applicant

and

THE SOUTH AFRICAN RED CROSS SOCIETY

First Respondent

NQE DLAMINI

Second Respondent

Heard: 21 May 2013

Delivered: 04 June 2013

Summary: Application for urgent relief to interdict continuation of disciplinary proceedings and set aside suspension and exclusion from workplace of Secretary-General of organisation by its President. Relief based on claim that President had been removed from office by vote of no confidence. Dispute over constitutional status that could not be resolved on papers and matter therefore decided on Respondents' version. Application refused.

JUDGMENT

BENJAMIN, AJ

Introduction

- [1] This is a judgment in an urgent application brought by Geraldine Dawn Elsdon (“Elsdon”) who has been employed since 1 October 2012 as the Secretary General of the First Respondent, the South African Red Cross Society (“the Society”). The Second Respondent is Mr Nqe Dlamini (“Dlamini”), the elected President of the Society. As will appear from the judgment, there is a dispute between the parties as to whether Dlamini is still the President.
- [2] On 25 January 2013, Elsdon received a letter from Dlamini calling on her to make representations as to why she should not be suspended pending a formal disciplinary inquiry. She did not make representations as the reasons for the suspension and inquiry had not been provided to her. Elsdon was not suspended and continued to perform her duties. On 7 February 2013, Elsdon received notification of a disciplinary inquiry to take place on 14 February 2013 in Durban. The disciplinary inquiry duly commenced on 14 February 2013 and continued on 21 February 2013 and 4 March 2013 at which point it was postponed without a further date being set.
- [3] On 10 April 2013, she received a further letter from Dlamini advising her that the Governing Body was considering suspending her from performing her duties pending the outcome of the unresolved disciplinary process and that she could make written representations by 12 April 2013. On 11 April 2013, the applicant’s version continues, she was placed on suspension by Dlamini. This is the first of several areas of conflict between the parties’ versions: Dlamini contends that letter of suspension, while dated 11 April 2013, was in fact sent on 13 April 2013 and the respondents’ annexed fax receipts to indicate this.
- [4] Despite the letter of suspension, Elsdon continued working at the Society’s national offices in Pretoria and Dlamini sent a further suspension letter on 7 May. She continued working and when Elsdon arrived on 13 May 2013, the premises had been locked to prevent her gaining access to her office. The security personnel at the entrance informed her that Dlamini had instructed them to prevent her entering the offices. Although Elsdon initially contended

that this was an “unlawful lock out”, it was common cause between the parties that what occurred was not a lock out, as defined in the LRA, but an exclusion from the workplace. Elsdon continued her duties, working from home.

- [5] Elsdon was advised in a letter by Dlamini that the disciplinary inquiry would continue on 16 May 2013. Elsdon came to court to restrain the continuation of these disciplinary proceedings. She also sought relief in respect of the suspension and her exclusion from her office. However, her papers were only served on 17 May 2013 and the matter was argued on 21 May 2013. Elsdon did not attend the disciplinary inquiry and counsel for the Respondents stated in court that the disciplinary inquiry had continued and been concluded in her absence on 16 May.
- [6] The Society is an incorporated association not for gain which operates in terms of a Constitution adopted by Special Resolution and registered with the Registrar of Companies in 22 May 2006. It has the status of a company not having a share capital.
- [7] In terms of its Articles of Association, the highest authority of the Society is the General Assembly which consists of two delegates from each branch, two delegates from each Provincial Council as well as the President, the Vice President and the National Treasurer. The General Assembly must meet at least annually. The Articles of Association provide for the requisition of additional meetings of the General Assembly by 20 or more of its members. The requirements for holding a requisitioned meeting are set out in detail in the Articles of Association. The responsibility for the management of the affairs of the society lies with the Governing Body. The members of the Governing Body include the President, the Vice President, the Honorary National Treasurer, between 3 and 5 members elected from the General Assembly and the Secretary General who is an ex-officio member.
- [8] The Society is clearly an organisation in turmoil and there is a total disagreement between the Applicant and the Respondents as to the current governance of the Society. On the Applicant's version, a requisitioned meeting of the General Assembly was held on 6 April 2013 at which a vote of

no confidence in the Governing Board was passed and an interim Governing Board was appointed to manage the society until the next meeting of the General Assembly. Elsdon played an active role in arranging the meeting of the 6 April. Her version of these events was confirmed on affidavit by the President elected at the meeting of the 6 April, Mr L.W. Madisha. In contrast, Dlamini contends that the meeting of 6 April 2013 took place in violation of the requirements of the Articles of Association for holding a requisitioned meeting of the General Assembly and that the meeting was not quorate. Accordingly, he contends, the Governing Body on which he serves and not the “interim” Governing Body appointed by the General Assembly on 6 April 2013 remains responsible for the management of the Society. As a result, two Governing Bodies purport to run the organisation.

[9] The versions of the Applicant and the Respondents are diametrically opposed. There is a clear conflict of facts which cannot be resolved on the papers and there would be no purpose in referring this matter to oral evidence as the issue would be academic by the time the matter could be set down. Mr Mosime for the applicant contended that I should decide the case on the basis of the status quo being, in his words, the governing structure put in place as a result of the requisitioned General Assembly of 6 April 2013 because Dlamini had not brought proceedings to challenge the constitutional status of the meeting of 6 April. Mr Edy for the respondents contended that the issue must be determined on the Respondents’ version in keeping with the well established approach first articulated in the *Plascon-Evans Paints (Tvl) Ltd v Van Riebeck Paints (Pty) Ltd*.¹

[10] Dlamini’s affidavit contains a detailed account of what he asserts are the breaches of mandatory procedures in terms of which the meeting should be held as well as the factual basis for his argument that the meeting was not quorate. He sets out his allegations in considerable detail. In a matter such as the present in which the versions of the parties are mutually destructive, I am required to decide whether to grant relief in urgent proceedings to the Applicant on the basis of the Respondents’ version. Accordingly, I must

¹ 1984 (3) SA 623 (A) at 634 E–635 C.

decide this case on the assumption that the meeting of the General Assembly on 6 April 2013 was unconstitutional and that the Governing Body presided over by Dlamini remains vested with responsibility for managing the Society.

- [11] This disposes of the claim for relief in respect of the disciplinary inquiry as this was premised on the claim that Dlamini was not entitled to direct the continuation of the proceedings on 16 May because he was no longer President. The proceedings have now been completed and, once the outcome is known, the applicant will be in a position to, properly advised, bring any challenge to its outcome that she may consider appropriate.
- [12] I now turn to her argument that her suspension was unlawful and should be set aside. Elsdon contends that as an ex-officio member of the Governing Body, her employment as Secretary General could only be terminated in accordance with clause 5.10 of the Articles of Association. This provides that members of the Governing Body can only be suspended or removed from office in terms of a by-law established by the General Assembly which only permits removal from office on a resolution of no confidence by the whole of the Governing Body or by the General Assembly. Her contention is that even though she is an employee, once she became member of the Governing Body, she acquired the same protection of clause 5.10 in addition to her rights as an employee. Accordingly, she argues that she could only be suspended by resolution of no confidence by the Governing Body or the General Assembly. The Respondents contend that this procedure only applies to elected officials and not an ex-officio member of the Governing Body, such as the Secretary General who is an employee of the Society.
- [13] I am in agreement with the contention of the Respondents. It is not uncommon in organisations for senior officials such as General Secretaries to be ex-officio members of the Board alongside elected office bearers such as Presidents and Vice Presidents. However, these persons remain employees and the issue of their suspension or termination continues to be regulated by their contract of employment and the relevant labour legislation. The Applicant contends that the requirement to comply with the relevant clause of the Articles of Association constitutes the clear right entitling the applicant to have

the suspension set aside. Mr Mosime for the applicant conceded that if this argument failed, there was no basis for the suspension to be set aside in these proceedings.

- [14] The final issue that I must decide is whether I can make any order in respect of Dlamini's action in barring Elsdon from her office. Mr Edy for the respondent argued that this would amount to spoliatory relief, which should not be granted in urgent proceedings. That question aside, it would appear that the issue of the exclusion is incidental to that of the suspension. As there is no basis for ruling on the lawfulness of the suspension, it would accordingly not be appropriate, to make any ruling in respect of the exclusion.
- [15] The entire application brought by Elsdon must therefore be dismissed. It was common cause between the parties that costs should follow the result. In argument, Mr Edy for the respondents requested a special costs order in respect of counsel's travel from Durban to Johannesburg and incidental expenses in that regard. I am not persuaded to make such an order. The first respondent is a national organization with offices throughout the country. The applicant was entitled to bring these proceedings in Johannesburg and therefore travel costs of counsel from Durban are not an appropriate part of the costs order.
- [16] In conclusion, I wish to say something about the context of this dispute. The Society is an important national institution affiliated to a major international humanitarian organisation. It is extremely sad that its noble endeavours should be imperilled by a civil war between factions in the organisation. Hopefully, there is sufficient goodwill surrounding the Society and its goals for those rifts to be resolved by negotiation rather than litigation. However, I do wish to record that this decision is not a finding as to who is entitled to exercise the constitutional mandate to run the Society or as to the correctness of the position of either faction. If the parties do not allow sense to prevail, those questions will have to be resolved in more drawn-out and painful proceedings.

[17] Accordingly I make the following order:

1. The application is dismissed with costs.

Benjamin, A J

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr K Mosime,
Instructed by: Strauss Daly Attorneys
For the Respondent: Mr C. Edy,
Instructed by: Norton Rose South Africa.