



- (1) Reportable: Yes
- (2) Of interest to other Judges: Yes
- (3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. JR1055/21

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA (NUMSA)**

First Applicant

SINDISO DUNJWA

Second Applicant

and

UNIVERSAL TISSUE (PTY) LTD

First Respondent

NADIA SITHOLE N.O.

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 4 February 2026

Delivered: 9 February 2026

Labour law – Review application - CCMA arbitration – Employee’s right to trade union representation - *Locus standi* - Membership “*in good standing*” and non-payment of subscriptions are issues between trade union and its member/s - Employer’s lack of standing to challenge union membership – review application granted and dispute remitted – member entitled to trade union representation

JUDGMENT

MAKHURA, J

- [1] The second applicant (employee), represented by the first applicant trade union, referred an unfair dismissal dispute to arbitration after an unsuccessful conciliation. At the commencement of arbitration proceedings on 11 May 2021, the first respondent company raised a point in *limine* that the union had no *locus standi* before the third respondent to represent the employee because the employee was not a member of the union. The first respondent submitted that “*a mere application of a membership form*” does not make him a member of the union and sought the second respondent commissioner’s intervention to request proof of membership. In addition, the first respondent argued that the employee’s name did not appear on the list of members who voted to participate in a protected strike that took place in February 2021.
- [2] The union argued that the employee was its member. The union presented the employee’s duly completed membership form before the commissioner as proof that the employee joined the union on 17 September 2019, having previously resigned his membership. It is common cause that although the union had recruited members at the first respondent, it was not a recognised trade union and therefore no deductions were made from the employees’ wages on behalf of the union. The employee was dismissed on 17 September 2020. At the time of his dismissal, he was not a paid-up member of the union.
- [3] The commissioner issued the following *ex-tempore* ruling:
- ‘I have made my ruling and I have decided that the union is not a good standing member in terms of rule 25 of this arbitration. The union had confirmed that the member does not pay levies and therefore it cannot be said that he is a member

in good standing. The union is therefore not allowed to represent the applicant in this arbitration.'

- [4] The commissioner, in response to a question from the union official and the employee's representative whether the ruling would be in writing, said:

'It's part of the arbitration, so we are going to continue with the arbitration now. I will give you 5 minutes with your member. I made a ruling, it's done. I will give more details in the ruling that I'm going to issue when I issue the arbitration.'

- [5] The union official again requested the commissioner for a written ruling to account to the union and submitted that he was "*not quite sure whether the member will be able to proceed in the absence of a representative*". The commissioner stated that the arbitration would proceed and that she would issue the ruling within 14 days after the end of the arbitration. Accordingly, the union was summarily excluded from the arbitration proceedings relating to its member. This left the employee unrepresented and with a mere five minutes to consult with his union representative before being required to conduct his own case, including the cross-examination of the company's witnesses.

- [6] The commissioner, as indicated in her *ex-tempore* ruling that she would provide more details of her ruling in the award, issued an award on 19 May 2021 and provided the following details about her ruling:

'Rule 25(1)(a)(iii) [provides that] if the party is a registered trade union, any member of that trade union or registered employer's organisation or and office bearer or officials as defined in this Act;

- (b) Subject to paragraph (c), in any arbitration proceedings a party to the dispute may appear in person or be represented only by
 - (i) a legal practitioner;
 - (ii) a candidate attorney; or

- (ii) an individual entitled to represent the party at the conciliation proceedings in terms of sub-rule (1)(a).'

It is common cause that [it] is a requirement in the constitution of a union for a member to be in good standing by paying subscriptions. Further it is also required that an applicant be a member in good standing for the union to represent the member in proceedings at the CCMA. Given that the applicant is not a member in good standing the union cannot represent him in these proceedings.'

- [7] The commissioner continued to deal with the merits of the unfair dismissal dispute. She found that the employee's dismissal was fair and dismissed his claim. The applicants are now challenging the award, including the ruling on the *locus standi* point. The company does not take a point with the union representing the employee in these proceedings.
- [8] The applicants contend that the commissioner's ruling denying the employee representation by his trade union and/or denying the trade union the right to represent its member constitutes an error of law and/or fact and that she misdirected herself by ignoring that the employee was a member of the union. They also challenge the commissioner's decision that the employee's dismissal was procedurally and substantively fair.
- [9] The following facts led to the charges and dismissal of the employee. Members of the union participated in a protected strike that commenced on 3 February 2020. The first respondent later alleged that the employees committed misconduct during the protected strike, charged and dismissed 56 employees on 19 May 2020. The union challenged the dismissal of its members before the third respondent. The employee in this case was not charged with the 56 employees.
- [10] On 5 August 2020, the union addressed an email to the first respondent. It recorded that the employee participated in the protected strike that commenced in February 2020, that he was not charged for misconduct when other employees were charged and that the first respondent waived any right it had to discipline

him. The union demanded that the first respondent should recall the employee with full pay for the period of absence from work.¹ The first respondent did not respond to the email.

[11] On 25 August 2020, the union addressed a further email demanding a response within five days, failing which it would conclude that the employee had been dismissed.

[12] On 27 August 2020, the first respondent's representative responded to the emails. It stated that the employee:

'Has never tendered his services since 27 January 2020 and therefore the principal (sic) of no work no pay is applicable. Your member is hereby directed to report for duty on 28 August 2020 at normal working hours at the company premises, failure to do so will be regarded as abscondment.' (Emphasis added)

[13] Having demanded his return to work and threatening him with abscondment if he did not report for duty, and the employee having complied with the demand, the first respondent then charged him with the following allegations of misconduct:

- '1. Abscondment – in that as from 01 February 2020 you have failed to report for duty.
2. Participating illegally in a protected strike from 03 February 2020.'

[14] The second charge was premised on the first respondent's argument that because he was allegedly not a member of the union, he was not allowed to participate in the strike and therefore, his participation in the protected strike that was called by the union was illegal. The employee was called to attend a disciplinary hearing on 9 September 2020. The employee's attempt to be represented by the union at the disciplinary hearing was rejected by the first respondent.

¹ What happened between the first day of strike until 5 August 2020 is a matter of evidence that has a direct impact on the enquiry into the fairness of the dismissal. I do not, based on the decision I ultimately arrive at, deem it necessary to deal with the issue.

[15] I deal first with the refusal to allow the employee trade union representation. If the commissioner's ruling is found to be unreasonable and/or erroneous, the appropriate remedy would be to set aside the award and the arbitration proceedings and remit the matter to the third respondent for a *de novo* hearing. It would therefore not be necessary to consider the further grounds of review. If, however, the applicants' attempt to set aside the ruling and award on this basis is refused, I will then proceed to deal with the review application on the fairness of the dismissal.

[16] The applicants argued that the commissioner committed material errors, ignored material and relevant evidence, misdirected herself and reached an unreasonable decision. Section 200 of the Labour Relations Act² (LRA) deals with representation of employees and employers. It provides that:

- '(1) A registered *trade union* or registered *employers' organisation* may act in any one or more of the following capacities in any *dispute* to which any of its members is a party –
- (a) in its own interest;
 - (b) on behalf of any of its members;
 - (c) in the interest of any of its members.
- (2) A registered *trade union* or a registered *employers' organisation* is entitled to be a party to any proceedings in terms of *this Act* if one or more of its members is a party to those proceedings.'

[17] The first applicant, as a registered trade union, is entitled to be a party to the arbitration proceedings that relate to its member/s. It can act on behalf of or in the interest of its member/s. This section, together with rule 25(1) of the rules of the CCMA, gives the employee the right to choose a trade union that would represent him or her, subject to the union's constitution.

² Act 66 of 1995, as amended.

- [18] The first respondent's case was that the employee joined the union and later cancelled his membership, did not pay subscriptions and therefore was not entitled to the union representation. The first respondent's attempt to dispute the membership form completed by the employee when he joined the union for the second time was rejected by the commissioner. In its answering affidavit before this Court, the first respondent relied on the union's constitution³ to further advance its argument. It argued that in terms of clause 5 of Chapter 3 of the union's constitution, any member who fails to pay subscription for more than 13 weeks and has not been granted exemption from such payment shall not be entitled to the benefits provided by the union and shall not be in good standing with the union. For this reason, the first respondent argued, the employee was not a paid-up member of the union and was not granted exemption.
- [19] Mr Du Toit, who appeared for the first respondent, argued that the union cannot act outside its constitution. For this, he referred to *National Union of Metalworkers of SA v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) & others*⁴ (*Lufil*). In *Lufil*, and also *Afgri Animal Feeds (A Division of PhilAfrica Foods (Pty) Ltd) v National Union of Metalworkers of SA & others*⁵ (*Afgri*), the Constitutional Court confirmed that as a voluntary association operating within the scope of and bound by its constitution, the right of employees to join the union is subject to its constitution. Therefore, the trade union could not represent employees, whether in collective or individual disputes, outside its own constitutional scope.
- [20] The above two judgments of the Constitutional Court are not on all fours with the current matter. The above judgments dealt with representation of employees where the union's constitution prohibits it to operate or organise in the particular sector. In *casu*, there is no issue with the union operating and/or organising in the sector where the first respondent operates. The issue raised by the first

³ Constitution of the National Union of Metalworkers of South Africa (NUMSA), as amended at National Congress of NUMSA in 2012 and at its Special National Congress in December 2013.

⁴ (2020) 41 ILJ 1846 (CC); [2020] ZACC 07.

⁵ (2024) 45 ILJ 1937 (CC); [2024] ZACC 13.

respondent regarding payment of subscriptions is an issue that concerns only the member and the trade union. It does not involve the first respondent in any manner whatsoever.

- [21] In their heads of arguments, the applicants sought to rely on this Court's decision in *National Union of Mineworkers on behalf of Mabote v Commission for Conciliation, Mediation & Arbitration & others*⁶ (*Mabote*) to advance its case. In *Mabote*, the Court was confronted with a similar question in *Lufil* and *Afgri*. Although the Court ruled that the employee could be represented by a trade union even though its constitutional scope does not cover the sector in which the employee is employed, and this decision was confirmed on appeal⁷, this judgment's reach has clearly been limited by the two subsequent Constitutional Court judgments above.
- [22] The case on point is the Labour Appeal Court (LAC) decision of *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers & Construction Union & others*⁸ (*MacDonald*). There, the company objected to the trade union representation on the basis that the employees were not its members because their membership had lapsed by reason of non-payment of subscriptions in excess of three months. Reliance was placed on several provisions of the union's constitution. The commissioner held that the membership of the employees had lapsed and consequently, the union could not represent them. This Court reviewed and set aside that ruling. On appeal, the LAC addressed four questions. First, whether the employees were members of the union at the relevant time or whether their membership had lapsed, second, the review test applicable to a ruling by an arbitrator on the interpretation of a union constitution. Third, "[w]hose rights are at issue?" and fourth, "[w]hat right, if any, does any employer have to concern itself with the membership status of individuals who

⁶ (2013) 34 ILJ 3296 (LC); [2013] ZALCCT 22.

⁷ *Kalahari Country Club v National Union of Mineworkers and Another* [2014] ZALAC 80; (2015) 36 ILJ 1210 (LAC).

⁸ [2016] ZALAC 32; (2016) 37 ILJ 2593 (LAC).

wish to be represented by a particular union?”. These questions are relevant to the current application.

- [23] The applicable review test is settled, and I need not deal with the second question any further. In *MacDonald*, the constitution of the union stated that membership lapses if the member’s subscription is in arrears for three months. The LAC underscored the significance of the context in which trade union members pay their subscriptions. It held that:

‘These provisions must be understood in the context of the provisions of the LRA about the procuring of organisational rights and in the context of labour relations dynamics, in which unions recruit members and have to engage with every employer to establish a right to enjoy a stop-order facility. Section 13 regulates the procedure to obtain stop-orders; it is elaborate and only commences once the majority representative status required by s 14 is shown to the satisfaction of the employer and if that is not forthcoming, the procedure provided in s 21 leading on to conciliation and maybe to arbitration, if not a strike. Axiomatically that may take time; sometimes a long time, as this very case illustrates.

The notion that members of AMCU, recruited on, say, 1 January, and AMCU has not by 2 April secured stop-order activations from their employer, forfeit their membership is preposterous. Were it so, an employer, by the simple tactic of delay, could undermine the recruitment efforts repeatedly, and ‘legitimately’ claim that membership is unproven. The union constitution cannot be understood in a way that renders recruitment of members by a union to be susceptible to such a ruse.’⁹

- [24] The first applicant’s constitution, just as it was in *MacDonald*, required members to sign a stop-order form for purpose of payment of their subscriptions, “*unless the NEC allows for cash collection*”. The union was not recognised and therefore a stop-order facility authorising the first respondent to make the deductions could not be implemented. There was no evidence to suggest that the employee was

⁹ Ibid at paras 18 – 19.

allowed to pay his subscriptions in cash. This in my view should be the collapse of the first respondent's point in *limine*.

[25] The LAC was unequivocal in its answers to the remaining two questions. *Whose rights are at stake?* The LAC said:

'Both the arbitrator and the Labour Court, on the premise of the parties' presentation of their cases, treated the matter as if the representation issue was solely about the union's *right to 'represent'* its members. However, it is also, and moreover, primarily, concerned with the *rights of the individual workers* who were parties to the dispute before the forum, to *choose their representatives*.

...

CCMA rule 25(1)(a)(ii) stipulates that a person who is a party to a dispute may be represented in conciliation by an office-bearer, official or member of that person's registered union. Rule 25(1)(b)(ii) extends that right to arbitration proceedings. These provisions say nothing about a union's right to represent its members in such proceedings.'¹⁰

[26] The right at issue is that of the employee - the right to representation in proceedings that determine not only his or her employment, but the livelihood of the employee and his or her family. This right should be jealously guarded by the commissioners and this Court as it strikes at the heart of the right to procedural fairness of the arbitration or court proceedings.

[27] What right, if any, does the employer have to challenge and enforce the rights created by the trade union and its member? The LAC took a critical view of the employer's involvement in matters pertaining to the employee's union membership status. It held that:

¹⁰ Ibid at paras 32 and 34. Although Rule 25 of was amended in April 2023, rule 25(1)(a)(ii) was retained and rule 25(1)(b)(ii) is now rule 25(1)(b)(iii) in terms of the amended rules, see *Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration* GG48445 of 21 April 2023 (which came into effect on 24 April 2023).

'Bluntly, what business is it of an employer, in such circumstances, to concern itself with whether membership dues are up to date or any other aspect of the relationship between individual employees and their union? In my view, there is no basis at all.

On the facts of this case, the individuals claimed to be members and the union claimed them as members. Assuming that the employer's challenge that the individuals were not in good standing were to be true, surely the choice of the union to elect not to cancel the membership or enforce specific performance is one which it can make without regard to any third party? No creditor is by law obliged to cancel a contract because the debtor fails to comply with the terms of the contract. Moreover, it has been held by Basson J in *Transport & General Workers Union & others v Coin Security Group (Pty) Ltd* (2001) 22 ILJ 968 (LC) at paras 160-161 that an employee who appears before the Labour Court represented by a union pursuant to s 161(1)(c) of the LRA, need not have been a member at the time of that employee's dismissal. If that be so, the relationship between union and a purported member in such proceedings is not dependent, in the least, on a history of membership, a point also latent in the decision in *County Fair* above.

Moreover, except as regards the need for a union to prove membership for collective bargaining purposes, the relationship between a union and its members is a private matter. To interfere with the private contractual relationship of other persons, a stranger would have to demonstrate some sort of delictual harm. None exists to justify the appellant seeking to pierce the veil of AMCU's internal affairs in relation to the dismissal dispute. If regard be had, for example, to the requirements for an interdict, the appellant, on these facts, can demonstrate neither a right nor a harm. The appellant's legitimate interest in the validity of membership for another purpose, relating to it incurring an obligation to accord AMCU a representative status, is quite distinct from any legitimate concerns it might conceivably have in relation to arbitration proceedings about misconduct.¹¹ (Emphasis added)

¹¹ *MacDonald*, at paras 40 – 42.

- [28] In this matter, the union's constitution did not preclude it from representing the employee. The employee and the union contended that the employee was a member of the union, notwithstanding the non-payment of subscription fees. The first respondent had no business involving itself in the internal affairs of the union, as the issue of membership did not affect its right to prove the fairness of the employee's dismissal. The fact that both the union and the employee appeared before the commissioner, ready to proceed with the matter, could only signify that the union regarded the employee as its member and accepted representation on that basis.
- [29] The commissioner ought to have resisted the first respondent's attempt to draw the proceedings into the internal affairs of the union. As emphasised by the LAC in *MacDonald*, trade union membership at the time the dispute arises is not a prerequisite for representation by that trade union. An employee may become a member of a trade union even after dismissal, and in such circumstances, there is no basis to deny the employee trade union representation or to exclude a trade union that has accepted the employee as its member post-dismissal. Where an employer appears before the CCMA and the employee is represented by a trade union that has agreed to act on the employee's behalf, it is not for the commissioner to interfere in that relationship or in the agreement between the union and the employee, unless it is able to show that the union is prohibited by its constitution from operating within the employer's sector.
- [30] By involving herself in the internal affairs of the trade union and denying the employee representation by his union, the commissioner deprived the employee of his fundamental right to trade union representation. In so doing, the commissioner committed a material error of law, exceeded her powers, and issued a ruling that was unreasonable. The arbitration proceedings that followed this ruling were accordingly unfair as they should not have proceeded without the union representation. The record of proceedings, during which the employee was unjustifiably denied representation and consequently deprived of a fair opportunity to present his case, must equally be set aside.

[31] The arbitration proceedings relating to the fairness of the dismissal were accordingly unfair and fell to be reviewed and set aside. It is unnecessary to remit the first respondent's point in *limine* to the third respondent for determination, as it raises a purely legal issue. This Court is in as good a position as the commissioner to determine that issue. For the reasons already set out above, the first respondent's point in *limine* lacks merit and must be dismissed. In light of this conclusion, it is neither necessary nor appropriate to engage with the substantive fairness of the dismissal. The unfair dismissal dispute should accordingly commence *de novo* before a different commissioner.

[32] Mr Du Toit, on behalf of the first respondent, the unsuccessful party, sought an order of costs against the applicants on the basis that the application was frivolous and vexatious. Mr Ngako, for the applicants, submitted that there was no basis for this Court to depart from the settled principle that costs do not ordinarily follow the result. I agree with Mr Ngako in this regard.

[33] In the premises, the following order is made:

Order

1. The arbitration award issued by the second respondent under case number GAEK9498-20 dated 19 May 2021 is reviewed and set aside.
2. The unfair dismissal dispute between the second applicant and the first respondent is remitted to the third respondent for arbitration *de novo* before a commissioner other than the second respondent.
3. The first respondent's point in *limine* that the first applicant lacks *locus standi* to represent the second applicant is dismissed.
4. The second applicant is entitled to representation by an official of the first applicant at the arbitration proceedings.
5. The third respondent is ordered to enrol the unfair dismissal dispute and issue a notice of set down within 10 court days of receipt of this judgment.

6. There is no order as to costs.

M. Makhura
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. X Ngako
c/o Ngako Attorneys

For the First Respondent: Mr J du Toit
c/o Chantell Timm Inc.