REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: J 1118/2013

In the matter between:

NATIONAL UNION OF MINEWORKERS	**Applicant**
and	
LONMIN PLATINUM comprising EASTERN PLATINUM LTD and WESTERN PLATINUM LTD	**First Respondent**
ASSOCIATION OF MINE WORKERS AND CONSTRUCTION UNION	**Second Respondent**

Heard: 12 July 2013

Delivered: 15 July 2013

Summary: (urgent interim application- extension of 90 day period prior to de-recognition pending finalisation of dispute referred to CCMA).

JUDGMENT

LAGRANGE, J

Introduction

[1] The National Union of Mineworkers ('NUM) launched this urgent application for the following interim relief on 27 June 2013, pending the outcome of dispute referred to the CCMA:

1.1 preventing the respondent company ('Lonmin') from terminating the recognition agreement between NUM and Lonmin;

1.2 declaring that all stop orders and notices of revocation of NUM membership submitted to Lonmin by a rival union, the Association of Mineworkers and Construction Workers ('AMCU') from 1 May 2012 are invalid and of no force and effect, and

1.3 ordering Lonmin to reinstate all stop order deductions from employees' salaries for the payment of NUM membership fees, which were being made before any notices of revocation were submitted during the period commencing 1 May 2012.

[2] Mr Rautenbach, who appeared for NUM assisted by Ms Basson, emphasised the importance of the relief sought in paragraph 1.1 above, but confirmed that NUM was not abandoning any of the other relief requested.

[3] The application was opposed by AMCU, which responded directly to the allegations made by NUM in its founding affidavit. Lonmin, by contrast, reserved the right to answer the factual allegations made by NUM if an offer it had made with prejudice was not accepted by the two union parties. For present purposes it suffices to say that Lonmin proposed that a ballot be conducted by an independent agency to determine the relative levels of actual employee support for the two rival unions and that the choice made by employees during the ballot would also decide in which union's favour, if any, a stop order deduction would be levied according to the individual choice of each employee. The proposal had much to commend it as it could have permitted employees to express their free choice in the relatively secure environment of a balloting process. As it

transpired, NUM was in favour of Lonmin's proposal, subject to certain conditions, but AMCU did not engage with the proposal.

[4] Despite Lonmin's offer not being accepted, the company did not press for a postponement to file a detailed response to NUM's allegations. It is fair to say that Lonmin's approach to the matter was to avoid entering the substantive dispute between the unions over which one commanded the allegiance of the majority of the workforce. Even though it was not keen to engage in this issue during the hearing of this matter, it clearly had adopted a view that NUM had lost its status as a majority representative of the workforce in the main bargaining unit as will become clear from the narrative below.

Factual background

[5] In July 2011, Lonmin concluded a recognition agreement with NUM. In terms of clause 3.1.4 of that agreement a union would be recognised as the collective bargaining representative for the employees in job categories 3 to 9, provided 50% plus one of those employees were its members. Employees in job categories 3 to 9 comprised one bargaining unit known as CBF1. Employees falling within job categories B to C comprised a second bargaining unit, CBF2. Collective bargaining and organisational rights in CBF2 are contingent on a union representing at least 20% plus one of the employees in that unit.

[6] The recognition agreement sets out provisions dealing with access by union officials, stop order facilities, the election of shop stewards, leave for union activities, the appointment of full-time shop stewards, the provision of facilities for union meetings including the provision of a vehicle for each union branch at the mine and union participation in various company forums. As long as the agreement remains in force, NUM is entitled to exercise these rights, though not all are dependent on its status as the majority union.

[7] The events giving rise to this application began in August 2012 around the time of the shocking killings which are now under the scrutiny of the

Farlam Commission of Enquiry. For present purposes, it is the apparently seismic shift in union allegiance which occurred during a period of three months, namely August, September and October 2012, which is directly relevant to this matter. Over this period the biggest change in the union membership of employees took place as a result of Lonmin giving effect to the written notices it had received ('the revocation notices') from AMCU. The revocation notices were drawn up on AMCU letterheads and each form comprised three sections: an application for AMCU membership, a portion for management to acknowledge the stop order and a section purportedly giving one month's notice of the employee's cancellation of their membership with NUM, or whichever other union they previously belonged to.

[8] The reversal of fortunes of NUM and AMCU is dramatically illustrated in a graph which appears in a report on the veracity of the notice commissioned by NUM. The report, drawn up on NUM's instruction by a firm of forensic accountants, Accountants@Law (Pty) Ltd, formed part of NUM's submissions. The report states, amongst other things, that: "the period between May 2012 and May 2013 demonstrates that NUM lost membership from about 13,000 down to 4000 and AMCU gained membership commensurately over the same year." The graph illustrates that AMCU's membership rose by 50% between May and the beginning of September 2012 to about 6000. During the same period, NUM's membership appeared to have remained constant at about 13,500. A dramatic shift then took place from the beginning of September to the end of October: AMCU's membership shot up to just under 14,000, while NUM's membership dropped to approximately 6,500. In short, the position of the two unions between August and November 2012 was reversed.

[9] NUM cites intimidation and violence directed against its members, as the reason for this apparent shift in allegiance. In his founding affidavit in support of NUM's application, Mr Timbela, the Lonmin NUM Co-ordinator, specifically mentions amongst other deaths, the killings of Mr I Twala and Mr D Mthinti on 14 August and 11 September 2012 respectively. He also cites an incident which took place on 20 September 2012 when employees disembarked from the bus transporting them to the shaft at

Western Platinum Ltd. Workers were allegedly forced to sign stop orders in favour of AMCU and revoke their membership of NUM or be denied access to the shaft. He further states: "We understand that employees were coerced during August and September 2012 at the Koppie [the Marikana koppie which was the site of the infamous police shooting of strikers on 16 August 2012] to sign these notices or face a fate similar to that of Twala and Mthinti."

[10] He further observes that, of the nine individuals arrested in connection with one or more of the murders of NUM members or office bearers and for the murder of mine security officers, six are AMCU members. Mr M J C Gama, AMCU's National Treasurer, who deposed to AMCU's answering affidavit does not dispute that the suspects are presently AMCU members, but claims that the person arrested for the murder of Mthinti was an NUM member at the time Mthinti was killed and only joined AMCU in late September 2012. However he denies that there was any intimidation of NUM members, and notes that in some of the incidents of intimidation alleged by NUM, no AMCU members were specifically identified.

[11] Gama also claims that the organisational challenges faced by NUM are no different from those faced by AMCU. He relates the killing of a AMCU regional organiser and a member on 11 May and 11 June 2013 respectively. He further states that attacks took place on the houses of an AMCU branch deputy chairperson and a member in May and June 2013 respectively. Gama mentions also an alleged incident on 1 July 2013 in which mine security had to intervene to remove NUM regional office bearers and shop stewards from two other platinum mines, who had blocked AMCU members leaving Lonmin Eastern Platinum saying they were "lost" and "must return home". Lastly, he recounts an alleged incident on 2 July 2013 in which an AMCU member was taken hostage and forced to sign a stop order form at gunpoint by NUM members, one of whom he identifies by name.

[12] In Timbela's replying affidavit, he notes the incidents mentioned but denies having any information about who is responsible for them. He goes on to assert that the important point to make is that on both unions' versions the

climate is "extremely volatile and out of control" and the issue was whether or not "conditions are such that recruitment in the normal sense of the word can be conducted and it is possible."

[13] At this juncture, it must be mentioned that while both unions clearly condemn the sporadic violence and intimidation which appears to be ongoing, neither gave any indication of what joint steps, if any, they are taking together with Lonmin to minimise or end it. I mention this because the court was invited to consider that, given a bit more time, the situation would improve, but no evidence to support such a conclusion was put before the court.

[14] Under certain circumstances set out in clause 12 of the recognition agreement, the agreement can be terminated and ceases to be of any force and effect. Thus, if a party commits a breach of the agreement and does not rectify that breach within a stipulated period the agreement may be terminated. The agreement also permits any party to bring it to an end simply by giving three months' notice without having to provide any justification for such a step. Apart from this termination on ordinary notice, the agreement also anticipates the possibility of the agreement being terminated on account of the majority union losing its representative status, which is the current situation that has arisen at Lonmin.

[15] Despite the membership upheaval which had taken since August 2012 there is little indication on the papers before the court what concrete steps, if any, NUM took to reverse the loss of membership and, if such steps were taken, why they yielded no results. The only specific action mentioned in the founding affidavit is a letter written by NUM's attorneys to Lonmin on 30 November 2012 in which the union complained, amongst other things, that 40 of its members had deductions made from their wages in favour of AMCU despite never having joined AMCU. The letter also complained of the fact that Lonmin had not provided the union with copies of notices of the revocation of stop orders of members who had supposedly resigned from NUM. In asserting this entitlement to copies of the revocation notices, the union relied on section 13(5)(c) of the LRA. Section 13(5)(c) requires an employer to remit a copy of any revocation of

union membership received together with the monthly remittance of membership fees to a representative union. The company responded to this request by asking for the details of the 40 members in question so that it could identify the relevant notices. It also expressed the view that the relevant provisions of the recognition agreement superseded the provisions of section 13(5)(c). The letter also mentioned that 'there has been a very large number of employees who have sought to change their union affiliation." In its replying affidavit, NUM says that at that stage Lonmin had not indicated any intention to de-recoginise it and there was no need to take any urgent legal action.

[16] Interestingly, AMCU confirms receiving a letter from Lonmin earlier in November 2012 headed 'Trade Union Representation Status at Lonmin Operations' in which the Executive Vice President (Human Capital and External Affairs) wrote:

> *"1. I write to inform you of the current union representation at Lonmin which necessitate engagement on a new trade union recognition dispensation."*

The letter contains Lonmin's figures of trade union membership as at the end of October 2012, showing AMCU with 12 548 members and NUM with 7 531 members in the CBF 1 bargaining unit, which consisted of 23 173 employees. The letter notes "a significant change in the membership profile" and that "(t)his significant shift necessitate [*sic*] a review of our current union recognition dispensation." The letter went on to invite AMCU to engage in a process of agreeing a new recognition dispensation with Lonmin based on "an all-inclusive engagement for all relevant stakeholders and a recognition dispensation that will create a place for all relevant stakeholders." AMCU did engage with Lonmin, but could not reach agreement on these issues. AMCU surmises that NUM was also the recipient of the letter, but NUM did not admit to receiving the letter.

[17] However, at a meeting between Lonmin and NUM on 3 April 2013, NUM was advised that its membership in CBF1 stood at 4 774 members, amounting to only 21% of that bargaining unit. On 16 April 2013, Lonmin confirmed the position in writing and gave formal notice of its intention to

withdraw the benefits and facilities previously granted to NUM on the basis of its majority status, namely withdrawal of the recognition and benefit of full-time branch representatives and full-time shop stewards, as well as the recognition of rights of other shop stewards and the withdrawal of offices and transport facilities. The union would retain rights of access to the workplace and stop order deductions in respect of CBF1. In relation to CBF2, where NUM still retained 25% of the bargaining unit as members, its rights remained unchanged.

[18] Lonmin confirmed that it was terminating the recognition agreement under the provisions of clause 12.1 thereof. Clause 12.1 provides that the agreement terminates and ceases to be of any force and effect,

> *" if the union no longer conforms to the level of representativity required for a Representative Union at any one of the plant/shaft. If the plant/shaft suspects that the union is no longer a Representative Union, it may on behalf of the employer then give notice in writing requesting the union to prove within 90 (ninety) calendar days of the date of such request that it is still a Representative Union. In the event that the union is unable to do so at any one of the plant/shaft concerned, this agreement shall automatically terminate on expiry of said period of 90 (ninety) calendar days without further notice to the union;..."*

(sic)

[19] Around this time, AMCU demanded the permanent closure of NUM's offices and that the keys of the office be handed over to them. An unprotected strike ensued in support of this demand and a demand that AMCU be recognised. Lonmin obtained an interdict against the strikers.

[20] Lonmin then attempted to advance the date of de-recognition from 16 July to 31 May 2013. NUM responded by approaching this court for urgent relief. As matters turned out, an order interdicting the cancellation of the agreement before 16 July 2013 and an order compelling Lonmin to make copies of stop orders and revocation notices available to it, in terms of

clause 5.3.1[1] of the recognition agreement, was agreed upon by NUM and Lonmin.[2] AMCU was not cited as a party in those proceedings.

[21] On 3 June 2013 following the court order, NUM received 12 097 notices of membership revocation from the company. On the same day, NUM's offices at Lonmin's Western Platinum branch were attacked and the chairperson, Mr M Nqeto was killed and its branch treasurer, MR P Patswana, was shot at after leaving a union meeting at the offices.

[22] NUM turned its attention to the notices it had received and identified a number of defects in them, which it claims Lonmin management had ignored, demonstrating that Lonmin had failed to apply its mind when verifying the forms. Amongst the flaws identified were:

22.1 most of the forms had the same membership number;

22.2 a large number of notices were not signed or had different signatures the same employee;

22.3 a large number of notices did not make provision for one months notice of revocation under the section dealing with cancellation of membership;

22.4 in some cases employees appeared to apply for and revoke a stop order in favour of AMCU on the same form;

22.5 a number of identity numbers entered on the forms were non-existent;

22.6 names and surnames were misspelt;

22.7 not all forms bore the signatures of witnesses;

22.8 different parts of the notices were not completed by the same person judging from the handwriting, and in some cases handwriting on the notices was partially illegible.

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[1] In terms of clause 5.3.1 of the Recognition Agreement the company is obliged to make available to the union a list of names and other details of members on whose behalf deductions were made, the period to which the deductions related, as well as the amounts deducted and a copy of every notice of revocation of authority related to the union subscriptions.

[2] It should be noted that the order agreed upon stated that: "*if [NUM] is unable to prove that it is sufficiently representative in terms of the recognition agreement by 16 July 2013, then the Recognition Agreement terminates on 16 July 2013.*"

[23] AMCU disputed the alleged laxity of Lonmin in verifying forms. It claims Lonmin had returned 44 notices to it because members had died, resigned or had been medically boarded. A further 724 notices were returned to AMCU by Lonmin with comments such as 'withdrawn' or 'discharged' written on the notices. Consequently, AMCU argues that Lonmin does scrutinise the notices it receives and the only reasonable inference to draw was that it was satisfied with the notices which it did not return.

[24] NUM engaged the services of a statistician, a handwriting expert and the forensic auditors mentioned above to assess the validity of the notices received. Based on a statistical sample of 202 randomly selected notices, the statistician concluded that approximately half the notices were not valid for reasons other than the failure of the employer to acknowledge receipt of the stop order.

[25] The net result of the forensic auditors' report may be stated in summary as follows:

25.1 The increase in AMCU membership of 12,515 between May 2012 in May 2013 as reported by Lonmin is overstated by 2667 members because that is the number of revocation notices received before May 2012 or after May 2013 and therefore cannot form part of the calculated gain of 12,515.

25.2 Of the apparent net gain of 9,848[3] members by AMCU a full 86.1% of those revocation notices have one or other defect rendering them invalid.

25.3 Consequently the report concludes that only 1,373 of the revocation forms can be considered valid.

[26] If these findings are correct, it implies that in the period May 2012 to May 2013, AMCU only gained 1,373 members which would have raised its membership to 5,135. Correspondingly, even if that gain was entirely at the expense of NUM, then NUM's true membership in May 2013 would have only dropped to 11,639, still enough to give it a slender majority of the approximately 23,000 workers falling with in bargaining unit CBF1.

[3] i.e 12,515 less 2,667

[27] However, one of the defects which the report treated as invalidating a revocation notice was the incomplete acknowledgement of receipt of the form by the employer. This defect was found in 4,395 revocation forms. If this defect is ignored as a nonmaterial factor in determining whether or not an employee intended to revoke membership of another union in favour of AMCU, since it merely serves as confirmation of receipt of the form by the employer, then the outcome changes dramatically. AMCU's membership would then have risen to 8,157 and NUM's membership would have dropped to 8,617, still slightly higher than AMCU's membership but nearly 3,000 members short of a majority.

[28] NUM complains that it was severely prejudiced by only obtaining the notices on 3 June 2013 because the number of notices simply could not be processed for recruitment purposes in the remaining weeks available before16 July 2013. Because NUM claims a large number of the affected employees were coerced into crossing over to AMCU from NUM, particularly in the September 2012 following the murder of Mthinti and the barring of access to shafts by AMCU members, it says it needed an opportunity to make personal contact with the individuals concerned to establish to what extent the forms reflected choices made freely and voluntarily by them.

[29] NUM referred a dispute over the interpretation and application of the recognition agreement to the CCMA on the same day it launched this application. In summarising the facts of the dispute referred to the CCMA it stated on the referral form that:

> *"The employer transferred NUM's members to AMCU in contravention of the Recognition Agreement and in so doing, caused NUM's membership to fall below the required threshold which has resulted in the employer threatening to cancel or terminate the Recognition Agreement, concluded between NUM and the employer, on 16 July 2013."*

[30] The contravention of the recognition agreement NUM is referring to is Lonmin's reliance on the allegedly defective notices as the basis for cancelling the agreement. The desired outcome of the dispute which NUM

seeks from the CCMA is "(r)estoration of membership and recognition as the majority trade union at Lonmin." Effectively, the court is being asked to grant the same relief in the interim pending the outcome of the CCMA process, which ordinarily will proceed by way of conciliation, followed by arbitration.

[31] In argument, NUM placed great emphasis on its interpretation of the requirement in section 3(5) of the LRA that an employer "must" give a representative union a copy of a revocation of membership with each monthly remittance of membership fees made to the union. It argued that on a proper interpretation of the provision it is clear that the legislature intended that a failure to give a union a notice of a membership revocation in the month it was received was intended to result in the notice being deemed invalid because of the peremptory phrasing of the provision and because the purpose of the provision was to give the union a month to try and rectify the revocation.

The applicable legal principles

[32] The test for interim relief pending the outcome of the final determination of a dispute is an extraordinary remedy within the discretion of the Court. The approach adopted by the courts where the right which it is sought to protect is not clear, the approach was laid down in ***Setlogelo v Setlogelo*****, 1914 AD 221**, namely that the applicant must establish *(a)* a right which, 'though *prima facie* established, is open to some doubt'; *(b)* a well grounded apprehension of irreparable injury, and *(c)* the absence of an ordinary remedy. In exercising its discretion the Court also weighs the balance of convenience between the parties, which means the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted.[4]

[33] More often than not, such interim relief is also sought on an urgent basis, as in this case. The applicant is therefore asking that the ordinary rules of court governing the time limits for filing answering papers before the

[4] At 227

matter is heard be shortened. Ordinarily, the time permitted for filing an answering affidavit is 10 court days in terms of Rule 7(4)(b) of the Labour Court rules. In this instance, the time period for the respondents to file answering affidavits was 5 court days. Accordingly, NUM must justify why it wishes to subject the respondent parties to such an abbreviated process.

Evaluation

[34] The reason relied on by NUM for bringing the application on such short notice is because it faces de-recognition on 16 July 2013 and claims it will not be able to challenge the invalidity of the transfer of its members to AMCU if it is de-recognised. It also claims the urgency is compounded by the threats, violence and intimidation which occur on a daily basis. This latter reference appears to be an indirect way of saying that the 90 day period afforded to it in the recognition agreement to restore its majority status, is simply insufficient in the prevailing environment, which is hostile to employees being able to freely exercise their right to freedom of association.

[35] NUM argues that if it is unlawfully de-recognised, it will be practically irreversible once it takes effect as it will have to recruit from a position of weakness, not from the position of a majority union which is its rightful status. Accordingly, it contends that the balance of convenience favours it.

[36] NUM contends also that if the court does not come to NUM's assistance it will be rewarding the lawless conduct of AMCU and its members in interfering with NUM's organisational rights and the right of its members not to be victimised. Moreover it will condone Lonmin's "culpable failure" to deal with the unlawful disruption of and interference with its organisational rights.

[37] NUM submitted that, as the current majority union, it had the right to recruit in a 'normal situation' and not under the prevailing hostile climate. Mr Kennedy assisted by Ms Collet, who appeared for AMCU, contended that in so far as NUM was claiming that the 90 day period was insufficient, it had to prove that it was impossible for it to approach and recruit members

during that time. I am not sure that this threshold is appropriate when the issue concerns the exercise of a fundamental right such as the exercise of a worker's right to join a trade union, which is enshrined in the Bill of Rights by s 23(2)(a) of the Constitution. However, it is not necessary to decide if such a demanding standard applies, for the reasons set out below.

[38] In this matter the issue of urgency is closely tied up with the substantive merits of the dispute, so it is necessary to canvass these to an extent.

The existence of a clear right or of a prima facie right though open to doubt

[39] On the face of clause 3.5.1. of the recognition agreement, it seems that NUM was probably entitled to insist on provision of revocation forms and could have done so on a monthly basis. However, the first time NUM tried to assert this right was only when it launched the previous urgent interdict on 24 May 2012. It claims it never did so earlier because the threat of de-recognition had not been made previously. It was then swamped with such a vast quantity of forms it could not deal with them. However, as the notices were provided, Lonmin is no longer in breach of that provision and this application is not really directed at enforcement of that right, but is more concerned with the alleged invalidity of the forms received.

[40] In this regard, NUM claims Lonmin failed to verify the forms which it says was necessary for a valid revocation notice. However, AMCU's experience suggests that the notices were not simply accepted at face value, but were scrutinised and were not implemented if Lonmin was not satisfied with them. Essentially, the question of whether or not they were properly verified is the subject matter of factual dispute of a considerable scale which cannot be determined in these proceedings. NUM contends that as neither AMCU nor Lonmin engaged with the findings of the forensic auditors that report must be accepted as correct for the purpose of these proceedings. There are two difficulties with adopting this approach. Firstly, the absence of an entry by Lonmin on the portion of the notice dealing with the employer's 'acknowledgment' of the stop order on a large number of forms does not amount to a failure of the employer to verify the

stop order. Accordingly, I am not persuaded that this is a defect which would invalidate the form. Secondly, it would be absurd if it did because it would mean that merely by failing to acknowledge the stop order, the employer could prevent giving effect to workers' union membership choices. Moreover, the recognition agreement itself makes no mention of a revocation form having to be acknowledged by the employer as a pre-requisite for verification.

[41] In so far as NUM alleges that the notices are invalid because they were completed under duress, it may well be so that some of the notices will be found to be invalid for that reason. But the basis laid by NUM for saying this is insufficiently detailed in the affidavits. I agree that it appears that there is a climate of violence which is inimical to ordinary recruitment practices. In an open and democratic society, an employee's choice of union membership should not be a matter of life or death. On the other hand, what is missing from NUM's application is confirmation by any individual workers of their experience of being coerced against their will to join AMCU. If the scale of press-ganged membership is as great as NUM alleges, surely there would have been more than 40 complaints directed to it by disgruntled members?

[42] Similarly, there is not a single account of any attempt made by NUM to re-recruit lost members over period of nearly ten month period since August 2012, and how that attempt was thwarted or inhibited by the actions of AMCU or its members. So too, there is no indication that NUM ever called upon Lonmin during this time to create the right climate for normal union activity, though it accuses it of a 'culpable failure" to deal with disruption of union activities at the workplace. If there had been circumstances where Lonmin could have been expected to act, but failed to do so, it is reasonable to expect that NUM would have complained about it at the time and would have provided details of this in its founding affidavit.

[43] In view of the absence of evidence on these matters, it is not necessary to decide if NUM needed to demonstrate that it was impossible for it to conduct normal recruiting in the notice period: it has not even laid enough

before the court to conclude that reasonable efforts by it to remedy its membership situation could not be feasibly implemented.

[44] As far as the 90 day period goes, the court has already ordered that if NUM fails to prove it is sufficiently representative by 16 July 2013, the agreement will terminate. Even if NUM was faced with a large quantity of notices, it would surely have been aware at the time it sought the previous interdict whether or not it was feasible to try and re-recruit members, in the 90 day period and would have raise this.

Existence of an alternative remedy

[45] The dispute referred to the CCMA will have to address the validity of the revocation notices in determining if Lonmin acted in breach of the Recognition Agreement. It is the CCMA process which provides the primary remedy for this type of dispute under the LRA. If NUM members have been chafing under the unwelcome yoke of AMCU for so many months, the further delay while the CCMA addresses the dispute should not be significant.

Irreparable harm and the balance of convenience

[46] To grant the relief sought in this application would not preserve the current status quo pending the outcome of that dispute, but would re-instate the status quo as it existed over a year ago. It is true that NUM will lose its majoritarian privileges, but if the scale of coerced or fraudulently altered membership is as great as NUM suggests, then there is no reason to believe it will not be able to recover its majority status.

[47] Moreover, granting the order sought would also mean that even though NUM accepts that at least 1300 odd members have validly revoked their membership of NUM, those employees would have their former union membership status imposed on them against their will if the order is granted. This is an outcome the court cannot countenance because it would deprive them of the choice they made in exercising their right to freedom of association.

Urgency

[48] NUM urges urgency in this matter partly because it claims it could not have been aware of the extent of invalid revocation notices that would be revealed when it received the forms. But it had the right to demand the notices all along. It could not have been unaware of the scale of the apparent membership shift by October 2012, yet it did not press its claim for revocation forms then. It is untenable to believe that NUM only thought it was important to check the forms when it received notice of de-recognition in April this year, when its status as the dominant union had patently been under attack for much longer than that. Moreover, if, as it claims it knew, there had been significant coercion of its members to join AMCU in September 2012, it ought to have demanded the notices then if it was so sure they had been forced to join AMCU against their will. It did not need to see the notices before it would know if something was wrong.

[49] NUM also urges that the matter is urgent on the basis that the 90 day period is insufficient time to rectify matters. Once again, if coercion lay behind the shift in membership, NUM did not need to wait until it saw the notices before raising the alarm about the situation. In any event, it could have pressed for the notices as soon as it was advised orally of the membership situation at the beginning of April this year.

[50] In the circumstances, I am satisfied that NUM's current predicament is a result of it not exercising its rights timeously in 2012, when it should have been apparent to it that it was losing members at an alarming rate. It did not need Lonmin to point this out to it, or to remind it of threat this posed to its majority status. For this reason, the application must ultimately be struck off the roll for lack of urgency, even though it was unlikely to succeed on the merits, if urgency had been established.

Order

[51] The application is struck of the roll for lack of urgency

[52] The applicant must pay the respondents' costs including the cost of two counsel.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: G RAUTENBACH & N BASSON instructed by Cheadle Thompson

FIRST RESPONDENT: N CASSIM SC & M VAN AS instructed by Cliff Dekker Hofmeyer

SECOND RESPONDENT: P KENNEDY SC & S R COLLER instructed Larry Dave Attorneys