

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 2414/19 AND J 34/20

In the matter between:

PHUMZILE ZWANE

First Applicant

NOKUSA VERONICA LUTHULI

Second Applicant

ZIKHALI ELPHAS LUTHULI

Third Applicant

and

JULIUS MOYO

First Respondent

MBHEKISENI MVUBU

Second Respondent

WILSON MUTWANAMBA

Third Respondent

INQUBELAPHAMBILI TRADE UNION

Fourth Respondent

Heard: 29 January 2020

Delivered: 26 February 2020

JUDGMENT

MAHOSI.J

Introduction

- [1] This is an application brought by the applicants for an order in the following terms:

'Part A

1. Condoning the first and second applicants non-compliance with Rule 8 of the Rules of this Honourable Court relating to the form and the service of this application on the first to further respondents in terms of section 158(1)(a)(i);
2. The dismissals of the first, second and third applicants in terms of the letters issued on 23 December 2019 being annexures "FA16", "FA17", and "FA18" to the founding affidavit are set aside and the applicants are to continue performing their functions as employees of the fourth respondent;
3. Any suspension of the first, second and third applicants is set aside.
4. Costs of the application had to be paid by the respondents, the one paying the other to be absolved on the scale as between attorney and client;
5. Further and/or alternative relief.

Part B

1. The First to Fourth Respondents are to show cause on a date to be determined by the Registrar of this honourable Court as to why they should not be found guilty of contempt of Court, for failing to comply with the Order granted by Ms Justice Nkutha-Nkotwana on 17 December 2019.
2. That the first to fourth respondents may explain their conduct by way of affidavit on the date of hearing or before that date (although this will not excuse them from being present at Court).
3. In the absence of providing an explanation to the satisfaction of the Court or failing to appear in Court despite being properly served, that:
 - 3.1 The first to fourth respondents be found guilty of contempt for failing to comply with the order of the Court.
 - 3.2 the first to third respondents be incarcerated for a period which is specified by this Honourable Court, and
 - 3.3 the first to fourth respondents be each fined in the amount of R50 000.00 (Fifty Thousand Rands) or an amount the Court deems appropriate.

4. Costs of the application are to be paid by the respondents, the one paying the other to be absolved on the scale as between attorney and client,
5. Further and/or alternative relief.'

[2] This dispute first served before this Court on 17 December 2019. On this occasion, Judge Gush, made the following order:

- '1. The matter is postponed *sine die* to be set down with the rescission application in case number J43/20;
2. The rescission application to be enrolled as a matter of urgency'

[3] Resultantly, before this Court are the consolidated disputes under J2414/19 and J43/20 and I deal with them *infra*.

Background

[4] At the heart of this dispute is the life and soul of the fourth respondent, Inqubelaphambili Trade Union (ITU), a registered trade union with its head office in Johannesburg. The first applicant Ms Phumzile Zwane (Ms Zwane) is employed as an office administrator, the second applicant, Ms Nokusa Veronica Luthuli (Ms Luthuli) is employed as a receptionist and the third respondent, Mr Zikhali Elphas Luthuli (Mr Luthuli) is employed as a union official. The first, second and third applicants are collectively herein referred to as "the applicants". Ms Luthuli is married to Mr Luthuli and Ms Zwane is their daughter.

[5] The first respondent is Mr Julius Moyo (Mr Moyo) who is the General Secretary of the ITU. The second respondent is Mr Mbhekiseni Mvubu (Mr Mvubu) who is a member of the National Executive Committee (NEC) of ITU. The third respondent is Mr Wilson Mutwanamba (Mr Mutwanamba) who is also a member of the ITU. The first, second and third respondents are collectively herein referred to as "the respondents". Although there are no qualms regarding the positions of the latter respondents, that of Mr Moyo is disputed by the applicants.

- [6] The respondents accuse the applicants of controlling the ITU's finances and running the affairs of the union for the benefit of their family and question their authority to be signatories of ITU's bank account.
- [7] The leadership of ITU is vested in the National Executive Committee (NEC) which consists of the President, Vice President, General Secretary, Treasurer and six Additional Members.¹ The constitution of the ITU provides *inter alia*, as follows:

'9. MEETINGS

(1) National Congress

- (a) The supreme governing body of trade union shall be the National Congress, which shall consist of the National Executive Committee and at least 66.7% of the union members entitled to vote.
- (b) The national congress shall be convened every calendar year. Provided that the National Executive Committee may decide to convene the national congress for a particular year within a six-month period after that year. None of its convocation shall be communicated by the general secretary to the members at least two months before it is held.
- (c) Resolutions from members shall be sent to the general secretary and shall reach his/her office not later than 2 weeks prior to the National Congress. Copies of the resolutions and of the National agenda shall be distributed to all members by General Secretary not less than 2 days prior to the National Congress.

(2) National Executive Committee

- (a) The National Executive Committee shall ordinarily meet at least once every 3 months on a date to be fixed by the President. Special meetings of the National Executive shall be called by the President whenever he/she deems it advisable or upon a requisition signed by not less than five (5) members of the National Executive Committee, in which event the meeting shall be called within 14 days of receipt of the requisition by the President.

¹ Constitution of ITU, clause 10

- (c) The quorum for meetings of the National Executive Committee shall be 60% of members. If within 60 minutes of the time fixed for any meeting a quorum is not present, the meeting shall stand adjourned to the same day in the week following (and if that day is a public holiday then to the next succeeding working day) at the same time and place, and at such adjourned meeting the members present shall be given to members who were absent from the first meeting.

...'

[8] The tumultuous relationship between the parties came to a head on 15 November 2019, when the respondents served the applicants with letters of suspension and disciplinary charges were levelled against them. They were arraigned before a disciplinary enquiry which was set to proceed on 17, 18 and 19 December 2019 after preliminary issues which they had raised were rejected by the chairperson of the inquiry. Aggrieved by this, the applicants approached this Court on an urgent basis and the matter served before Nkutha-Nkontwana, J who issued the following order on 17 December 2019:

- '1. The provisions of the rules relating to times and manner of service referred to therein are dispensed with and the matter is dealt with as one of urgency in terms of Rule 8 of the rules of this Court.
2. The disciplinary hearing set to commence as against the first, second and third respondent applicants on 17, 18 and 19 December 2019 is stayed in before the respondent may only proceed with a disciplinary hearing if, after a duly constituted National Congress is held and a new National Executive Committee of the fourth respondent is elected, the decision to institute disciplinary proceedings as against any of the applicants is ratified;
3. Costs of the application had to be paid by the second and third respondents, no one paying the other to be absolved.'

[9] It is not in dispute that in 2017, the then President of the ITU passed away and the Vice President and the General Secretary resigned. As matters stand, there is no President and there is no Vice President at the ITU. Further it is not in dispute

that Mr Moyo has occupied the General Secretary position since 2017. However, the applicants challenge the legality of his assumption to this position.

- [10] Furthermore, although clause 9(2)(a) of the ITU constitution provides that the NEC must meet every three months, such has not taken place since 2017 and no National Congress has been held since. In my view, the aforementioned background constitute the lethal ingredients to the disputes between the parties. The Court will return to this issue later on in the judgment.

The dispute

- [11] As aforementioned, in essence, before this Court are three applications. The first one is an application brought by the respondents in terms of which they seek an order to rescind the orders granted by Nkutha-Nkontwana, J mentioned above. The second one is an application to declare the dismissal of the applicants unlawful and to set same aside. The third is the application to hold the respondents in contempt of Court and issue fines against them or have them committed to incarceration for failure to comply with the order of Nkutha-Nkontwana, J referred to above. All the applications are dealt with *infra*.

Rescission Application

- [12] This application is brought by the respondents seeking an order to rescind the aforementioned order of this Court granted by Nkutha-Nkontwana, J.
- [13] The legislative framework for applications for rescission of court orders is set out in section 165 of the Labour Relations Act ²(LRA), which reads:

‘165. Variation and rescission of orders of Labour Court

The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order –

² Act 66 of 1995 as amended.

- (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) granted as a result of a mistake common to the parties to the proceedings.'

[14] This section should be read together with Rule 16A of the Labour Court Rules, which reads as follows:

'16A

- (1) The court may, in addition to any other powers it may have-
 - (a) ...
 - (b) on application of any party affected, rescind any order or judgment granted in the absence of that party.
- (2) Any party desiring any relief under-
 - (a) ...
 - (b) may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit.'

[15] In the current matter, the respondents aver that they are bringing this application in terms of section 144 of the LRA. This is a misguided approach as section 144 provides for the variation and rescission of arbitration awards and rulings. This is the first hurdle that the respondents fail to clear. Even if the Court were inclined to consider the application on the application of common law sufficient cause must be shown. This means that firstly, there must be a reasonable explanation for the default, prove that the application is *bona fide* defence and that the prospects of success are reasonable.

[16] Whilst this is not an end in itself, the respondents argue that they were not in wilful default when the matter was heard for reason that they were not properly

served with the urgent application as the papers they were served with bore no case number.

- [17] Furthermore, the respondents submitted that they attended court despite the defective service of the application. However, they allege that an official of this Court directed them to a courtroom that was not hearing urgent matters and further that an official of this Court advised them that they should wait for the outcome of the order although their matter was not on the roll.
- [18] On the prospect of success, the respondents contend that they had on all material times indicated their intention to defend the matter and that they participated fully in the disciplinary hearings and indicated their desire to have the matter resolved, save for the cancellation of fourth respondent's registration.
- [19] In opposing this application, the applicants submit that the respondents have no *locus standi* to bring this application on their personal capacity as they failed to attach the resolution authorising them to do so. Further that to the extent that they may be able to act on behalf of the fourth respondent, no resolution has been passed by the fourth respondent to authorize them to do so.
- [20] It is the applicant's further submission that the respondents' reliance on defective service is misplaced because on their own version, they were aware that the matter was proceeding on 17 December 2019 and they were present in court on that day. Furthermore, the applicants submitted that despite being aware of the court date, the respondents failed to file a notice of intention to oppose the application. This conduct, according to the applicants evinces the respondent's disinterest in the matter and makes their suggestion that they were in court even more implausible.
- [21] The courts have held that a judgment will be considered to be granted erroneously if, at the time of granting it, there existed facts which the court had

not been aware of and, had it been aware thereof, would not have granted the judgment.³

[22] In the current matter, the respondents have not made out a case for the rescission of Nkutha-Nkontwana, J for the following reasons. Firstly, the respondents failed to show that they have authority to bring this application in their personal capacity or to act on behalf of the fourth respondent. Secondly, even if they had authority to bring this application, the reliance on improper service is without merit in that on their own version, they were aware of the proceedings of 17 December 2019, hence they attended court. Further, on the basis of the undisputed evidence that there was only one court which sat on 17 December 2019 and the respondent's failure to provide the name of the official(s) of the court they interacted with on 17 December 2019, the respondents' submission that they were directed to an incorrect court is improbable and stands to be rejected.

[23] Besides, there is no evidence that the respondents had an intention to oppose the application of 17 December 2019 because as of that date, they had not filed a notice to oppose and neither had they filed their answering affidavits. It follows then that the respondents have no prospects of success in this application and the application of 17 December 2019.

[24] Thirdly and more importantly, the respondents failed to disclose any facts which should Nkutha-Nkontwa, J had been aware of, would have been persuaded not to grant the order they seek to rescind.

[25] In my view, the respondents have not shown that, had Nkutha-Nkontwana, J been made aware of their defence or presence in court, it would have changed or persuaded her not to grant the order that she did. Further, even if it were to be accepted that she would have, there was, in fact, no such defence because at the time, the respondents had not opposed the application. Additionally, in this

³ See: *Department of Correctional Services v Baloyi* (2016) 37 ILJ 2852 (LC).

application, the respondents failed to set out facts to support their assertion that they have reasonable prospects of success.

[26] There is nothing before this Court, in the papers and in argument, which logically demonstrate existence of events or situation, which Nkutha-Nkontwana, J had been aware of, would have not granted the order as she did. For these reasons, this application falls to be dismissed.

[27] The Court will now deal with remaining applications brought by the applicants.

Contempt Application

[28] Although this application is captured as Part B in the applicants' papers, I propose to deal with it here as it is integral to the order sought in Part A, which is to set aside the dismissal of the applicants. Herein the applicants seek a *rule nisi*, calling upon the respondents to show cause why they should not be held in contempt of Court for failing to comply with the order of Nkutha-Nkontwana, J and committing them to imprisonment and or why a fine of R50 000 should not be imposed on each of them. The basis on which the applicants seek this order is that the respondents have, following the order of Nkutha-Nkontwana, J, proceeded to issue the applicants with letters of dismissal on 23 December 2019.

[29] The requisites of contempt of court were reaffirmed by the Supreme Court of Appeal (SCA) in *Compensation Solutions (Pty) Ltd v Compensation Commissioner*⁴ as: (a) the existence of a court order; (b) service or notice thereof; (c) non-compliance with the terms of the order; and (d) wilfulness and *mala fides* beyond reasonable doubt.

[30] In *Anglo American Platinum Ltd and another v Association of Mineworkers and Construction Union and Others*⁵ the Court has held that:

⁴ (2016) 37 ILJ 1625 (SCA) at para 15.

⁵ (2014) 35 ILJ 2832 (LC).

'The principles applicable in an application such as the present are well-established. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), the Supreme Court of Appeal observed that the civil process for a contempt committal is a 'peculiar amalgam' since it is a civil proceeding that invokes a criminal sanction or its threat. A litigant seeking to enforce a court order has an obvious and manifest interest in securing compliance with the terms of that order but contempt proceedings have at their heart the public interest in the enforcement of court orders (see para 8 of the judgment). The court summarized the position as follows at para 42:

'To sum up:

- (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
- (b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and willfulness and *mala fides*) beyond reasonable doubt.
- (d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to willfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and *mala fide*, contempt will have been established beyond reasonable doubt.
- (e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'

[31] In this matter, the existence of a court order is not in dispute. So too is the fact that the respondents are aware of that court order. What is central for this Court to decide is whether the order granted on 17 December 2019 interdicted the respondents from dismissing the applicants.

[32] The applicants argue that the second and third respondents are not the NEC of the ITU, and that in fact, the NEC ceased to exist in 2017 as there has not been a National Congress and that there was no quorum nor resolution authorising the respondents to take disciplinary steps against them. Further, they contend that the respondents issued dismissal letters to them in an effort to get rid of them and to get their hands on the union's finances.

[33] I have to give effect to the order of Nkutha-Nkontwana, J read in context with the order sought in this instance and that is to declare the respondents to be in contempt thereof. I have in the opening paragraphs of this judgment, set out the order of Nkutha-Nkontwana, J and it is worth noting that the dismissal letters set out in great detail the allegations levelled against the applicants which led to their summary dismissal. Chief amongst these are accusations of defrauding the union, bringing the union into disrepute and to near deregistration.

[34] It is correct that the order of Nkutha-Nkontwana, J interdicted the impending disciplinary process against the applicants. What is important and cannot be ignored by this Court is the fact that Nkutha-Nkontwana, J places a condition on future conduct as follows:

'The disciplinary hearing set to commence as against the first, second and third respondent applicants on 17, 18 and 19 December 2019 is stayed in before the respondent may only proceed with a disciplinary hearing if, after a duly constituted National Congress is held and a new National Executive Committee of the fourth respondent is elected, the decision to institute disciplinary proceedings as against any of the applicants is ratified;'

[35] In deciding whether the respondents are in contempt of Court, non-compliance with the terms of the order and wilfulness and *mala fides* on their part needs to be shown beyond reasonable doubt.

[36] It is common cause that following the issuance of the Order, the respondents proceeded to dismiss the applicants. This is troubling for a number of reasons. Firstly, the respondents were aware that they are not a properly constituted

NEC, secondly, Nkutha-Nkontwana, J directed that disciplinary proceedings against the applicants be stayed pending the holding of the National Congress where a new NEC would be elected. It is common cause that currently the NEC is almost non-existent; does not even at least compose of the 60% quorum; There is no President and no Vice President, no Treasurer and further, no National Congress has been held for a period of almost three years.

[37] The disciplinary code and procedure of the ITU vests the NEC with the authority '*to take appropriate disciplinary steps against any worker*'. The power lies with the NEC which is not properly constituted if not non-existent at the present moment. Then, if the status of the NEC is in such disarray, the question is, where do the respondents assume power or authority to dismiss the applicants?

[38] In their defence, the respondents argue that the order of Nkutha-Nkontwana, J is open ended and does not have specifics as to when the National Congress should be held. I find this argument nonsensical and opportunistic. As members of the ITU, logic would demand that they be familiar with the prescripts of their union's constitution. In fact, this argument evinces that the respondents are well aware of what is required of them but elected to treat the order of Nkutha-Nkontwana, J with contemptuous disregard by proceeding to issue the dismissal letters to the applicants.

[39] The applicants sought a *rule nisi*, calling upon the respondents to appear in Court and explain their actions. This is common practice in this Court, however, sometimes practical considerations would require finality and in my view, it is desirable to depart from the ordinary rule of practice to issue a *rule nisi*. I take this view as the respondents, by their own admission, have acted in contempt of Court. I find that the, first, second and third respondents to be in contempt of the Court Order of Nkutha-Nkontwana, J.

- [40] What remains then is what the consequences will be for the respondents' actions and the Court will deal with that in summing up this judgment.

Application to set aside the dismissal of the applicants

- [41] The applicants contend that the respondents had no *locus standi* to institute disciplinary proceedings against them based *inter alia*, on the fact that the NEC is not properly constituted, that should they follow the statutory procedures in dismissals, the payment of compensation would be from the accumulated financial reserves of the union and that the conduct of the respondents is in contravention of the spirit and letter of the Court Order of Nkutha-Nkontwana, J.
- [42] In the face of the undisputed fact that the power to take disciplinary steps against employees lies with the NEC, the paralysis which the NEC is at present, dissipates the respondents from dismissing the applicants. What remains for the Court to decide is whether, having found that there is no NEC, thus the absence of authority to dismiss, what remains of the dismissal of the applicants.
- [43] The respondents are not the NEC. It follows that they do not have authority to dismiss the applicants and in doing so, they acted *ultra vires*. Therefore, their decision is invalid and thus a nullity. What remains for determination now is what to make of the dismissal.
- [44] In *Steenkamp and Others v Edcon Limited*⁶ the Constitutional Court found that an order declaring the applicants' dismissals invalid, will have the legal effect that their dismissals never took place.

'An invalid dismissal is a nullity. In the eyes of the law an employee whose dismissal is invalid has never been dismissed. If, in the eyes of the law, that

⁶ (2016) ILJ 564 (CC) at para189

employee has never been dismissed, that means the employee remains in his or her position in the employ of the employer’.

[45] This Court per Lagrange, J *Solidarity and Others v South African Broadcasting Corporation*⁷ endorsed the principle that where the dismissal is found to be unlawful, it has to be annulled. It further held that ‘

‘Consequently, an order declaring the applicants’ dismissals invalid, will have the legal effect that their dismissals never took place and can be accompanied by an order that the SABCC must allow them into their workplaces for the purpose of performing their duties. The appropriate relief in this instance given that the claim rests on unlawfulness is that the dismissals should be nullified.’

[46] A similar dispute played out in *Matatiele Local Municipality v Shaik and Others*⁸, the applicant challenged her dismissal arguing that she was unfairly subjected to a disciplinary hearing and that her dismissal was void as it was held outside the time limits prescribed in terms of clause 6.3 of the SALGBC disciplinary collective agreement. The LAC accepted the Labour Court’s finding that dismissal was invalid therefore void. The Court opined:

‘Should an employee inform and persuade an arbitrator that his or her dismissal is invalid and of no legal effect, it means that the employee has not been dismissed.’

Conclusion

[47] This is how to best describe this matter. More so, its turbulent history. The Court has noted that in 2018, some members of the ITU sent a complaint to the Registrar of Labour regarding the operations of the ITU which included *inter alia*, how the members of the applicants’ family were running the union, how finances were managed, infightings, acts of intimidation and threats. In a reply the Registrar stated:

⁷ (2016) 37 ILJ 2888 (LC) at para 72.

⁸ (2017) 38 ILJ 2280 (LAC).

'There is a disturbing situation where it seems that the NEC has been 'captured' by the Luthuli family. The above-mentioned disturbing activities taking place within the operation of the union are noted with great concern by this office as they impact negatively on the genuineness of the trade union.'

[48] It is not apparent why having had such strong views on the ITU's situation, has the Registrar of Labour not taken steps to intervene and exercise its constitutional powers in remedying the said situation. The Court has taken note that, apart from the three applications which served before this Court and which were dealt with *supra*, there is another application which was to be heard by the South Gauteng High Court on 21 January 2020, before this judgment was handed down. That also deals with the continued infighting within the ITU involving the same parties, further is the case filed with SAPS, in which the respondents seek the arrest and detention of the applicants for alleged acts of threats and intimidation.

[49] There are also allegations that the applicants have dismissed and suspended some employees of the union. The Court was referred to CCMA case referred by an employee of the ITU who was allegedly dismissed by the applicants. This situation should not be allowed to exist, especially where the interests of the members who pay subscription fees, face obvious threat. There is no doubt that this union is run in a manner far remote from the purpose and spirit of trade unions. Furthermore, the fact that the applicants are signatories of the ITU bank account and that they are funding this litigation out of the ITU funds is concerning.

[50] The Court has left the sanction against the respondents for later in the judgment the Court's decision is influenced by a holistic consideration of the facts before Court. In the Court's view, all parties are not without blame in this matter. However, the respondents' disregard of the Court Order of Nkutha-Nkotwana, J cannot be ignored and a fine in the amount of R 5000. 00 each, against the respondents, wholly suspended for a period of 12 months should serve as a deterrent.

Costs

[51] This Court has discretion in awarding costs, guided by the requirements of law and fairness. There is clear indication that it is the union member's monies that fund this litigation and should the Court order costs, the union members are the ones who would suffer financially. For that reason, the requirements of law and fairness dictate that there should be no order as to costs.

[52] In the circumstances, the following order is made.

Order

1. The application to rescind the order granted by Nkutha-Nkontwana, J on 17 December 2019 is dismissed.
2. The first, second and third respondents are found to be in contempt of the order of by Nkutha-Nkontwana, J.
3. The first, second and third respondents are fined an amount of R 5 000.00 each for their failure to comply with the order of Nkutha-Nkontwana J, which fines are wholly suspended for a period of 12 months.
4. The dismissal of the applicants is declared invalid.
5. The applicants are barred from using the funds of the union ITU to pay their attorney's costs.
6. The applicants must within 15 days of this order, file an affidavit confirming that they have not used the union funds to pay for their attorney's costs.

7. The Registrar of Labour is directed to investigate the affairs of the ITU and to report to this Court on affidavit what steps it intends taking in dealing with the situation at the ITU, within 15 days of the date of this Order.
8. The Registrar of the Labour Court is directed to furnish a copy of this judgment to the office of the Registrar of Labour.
9. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Lennox

Instructed by: Cheadle Thompson and Haysom Incorporated

For Respondents: Mr Mvuyisi Mfebe- Union Official