

SOUTH AFRICA / JUDGMENT

Elias and Others v Morifi and Others (J1246/21) [2021] ZALCJHB 350; (2022) 43 ILJ 382 (LC) (15 October 2021)

[2021] ZALCJHB 350

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J1246/21

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THE

LABOUR COURT OF SOUTH AFRICA

(HELD

AT JOHANNESBURG)

Not

reportable

CASE

NO: J1246/21

In

the matter between:

MOKHONOANA

THINTA

ELIAS First

Applicant

BONGAZA

MANGO Second

Applicant

MOLEFHE

NEO Third

Applicant

MANDLA

MASHININI Fourth

Applicant

MAOTO

ISAAC

PHADIME Fifth

Applicant

JAROME

BOCK Sixth

Applicant
CLAUDE
MARKS Seventh
Applicant
ELIAS
MIGA Eighth
Applicant
PIETER
TOPP Ninth
Applicant
And
KOENA
RAYMOND
MORIFI First
Respondent
HALALISANI
GUMEDE Second
Respondent
JOEY
HECTOR Third
Respondent
KAPTEIN
JOHANNES Fourth
Respondent
MABUNDA
MARIAM Fifth
Respondent
TSHISEVHE
JOSEPH Sixth
Respondent
PAWUSA Seventh
Respondent
Hearing: 14
October 2021

Date of judgment: 15 October 2021

JUDGMENT

VAN NIEKERK J

[1] The applicant approaches the Court on an urgent basis, seeking the following relief:

1.1 Declaring that:

1.1.1 the National Executive Committee (“NEC”) meeting held on 16th and 17 September 2021 was unconstitutional (in terms of the Constitution of PAWUSA), invalid and of no force and effect;

1.1.2 the purported decisions of the Respondents in the meeting of the NEC meeting held on 16th and 17th September 2021 were unconstitutional (in terms of the Constitution of PAWUSA) invalid and of no force and effect and are, accordingly be set aside;

1.1.3 the purported decisions of the Respondents that Mokhonoana Thinta Elias, the “President” of PAWUSA be placed on suspension which was taken at the meeting of the NEC held on 16th and 17th September 2021 and that disciplinary action be taken against him are invalid, unconstitutional (in terms of the Constitution of PAWUSA) and of no force and effect and accordingly be set aside;

1.1.4 all other decisions taken at, and all consequences that flowed from and actions that were taken consequent upon the meeting of NEC held on 16th and 17th September 2021 be invalid, unconstitutional (in terms of the Constitution of PAWUSA) and of no force and effect and accordingly be set aside;

1.2 Reviewing and setting aside the purported decision taken by the Respondents at the meeting of the NEC held on 16th and 17th September 2021 to place Mokhonoana Thinta on suspension;

1.3 The Respondents, except the seventh Respondent be ordered to pay costs of this application jointly and severally the one paying the other to be absolved on an attorney and client scale.

1.4 Further and/alternative relief”.

- [2] The application is opposed on a number of grounds, including what the respondents assert to be a lack of jurisdiction. I am indebted to the respondents’ counsel for his comprehensive heads of argument, on which I have drawn liberally in the preparation of this judgment.
- [3] The applicants are all office-bearers of the seventh respondent, the latter being a trade union (PAWUSA). The respondents are also office-bearers of PAWUSA. PAWUSA has a constitution that governs its affairs, which constitution is binding on the parties. The PAWUSA constitution regulates the powers, functions and processes of PAWUSA’s National Executive Committee (the NEC).
- [4] Prior to February 2021, members of the NEC were made up of 6 office-bearers and 9 chairpersons of the different provinces in South Africa. During a meeting of the NEC of February 2021, it was resolved that provincial secretaries must form part of the NEC, for operational reasons. The first applicant as President of PAWUSA signed the organisational report that was adopted by the NEC.
- [5] On 17 August 2021, the first applicant as general secretary of PAWUSA invited members of the NEC to an NEC meeting that was scheduled for 16 and 17 September 2021. The invitation was sent to the 6 relevant national office-bearers, the 9 chairpersons of provinces, and the 9 provincial secretaries. The inclusion of the provincial secretaries was in line with the NEC’s decision of February 2021.

- [6] One of the items on the agenda for the NEC meeting was “Divisions in the union – NOB & NEC, which have a potential of spilling over to the PECs”. Some of the applicants undertook to attend the NEC meeting. Letters of time-off were issued to the attendees, in order for them to secure permission from their employers to attend the meeting. Travelling and accommodation arrangements were made for the NEC meeting, at a cost to PAWUSA and ultimately its members. At some point in time, it seems the applicants made a U-turn. They no longer wanted to attend the NEC meeting. They devised a plan to derail the NEC meeting.
- [7] On 10 September 2021, the first respondent as General Secretary received requests from two-thirds of the chairpersons of the provinces, for a special NEC meeting that had to happen on 13 September 2021. The special NEC meeting was to discuss “Divisions in the union – NOB & NEC, which have a potential of spilling over to the PECs” and the suspension of the first respondent as General Secretary for allegedly violating the PAWUSA constitution or being a constitutional delinquent. The requests were not made by the provincial executive committees of PAWUSA. No resolutions of these committees have been furnished by the applicants.
- [8] The first respondent was obliged by the PAWUSA constitution to schedule a special NEC meeting on 3 or more days’ notice. Issuing an invitation to a special NEC meeting on 10 October 2021 for a meeting scheduled for 13 September 2021 would not be in line with the PAWUSA constitution. And there was already an NEC meeting scheduled at a cost to PAWUSA and its members for the same week. As such, the first respondent did not schedule the special NEC meeting.
- [9] It seems on 11 September 2021, the first applicant as President scheduled the special NEC meeting for 13 September
2021. No invitation to this meeting has been provided by the applicants and it is not clear whether such an invite was sent to any of the respondents. No time-off letters have been provided by the applicants to prove that they were authorised by their employers to attend the meeting. No attendance register has been produced to prove that this meeting was attended.
- [10] On 16 and 17 September 2021, the NEC meeting that was scheduled by the first respondent took place. One of the resolutions of that meeting was that the first applicant as President of PAWUSA be suspended pending the outcome of disciplinary action against him. The first applicant was notified of his suspension on 18 September 2021. On 4 October 2021, the first applicant signed his founding affidavit in this matter.
- [11] On 7 October 2021, the applicants filed their application at Court. Their application seeks no relief against PAWUSA and it does not allege a dispute between the applicants and PAWUSA. The respondent has raised a point in limine to the effect that the court has no jurisdiction, since the dispute that serves before the court is not a dispute between a trade union on the one hand, and one or members of the trade union on the other.

[12] Section 158(1)(e) of the LRA provides the following:

“(1) The Labour Court may –

...

- (e) determine a dispute between a registered trade union or registered employers’ organisation and any one of the members or applicants for membership thereof, about any alleged non-compliance with –
 - (i) the constitution of that trade union or employers’ organisation (as the case may be); or
 - (ii) section 26(5)(b)” (own emphasis).

[13] The requirements that must exist for section 158(1)(e) of the LRA to find application are thus the following:

- (i) there must be a dispute between a trade union and its members; and
- (ii) regarding non-compliance with either the union’s constitution or section 26(5)(b) of the LRA.

[14] Section 26(5)(b) of the LRA relates to a trade union that is party to a closed shop agreement denying an employee membership or terminating the membership of an employee. This section has no application in the present instance.

[15] Further, there is no dispute between PAWUSA and the applicants in this matter. This is rather a dispute between office-bearers of PAWUSA inter se. In Seatlholo the Labour Court (per Lagrange J) applied this requirement in the following terms:

“[15] ... A plain reading of the terms of section 158 (1) (e) is that, the labour court is only empowered to deal with disputes over compliance with a union’s Constitution which arise between a member or members of the union and the union itself. An employee of the union cannot rely on this provision to assert rights as an employee, but must rely on remedies in contract, or remedies for unfair dismissal or unfair labour practices. By contrast, in the absence of section 158(1) (e) members of a union

would have no remedy in this court to enforce the contract of membership between them and their union which is embodied in the

union’s Constitution and would have to approach the high courts to do so as members of a voluntary association.

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

- [16] On the applicant's version, there is no dispute between them and the union. Although the union is cited as the seventh respondent, the founding affidavit makes clear that no relief is sought against the union, which is cited only because it has an interest in the outcome of the application. This position is confirmed in the replying affidavit where the deponent makes clear that the applicants have no dispute with the seventh respondent qua trade union. The dispute is one between factions within the union, and not one between any one or more members of the union and the union itself. It follows that the dispute before the court is not one that falls within the jurisdictional footprint established by section 158 of the LRA, and that the application stands to be dismissed on that basis.
- [17] In so far as costs are concerned, the court has a broad discretion to make orders for costs in terms of the requirements of the law and fairness (section 162 of the LRA). This court does not ordinarily make orders for costs in circumstances where genuinely aggrieved employees pursue legitimately felt grievances against their employers, or where there is a collective bargaining relationship that stands to be prejudiced by the granting of a costs order. The present case falls into neither of those categories. The applicants have pursued relief which this court cannot grant in circumstances where there is at least one existing judgement that makes clear this court's lack of jurisdiction in disputes such as the present. The respondents have been required to oppose proceedings, on an urgent basis, that ought never have been initiated. There is no reason, having regard to the requirements of the law and fairness, to deny them their costs.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Mr M E Phoko of Moloko Phoko Attorneys

For the respondents: Mr V G Mkwibiso of DM5 Inc

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Prepared on 11 October 2026 · Esheria