



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: J 1844/18

Not Reportable

In the matter between:

RICHARD MAHOA

First Applicant

ROBERT MADONSELA

Second Applicant

LUXOLO MPAFA

Third Applicant

DIKELEDI MOKGAUTSI

Fourth Applicant

WILLIAM MATABOGE

Fifth Applicant

THAPELO QABATHI

Sixth Applicant

SETSOGE MPHAHLELE

Seventh Applicant

GEOFFREY MOATSHE

Eighth Applicant

NONHLANHLA MBATANI

Ninth Applicant

and

NATIONAL UNION OF MINEWORKERS

First Respondent

NATIONAL EXECUTIVE COMMITTEE OF THE

NATIONAL UNION OF MINEWORKERS

Second Respondent

KOLEKILE DAVID SIPUNZI (N.O)

Third Respondent

Heard: 5 June 2018

Delivered: 18 June 2018

JUDGMENT

WHITCHER. J

- [1] The applicants have instituted a two part application. Part A, which is before me, seeks interim relief pending the finalisation of Part B of the application.
- [2] In Part A, the applicants seek to have the legal force and effect of the following decisions taken by the NEC at a Special National Executive Committee meeting (held on 21 May 2018) suspended and interdicted: (a) the decision in terms of which the 2017 Rustenburg Regional elections were nullified (and which had the effect of nullifying the election of the applicants as regional office bearers of the Rustenburg Region); (b) the decision to establish a Task Team to assist the Rustenburg Region to prepare for a regional conference to take place within six (6) months; and (c) the decision to suspend the first applicant.
- [3] Consequent to the above, the applicants want this Court to order NUM to reinstate them into their elected positions with immediate effect and to refrain from preventing them from carrying out their duties as elected regional office bearers,¹ pending the final determination of Part B.
- [4] Part B in essence alleges that the decisions taken by the NEC at the Special National Executive Committee meeting on 21 May 2018 are in breach of the Constitution of NUM and the Constitution of South Africa. The attack essentially relies on alleged procedural defects.
- [5] The applicants contend that, in acting as it did, the NEC “trampled” their rights set out in s 4(2)(a) of the LRA: the right to participate in the lawful activities of their trade union and to participate in the election of its office bearers.
- [6] The respondents oppose the application on various grounds.

¹ Emphasis added.

Jurisdiction

- [7] The applicants base all relief sought on the provisions of s 4(2)(a) of the LRA. Section 4 deals with employees' right to freedom of association² and is contained in Chapter 2 of the LRA. Section 9 which also falls within Chapter 2 provides that that disputes about the interpretation and application of Chapter 2 requires referral to the CCMA or a Bargaining Council for conciliation, and then to the Labour Court for adjudication.
- [8] In light of this, the respondents submit that the Court has no jurisdiction to consider Part B. As the relief sought in Part A is premised on this Court eventually ruling on Part B it follows that the Court has no jurisdiction to deal with Part A either.
- [9] This point is dismissed. In *Taho v Public Services Sector Education and Training*, the Court held thus:
- ‘... I hold the view that argument around the issue of jurisdiction during an interim relief application is somewhat premature and ought not to arise at all. That argument, which is purely procedural, could best be left to the court hearing the merits in due course’.³
- [10] At this stage, and under Part A of the application, the applicants seek urgent interim relief and other ancillary relief. This Court’s power to grant urgent interim relief is authorised by s 158(1)(a)(i) of the LRA.

The first applicant’s authority

- [11] The respondents challenge, on the basis that there are no confirmatory affidavits, the first applicant’s averment that he is “duly authorized to depose to the [founding] affidavit and to launch this application”. I am not inclined to uphold this point.

² My emphasis.

³ 2014 JDR 0057 (GNP) at para 14.

[12] In *Ganes and Another v Telecom Namibia Ltd*⁴ Streicher JA stated that:

‘In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged... It must, therefore be accepted that the institution of proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided.’

The third applicant's suspension

[13] I agree with the respondents that there is no basis for any relief to be afforded specifically to the third applicant in this application. He was suspended in February 2018 (that is, long before the special NEC meeting) for reasons entirely unconnected with the current application, and his suspension has not been canvassed in the papers before me.

Urgency

[14] I accept that this matter is urgent and that the Respondents were not denied a reasonable time to respond to this application. The period from the date of the NEC decision to the date of launching the present application is five (5) court days. There was therefore no delay in bringing these proceedings before this court. The present application is no different to that which was launched in the High Court and accordingly the Respondents had six (6) days within which to respond to this application.

⁴ 2004 (3) SA 615 (SCA) at para 19.

- [15] Further, NUM is going to the National Congress on 20 to 22 June 2018. The applicants contend that they need to attend the National Congress in their capacities as regional office bearers.

Chronology of events

- [16] The applicants were elected as regional office bearers for the Rustenburg Region of NUM at Regional Conference held from 18 to 20 August 2017: regional chairperson (1st applicant), deputy regional chairperson (2nd applicant), regional secretary (3rd applicant), deputy regional secretary (4th applicant), regional treasurer (5th applicant), deputy-chairperson for education (6th applicant), deputy-chairperson for health and safety (7th applicant), deputy-secretary for education (8th applicant), deputy-secretary for health and safety (9th applicant).
- [17] Regional Committees consist of the positions to which the applicants were appointed and a chairperson and secretary for women, a chairperson and secretary for the Youth structure and a chairperson and secretary of each branch of the region in question. The applicants were therefore not the only ROBs in the Rustenburg region.
- [18] In terms of NUM's Constitution, the general function of a Regional Committee is to supervise the affairs of the region.
- [19] A key function of a Regional Committee is to prepare the regional delegation to a National Congresses (clause 8.4.3). There is an upcoming National Congress on 20 to 22 June 2018.
- [20] In terms of clause 11.3.3, regions must send their nominations for the 9 (NEC) office bearers to an independent electoral commission decided by the NEC at least one month before the National Congress; and send their resolutions to the General Secretary to reach his office or her office at least twenty-one (21) days before the National Congress.
- [21] In relation to the upcoming National Congress, nominations were open from 8 May to 6 June 2018.

- [22] In terms of clause 11.6, delegates must, *inter alia*, elect (NEC) office bearers at the National Congress.
- [23] In terms of clause 11.8.2 (in relation to electing NEC office bearers and officials at the National Congress) regions with voting rights may nominate and second candidates from the floor for positions of office bearers and officials of the NEC, except for the positions of Regional Chairperson and Regional Secretary who hold positions on the NEC by virtue of their positions. A candidate nominated in terms of clause 11.8.2 who was nominated as contemplated in sub-clause 11.3.3.1 must be seconded by a majority of regions.
- [24] Resolutions at a National Congress must be adopted by a majority vote of voting delegates.
- [25] On 14 September 201, the national office bearers (“NOBs”) received a letter of complaint about the way the elections at the 2017 Rustenburg Regional Conference had been conducted. This is the Regional Conference at which the applicants were elected regional office bearers.
- [26] On 25 November 2017 the NEC resolved to establish an independent Task Team to investigate the complaint and that the Task Team should be endorsed by the NOBs before doing its work.
- [27] According to the respondents’ answering affidavit, the NOBs, acting on this resolution secured quotes from law firms and decided to appoint Nomaswazi Maseko Inc Attorneys (NM Inc) to undertake the investigation. Save for a bald denial, this claim was not disputed in any meaningful manner in the founding or replying affidavit. The claim that NM Inc constituted an “independent” Task Team was similarly not disputed.
- [28] At a Special NEC meeting held on 21 May 2018, *attended by the first and fourth applicants*, a “Final Report – Rustenburg Regional Conference Investigation” compiled by NM Inc was tabled. The respondents provided full, undisputed details as to why the report was tabled only on 21 May 2018.

- [29] The final report, in essence, determined that there were a host of irregularities, including financial misconduct in relation to the Rustenburg election.
- [30] At the meeting, the NEC resolved to nullify the outcome of the 2017 Rustenburg Regional Conference election with immediate effect. The nullification meant that the applicants were no longer officer bearers.
- [31] The NEC also resolved to establish a Task Team to assist the Rustenburg Region to prepare for a Regional Conference to take place within six (6) months.
- [32] The first applicant was implicated in the financial irregularities in the report of NM Inc, and the NEC, purporting to act in line with Clause 6 of annexure 3 to the union's Constitution, suspended him at the meeting of 21 May 2018.

The applicants' submissions

- [33] I have summarised their submissions as follows.
- [34] The NEC is not empowered by the union's Constitution to set aside Regional Conferences and thereby automatically "remove" regional office bearers without following the provisions of clause 14 of the Constitution.
- [35] The NEC flouted the provision of clause 14 in that the applicants were not afforded an opportunity of being heard before their "removal", and in the case of the first applicant, his further suspension.
- [36] Clause 14, which deals with *Discipline and removal from office of office bearers and elected officials and disciplining of members*, provides that:

'If in the opinion of the NEC, an office bearer who serves on the NEC or a Regional Committee has behaved in a manner which is detrimental to the interests of the union and its members, it may resolve to remove him or her from office or to impose such penalty as it sees fit. When disciplining an office bearer, the NEC must follow the [Constitution's] disciplinary code and

procedure. The individual may appeal against such decision (which must remain in force until the appeal is determined).'

- [37] As a result of the unconstitutional conduct of the NEC, their “rights”, as an integral part of the Rustenburg Regional Committee, to *inter alia*, participate in the activities of the union, perform the constitutional functions of a Regional Committee and, at this critical moment, to prepare the regional delegation to the National Congress has been infringed. As the Rustenburg Regional Committee, they would have been responsible for preparing the second largest delegation of NUM to the upcoming National Congress and to influence the elections of the NOBs and the NEC. At this congress, delegates from the various regions of NUM will, *inter alia*, elect office bearers and officials who will occupy their positions for the next three years.
- [38] It is evidence from the founding affidavit that the applicants have a substantial interest in having the third respondent removed as the General Secretary at the upcoming National Congress.
- [39] The applicants further contend that their “removal” has left the Rustenburg Region leaderless. The remaining regional officer bearers do not constitute the Regional Committee or a quorum for a meeting of the Regional Committee. There is effectively no Regional Committee that can fulfil the functions and powers of a Regional Committee.

The respondents’ submissions

- [40] Significantly the applicants do not attack a single factual and substantive finding made in the report.
- [41] The purpose of the NEC is set out in Clause 9 of the Constitution. Clause 9.1.3 provides that:

‘The NEC manages the affairs of the union by doing such lawful things which in its own opinion furthers the interest of the union and its members and are consistent with this Constitution.’

- [42] There is no provision of the Constitution which deals specifically with an irregular election in a region. However, it is impossible to argue that the setting aside of an irregular election is not something which furthers the interests of the union and its members.
- [43] Given the serious irregularities found by NM Inc it is impossible to sustain the contention that the decision made by the NEC to nullify the election was one *“no proper trade union structure”* could have reached. It was necessary for the special NEC to act swiftly to protect the interests and image of the union.
- [44] The provision of clause 14 of NUM's Constitution dealing with the removal of office bearers was not applicable as the applicants' removal flowed from the nullification of the Rustenburg Regional election.
- [45] The Rustenburg Region is not leaderless prior to the National Congress and a Regional re-election in 6 months' time. There are four regional office bearers who have not been removed from their office (they had been elected prior to the Regional Conference and their term of office has not yet expired). The Regional Committee is composed of the 9 office bearer positions formerly held by the applicants and the chairpersons and secretaries of each and every branch in the region, a chairperson and secretary for women and chairperson and secretary for the Youth structure.
- [46] The submission of nominations for the National Congress is not the function of regional office bearers. It is the function of the Regional Committee which includes many individuals who are not regional office bearers.
- [47] Nominations from Regional Committees for national office bearers and officials were open from 8 May 2018 to 6 June 2018. Thus the setting aside of the Regional elections could not have impacted on this.
- [48] The Constitution does not require the regional office bearers to prepare the Rustenburg delegation to the National Congress. This is prepared by the Regional Committee which is far broader than the regional office bearers positions formerly held by the applicants.

- [49] Apart from the first and third applicants, who are suspended, nothing prevents any of the other applicants attending and participating in the National Congress if they are chosen as delegates by the Rustenburg Region. If so chosen nothing prevents them from lobbying for the removal of the General Secretary.
- [50] The first applicant was implicated in financial irregularities in the report of NM Inc. As a result, he had been suspended in line with Clause 6 of annexure 3 to the union's Constitution. If found guilty of misconduct after the requisite hearing has taken place, he may have his membership terminated. Insofar as his complaint that he was not heard prior to his suspension is concerned, on his own version that decision was taken following the special NEC meeting of 21 May which he attended.

Analysis

Prospects of success

- [51] It is my view that the submissions by the respondents have placed serious doubt on the applicants' prospects of success in the main application. The applicants have set out no concrete evidence that the NEC did not abide by the resolution that it secure the services of an *independent* task team to investigate the Rustenburg regional election and that the act of nullification was not reasonable in the circumstances.
- [52] Moreover, the applicants have not demonstrated that they, as *individuals*, had the right to be heard prior to a nullification of an election.
- [53] I have taken note that NM Inc interviewed the first applicant and several of the other applicants prior to the report being rendered.

Prima facie right

- [54] One of the fundamental requirements for an interdict *pendent lite* is to assert a right which is the subject matter of the main application and which the applicant seeks to protect by means of interim relief.

- [55] In this application, the *rights* expressly relied on the applicants are the rights set out in section 4(2) of the Labour Relations Act, 1995, namely the right to participate in the lawful activities of their trade union and the right to participate in the election of any of its office bearers.
- [56] The action of the NEC, right or wrong, has not deprived the applicants of these rights. Like any other member, they still possess the right to participate in the lawful activities of NUM and in the election of its office bearers.
- [57] Apart from the first and third applicants, who are suspended, nothing prevents any of the other applicants attending and participating in the National Congress (or any Regional Congress) if they are chosen as delegates by the Rustenburg Region. If so chosen nothing prevents them from lobbying for the removal of the General Secretary.
- [58] The union's constitution does not afford specific and special rights to office bearers. Rights are afforded to union members and powers and duties are assigned to collectives, that is, Branch, Regional and National *Committees*.

Irreparable harm

- [59] As indicated above, the applicants still possess the right to participate in the lawful activities of NUM and in the election of its office bearers. Apart from the first and third applicants, who are suspended, nothing prevents any of the other applicants attending and participating in the National Congress (or any other Congress) if they are chosen as delegates by the Rustenburg Region. If so chosen nothing prevents them from lobbying for the removal of the General Secretary.
- [60] The contention that their removal will result in the total collapse of the Rustenburg Region is an *organisational* issue (which will probably and/or could probably be addressed at the National Congress). The applicants cannot rely on *harm to the union* to address the issue of potential *personal* irreparable harm.

- [61] In any event, the NEC has made provision for a re-election within 6 months. The NEC resolved to establish a Task Team to assist the Rustenburg Region to prepare for a Regional Conference to take place within six (6) months.

Balance of convenience

- [62] The balance of convenience does not favour the applicants. In my view, the union stands, potentially, to suffer more harm than the applicants if this urgent interim relief is granted. Essentially what the applicants are asking this Court to do is to order the union to reinstate them as regional office bearers in circumstances where their attack on the NEC's decision is essentially a *procedural* one and the undisputed *factual and substantive* findings of NM Inc demonstrate a seriously flawed election process.

Alternative remedy

- [63] The applicants contend that they cannot turn to any structure of NUM for assistance. However, if, as they contend, the act of the NEC amounted to disciplinary action, then they have the right to lodge appeals against the decision of the NEC, as provided for in clause 14.
- [64] Furthermore, as already stated above, the issue of *organisational* harm and the nullification of an election is surely an organisational matter which can be addressed at structures such as the National Congress.

Conclusion

- [65] All things considered, it is my view that the applicants have failed to make out a case for the relief they seek under Part A of the application.
- [66] I do not consider it appropriate to grant an adverse cost order, considering the relationship between the parties, particularly at this stage. And, although I have dismissed the matter, I did not consider the application to be frivolous.

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

Order

1. The application for interim relief is dismissed.
2. There is no order as to costs.

B. Whitcher

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	D Z Kela,
Instructed by:	Ndumiso Voyi Incorporated Attorneys
For the Respondents:	C Orr
Instructed by:	Cheadle Thompson & Haysom Inc

LABOUR COURT