REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J1872/2015

In the matter between:

SOUTH AFRICAN AIRWAYS (SOC) LTD **First Applicant**

SOUTH AFRICAN AIRWAYS TECHNICAL (SOC) LTD **Second Applicant**

and

NATIONAL TRANSPORT MOVEMENT **First Respondent**

"THE NTM LEADERSHIP" AS PER ANNEXURE

"A" TO THE NOTICE OF MOTION **Second to Twelfth Respondents**

"THE MOLEFE FACTION" AS PER ANNEXURE

"B" TO THE NOTICE OF MOTION **Thirteenth to Twenty Sixth Respondents**

REGISTRAR OF LABOUR RELATIONS **Twenty Seventh Respondent**

Heard: **11 February 2016**

Delivered: **12 May 2016**

Summary: Application by employers for a declaratory and interdictory relief that collective agreements are valid and enforceable despite dispute within union as to authority of those purporting to conclude agreements on its behalf – such agreements not void but voidable – no order sought setting disputed agreements aside – agreements declared valid and enforceable – interdictory relief dismissed in absence of reasonable apprehension of harm

Application by employers for declaratory and interdictory relief that certain persons constitute lawful leadership of union – factual dispute – application of *Plascon-Evans* rule – absence of clear or *prima facie* right – absence of *locus standi* – application dismissed

Trades union – power struggle and leadership dispute – potential infringements of rights of employers and members to meaningful collective bargaining – possible remedies

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JUDGMENT

MOULTRIE AJ

Introduction and background facts

[1] The applicants (SAA and SAAT) are the employers of a number of the members of the first respondent, the National Transport Movement (NTM), which was registered as a trade union in September 2012.

[2] There is currently a power struggle within NTM. What may best be described as two 'camps' (the 'Molefe camp', which coalesced around the thirteenth respondent, Mr Reuben Molefe; and the 'Mphahlele camp', led by the second respondent, Mr Ephraim Mphahlele) both claim to have constituted NTM's duly appointed and authorised leadership.

[3] It is common cause that Molefe was the first General Secretary and that the offices of the members of the executive committee were filled by members in

the Molefe camp. While it is not clear exactly why the power struggle between the two camps developed, it is apparent that it had already reached an advanced stage by October 2012, when Molefe and his camp were purportedly removed from their executive committee positions and replaced by members of the Mphahlele camp in a manner that Molefe contends was not in conformance with NTM's constitution. Since that time, it would appear that the camps have acted in parallel, with both claiming that they are the rightful leadership of NTM, purporting to convene and hold meetings, congresses, elections and disciplinary hearings (including purportedly expelling members of the other camp from the union altogether). This battle forms the subject matter of at least three applications that are currently before the Labour Court, under case numbers J1308/14; J1654/14 and J158/16.

[4] Despite being fully aware of these disputes, the deponent to the founding affidavit somewhat contentiously refers to the Mphahlele camp as 'the NTM leadership' and states that 'all times material, the applicants have recognised [that camp] to be the duly authorised leadership of NTM'. Indeed, it appears from the papers before me that the applicants have for some time dealt exclusively with the Mphahlele camp, not only in purporting to conclude collective agreements with NTM on behalf of its members, but also in relation to a range of other collective bargaining matters that have arisen in their workplaces.

[5] Notwithstanding the applicants' clearly expressed attitude as to which camp they prefer to deal with, it would appear that the existence of parallel leadership structures in NTM has been a cause of frustration and difficulties leading to instances of a breakdown in effective and harmonious labour relations. The papers disclose that there have been numerous instances in which the applicants have sought to consult, negotiate or otherwise engage with NTM on behalf of its members who are employees of the applicants (for example under section 189 of the Labour Relations Act, 66 of 1995 in relation to retrenchments and in the section 21 proceedings referred to below) but have been frustrated from doing so effectively as a result of the power struggle and the two camps separately purporting to represent NTM members

in the union's dealings with the applicants.

[6] Against that background, it is convenient to categorise the relief that the applicants seek in the current matter into three broad categories:

a. Firstly, the applicants seek orders declaring that certain collective agreements concluded between SAA and the Mphahlele camp purporting to act on behalf of NTM are valid and enforceable as between SAA and NTM (prayer 2 of the notice of motion) and interdicts seeking to prohibit the Molefe camp from interfering with or infringing with those collective agreements or encouraging NTM or its officials and members to do so (prayers 4.1 and 4.2);

b. Secondly, they seek an order declaring that that any further collective agreements purportedly concluded between SAA and the Mphahlele camp would be valid and binding (prayer 3) and an interdict prohibiting the Molefe camp from 'purporting to represent NTM or members of NTM' (prayer 4.4) until such time as finality has been reached in the litigation currently pending between the two camps as to which constitutes the lawful leadership of NTM; and

c. Thirdly, they seek interdictory relief (prayer 4.3) prohibiting the Molefe camp from 'interfering [with] and unlawfully disrupting' a dispute in terms of section 21 of the Labour Relations Act (LRA) launched by the Mphahlele camp on behalf of NTM to which SAAT is a party and which is currently before the Commission for Conciliation, Mediation and Arbitration.

[7] NTM itself and members of both of the camps were cited as respondents, as was the Registrar of Labour Relations. While a 'notice to abide' was filed on behalf of NTM, together with an affidavit deposed to by Mphahlele purporting to set out NTM's position, no notice of opposition or opposing affidavit was filed on behalf of the cited members of the Mphahlele camp. Only four members of the Molefe camp (the thirteenth to sixteenth respondents) opposed the application. Upon my enquiry at the hearing as to which other members of the Molefe camp had received service of the application, the

applicants were only able to provide proof of service upon the 20th, 24th and 25th respondents. No *rule nisi* was sought in respect of the remaining respondents and no basis was advanced (nor could it have been on the papers before the court), as to why service on Fluxmans Attorneys might constitute acceptable substituted service in respect of them. To the extent that any relief may be granted against 'the Molefe faction', it can thus only be granted against these parties.

The relief sought in relation to the existing agreements

[8] It is common cause that SAA concluded a number of collective agreements with the Mphahlele camp which purported to act on behalf of NTM and its members (the disputed agreements). The applicants now seek to have the disputed agreements declared valid and binding.

[9] The Molefe camp, on the other hand, contend that the agreements cannot be given effect to as a result of the fact that they were concluded by the Mphahlele camp who, they allege, were not duly authorised to represent NTM in concluding them.

[10] At the hearing, the applicants emphasised that it was not necessary for this court, in granting any of the relief it seeks, to determine the disputes as to which of the two contending camps or their members are, or has at any time been, the legally appointed executive office-bearers of NTM – indeed, the entire application was argued by the applicants on an assumption in favour of the Molefe camp that the Mphahlele camp had not been duly appointed at the time that the disputed agreements were concluded and that they were not duly authorised to represent NTM in concluding them. While I have taken this approach in deciding this aspect of this case (the applicants refer to it as 'the main relief'), it will be seen below that such an approach cannot be taken in relation to what the applicants call 'the ancillary relief'.

[11] In advancing their argument that the disputed agreements should be declared valid and binding, the applicants emphasised that the courts have repeatedly recognised that collective agreements are *sui generis* agreements of a special nature which are entered into under the LRA for a particular purpose and

operate in a context 'that is vastly different from that of an ordinary commercial contract' and should be interpreted accordingly.[1] They then sought to rely on this authority regarding the purposive approach to interpreting collective agreements and on Constitutional Court authority in the context of administrative action[2] to argue that the disputed agreements would, even if they were void, have legal consequences until set aside by a substantive application. It was argued that since the conclusion of the disputed agreements by NTM constituted the exercise of public power, the principle of legality meant that they continued to have legal effect until set aside, even if it were to be found that they did not constitute administrative action within the definition of that term under the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

[12] While I do not reject out of hand what appears to be the novel contention that the conclusion of a collective agreement by a trade union might constitute either the exercise of public power or administrative action under PAJA, I do not believe that it is necessary or appropriate in the context of this matter to explore it further. This is simply because if it is indeed correct that the Mphahlele camp were not duly appointed and authorised to conclude the disputed agreements (as is assumed for the purposes of this relief) that would not, in itself, render the agreements void *ab initio*. As long as the conclusion of collective agreements of this nature was not *ultra vires* NTM's constitution and fell within its powers (which is undoubtedly the case), the fact that the disputed agreements were concluded by unauthorised persons would (even if they had been 'ordinary commercial agreements') render them merely voidable, not void *ab initio*.[3]

[13] The case of *Minister of Transport v Prodiba (Pty) Ltd*[4] referred to by Counsel for the Molefe camp is not authority for the proposition that an agreement

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[1] *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others* (1997) 18 *ILJ* 971 (LAC) at 979-980.

[2] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC).

[3] *Gründling v Beyers and Others* 1967 (2) SA 131 (W) at 139H – 140 and 145B-C, applying *Mine Workers' Union v Prinsloo* 1948 (3) SA 831 (A), the facts of which were notably similar to those in the current matter.

[4] *Minister of Transport v Prodiba (Pty) Ltd* 2015 JDR 1127 (SCA).

entered into without authority is void *ab initio*. While it is correct that the Director-General in that case lacked authority to conclude the contract, the *ratio decidendi* of the SCA's decision was based on the 'more fundamental' fact that the Director-General had acted without sufficient regard to 'Constitutional principles … and other statutory prescripts' that applied to the power of the Department of Transport to conclude the agreement at all, in particular, the requirement that it was legally necessary for moneys to be appropriated to ensure compliance with the Department's obligations under the agreement, which was 'in itself … sufficient ground on which to invalidate the agreement',[5] and also due to non-compliance with Regulation 16A6.4, read with section 76(4)(c) of the Public Finance Management Act, 1 of 1999, which required that reasons for deviation from the requirement of a competitive tender had to be recorded.[6] Furthermore, the court specifically distinguished two other cases in which the contracts in question were 'not *ultra vires*' the powers of the Department.[7] The conclusion was that apart from lacking of authority, the Director General acted against mandatory statutory prescripts and against constitutional prescripts by 'incurring a liability for which there had been no appropriation'.[8]

[14] Furthermore, while the Molefe camp's Counsel may well be correct in arguing that should any party with standing to do so seek an order avoiding the disputed agreements, it would not be possible for SAA to seek to uphold them by relying on the so-called *Turquand* rule[9] in circumstances where it is common cause that SAA had notice of the alleged lack of authority, no party has sought such an order in the current instance.

[15] In the current matter, NTM has not sought to have the disputed agreements set aside – the persons purporting to represent NTM itself abide by the decision of the court and do not oppose the relief seeking to declare the agreements valid and enforceable. In addition, not only do the Molefe

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[5] *Prodiba* (*supra*) at paras 32 – 34.
[6] *Prodiba* (*supra*) at paras 35 – 36.
[7] *Prodiba* (*supra*) at para 39.
[8] *Prodiba* (*supra*) at para 40.
[9] *Royal British Bank v Turquand* (1856) 119 E.R. 886.

respondents not purport to act on behalf of NTM in these proceedings, even if they could rely on one of the limited exceptions to the rule in *Foss v Harbottle*[10] (about which I have reservations), they simply do not seek any relief in the form of an order setting aside the disputed agreements nor have they ever done so previously. The situation is therefore akin to that which arose in *Tasima (Pty) Ltd v Department of Transport*,[11] in which (unlike *Prodiba*)[12] it was held that the court was precluded from entertaining the Department's counter-application on the basis that it was launched outside of the time-bar contained in section 7 of PAJA which could not be condoned and because it constituted an impermissible collateral challenge.

[16] I therefore conclude that the disputed agreements remain valid and binding unless and until such time as they are validly terminated or cancelled or declared invalid and unenforceable by a court of competent jurisdiction at the suit of a party with standing to seek such an order.[13]

[17] With regard to the interdict sought against interference with the disputed agreements, it is quite apparent from the applicants' own papers that the Molefe camp's refusal to give effect to the disputed agreements has at all times been premised on the (incorrect) belief that they were legally unenforceable. There is no evidence that the members of the Molefe camp have ever indicated an intention not to comply with them even if it were to be determined that they were valid and enforceable. Now that this court has found that the agreements are indeed valid and enforceable, I am not persuaded that there is sufficient reason to believe that the Molefe camp will seek to undermine them. I am thus of the view that, even if there ever was any reasonable apprehension of harm upon which to justify the grant of the

[10] It was noted in *Gründling* (*supra*) that the rule in *Foss v Harbottle* (i.e. the 'proper claimant rule' laid down in *Foss v Harbottle* (1843) 67 ER 189 that in any instance in which a wrong is alleged to have been done to a corporation, the proper claimant is the corporation itself and not a member) applies equally to trades union.

[11] *Tasima (Pty) Ltd v Department of Transport* (792/2015) [2015] ZASCA 200 (2 December 2015) at paras 24 - 39. See also *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd and Another* [2016] 1 BLLR 13 (LAC) at para 23, where the agreement in question was upheld even though its validity had been challenged in other litigation which had not yet been finalised.

[12] *Prodiba* (*supra*) at para 15.

[13] A declaratory order such as that granted herein would not stand in the way of a claim for an order declaring the agreements invalid and unenforceable: *Netherlands Bank of SA v Stern* 1955 (1) SA 667 (W) at 674.

interdict sought against the Molefe camp or any of its members (of which I am unpersuaded), this is no longer the case.

[18] Before concluding on this aspect, it is necessary to identify the specific agreements that are to form the subject of the order that I propose to make. This task is somewhat complicated by the fact that not all of the agreements identified in the notice of motion are attached, let alone specifically referred to, in the founding affidavit (and indeed, the founding affidavit refers to other agreements concluded by SAA which the applicants do not seek to have declared valid and binding). I am satisfied, however, that it is apparent from paragraphs 114 and 119 to 123 of Molefe's answering affidavit that it is not disputed that the agreements identified in prayers 2.1, 2.2 and 2.4 of the notice of motion were purportedly concluded with SAA[14] on behalf of NTM by the Mphahlele camp. In paragraph 124, however, Molefe pertinently denies that NTM is a party to any of the agreements annexed to the founding affidavit as 'H1' and 'H2', which fall under the rubric 'the BCEA variation/exemption agreements dated 2 December 2010 and October 2011 and extensions thereof'. Having carefully analysed the documents in question, I am satisfied that while this denial is partly borne out by the documents themselves and there is no evidence at all of any other similar agreements concluded by NTM, it is apparent that Mphahlele purported to conclude the agreement at pages 108 – 110 of the application papers on behalf of NTM on 28 October 2014. The order that I make in relation to this prayer has been crafted accordingly.

<u>The representation relief and the section 21 relief</u>

[19] As noted above, the entire application was argued by the applicants on an assumption in favour of the Molefe camp that the Mphahlele camp had not been validly appointed to their positions. Having engaged with what they refer to as 'the main relief' on this basis, the applicants went on to argue that 'the ancillary relief would flow from a positive finding on this issue'.[15] I do not agree. While the orders sought in relation to the disputed agreements could

[14] Despite the use of the words 'the applicants' in the introductory portion of prayer 2, it is apparent from the founding affidavit that all of the agreements were concluded by SAA only and that SAAT was not party to any of them.
[15] Applicants' heads of argument, para 22.

(and have) been granted on the basis of the assumption made in favour of the Molefe camp, orders declaring that any further collective agreements concluded between SAA and the Mphahlele camp purportedly on behalf of NTM would be valid and binding and prohibiting the Molefe camp from 'purporting to represent NTM or members of NTM' or being involved in the section 21 dispute on its behalf,[16] cannot be granted on the basis of such an assumption. In making such orders, it would be necessary for this court to find that the members of the Mphahlele camp have indeed been validly appointed to their positions and that they do indeed have authority to represent NTM, whereas the Molefe camp do not.

[20] Apart from the fact that the applicants did not suggest that it was necessary for this court to do so, I am not in position to determine this question in their favour. This is for the following reasons.

[21] Firstly, granting the ancillary relief would involve the consideration of the issues of the validity of the removal of the Molefe camp and which of the two camps may validly represent NTM, in relation to which there are a series of material disputes of fact. The determination of these disputes would be inappropriate in motion proceedings such as the current matter and I am consequently bound to apply the well-known *Plascon-Evans* rule[17] and accept the Molefe camp's version that they are the ones who are the lawful leadership of NTM in terms of its constitution. I am not minded to refer these disputes for the hearing of oral evidence (i.e. *mero motu* and despite the fact that neither party requested me to do so), as they are (unlike the narrow issue of the validity of the disputed agreements) currently the subject of the litigation between the two camps in the applications under case numbers J1308/14, J1654/14 and J158/16, none of which are before me and in relation to which I

[16] There is little evidence before me in relation to the section 21 dispute. Paragraph 46.3 of the founding affidavit (not disputed in the answering affidavit) expressly refers to the existence of such a dispute and (given the verification procedures provided for in section 21(9) of the LRA), it would appear that the reference in paragraph 110 of the founding affidavit to 'a verification exercise scheduled before the CCMA' is also a reference to this dispute. In this paragraph, it is alleged that 'the Molefe [camp] disrupted this process, which has been held in abeyance pending the outcome of this dispute'. In response, Molefe denies (in paragraph 153 of his answering affidavit) disrupting the process, and specifically states that the CCMA Commissioner 'had no difficulty in allowing participation of persons aligned with me'.

[17] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 – 635.

would undoubtedly be precluded from making a determination under the principle of *lis alibi pendens*.

[22] Secondly, even though the applicants made it clear that the so-called 'ancillary relief' was only sought pending the outcome of the other litigation (and counsel sought to clarify the relief sought in the notice of motion from the bar), I am of the view that granting it would be final in effect[18] because it would enable the Mphahlele camp to determine NTM's future conduct, not only in concluding collective agreements, but also in relation to a wide range of other conduct which may not be reversible, such as decisions to embark on industrial action (including strikes), consultations over contemplated operational requirements dismissals and the settlement of unfair dismissal or labour practice disputes.

[23] Thirdly, even on the less stringent test applicable to the grant of interim relief, I am not persuaded that the applicants have made out a *prima facie* case that the Mphahlele camp is the rightful leadership of NTM. It is apparent from the papers that to the extent that such an allegation is made at all, it is based purely on the *ipse dixit* of the Mphahlele camp. In October 2013, when the Molefe camp's attorneys sent SAA a letter setting out their contention that their purported removal had been unlawful and identifying the Molefe camp members that were alleged to be NTM's executive committee, SAA's response was to the effect that '[w]e have … made enquiries with regards [to the leadership dispute] and have been informed of the leadership that has been authorized by the said union to engage with the Company'. The founding affidavit states that this correspondence was drafted 'on the understanding that Reuben Molefe had in fact been expelled from NTM on 24 June 2013 on disciplinary grounds'. Similarly, when the applicants became aware of 'rumours' that Molefe had been reinstated, they relied upon 'correspondence from Mphahlele … specifically placing on record that Molefe had not been reinstated by NTM or any court of law'. I note that if Molefe had indeed been lawfully expelled in June 2013, that would not *ipso facto* have

[18] *BTH Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) at 55E, approved in *De Beer v Minister of Safety and Security and Another* (2013) 34 *ILJ* 3083 (LAC) at para 33. Logically speaking, a declaration of rights could never, on its own constitute interim relief.

meant that the remaining members of the Molefe executive committee ceased to hold their positions as such. It is also relevant to note that the deponent to the founding affidavit indicates that at one point an agreement was signed purporting to settle the disputes between the two camps 'in terms of which Molefe was reinstated'. Despite this, the applicants continued to recognise the Mphahlele camp on the basis that when the Molefe camp sought to have the agreement made an order of court, the Mphahlele camp opposed it on the basis that they disputed the authority of the persons that purported to sign it on behalf of the parties named in the relevant litigation. The applicants have made no attempt in the founding affidavit to explain what enquiries were made, with whom, or why the applicants believed, either then or now, that the Mphahlele camp are lawfully entitled to hold the NTM reins.

[24] Finally, irrespective of the underlying merits of the two camps' respective claims, *prima facie* or otherwise, I do not accept that the applicants have *locus standi* to seek an order declaring that one of the two camps is rightfully in control of NTM. The applicants cannot have a 'right', *prima facie* or otherwise, that its preferred choice be recognised as NTM's leadership – especially, but not only, in circumstances where it fails to put up evidence that the Mphahlele camp is the true NTM leadership.

[25] Furthermore, it is not fitting for the applicants, as employers, to 'take sides' in this regard and it would be inappropriate for this court to allow them to pursue their seemingly unsupported preference by entertaining the application for the ancillary relief in view of section 95(1)(d), read with section 95(2)(b) of the LRA, which require that a union must be independent and 'free from any interference or influence of any kind from any employer'.

[26] In the circumstances, the applicants have failed to make out a case for any of the ancillary relief, which must be dismissed.

[27] Despite the conclusion that I have reached in relation to the ancillary relief, I am mindful of the difficult position that the applicants find themselves in. I have described above the consequences that the power struggle is having on labour relations at the applicants' workplaces. While the applicants may not

have a right to any of the ancillary relief sought in this application, I accept that they do have both a right and a duty to engage in collective bargaining under section 23(5) of the Constitution and that those rights and duties give rise to a concomitant right that the collective bargaining process should not be rendered unmanageable by the apparent inability or unwillingness of the two camps to find a resolution within a reasonable period. In addition, I am deeply concerned about the consequences of the power struggle for the rights and interests of the ordinary members of NTM, whose membership contributions I can only assume are being used up to fund the seemingly endless and ineffective campaign of 'lawfare'[19] that the two camps have engaged in over the last three and a half years. As the East African proverb goes: 'when elephants fight, it's the grass that suffers'. It is time that the matter is brought to a head and resolved once and for all.

[28] In my view, it would not be inappropriate in the current circumstances for the applicants, or ordinary members of NTM, to seek to prevail upon the Registrar of Labour Relations (who is a party to the current proceedings) to exercise the power:

a. To seek the winding up of NTM in terms of section 103(1)(b) on the basis that it is 'unable to continue to function' and its de-registration in terms of section 106(2); or

b. To directly cancel NTM's registration (after following the required procedures) on the basis that, it 'has ceased to function as a genuine trade union' as envisaged in section 106(2A)(a).

Costs

[29] While both parties have achieved a measure of success, neither has been entirely unsuccessful. In the circumstances, I am of the view that it is appropriate to order that each party be required to pay its own costs.

[19] Jean and John Comaroff (eds) *Law and Disorder in the Postcolony* University of Chicago Press: Chicago (2006) at 26 – 27, discussed in Dennis Davis and Michelle Le Roux *Precedent & Possibility: The (ab)use of Law in South Africa* Double Story: Cape Town (2009) at 185ff.

Order

[30] In the premises, the following order is made:

a. It is declared that the following agreements concluded between the first applicant and first respondent are valid and binding:

i. The SAA Main Collective Bargaining Forum Constitution dated 17 December 2014;

ii. The verification terms of reference agreement dated 12 February 2014;

iii. The BCEA variation/exemption agreement dated 28 October 2014 annexed as pages 108 to 110 of the application papers; and

iv. The Wage Agreement for the 2014/2015 financial year dated 11 September 2014 and its addendum dated 9 December 2014.

b. Each party is ordered to pay its own costs.

RJA Moultrie AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants:	Advocate FA Boda
Instructed by:	Norton Rose Fulbright South Africa, Johannesburg
For the 13th to 16th Respondents:	Advocate C Bester and Advocate C Gibson
Instructed by:	Fluxmans Attorneys, Johannesburg