



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 2217/18

In the matter between:

THE NATIONAL UNION OF PUBLIC

SERVICE AND ALLIED WORKERS (“NUPSAW”)

First Applicant

SOUTH AFRICAN LIBERATED PUBLIC

SECTOR WORKERS UNION (“SALIPSWU”)

Second Applicant

SOUTH AFRICAN STATE AND ALLIED

WORKERS UNION (“SASAWU”)

Third Applicant

YOUNG NURSES INDABA TRADE UNION (“NYITU”)

Fourth Applicant

SOUTH AFRICAN CORRECTIONAL

SERVICES UNION (“SACOWSU”)

Fifth Applicant

and

THE GENERAL SECRETARY OF THE

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL,

MR. MPUMELELO SIBIYA, N.O

First Respondent

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL (“PHSDSBC”)**

Second Respondent

Heard: 17 August 2018

Delivered: 4 September 2018

Summary: Urgent application to interdict the general secretary of the bargaining council from conducting a further verification of trade union membership. Point *in limine* on non-joinder upheld.

JUDGMENT

PRINSLOO, J

Background

- [1] The Applicants seek an order to interdict and restrain the First Respondent (the General Secretary) from giving effect to a decision of the Second Respondent (the Council) which resolved that a further verification of trade union membership be done on the grounds that such resolution is unlawful and in breach of the bargaining council’s constitution.
- [2] The matter came before the urgent Court on 27 June 2018 when the parties agreed to an order in the following terms:

Order

1. By consent of the Respondents, an interim order is granted that the First Applicant, the National Union of Public Service and Allied Workers (NUPSAW), shall be regarded as a member of the Second Respondent, the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC), which order shall operate until the outcome of the verification process for the determination of representivity levels, which is the subject of the resolution adopted by the PHSDSBC on 21 June 2018, or until any further order which may

be issued by this Court after hearing argument, whichever occurs earlier;

2. The issuing of this order shall not affect the rights of the Applicants to challenge the validity of the PHSDSBC's resolution adopted on 21 June 2018 or the verification process and its outcome in due course;
3. The issuing of this order shall not affect the rights of the Respondents to challenge the urgency of this application and to raise the issue of non-joinder of alleged materially interested parties in due course;
4. The application is postponed to 17 August 2018 (being a date that has been arranged with the Registrar);
5. The Respondents shall file their answering affidavits by Friday 13 July 2018, and the Applicants shall file their replying affidavits by Friday 20 July 2018;
6. The Applicants shall file heads of argument by Tuesday 24 July 2018 and the Respondents shall file heads of argument by Friday 27 July 2018;"

[3] The Respondents' right to challenge the urgency of this application and to raise the issue of non-joinder had been reserved.

This application

[4] The Applicant provided a detailed background to the matter in respect of the amendment of the Council's constitution (the constitution) and the increase of the membership threshold requirement for admission to the Bargaining Council from 10 000 to 30 000 members. The Applicant instituted review proceedings under case number JR 2576/2017, which review is still pending.

[5] The Applicant made it clear that whilst it is challenging the decision to increase the threshold for membership to the Council by way of review proceedings, it abides by the new constitutional construct, pending the review application. For purposes of this application, the Applicant is not challenging the increase in the threshold, but seeks compliance with the amended constitution.

The constitution

- [6] The amended and current constitution of the Council defines 'threshold requirements' as the minimum membership requirements that a trade union must satisfy to be admitted as a party to the Council, or to remain a party to the Council under the provisions of the constitution.
- [7] The constitution provides that any single trade union may apply for admission to the Council if it meets the threshold requirement of 30 000 members in good standing in the public health and social development sector. If two or more trade unions act jointly, and each enjoys organisational rights with an employer and have a combined membership of 30 000, the trade unions may be represented in the Council as a single party.
- [8] In terms of clause 11 of the constitution, membership figures are to be reviewed annually. Relevant for this application is clause 11.1 which provides that:
- "The General Secretary to the Council must review the annual membership figures, as at 31 December of the previous year, of all trade unions admitted to the Council. This review must take place as soon as reasonably possible after 1 April of each year. The General Secretary must report this decision to the Council by no later than 14 May of each year, or such later date as the Council may decide."
- [9] Clause 11 further provides for the process of submitting audited membership figures to the General Secretary of the Council by 31 March each year for the purposes of the review as provided for in clause 11.1.
- [10] Clause 11.4 provides that the General Secretary may request an employer to provide figures of the number of employees for whom it deducts membership fees for any trade union by means of stop orders and may request a trade union to provide audited figures of the members in good standing in accordance with the guidelines on membership audits and the Council shall be entitled to instruct its auditors and or an independent auditor to verify these figures.
- [11] Clause 13 of the constitution provides for the determination of voting weights of the trade unions. The voting weight of each admitted trade union in the

Council shall be equal to the number of members in good standing of such trade union as on 31 December of the previous year, as determined with reference to the trade unions audited membership figures. Membership figures are determined as per the provisions of clause 11 and is expressed as a percentage of the aggregate number of trade union members of all trade union parties to the Council, who are employees within the scope of the Council as on 31 December of the previous year.

[12] The General Secretary determines the voting of each admitted trade union in accordance with clause 13 and such determination shall apply from one annual general meeting (AGM) to the next AGM.

[13] Clause 13.3 provides that:

“The General Secretary shall, as soon as practicable after 31 March of each year, but by no later than 14 May of each year, or such later date as the Council may decide, inform the Council and the admitted trade unions in writing of the voting weights of the admitted trade unions in the Council.”

[14] Clause 13.4 provides that:

“Any party that disputes the determination of voting weights by the General Secretary in accordance with the provisions of clause 13, may refer such a dispute for conciliation and, if the dispute remains unresolved, for arbitration under clause 5 of the Dispute Procedure. If the dispute is referred to arbitration, the arbitrator’s award shall replace the General Secretary’s determination.”

[15] It is common cause that NUPSAW, acting jointly with other unions, submitted their audited membership figures as at 31 December 2017. The General Secretary appointed an independent auditing firm, Sizwe Ntsaluba Gobodo (SNG), to conduct a verification exercise and on 18 May 2018 SNG submitted a report to the Council, setting out the determination of voting weights for the various trade unions. In terms of the said report, NUPSAW, acting jointly with other unions, had 30 727 members and had acquired a 8,35% voting weight.

- [16] It is evident that NUPSAW, acting jointly with other unions, met the threshold requirement of 30 000 members for admission to the Council. On 18 June 2018 the General Secretary confirmed in writing its admission to the Council as a single party under the name “NUPSAW”.
- [17] Pursuant thereto and on 21 June 2018 at its AGM, the Council resolved that a further verification exercise must be done.
- [18] This resolution gave rise to the present urgent application.

The Applicants' case

- [19] The Applicants' case is that the resolution that a further verification exercise be done on grounds that the figures presented by the General Secretary were disputed, is based on the provisions of clause 11.4 of the constitution. Clause 11.4 provides that the General Secretary may request employers to provide figures of employees for whom membership fees are deducted and trade unions to provide audited figures of members in good standing.
- [20] It was further resolved by the Council that when this further verification is done, the trade unions' membership will revert to the figures prior to the SNG report, in which case NUPSAW will fall below the 30 000 threshold.
- [21] The Applicant submitted that clause 11 of the constitution deals with the processes that the General Secretary can engage in to ascertain annual membership figures. Once the annual membership figures have been collated, it is reported and the parties are informed, as per clause 13.3. The constitution does not make provision for the General Secretary to revert to clause 11.4, when a decision had already been taken and the parties had already been informed of their voting weights.
- [22] The decision to revert to clause 11.4 is premised upon dissatisfaction with or a dispute about the voting weights attributed to NUPSAW.
- [23] The Applicant's argument is that the constitution does not have a procedure for challenging voting thresholds, other than clause 13.4, which provides specifically that any party that disputes the determination of voting weights by

the General Secretary, may refer such dispute for conciliation and if that fails, arbitration under clause 5 of the dispute procedure.

- [24] The conducting of a further verification exercise after the General Secretary has informed the parties of the voting weights, is unlawful and unconstitutional and prejudices the Applicants in material respects.
- [25] The Applicants seek relief on the basis that NUPSAW's (including the unions acting jointly) right to be a member of the Council is founded upon the fact that they meet the threshold requirements for membership of the Council.
- [26] The Applicants seeking an order to interdict and restrain the General Secretary from giving effect to a decision of the Council which resolved that a further verification of trade union membership be done on the grounds that such resolution is unlawful and in breach of the bargaining council's constitution.

The opposition

- [27] The Respondents opposed the application and raised two points *in limine* namely the urgency of this application and the issue of non-joinder.

Urgency

- [28] The Respondents submitted a number of arguments to show that the application is not urgent and should not be dealt with on an urgent basis. The Applicants on the other hand submitted arguments as to why the matter is urgent.
- [29] On 27 June 2018 the parties agreed to the filing of further affidavits and heads of argument and the Registrar enrolled the matter for hearing on 17 August 2018.
- [30] Notwithstanding the Respondents' challenge in respect of urgency, I am inclined to deal with this matter without making a finding on the issue of urgency. This is so for a number of reasons. This matter was enrolled for hearing in Court on 27 June 2018, when an order was issued by consent of

the parties and the matter was enrolled for hearing on 17 August 2018. Judicial resources are scarce and limited and no matter should be afforded the luxury of numerous Court days being allocated to it. Therefore, it is in the interest of the parties that when a second Court day is allocated to the same matter, it be dealt with.

[31] This is more so where there is before me a complete set of papers, with heads of argument drafted by senior and junior counsel and where the matter was fully ventilated and argued in Court.

[32] I therefore proceed to consider the second point *in limine*.

Non-joinder

[33] The second point *in limine* raised by the Respondents is that there has been a non-joinder of parties that have a material interest in the relief sought by the Applicants.

[34] The General Secretary explained that in terms of clause 11 of the constitution he is required to review the annual membership figures of all trade unions admitted to the Council as at 31 December of the previous year, or as soon as possible after 1 April each year and report to the Council by no later than 14 May of each year. The requirement of a review of membership figures as at 31 December 2017 was conducted and the report was tabled on 14 May 2018 at a meeting of the Council's EXCO. The report revealed membership figures which differed considerably from the previous year and concerns were raised by the trade union parties that the membership figures did not correspond with the trade unions' membership contribution information. A proposal was put forward that a verification of trade union membership be conducted and the EXCO resolved that the verification of trade union membership be dealt with at a meeting of the Council. The issue was tabled at a Council meeting and it was determined that it be dealt with at the AGM.

[35] The verification issue was raised at the Council's AGM on 21 June 2018 and it was resolved that a verification exercise of trade union membership should be conducted. The General Secretary stated that resolutions of the Council are

collective agreements concluded between the members of the Council and are not decisions taken by the executive leadership of the Council. On 21 June 2018 the employer and trade union parties to the Council resolved that the General Secretary should conduct the verification exercise.

- [36] The General Secretary subsequently commissioned the Council's auditors to conduct a verification as aforesaid.
- [37] The decision that the Applicants challenge in this matter is a resolution taken by the parties to the Council, namely the State as employer and the majority of the unions which are the other parties to the Council. They raised concerns about the General Secretary's figures when he reported them to the Council members and they debated them at the AGM and as a result, they took a resolution that a verification process should be undertaken.
- [38] The relief sought by the Applicants would effectively interfere with the Council's fulfilment of its responsibilities and performing its duties in circumstances where it has been mandated to verify membership levels of the trade union members. The Applicant seeks to prevent the Council from carrying out a verification of membership, which is a lawful and legitimate function.
- [39] Mr Kennedy for the Respondents submitted that the other unions have a direct and material interest in the relief sought in this application. The Applicants are themselves parties to the Council and they are in dispute with other parties to the Council, wherefore it is not only the Council that should have been joined. The other parties have a material and direct interest in the outcome of this matter and should have been joined.
- [40] As such, there is a material non-joinder of the employer and other trade union parties to the Council.
- [41] The Respondents submitted that on this basis alone the matter should be struck from the roll.

- [42] In reply, the Applicants denied that citing the Bargaining Council as a respondent renders the application defective. The Applicants' case is that the employer party and trade unions acting together make up the Bargaining Council and the decision taken by the Bargaining Council, was not derived on account of the individual trade unions or the employer in their individual capacities, but that it was made by the collective which forms the Bargaining Council. It is illogical for a party to site the constituent parties of the Bargaining Council when a dispute lies against a decision taken by the Bargaining Council.
- [43] In my view this argument is without merit because the Applicants are themselves parties to the Council and they are in dispute with other parties to the Council.
- [44] Mr Hulley for the Applicants submitted that there is no merit in the non-joinder point as the Applicant applied to this Court to interdict the General Secretary from giving effect to a decision taken in the Council on the ground that the decision is unlawful and runs counter the Council's constitution.
- [45] The Applicants' argument is that it is the decision of the General Secretary that is attacked, wherefore it is difficult to understand why the other unions and employer have an interest in the matter. Mr Hulley however submitted that an order of this Court will render their resolution nugatory, but the attack is not directed at their resolution, but is directed at the General Secretary and his powers.
- [46] In the Applicant's founding affidavit, it is stated that the conducting of a further verification exercise, after the General Secretary has informed the parties in terms of clause 13.3 of the constitution, is unlawful and unconstitutional and that there are no lawful grounds for the General Secretary to heed an unconstitutional resolution to conduct a further verification exercise.
- [47] Mr Hulley submitted that the General Secretary's decision is unlawful in that it runs counter to the constitution.

- [48] In my view there is no merit in this argument. Firstly, there is no case made out that the General Secretary has taken any decision and secondly, this argument does not accord with the Applicants' version on affidavit and the relief they seek, namely to interdict the General Secretary from giving effect to a decision of the Bargaining Council.
- [49] The objection of non-joinder may be raised where the point is taken that a party who should be before Court, has not been joined or given judicial notice of the proceedings. The substantial test is whether the party that is alleged to be a necessary party for joinder, has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned¹.
- [50] *In casu* the Applicants seek an order to interdict the effecting of a Council resolution and if the relief is granted, it would render the resolution nugatory. The other parties to the Bargaining Council have a direct and substantial interest in the outcome of this application and as such they should have been joined.
- [51] There is merit in the Respondents' non-joinder argument and the point *in limine* is upheld.
- [52] This Court has a broad discretion in terms of section 162 of the Labour Relations Act² to make orders for costs according to the requirements of the law and fairness. Considering that the parties are in a collective bargaining relationship and that a cost order may have an adverse effect on such a relationship, the interest of justice and fairness will be best served by making no order as to costs.
- [53] In the premises, I make the following order:

Order

1. The application is struck from the roll;

¹ Herbstein & Van Winsen, 'The Civil Practice of the High Courts of South Africa', Volume 1.

² Act 66 of 1995 as amended.

2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

Applicants: Advocate G Hulley SC with Advocate B Ford

Instructed by: Ndumiso Voyi Inc

Respondents: Advocate P Kennedy SC

Instructed by: Bowman Gilfillan Attorneys