Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case : C 76/2021

In the matter between:

MHLELI OSBOURNE MBANA	**First Applicant**
MEMBERS OF FAWU	**Second and further Applicants**
FAWU OFFICIALS (as listed in the attached list)	**Third and further Applicants**

and

MGOMEZULU MAYOYO	**Respondent**

Date of Hearing: 23 February 2021

Date of Judgment:

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 13h00 on 24 February 2021

Summary: (Urgent - declaratory and consequential relief relating to the status of the respondent as general secretary of a union - *in limine* objections – struck off roll for lack of urgency and non-joinder – principles of joinder restated - costs)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an urgent application launched on 17 February 2021 and set down for hearing five court days later on 23 February 2021. An amended notice of motion was filed on 19 February 2021. The hearing was conducted remotely using Zoom.

[2] On the face of the application, the applicants are: Mr M Mbana ('Mbana'), the national legal officer of the union FAWU (first applicant); a number of union members employed at various plants whom it is contended are adversely affected by the actions of the respondent (second and further applicants), and three other union officials based in the Western Cape (the third applicant and further applicants). The officials are identified by name and the individual members' names appear on lists which were apparently completed pursuant to another internal dispute union in July 2020. When the application was launched and at the time the matter was argued no confirmatory affidavits from any of the members or the officials had been filed, though Mngomezulu claimed to have received some. Likewise, there was no proof that any of them had authorized Mbana to bring the application on their behalf.

[3] The relief sought is for an interim order in terms of section 158 [a] [i] of the Labor Relations Act, 66 of 1995 ['the LRA'], to the following effect, pending a final order for the same relief:

3.1 in terms of section 158 [1] [ii], firstly preventing the respondent, Mr. Mngomezulu ['Mngomezulu'], from acting or purporting to act as a national office bearers and general secretary of the union, and

secondly declaring that he is not an office bearer and should be removed from the control and administration of the union's affairs and finances;

3.2 interdicting Mngomezulu from instituting disciplinary proceedings against the first applicant and any other employee or office bearer, with the intention of dismissing them in pursuit of "his personal orchestrated agenda"; ordering that, what I presume are the duties of the general secretary, to be carried out by "relevant employees" and office bearers elected by the national congress of the union, and

3.3 interdicting Mngomezulu from holding or calling meetings of the union structures and presiding as a national office bearer, as well as declaring that any such meetings he had presided over were unconstitutional and therefore null and void.

[4] The applicants also ask for the interim relief sought above to be granted until such time as the final relief is determined.

[5] Although the disciplinary action taken against Mbana is very recent, the alleged unlawful usurpation of the office of general secretary by Mngomezulu, which lies at the heart of the cause of action underlying the application, has a longer history and forms part of a series of internecine struggles between different groups of members and officials over the control of the union. Because these struggles often entail disputes about the lawfulness of decisions taken by various union bodies or about the powers of various office bearers, the courts are regularly drawn into these conflicts, which seldom result in outcomes that heal the underlying rifts within the union, even if the legal questions are settled. This application is of a similar nature.

In limine objections

[6] At the hearing of the matter the first issues that needed to be determined were the preliminary objections raised by Mngomezulu. After hearing extensive argument on these, court was adjourned to determine these.

Identity of applicants

[7] Mngomezulu claims that Mbana is the only applicant clearly identified. No confirmatory affidavits from the aggrieved claimed accompanied the founding affidavit. The lists of names of union members attached to the application refer to other internal events in the union in 2020. Although the union officials who are supposedly co-applicants are named in the founding affidavit no confirmatory affidavits of any of them accompanied the founding affidavit either.

[8] At the hearing of the application, Mbana claimed that he had just received some confirmatory affidavits from the other applicants, but that he had been unable to transmit these to the court or to Mngomezulu's attorneys owing to his curtailed access to IT resources following what he characterizes as his purported dismissal. That issue will be dealt with below.

Locus standi

[9] In relation to Mbana, Mngomezulu asserts that he has no *locus standi* to bring the application pertaining to the alleged unlawful status of Mngomezulu as general secretary of the union, because not only is Mbana not a union member but he is no longer even an employee of the union since his dismissal on 12 February 2021.

[10] Although part of the relief sought is to nullify the institution of disciplinary proceedings against Mbana by Mngomezulu, those proceedings had already been instituted and concluded by the time he launched this application. Notably, Mbana also did not mention that he had been purportedly dismissed by Mngomezulu in his founding affidavit, which he should have done.

[11] A further issue relating to Mbana's *locus standi* concerns his authority to act on behalf of any of the other applicants in the absence of affidavits from them confirming his authority.

Non-joinder of the union

[12] Thirdly, the applicants have failed to join the union itself in the application and have cited the president of the union morning on him to prove that he is an office bearer, yet have not joined him.

Urgency

[13] Mngomezuly disputes that the application needed to be brought on what he describes as a 'hyper-urgent' timetable, so that the matter could be heard within less than a week of being launched.

Evaluation

[14] it is not necessary to deal with all the *in limine* points raised in view of the reasoning below on the issues of joinder and urgency.

Non-joinder

[15] In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), the former Appellate Division laid down the test when joinder of a party is a necessity and not merely a matter of convenience. The constitutional court has reaffirmed it and expressed it succinctly, thus:[i]

> 'The test for joinder requires that a litigant have a direct and substantial interest in the subject-matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the court.'

[16] Mbana explained in argument that the reason the union had not been joined as a respondent is because the union members supporting the application did not want the union to be responsible for paying the costs of the application if they were successful, because those costs would ultimately, come out of the union coffers which they had filled with their membership subscriptions. That may well be so, but the issue is that the union constitutes a separate juristic personality, which is distinct from the individual union members and the various office bearers of the union who currently occupy positions of authority in the union.

[17] What the applicants fail to appreciate is that if the court makes the order they seek, the court would be determining the validity of an appointment of a key officeholder of the union, the general secretary. It should be obvious that, as an institution, the union has a substantial interest in the identity of the person exercising the powers given to a general secretary in terms of the Constitution. In allowing the court to decide that question, the authority of the union as the final arbiter of who should be its current general secretary would be placed under scrutiny and could be set aside. Clearly, the threat of the court making a binding decision on a matter of union governance matter which ordinarily would purely be a matter internal to the union, is something which is potentially prejudicial to the autonomy of the union's decision-making powers and therefore the relief sought is potentially prejudicial to its direct and substantial interests.

[18] In the circumstances, I am satisfied that the relief sought by the applicants would necessarily have an impact on the direct and substantial interest of the union as an institution in the validity of the appointment of its most senior official, and it should have been joined as a respondent in the application.

[19] This is one reason why the application stands to be struck off the roll.

Urgency

[20] The contested appointment of Mngomezulu to the position of General Secretary concerns a chain of events beginning sometime in around 2017 to 2019. It is the alleged invalidity of his attainment of that office on which the applicants' case hangs. However, the urgency the applicants rely on does not stem from that event having just happened. They claim that unless the court intervenes various forms of prejudice will be suffered , namely:

20.1 the union will cease to function in terms of its constitution;

20.2 union employees like Mbana will be dismissed by persons who have usurped the authority to manage the union and its finances;

20.3 the usurpers will, in the pursuit of their personal interests, destroy the union;

20.4 members of the union or resigning en masse because of the potential threat to hard won collective agreements,

20.5 a number of cases currently been conducted by Mbana as the national legal officer will be prejudiced if he is unable to act in that capacity.

[21] There are also certain allegations made about some of the usurpers carrying firearms or being escorted by bodyguards and an incident of violence, which the applicants appear to believe this application, if successful, would supposedly prevent.

[22] Firstly, it must be said that the events summarised above are pleaded with no factual specificity. They are pleaded in sweeping and general terms without reference to when such events started and without any particularity about a single one of such alleged events. It may well be that there are such facts that could be placed before the court, but at the very least properly pleaded examples should have been included in the founding papers. It is no answer, as Mbana appears to suggest, that the court can simply ignore this lack of detail at this point in time because all will be revealed when the final application is heard and parties have had a chance to supplement their papers. Even for interim relief, and applicant must plead specific facts, which can be specifically answered by the respondent party. The court cannot grant relief based on broad factual assertions unsupported by evidence of the factual basis for such assertions on affidavit.

[23] Secondly, most of the alleged prejudice the applicants face, which is summarised in paragraph [21] above, is directly linked to Mngomezulu holding the office of General Secretary as one of the ‘usurpers’. Since that event took place a few years ago, it stands to reason that all prejudicial consequences applicants have suffered or anticipate, have already been suffered for a while or should have been anticipated for some time. As pleaded, none of those prejudicial consequences appears to be something of recent vintage justifying rapid intervention. It may be that the applicants feel that the consequences of the contested appointment are now more manifest, but no recent events are related in the founding affidavit to persuade the court that all these issues have only occurred recently. Still

less, is any explanation provided why it is vital that the court needed to pronounce on them this week.

[24] The only recent event that can be discerned on the papers is the disciplinary action and, albeit not specifically pleaded, the dismissal of Mbana as a legal officer. The consequences attributable to that are that the conduct of cases he was handling will be prejudiced. Once again, not a single example of any imminent litigation or pending litigation is cited that would be adversely affected if the court did not nullify the disciplinary action taken against him. Accordingly, assuming in his favour for the sake of argument, that this would be a determinative factor in setting aside that disciplinary action and effectively reinstating him, the factual basis for the imminent prejudice to members' legal matters has not been laid out in the necessary detail to warrant the court intervening on an urgent basis.

[25] In passing it should be mentioned that it extremely unlikely, even if such detail were provided, that this would mean that the appropriate relief the court should grant would be the reinstatement of the person handling such litigation.

[26] In conclusion, I am not satisfied that the applicants have made out a case for urgency.

Costs

[27] I appreciate that Mbana has launched this application with limited resources and that he is not necessarily an admitted legal practitioner. However, the court is surprised, given his long service as a legal officer, he would not be familiar with the principle of necessary joinder and the requirements for demonstrating urgency. In the course of the argument, Mbana said that he did not wait for confirmatory affidavits from the other applicants because he feared that the court would find that the application was not urgent if it was brought a few days later. It was pointed out, that the court was more likely to be sympathetic if he had explained the difficulties of obtaining the confirmatory affidavits on short notice as one of the reasons why it was launched a few days later than it might have been.

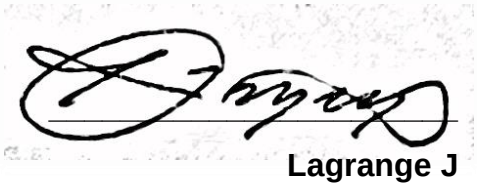
[28] In the circumstances, I can only conclude that the matter was brought in reckless haste and disregard for some of the basic legal requirements of such an application. The problems with the application are not 'mere technicalities', but related to fundamental legal principles. I am strongly inclined in the circumstances to make an adverse cost order against Mbana.

[29] The only factor which militates against such an order, is the fact that the application is clearly not just related to Mbana's personal battle to retain his position, but is part of a much wider struggle between conflicting interests of members, officials and office bearers in the union. In the circumstances, it would not be fair in my view to impose a cost order on Mbana alone, knowing that there probably were other applicants who were willing to make common cause with him, but whose confirmatory affidavits were not timeously filed. Were it not for that, I would have no hesitation ordering Mbana and the other applicants to pay the costs of yesterday's appearance at least, because having had sight of the trenchant preliminary objections of the respondent, the application should at least have been withdrawn prior to the hearing.

Order

[1] The application is struck off the roll for two reasons, namely lack of urgency and non-joinder of FAWU as a respondent.

[2] No order is made as to costs.



Lagrange J
Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicants M. O. Mbana (First Applicant)

For the Respondent:	A Friedman instructed by Haffegee Roskam Savage Attorneys

[i] Reaffirmed again by the Constitutional Court in *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) at 625,para [56].