

SOUTH AFRICA / JUDGMENT

Dube and Others v Mofokeng and Others (36131/2014) [2014] ZAGPJHC 353 (30 October 2014)

[2014] ZAGPJHC 353

COURT

South Gauteng High Court, Johannesburg

BEFORE

N D Tshabalala

CASE / FILE NUMBER

36131/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 36131/2014

DATE: 30 OCTOBER 2014

In the matter between:

JOHANNES DUBE.....First Applicant

SCOTCH MPONENG DIBETSO.....Second Applicant

LAWRENCE NEZELE.....Third Applicant

And

SIMON MOFOKENG.....First Respondent

THAMSANQA MHLONGO.....Second Respondent

LUCAS MASHEGO.....Third Respondent

NOCONGRESS EUNICE DLODLO.....Fourth Respondent

CHEMICAL, ENERGY, PAPER, PRINTING

WOOD AND ALLIED WORKERS UNION.....Fifth Respondent

J U D G M E N T

TSHABALALA, J:

[1] This is an application by three regions of a union on an urgent basis to stop the holding of a special National Executive Committee (NEC) meeting scheduled for the 17th and 18th October 2014.

[2] The following are common cause facts alternatively not disputed facts:

2.1 The union consists of a total of nine regions which almost correspond with the country's provinces.

2.2 The three applicant regions Wits, North West and Western Cape are represented by their current chairpersons elected in a process which the mother body refuses to recognise.

2.3 The union is threatened by the Department of Labour with deregistration for failing to submit its Audited Financial Statements timeously.

2.4 On receipt of the notification to deregister the union, the first respondent issued a notice to convene a meeting on the 8th August 2014 of the NEC for the 13th and 14th November 2014.

2.5 Certain conditions were attached to the attendance by the delegation from the three applicant regions which conditions were to be complied with before the meeting of the 13th -14th November 2014.

2.6 On the 26th August 2014 the three applicant regions resolved to re-run the elections of 2013 pursuant to which they came to power in compliance with the conditions stipulated in 2.5 above.

2.7 The elections are scheduled for the 18th October 2014 for both the Wits and North West Regions and for the first November for the Western Cape.

2.8 On the 26th September 2014 the first respondent/national leadership issued another notice convening a special National Executive Committee meeting for the 10th and the 11th October 2014 which the applicants allege they received on 2 October 2014.

2.9 The applicants objected to the scheduling of this meeting.

2.10 There was an exchange of correspondence between the feuding parties concerning the convening of this meeting which failed to resolve their impasse.

2.11 The meeting scheduled for the 10th-11th October 2014 did not take place because the attendees did not form a quorum.

2.12 In a letter dated the 9th October 2010 from the legal representatives of the respondent, the applicants were advised that their presence at the special NEC meeting will not be recognised. In the same letter it was suggested that the office the incumbent Regional leadership had replaced was the one that would be recognised to represent the three regions.

2.13 When the meeting failed to form a quorum, the first respondent then gave six days' notice of the same meeting scheduled for the 17th October 2014.

2.14 On the 13th October 2014 on Monday the applicants launched the present application on an urgent basis to be heard on Thursday the 16th October 2014.

2.15 The parties submitted their heads of argument for which I am grateful.

2.16 The respondents did not file any answering affidavit/s contending instead that they intended raising two points in limine, which, in their view would be dispositive of the case. They also indicated that they will argue on the applicants' own papers.

2.17 The following points were raised:

2.17.1 The non-joinder of the other regions in this application.

2.17.2 Urgency was disputed alternatively self-created.

2.17.3 The third point related to the merits of the case and concerned one of the requirements of an interdict, viz failure to demonstrate prejudice in the sense of obtaining substantial redress after the meeting.

2.18 The other regions of the union were not cited as parties to the application.

[3] After argument I granted prayers 1, 2 and 3 of the Notice of Motion and reserved the issue of costs indicating that I will deal with that issue in my judgment.

[4] I now proceed to deal with the reasons for my order.

4.1 Ad Non-Joinder

The parties cited in the application as respondents are, the general secretary, the president, his deputy and second deputy president and the union.

The NEC consists of inter alia the national leadership of the union, the regional secretaries, the leadership of the regions and the additional delegates from the regions depending on the membership of those regions.

By reason of the fact that the regions are represented in the NEC and were invited to and expected to attend the meeting, the respondents argue that their omission from the application is fatal to the application on the basis that they will not be heard although they are an integral part of the NEC.

The union is made up by its membership from the regions, without which there is no union.

Having regard to section 42 of the Constitution dealing with the establishment and powers of the NEC it is clear that the regions have no independent/separate identity outside of the union. They are part of the union and in fact constitute the union. By citing the union as a party to the proceedings one ipso facto includes the regions in such a citation. The union represents the regions in a court process and not vice versa.

In my view, therefore, the issue of non-joinder stands to fail on this ground alone.

4.2 Urgency

The respondents having not filed papers, I inquired from their counsel what the effect of not going ahead with the meeting would be. This would have enabled me to determine whether or not its cancellation would bring about consequences which I as an outsider could not foresee.

The response I got was that the onus was on the applicants to establish urgency and not on the respondents to prove its non-existence. It was also put to me that there was no lawful impediment for the union to hold its meeting during October 2014.

I was therefore left with only one version before me on the issue of urgency, namely that of the applicants.

According to the applicants, notice of the meeting scheduled for the 10th-11th October 2014 came to their attention on the 2nd October 2014 which was not disputed.

Correspondence exchanged hands between the parties inter se and their legal representatives culminating in the applicants being advised on Thursday the 9th October 2014 that they will not be permitted to participate in the meeting of the 10th-11th October 2014.

I have considered the communication between the parties themselves, and between their legal representatives during the period 2nd October 2014 until the 9th October 2014. I am satisfied with regard thereto, that the applicants were trying to broker the stalemate between the parties and to obtain clarity on their status at the meeting. The matter was not resolved.

On Monday the 13th October 2014 the present application was launched and service thereof effected on the same day.

On these facts, I am satisfied that urgency has been established and that on the facts presented before me, the delay, if any, in launching the application was justified by the steps the applicants took to resolve the issue of their status and the staging of the meeting without resorting to a legal battle. The delay, if any, was not so unreasonable that it could be said that it cancelled out urgency.

I am therefore satisfied that urgency has been established.

4.3 Substantial Redress

The requirements for an interdict, depending on whether it is for an interim or permanent relief, have one common requirement, in them, namely harm or damage that cannot be redressed.

The other requirements for the interdict sought were not challenged. Only the requirement of the existence of substantial redress was raised by the respondents.

According to the respondents the applicants could still obtain substantial redress against the respondents even if the meeting proceeded. According to the respondents, the applicants could, if they win the regional elections scheduled for the 18th October and 1st November 2014 attend the meeting of the 13th-14th November 2014 and reverse or vote to reverse the results of the resolutions taken at the meeting sought to be interdicted.

The respondents' further argument is that the decision/s taken at the meeting of the 17th-18th October 2014 could be legally challenged to be set aside. On the grounds that the applicants have these further avenues open to them, the respondents argue that they can subsequently obtain sufficient redress, and therefore that the prejudice they will suffer if the meeting proceeds is not without remedy.

The choice to adopt a particular procedure/step and to seek the relief that suits one is that of the applicant, provided of course that the requirement for an interdict are established. I do not understand the existence of substantial redress to mean that merely because it is there, the applicant who seeks an interdict should not succeed.

Various factors including treating each case on its merits need to be taken into consideration to conclude that the redress that will be attained subsequently will achieve the same or substantially the same objective that the interdict seeks to achieve.

The special NEC scheduled for the 17th-18th October 2014 has on its agenda various highly contested issues as the approval of Audited Financial Statements, regional congresses, the union's investments report and an update on the progress on the issue relating to the Department of Labour.

I was referred to an affidavit of the first respondent in an earlier application brought by the first to the fourth respondents in this very court under Case No 18942/2014 para 43.2 thereof where he states:

"43.2 This is because in order to call a NEC, the regional processes are required to have been lawfully conducted, in order that those representatives of the Regions who attend the NEC are validly and lawfully present. As set out in the main application, the Applicants have serious concerns about the validity of the Regional processes which feed into the NEC. Despite the need to hold an NEC meeting the second applicant and I were not prepared to call a meeting of the NEC until the irregularities in the representation of various regions had been corrected. We were not willing to hold such a critical NEC meeting in circumstances in which the meeting would not be properly convened because the representatives of three regions had not been properly selected."

On this excerpt alone the first respondent admits and recognises the need for the presence of the three applicant regions at the NEC. By convening the meeting of the 17th October 2014, the first respondent seeks to do exactly that which he concedes is inadvisable to do.

Should the meeting proceed, decisions and resolutions may be taken which may have far reaching implications on the applicants or their regions particularly in view of the fact that the national leadership has already appointed the regional representatives to the special NEC without the input of the affected regions.

The Audited Financial Statement and the Union Investments will be deliberated upon in the absence of those critical of them. The fact that they may subsequently obtain redress at an undetermined period, in my view does not preclude them from being present and participating in those deliberations before the reports concerning these items on the agenda are adopted.

Prejudice, on this issue, exists in having a meeting that you are entitled to participate in personally, or through a representative of your choice take place in your absence and to your exclusion. The prejudice of not being heard and being expressly excluded in a meeting that you qualify or may qualify to attend cannot be redressed by your right to set aside the decisions taken in your absence.

Firstly, various factors may affect the holding of the meeting of the 13th-14th November 2014. These factors may be deliberately engineered or may follow the same fate that befell the failed meeting of the 10th-11th October 2014.

Secondly, the reviewing of the resolutions or decisions taken in the meeting of the 17th-18th November 2014 may be too late, due to the fact that the Audited Financial Statements, if adopted, may already have been forwarded to the Department of Labour, and recalling them may have consequences that are fatal for or too drastic for the union.

Resolutions on how to deal with the Investments may have been taken at this meeting. The reversal of those decisions at the 13th-14th meeting may also result in unforeseen consequences.

Should the meeting have proceeded and the applicants subsequently apply to set aside those decisions in court and the matter became opposed, it is more than likely that the date for the hearing of such opposed application will be in February or March 2015.

All these facts, in my view, amount to prejudice on the part of the applicants. The fact that they get relief five or six months later does give them substantial redress.

COSTS

- [5] This is an application brought by a union, albeit branches thereof, against itself. A costs order will entail a union paying costs against itself by taking from the one pocket and putting the money into the other pocket.

This issue was not raised in the papers, nor was it addressed by counsel in argument.

The order I confirm therefore is the following:

1. The applicants are granted leave to move this application as a matter of urgency, disposing with the forms and services provided for in the Uniform Rules.

2. The National Executive Committee of the CEPPWAWU is interdicted and restrained from holding the deferred meeting on the 17th October 2014 and from conducting the meeting and taking any resolution of the NEC on such occasion.
3. The NEC is interdicted from taking any further decisions without the participation of the applicants' delegates, or until such time as the regional congresses (applicants and the re-election of regional office bearers) have taken place.
4. No costs order is made.

N D TSHABALALA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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