IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: 19/04/2022 ***Signature***:

Case No. 25906/2020

NATIONAL AFRICAN FEDERATED CHAMBER OF COMMERCE AND INDUSTRY	First Applicant
MOSENA, SEKWAMO GILBERT	Second Applicant
and	
MACINGWANE, SABELO VUSUMZI	Respondent

JUDGMENT

MAHOMED, AJ

The applicants in this matter apply for an interim order to prohibit the respondent from portraying himself as President of the first applicant and from making any statements in the media or appearing on public platforms as president of the

first applicant. The order is sought pending finalisation of the respondent's appeal to the Supreme Court of Appeals.

BACKGROUND

1. The applicant is a voluntary association which is set up to promote the business interests of its members. It is regulated in terms of its Constitution of 2011.

2. The respondent opposes the application and has appealed the validity of a meeting which was convened on 31 July 2019, wherein members passed a motion of no confidence in the respondent, as President of the first applicant. He was replaced by second applicant, who was elected as acting president.

3. The respondent contends that the meeting could not have been validly called for by anyone other than by himself. This is the main point for interpretation of the constitution and is the point on appeal.

4. The dispute before this court, between the parties, arises from the fact that the respondent continues to portray himself as president of NAFCOC which creates confusion, dissension, and distrust, amongst the first applicant's members, its business partners, its associates, and

affiliates. I shall refer to the first applicant as NAFCOC, and the second applicant as Mr Mosena for ease of reference.

5. The main application between the parties lies in the interpretation of the wording of the constitution, as to who may call a meeting of the federal council. This dispute is before the Supreme Court of Appeals.

6. In August 2019, after the alleged unlawful meeting, the respondent together with others, launched an urgent application to set aside the meeting held on 31 July 2019 and to find Mosena and others in contempt of court. This application was before Farber AJ who dismissed the application with costs as per a judgment handed down on 6 February 2020. The respondent has with leave, appealed the judgment of Farber AJ, to the SCA.

7. The dismissal of that application effectively means that the decision taken by the members at the meeting of July 2019 remains that Mosena is the duly elected acting president of NAFCOC.

7.1. The respondent contends that pending the appeal, on lawfulness of the meeting held in July 2019, Farber AJ's order is suspended and that this court has no jurisdiction to hear the

matter, and that should this court find for the applicant, this court is effectively validating an unlawful decision.

8. Advocate Korf appeared for the NAFCOC and Mosena and he submitted that the respondent's reliance on the provisions of s18 of the Superior Courts Act 10 of 2013, is incorrect, as Farber AJ, "dismissed' the application, with costs, it is only the "costs" order that can operate or is executable. Farber AJ made no "order' that is operational or be executed. The status quo is that Mosena is president.

9. Accordingly, it was submitted there is no merit in this point. NAFCOC and Mosena apply to this court for an interim interdict, to restrain the respondent's behaviour, pending the outcome of the decision on appeal.

THE APPLICANT'S CASE

10. Mr Korf informed the court that his clients approach this court to order the respondent to desist from posing as President of NAFCOC and to desist from making any public statements under the title of President of NAFCOC, *pendente lite.*

11. It is not disputed that the respondent continues to pose as the President of NAFCOC and continues to issue statements in the media as its President.

12. The evidence is that the applicant's attorneys have written to the respondent's attorneys on two previous occasions in which they demanded that the respondent refrain from doing so. On both occasions the demands were rejected.

    12.1. Furthermore, the respondent has not disputed/denied that he made the statements in the media as the NAFCOC president.

13. The respondent raised a point in limine, wherein he disputes the authority of Mr Mosena to institute these proceedings in the absence of a two thirds majority.

IN LIMINE

14. Mr Korf submitted that the respondent's objections to the recognition and authority of Mosena to bring this application is misplaced.

15. Counsel submitted that this application was instituted by the attorneys for NAFCOC, being "VFV Attorneys." He referred the court to the

amended Uniform Rules of Court, which dispenses with a requirement for a power of attorney.

16. Mr Korf submitted that if an attorney is authorised to bring an application on behalf of his client it is sufficient for purposes of authority.

17. He referred this court to a resolution taken at a meeting of NAFCOC, in which is recorded,

> *"It is resolved that:*
>
> *1. NAFCOC institute an urgent application against SV Macingwane, (the respondent) ….*
>
> *2. authorising VFV Attorneys to institute and to represent the applicant in this application and any further and or ancillary processes: and,*
>
> *3. authorises SEKWAMO GILBERT MOSENA, to depose to, or sign any and all affidavits or other documents necessary to give effect to this resolution."*

18. Counsel furthermore referred to the decision in **ESKOM v SOWETO CITY COUNCIL** referred with approval in **GANES AND ANOTHER v TELECOM NAMIBIA LTD**,[1] where the court held that as long as the

[1] 1992 (2) SA 703 W , 2004 (3) SA 615 (SCA)N624I-625A

attorney is authorised to make an application, it is the applicants' application and further authorisations are not necessary.

19. Furthermore, counsel referred this court to correspondences with the respondent's erstwhile attorneys wherein the wording and tenor of their reply acknowledged the applicants' authority to act, by referring to them as "your client."

20. He submitted further, that the respondent ought to have employed Rule 7(1) of the Uniform Rules of Court to challenge Mosena's authority, he referred the court to the decision in **UNLAWFUL OCCUPIERS OF THE SCHOOL SITE v CITY OF JOHANNESBURG**.[2]

21. I agree with Mr Korf that the minutes that reflect authority given to the attorney is sufficient and accordingly, the point is dismissed.

22. Counsel for applicants confirmed that the applicants for interim interdictory relief must in that regard prove:

- a prima facie right

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[2] 2005 (4) SA 199 (SCA) at par 14-16

- a well grounded apprehension of irreparable harm

- the balance of convenience favours the granting of this relief and

- that the applicants' have no alternate remedy.

PRIMA FACIE RIGHT

23. The applicants submit that during the head office meeting of 31 July 2019 Mosena was properly elected as president, and he derives his rights as President from the NAFCOC constitution.

24. Mr Korf reminded the court that the respondent's application to declare the meeting unlawful was dismissed with costs. Farber AJ made no order that is to be operational or executable, other than the costs.

25. Mr Korf, referred to SIMON N.O. v AIR OPERATIONS OF EUROPE AB AND OTHERS[3] where the court restated the test for a prima facie right as,

"*the accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with the*

[3] 1999 (1) SA 217 SCA; [1998] E ALL SA 573 (A) at 581

facts set out by the respondent that are not or cannot be disputed and to consider, whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown on the applicants' case he cannot succeed."

26. In the light of the dismissal of his application for final relief obviously the respondent failed to prove a clear right. The court did not accept his interpretation of the NAFCOC constitution, it accepted NAFCOC's interpretation. Therefore, the meeting of July 2019 was properly convened, the respondent's removal is valid, and he is no longer the President. He cannot portray himself as the President and as he continues to remain defiant, the applicants have a right to interdict his conduct.

27. Faber AJ's judgment is final and cannot be reviewed or set aside by this same court.

28. Mr Korf submitted that the applicants have proven a prima facie right although open to some doubt and must be granted the relief they seek.

IRREPARABLE HARM

29. Mr Korf reminded the court of the letters sent by VFV attorneys to the respondent's attorney wherein they demanded that he refrain from his objectionable conduct and submitted that the NAFCOC constitution does not provide for any "rogue element to depict himself as President when he has been stripped off the position and the related powers.

30. NAFCOC suffers severe prejudice, as it struggles to manage reputational risks and the respondents conduct fuels divisions amongst members and impacts on the strengthening of the organisation.

31. Some of NAFCOC's initiatives and relationships with partners have taken strain as the respondent sabotages its efforts by misrepresenting himself as the President.

32. Mr Korf proffered that his clients have tried all along to approach incendiary situations tactfully without public responses, they prefer to address disputes internally. The respondent's conduct has become untenable and therefor his clients have had to resort to the court for the relief sought.

33. Recently, the Department of Small Business Development had communicated it will no longer work with NAFCOC due to its internal

disputes and the respondents conduct further prejudices important business relations and derails all efforts to continue with its mandate.

34. Mr Korf informed the court of the various articles in the print media in which the respondent poses as the president of NAFCOC.

35. The court was advised that the respondent is from a structure which is no longer affiliated to NAFCOC.

BALANCE OF CONVENIENCE

36. Counsel submitted the primary interest is that of NAFCOC and its reputation in the business world.

37. The constitution does not provide for two persons to hold the position of President which will create greater confusion and deepen distrust within the organisation.

38. Mr Korf submitted that the respondent has not demonstrated any prejudice he suffers if the relief sought is granted.

39. For the reasons set out earlier, the facts favour the granting of the relief sought.

NO OTHER REMEDY

40. Counsel submitted that there is no other remedy available to the applicants in addressing the impasse.

41. The respondent persists in his conduct despite a dismissal of his application and a finding by a court that he is no longer the president of NAFCOC.

THE RESPONDENT'S CASE

42. The respondent argues that this court does not have the jurisdiction to hear this matter as the issue is the subject of appeal.

43. The respondent further argues that if this court were to determine the matter, this court would in effect be legitimising an unlawful resolution taken at a meeting held on 31 July 2019, which meeting was unlawfully convened. All decisions taken at the meeting are therefore invalid and of no force and effect.

44. Advocate Kwinda appeared for the respondent and submitted that the applicants failed to show prejudice they suffer until the determination of the issue by the Supreme Court of Appeals.

45. Counsel furthermore proffered that the applicants have not proved all the requirements for an interim interdict because the applicants have another remedy.

45.1. Counsel submitted that the applicants should have called for a special meeting to suspend the respondent. They failed to do so and have not exhausted internal remedies.

46. Counsel also argued that the applicants rely on media statements that are unsigned, undated and are simply hearsay. He submitted that the applicants were on a fishing expedition.

47. Mr Kwinda further argued that the NAFCOC and Mosena rely on harm that has already happened, and it is not a continuing harm. They therefor do not satisfy the requirement for an interim interdict. Counsel referred the court to **NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS v OPENSHAW**,[4] he argued there must be a reasonable apprehension that the harm would be repeated.

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[4] 2008 (5) SA 339 (SCA)

48. Counsel argued that the applicants have not told the court that there are factions within the organisation and that it has led to the unlawful convening of the meeting of July 2019. He submitted that the applicants failed to address this point in their papers. This was evidenced by the Department of Small Business Development's decision to suspend its projects with the applicants.

49. The respondent submitted that NAFCOC will not suffer prejudice and that if the respondent succeeds in the appeal, this court's finding will be moot. If this court grants an order, it will conflict with that of the decision of the SCA.

50. Mr Kwinda submitted that the applicants have not proven a prima facie right as the respondent has taken the matter on appeal and that Farber AJ's order is suspended pending the decision of the SCA.

51. Counsel, furthermore, argued that the applicant failed to mediate this dispute when called upon to do so. He submitted that had they agreed to mediation his client is sure that the dispute would have been resolved.

52. The respondent argued that Mosena was simply serving his own interests and not acting in the interests of NAFCOC.

53. In reply Mr Korf reminded the court that the dismissal of the application by Faber AJ, was the final order that was the subject of the appeal. He dismissed the application with cost. That court did not make any finding that can be operational or can be executed. Only the cost order is suspended on account of the appeal.

53.1. Therefore the status quo is that Mosena remains the President of NAFCOC.

54. Mr Korf referred the court to **CATHCART RESIDENTS ASSOCIATION v THE MUNICIPAL MANAGER FOR THE AMAHLATHI MUNICIPALITY AND OTHERS** [5], in which the court referred to the now established principle in **OUDERKRAAL**, in administrative law, a decision taken stands until it is set aside, it may even be that the decision although unlawful, could lead to lawful decisions, until set aside. The court held that this must apply to voluntary associations as well.

55. Counsel submitted that this is the case in point. The decision taken at the July 2019 meeting remains until it is set aside.

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[5] Case no 3667/2013 not reportable [14-16]

56. In response to the court's question, Mr Korf confirmed that the respondent did not deny that he made the media statements, or that he signed the document or that he represented himself as the President, in pamphlets. He submitted those were in fact common cause facts.

57. The evidence is that the parties have been in several protracted disputes and litigation that a mediation would not have resolved this issue and the applicant saw no benefit in mediation.

58. Mr Korf submitted that the court a has discretion in relation to the admission of the media statements and references to pamphlets. The court is to note that there was no application to strike out the evidence and there was no denial or attempts to exclude the articles from the papers.

59. On the point of an apprehension of continuing harm, it was argued that the respondent's behaviour persisted at the time of this application and a rejection and refusal to their letter demanding he desist, must mean he intended and will continue to pose as President of NAFCOC.

JUDGMENT

60. The authority of the attorney to bring the application is confirmed as in the point in limine. The applicants are duly authorised as per the extract of the minutes of the meeting set out earlier.

61. The judgment of Farber AJ is suspended only to the issue of costs, in that the application before that court was dismissed with costs and no order exists to be operated on.

61.1. In that regard I agree with Mr Korf that the respondent's reliance on s18 of the Superior Courts Act of 2013 is misplaced on suspension of the order made by Farber AJ wherein the Honourable Court made findings about the interpretation of the Constitution and it dismissed the respondents application.

62. The judgment of Farber AJ implied that the meeting held was lawfully convened and all decisions made at this meeting were valid and lawful. Mosena was duly elected to replace the respondent as President of NAFCOC.

63. Having regard to the judgment of Farber AJ and the factual matrix, I am of the view that the applicants have proven a prima facie right although open to some doubt.

64. In **CATHCART RESIDENTS' ASSOCIATION v THE MUNICIPAL MANAGER FOR THE AMAHLATHI MUNICIPALITY**, [6] where Plasket J with reference to the principle established in **OUDEDKRAAL ESTATES (PTY) LTD V CITY OF CAPE TOWN**,[7] that an administrative decision stands until it is set aside, quoted the reasoning for this approach, as follows:

> *"the proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."*

65. The Honourable Plasket J, held the view that,

> *"the same considerations apply for the same reasons and with the same equal force to the decisions of voluntary associations. It is not difficult to imagine the chaos that would be caused in organisations ranging from massive trade unions or church bodies to small sporting or cultural clubs if this default setting was otherwise."*

66. I am agreement with Mr Korf that the case is one in point. It is common cause that the NAFCOC is functioning in a fractious environment.

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[6] See footnote 4 above

[7] 2004 (6) SA 222 (SCA)

66.1. The respondent refuses to accept the outcome of the vote of no confidence in his leadership.

66.2. He approached the court on an urgent basis to set aside that decision. His application was dismissed. In effect that court found that he was lawfully removed and has no right to act as president. He refuses to accept that finding and has filed an appeal against the decision.

66.3. He was called upon on two occasions to refrain from continuing to pose as its president, he rejected the demands and remains defiant.

66.4. His counsel acknowledges that due to the strife within the organisation its business partner, the Department of Small Business Enterprises no longer considers it viable to work with NAFCOC. The respondent claims to be NAFCOS's leader yet remains a "thorn in its side," by forcing the applicants to approach this court for interim relief, which he opposes. Furthermore, he fails to tell this court, how he is prejudiced by the decision taken at the meeting of July 2019.

66.5. The situation can be described as chaotic, especially when the alleged leadership is part of the problem, rather than the solution, as a leader.

67. That is not to say that the respondent does not have any rights. Indeed, he does have a right to be heard, it is the bedrock of any legal system, but one wonders whose interests are served in all the litigation to date.

68. It is common cause that NAFCOC is compromised, the very organisation that the respondent demands to continue to lead. The principle in Oudekraal, as expounded in the Cathcart judgment supra, is our law and until the decision is set aside, Mosena is NAFCOC's president.

69. NAFCOC and Mosena have demonstrated a reasonable apprehension of irreparable harm, as its partners no longer want to collaborate with it, and its reputation suffers for as long as the respondent rejects their demands to desist from his conduct.

69.1. Mr Korf confirmed that the respondent has not denied that he was posing as the president, nor did he deny that he made the media statements posing as president.

69.2. I am of the view that the applicants are justified in fearing a continuation in his conduct. I refer also to the various incidences highlighted by counsel for the applicants supra, that cause it harm.

70. It is common cause that the internal strife is known to NAFCOC's associates and affiliates and must impact on its reputation. The applicants seek "interim relief," to salvage their reputation and to promote its work. The balance of convenience must favour the granting of this relief sought.

70.1. NAFCOC has an integral role to play in the advancement of the economic rights and the promotion of economic opportunities for large numbers of our people who for most of our economic history, have been excluded from the mainstream economy of our country. It must also serve as a pool for stronger leaders from diverse backgrounds who fuel the economy and establish competitive business environments.

70.2. Strife and distrust serve only to derail the organisation. Mosena in his founding papers proffered that the organisation tries to address its disputes internally as best it can.

71. I am also persuaded that NAFCOC has no other remedy as an interim measure given that the respondent has outright rejected its demands that he desists from posing as its president. Furthermore, the existence of the media statements and the message conveyed is not disputed.

72. Mr Kwinda argued the media statements were hearsay evidence and ought to be rejected by the court.

72.1. A court in determining the granting of interim relief has a wide discretion. It is noteworthy that the respondent did not deny the media statements, nor did he apply to strike out the reference from the papers.

72.2. The media statements were but one of the factors used in support of the proof of a reasonable apprehension of harm. It is in the interest of justice that the court allows the applicant to rely on them.

73. Mr Kwinda early in his submissions in response to the Court's question, conceded that the issue before this court was a narrow one, and did not pertain to the points raised on appeal. Therefore, I am satisfied that this court has the jurisdiction to have heard the matter and to granting the relief sought pendente lite.

74. I am satisfied the applicants have met all the requirements of interim interdictory relief and the application must succeed.

75. Costs must follow the cause.

Accordingly, I make the following order:

1. The Respondent is hereby interdicted, restrained, and prohibited from, in any manner whatsoever, whether directly or indirectly:

    1.1. portraying himself as President of the First Applicant; and/or,

    1.2. issuing any statements to the media, or engaging in or negotiating with third parties, purportedly as President of the First Applicant, and/or in any other capacity purporting to represent the First Applicant.

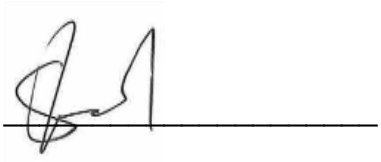
2. That paragraph 1 of this order (incorporating 1.1 and 1.2 thereof) shall operate as an interim interdict, pending:

    2.1. finalisation of the appeal proceedings to or before the Supreme Court of Appeal under SCA Case Number 626/2021; and/or,

2.2. finalisation of any further appeal proceedings, if any, to or before the Constitutional Court, including any application for leave or special leave to appeal.

against or pertaining to the order granted by His Lordship Mr Acting Judge Farber handed down on 6 February 2020 under case number: 27925/2019 ("the Order") Order, or any further proceedings subsequent to any such appeal proceedings.

3. The Respondent is ordered to pay First and Second Applicants' costs of suit.



MAHOMED AJ

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand-down is deemed to be 19 April 2022.

Heard on: 18 January 2022

Delivered on: 19 April 2022

Appearances

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