



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Of interest to other judges

Case no: C329/15

In the matter between:

CHAUKE, KHAZAMULA NORMAN

First Applicant

GCWENSA, BONGANI

Second Applicant

MBEKI, MONWABISI

Third Applicant

GIDANA MANDLA

Fourth Applicant

MKHOMBO, STHEMBISO

Fifth Applicant

KHUMISI, ISHMAEL

Sixth Applicant

MDAKANE, MOTSAI

Seventh Applicant

BREDA, JACKIE

Eighth Applicant

XWAZI, SONGEZILE

Ninth Applicant

MTHATI, BASIL

Tenth Applicant

and

FOOD AND ALLIED WORKERS' UNION

First Respondent

NAZO, ATWELL

Second Respondent

MNGUI, RAYMOND

Third Respondent

MANOTO, ELIZABETH

Fourth Respondent

MASEMOLA, KATISHI

Fifth Respondent

PHAKEDI, MOLEKO

Sixth Respondent

OLIVER, MARK

Seventh Respondent

Heard: 15 MAY 2015

Delivered: 28 MAY 2015

Summary: Urgent application in terms of section 158(1)(e)(i); whether expulsion of the applicants compliant with union's constitution.

JUDGMENT

RABKIN-NAICKER J

[1] In this urgent application the applicants seek an order:

- 1.1 Declaring unlawful the purported decision by the Union's National Office Bearers expelling them the applicants as members and removing them from their positions as union office bearers;
- 1.2 Setting aside that purported decision; and
- 1.3 Ordering the union to pay the costs of the application.

[2] It was common cause between the parties that this court has jurisdiction to hear the matter in terms of section 158(1)(e)(i) of the LRA which provides that this court may:

“(e) determine a dispute between a registered trade union or registered employers' organisation and any one of the members or applicants for membership thereof, about any alleged non-compliance with-

(i) the constitution of that trade union or employers' organisation (as the case may be);”

- [3] All of the applicants are members in good standing of the First Respondent (the Union). The first to fifth applicants and the eighth to tenth applicants are duly elected Provincial Office Bearers (POBs) of the Union. All of the applicants are shop stewards. The second to seventh respondents are National Office Bearers (NOBs) of the Union. They occupy the following offices: the president, first deputy president, second deputy president, the general secretary, the deputy general secretary and the national treasurer.
- [4] In a letter dated 6 February 2015, signed by the deputy general secretary on behalf of the NOBs, the applicants were informed as follows:

“SUBJECT: ALLEGED SERIOUS AND UNACCEPTABLE BEHAVIOUR AND CONDUCT AS A MEMBER & LEADER OF THE ORGANISATION

Dear Comrade;

- 1. It has come to the attention of the NOBs that you have organized / planned; coordinated, attended and participates in an unconstitutional meeting in Kwa Zulu Natal involving certain Union Leaders and staff members, conspiring and planning against the Union and its leadership.*
- 2. This conduct and behavior is viewed in a VERY serious light by the Union, it is a cause for serious organizational challenges including instability, division; disunity and basically a state of a self – made paralysis and ultimately collapse or destructions, breach and violation of union Constitution, policies and standing decisions, thus not in the interest of the union and seriously disrupting the organization.*
- 3. You are therefore requested and given an opportunity to explain and account in writing as to why the Union should NOT charge and disciplinary actions against yourself and this should reach writer by no later than Monday 09th February 2015 at 14:00pm.”*

- [5] The above letter was the beginning of a process which saw the expulsion of the applicants from the Union. When the parties first approached this court on the 6 May 2015, I issued an order by agreement, which included that the expulsion of the applicants as members and office bearers of the union stands suspended pending the finalization of this application. The said expulsions, should they stand, are still subject to appeal to the NEC. The respondents did not take the point that internal remedies had not been exhausted.
- [6] The parties dispute the ambit of the court's power in a matter such as this. For the respondents it was argued that this court's jurisdiction (in terms of section 158(1)(e)(i)) "and thus its powers" are limited to a consideration of disputes concerning the alleged non-compliance by a union with its constitution. In addition, it was submitted that the court may not hear a review under the common law i.e. the determination of a dispute in terms of section 158(1)(e)(i) is limited to granting contractual remedies only. The applicants submit that the court may declare the expulsions invalid on the basis of common law review. First, I will consider if the respondents have complied with the provisions of the union's constitution in the ways in which they have expelled the applicants.
- [7] In reading the constitution, I am mindful of the reformulation of the correct approach to the construction of documents, and of contracts in particular, by the Supreme Court of Appeal in **Natal Joint Municipal Pension Fund v Endumeni Municipality**¹ in which Wallis JA wrote:
- "....consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to,

¹ 2012 (4) SA 593 (SCA) at 603 - 605

and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

- [8] While acknowledging that this Constitution is drafted in compliance with the provisions of the LRA, it is also necessary for the court to recognise the legal nature of the Union as set out in **Mcoyi and Others v Inkatha Freedom Party; Magwaza-Msibi V Inkatha Freedom Party 2011 (4) SA 298 (KZP)** where it was stated:

"In Garment Workers' Union v De Vries and Others 1949 (1) SA 1110 (W) the basic principles and manner of approach were expounded as follows at 1129:

'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 commonsense 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 member would be encouraged to drag his society into Court for every trifling failure to observe the exact letter of every regulation.'

Where certain provisions in a constitution are fairly open to two constructions, the one having the more convenient result will be followed (see Deutsche Evangelische Kirche zu Pretoria v Hoepner 1911 TPD 218 at 232). Similarly, in Ward v Cape Peninsula Ice Skating Club 1998 (2) SA 487 (C) at 500I – 501C it was held that in cases of doubt the constitution of a voluntary association should

*be interpreted so as to lead to preservation of rights, rather than their destruction, and to a result convenient to its members.*²

- [9] The Constitution defines an Office Bearer as meaning: “any person who is elected to an office in the union, and who may act as a spokesperson or representative of the union at the Branch, Provincial or National level, as the case may be.” The NOBs’ duties and functions are set out in clause 21 of the Constitution and are in general, to manage the affairs of the Union in between National Executive Council (NEC) meetings. The powers of the NOBs are set out in clause 21.3 of the constitution as follows:

“21.3 POWERS OF THE NATIONAL OFFICE BEARERS

21.3.1 The National Office Bearers (NOBs) have powers less than those of the National Executive Council (NEC) in principle.

21.3.2 The NOBs shall manage the affairs of the union, including taking policy decisions and actions, subject to prior approval and/or post endorsement of the NEC.

21.3.3 The NOBs do not have powers to alter, amend or repeal policies, as this is the specific competence of the NEC, and the constitution, as this is the competence of the National Congress.

21.3.4 The NOBs shall process recruitment, selection and appointment of the candidates to fill vacant positions and take occupation subject to the NEC endorsement.

21.3.5 The NOBs shall implement the NEC decisions, make recommendations to the NEC, and seek mandate from and/or endorsement of the NEC.”

- [10] The composition of the NEC is not confined to Office Bearers and is provided for in clause 20.1 as follows:

“20.1 COMPOSITION

² At 307-8, para [26].

The NEC shall composed of the President, 1st Deputy President, 2nd Deputy President, General Secretary, Deputy General Secretary, Treasurer and

20.1.1 Two (2) delegates from every Province up to ten thousand (10,000) members;

20.1.2 Four (4) delegates for every Province between ten thousand (10,000) and twenty thousand (20,000) members;

20.1.3 Six (6) delegates for every Province with more than twenty thousand (20,000) members.”

[11] Clause 20.6.11 specifically provides that the NEC has the power to:

“suspend any BEC, PEC or Office-Bearer or members for violations of provisions of the Constitution or in the interests of the Union; and to take over the management of the affairs of any Branch or Province until a BC or PC can be held and a new committee and or Office Bearers can be elected.” (my emphasis)

[12] Clause 24 of the union’s constitution governs the removal from office of Office Bearers and shop stewards. The clause provides *inter alia* as follows:

“REMOVAL OF OFFICE BEARERS FROM OFFICE, OFFICIALS AND SHOP STEWARDS

24.1 An Office Bearer, official or shop steward may be removed from office if he/she”

24.1.1 Infringes any provision(s) of this Constitution;

24.1.2 Acts in any manner, which is detrimental to the interests of the Union.

24.2 No Office Bearer, official or shops steward may be removed from office unless he/she has been afforded an opportunity to state his/her case personally or in writing to the WGM/BEC, PEC or NEC as the case may be.

24.3 An Office Bearer, official or Shops Steward who has appeared before the *applicable body* and who is dissatisfied with the decision of the body concerned shall have the right to appeal as follows.....” (my emphasis)

[13] The charges against the applicants were purportedly brought in terms of Clause 25.2 of the Constitution and read as follows:

“THE MATTER WITH WHICH YOU HAVE BEEN CHARGED WITH ARE:

1. Violating the Union Leadership Code of Conduct and 2005 August NEC Declaration
 - a. In that you have, as an individual and part of a group, attended and participated in an unconstitutional meeting and not sanctioned by the Union held in Kwa Zulu Natal.
 - b. In that you were party to a destructive caucus/es or clique/s, destructive factions, cabals and programs that seeks to cause disunity, divisions and hostility within the Union.
 - c. Your actions are against and/or in violation of the provisions of the Leadership Code of Conduct And the 2005 August NEC Declaration.
2. Infringing The Provisions Of The Union's Constitution
 - a. In that, as the member of the Union, elected the Provincial Chairperson / Provincial 1st Deputy Chairperson / Provincial Treasurer and the NEC Delegate have failed to observe, enforce and uphold the Constitution of the Union.
 - b. In that you acted in the manner that is disrespecting and/or Undermining and/or Violating decisions taken by the Union's Constitutional Structures thereby neglecting your duties as per the Constitution.
3. Acting In the manner That Is Against The Interest Of The Union
 - a. You acted dishonestly and presented a false document by:
 - i. Wrote an un-mandated letter to the President stating that it is the decision of the POBs and
 - ii. Claimed you were acting on their behalf Gauteng NEC Delegates in that same letter as the mandated to request for Special NEC, when in fact you had no such mandate.
 - b. You fraudulently used or misused or used without permission the union name and resources against the Union.
4. Bringing the Union into Serious Disrepute:

- a. You attended and participated in a meeting that was externally funded, to deliberately plant against the union, its decisions and leadership thereby disrupting or sabotaging programs and plans of the Union.
- b. You incited agitated, mobilised members and/or shop stewards and/or official against the union, its decision and its leadership.”

[14] Although charge 2 above refers to the applicants in their capacity as members and as elected office bearers, reliance for the charges is only placed on clause 25 of the constitution which reads as follows:

“DISCIPLINE OF MEMBERS

25. Impose the fine of not less than R100 but not exceeding R200 for the first offence and not less than R300 but not more than R500 for subsequent offences.

25.1 A member may be suspended, fined or expelled as may be determined by the POB/NOB/BOB if he/ she infringes any of the terms of this Constitution or act in a manner, which is detrimental to the interests of the Union.

25.2 No member may be suspended, fined or expelled unless s/he has been afforded the opportunity to state his/her case personally or in writing at a meeting of the POB/NOB/BOB which intends to consider the matter Such member shall be given not less than (7) days’ notice in writing from the Secretary of the POB/NOB/BOB. The matter with which the member is charged shall be set out in such notice.

25.3 If the POB/NOB/BOB is satisfied that the member charged, though absent, received the prescribed notice, or is the person charged is present, the POB/NOB/BOB may proceed to hear the matter and determine it and if it finds the charge proved to its satisfaction may:

25.3.1 Expel the member from the union.

25.3.2 Suspend the member for a definite period from membership of the Union.

25.3.3 Impose a fine of one hundred rand (100) for the first time offence but not exceeding two hundred rand (R200), and not less than three hundred rand (R300) for subsequent offences but not more

than five hundred rand (500) and may suspend such a person from membership until such a fine is paid without prejudice to any right of action to recover such monies by civil action;

25.3.4 Remove such person from any position of leadership within the Union (or the time of office to which he/she was elected)

25.4 The accused member shall be entitled to call such witnesses in support of his/her case as are reasonably necessary when attending a disciplinary hearing. The POB/BOB/NOB may call such further witnesses as it finds necessary and may take such further investigations as it deem expedient before arriving at a decision.”

[15] The respondents’ justification for reliance on clause 25(3) of the Constitution, as recorded by the NOBs when they informed the applicants NOBs of their decision to expel them, is that:

“8.1 It needs to be cleared that the NOBs are constitutionally empowered to take disciplinary action against any member of the Union and regard to clause 25.1, 25.2 and 25.3, the fact that a particular members is based in a particular workplace, branch or province remains immaterial and irrelevant.”

[16] Mr. Whyte for the respondents argued that the phrase in clause 25 “by the POB/NOB/BOB”, should not be read as implying that one or other of these categories of office bearers is a relevant body for the purpose of disciplinary action in relation to a particular member, but that any of these bodies could carry out the function in respect of any member.

[17] The sanctions listed in clause 25.3 descend in severity – from expulsion, to suspension, to the imposition of a fine and finally to the sanction of removing ‘such person from any position of leadership within the Union (or the term of office to which he/she was elected).’ What is evident from the hierarchy of penalties listed in this clause is that the penalty of removal from office is a distinct and lesser penalty than expulsion for the purposes of clause 25. I note that the letter of expulsion received by the applicants relies specifically on clause 25.3.1 but also makes reference, albeit obliquely, to clause 25.3.4 stating that:

“8.13 In terms of the Clause 25.3 of the Constitution the NOBs decided to:

8.13.1 EXPEL you as a member from the Union in terms of Clause 25.3.1, with an immediate effect

8.14 In relations with your expulsion, you are immediately removed from any positions of leadership within the Union.”

[18] Two observations need to be made with respect to the respondent's reliance on clause 25. First, that it cannot be correct that any of the bodies of office bearers can discipline any member without reference to the level in the Union's structure. The Constitution requires the requisite body to determine sanction in respect of members holding positions in the different levels of union organization, just as it requires a requisite body to hear an appeal. Secondly, clause 24 which deals with the removal from office of office bearers, cannot simply be bypassed and be rendered superfluous. A look at section 95 of the LRA is instructive.

[19] The basis for requisite bodies to hear appeals as well as the need for separate provisions governing the discipline of members *per se* and the removal from office of office bearers, is to be found in Section 95(5) of the LRA which sets out the requirements for registration of a trade union and specifies the provisions a union's constitution (and that of a registered employers' organization) must contain. Important for our purposes are the following clauses requiring that a constitution should:

“(c) establish the circumstances in which a member will no longer be entitled to the benefits of membership;

(d) provide for the termination of membership;

(e) provide for appeals against loss of the benefits of membership or against termination of membership, prescribe a procedure for those appeals and determine the body to which those appeals may be made;” and

“(m) establish the circumstances and manner in which office-bearers, officials and, in the case of a trade union, trade union representatives, may be removed from office;

- (n) provide for appeals against removal from office of office-bearers, officials and, in the case of a trade union, trade union representatives, prescribe a procedure for those appeals and determine the body to which those appeals may be made;”

[20] Section 95 of the LRA thus prescribes that a compliant constitution must identify an applicable body to which appeals are made, both for the purposes of disciplining members and for the removal of office bearers. In my judgment, taking into account that the constitution is drafted in compliance with the LRA, the sensible meaning of the POB/NOB/BOB phrase in Clause 25(1) and (2) must be read as denoting either one or other of the bodies, as the case may be, and not any of them. Mr Whyte’s submission in support of the respondents’ contentions as contained in the letter of expulsion, cannot be correct. More important however is the applicability of clause 24.

[21] It was submitted on behalf of the applicants that the election of a member as an office bearer, irrespective of the level at which the member serves, removes such member from the ambit of clause 25 dealing with the discipline of members, at least in so far as the application of clause 25 may lead to the removal of an office bearer by a higher body than the one which elected the office bearer. Further, that to conclude that office bearers are subject to discipline *qua* member renders it possible for a higher body to determine the composition of a lower body.

[22] As referred to above, the NEC is given the power to: “suspend any BEC, PEC or Office-Bearer or members for violations of provisions of the Constitution or in the interests of the Union; and to take over the management of the affairs of any Branch or Province until a BC or PC can be held and a new committee and or Office Bearers can be elected.” (Clause 20.6.1) Thus the NEC may suspend office bearers (a body higher than the NOBs and which comprises representatives from the provinces as well as NOBs) with the proviso, that that the branch congress or provincial congress are the bodies empowered to elect new office bearers.

[23] My reading of the Constitution to exclude reliance on clause 25, in so far as the application of clause 25 may lead to the removal of an office bearer by a higher

body without reference to those bodies which elected the office bearer, is also fortified by the following clauses contained in it, which underline the powers of control and accountability in the Union:

23.1 Clause 10 dealing with Establishment and Control of Branches provides amongst others that:

“.....The control of the union at this level shall be vested in the following structures in order of supremacy:

10.1 Quadrennial Branch Congress

10.2 Branch Executive Council”;

23.2 Clause 15 of the Constitution deals with the Establishment and Control of Provinces and sets out in clause 15.4 the following:

“15.4 The control of the union provincially shall be vested in the following Structures in order of supremacy:

15.4.1 Provincial Congress

15.4.2 Provincial Executive Council”;

23.3 Clause 18 of the constitution deals with Control of the Union Nationally as follows:

“The control of the Union nationally shall be vested in the following structures or committee in order of supremacy:

18.1 National Congress

18.2 National Executive Council

18.3 National Office Bearers”

[24] Given the recorded order of supremacy of democratic structures in the Union, the wording of clause 20.6.1 above serves as a further confirmation that the Constitution does not contemplate a situation in which the NOBs may remove

office bearers by means of expulsion, relying on clause 25 of the Constitution. The expulsions were therefore not in compliance with the Constitution.

- [25] I return to the question of the powers of this Court in relation to its jurisdiction in terms of section 158 (1)(e) of the LRA. In a recent as yet unreported judgment³ my brother Van Niekerk J was also confronted with a matter arising from a schism within a union. He had this to say about section 158(e)(i) of the LRA:

“Although this provision is located in the section of the LRA that confers powers on the court (as opposed to s157 which more specifically concerns this court’s jurisdiction), provided that the process brought before the court relates to a dispute between a registered trade union (or employers’ organization) and any one or more of its members concerning any non-compliance with that body’s constitution, this court has jurisdiction to hear the matter and to make any of the appropriate order, including the granting of interdictory relief, referred to in s158(1)(a).”⁴

- [26] I am in respectful agreement with his approach. It is not necessary for me to delve into the question of common law review versus contractual remedies or to consider the court’s jurisdiction to evaluate the procedural and /or substantive factors in relation to the disciplinary process that was followed. In handing down what I believe is an appropriate order, I choose not make an order for costs given that it appears to me that this matter has come to court flowing from wider problems confronting the trade union movement at present. A costs order in such circumstances may not promote labour peace, one of the fundamental objectives set out in section 1 of the LRA. In all the circumstances I make the following order:

³ *SATAWU and Lucky Zondo & Others* J715/15

⁴ At paragraph 6

Order

1. The expulsion of the applicants by the National Office Bearers was not in compliance with the Constitution of FAWU;
2. The expulsion of the applicants is set aside.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv PI Kennedy SC and Adv HM Viljoen

Instructed by: Cowan Harper Attorneys

For the Respondents: Mr J. Whyte of Cheadle Thompson & Haysom Inc

LABOUR COURT