REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 715/15

In the matter between:

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION (SATAWU) **Applicant**

and

LUCKY ZONDO AND 10 OTHERS **Respondents**

Heard: **16 April 2015**

Delivered: **17 April 2015**

Summary: Urgent application for interdict – union contending that shop stewards lawfully expelled from union in terms of resolution adopted by provincial structure and no longer entitled to discharge duties and befits of office. Shop stewards contending that resolution *ultra vires* the union's constitution. Where union constitution prescribes procedure for disciplinary action against union office bearers, that procedure must be followed. Resolutions adopted by union structures that bypass provisions of the union's constitution invalid and not a legitimate basis on which to expel union office bearer. Section 95(5) of LRA requires that constitutions of trade unions prescribe procedures, including appeals, against expulsion and removal from office. Intention is to ensure that union members, officials and office bearers are

protected against arbitrary exercises of power. Jurisdiction – s 158 (1) (e) (i) considered. Application dismissed.

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application in which the applicant (to which I shall refer as 'the union') seeks a final order to restrain the respondents, amongst other things, from entering into and remaining in the applicant's offices, engaging in any collective bargaining or consultation meeting in the name of the union, participating in any union activities, communicating with union members, representing the union or its members in any forum or tribunal, organising any strike or other assembly under the banner of the union, receiving or collecting any funds for and on behalf of the union and intimidating, threatening, harassing and assaulting any officials or office bearers of the union.

[2] At issue in these proceedings is the status of the respondents and in particular, their status as union members and shop stewards. The union contends that the respondents were lawfully expelled from the union by virtue of a resolution adopted at a meeting of the union's Gauteng provincial executive committee (PEC) held on 18 and 19 March 2015. The relief sought and reflected above is consequential on that decision. The respondents contend that the resolution on which the union relies is invalid and of no force and effect and that they remain in office as shop stewards and thus entitled to continue to engage in the above activities. They also contend that because appeals against their expulsions remain pending, these proceedings are premature and that the application ought to be dismissed on that basis.

[3] The application is brought in tragic circumstances. Three days after deposing to the founding affidavit, the deponent, Mr. Chris Nkosi, the union's provincial secretary in Gauteng province, was killed in what is widely speculated to be an assassination. Press reports indicate that Mr Nkosi died when he was hit by five bullets fired from a passing motor

vehicle. While it would be premature to suggest that Mr Nkosi's death was directly related to the events that are the subject on the papers before me, the present proceedings have their roots in what is clearly a major schism within the union and a clear inability of the parties to address and resolve their differences in a peaceful and constructive manner.

Jurisdiction

[4] I deal first with the question of jurisdiction. The respondents submit that their expulsion was a consequence of their non-compliance with a resolution adopted by the union which prohibited its members from marching against the union. They submit therefore that the present proceedings do not concern any non-compliance by them with the constitution of the union and therefore does not fall within the scope of s 158 (1) (e) (i) of the Labour Relations Act (LRA).

[5] Section 158 (1) (e) (i) provides as follows:

> (1) The Labour 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 the trade union or employers' organisation (as the case may be; or …

[6] Although this provision is located in the section of the LRA that confers powers on this court (as opposed to s 157 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' organisation) and any one or more of its members concerning any alleged non-compliance with that body's constitution, this court has jurisdiction to hear the matter and to make any of the appropriate orders, including the granting of interdictory relief, referred to in s 158 (1) (a). It is well established that whether the court has jurisdiction in any particular matter is to be by reference to the pleadings or, as in this case, the affidavits filed by the parties. The founding affidavit in the present instance is predicated on an alleged failure by the respondents to comply with the union's constitution and in particular, paragraph 9.2.3, which

requires every member to observe the provisions of the constitution and not to act in a way that is detrimental or prejudicial to the interests of the union and its members. Further, the union relies on paragraph 17.2 of the constitution, which provides that shop stewards and shop stewards committees are obliged to implement the policies and decisions of the national, provincial and local structures of the union and to do all further things necessary to advance the interests of the union. It is specifically alleged in the founding affidavit that the respondents have acted in violation of both paragraph 9 and paragraph 17 of the constitution, more particularly in that they have failed or refused to comply with a binding resolution adopted by union structures and implement the lawful decisions represented by the resolutions concerned. In these circumstances, I am satisfied that the founding affidavit makes out a case for an alleged non-compliance by the respondents with the union's constitution and that this court therefore has jurisdiction in terms of s 158 (1) (e) (i) to entertain the application.

Is the application premature?

[7] I turn next to the respondents' submission that the application is premature on account of pending appeals against the decision to expel them, and that it should be dismissed for that reason. Paragraph 42.5 of the union's constitution affords any person found guilty by a disciplinary committee a right of appeal to the CEC or any other body or grouping appointed by the CEC to hear the appeal. It is not disputed that the respondents have submitted a letter, signed by all of them, to the union's head office on 24 March 2015 in terms of which they lodge appeals against the PEC's decision to expel them. There was some debate during argument about the form and content of the letter and whether it comprised a valid appeal – in my view, that is of no relevance to these proceedings. The fact remains that the respondents have appealed against their expulsion and is all that need be determined for present purposes is whether that is a basis for the application to be dismissed. The legal principles are clear. In *Dennis v Garment Workers' Union, Cape Peninsula* 1955 (3) SA 232 (CPD) at 238B, the court said the following:

> When the executive committee of a trade union adjudicates upon disciplinary matters is acting as a domestic tribunal with limited powers. Those powers are defined by a contract, the terms of which are generally set forth in a set of rules or in a constitution. As was said in *Long v Bishop of Cape Town* 4 S. 162, tribunals which are set up by associations of individuals are not in any sense courts; they derive no authority from the Crown and have no power of their own to enforce the sentences; the jurisdiction rests entirely upon the agreement of the parties... However reasonable and equitable it may be that the decision of a domestic tribunal should not be given effect to pending an appeal, such a rule cannot be invoked unless provision is made therefore either expressly or impliedly in the constitution.

[8] There is nothing in the union's constitution, either expressly or impliedly, which provides that pending the outcome of any appeal lodged in terms of paragraph 42.5, the decision that is the subject of the appeal should not be given effect. The fact of a pending appeal lodged by the respondents against the decision to expel them is therefore no bar to the granting of the relief sought by the union.

Factual background

[9] The union's case, in brief, is that during a special meeting of the union's central executive committee (CEC) held in August 2012, a resolution was adopted concerning the consequences of certain conduct by members of the union. The minutes record the resolution in the following terms:

> The CEC resolved that any member of this union that will march against it, or take the union to court, such person will have dismissed him/or herself in the organisation, all what the organisation must do is to assist that person to leave by giving him expulsion letter/or dismissal letter. Satawu will not have money to take people to disciplinary hearing which have clearly demonstrated that, there are renegaded against the union. Such people must be identify and expelled with immediately effect because it become dangerous to call this people in any disciplinary process, because their plain is to assassinate our leaders (sic).

[10] The context within which the resolution was adopted was explained from the bar – it was apparently a consequence of a judgment of the

Constitutional Court that imposed liability on the union for damage occasioned by the acts of its members engaged in marches and protests. (I assume the reference is to *South African Transport and Allied Workers Union & another v Garvas & others* [2012] ZACC 13.) Be that as it may, on 10 March 2015 the respondents, together with others, participated in a march to the union's head office to hand over a memorandum that amongst other things, dealt with amongst other things their dissatisfaction concerning disciplinary action in the form of a summary dismissal taken by the union against Mr Vusi Ntshangase, the union's Mpumalanga provincial secretary. The union contends that the march was unlawful and unconstitutional because it took place without the union's prior permission or that of the appropriate regulatory authority, and in violation of the union's constitution and the CEC's resolution.

[11] The same date, 10 March 2015, the union addressed a letter to the respondents in the following terms:

> Kindly take notice that you are officially suspended from union activities for acting contrary to the union Constitution, contrary to the interest of the trade union and its members, also committing an act of misconduct including, bringing the trade union name into disrepute.
>
> You are not allowed to attend, participate and/or represent SATAWU in any activities including meetings.
>
> Your employer is also advised accordingly (sic).

[12] On 18 and 19 March 2015, the union's Gauteng PEC adopted a resolution, as I have indicated above, to set aside the suspension of the respondent since and to substitute the suspension with their expulsion from the union. The letter advising the respondents of the resolution was addressed to them on 23 March 2015 and reads in the following terms:

> Kindly be advised that the Provincial Executive Committee meeting held on the 18 and 19 March 2015 at Reef Hotel resolved to expel you from the trade union with immediate effect.
>
> The expulsion is informed about violation of central executive committee decision/ resolution of 2012, and trade union Constitution.

> We thus officially informing you that your suspension is set aside and replaced with an expulsion and advised you of your rights to appeal to the CEC appeal committee through the general secretary of the trade union (clause 42.5 of SATAWU constitution).
>
> We trust that you will find the above in order (sic).

[13] As appears from this correspondence, the union contends that the resolution to expel the respondents was 'informed' or 'founded' by the 2012 resolution adopted by the CEC. By that I understood the union to mean that having marched on the union's head office, the respondents brought themselves within the ambit of the 2012 resolution and thus visited on themselves the severe consequences that it foreshadowed.

[14] It is common cause that the provisions of the union's constitution which establish the procedures to be adopted in disciplinary matters were not observed. The relevant provisions regulating disciplinary action against members, office bearers, elected officials and shop stewards are contained in paragraphs 42 and 43 of the union's constitution. In broad terms, paragraph 42 provides that these persons may be disciplined by the union if they act in a manner contrary to the constitution or the interests of the union and its members, or commit any other act of misconduct. The procedure established by paragraph 42.3 requires a disciplinary committee to be convened by the CEC and PEC. A PEC disciplinary committee is empowered to discipline members, shop stewards and sector office bearers. The disciplinary committee may, if it believes that a charge brought against a person has been satisfactorily proven, remove that person from his or her office or expel that person from the union, or suspend him or her from the position he or she holds or from membership of the union.

[15] The relevant disciplinary committee is specifically enjoined to follow the procedure set out in paragraph 42.4. That paragraph requires at least seven days' notice in writing of all charges, together with the time and place of the disciplinary hearing. The committee must satisfy itself, before it proceeds to hear determine the charges, that the person charged is present or that it is reasonable to assume that notice of the

hearing was received and that the person concerned has no acceptable reason for failing to attend the hearing. The person charged must specifically be afforded the opportunity to state his or her case personally and to call question witnesses, and is entitled to receive written notice of the committee's decision. Paragraph 42.5 establishes a period an appeal procedure in terms of which any person found guilty has a right of appeal to the CEC. On appeal, the person found guilty of an offence may state his or her case personally, question and call witnesses. The CEC is in part to confirm, vary or reverse the decision appealed against.

[16] As I have indicated, it is common cause that the union did not follow the disciplinary procedure established by paragraph 42 before it decided to expel the respondents. The union relies on what it contends to be an exception to the procedure established by the constiution, in the form of the resolution adopted by the CEC in March 2012.

Analysis

[17] The resolution adopted by the Gauteng PEC reads as follows:

> The PEC resolve to change the suspensions of cadres who partook to the March on 10 March 2015 to head office to be expulsion and consistency meaning all who partook to the March including other provinces must be expelled and CEC delegates to push for expulsion in the next CEC.

[18] The PEC's resolution makes no reference to the August 2012 resolution by the CEC, but I will assume for present purposes that, as the union contends, the former was 'founded' in the latter.

[19] The fundamental difficulty I have with the case of exceptionalism on which the union relies (i.e. that the August 2012 resolution by the CEC creates an exceptional circumstance in terms of which union members are automatically expelled, regardless of the provisions of the constitution) is that the August 2012 resolution stands so starkly and fundamentally at odds with the provisions of the constitution. In effect, the resolution relies on the notion that by one's conduct, one can dismiss oneself. Prior to the introduction of a new labour dispensation following the Wiehahn Commission's recommendation in 1979, this was a

commonly accepted manner for employers to deal especially with absence from work, and to avoid any consequences that might flow from the act of dismissal. It was quickly replaced by the rule that any notion of automatic self- dismissal was inimical to the conception of fairness embodied in labour legislation, and that it was for an employer, at its initiative, to terminate employment provided there were justifiable grounds to do so, after following a fair procedure.

[20] The very purpose of paragraph 42 of the constitution and the procedure that it establishes is to afford an opportunity to be heard before any decision to expel a member from the union is taken. Indeed, s 95(5) of the LRA requires that the constitution of any trade union that intends to register must establish the circumstances in which a member will no longer be entitled to the benefits of membership, provide for the termination of membership and provide for appeals against the loss of the benefits of membership or against termination of membership itself and prescribe a procedure for those appeals and determine the body to which those appeals may be directed. The section provides further that a constitution must provide for appeals against any removal from office of office bearers, officials and trade union representatives and prescribe a procedure for those appeals and determine the body to which those appeals may be made. The registrar may not register a trade union in circumstances where a constitution fails to meet these criteria. The only conclusion to be drawn from these provisions, and especially the *audi alterem partem* requirement that they embody, is that the drafters of the legislation were concerned to acknowledge the significance of the consequences of expulsion from a union or removal from office and to protect union members, officials, office bearers and representatives against the arbitrary exercise of power by union structures.

[21] There is nothing in the union's constitution which entitles any of the union's structures to dilute the rights established by paragraphs 42 and 43 of the constitution simply by adopting a resolution which has the effect of entirely bypassing those provisions and imposing a penalty of 'self-dismissal' where the union's only and residual role is to 'assist that person to leave' by issuing an expulsion or dismissal letter. A right

afforded by the constitution can be enhanced or diminished only by an amendment to the constitution, as provided in paragraph 49. The August 2012 CEC resolution does not purport to amend the union's constitution, and I did not understand either party to contend that either in form or in effect, that is what it sought to achieve. (In any event, as I have indicated, the provisions of s 95(5) of the LRA would preclude the introduction into a union constitution of the sort contemplated by the 2012 CEC resolution.) The union's constitution, comprising as it does a contract between the individual members of the union, bound in a voluntary association in terms of which powers are granted to bodies or individuals by mutual agreement to which all have subscribed, is not subservient to resolutions adopted by structures such as the CEC or PEC. Where the latter adopt resolutions that stand in conflict with the provisions of the constitution, they are *ultra vires* and of no force and effect.

[22] To the extent that the union suggested during argument that the CEC is entitled in terms of paragraph 28.4 of the constitution to broadly manage the affairs of the union and to do all lawful things that in the opinion of the CEC promotes the interests of the union, its aims and objectives and policies, that may be so, but it does no more than beg the question of what is lawful. A general power to manage the union's affairs and promote its interests cannot trump a specific right to be heard in the terms provided by paragraph 42 before any expulsion from the union is given effect.

[23] It was also suggested during argument that the respondents had failed, since 2012, to raise any objection to the CEC's resolution and that they were accordingly precluded from raising any argument as to its validity. In my view, this submission has no merit. There is no evidence on the papers before me that the respondents were either party to the adoption of the resolution, or that they in any specific way acquiesced in it. In any event, for the reasons reflected above, the resolution was *ultra vires* the union's constitution and invalid in 2012, and it remains invalid in 2015.

[24] I was referred to the case of *Engineering Workers SA v Abrahams and others* 1982 (2) SA 326 (SECLD) in which a trade union was afforded relief similar to that sought in the present circumstances. In that case, members of the union's Port Elizabeth branch executive committee were interdicted from holding themselves out as the branch committee of the applicant union, occupying the union's premises, operating its branch bank account and managing the affairs of the branch concerned in circumstances where the union's national executive council had adopted a resolution to suspend the branch executive committee. The resolution was adopted in circumstances where the branch committee was engaged in advanced discussions to break away from the union and to amalgamate with a breakaway from another union in the same sector. The court held that since the respondents had admitted the acts on which the applicant union had relied for reaching its decision, and given that the issues raised fell within a provision of the union constitution that entitled the national executive council to review decisions of a branch executive committee, the respondents should be restrained from holding themselves out as the Port Elizabeth branch committee of the applicant union. The consequential relief sought by the applicant was accordingly granted. To the extent that the union in the present instance relies on this authority to suggest that once the respondents have admitted, as they have done, the acts on which the PEC relied in reaching its decision to expel them, that the union is entitled to the relief it seeks even in the absence of a disciplinary hearing, this submission overlooks the distinction drawn by the court between discipline against an individual and what the facts of the case concerned, i.e. the suspension of the branch executive committee. The court referred specifically to the union's constitution which provided that no member may be suspended, fined or expelled '*unless he has been afforded an opportunity to state his case personally at a meeting of the branch executive committee, of which is received not less than seven days' notice in writing*' The court observed (at 333C) that while the constitution made provision for hearing an individual suspended from membership of the union it did not do so in the

case of the suspension of the branch committee. The court stated, in regard to the case of an individual:

> It is right that this protection should be given to the individual, because suspension from the union may materially affect the status of the individual and his freedom to obtain employment. In the case of the committee, an act committed by it, which is contrary to, or in conflict with, the constitution may have effects which strike at the very foundations of the union

[25] In other words, had disciplinary action been taken against the respondents individually, the result would have been very different. As individuals, they had the right to be heard before any disciplinary action was taken against them. In the present instance, on the union's own version, the disciplinary action taken against the respondents was taken on an individual basis. Indeed, one of the objections raised to the notice of appeal lodged by the respondents is that it was single notice signed by all of them, i.e. a collective response. That being so, I fail to appreciate how the *Engineering Workers* case is of any assistance to the union; it is certainly not authority for the proposition that where disciplinary action is taken against individual union members, the fact that they admit to having committed acts inimical to the interests of the union can be said to excuse any failure to comply with a disciplinary procedure established by the constiution .

[26] For these reasons, in my view, the resolution adopted in August 2012 by the CEC is *ultra vires* the union's constitution. It follows that the resolution adopted by the union's Gauteng PEC in terms of which the respondents were expelled from the union is of no force and effect. It follows too that the respondents retain, at least until some legitimate form of disciplinary action is taken against them, their offices as shop stewards and that they remain entitled to discharge the functions of that office as prescribed by the union's constitution, its policies and the terms of relevant collective agreements. The application accordingly stands to be dismissed.

[27] This judgment is not to be construed in any way as condoning the conduct of Mr Lucky Zondo, the first respondent and deponent to the answering affidavit, and the other respondents. The papers before me disclose conduct that ought appropriately to be the subject of investigation by the SAPS. The replying affidavit sets out in some detail specific comments and threats made by certain of the respondents in social media between 10 and 13 April 2015. These and others, I was informed from the bar, have apparently been seized by the relevant authorities in the course of the investigation into the murder of Mr. Nkosi.

[28] Finally, in relation to costs, this court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. There are two considerations that militate against an order for costs. First, there is the conduct of the respondents to which I have referred. They do not come to court with clean hands. Secondly, as I have already observed, this application is the consequence of a schism that no doubt has its origins in matters that extend beyond the immediate affairs of the union and its members. The extent of the rift between the competing factions of the union is illustrated by correspondence attached to the papers, where the union's president is on record as having addressed letters to major employers in the sector advising them that he had been unaware of expulsions that form the subject of these proceedings, and had received the information with shock. The correspondence advises those concerned that in terms of the union's constitution, shop stewards and office bearers who have committed an offence ought to have been disciplined in terms of the union's constitution and that the union's national office bearers ought to be given an opportunity to investigate the entire matter and that the purported expulsions should be ignored. A similar letter was addressed to the national office bearers by the provincial chairperson, Gauteng, albeit with a disclaimer to the effect that his letter ought not to be construed as disrespecting or defying the decisions of 'higher structures.' I make these comments not in relation to the merits of the present application, but to illustrate the nature and extent of the crisis that currently exists in the union's ranks.

[29] In those cases where the effect of an order for costs might cause prejudice to an existing collective-bargaining relationship, this court has traditionally been hesitant to make such orders. The present circumstances are no different. There are two factions of the union, each at war with the other. In my view, the goal of industrial peace, which is after all one of the fundamental purposes of the LRA, would be best promoted and served by making no order as to costs.

I make the following order:

1. The application is dismissed.

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André van Niekerk

Judge

APPEARANCES

FOR THE APPLICANT: ADV. JS MPHAHLANI INSTRUCTED BY M. M BALOYI ATTORNEYS

FOR THE RESPONDENT: ADV. MM ZONDI INSTRUCTED BY MHLUNGU ATTORNEYS