**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: J 605/21

**In the matter between:**

**BRIGHTSTONE TRADING 3 CLOSED CORPORATION**
**T/A GORDON ROAD SPAR** Applicant

and

**THE ECONOMIC FREEDOM FIGHTER** First Respondent

**PATRIACIA BAFEDILE** Second Respondent

**DORA BANTSIJANG** Third Respondent

**PRECIOUS** Fourth Respondent

**OLOVIA BULANI** Fifth Respondent

**IGNITIA MASHIFANE** Sixth Respondent

**SIBUSISO BONGA** Seventh Respondent

**NELLY ZUMMA** Eighth Respondent

**EMMA LOBAKENG** Ninth Respondent

**EUNICE SEBOLA** Tenth Respondent

**Heard: 11 June 2021**
**Delivered: 18 June 2021** "By Email"

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**JUDGMENT**

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TULK AJ

Introduction

[1] This matter arose from an urgent application brought by the applicant, Brightstone Trading 3 Closed Corporation ("the applicant"), on 1 June 2021. The matter appeared before Van Niekerk J, who issued a rule nisi interdicting the first respondent, the Economic Freedom Fighters ("the EFF or the first respondent"), and its members from:

*"5.1 gathering, barricading, blocking or generally restricting or preventing access to and from the applicant's premises situated at Bergbron Shopping Centre, corner of Bergbron Drive and Gordon Roads, Bergbron, Roodepoort;*

*5.2 disrupting the applicant's business or any of its business or any of its operations at its premises situated at Bergbron Shopping Centre, corner of Bergbron Drive and Gordon Roads, Bergbron, Roodepoort;*

*5.3 physically or verbally or in any other manner whatsoever intimidating or harassing and/or threatening the applicant's employees, contractors, service providers, suppliers, customers, or visitors;*

*5.4 unlawfully interfering with or obstructing the conduct of the business of the applicant;*

*5.5 blockading or obstructing the entrance to the applicant's premises;*

*5.6 inciting employees of the applicant and/or any other person from performing any unlawful activity or interfering in any manner with the business of the applicant;*

*5.7 unlawfully interfering with the employment relationship between the applicant and its employees and conducting any unlawful activities outside the premises of the applicant;*

*5.8 supporting, promoting, instigating, advancing, embarking upon, or participating in any unlawful behaviour;*

*5.9 intimidating, assaulting and/or performing any act with the intent to cause harm to any staff member or customer and/or visitor of the applicant, as more fully set out in the notice of motion to which this affidavit is attached;*

*5.10 protesting other than in accordance with applicable legislation and other regulatory measures.*

[2] Van Niekerk J postponed the matter to 11 June 2021 and set out a timetable for the exchange of further papers. The timetable having been complied with, the application came before me on 11 June 2021 for a determination whether the *rule nisi* should be discharged or confirmed. The application is only opposed by the first respondent. The remaining respondents all of whom are employees of the applicant, do not oppose the relief sought.

[3] Since the applicant seeks confirmation of the *rule nisi,* it is required to satisfy three essential requirements, namely clear right; an injury actually committed or reasonably apprehended and the absence of any other satisfactory

remedy. In what follows, these issues are traversed commencing with the background facts leading to this application.

Background Facts

[4] The applicant conducts business in the food retail sector and is part of the SPAR group of retailers. It owns the Gordon Road Spar situated in Bergbron Road, Roodepoort.

[5] On 15 April 2021, the applicant demoted the eleventh respondent, Ms Emma Lobakeng, from floor manager to cashier. As a result of the demotion, the second respondent, Ms Patricia Bafedile, sought the assistance of the EFF to interfere with the applicant's labour structure.

[6] The first respondent obliged and did two things. First, it addressed a letter to the applicant on 12 May 2021. The letter set out five issues, which in evidence before me, the applicant categorised as demands. These demands related to the working conditions of the applicant's employees. On the face of it, the letter :

[6.1] is issued on the first respondent's letterhead;

[6.2] sets out the address of its regional office, EFF Johannesburg, James Sofasonke Mpanza Region; and

[6.3] is electronically transferred under the hand of the EFF's regional secretary, Fighter Sechaba Sono.

[7] In the letter, the first respondent requested a meeting with applicant's management on 16 May 2021 to discuss at least five issues, which it says were raised by "*our members and workers*". These related to the daily rates of employees; unpaid sick notes and medical certificates; unfair treatment that if they joined the EFF they would be dismissed; alleged racism and favoritism; and non-

payment of wages. The letter proposed a meeting date of Sunday, 16 May 2021, and records that the first respondent *"will not accept any suggestion that since we are not a Trade union, we can't therefore represent our member and workers".*

[8] Second – and in accordance with the proposed meeting date – members of the first respondent arrived at the applicant's premises on Sunday, 16 May 2021. The situation became volatile as these members, together with the employees cited to this application engaged in the following intimidating behaviour:

[8.1] They shouted and demanded that all cashiers leave their workstations.

[8.2] They directed verbal threats at those employees who did not succumb to their demands.

[8.3] They demanded that customers leave the store, directing verbal threats at them, generally instilling fear and uttering that they would attack customers who did not comply.

[8.4] They physically barricaded the entrance to the store. Evidence of this also appears from the uncontested photographic evidence attached to the founding affidavit.

[9] The applicant's employees and customers felt intimidated and feared for their physical safety. The applicant did not take any action at this stage for fear that it would cause the situation to become more volatile. It believed that the protest action on 16 May 2021 was an isolated incident and chose instead to engage the first respondent. On advice from a labour consultant, the applicant elected to do whatever was required to keep the peace and ensure the safety of its customers and employees.

[10] When the first respondent's members protested at its premises for a second time, on 28 May 2021, the applicant agreed to meet with the first respondent, (as

represented by the branch secretary of Ward 82, Mr Sono), and its members on Sunday, 30 May 2021. This is confirmed in a letter from the applicant's attorney of record, Schoeman Inc, dated 28 May 2021 to the first respondent. This letter is significant for detailing the extent of the first respondent's involvement in the protest action and is dealt with in some detail below.

[11] The letter records that the applicant had been contacted by representatives from the Economic Freedom Fighters for the Johannesburg James Sofasonke Mpanza Region who wanted to meet on certain labour related disputes. It further records that because the applicant refrained from meeting the first respondent as an institution, certain of the applicant's employees disrupted the store's operations. This had occurred on two prior occasions, after they were incited to do so and joined by members of the first respondent. On both occasions the store had to be closed.

[12] The first respondent was further advised that the applicant only agreed to a meeting with its members on Sunday, 30 May 2021 because of the continued illegal conduct that disrupted store operations on Friday, 28 May 2021. However, after taking advice, the applicant decided to cancel the meeting of 30 May 2021. The letter further cautioned members of the first respondent that if they attended at the applicant's premises on 29 May 2021, "*as threatened to ensure the closure of the store"*, an urgent application would be brought. The letter was addressed to the EFF: Johannesburg James Sofasonke Mpanza Region and emailed to three of its members. Ostensibly, this included the branch secretary, Mr Sono.

[13] Thus, according to the applicant, when the first respondent received notice on 28 May 2021 of the cancelled meeting, the protest action erupted again and continued to 1 June 2021. On 29 May 2021, members of the first respondent attended at the applicant's premises and demanded a meeting with the applicant's representatives. The request was refused, resulting in yet another disruptive protest where members of the first respondent, with the assistance of the second to fourteenth respondents, once again shouted and demanded that all cashiers leave their workstations. They also demanded that customers leave the store and

threatened to attack those who did not. Once again customers fled the store. Whilst the store was not physically barricaded on this occasion, it was closed for the safety of the public and the remaining staff members.

[14] It was this latter protest action which caused the applicant to approach this court for urgent relief, culminating in the interim *rule nisi* of 1 June 2021. In oral submissions before me, Ms Nortje for the applicant stated that the urgent relief was necessitated by the escalation of the violence. She contended that these acts were not only perpetrated by Mr Sono, but also by other protestors who confirmed to Mr Booyse, a security official deployed by the applicant to assist with the protest action, that they were members of the first respondent acting on its instruction in the furtherance of its political mandate. She pointed out that for its part, the first respondent does not deny that Mr Sono is indeed a branch secretary and that there is nothing in its constitution suggesting that he has no authority to act on its behalf.

[15] The first respondent takes issue with Mr Booyse's affidavit, arguing that it constitutes new evidence introduced in reply. I deal with this when I determine in the facts whether the applicant has succeeded in demonstrating ostensible authority.

The Parties' Submissions

[16] The applicant relies on the principle of ostensible authority in attributing the conduct of Mr Sono and that of the other protestors to the first respondent. It disavows that it relies on actual authority, whether express or implied and argues that the decision to rely on the authority of Mr Sono was premised on the following two incidents:

[16.1] The first is the letter of 12 May 2021. The letter creates authority because it was written on an EFF letterhead; had the registered address of the branch; and was sanctioned by the branch secretary of Ward 82, Mr Sono; and

[16.2] The second is the participation of the first respondent's members in the protest action on 16 May 2021 and 28 May 2021 to 1 June 2021; and

[17] The applicant further submits that the first respondent does not deny that Mr Sono is a branch secretary but only that it authorised him to act on its behalf in engaging in the protest action. According to the applicant, Mr Sono's position as branch secretary vests in him the authority under the first respondent's constitution to act on its behalf, notwithstanding the first respondent's protestations to the contrary. The applicant relies on a number of provisions in the first respondent's constitution to support this argument. However, because of the approach I adopt in this judgment, it is not necessary to determine whether in fact the first respondent's constitution vests authority in Mr Sono to act on its behalf.

[18] The applicant's order is sought against the EFF as a political body who is persisting in unlawful conduct, as represented by the members who participated in the protest action. The applicant places reliance on the *dicta* in *Calgan Lounge (Pty) Ltd v National Union of Furniture & Allied Workers of South Africa & Others 2019 40 ILJ 342 LC*, in seeking relief against the EFF as an organisation.

[19] Mr Ramogale for the first respondent, argued that it was irrelevant that Mr Sono, as well as the other protesting members, represented that they had authority to act on the EFF's behalf. He submitted that Mr Sono's ostensible authority did not depend on what he, or the protestors for that matter represented or misrepresented to the applicant. Rather, the proper enquiry was this: What conduct did the EFF engage in to create the impression that the protestors were authorised to act on its behalf? He answered by saying that there was no such conduct on the part of the first respondent. For its part, the first respondent denies having clothed Mr Sono and the protestors with ostensible authority and denies that they were either authorised or sanctioned to speak in its name or act on its behalf. In essence, the first respondent denies having vested Mr Sono or the protestors with the authority to engage in the protest action on its behalf.

[20] Mr Ramogale went on that the first respondent neither sanctioned, authorised or mandated any protest action or unlawful activity at the applicant's premises, and that such events have nothing to do with it. This much, he argued, is apparent from

the fact that there was no official communication that emanated either from the first respondent or those entrusted with authority to speak on its behalf that protest action be taken against the applicant. The letter of 12 May 2021 does not constitute such an instruction and cannot be a basis on which it is held liable for the protest action.

[21] The high-water mark of the first respondent's opposition is its reliance on the powers vested in its officials by its constitution, which is a publicly available document. The constitution vests specific powers to bind the organisation only in certain officials who form part of its Central Command Team ("CCT"). It is the CCT, which consists of the President and Commander in Chief ("CIC"); the Deputy President; the Secretary General; the Deputy Secretary General; the National Chairperson and the Treasurer-General, that both leads the first respondent and makes decisions on its behalf. Ultimately, the question whether Mr Sono had authority to bind the EFF must be determined with reference to its constitution which vests express authority only in its CCT.

[22] Clause 13(6)(a) of the constitution vests authority to make binding decisions for the EFF in its CIC. These decisions are then communicated to the organisation by its Secretary General. Neither an individual, member nor a member who holds a branch leadership position, such as Mr Sono, is authorised to speak on its behalf. Thus, the impugned conduct was not sanctioned by the EFF and it had no knowledge thereof. For these reasons, it is unable to answer to the allegations in the founding papers.

[23] The first respondent argues that express authority to act on behalf of the organisation is vested only in the officials as set out in the various clauses in its constitution. Clearly, the first respondent's defence is that Mr Sono had no actual authority to act on its behalf. However, given the view I adopt, again, it is not necessary to determine Mr Sono's actual authority in terms of the powers vested in him by the first respondent's constitution. It is not relevant to the outcome of the dispute. This is because the case before me is not whether Mr Sono was authorised

by the EFF's constitution to bind it but rather whether he misrepresented, through ostensible authority, that he had the power to do so.

[24] In answer to the applicant's submissions on ostensible authority, the first respondent contends that the letter of 12 May 2021 does not mean that it mandated or sanctioned the protest action complained of by the applicant. The fact that the letter holds is issued on its letterhead does not mean that it must be held accountable for Mr Sono's conduct.

[25] Also, even if Mr Sono and members of the first respondent made representations on which the applicant relied to its detriment, there was nothing pleaded in the founding papers specifically stating what those representations were. Moreover, there was no evidence on the papers that Mr Sono was even at any of the identified protests. Mr Sono's presence was raised for the first time in the Mr Booyse's confirmatory affidavit under reply and it is trite that the applicant had to make its case in its founding papers.

[26] In addition, the letter of 12 May 2021 cannot be relied upon as constituting evidence of a representation made by the EFF. On this score, *Calgan Lounge supra* does not serve as binding authority that the letter constitutes evidence of misrepresentation. The first respondent argues that *Calgan Lounge* is distinguishable because in that case, the letters were sent, and written to and by the EFF. This is not the case here and nothing can be read into the fact that the EFF failed to respond to the letter of 28 May 2021 because that letter was not addressed to the EFF. Rather, as appears from the email addresses it was addressed to the very person whom the EFF contends had no authority to participate in the protest activity on its behalf.

[27] In any event, the first respondent argues that the applicant has not shown on the facts that the EFF must be held liable for the unauthorised conduct of its members and those who purport to be its members merely because they were wearing its regalia. Its apparel can be purchased anywhere and simply donning it

does not mean that one is a member of the first respondent. Moreover, mere membership or alleged membership does not mean that the organisation can be held accountable for the actions of its members.

[28] Stripped to its core, the first respondent's opposition is therefore that it is not liable for the conduct of the second to fourteenth respondents, the applicant's employees. Simply put, it has no knowledge about what transpired at the applicant's premises because it was not there. It is the applicant's employees who must be held liable for any unlawful conduct on their part, not the EFF, since it did not authorise the protestors to act on its behalf.

[29] The question that must be asked is what did the EFF, on the applicant's version, say to Mr Sono and other members to publicly indicate that they had a mandate to represent it. In this regard it is imperative that this court have regard to the Constitution of the EFF which sets out in clear and unequivocal terms who may act on its behalf. In terms of the constitution, the branch secretary has no authority to act on the party's behalf.

[30] This applicant argues that this defence is not open to the first respondent as it applies to estoppel which must not be conflated with ostensible authority. Estoppel is a shield which precludes a principal from raising the absence of authority, whereas, ostensible authority, is the authority of Mr Sono and the members of the EFF, as it appeared(or was represented) to the applicant's management.

[31] The first respondent also denies the authenticity of the letter of 12 May 2021, contending that it has no knowledge about the existence of the letter. Thus, it denies that the branch secretary, Mr Sono, was authorised to issue the letter on its behalf. Even if the letter of 12 May 2021 was shown to be authentic, this does not mean that the EFF must be held liable for the protest action of the applicant's employees, the remaining respondents. The first respondent argues that if the branch secretary was involved, the applicant must hold him personally accountable, and not the EFF and the whole of its membership.

[32] Moreover, the applicant has not succeeded in showing on the facts in its founding papers what Mr Sono did to further the unlawful protest action. The first respondent argued that the applicant did not plead firstly whether Mr Sono was present and secondly what unlawful conduct he engaged in.

[33] The first respondent says it did not receive the correspondence of 28 May 2020 from Schoeman Inc alerting it to the protest action and pending urgent application. The notice was sent to the branch secretary and other individuals via their personal electronic mail addresses. In short, the EFF was not in a position to deny any participation in the protest action because it was not aware thereof and no correspondence had been addressed to it.

[34] Finally, the first respondent's case is that it exists separately from its members and must therefore be held liable for its own acts and not those of members who decide to act on a frolic of their own. In this regard, it can only warn its members against committing unlawful conduct, but cannot enforce this. It has issued such a warning in its *Directive on Unauthorised Strikes and Protests in the Name of the EFF* through the Secretary General's office on 6 October 2020. The Directive notes the increased number of unauthorised protests carried out in its name since the CLICKS protests. It records that this has resulted in legal and financial implications which jeopardises the organisation's name and that *"protests and strikes relating to workplace matters must be approved by the Labour Desk through the appropriate channels".*

[35] The Directive goes on to caution members that should they engage in protest action without authorisation*, "the organisation will take firm and decisive action to restore order and maintain maximum discipline".* The duty to prevent such conduct is foisted upon the shoulders of its leadership, which includes regional and branch leadership. The Directive concludes that *"[i]f people engage in conduct which is not sanctioned, under the watch of Leadership, then Leadership must be held accountable for negligence".*

[36] Lastly, the first respondent contends that the application should fail for material non-joinder since applicant has not cited the alleged representatives of the first respondent who are a party to this dispute. The first respondent argues that without them, no liability can accrue to it.

The Issues That Must Be Determined

[37] On the facts before me there are four main issues that arise for consideration. These are:

[37.1] Whether the ostensible authority of Mr Sono and that of the first respondent's members who engaged in the protest action, was pleaded;

[37.2] If such ostensible authority was pleaded, whether it was established on the facts;

[37.3] If such ostensible authority was both pleaded and established on the facts, whether it was open to the first respondent to:

[37.3.1] First, deny that they were vested with authority to act on its behalf; and

[37.3.2] Second, contend that its liability as a political party is separate to that of its members and thus, it cannot be held liable for members who act 'on a frolic of their own'; and

[37.4] The question of non-joinder.

**Evaluation**

Was Ostensible Authority Pleaded?

[38] The first respondent argued that the applicant could not rely on Mr Sono's ostensible authority, or the purported authority of the other members who participated in the protest action. The submission was premised on two considerations. First, the applicant's formulation of the ostensible authority it sought to rely on was misplaced. The question was not whether Mr Sono and those members who participated in the protest action led the applicant to believe they were authorised to do so, Rather, to establish ostensible authority, the applicant was obliged to show which conduct of the first respondent created the impression that Mr Sono and the protesting members were authorised to protest on its behalf. The applicant has not done so because the first respondent has not engaged in any such conduct. Furthermore, its Constitution is clear in terms of who is vested with authority to both bind the organisation and issue mandates for protest action. Second, there were no pleaded facts, at least in the founding papers, to establish ostensible authority.

[39] The test for ostensible authority was clarified by the Constitutional Court in *Makate v Vodacom Ltd 2016 (4) SA 121 CC.* The principles set out therein were subsequently applied by the late Mr Justice Steenkamp sitting in the Cape Labour Court in *Mngomezulu v Vodacom (Pty) Ltd and Others [2017] ZALCCT 27 (21 June 2017)* at paragraphs 14 – 15. It is apposite to quote the oft relied upon passage distinguishing ostensible authority from estoppel since the conflation of the two lies at the heart of the first respondent's opposition. Writing for the majority, Jafta J held that whilst ostensible authority and estoppel have been treated synonymously by our courts, they are different legal doctrines. The majority held:

*"[45] Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to*

*have actual authority. But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent had authority, the principal is precluded from denying that the agent had authority.*

*[46] The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel which is not authority at all. Moreover, estoppel and apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct".*

[40] Thus, authority is the mandate conferred by the principal on the agent to carry out the particular juristic act on its behalf. Authority takes two forms, actual and ostensible. Where authority is conferred by the principal, expressly or implicitly, it is actual and if a principal, such as the EFF were to deny the conferral of authority, the applicant, Brightstone, could in replication, plead that it is estopped from doing so.

[41] Where actual authority is denied, estoppel is not about whether the principal conferred authority on the agent. Rather, it is a rule that stops the principal from denying the existence of authority, if by its own conduct the principal brought about a scenario that misled the third party into believing that the agent had authority to act on its behalf.

[42] Thus, Mr Ramogale's submission that the starting point is what the EFF did to conduct itself in a manner which created the impression that Mr Sono and the protestors were authorised to act in its behalf , would be correct if what was in issue was the denial of actual authority. However, that is not the case made by the applicant. The applicant expressly disavowed any reliance on actual

authority. It built the cause of complaint on the ostensible or apparent authority Mr Sono and the protestors created that they were acting on behalf of the first respondent. Therefore, the enquiry is not whether the first respondent, through the provisions of its constitution or otherwise, conferred authority on Mr Sono and its members to protest at the applicant's premises. It is whether, on the probabilities of the pleaded facts this court can conclude that Mr Sono and the protestors created the appearance that they had the power to act on behalf of the first respondent. This is of course a factual inquiry that must be determined with reference to the objective, empirical evidence that served before this court. It is to that question that I now turn, i.e., whether the applicant has established ostensible authority on the facts.

Was ostensible authority established?

[43] What remains to be determined is whether the applicant demonstrated that Mr Sono and indeed, the protestors at its premises on 16 May 2021 and 28 May 2021 to 1 June 2021 had ostensible authority when they engaged in the protest action. The first respondent has placed this fact in dispute and thus, it must be assessed, in an application for a final interdict, in terms of the test as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).* Corbett JA, as he then was, cited the test at paragraphs 634E-635D as follows:

*"Where in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant`s affidavit and which have been admitted by the respondent, together with the facts admitted by the respondent, together with the facts alleged by the respondent justify such an order."*

[44] The applicant relies principally on four contentions to establish ostensible authority. These are:

[44.1] the letter of 12 May 2021 sanctioned by the branch secretary;

[44.2] the attendance of protestors purporting to act on behalf of the first respondent at its premises on 16 May 2021 and 28 May 2021 to 1 June 2021;

[44.3] the confirmatory affidavit of Mr Booyse attached in reply that Mr Sono introduced himself as a member of the EFF with authority to act on its behalf; and

[44.4] the fact that several provisions of the first respondent's constitution vest the branch secretary and the members with the authority to engage in protest action on its behalf. I have already indicated that it is not necessary to determine this question as it relates to Mr Sono's actual authority, which is not the case pleaded on the applicant's papers.

[45] There is no reason to dismiss the applicant's contention that it believed Mr Sono to have authority to act on behalf of the first respondent. The letter of 12 May 2021 was written by him on the EFFs letterhead and in his capacity as branch secretary of Ward 82. It also set out the correct address for the regional office. Moreover, the ostensible authority of Mr Sono and the protesting members was given credence when they acted on the terms of the letter and arrived at the applicant's premises on 16 May 2021.

[46] It was buttressed again by the protest action of 28 May 2021, which led to the applicant agreeing to a second meeting with representatives of the first respondent from the James Sofasonke Mpanza Region on 30 May 2021. The ostensible authority of the region/ward and its members, as represented by its branch secretary, was then again exhibited in the protest action that took place until 1 June 2021. What is apparent, and what remained undisputed on the facts before me is that the applicant was contacted by representatives from the branch of the first respondent, in particular its branch secretary, who requested a meeting in his capacity as such, on 12 May 2021.

[47] In that letter, the branch secretary exercises authority to engage with the applicant in labour disputes on behalf of what Mr Sono referred to as the first

respondent's members and workers. The first respondent denies that it knew of the existence of the letter or that Mr Sono was constitutionally empowered to issue the letter. It does not state why the applicant's reliance on the misrepresented authority was unreasonable.

[48] The uncontested facts, as appears from the letter of Schoeman Inc, is that there were at least three incidents of unlawful protest action perpetrated at the applicant's premises by its members at Ward 82 under the watch and I daresay, with the blessing of its leadership. As discussed more fully below these members and the branch leadership must be dealt with in accordance with the first respondent's constitution. It is no answer for the first respondent to blithely contend that the applicant must take action against them. The applicant has no nexus with the protestors. They are members of the first respondent with whom they have a *sui generis* contractual bond in the form of the constitution.

[49] In sum, the first respondent does not deny that the letter was issued or that it was sent by Mr Sono. It also does not deny that the applicant's attorneys of record wrote to it on 30 May 2021 to cancel the meeting of 28 May 2021. It disputes the authenticity of the letter only because it was unaware of its existence and because of its denial that Mr Sono could act on its behalf. It says also that the letter of 30 May 2021 is not relevant because it was sent to the very person it denies has authority to represent it. Moreover, it contends that as a result of the want of authority and because it is an organisation in its own right, it cannot be held responsible for the conduct of its members. his is not a defence to a claim of ostensible authority.

[50] The next issue is the content of Mr Booyse's affidavit and its relevance to the outcome of this dispute. Mr Booyse stated that he was present at the store in his capacity as a security officer when the protests unfolded on 16 May 2021 and from 29 May 2021 to 1 June 2021. He was deployed to assist with the protest action and was approached by a gentleman who identified himself as

Mr Sono. The latter threatened him informed Mr Booyse that he was from the EFF and that its members would burn down the store. Mr Booyse does not mention other protestors by name, but gave evidence that they too informed him that they had been called to the premises by the first respondent and that they would burn down the store. Mr Booyse was emphatic that Mr Sono and the other protestors communicated to him that they were representing the EFF and acting on its instructions.

[51] The evidence contained in Mr Booyse's reply is not new. Mr Sono's identity and his position as branch secretary of Ward 82 appear from the letter of 12 May 2021, attached to the founding papers. It is this letter that the applicant relied on to plead in its founding papers that the first respondent arrived at its premises on 16 May 2021, with a list of demands. That letter is of course signed by the branch secretary, Mr Sono, so Mr Booyse's evidence that Mr Sono introduced himself as the branch secretary takes the matter no further. This is an uncontested fact as appears from the letter of 12 May 2021, and the fact that Mr Sono's designation is not denied by the first respondent.

[52] Moreover, the founding affidavit at paragraphs 5.6 to 5.14 pleads that it was the first respondent who engaged in intimidating conduct on 16 May 2021 and then again on 29 May 2021 at paragraphs 6.1 to 6.7. thus, Mr Booyse's evidence in reply that the protestors said they were members of the first respondent is not new. Neither is his evidence that they engaged in threatening and intimidating behaviour.

[53] The founding papers on its own establish on the probabilities that members of the first respondent protested unlawfully at the applicant's premises, and that this was at the behest of the first respondent's branch secretary, who purported to act on its behalf. There is therefore no substance to the contention that Mr Booyse's affidavit constitutes new evidence that should be disregarded. Thus, the fundamental point that Mr Booyse's affidavit seeks to make, namely that Mr Sono, and the protestors were EFF members who took

part in unlawful protest action at the applicant's premises, was pleaded in the founding papers.

[54] To properly answer this claim, the first respondent was required to show, on the facts, why the applicant was wrong to rely on Mr Sono's authority as appears from the letter and the conduct of the protestors on 16 May 2021. In answer to this it states only that its constitution, which is publicly available, vests no power in Mr Sono and the protestors to lodge the protest action and that it was not aware of the notice of 12 May 2021 or the protest action of 16 May 2021. It only became aware thereof when it was served with the application on 1 June 2021. The first respondent's lack of knowledge is not a defence to the claim that Mr Sono and its members created the impression that it was engaged in protest action on its behalf.

[55] The fact is that the first respondent does not deny that Mr Sono is a branch secretary and placed no evidence before this court that those who supported him were not EFF members. The first respondent did not contend that such information was not available to it or could not be acquired by it. Mr Sono is a member of the first respondent, and not just any member at that. He is part of its leadership, namely a branch secretary, and as will become clear from the discussion below, this information could have been sought from him in this capacity in terms of section 7(2) of the first respondent's constitution. Where he failed to provide the information, the necessary steps could be taken against him in terms of clauses 4 and 5 of the October 2020 CCT Directive.

[56] There is thus no substance to the first respondent's contention that nothing pleaded in the founding papers about the representations made by Mr Sono. The representations made appear from the conduct of Mr Sono and those who aided and abetted his misrepresented authority. It is in the content of the letter of 12 May 2021; their engagement in the protest action; and the applicant's agreement to meet with the first respondent's representatives on at least two occasions, all of which was recorded in the letter of 28 May 2021 by

Schoeman Inc. The first respondent alleges that it did not see the letter because it was sent to a person not authorised to represent it, yet there is no denial that Mr Sono is its member and branch secretary. These complaints, legitimate as they are, serve as a basis to discipline Mr Sono under its constitution. It is not a defence to his apparent misrepresented authority, which the applicant relied on in seeking to stave off the protest action.

[57] In circumstances where neither the content of the letter of 12 May 2021 is denied nor the capacity in which Mr Sono sent it – which is distinct from whether the first respondent authorised him to do so – there is no dispute on the facts as contemplated in *Plascon-Evans.* There is also no reason why this uncontested version should not be accepted. On the undisputed facts, the branch secretary of Ward 82 involved himself and the other protestors in the applicant's employment relations. This he did by engaging in protest action in his role as a branch secretary of the EFF. To the extent that this was a breach of the EFF constitution because it was unauthorised, it is to the branch secretary that the EFF must direct its displeasure by disciplining him in terms of its constitution.

[58] The applicant has succeeded in showing that it relied on a misrepresentation by Mr Sono and the protestors that they acted on behalf of the first respondent. This is the end of the inquiry for ostensible authority. It is only open to the first respondent to contend that the applicant's reliance was, on the probabilities, unreasonable or misguided. This it has failed to do. The import of this is that it is not open to the first respondent to deny that Mr Sono and the protestors were not authorised to act on its behalf. This is a defence to actual authority which allows an applicant to raise estoppel by replication. The facts that have been placed before me do not warrant such a finding.

[59] Thus, the applicant has succeeded in showing the ostensible authority of Mr Sono who acted in concert with protestors who also claimed to be members of the first respondent. On this basis, the first respondent must account for its involvement in the unlawful protest action.

Does the first respondent exist separately from its members?

[60] This question must be answered with reference to the contractual relationship between the first respondent and its members. Relying on the decision of the Constitutional Court in *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC), the Eastern Cape High Court said the following of this contractual relationship in *Mgabadeli and Others v African National Congress and Others 2017 JDR 2051 ECG*

*"[10] A political party is a voluntary association. Like any other voluntary association the constitution of the ANC constitutes a contract between its members, and their rights and duties, both as between themselves and in their relation to the association in all matters affecting its internal government and management, are determined by the terms of the contract. The existence of the contractual nature of the relationship was confirmed by the Constitutional Court in Ramakatsa and Others v Magashule and Others (Ramakatsa) "At common law a voluntary association like the ANC is taken to have been created by agreement as it is not a body established by structure. The ANC's constitution together with the audit guidelines and any other rules collectively constitute the terms of the agreement entered into by its members . Thus the relationship between the party and its members is contractual. It is taken to be a unique contract."*

*[11] The unique status of the contract is no doubt by reason of the fact that the constitution of a political party performs an important function in the exercise by a citizen of his entrenched right in section 19 of the Bill of Rights. It is the instrument through which a member of a political party exercises his right in subsection (1)(b) to "participate in the activities of a political party." The Court in Ramakatsa acknowledged this when it said that: "The constitutions of political parties are the instruments which facilitate and regulate participation by*

*members in the activities of a political party, and "that constitutions and rules of political parties must be consistent with the Constitution which is our supreme law."*

[61] Thus, as correctly argued by Mr Ramogale, it is the first respondent's constitution that confers rights and obligations on Mr Sono and indeed the other protesting members. The constitution together with any other rules, such as the Directive of 6 October 2021, set out the process for approved protest action, and form the basis of the agreement between the first respondent and its members. They facilitate and regulate how Mr Sono and the other protestors participate in the activities of the EFF, including any proposed protest action.

[62] In *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* at paragraphs 18 and 23, the SCA held that whatever the nature of the document being interpreted, the inevitable point of departure is the language itself. The language used in the document must be interpreted in the light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed. Where more than one meaning is possible, each possibility must be weighed in the light of these factors in terms of an objective process leading to a sensible meaning.

[63] The Preamble to the first respondent's constitution traces its genesis as coming about to bring together *"revolutionary, fearless, radical and militant activists, worker's movements, non-governmental organisations, community-based organisations, lobby-groups under the need to pursue the struggle for economic emancipation*". It anchors the EFF in popular grassroots formations and struggles, declaring the party to be "*the vanguard of community and worker's struggles and will always be on the side of the people".*

[64] Ninety percent of its highest decision-making body, the National People's Assembly, is constituted of membership at branch level. The branch in turn is

defined as "*the most basic unit of the Economic Freedom Fighters and is constituted of a minimum of 100 paid up Members*". It is clear from its Constitution that the EFF exists for its members and that they are the moving force behind its existence.

[65] In terms of section 7(2) it is mandatory that all members comply with the constitution. On joining, members sign a declaration solemnly declaring that they will abide by the aims, objectives and radical policies of the EFF, as set out in its constitution. On taking up membership, members are given the rights as set out in section 8, which includes, in terms of section 8(b) the right to participate in all activities organised by the EFF, "*unless decided otherwise by a constitutional structure of the EFF*".

[66] What is relevant is that the CCT, one of the first respondent's constitutional structures, adopted a directive limiting participation in strikes and protests in its name. The directive sets out criteria before members can engage in protest action under the banner of the first respondent. That process requires approval by the Labour Desk and proper authorisation, failing which "*the organization will take firm and decisive action to restore order and maintain maximum discipline*". Where the unauthorised action takes place under the watch of leadership, including branch and regional leadership, as in this case, clause 5 records that "*Leadership must be held accountable for negligence*".

[67] What this means is that the consequences of a breach (especially in the absence of a denial that Mr Sono is a member of the EFF and its branch secretary), and in terms of the first respondent's own directive, must lie at the door of its leadership and cannot be visited upon the applicant, as contended by the first respondent. This is all the more so where section 7(2) of its constitution prescribes that all members comply with the constitution, and where, as held in *De Lille v Democratic Alliance and Others [2018] 3 All SA 684 (WCC)* at para 54, a member of a party is entitled to "*demand and obtain*" compliance with the party's constitution. As held in *Ramakatsa*

supra "*our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party.*"

[68] By extension, the same principles apply to the first respondent and its constitutional bodies. It can exact compliance in terms of section 7(2) of the constitution as read with clauses 4 and 5 of the October 2020 Directive. There is therefore no substance to the first respondent's argument that it can only warn its members against unlawful conduct but cannot enforce it. Indeed, the exact opposite is true. Where that unlawful conduct is perpetrated in the name of the organisation without authorisation, the first respondent is empowered by the terms of its constitution to enforce its provisions and act against members, such as Mr Sono and the protestors, who participated in the unlawful protest action.

[69] The first respondent can enforce the solemn declaration, insist on compliance with its constitution, take action to restore discipline, which includes, within the framework of the Directive, holding Mr Sono and the protestors liable for negligence.

[70] It is also not for the applicant to hold Mr Sono and the protestors liable in their personal capacities, as argued by the first respondent. The applicant has shown on the probabilities of the evidence that it was led to believe that these members had apparent authority to act on behalf of the first respondent. Having done so, the duty is on the first respondent to discipline the errant members in terms of its constitution as read with its October 2020 Directive.

Simply put, the first respondent must hold its members accountable under the rubric of its constitution when such members acted in breach thereof. In the absence of a denial from the first respondent that Mr Sono is its member and its branch secretary, it must call its member to account which can include

identifying all other members who acted in concert with him in the illegal protest action. This is because it is the first respondent and not the applicant who is vested with the right to exact accountability and enforce discipline upon its own members.

[71] The *sui generis* contractual nature of the first respondent's relationship with its members, which *inter alia* gives effect to section 19 of the Bill of Rights, means that first respondent cannot contend that it exists separately from its members and cannot be held liable where they "act on a frolic of their own". Rather, as outlined above, the first respondent exists for and because of its members. Thus, this contention is not only expedient, but is also contrary to the *dicta* from the Constitutional Court on the *sui generis* contractual relationship between the first respondent, as a political party and its members.

[72] Finally, the EFF's contention that it exists separately from its members and cannot be held accountable for their conduct, is at odds with the provisions of its own constitution. Therefore, there is no substance to the argument that the first respondent cannot be held liable for the conduct of its members or those members who represented ostensibly that they acted on its behalf.

Non-joinder

[73] Moreover, once the applicant succeeded in establishing ostensible authority, there was no need to join the representatives of the first respondent who are a party to this dispute. Mr Sono and the protestors are party to this dispute by virtue of their being members of the first respondent, in circumstances where the latter has been cited as a material party against whom specific relief is being sought.

**The Requirements for a Final Interdict.**
A Clear Right

[74] There can be no doubt that the first respondent's members who are also the applicant's employees embarked in unlawful conduct. They committed acts of intimidation, obstruction and blockading of premises, among others. It is not controversial to grant an order interdicting the employees from engaging in such volatile behaviour. This court has held that such behaviour by employees is unacceptable and has no place in our employment law dispensation. (See *National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers & others* (2016) 37 *ILJ* 476 (LC) at para 37; *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 *ILJ* 998 (LC) at para 13; *Verulam Sawmills (Pty) Ltd v Association of Mineworkers & Construction Union & others (2016) 37 ILJ 246 (LC) at para 15).*

[75] There can be no doubt also that the first respondent was directly involved in and instigated the unlawful protest action through the conduct of its members and branch secretary. This it did by engaging in protest action with the employees at the applicant's premises on 16 May 2021 and 29 May 2021 to 1 June 2021. That the EFF was directly involved is also demonstrated by the correspondence of 12 May 2021 written on its letterhead by its branch secretary, making it clear that it was taking up the employees' cause and seeking a meeting on at least five employment conditions.

[76] I can do no better than to rely on the passages in *Calgan Lounge* by Snyman AJ when he confirmed a *rule nisi* against the EFF where it was also engaged in unlawful protest action that furthered a strike:

*"[41] The first question that must be asked is what was the EFF doing getting involved in workplace issues in the first place, especially considering that the applicant's workplace is organised with the first respondent as majority representative and recognised trade union? The simple answer has to be that the EFF has no*

*business in doing so. It is not a registered trade union. The deliberate and specific design of the LRA is to designate the task of dealing with workplace disputes and grievances to employers' organisations, trade unions and workplace forums. There is no place in this structure for the involvement of political parties…*

*[43] Trade unions must be registered under the LRA, for good reason. It ensures that such institutions fulfil the duties as prescribed by the LRA, and gives effect to its primary objectives. Registration places trade unions under a number of regulatory provisions and places them under the supervision of the Registrar of Labour Relations. The penalty for non-compliance could be deregistration in the case of serious contravention. It also places such institutions under the supervision of this court. By seeking to assume this role which is reserved for trade unions under the LRA, the EFF in effect bypasses all these regulatory provisions that trade unions must comply with. This can never be what the legislature had intended when seeking to regulate the rights under s 23 of the Constitution by way of the LRA. In writing for the majority in National Union of Public Service & Allied Workers on behalf of Mani & others v National Lotteries Board, Zondo J (as he then was) held as follows:*

> *'[142] Earlier I referred to every trade union's right in s 23(5) of the Constitution "to engage in collective bargaining" and the fact that the LRA was enacted to give effect to the rights in s 23 of the Constitution. About collective bargaining it has been said:*
>
> > *"[B]y bargaining collectively with organized labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc should not be frustrated through interruptions of work. By bargaining collectively with management, organized labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and has to be compatible with the physical integrity and moral dignity of the individual, and also the job should be reasonably secure. This definition is not intended to be exhaustive. It is intended to indicate (and this is important for the law) that the principal interest of management in collective bargaining has always been the maintenance of industrial peace over a given area and period, and that the principal interest of labour has always been the creation and the maintenance of certain standards over a given area and period, standards of distribution of work, of rewards, and of stability of employment."*

*As to what collective bargaining entails, it has also been said:*

> *"By collective bargaining we mean those social structures whereby employers (either alone or in coalition with other employers) bargain with the representatives of their employees about terms and conditions of employment, about rules governing the working environment (eg the ratio of apprentices to skilled men) and about the procedures that should govern the relations between unions and employer. Such bargaining is called 'collective' bargaining because on the workers' side the representative acts on behalf of a group of C workers."*
>
> *[143] In chapter III the LRA seeks to give effect to trade unions' and employers' constitutional right to collective bargaining.'*

*[44] What the EFF did in this case was to undermine orderly collective bargaining and dispute resolution, which are cornerstones of the LRA. As an employer, the applicant is entitled to expect its employees to comply with these objectives of the LRA when seeking to resolve any disputes they may have with the applicant as employer. And for the EFF simply to negate all of this based on some misguided view of what the Constitution allows it to do, is simply unacceptable, and cannot be permitted. The applicant specifically, in writing, warned the EFF that this course of action was not permitted in law, but still the EFF pressed on nonetheless. In this regard, it can be hardly better be said than the following dictum in Gcaba v Minister for Safety & Security & others:*

> *'However, another principle or policy consideration is that the Constitution recognizes the need for specificity and specialisation in a modern and complex society under the rule of law. Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognized in the Constitution. Different kinds of relationships between citizens and the state and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasized in Chirwa by both Skweyiya J and Ngcobo J.*

[77] In sum, the first respondent involved itself in workplace matters that did not concern it because it has no standing as a trade union. The first respondent was not entitled to organise employees in the applicant's workplace or for that matter engage in unlawful protest action in pursuance of demands it simply has no standing to make. As Snyman AJ held in *Calgan Lounge* supra, if it wants to do so, it must register as a trade union, and comply with the LRA.

[78] The EFF stopped its unlawful protests between the period 1 June 2021 and the hearing of this matter. To date, there have been no complaints of further unlawful conduct. It is no doubt that the cessation of its protest action is due in part to the *rule nisi* being granted on 1 June 2021. This, together with the fact that the first respondent has made it clear that "*it will not accept any suggestion that since we are not a Trade union we can't therefore represent our members and workers*", means that the applicant has established a clear right to final interdictory relief against the first respondent, as represented by its branch secretary, Mr Sono.

[79] That right is premised on its entitlement to expect and require its employees to comply with the LRA. Insofar as the applicant's employees may have disputes or grievances against the applicant, the first respondent has no legal standing to insert itself in these matters through the vehicle of unlawful, volatile, and intimidating protest action. The applicant is entitled to expect the EFF not to become involved in its employment matters and the breach of this right reinforces its entitlement to final interdictory relief.

The Remaining Requirements

[80] As to the other considerations, it is clear that the applicant has no alternative remedy available to it to stop the unlawful conduct and acts of intimidation committed on its premises. Only this court can come to its assistance through an application for interdictory relief. There is no alternative remedy available to the applicant.

[81] On this score, it is clear that if the current situation persists or resurrects itself, the applicant would suffer severe financial prejudice in an already difficult market place. As Snyman AJ noted in *Calgan Lounge*

> *"[48] It is difficult for the applicant to protect itself against such undue external influences, which only compounds the prejudice. I may also add that there is a broader occurrence of prejudice, being the undermining of the dispute-resolution mechanisms under the LRA, which leads to undue instability in the employment environment and the reputational prejudice associated with it. Prejudice, in my view, is thus a reality, and manifest.*
>
> *[49] As opposed to this, the respondents are not left stranded if final relief is granted. All that the employees always needed to do is simply to comply with the dispute-resolution mechanisms prescribed by the LRA to have their disputes and grievances properly and lawfully addressed, and there is no reason why this still cannot be the case. If the employees were dismissed, as suggested, they have the unfair dismissal provisions under chapter VIII of the LRA available to them.*
>
> *[50] Where it comes to the EFF and its functionaries, it simply should not stick in its nose where it does not belong. Nothing in this judgment can serve to in any way prejudice the legitimate functions and activities of the EFF, in the arena where it belongs".*

**CONCLUSION**

[82] The applicant is entitled to a final order and the confirmation of the *rule nisi* interdicting the respondents from carrying out the unlawful conduct set out therein.

COSTS

[83] All that remains is the issue of costs. The second to fourteenth respondents did not oppose the application, so no costs order can issue against them.

[84] The first respondent took the emphatic view that its conduct was lawful and that it was, through its branch secretary, acting in furtherance of its constitutional mandate. This view has been shown to be devoid of merit. Instead the actions of the first respondent and its members undermine the dispute resolution processes prescribed by the LRA. There was no prospect of this conduct abating unless interdicted by a court order. In the circumstances a costs order is granted against the first respondent.

[85] Whilst the Constitutional Court said in *Zungu v Premier of the Province of KwaZulu-Natal & Others* (2018) 39 ILJ 523 (CC), that costs does not follow the result in labour matters, this court still has a discretion under section 162 of the LRA when it comes to the question of costs. In *casu* the applicant tried to engage with the first respondent via the letter of 28 May 2021, by pointing out that it had no standing to interfere in its labour matters and that if it did not desist from the threatened protest action, an urgent application would follow. Instead of writing back or engaging the applicant, the members of the first respondent persisted with the protest again which gained new momentum and continued unabated for three days until the grant of the interim order by Van Niekerk J.

[86] The first respondent has not upset the applicant's reliance on the apparent authority of its branch secretary. Thus, it is bound by his conduct as well as the conduct of its members who engaged in the unlawful protest action. The applicant should not be left out of pocket in seeking to stop and contain this unlawful conduct. In the circumstances, this is a case where the proper exercise of this court's discretion under section 162 of the LRA compels that an order of costs is issued against the first respondent.

**ORDER**

[87] It is for all the reasons the following order is issued:

1. The *rule nisi* dated 1 June 2021 is confirmed in its entirety.

2. The first respondent shall pay the costs of the applicant's appearance on 1 June 2021 and the costs of the application, including the costs of counsel.

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TULK, AJ

Acting Judge of the Labour Court South Africa