Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 131/16

In the matter between:

SAMUEL CHIEF SEATLHOLO	**First Applicant**
THULASIZWE SIBANDE	**Second Applicant**
SCOTCH MPONENG DIBETSO	**Third Applicant**
JOHANNES DUBE	**Fourth Applicant**
LAWRENCE NZELE	**Fifth Applicant**
and	
CHEMICAL, ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS' UNION	**First Respondent**
SIMON MOFOKENG	**Second Respondent**
THAMSANQA MHLONGO	**Third Respondent**

Heard: 4 February 2016

Delivered: 9 February 2016

Summary: (Urgent interim relief – suspension of official and office bearers – nullifying NEC meeting and decisions – *locus standi*/jurisdiction over disputes involving employee office bearers – requirements of urgency not met – evaluation of evidence in context of applications for interim relief)

JUDGMENT[i]

LAGRANGE J

Introduction

[1] This is an interim application pending the outcome of a final application to declare that a National Executive Committee ('NEC') meeting of the union, CEPPWAWU, held on 14 January 2016 was *ultra vires* the union's constitution and in consequence that any decisions taken at that meeting should also be declared null and void.

[2] The resolutions of that meeting which the applicants seek to set aside concerned a purported resolution to suspend the applicants pending disciplinary proceedings being instituted against them, and resolutions purporting to adopt a slew of audited financial statements, from 2010 to 2013.

[3] The matter has a long history, but the more immediate background to the calling of the impugned meeting lies in a judgement handed down by Van Niekerk J on 4 January 2016[1] in another urgent application brought by the applicants who sought to interdict the NEC meeting called for 5 January 2016. For the sake of contextualising this application, Judge Van Niekerk's summary of the most recent litigation between the parties in that judgement is sufficient:

> "[2] The roots of the present application lie in internecine squabbling between two factions within the first respondent. It is not the first proceeding to be generated by that conflict – this court (and the High Court) have been called upon to make rulings in respect of disputes between the two factions and also in respect of litigation initiated by the registrar of

[1] Seathlolo & others v Cepppwawu & others (J2595/15) Unreported dated 04/01/16.

labour relations to have the first respondent placed under administration (see the proceedings conducted under case number J815/15).

[3] The order granted in the latter case on 9 October 2015 assumes some significance in the present proceedings. In terms of the order, the first respondent was placed on terms to provide the registrar, amongst other things, with audited financial statements for 2010 – 2013 within 90 days, and also to make available to the national treasurer (the second applicant in the present proceedings) all books and accounting records as required for him to discharge his obligations in terms of the union's constitution. At the time when the present application was heard, the 90-day period had not yet expired. This is not insignificant. To the extent that the applicants' case is premised on a failure by the respondents to comply with the order granted on 9 October 2015, the period for compliance has not yet elapsed. It is therefore not for this court to make any factual findings in relation to the extent of any compliance (if any) with the order – that is a matter that may well be the subject of future proceedings either at the initiative of the registrar or to declare the respondents in contempt of the order. A further point that should be emphasised at the outset is that this court's powers in matters such as the present are limited by s 158 (1) (e), which permits intervention by the court if and only if the issue in dispute concerns any alleged non-compliance with a trade union's constitution.

[4] The present dispute relates to a notice issued by the respondents on 4 November 2015 in which they gave notice of a special meeting of the first respondent's internal audit committee (Fincom) and a special meeting of the NEC. It is not in dispute that the Fincom meeting was postponed indefinitely pending the receipt of the first respondent's 2013 financial statements, and that the NEC meeting was rescheduled to take place on 5 January 2016. As I have indicated, the applicants seek an interdict in respect of the latter meeting. The agenda for the meeting primarily concerns the consideration of the first respondent's audited financial statements for the financial years 2010 to 2013"

[4] Van Niekerk J dismissed the application before him, *inter alia*, because even if the meeting might have been set aside on account of a failure by the General Secretary to provide documentation to the applicants prior to the meeting, on the facts, the documentation in question had been made

available.[2] The court also found that the applicants had an adequate alternative remedy which they could have pursued by raising their complaint at the meeting before approaching the court for relief[3].

Events of 5 and 14 January 2016

[5] Following the dismissal of the application, the scheduled NEC meeting on 5 January 2013 was convened, but after lengthy debate much of which concerned the status of various regional delegates in the meeting and whether the meeting was quorate, the meeting ended without any resolutions being adopted. The day after that meeting, the General Secretary of the union, the second respondent ('Mofokeng'), issued a notice to all Regional Executive Committees ('RECs') in terms of 44 (5) (a) and (b) of the union's Constitution convening a special NEC meeting on 14 January 2016. The provisions mentioned state that:

> "44 (5) If in terms of subsection (4), a meeting cannot be commenced within 2 hours after the time fixed for it to begin-
>
> (a) the General Secretary in consultation with the President must fix a new time and date for the meeting, which must be no less than 7 days, and no more than 14 days, after the original date for the meeting; and
>
> (b) the General Secretary must give written notice in writing to each REC of the new date for the meeting."

[6] Further, clause 44 (5) of the Constitution provides that a meeting called in terms of that provision may proceed until the agenda is completed regardless of the number of persons present.

[7] The applicants contend that the general secretary could not rely on the provisions of clause 44 (5) to convene the special NEC meeting, essentially because the first meeting of 5 January 2016 was quorate. In consequence, they contended that the subsequent meeting convened on 14 January 2016 was "ultra vires and void from the outset". Apart from their attack on the legal status of the second meeting, the applicants also contend that no resolution adopting any of the financial statements was

[2] At para [5]

[3] At para [10]

properly passed because although a motion to adopt them was proposed and seconded, the motion was never put to a vote by show of hands as required by clause 59 (3) (b) of the Constitution. In relation to the alleged decision of the NEC to suspend the applicants, the applicants argue that no such resolution was adopted by the meeting.

[8] The applicants claim that the first time they became aware of their suspension was when they received letters dated 25 January 2016 calling upon them to make representations why they should not be suspended. In the case of the first applicant, the Deputy General Secretary ('Seatlholo'), he was called upon to make representations why he should not be suspended "… pending the holding of a disciplinary hearing relating to your abusive, criminal and violent conduct during and after the NEC held on 14 January 2016" (emphasis added). In the case of the remaining applicants being the National Treasurer ('Sibande'), the chairperson of the North West region ('Dibetso'), the chairperson of Wits region ('Dube'), the chairperson of the Western Cape region ('Nzele') and the chairperson of the Eastern Cape region ('Xaba'), they each received two letters. One letter temporarily suspended their union membership with immediate effect and the other called upon them to make representations why they should not be suspended pending a disciplinary hearing into their conduct, which was described in identical terms to that appearing in the letter to Seatlholo.

[9] The applicant's attorneys of record immediately wrote to the respondents' "legal team", being the respondents' attorneys of record in previous litigation between the parties, demanding amongst other things the withdrawal of the notices and disputing the existence of the resolutions in question. There was no response to this letter dated 26 January 2016. In the absence of a response, on 28 January 2016 the applicant's attorneys advised that the applicants intended launching these urgent proceedings and simultaneously requested as a matter of urgency a transcript and the full minutes of the meeting of 14 January 2016 containing the alleged resolutions. The next day, the respondents' attorneys advised that the proceedings on 14 January 2016 were lawful, that the suspensions would not be temporarily uplifted and that the minutes of the meeting, which were currently being finalised, would be circulated to NEC delegates once

completed. The applicants launched these proceedings three days later on 1 February 2016. When the respondents filed the answering affidavit of Mofokeng late on 3 February, a copy of the draft minutes of the meeting of 14 January was attached. Mofokeng acknowledged that the minutes had not yet been finalised or adopted but confirmed that they correctly reflected the events of that day. According to the draft minutes, the resolution suspending the applican's was moved, seconded and approved by 25 delegates shortly after the financial statements had been adopted and following disruptive and abusive behaviour by delegates opposed to the adoption of the statements. The draft minute records, somewhat melodramatically, that:

> "It was at that moment that Cde Vusi raised a hand and was pointed by the President. Cde Vusi moved a resolution, in addition for the following delegates who were disruptive and abusive and bringing the name of the union into disrepute that their membership to be immediately suspended and for some to be expelled from the union and section 42 (2) (o) of the Constitution be invoked. Those he moved that their membership be suspended are: Cdes Sohopu; Lemmy Mokoena; Charles Mataludi; Joe Dube; Dixon; Jackson Makhubela; Scotch Dibetso, and Thualasizwe Sibande; and that in internal disciplinary action be taken against Cdes Chief Samuel Seatlholo and Petrus Petje as employees of the union."

[10] By way of a riposte to Mofokeng's draft minutes, the applicants in reply attached lengthy purported transcripts of an alleged recording made of the meetings on 5 and 14 January. The transcript does not bear a certificate of verification, and its origin is obscure. In his replying affidavit, Seatlholo explains it thus:

> "Not having received the minutes as requested for the meetings of five and 14 January 2016, our legal representatives received a transcribed copy of those meetings, during the course of the afternoon of 3 February 2016."

[11] Who transcribed the minute and the identity of the benefactor or benefactors who provided the applicant's legal representatives with these documents at the eleventh hour was not disclosed, though this is hinted at, later in Seatlholo's replying affidavit. What the purported transcript of the second meeting reflects is the proceedings of a fractious and at times

disorderly gathering. The transcript ends with the union's President, who was chairing the meeting, apparently declaring the meeting closed sometime after a much interrupted session dealing with the financial statements. There is no hint of any discussion on any other substantive issue after the chaotic proceedings in which the financial statements were tabled. There is certainly no trace of anything in the transcript that might support the respondents' version that a proposal to suspend any individuals was proposed, seconded or voted upon. Plainly, there is a serious dispute of fact about whether or not the NEC did take a resolution to suspend the applicants or not.

[12] Before dealing with urgency and substantive issues, the respondents' objection to Seatlholo's *locus standi* in these proceedings must be addressed.

Locus standi of first applicant

[13] Seatlholo is an employee of the union and holds the elected office of Deputy General Secretary. He is not a member of the union as such, but claims to have brought the application in his official capacity as Deputy General Secretary and as an ex-officio member of the NEC. In reinforcement of his claim to be entitled to initiate an application of this sort he refers to various sections of the union's Constitution. However, whatever general interest he might conceivably have in upholding the proper governance of the union in terms of its constitution, the relief he seeks relates to his own suspension in which he has a direct personal interest, which clearly is not relief sought in a representative capacity.

[14] The respondents claimed that he does not have the necessary legal standing to bring such an application under section 158 (1) (e) of the Labour Relations Act 66 of 1995 ('the LRA') because he is not a member of the union. Section 158 (1) (b) states:

> "158(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 that trade union or employers' organisation (as the case may be);..."

(emphasis added)

[15] In the course of argument, *Mr Kennedy*, the respondent's counsel (assisted by *Mr Viljoen*) agreed that, properly speaking, the respondents' objection to this court's jurisdiction to hear Seatlholo's complaint that his suspension was in breach of the union constitution is a jurisdictional issue. A plain reading of the terms of section 158 (1) (e) is that, the labour court is only empowered to deal with disputes over compliance with a union's Constitution which arise between a member or members of the union and the union itself. An employee of the union cannot rely on this provision to assert rights as an employee, but must rely on remedies in contract, or remedies for unfair dismissal or unfair labour practices. By contrast, in the absence of section 158(1) (e) members of a union would have no remedy in this court to enforce the contract of membership between them and their union which is embodied in the union's Constitution and would have to approach the high courts to do so as members of a voluntary association.[4]

[16] I am satisfied that the first applicant cannot seek to set aside his suspension as an employee, *albeit* that he is also an elected office bearer, by relying on section 158 (1) (e) of the LRA, and consequently, I have no jurisdiction to entertain that claim. I am aware that this may seem somewhat anomalous, but the section is quite clear in confining the remedy to disputes between the union and members as parties. Further, as mentioned, the first applicant is not without remedies as an employee, whereas by contrast members of a union would be confined to common law remedies in the absence of this provision. The court cannot extend the jurisdiction the legislature has afforded it in terms of the provision.

[4] See The Law of Partnership and Voluntary Associations in South Africa, 3 ed, B Bamford, (Juta), 1982 at 132-134.

Urgency

[17] The key issues to consider when determining if an application for interim relief is sufficiently urgent to warrant it being heard without following the time periods for filing pleadings in terms of the court rules, is whether the applicant acted timeously (neither prematurely nor too late) in seeking to assert their right to the relief sought and that there is a real risk that if the relief is not granted on an interim basis any permanent relief they may obtain in due course will be of little value. The applicant must also justify the extent to which they seek to attenuate the ordinary time limits within which the respondent is afforded a reasonable opportunity to oppose the application.[5]

[18] *Mr Rautenbach,* counsel for the applicants, who was assisted by *Mr Williamson*, correctly observed that the question of urgency needed to be considered separately in relation to each kind of relief sought. Thus, the evaluation of urgency in relation to the setting aside the suspension of the applicants stands on a different footing from the setting aside of the resolutions purportedly adopting the financial statements based on the alleged invalidity of the NEC meeting of 14 January 2016.

[19] The challenge to the validity of the meeting held on 14 January 2016, rests on the contention that the meeting of 5 January was in fact quorate and accordingly the general secretary could not invoke clause 44(5) of the union's constitution to convene the second meeting. However, the notice of the second meeting was issued on 6 January 2016. The applicants do not suggest they were not aware of this. They attended the second meeting and do not claim that they objected to the meeting taking place on

[5] See ***Luna Meubel Vervaardigers (Edms) Bpk v Makin And Another (T/A Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W)** at 137E-GS:

> "Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) *(b)* will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

the basis that it could not be convened in terms of clause 44 (5). If any reliance were to be placed on the purported transcript of the meeting, not only did they not object but the first applicant made it clear that there was no objection being raised to the convening of the meeting as such. The first time the objection is raised is when the application is launched, just over two weeks after the meeting took place. No explanation is provided why the challenge was not at least raised shortly after the meeting. In the circumstances, I do not think that the applicant's delay in launching proceedings based on the invalidity of the second meeting on 14 January is justified. Moreover, when they did launch their application on 1 February, they gave the respondents barely 48 hours to respond. No justification was provided why the matter had to be heard on 4 February. In the circumstances, the applicants have failed to lay a basis for the degree of urgency with which they had sought to obtain this relief.

[20] In relation to setting aside the resolutions suspending the applicants, if it is accepted that they only learnt of their suspension on or about 25 January, then they acted expeditiously when they queried the purported decision through their attorneys and in launching these proceedings when no minutes of the meeting had been circulated within the period stipulated by the Constitution and despite their request for the same. This raises the question whether it ought to be inferred from the papers that they only heard of their suspensions on or about 25 January given the mutually exclusive versions of the parties about whether or not a resolution to suspend the applicants was taken at the meeting?

[21] The approach to the evaluation of disputes of fact in applications for interim relief has been stated in the following terms in deciding if an applicant has met the first threshold for success[6] in obtaining interim relief:

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[6] The well-known requirements for interim relief were recently restated by the Constitutional Court in ***National Treasury and others v Opposition To Urban Tolling Alliance and others*** **2012 (6) SA 223 (CC)** at 235:

> prima facie right even if it is open to some doubt; *(b)* a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; *(c)* the

> "The use of the phrase '*prima facie* established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."[7]

[22] In this instance, the applicants denied that a resolution was taken to suspend them at the meeting on 14 January. Mofokeng responded by producing a draft of the minutes containing the passage referred to above, which he asserts "… accurately reflect the events that took place at the meeting." The applicants dispute the veracity of the minutes and referred to the uncertified transcript, which does not reflect any discussion of disciplinary action during the chaotic meeting. However, in his replying affidavit, Seatlholo curiously expressly disavows any attempt to assert the authenticity of the transcripts in these proceedings in paragraph 12.3 of his affidavit, viz:

> "We shall deal with the question of authenticity and admissibility of the transcriptions at the appropriate time when part B becomes germane."

[23] Later, in paragraph 13.2 of the affidavit he sheds a glimmer of light on the origin of the transcripts, but without revealing the details of their provenance:

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balance of convenience must favour the grant of the interdict; and *(d)* the applicant must have no other remedy."

[7] ***Webster v Mitchell*** **1948 (1) SA 1186 (W)** at 1189

> "Precisely so as to avoid the type of dispute now presenting itself, delegates at the impugned meeting of 14 January 2016 insisted that an audio recording of the meeting be conducted. Had it not been that several delegates, of their own volition, made such audio recordings of the impugned meeting, a court would in due course not be able to determine what transpired there at without subjecting numerous witnesses to extensive cross examination. Now that an audio recording has come to light, this determination should be able to be made with greater ease."

It seems patently obvious that Seatlholo is aware of the source or sources of the transcripts but declines to take the court into his confidence in this regard. Further, no explanation is provided why the person or persons recording the meetings did not identify themselves and at least confirm the origin of the transcripts. The purported transcripts of the two meetings consist of 53 densely typed pages of single space text. It is obvious they must have taken considerable time and money to produce. There is no explanation from the applicants or their attorneys as to how the transcripts came into their possession. Given that Seatlholo says he was aware of delegates making their own recordings of the meetings, I find it extremely hard to believe that he would have been unaware of the fact that such potential records of the meetings might exist at the time this application was launched on 1 February 2016. Yet, it is only in his replying affidavit that he admits to knowledge of the recordings being made. He gives no explanation why, in the light of that knowledge, the applicants did not take steps to obtain those recordings before launching these proceedings. Instead of waiting for a transcript of those recordings to be made available, the applicants launched the proceedings without giving any intimation that efforts were being made to obtain copies of those recordings. Instead, the court is implicitly asked to stretch its credulity to the limit and accept that the transcript fortuitously landed unexpectedly in the lap of their attorneys of record just in time for them to settle the replying affidavit.

Applicant's counsel argued that the veracity of the transcripts should be accepted on the basis of Seatlholo's indirect endorsement of the transcripts where he refers to them elsewhere in his affidavit as evidence of what transpired in the second meeting. However, as previously

observed, nowhere does he commit himself unequivocally to the accuracy of what the transcripts supposedly recorded. In this regard, the following summary by the learned author CB Prest is pertinent:

> "The importance of urgency in applications for interdicts is reflected in the fact that in certain circumstances and on certain conditions the court condoning non-compliance with certain rules relating to the law of evidence. For instance, and has already been pointed out, but must be stressed again, as a general rule evidence is not permitted in affidavits, may be necessary to file an affidavits of persons other than the applicant, who can depose to the facts. This is very often do not. In interlocutory matters generally, and in applications for interdicts specifically, where it urgency appears to justify doing so court has allowed a deponent to state that 'he is informed and verily believes, certain facts on which he relies for relief. In such cases is required to set out in full facts upon which he bases his grounds of the and how he obtained the information. The failure of the applicant to do so constitutes an irregularity which in accordance with the general rule against new matter in reply is not cured by filing a replying affidavit setting out the required information. He can, however, be granted to amplify the supporting affidavit and thus put the matter in order. If the deponent to an affidavit sets out statements made by other persons without indicating when the leaves them or not, such statements are inadmissible and will, on application be struck out. An affidavit on which an application [is] founded is not fatally defective if, disregarding the statements of information and belief, there remains sufficient material on which the applicant can move for the order which he seeks."[8]

[24] In these circumstances, as the applicants have not been candid about the origin of the transcripts and do not make any direct claim about their accuracy, I am disinclined to attach weight to them, even though they might well have cast serious doubt on parts of the minutes provided by Mofokeng, if properly confirmed. That leaves the court with the draft minutes of the meeting provided by Mofokeng and the evidence that the applicants acted quickly in taking steps to challenge their suspensions when they received letters notifying them thereof on or about 25 February. I believe that *Mr Rautenbach* is correct in arguing, leaving aside the

[8] C B Prest, The Law & Practice of Interdicts, 2007, Juta, at 258-9.

transcripts, that on the inherent probabilities, if a decision had been taken at the meeting of 14 January 2016 to suspend them, the applicants would not have waited until they received the letters notifying them thereof two weeks later, before doing anything about it. It is also noteworthy that the letters of suspension also refer to their alleged conduct *after* the meeting. Further, the motion to suspend the applicants and others was supposedly taken and passed without any debate or opposition being raised by the applicants before it was voted on, which seems inherently implausible given the implications of the resolution and the fact that they were present when it was taken. I am satisfied that the applicants most probably only heard of their suspension when the letters were issued and did act promptly when they were advised thereof.

[25] However, that does not detract from the fact that when the application was launched, the respondents had barely two days to respond and without any reasons being advanced why irreparable harm would be suffered if the matter was not heard on 4 February 2014. Apart from placing the respondents under unwarranted time constraints, the timing of the hearing placed unnecessary pressure on the urgent court roll for that week. In the circumstances, I am not satisfied that the applicants have justified the degree of urgency which they relied on to stipulate the time for filing the respondents' answering affidavit and to enrol the application for a hearing.

[26] I must stress that the finding relates solely to urgency and is by no means an endorsement of the conduct of the respondents, nor should it be understood or portrayed as an implied approval of the purported adoption of the audited financial statements at the meeting of 14 January which contained serious qualifications and concerns about the union's viability as a going concern.

Costs

[27] These proceedings were initiated with undue haste and unjustifiably abbreviated timetables, which put the respondents to unnecessary expense. Common sense ought to have dictated a less frenetic timetable, especially when it must have been known that efforts were underway to obtain the recording or recordings of the impugned meetings which

Seatlholo knew had been made. In the circumstances, the applicants' recklessness in unduly accelerating the urgency of the matter warrants an adverse cost order.

Order

[28] In light of the aforegoing,

28.1 the court has no jurisdiction to set aside the first applicant's suspension under s 158(1)(e) of the LRA;

28.2 the application is struck off the roll for want of urgency, and

28.3 the applicants are jointly and severally liable for the respondents' costs including the costs of two counsel, the one paying the other to be absolved.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	G Rautenbach, SC assisted by A Williamson instructed by Vasco De Oliveira Attorneys
RESPONDENTS:	P Kennedy SC assisted by H M Viljoen instructed by Webber Wentzel Attorneys

[i] As varied on 9 February 2016. The original order stated that the application was dismissed for want of urgency which was a patent error as the only competent order was to strike it off the roll.