



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 122/2016

In the matter between:

CHAUKE, Khazamule Norman

First applicant

BREDA, Jacqueline

Second applicant

XWAZI, Songezile

Third applicant

GCWENSA, Bongani

Fourth applicant

GIDANA, Mandla

Fifth applicant

MBEKI, Monwabisi

Sixth applicant

KONAFANA, Monwabisi

Seventh applicant

KHUMISI, Ishmael

Eighth applicant

MTHANTI, Basil

Ninth applicant

and

FAWU

First Respondent

NAZO, Atwell

Second Respondent

MNGUNI, Raymond

Third Respondent

MASEMOLA, Katishi

Fourth respondent

PHAKEDI, Moleko

Fifth respondent

OLIVER, Mark

Sixth respondent

Heard: 18 March 2016

Delivered: 5 April 2016

Summary: Urgent application to suspend the expulsion of union members and office bearers pending challenge to NEC resolution.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicants are all current or former members and office bearers of FAWU.¹ The National Executive Council (NEC) of FAWU purported to remove the first to seventh applicants as members and office bearers on 28 February 2016. That means that they cannot attend the union's forthcoming national congress as delegates. The NEC has also instituted disciplinary steps against the eighth and ninth applicants.
- [2] The first seven applicants ask for an urgent interdict setting aside the NEC decision against the first seven applicants and interdicting it from implementing it; and the other two ask for an order setting aside the pending disciplinary hearings. In the alternative, the applicants seek a temporary order suspending the expulsion of applicants 1-7 and the disciplinary proceedings against applicants 8 and 9, pending the determination of part B of the application.

¹ The Food and Allied Workers' Union (the first respondent).

Background facts

- [3] This application stems from a long, bitter and undignified saga of intra-union rivalry. The union has attempted to get rid of the applicants as members and office bearers on a number of occasions over the last year. It has led to at least seven appearances in this Court, no doubt at significant cost to the union membership. In this ongoing battle, their membership fees have not been spent to their benefit, it would seem.
- [4] FAWU is a registered trade union in terms of LRA.² The second to sixth applicants are provincial office bearers (POBs) from various provinces. The seventh applicant, Monwabisi Konofana, is the secretary of the Johannesburg branch. The eighth applicant is a shop steward and the ninth was a provincial treasurer. The second to seventh respondents are national office bearers (NOBs). They are, respectively, the president, first deputy president, second deputy president, general secretary, deputy general secretary and national treasurer.
- [5] A year ago, the NOBs – the second to seventh respondents – took a decision to expel all but the seventh applicant from the union.
- [6] The applicants brought an urgent application before this court. It came before Rabkin-Naicker J. She held that the decision of the NOBs was *ultra vires* the union's constitution and set it aside:³
- “Given the recorded order of supremacy of democratic structures in the union, the wording of clause 20.6.1 [of its constitution] serves as a further confirmation that the constitution does not contemplate a situation in which the NOBs may remove office bearers by means of expulsion, relying on clause 25 of the constitution. The expulsions were therefore not in compliance with the constitution.”
- [7] The respondents delivered an application for leave to appeal on 18 June 2015. They took the view that that stayed the operation of the Rabkin-Naicker judgment and they sought to prevent the applicants from fulfilling their duties as office bearers. The applicants brought an urgent application to enforce the interdict pending appeal. It was granted.

² Labour Relations Act 66 of 1995.

³ *Chauke & ors v FAWU & ors* [2015] ZALCCT 44 (28 May 2015).

- [8] The Western Cape Provincial Executive Committee (PEC) held a meeting on 30 June 2015. It passed a resolution removing the second and third applicants – Jacqueline Breda and Songezile Xwazi – as office bearers and as delegates to the FAWU national congress and the COSATU special congress. They brought an urgent application before Gush J. He set those actions aside on 10 July 2015 because the PEC had acted outside of its powers.
- [9] The Gauteng PEC took a similar step on 3 August 2015, removing Chauke as provincial chairperson and as delegate to the NEC. In a fourth urgent application before this Court, Lagrange J determined on 26 August 2015 that that resolution was unlawful and set it aside.
- [10] In the meantime the second and third applicants brought a fifth urgent application pertaining to a further Western Cape PEC meeting. Rabkin-Naicker J issued a rule *nisi*, returnable on 18 September, calling upon the respondents to show cause why they should not be interdicted from proceeding with the PEC meeting and filling those posts. The respondents conceded the relief sought before Van Niekerk J on the return day. And on 26 October 2015 the respondents withdrew their application for leave to appeal the Rabkin-Naicker judgment.
- [11] The upshot is that the Rabkin-Naicker judgment stands. But the respondents were not deterred. In a new effort to remove the applicants, the NEC expelled the first to seventh applicants.
- [12] All of these actions arise from a meeting that the applicants held in KwaZulu-Natal in January 2015. The respondents say it was a “secretive” meeting. The applicants say they convened the meeting – comprising concerned POBs and other union members – because of concerns with union issues and various concerns raised by POBs and members of the union.
- [13] The decision at the heart of this latest application is that of the NEC on 28 February 2016 at a special NEC meeting to dismiss the applicants as members and to expel them as office bearers.

The relief sought

[14] The applicants seek relief in two parts. At the least, they ask for the relief in part A of their notice of motion on an urgent basis, pending the final relief sought in part B. The urgency stems, in part, from their concern that, if the relief in at least part A is not granted at this stage, they will be barred from the union's national congress to be held on 18 April 2016.

[15] They seek the following relief in part A:

15.1 Dispensing with the forms and service provided by the rules and enrolling the matter on an urgent basis in terms of rule 8.

15.2 Setting aside the unlawful resolution taken by a special meeting of the NEC on 28 February 2016, purportedly removing the first to seventh applicants as members and office bearers of the union and as delegates to the national congress.

15.3 Interdicting the respondents from implementing the resolution.

15.4 Setting aside the pending disciplinary proceedings against the eighth and ninth applicants (Khumisi and Mthanti) before the NEC and its disciplinary sub-committee.

15.5 Interdicting the respondents from proceeding with the disciplinary proceedings against Khumisi and Mthanti.

15.6 In the alternative to the second and third prayers, pending the determination of part B, suspending the expulsion of the first to seventh applicants.

15.7 In the alternative to the fourth and fifth prayers, pending the determination of part B, suspending the disciplinary proceedings against Khumisi and Mthanti.

Evaluation / Analysis

[16] The application was brought on an urgent basis shortly before the April recess. The union's national congress is due to take place on 18 April 2016. It is less than two weeks away. In order to deal with the dispute expeditiously before then, it seems to me to be in the interests of justice to

consider at least the interim relief sought in Part A at this juncture, as the applicants suggested in the alternative.

Jurisdiction and powers

[17] Section 158(1)(e)(i) of the LRA empowers this Court to determine disputes between a registered trade union and any of its members about any alleged non-compliance with the constitution of the trade union. This is such a case. This Court has jurisdiction over the dispute and the power to determine it.

Urgent relief : Part A (first to seventh applicants)

[18] As stated above, I am satisfied that the application is urgent – at least insofar as the interim relief sought in part A is concerned – given the imminent national congress.

Prima facie right?

[19] In order to establish whether the applicants have established a *prima facie* right to the relief sought, though open to some doubt, it is necessary to examine where they locate that right. And much of what they base their submissions on has already been decided by Rabkin-Naicker J. (When I refer to “the applicants” in the rest of this judgment, I deal mainly with the position of the first to seventh applicants, who have already been expelled by the NEC. The position of Khumisi and Mthanti is slightly different, as disciplinary proceedings against them are still pending. I will deal with them separately insofar as it is necessary).

[20] The applicants challenge their expulsion by the NEC on three grounds:

20.1 The NEC acted *ultra vires* of the union’s constitution.

20.2 The NEC did not follow a fair procedure; and

20.3 The decision itself was unfair.

NEC power to expel, Rabkin-Naicker judgment and the union’s constitution

[21] The union’s constitution sets out its organisation and powers.

- [22] The union functions from the bottom up on four levels: workplace, branch, province and national. Within each of these levels members of the appropriate body elect office bearers. (The first to sixth applicants are all POBs; the seventh is a local office bearer; the eighth is a shop steward; and the ninth was a provincial treasurer).
- [23] Clause 24 of the constitution governs the discipline and removal from office of office bearers and shop stewards. It reads:
- “REMOVAL OF OFFICE BEARERS FROM OFFICE, OFFICIALS AND SHOP STEWARDS
- 24.1 An office bearer, official or shop steward may be removed from office if he/she:
- 24.1.1 infringes any provision(s) of this constitution;
- 24.2.2 acts in any manner which is detrimental to the interests of the union.
- 24.2 No office bearer, official or shop steward may be removed from office unless he/she has been offered an opportunity to state his/her case personally or in writing to the WGM, BEC, PEC or NEC as the case may be.⁴”
- [24] The constitution then provides for a right of appeal to the NEC; or, in the case of an NOB, to the national congress.
- [25] It seems to me clear from the above provisions that the applicable structure may discipline office bearers; for example, the PEC may remove an POB. That expelled POB may then appeal to the NEC. But the NEC does not have original jurisdiction, as it were.
- [26] Rabkin-Naicker J came to the same conclusion in her judgment of 28 May 2015. And that judgment stands. The respondents have withdrawn their application for leave to appeal.
- [27] The learned judge pointed out that clause 25 of the constitution deals with the discipline of members (as opposed to office bearers). She held that “it cannot be correct that any of the bodies of office bearers can discipline any member without reference to the level in the union’s structure.” And the constitution “does not contemplate a situation in which NOBs may

⁴ My underlining.

remove office bearers by means of expulsion, relying on clause 25 of the constitution.”

[28] *Prima facie*, the same principles hold true for discipline by the NEC. Only the “appropriate level” of the union’s structure may expel the applicants.

[29] In any event, the NEC only has the power to suspend – and not to expel – office bearers in terms of clause 20.6.11 of the constitution:

“The NEC, subject to the provisions of this constitution, shall have the power:

...

20.6.11 to suspend any BEC, PEC or office-bearer or members for violations of provisions of this constitution or in the interests of the union.”

[30] Given the provisions of the constitution and the judgment of Rabkin-Naicker J, I hold that the applicants have established at least a *prima facie* right, even if open to some doubt, not to be expelled by the NEC. That decision should be suspended pending the determination of part B.

Balance of convenience

[31] The balance of convenience favours the applicants. If their positions are filled before this dispute is finalised, it will be nigh impossible to regain them. And they would be prevented from attending the imminent national congress and the provincial congresses preceding the national congress. The respondents, on the other hand, will suffer no great inconvenience if the action against the applicants is suspended.

Apprehension of irreparable harm

[32] The applicants have at least an apprehension of irreparable harm. Should the decision of the NEC stand, they will not be able to attend the national congress; their positions will be filled, and it would be very hard for them to regain those positions.

Alternative remedy?

[33] The applicants seek interim relief at this stage. They have availed themselves of an alternative remedy: that is the relief sought in part B of this application.

Eighth and ninth applicants

[34] The eighth and ninth applicants, Khumisi and Mthanthi, have not been expelled. Disciplinary proceedings against them are pending. But, based on the discussion above, it appears *prima facie* that the NEC does not have the power to discipline them. They have established at least a *prima facie* right to interim relief pending the resolution of part B.

Conclusion

[35] I am satisfied that the applicants are at least entitled to interim relief pending the resolution of part B of this application.

[36] Costs are best left to be decided at that stage of the application.

Order

[37] I therefore make the following order:

37.1 The expulsion of the first to seventh applicants as members and office bearers of FAWU and as delegates to its national congress is suspended pending the determination of part B of this application.

37.2 The disciplinary proceedings against the eighth and ninth applicants, Messrs Khumisi and Mthanthi, before the NEC and its disciplinary sub-committee are suspended pending the determination of part B.

37.3 Costs of this application are to stand over for determination at the hearing of part B.

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS: H M Viljoen (with him J K S Macdonald)
Instructed by Cowan Harper attorneys.

RESPONDENTS: Terry Motau SC
Instructed by Werksmans.