IN THE LABOUR COURT OF SOUTH AFRICA (CAPE DIVISION)

CASE NOS C52 & C53/97

In the matter between:

ERNEST THERON	**First Applicant**
PAPIKI MOENG	**Second Applicant**
RICHARD MPONGOSE	**Third Applicant**

and

FOOD & ALLIED WORKERS UNION	**First Respondent**
PETER MALEPE	**Second Respondent**
MANDLA GXANYANA	**Third Respondent**

CONSTITUTION OF THE COURT:

THE HONOURABLE ACTING JUDGE D MLAMBO

On behalf of Applicants:

Mr Whitehead S C with Mr Kotze instructed by

Chennells Albertyn Attorneys

On behalf of Respondents:

Mr Gamble instructed by

Cheadle Thompson & Haysom Attorneys

PLACE AND DATE OF PROCEEDINGS: Cape High Court
23 May 1997

TRANSCRIBERS : PRESIDENT TRANSCRIPTIONS & RECORDINGS

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The two applications before me are for interdictory and ancillary relief. Where necessary I shall refer to them as the first and second applications. Both applications were initially instituted in the High Court, Cape Division, whereafter the parties agreed to transfer them to this court as this court has appropriate jurisdiction to determine them. In both applications the applicants seek to set aside the resolutions of the National Executive Council ("NEC") of the first respondent, FAWU. These resolutions were adopted on 7th February 1997 and 1st March 1997 respectively, to the effect that:

1) All three applicants were removed as National Office Bearers ("NOBs");
2) The removal of the first applicant as director of Ikhwezi Investments (Pty) Ltd; and
3) The removal of the applicants as trustees of the FAWU Building Trust.

At the commencement of his argument Mr Gamble, who appeared on behalf of all the respondents, correctly conceded that this court does not have the necessary jurisdiction to consider the removal of the first applicant as director of Ikhwezi Investments (Pty) Ltd, as well as the removal of all applicants as trustees of the FAWU Building Trust. He further gave an undertaking that should the applicants succeed in their bid to set aside their removal as National Office Bearers/..

Office Bearers then FAWU would reinstate them as director and trustees

of Ikhwezi Investments (Pty) Ltd, and the FAWU Building Trust respectively. The issue for decision therefore is whether the resolutions of the NEC of 7th February 1997 and 1st March 1997 were fundamentally flawed as to render them a nullity.

As far as the first application is concerned the only question I have to decide is that of costs in view of the fact that on 21st February 1997 the parties agreed that the applicants be reinstated in their previous positions and that only the costs aspect be left over for decision.

Before I dwell on the merits of both applications I must deal with two points argued in limine by Mr Gamble. He argued that this court is not at this stage empowered to deal with the entire matter but should at least refer it for private conciliation. He argued that this court can only determine the matters in terms of section 158(1)(e). Therefore the matters had to be referred for conciliation before referral to this court. He argued that the jurisdiction of this court to deal with these matters derives from section 4.2 of the Labour Relations Act No.66 of 1995 as amended. This section, provides, briefly, that every member of a trade union has the right, subject to the constitution of that trade union, to participate in its

lawful activities/..

lawful activities including participation in the election of any of its office bearers, officials and trade union representatives and, further, to stand for election and be eligible for appointment as an office bearer, official or trade union representative, and if elected or appointed to hold office and carry out such functions as provided for in the act or in any collective agreement. Mr Gamble then suggested that

any dispute arising from the provisions of section 4.2 stood to be dealt with in terms of section 9 which makes provision for a procedure in terms of which any dispute arising from section 4.2, in particular, had to be referred to a bargaining council that had jurisdiction or to the Commission for Conciliation, Mediation and Arbitration. Only after the commission or council had attempted to resolve the dispute and failed could any party to the dispute refer it to the Labour Court for adjudication.

The purpose of section 4 is to set out the freedom of association rights of employees, members of trade unions and trade union federations, as well as employers. Section 5 sets out protections of the freedom of association rights of employees and persons seeking employment. Is the freedom of association right of, for example, an employee enforceable only against an employer, and vice versa? The language of section 5 in particular

is that/..

is that an employee and/or a person seeking employment has protection against discrimination or any other unfair conduct towards himself, if he exercises his freedom of association right. The usage of the term "employee" as well as "person seeking employment" suggests that employers should not victimise or otherwise discriminate against their employees or persons seeking employment if such employee or person seeking employment has exercised one of his freedom of association rights like joining a trade union or participating in his trade union's activities. Does it therefore mean that the potential infringers of this freedom of association right [of employees and persons seeking employment] are only employers? Certainly a reading of section 4, and

in particular section 5, suggests that the answer to this question is in the affirmative, meaning that, for example, a trade union itself is not capable of infringing a freedom of association right of its members.

The freedom of association right is a constitutionally entrenched right.

I am of the view that the restricted interpretation of the application of section 4 and 5, such as that set out above, is untenable. Once a right exists the protection against infringement of that right operates against anyone who

might infringe/..

might infringe it. It is simply inconceivable that an employee could enjoy protection of this freedom of association right against his employer, but does not enjoy the same protection against the infringement of the same right by his own trade union. In casu although the applicants alleged that their removal as office bearers was done for ulterior reasons, it is clear that what they actually mean is that they are being victimised by their own trade union for having exercised their basic right of participating in the activities of their union, eg suggesting and moving for the suspension of the general secretary for alleged negligent financial conduct, and that the effect of their removal is to deprive them of this right, i.e. of participating in the activities of their union. My view is that if the applicants' allegations are found to be correct then it means that FAWU has infringed the provisions of section 4 and the applicants are therefore enjoined to utilise the procedures set out in section 9.

That being the case does it therefore mean that I should refer this

matter for conciliation before I can determine it? With reference to the facts of this particular case, in particular the fact that these matters come to me by way of urgent application to interdict certain conduct and more importantly, they come to this court by way of the parties

agreement, I/..

agreement, I am of the view that the matter is not as clear-cut and simple as Mr Gamble suggests. The purpose of interdicts is, in the main, to restore the status quo until a proper assessment of all the facts or, in casu, until proper compliance with constitutional requirements. It would be illogical to deny legitimate applicants interdictory relief simply because a dilatory procedure for the resolution of their dispute exists which has not been followed. On the basis of the parties agreement to transfer the matters to this court and on the basis of the nature of the proceedings and relief sought nothing precludes this court from entertaining the applications fully. However there is another issue that is relevant in matters of this nature and where arguments such as these are raised. This is to be found in section 157(4)(a) of the act which gives this court a discretion to refuse to determine a dispute if the court is not satisfied that there has been an attempt at conciliation. In my opinion this section equally applies to interdict applications where the issue should be referred for conciliation before adjudication. For the above reasons I am not convinced that I should not hear both applications.

Mr Gamble's second in limine argument was to the effect that I should not hear the applications but should refer

them back/..

them back to the structures of FAWU as the applicants have failed to exhaust the internal dispute resolution mechanisms provided for in FAWU's constitution. Whilst this argument has been raised as an in limine point I do not think it would be appropriate to deal with it as such as its examination depends on a proper assessment of all the relevant facts. For that reason I will decide this question having assessed the whole matter fully.

The Facts

In order to provide a proper perspective and understanding of the decisions to which I have come I think it appropriate that I briefly sketch out the pertinent, and in a way the common cause facts of the two applications. Where disputes of fact arise I will follow the well traversed path set out in the matter of Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 3 SA 623 A.

On 24th to 26th January 1997 the NEC of FAWU held a meeting during the course of which, inter alia, the assistant general secretary, one, Ernest Buthelezi, was suspended pending a disciplinary enquiry. Also during the course of such meeting the so-called IMSSA report was tabled which suggested that the general secretary could have been negligent in the discharge of his duties. After the

tabling of/..

tabling of this report, which was followed by some discussion by the NEC members, the NEC decided to refer the report to a committee consisting of National Office Bearers, hereinafter referred to as the NOB meeting.

There is a dispute on the papers as to what exactly was the mandate of the NOB meeting after it had considered the report. Be that as it may the NOB meeting sat on 3rd February 1997. During the meeting the first applicant, seconded and/or supported by the second and third applicants, moved a motion that the general secretary be suspended pending disciplinary action. The second respondent did not align himself with this motion and the third respondent, who was the subject matter of the motion, openly declared that he would defy it. The motion was carried and thereafter first applicant took steps to effect the suspension of the general secretary.

On 5th February 1997 it came to the notice of the applicants that the first respondent had apparently called a special meeting of the NEC for the 7th February 1997. This knowledge was imparted to the first applicant by the Transvaal regional secretary. He then discussed the matter with the two other applicants. Despite such knowledge of the special NEC meeting all the applicants and the Transvaal region failed to attend the special meeting of the NEC held on 7th February 1997.

The absence/..

The absence of the three applicants and the absence of a single delegate from the Transvaal region deprived the special NEC meeting of a quorum to pass any binding resolutions, that is according to clause 8.5 of FAWU's constitution. Despite such lack of quorum the special NEC meeting passed a resolution, inter alia, removing the applicants from office as National Office Bearers on the basis that the NEC had lost confidence in their leadership due to their conduct of suspending the general secretary.

Pursuant to this resolution coming to the notice of the applicants they launched an urgent application (the first application) to declare that resolution, inter alia, nul and void. This application was to be heard on 21st February 1997 but on that day an agreement was reached between the parties in terms of which the applicants were reinstated in their positions as National Office Bearers, leaving only the question of costs for determination.

On 28th February to 1st March 1997 the NEC of FAWU held another meeting whereby another resolution was passed again removing all the applicants from office as National Office Bearers. The first applicant was present on the first day of the NEC meeting but then left for an overseas engagement related to his responsibilities as a National Office

Bearers,/..

Bearers, however the second and third applicants remained at such meeting. Again pursuant to such resolution the applicants launched another urgent application (the second application) basically seeking the same relief they sought in the first application. This application was to be heard on the 23rd April 1997. On that day the parties agreed to postpone the hearing of the matter to a later date but subsequently agreed that the matters be transferred to this court for appropriate attention.

I propose to firstly consider the second application.
The applicants' challenge to the 28 February to 1 March 1997 NEC meeting can be summarised into three categories:

(1) matters of procedure prior to the meeting relating essentially to

lack of consultation, insufficient notice of the meeting, as well as the non-disclosure of the meeting venue as required by the constitution;

(2) alleged constitutional irregularities during the meeting relating to voting rights being given to non-delegates, the non-inclusion in the agenda of the matter in terms of which the resolution of their removal was adopted, and that the decision for their removal was not voted upon;

(3) the failure of the NEC to apply the principles of natural justice;

I am/..

I am not persuaded by the applicants' argument that there was no consultation prior to the calling of the meeting and that there was insufficient notice of the said meeting. There is no doubt in my mind that the date of the February NEC meeting had been pre-arranged as appears from Annexure "MGA2" which succinctly states that the next NEC meeting would be held on 28 February 1997 and 1 and 2 March 1997. That being the case I cannot understand why was there a need, as alleged by the applicants, that there should have been proper notice given to delegates of the meeting, as well as any consultation. There is no suggestion that delegates were in the dark about the meeting taking place. I however agree with the applicants that the meeting venue was not stipulated in the communication that was sent to delegates advising them that the meeting would take place. Despite this oversight all delegates were present at the meeting venue, including all the applicants.

The procedural irregularities alleged by the applicants relate to the acceptance of credentials and extension of voting rights to seven delegates from the Eastern Cape Region. The NEC meeting accepted the credentials of seven delegates from the Eastern Cape, one of such

delegatees from that region, a certain Mfuphi, was accepted and given voting rights although he was not allegedly a paid up member of FAWU as required by the constitution. The

constitution/..

constitution provides that any region that has less than 15,000 members was to be allowed only five delegates. As regards the size of the Eastern Cape delegation it is clear that during 1996 the head office of FAWU had indicated that the membership of this region had fallen below 15,000. At the 28/2/97 NEC meeting the Transvaal region challenged the Eastern Cape from continuing to have seven delegates while their membership had dropped to less than 15,000. The Eastern Cape disputed this fact indicating that it still had more than 15,000 members. The NEC resolved that the Eastern Cape delegation was to remain at seven until it proved what the actual extent of its membership was during the NEC meeting of May 1997. I am of the view that constitutional provisions providing for status of delegates, inter alia their voting rights, are peremptory. I do not think however that the applicants are correct that the Eastern Cape delegation received more voting rights than it was entitled to. I am satisfied that the issue of the size of the Eastern Cape delegation had been settled by the NEC at seven until the size of its membership had been determined.

Regarding the Mfuphi issue, whilst it is technically correct that Mr Mfuphi's dues, as well as those of his colleagues who were employed by a company called Bonnita, were not paid into FAWU's coffers their union dues were

deducted but/..

deducted but paid into a trust account held by Bonnita after the Bonnita employees accused FAWU of not supporting them properly. The Bonnita employees asserted that until such time as they received proper support from FAWU they would continue having their union dues deducted but these would be paid into a separate account which would only be paid into FAWU coffers once the dispute had been resolved. It is a basic trade union right to have trade union dues deducted from their members, and in this particular instance this right was being exercised in favour of FAWU although the money was not going to FAWU coffers. There is no doubt in my mind that such money would eventually find its way into the FAWU coffers. This therefore makes Mfuphi and other employees in the Bonnita company different to employees who were not contributing anything whatsoever to their union.

There is no serious dispute regarding the fact that once a motion was seconded to the effect that the NEC had lost all confidence in the leadership of the three applicants, and moving for their removal from office as National Office Bearers, that the only counter motion raised by the Transvaal region was not seconded. This prompted the chairperson of the NEC, the second respondent, to declare the motion as passed without referring it to a vote.

In as far/..

In as far as the agenda is concerned it is correct that the initial agenda sent to delegates before the meeting underwent several changes and that at the start of the NEC meeting itself a new agenda was set up and agreed upon by all delegates present. It is further correct that one of the items described in the agenda was as follows "National Office

Bearers report".

Mr Whitehead who appeared for the applicants sought to persuade me that non-compliance with any clause of the constitution in an NEC meeting which later resolved to affect the status of certain office bearers within the structures of the union was fatal and rendered decisions taken at such meeting fatally flawed. It is worthwhile to examine the merits of this argument with particular reference to cases where similar issues were raised.

In the matter of Jonker v Ackerman en Andere 1979 3 SA 575 (O) the court stated that the mere non-compliance with the rules of a voluntary association was ordinarily not sufficient justification for a court to intervene in the proceedings of such an association. The court further found that besides the disregarding of the rules or the provisions of the constitution there must be actual prejudice of the civil rights of the person who avers that

he was/..

he was aggrieved by the disregarding of the rules and/or the constitution of the association of which he was a member. The court stated that the onus rested on the applicant to show that the irregularity on which he relied was calculated to prejudice him in his civil rights or interests. Furthermore in the matter of Garment Workers' Union v de Fries & Others 1949 1 SA 1110 at 1129 the following was said:

"In considering questions concerning the administration of a lay society governed by rules, it seems to me that a court must look at the matter

broadly and benevolently and not in a carping, critical and narrow way. A court should not lay down a standard of observance that would make it always unnecessarily difficult and sometimes impossible, to carry out the constitution. I think that one should approach such enquiries as the present in a reasonable common sense way, and not in the fault finding spirit that would seek to exact the uttermost farthing of meticulous compliance with every trifling detail, however unimportant and unnecessary, of the constitution. If such a narrow and close attention to the rules of the constitution are demanded, a very large number of administrative acts done by lay bodies could be upset by the courts. Such a state of
affairs would be in the highest degree calamitous for

every disappointed/..

every disappointed member would be encouraged to drag his society into court for every trifling failure to observe the exact letter of every regulation. There is no reason why the same benevolent rules should not be applied to the interpreting of the conduct of governing bodies of societies as one applies to the interpretation of by-laws."
See also Chetty v Tamil Protective Association 1951 (3)
NPD 34.

I find such comments instructive and I am favourably disposed to applying them in casu. I do not think it necessary for me to find whether there was proper prior consultation and sufficient notice before the NEC meeting was called. I say this in the light of the fact that the February NEC meeting was pre-arranged and that delegates in every region were aware of the dates on which the meeting was to take place. That being the case I do not see any need why there should have been any

consultation before such meeting was to take place. My comments regarding the alleged lack of consultation are equally apposite to the complaint of insufficient notice of the meeting. However I am of the view that militating against the applicants' complaints regarding consultation and notice is the fact that they attended the NEC meeting and did not miss it on the basis of lack of consultation and sufficient notice, or even the/..

even the complaint that the meeting venue was not stipulated.

It is correct that the issue of the removal of the applicants from office as National Office Bearers was not part of the agenda. Frankly speaking, I do not see any basis how this item could have formed part of the agenda as it would suggest that whoever was formulating the agenda, in this instance it was a function of the general secretary, had sat down and planned their demise and then included it as an agenda point. The truth of the matter seems to be that although this matter was not included in the agenda in the manner in which the applicants suggested it should have been, it is clear that it became an issue once the NEC was deliberating the NOB's report which formed part of the agenda. If one considers the extent to which this matter was debated it leaves no doubt in one's mind that the motion leading to the issue of the removal came up as a result of the debate regarding the NOB's report.

The applicants' complaint that the decision removing them from office as office bearers was not voted upon does not carry much weight. The fact of the matter is that the motion of no confidence enjoyed overwhelming support of the delegates who attended the meeting. Whilst it is correct that the constitution provides that all decisions

of the

NEC must/..

NEC must be taken after a vote it is clear that in this particular instance the subjecting of the matter to a vote would have confirmed what was already obvious. Anyway I am persuaded by the applicants' explanation that the taking of decisions in this manner had become customary in the affairs of FAWU and as such does not constitute a constitutional irregularity necessitating vitiation of the decision taken.

Mr Whitehead has sought to argue that the constitution incorporates rules of natural justice and non-application of these would vitiate any decision of the NEC. He argued that the applicants were entitled to be given notice of what the NEC intended to do with them and give them an opportunity to be heard on the subject before a decision was taken to remove them from office. Mr Whitehead's argument in effect is that the courts have a power to review the decisions of bodies such as union NECs even if such decisions are taken by way of the passing of a vote. There is no doubt that the courts do have a power of review on all bodies carrying out judicial or quasi-judicial functions should it be alleged that such bodies failed to apply the rules of natural justice. Does the act of a union NEC of passing a decision by vote in terms of its constitution amount to judicial or quasi-judicial conduct? According to the constitution of FAWU all office bearers

are elected/..

are elected and/or appointed in a so-called democratic manner which is provided for by the constitution. This union democracy takes the form

of delegates voting as to who they want to be in the leadership structures of the union. The democratic way in which union structures operate is a way agreed upon by all members of such union as to how they wish to govern themselves.

Mr Whitehead relied heavily on the decision of Breen v Amalgamated Engineering Union (then) and Others (Court of Appeal). In this matter the appellant (Breen) was elected as a shop steward in a democratic manner by his constituency. His election, however, was subject to approval by the district committee. The committee refused to approve Breen's election. It appears from the judgment that the committee had a discretion whether to approve Breen's election. It is further clear from the judgment that in exercising its discretion and refusing to approve the election the committee relied on invalid and/or ulterior reasons. When considering statutory bodies, Lord Denning found that courts had a review power over their decisions whether their functions were judicial, quasi-judicial or administrative. He further held that this review power is also applicable to domestic bodies such as trade unions. He stated that domestic bodies also delegate powers to committees. The rules in terms of which these

committees/..

committees function are framed in such a manner that a discretion is provided for. He stated that the discretion is never unfettered. It must be exercised fairly and according to law. He held that should the discretion not be exercised in this manner, then the decision of that committee can be set aside by the courts. Lord Denning further reasoned that in certain instances these bodies had to hear affected persons before deciding on their fate. One instance was where a

person's property or livelihood was at stake then according to Lord Denning, this person must be heard before and be given reasons why he is turned down.

Mr Whitehead further relied on the decision in Theron en Andere v Ring van Wellington, N G Sendingkerk SA 1976 (2) SA 1. In this matter the appellants challenged certain decisions of bodies functioning as disciplinary tribunals.
In this matter, too, no distinction was made between statutory and domestic tribunals. I fully concur with these decisions. In the present matter, however, no suggestion can be made that the NEC had to exercise a discretion in voting on a motion and passing a resolution. Furthermore, I have found nothing in the constitution of FAWU suggesting that. Clause 8.2.1.7 incorporates rules of natural justice or that same can be implied therefrom or anywhere else in the constitution.
Lamprecht and Another v

Menellie 1994/..

Menellie 1994 (3) SA 665 (AD). Clause 8.2.1.7 is the clause in terms of which the applicants were removed as National Office Bearers. It reads: "In addition to the circumstances set out above, an office bearer of the NEC shall vacate his/her office and his/her seat on the NEC by a majority resolution of the NEC, subject to confirmation by a conference."

In my opinion the situation found in the FAWU constitution is clearly distinguishable from that in the Breen and Theron cases. The fact of the matter is that the FAWU NEC does not function in the manner found in the Breen and Theron matters. It is empowered to arrive at a decision

by an agreed democratic process.

I cannot find any basis which would give a court power to interfere with a decision of a trade union whereby it removes or elects office bearers in a way in which the members of such union have agreed. I equally do not think it is open to the courts to look at the reason why a particular official was removed or elected as this is beyond the court's powers of interference.

I agree that where a tribunal is sitting as a disciplinary forum and performing a disciplinary function it is
implicit that the rules of natural are applicable and

procedural and/..

procedural and substantive unfairness apparent from the workings of such tribunals would give the courts leeway to interfere. I think that the point of distinction is very clear. Where an association or trade union is exercising original jurisdiction, as Mr Gamble puts it, whereby by majority vote it takes decisions is not reviewable on substantive or procedural unfairness grounds. Courts would be in a position to interfere in the decisions of such associations or trade unions if they have not adhered to their own constitutions which enjoins them to act in a certain manner. I am therefore of the view that the applicants' argument on this issue must fail.

It is now opportune for me to deal with Mr Gamble's argument regarding the exhaustion of internal procedures before parties rush to court for relief. The respondents' case is that they acted in terms of section 8.2.1.7 which gives the NEC the power to remove office bearers. Clause

34.2 makes provision for a procedure for office bearers of the NEC, BBC or REC to follow after such office bearers have been removed in terms of the union constitution but not in terms of clause 32.1. Furthermore, the National Conference is the supreme governing body of the union and it has the power to ratify all decisions of the NEC. I am of the view that it was open for the applicants to follow
the route suggested in clause 34.2 if they thought that

they had/..

they had enough support within the union membership to upset the NEC resolution. Any way the National Conference is to take place shortly and if anything I think that is the proper forum where the applicants should present their case. In anyway the rights at stake which the applicants seek to protect are no different to the rights which any ordinary member of the union does not have, which do not have any patrimonial or financial implications.

I am therefore of the view that the second application should fail with costs.

The next issue is that of costs regarding the first application. Basically the challenges which the applicants raised in the second application were similarly raised in the first application, although in a somewhat restricted fashion. For instance in the first application the applicants also complained of inadequate notice, insufficient information or particularity on the agenda, as well as the lack of a quorum at the NEC meeting. I do not wish to repeat myself, and my views regarding
procedural matters as expressed above are also apposite here.

Similarly my views regarding the requirements of substantive and procedural fairness as expounded above are also apposite.

An issue/..

An issue I feel should deserve special attention is the issue of the alleged lack of a quorum at the special NEC meeting. As already stated above it is correct that there was no quorum at the special NEC meeting which passed the resolution removing the applicants from office as office bearers. Mr Gamble argued that the special NEC meeting was entitled to take decisions then as the union was in crisis. He argued that the special NEC meeting was deprived of a quorum deliberately by the three applicants and the Transvaal delegation as they were all aware of the meeting but chose to stay away. He argued that they knew that the special NEC would not have a quorum and would therefore not be in a position to pass any resolutions. The premise of this argument is that the applicants must have been aware of what was being planned and therefore they sought to sabotage the NEC from arriving at that decision by depriving it of a quorum.

I am of the view that it is crucial to establish the true nature of clause 8.5. This clause provides as follows:

"The quorum for meetings of the NEC shall be half the number of delegates and office bearers required to attend, but excluding those which have sent written apologies, provided further that there is at least one delegate present from each region. If within 90 minutes of the time fixed for a meeting a quorum is

not present,/..

not present, the meeting shall stand adjourned until a further meeting can be arranged. Such an adjourned meeting shall take place at a date not sooner than 12 days and not longer than 30 days from the date of the meeting which was so adjourned, and due notice shall be given to all members of the NEC. At such adjourned meeting the members present shall form a quorum." (My underlining.)

The formation of a quorum in any institution is an important regulatory mechanism to ensure that all decisions of such a forum are passed by a certain number of members of the forum present. It follows that it is crucial to always have a quorum where same is required especially where, in the case of a trade union, the status of National Office Bearers is at stake. I am of the view therefore that the quorum requirement in clause 8.5 is peremptory and that non-compliance therewith renders any resolution passed a nullity. I do not think that the quorum requirement can be equated to issues of consultation, notice or agenda. I am therefore of the view that the principles laid down in the Jonker case and especially in the Garment Workers' Union case do not carry the same weight as far as the requirement of a quorum is concerned. One cannot simply treat the requirement of a quorum as a trifling or unimportant matter. To do so would be to encourage disrespect for constitutive documents in the affairs of associations, trade/..

associations, trade unions, etc. Mr Gamble's argument that despite such lack of quorum the special NEC was entitled to pass the resolutions does not commend itself to me. Whilst I do not wish to decide that issue as argued I am of the view that the latter part, or the underlined part, of clause 8.5 above gave the NEC an

escape route. Such escape route would have been to adjourn the meeting and instead of waiting for the 12 days to pass an earlier meeting be convened if there are urgent matters for consideration. It would make no sense, that if indeed the union was in a state of crisis, to wait for 12 days rather than call a meeting on an urgent basis to ensure that the crisis situation is averted or, at most, rescued. I am therefore of the view that the resolution passed on the 7th February 1997 was a nullity as there was no compliance with a peremptory provision of the constitution.

That being the case should the applicants have approached the matter by utilising internal procedures as provided for in the constitution? As far as I am concerned once a decision is invalid it is open to those members whose interests are detrimentally affected by such a decision to approach a court to set aside such decision. Sorenson and Others v Executive Committee Tramway & Omnibus Workers' Union (Cape) and Another 1974(2) SA CPD 545. It is clearly not the type of matter that could have been dealt

with in/..

with in terms of clause 34.2 as set out above.

I am therefore of the view that even if the matter had not been settled on 21st February 1997 the applicants would have succeeded in their application. That being my view I am of the view that the applicants are entitled to their costs regarding the first application. Such costs should include the costs of two counsel. It is neither here nor there that only the second and third respondents were cited as parties. I am satisfied that their opposition was on the basis of their

representative capacities and that is how they should be treated with due regards to costs.

I lastly take this opportunity to thank both counsel for their helpful presentation of their respective argument.

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ACTING JUDGE D MLAMBO OF THE LABOUR COURT

DATE OF HEARING : 23 MAY 1997

DATE OF DECISION : 10 JUNE 1997