

SOUTH AFRICA / JUDGMENT

Joni v Association On Mine Workers And Construction Union and Others (JS 413/20) [2021] ZALCJHB 470 (22 November 2021) [2021] ZALCJHB 470

COURT

Labour Court Johannesburg

BEFORE

Mabaso

CASE / FILE NUMBER

JS 413/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case

No. JS 413/20

In

the matter between

NKOSIKHO

JONI Applicant

and

ASSOCIATION

ON MINE WORKERS AND

CONSTRUCTION

UNION First

respondent

JOSEPH

MATHUNJWA N.O. Second

respondent

JIMMY

GAMA N.O. Third

respondent

JEFFREY

MPHAHLELE N.O. Fourth

respondent

AMCU,

MPUMALANGA-NKANGALA

REGION Fifth
respondent
AMCU
WESTRAND REGION Sixth
respondent
AMCU
SEDIBENG REGION Seventh
respondent
AMCU
MPUMALANGA EHLANZENI REGION Eighth respondent
AMCU
LIMPOPO EAST REGION Ninth
respondent
AMCU
LIMPOPO WEST REGION Tenth
respondent
AMCU
NORTH WEST REGION Eleventh
respondent
AMCU
CAPE TOWN REGION Twelfth
respondent
AMCU
EASTERN CAPE REGION Thirteen
respondent
AMCU
KZN MIDLANDS REGION Fourteenth
respondent
AMCU
DURBAN METRO REGION Fifteenth
respondent
AMCU
KZN COASTAL REGION Sixteenth
respondent
AMCU
NORTHERN CAPE REGION Seventeenth
respondent
AMCU
GERT SIBANDE REGION Eighteenth
respondent
AMCU
KLERSDORP REGION Nineteenth
respondent
AMCU

FREE STATE REGION Twentieth
respondent
THE
COMMISSION FOR CONCILIATION
MEDIATION
AND ARBITRATION
Twenty
first respondent
THE
REGISTRAR OF LABOUR
RELATIONS Twentysecond
respondent
THE
MISTER: DEPARTMENT OF EMPLOYMENT
AND
LABOUR, REPUBLIC OF
SOUTH
AFRICA Twenty
fourth respondent
AMCU
TSHWANE REGION Twenty
fifth respondent
AMCU
JOHANNESBURG METRO REGION Twenty sixth
respondent

Heard: 25 May 2021

Delivered: 22 November 2021

JUDGMENT

MABASO, AJ

Introduction:

[1] In Isithebe,^[1] the Constitution Court said the following about role players in trade unions, "The identification and pursuit of attaining certain goals makes associations worthy of protection...from external actors who may not share these goals."

[2] The issues for determination in this application primarily concern the interpretation and application of the First Respondent ("AMCU")'s Constitution vis-à-vis the Labour Relations Act 66 of 1995 ("the LRA"), as the Applicant, Mr Nkosikho Joni ("Mr Joni"), has approached this Court seeking an order inter alia:

"That it is declared that the purported election of [both the second and third respondents] ..., the president of the first respondent held at Birchwood Hotel in September 2019 is ultra vires the applicable constitution of the first respondent, and the provisions of section 213 of the Labour Relations Act and is accordingly unlawful, unconstitutional and invalid. [3. And set aside][2]

That it is declared that the decision of the Central Executive Committee of the first respondent passed in the meeting held on Thursday

12 March 2020 and announced by the first respondent's Treasurer-General..., on the same date to the effect that the vote of no confidence in the applicant has been passed is declared ultra vires and inconsistent with the provisions of the first respondent's constitution, is unlawful, unconstitutional and invalid, [5. And set aside][3]

That it is declared that the first respondent has failed to carry out its functions in accordance with the constitution and the Labour Relations Act 66 of 1995...[4]

That it is declared that it is just and equitable that the first respondent be placed under administration in the hands of the Commissioner to be appointed by the above Court at the instance of the 22nd respondent. [5]

That the first respondent's decision or resolution dated 4 June 2020 to the effect that the removal of the applicant from the office of former Deputy President of the first Respondent and to expel the former Deputy President...the applicant, as a member of AMCU is approved and ratified and is hereby declared unlawful, unconstitutional, and is accordingly set aside." [6]

Preliminary

Issues:

Further affidavits

[3] Following Mr Joni delivering a replying affidavit in these proceedings, the Respondents[7] delivered a "supplementary affidavit". This was done without any leave of this Court being sought, so this affidavit is not considered in this application. Cf. Reddi and Others v Mercedes-Benz South Africa Limited and Others (J3053/14)

[2017] ZALCJHB 362, at para 32-34 and 37. Whereas Mr Joni delivered an application to submit further affidavit wherein explaining what happened following the vote of no confidence (detailed in this judgment), the Respondents have delivered an answering affidavit to the Applicant's affidavit. The issues raised by Mr Joni in this affidavit are related to what transpired following the close of pleadings in the main case. I see no prejudice suffered by the Respondents considering relevant principles, and I cannot entirely agree with the contention by Respondents that this affidavit introduces a new cause of action. I, therefore, grant Mr Joni leave to submit the further affidavit.

Locus Standi

Prayers 7 and Additional Prayer

- [4] In their opposition, AMCU, Messrs Joseph Mathunjwa ("Mr Mathunjwa"), Jimmy Gama ("Mr Gama") and Mr Jeffrey Mphahlele ("Mr Mphahlele") in the answering affidavit signed by Mr Mphahlele[8] contend that Mr Joni has no locus standi to seek and obtain prayers 1 to 3, 7 and 8 of the notice of motion (declaring the election of Messrs Mathunjwa and Gama unlawful,

unconstitutional and invalid so be set aside; and appointment of an administrator). Relating to prayer 4, they contend that Mr Joni has failed to make a case that sustains this relief. I shall deal with these issues below without any sequence, as they are intertwined.

- [5] Mr Joni, in paragraph 3,[9] avers that "I am the applicant in these proceedings", so this indicates that this application is not brought on behalf of particular groups but in his capacity. This Court may make an order in favour of an applicant if such applicant is the right person to seek such an order, meaning he must have sufficient interest in the subject matter, which interest must be actual. The right to approach this Court is either explicitly regulated by section 38 of the Constitution of the Republic,[10] common law or statutory promulgated; for example, section 103A[11] succinctly provides that application to put a trade union under administration has to be brought by the Twenty-Second Respondent (the Registrar) or the trade union concern.[12] Relating to common law, it has to be moulded by the Constitution of the Republic of South Africa. Necessary locus standi in a matter before a court must be established by facts of the case, as was held by the Constitutional Court in *Ferreira v Levin NO and others*; *Vryenhoek and others v Powell NO and others*[13] ("*Ferreira*"), at para 231. The locus standi has to be determined first since it determines whether a court should consider merits to points raised or not.
- [6] As Mr Joni is bringing this application on his behalf, he has to show in the papers that he has a direct interest in the relief sought, and the relief is further actual and current. So, as a result, it is expected of him to show that the decision/action directly affects him, as the Constitutional Court in *Giant's case*[14] said the following relating to this rubric:

"These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

- (a) To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct

interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

- (b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

- (c) The interest must, however, be real and not hypothetical or academic.

Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour affording standing. Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

- (f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here, a measure of pragmatism is needed."
- [7] Mr Joni seeks an order that this Court directs the Registrar to appoint a Commissioner as an Administrator. This type of an Order is statutory regulated, as shown below in this paragraph. It has to be stated at this stage that the Registrar is the body which registers trade unions in terms of the provisions of the LRA, the same Act which prescribes that this Court can only make a just and equitable order to "administer a trade union" if: (a) a trade union brings an application, as per s 103A(1)(b), and (b) a resolution from that trade union was made. In casu none of the two requirements has been demonstrated by Mr Joni. Logically, such a trade union would detail the reasons behind which

resulted in the resolution being made.[15]

- [8] The CC in Giant's case, at para 32-4, demonstrates that the inquiry regarding the issue of locus standi and the substance of the case are different. As it held thus, inter alia, that,

"An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated..."

- [9] Clearly, as the locus standi to seek an order in terms of provisions of s 103A of the LRA, an applicant must be either the trade union or the Registrar and in this matter, Mr Joni has failed to meet this requirement, instead, he moved for this prayer on his personal capacity, so he has no such locus standi.

Prayer 1 to 3

- [10] As indicated above, per Giant's case, the Con-Court directs an applicant to show that his interests are affected. Mr Joni asserted that the alleged unconstitutionality of both Messrs Mathunjwa's and Gama's appointments affect his interests. A decision was subsequently made in a meeting that Mr Mathunjwa should have presided over, but Mr Gama did. As demonstrated below, this meeting resulted in Mr Joni's vote of no confidence passed and subsequent expulsion from AMCU. His main issue is that the meeting was not properly constituted, and a decision about his status within AMCU was made.

- [11] The Labour Appeal Court (LAC) indicated that in determining a party's legal standing number of factors have to be taken into account, such as (a) applicable legislation, (b) the nature of the relief sought,
- (c) whether there was any other "reasonable and effective manner" to challenge a decision. See *Merafong City Local Municipality v South African Municipality Workers Union ("SAMWU") and Another*.^[16]
- [12] According to Mr Joni and the Constitution of AMCU (the Constitution), the meeting that is being challenged should have been presided by Mr Mathunjwa. See clauses 20.2.1 of the Constitution of AMCU. Mr Joni could not attend because he had been on suspension. Furthermore, Mr Joni is asking that the positions of the President and the Treasurer-General to be declared invalid and set aside; which according to the Constitution, the presidency is a decision-maker, and there is nothing in the Constitution that suggests that he will have further recourse except to go via the same presidency, that has all the powers between National Congresses. In my considered view, there is no effective way that Mr Joni would have to challenge this decision rather than approaching the competent Court as is the case here. As a result, I conclude that Mr Joni has a locus standi to challenge the validity of those two positions. Furthermore, generally, a member of a trade union has a right to challenge any

decision that is contrary to the constitution of the same trade union because such a decision in a way affects his rights.

- [13] The Respondents further raise the point that Mr Joni did not object to the nomination requirements, resulting in Messrs Mathunjwa's and Gama's elections. Therefore, they submit that Mr Joni validated such decisions and is prevented from objecting through this application. They rely on *Gohlke & Schenider v Westies Minerale Beperk* 1970 (2) SA 685 (A) ("Gohlke").^[17] Briefly, the case of Gohlke relates to what in common law is called unanimous assent, which is allowing shareholders to approve decisions without requiring a properly constituted meeting and/or without having to observe other prescribed formalities. I must indicate that this argument by the Respondents is misplaced as the facts in that matter and in casu are not the same. Here we are talking about a trade union whose operation should comply with the provisions of the LRA. Furthermore,

one will have to take into account that Mr Joni is bringing this application because Mr Mathunjwa is responsible for the running of the organization, which among other things, includes the calling of the meeting in question, so Mr Joni cannot be prevented to bring an application of this nature because he kept quiet at the time of election. However, I must indicate that Mr Joni's inaction before the September 2019 meeting has the effect relating to the type of order issued in this judgment, as I explain later in this

judgment.

Relevant background and analysis:

Membership

- [14] A role of a trade union's Constitution in South Africa is to give effect to the legitimate policies of that trade union, which assists the trade union to map out qualifications as to who should be a member and circumstances for membership termination.[18] In addition, the Constitution of a trade union will have to “prescribe a procedure for nomination or electing office-bearers”.[19] It is relevant at this juncture to state that a trade union in terms of section 213 of the LRA is defined as "an association of employees," furthermore that Mr Mathunjwa, at the time of his election as a president in September 2019, was not an employee but "he serve[d] [AMCU] on a full-time basis", and he is in charge of AMCU as I demonstrate below.
- [15] The Constitution is an off-spring of the LRA, so all definitions and or any ambiguity in the Constitution will be clarified through the LRA. This is being confirmed by clause 34.1 of the Constitution, which provides that each word or term defined will have the same meaning as in the LRA. In terms of clause 20.2.1.1 of the Constitution, a president is defined as “a member elected in accordance with [AMCU] constitution and hold office as an office bearer in terms of [s 213 of the LRA]”.[20] The Constitution defines “Office Bearer” as: “an elected member of the Branch, Region, National and Central Executive Committee.” The Respondents contended that Mr Joni’s reliance on clause 20.2.1.1 is unsustainable and argued that the definition of “Member in good Standing” covers office bearers who are not employees. I must indicate that the Respondents argument in this is incorrect because the same Constitution defines this latter phrase thus: “an employee who is paying his/her stop order subscription deductions in favour of AMCU on a monthly basis and those office bearers who are currently in the Organisation”.[21] For one to be an office-bearer, one has to be a member. Moreover, the Constitution clearly states that a condition of being a member you need to be employed in a sector and or conditions as are set in the following paragraphs under this topic.
- [16] In terms of the Constitution, membership is open to any worker who is "eligible" to join it and subscribe to its terms. This Constitution states explicitly that this will also apply to associates and "honorary members".[22] The word eligible is not defined in the Constitution, so it has to be read together with all relevant clauses of the Constitution; for example, clause 7.1.1 provides thus:

"Eligibility

Every worker employed [23]in the Mining, Energy, Construction, Transport, Security, Metal and Engineering, Automobile, Manufacturing, Chemical and Allied

Industries shall be eligible to join AMCU." (own emphasis)

- [17] In terms of clause 7.1.2 read with 7.2.2 of the Constitution, the worker becomes a member upon acceptance of their membership by the Branch Executive Committee ("the BEC"), Regional Executive Committee ("the REC") or the National Executive Committee ("the NEC"). Clause 7.2.1 states that the worker's application form shall be lodged with the branch secretary "where the worker is employed". Reading these clauses, three requirements have to be met, namely (a) application, (b) submitted to the Branch Secretary, (c) where he is employed. However, the Honorary members become eligible once the NEC grants such status and such persons have "no voting rights". It is important to mention at this stage that in terms of clause 19.3.5 of the Constitution, a president of AMCU "shall have a casting vote". So, the Constitution does not indicate that an honorary member may be an office bearer if such member is not employed in the sector.
- [18] The same Constitution provides provisions relating to termination of membership. As it states that membership ends by
- (i) resignation and (ii) unemployment in the relevant industries; however, there is an exception to the latter in that a member continues to be eligible for "Associate Membership", [24] and or that member is re-employed in the relevant industries within 14 weeks and pays a subscription, or where AMCU is in the process of disputing member's dismissal until legal proceedings are finalized, or AMCU withdraws its involvement. [25]

National Structure/Powers of Mr Mathunjwa

- [19] The NEC of AMCU consists of the President, Deputy President, the General Secretary, the Deputy General Secretary, and the Treasurer General, National Chairpersons of Health and Education, the National Organiser and Regional Chairpersons and Secretaries. [26] The Top Five term of office is five years, and a member shall be eligible for re-election at the next National Congress. [27] The National Congress is the supreme governing body of AMCU; however, between National Congresses, the structure that is in place would be the CEC, which according to the Constitution, is responsible for dealing with any major organizational changes, policy reviews and constitutional amendment in other urgent matters of national importance.
- [20] The Constitution defines the President as a member elected per the AMCU's Constitution and holds office as an "office-bearer" [28] in terms of section 213 of the LRA. Some of the duties of the President is to appoint senior officials of AMCU in consultation with the NEC; exercise supervision over the work of all the NEC members "who shall be accountable to him"; he deploys and redeploys any official and office bearers of AMCU; he is involved in such a decision as he is the one who directs General Secretary. In essence, the President is the engine of AMCU as he is only required to report to the NEC, CEC and National Congress on the organizational political direction impacting AMCU. Even the treasurer-general performs any other duties directed to him by the President.

September Congress ("Birchwood Congress"): the election of both Messrs Mathunjwa and Gama:

- [21] In September 2019, an elective congress of AMCU was held in Ekurhuleni wherein Messrs Njoni, Mathunjwa, the Secretary-General and further members of the Top Five were elected. Mr Joni contends that the election of Mr Mathunjwa as President of AMCU was against the provisions of the Constitution and the LRA, so it is unconstitutional and unlawful and invalid. It has to be set aside by this Court. In support of this, Mr Joni avers that Mr Mathunjwa is not an employee as defined by section 213 of the LRA, as he is not employed in any of the sectors identified in the Constitution of AMCU; in addition, the LRA defines a trade union as an association of employees with the principal purpose is to regulate relations "between employees and employers", so Mr Mathunjwa does not qualify as a member as per the Constitution, accordingly "not eligible to be a member and to be the President of [AMCU]".
- [22] In contrast, the Respondents contend that Mr Mathunjwa was a President of AMCU before the elections in question, so he was eligible for re-election in the Birchwood Congress considering clause 19.2.1 of the Constitution. On the opposite of Mr Joni's contention is that his interpretation of the Constitution is unsustainable as Mr Mathunjwa is paying a subscription, at the time of the election, was serving AMCU. Hence, he qualified the meaning of member in good standing as per the Constitution. To be elected in the position of National Office Bearer, one is not required to be "an employee as defined at the time of election". Furthermore, Mr Mathunjwa accepts that he is not an employee as the Respondents say: he worked for Douglas Colliery/South32. By 2013, he served AMCU as a full-time shop steward which it happened that he and Mr Gama were retrenched. According to the policy and practice in AMCU, when a full-time shop steward is retrenched during his tenure of office "remains in office for the remainder of his/her term of office".
- [23] I am mindful that Mr Joni approached this Court by way of motion proceedings; he has an onus of proof in these proceedings.

Furthermore, that in *Administrator, Transvaal and Others v Theletsane and Others* [1991] 4 All SA 132 (AD), the Appellate Division held that an applicant is not entitled to make out a case for relief on the respondents own averments unless the former provided a proper foundation for relief in the founding papers.

- [24] The Respondents have accepted that both Messrs Gama and Mathunjwa were not employees as defined by the LRA at the time of their election. At this juncture, it is prudent that I highlight that considering clause 7 of the Constitution, there are two types of groups eligible to be members of AMCU, namely those employed in the sector[29] (as per clause 7.1.1) and associate and honorary members[30], as partly highlighted above under relevant background. Both Sector Membership and Status Membership are eligible to be members of AMCU. Properly scrutinizing the papers before this Court, it is not in dispute that Mr Mathunjwa held a Sector Membership at some stage; now the Respondents suggest that his Sector Membership was extended by the practice and policy following his dismissal, following his dismissal by his former employer.

Sector Membership

- [25] Firstly, I propose dealing with what the Respondents are saying is a practice/ policy of AMCU, that an official will be allowed to finish his terms even if dismissed by their employer. At this juncture, I must say that AMCU is within its rights to develop internal policies and practices to have an effective organizational structure; however, the same shall not be contrary to its Constitution allowed by the Registrar for its registration. So any practice or policy of a trade union will pass muster if in line with its Constitution and the LRA; if it is contrary to such foundations, it will be invalid.[31]
- [26] Moreover, as parties are at war about the interpretation of the provisions of the Constitution, this Court will have to follow the tools of interpretation of documents as compressed in *National African Federated Chamber of Commerce and Industry and others v Mkhize and others* [2015] 1 All SA 393 (SCA) read with *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) and *Renaissance BJM Securities (Proprietary) Limited v Grup*
- [2016] 2 BLLR 135 (LAC), where the SCA gave guidance relating to the interpretation of clauses and words in a document as in para 21 held thus:
- "It is trite that the Constitution of a voluntary association together with all the rules or regulations collectively forms the agreement entered into by that association's members. The Constitution must be interpreted in accordance with the ordinary rules of construction applying to contracts in general. This requires giving effect to the plain language of the document, objectively ascertained within its context. In the course of interpretation, preference should be given to a sensible meaning over "one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."
- [27] The Respondents delivered no written documents supporting the alleged practice or policy, e.g. showing its resolution, if it exists, or providing names of officials exercised of such because practice is something that is usually done more like a tradition or custom. On the contrary, Mr Joni has provided an example of one of the officials, Mr Tshisa, who was dismissed by his then-employer while occupying a position within the AMCU. It is submitted that AMCU did not pursue Mr Tshisa's dismissal as he settled the dispute with his then-employer; as a result, AMCU issued a notice that he should relinquish his position as he was no longer an "employee" and referred to the relevant provisions of the Constitution. Same as referred in this matter.
- [28] I accept that the Constitution allows that a dismissed member to continue to be a member in good standing if AMCU is challenging the dismissal of such an employee, it is specific that if the member is dismissed and his dismissal was in dispute, it continues to be a member in terms of clause 7.4.2 of the Constitution. By default, such an official will continue to occupy a position that he held at the time of dismissal, and then this would make sense because if the dismissal dispute is ruled in his favour, he will continue to be in that position. Now the proposition by the Respondents that if an official is dismissed by his employer, he qualifies

for re-election, as he continued to be in the position that he was at the time of dismissal, is correct, but only if AMCU is challenging such dismissal. In this matter, Mr Mathunjwa has not shown that following his dismissal in 2013, AMCU challenged his dismissal and that by September 2019, there was still a pending dismissal dispute by AMCU as required by the Constitution.

[29] In this matter, both Messrs Mathunjwa and Gama confirmed that their employer dismissed them in 2013 due to the retrenchment, and the papers before this Court are not such that AMCU challenges such retrenchment. Therefore, the submission that a person will continue to be in the position after the dismissal, even if it is not challenging the dispute, is contrary to the practice of AMCU, as demonstrated in the matter of Mr Tshisa. I deal more with Tshisa's case in the following paragraph.

[30] Mr Joni, through replying affidavit, indicated that in January 2018, Mr Tshisa, who was Gauteng Regional Chairperson of AMCU, worked for a company that falls within the scope of the Union. Mr Tshisa was notified that his relationship with AMCU was terminated following his dismissal by his then-employer, and AMCU did not challenge his dismissal as he had accepted a settlement agreement, so Tshisa was advised as follows:

"a good member standing is defined as, in short, a member who is not only up to date with their subscription but who is an employee....in keeping with the provisions of the AMCU Constitution, we hereby

notify you, that you have since become ineligible to occupy the positionor any other constitutional structure of AMCU"[32] (Own emphasis)

[31] I must indicate that Mr Joni, by submittal of this letter, is not introducing new facts in replying but responding to the allegations made by the Respondents in the answering affidavit that there is a practice, as they have the burden to show that Messrs Mathunjwa and Gama (I deal more about Mr Gama's case below) were in their positions lawfully and there is no violation of the Constitution, as Mr Joni made undisputed averments in the founding affidavit that Mr Mathunjwa was not an employee as defined by the LRA. Considering the case of Mr Tshisa, I conclude that Mr Tshisa's case is in line with the Constitution, specifically clause 7. As indicated above that, a person becomes an employee and a member before becoming an official. Reading the Constitution, I could not find any section that allows an official to be eligible for re-election even after being dismissed by their employer where AMCU is not challenging such dismissal. At the time of the election in September 2019, Mr Mathunjwa was not an employee, so he could not qualify as a member of AMCU even if he was paying a subscription; in amplifying this, the Tshisa letter confirmed the correct position of the Constitution.

Status Membership

[32] A person is granted this status by the NEC, which reports to the President, on the basis of such person's contributions to AMCU and its aims and objectives.[33] The Constitution does not suggest that such a person shall be a sector member before considering such status. It is further noted

that there is no definition of the "associate and honorary member". The general meaning of honorary member is someone

allowed to join an organization without applying or without having the usual qualification but is a conferred honour. This general

meaning is consistent with clause 7.1.3 of the Constitution, as this member has no voting rights.

[33] To be eligible to be part of the NEC, a person must have been a member in good standing for at least three conservative years, have been serving on the previous NEC, and have previously served at both branch and regional levels. See clause 22.7.1 of the Constitution. The Respondents also rely on clause 34.1, which inter alia provides that "Member in Good Standing" means

"an employee who is paying his/her stop order subscription in favour of AMCU on a monthly basis and those office bearers who currently serve in the Organisation".[34]

[34] It is clear that on the part whereby members define people standing as "an employee", Mr Mathunjwa does not fit in this category because he is not an employee, by his own admission. I say this because the LRA defines an employee as "any person who works for another person and who receives or is entitled to receive any remuneration". In this matter, Mr Mathunjwa was dismissed in 2013 (and no indication in the papers that there is a dispute relating to his dismissal declared by AMCU and is still pending). Based on the information before this Court, Mr Mathunjwa is not employed; therefore, even regarding subscription is not explicit where it is coming from because he is not an employee. Although uncontroverted, Mr Mathunjwa is "a paid-up member of AMCU and has been a paid-up member of AMCU since its inception in 2001". As Mr Mathunjwa is not an employee and his employer retrenched him disqualifies him from being a member of AMCU; its Constitution indicates that a dismissed employee only qualifies to be an employee if AMCU challenges his dismissal. Section 95(5) of the LRA prescribes

the prescribed qualifications for and admission to membership and provides for membership termination. So, clause 7.4.2 indicates that a person in the position of Mr Mathunjwa, as he was dismissed in 2013, lost his membership 14 weeks after becoming unemployed in the relevant industries unless (a) that is eligible for Associate membership, (b)

re-employed in the relevant industries, or (c) "If AMCU is in the process of disputing the member's dismissal".

[35] Nowhere in the Constitution is suggested that a person remains a member after dismissal due to his status as "honorary

membership". I accept that clause 19.2.1 provides that a serving office-bearer is "eligible for re-election at the next National Congress". Considering that Mr Mathunjwa was dismissed in 2013, clearly, his stay as a President after that, since there is no averment that the above three exceptions were applicable, was no longer in compliance with the Constitution. Therefore, he automatically was not eligible to stand and or be elected as the President of AMCU. Consequently, AMCU cannot have people who are not employees and let alone a person whom even the NEC reports to him, while such person is not an employee as the LRA set out that a union should be an association of employees. See *Lufil Packaging (Isithebe) (A division of Bidvest Paperplus (Pty) Ltd) v Commission for Conciliation, Mediation and Arbitration and others*

[2019] 11 BLLR 1212 (LAC) at para 34, also *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd*.^[35]

[36] Based on the afore-going, it is, therefore, my conclusion that the election of Mr Mathunjwa was unlawful as it is against the Constitution of the same trade union, therefore has to be set aside.

[37] Now the question remains as to whether the set aside should be retrospective or prospective.

[38] It is prudent to follow how other Courts have dealt with matters that raise issues similar to this (the setting aside an unconstitutional decision). In *Minister of Police and Others v Kunjana*,^[36] the Constitutional Court, whereby it had been invited to confirm constitutional invalidity of a specific section of legislation passed by a parliament, proceeded to declare such invalidity from the date of the judgement and refused to backdate it. In supporting this, that Court concluded that the *S v Zuma* ("Zuma")^[37] was the authority to prospective setting aside as in the Zuma matter, it was held thus,

"so as to avoid the dislocation and inconvenience of undoing transactions, decisions and actions taken under that statute. This Court's power to order otherwise in the interest of justice and good governance should be exercised circumspectly. In some cases (and I believe that this is one of them), the interest of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the new".

[39] In *Kunjana*,^[38] the Constitutional Court, in supporting its decision of making a prospective order, one of the things that it said/took into account

was that,

"the respondent was no doubt aware that legislation existed to prevent and combat drug related offences and her institution of proceedings to challenge such legislation some two and a half years after the searched and seizures in question were made do not entitle her to an exemption from their application...".

[40] Now in this matter, there is a possibility that some decisions have been taken by Mr Mathunjwa in the running of AMCU, as reading the Constitution, he is the engine of AMCU, and he runs AMCU and is even responsible for the supervision of its finances, and even all

members of the NEC reports to him. There are engagements before the election that took place, as placed before this Court that nominations were done and subsequent to that the President was elected unopposed together with Mr Joni who was elected as the Deputy President. No averment was presented before this Court that Mr Joni objected to at that time. He only raised this objection when the tables turned against him due to uncontested allegations of corruption and fraud, especially towards finalizing the same election he is now challenging. Under the circumstances, as the Constitutional Court, as stated in the preceding paragraph, said that “the interest of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the

desirability of a smooth transition from the old to the new”, in this matter I believe that the order of setting aside of Mr Mathunjwa’s election to be retrospective from 2019 will not be in the interest of justice, but prospective order is an appropriate one. Furthermore, courts are expected to make a just and equitable remedy. Like recently in Langa,[39] the Constitutional Court, setting aside a decision of a Limpopo Premier, applied the aforementioned principles to avoid antedated order but made a future order. In the circumstances, I opine that the prospective order, as made in these Constitutional Court judgements, is an appropriate one in this matter.

Case Against Mr Gama:

[41] Following the principle mentioned in paragraph 23 above, Theletsane supra, which provides that it will be unfair and/or it is a reversal of the onus of proof to make a finding in favour of an applicant based on a Respondent’s answering affidavit, as a rule, is that a party has to make out his case in the founding papers. In the notice of motion, Mr Joni asked that the election of Mr Gama be set aside. However, considering the founding affidavit, there is nothing that Mr Joni alleges that Mr Gama is not an employee (as is the case in respect of Mr Mathunjwa); therefore, it would be wrong for this Court to take into account the unwarranted explanation put forth in the answering affidavit relating to Mr Gama. Under these circumstances, the case against Gama is dismissed because Mr Joni failed to support the prayer in the notice of motion.

The vote of no confidence and expulsion of the Applicant:

[42] In terms of the Constitution of AMCU, a member of the NOB’s may be relinquished his powers if his behaviour brings the name of AMCU into disrepute or if he commits misconduct. The NEC will have to investigate such conduct, and the accused official shall be allowed to state their case at a disciplinary enquiry. A branch of AMCU could also recall members from the NEC if a member is found to have committed conduct that brings the name of AMCU into disrepute, and they will have to present their case to the NEC or when a Branch passes a vote of no confidence. The constitution further provides,

“When two thirds of Regions have raised a vote of no confidence against an NEC member, the president shall call a [CEC] to confirm the vote of no confidence, upon which such NEC member shall immediately vacate his/her position at the national office.”

[43] In terms of prayer 4, Mr Joni is asking this Court to declare a decision of the CEC held on 12 March 2020 unconstitutional

and invalid. In support of this prayer, he detailed that he was suspended on 10 December 2019 following allegations of

misconduct levelled against him. In support of this contention, he raised, among other things, the following grounds:

- (a) According to him, the meeting had been called to discuss a query that the Registrar had lodged regarding the mismanagement within AMCU, not the vote of no confidence.
- (b) This motion was raised from the floor by eNkangala and Mpumalanga regions who had members who were not eligible for membership of AMCU.
- (c) It is his averment that the President and him, as the Deputy President, were not in attendance; as a result, he avers that clause 21 of the Constitution does not give powers to any other person to preside at the CEC meetings.
- (d) His argument further proceeds by saying that even if the president called the meeting, he was not entitled to do so due to his election being invalid due to his ineligibility to sit in the said meeting.
- (e) He further states that clause 23.1.6 does not permit a vote of no confidence being raised from the floor. This clause, properly understood, requires “two thirds of the regions” and not “two thirds of regional executive committee representatives” present at the central executive committee meeting.
- (f) Lastly, he says he was never given an opportunity to be heard by either the CEC or NEC.

[44] On the contrary, the Respondents contend that Mr Joni’s application relating to prayer 4 was made prematurely as he had launched an appeal at the time of this application. I have considered this point, and I must say that considering what I state hereinafter, as much as it was delivered prematurely, is relevant to the determination of this matter. (b) The respondents contend that the agenda issued for the CEC included an item called urgent matters of national importance, which is inclusive of Mr Joni’s. (c) In the meeting, the eNkangala Region, seconded by Eastern Cape Region, put a motion item; once this was raised, 14/18 regions supported it.

(d) they state why the President could not attend the meeting and delegated his powers as per clause 20.2.1.3. (d) .In respect of raising a point of no confidence, the Constitution does not stipulate the procedure that had to be followed (a hearing is not required).

[45] In this matter, Mr Joni decided to approach this Court by way of motion proceedings, and it is trite that an applicant falls or stands by his founding papers. In addition, a party who has a burden to present evidence is expected to do so with particularity, and I am mindful that there is a difference between the onus of proof and the burden to present evidence. There

are factual questions that have to be decided under this rubric, and I am aware I will use either the Plascon-events Rule[40] or the Truth Detection Rule (both these Rules are succinctly distinguished in Mtolo).[41]

- [46] The Respondents presented the following uncontroverted averments in the answering affidavit. There was an investigation about one Mr Nkalitshana that resulted in a disciplinary hearing. On 6 December 2019, the CEC met to deliberate on the feedback of this disciplinary hearing. A decision was taken to investigate Mr Joni too, this resulted in his suspension on 10 December 2019,

and he was given an opportunity to give reasons as to why he should not be suspended. He was later charged, and the charges relate to corruption. Evidence was led during the disciplinary hearing, which revealed that indeed he had committed misconduct for which he was charged. So his conduct constitutes a breach of Clause 6.1.2, 4, 7 and 11 of the Constitution.

- [47] The Respondents deny that the meeting was called exclusively to discuss the queries from the Registrar. In para 73.3, they submit thus the agenda included urgent matters of national importance, including Mr Joni's. Joni has not disputed in the replying affidavit. This is being amplified by the Respondents when they say that after the meeting had been declared open, the eNkangala Region specifically asked that the issue of motion be added as an item and Eastern Cape Region supported this, and the Respondents maintain that this is part of what they call matters on national importance. The Respondents have attached the agenda, which its 6.4.2. refers to it as "Conduct of Deputy President." [42]

- [48] It is my view that Mr Joni's contention that the "regions", not the "representatives", have to raise a vote of no confidence motion is a misunderstanding of clause 23.1.6; and if his assertion were to be accepted, it would amount to a narrow interpretation of that clause and will disregard other provisions of the Constitution. I say this based on the following, and this cannot be read in isolation: Clause 13 of the Constitution does not define the Region; what it says is that a REC is part of the CEC and the duties and powers of the REC include organizing regional meetings, conferences and congresses, therefore, they are in charge of the regions. In the CEC, they form part of such a committee, and it is absurd for Mr Joni to suggest that they do not represent their respective regions. Moreover, I say this because they supervise all branches in a region[43]. One would not be unreasonable to conclude that they are the ones that convey messages from their respective regions to the CEC and NEC. In this matter, the Respondents presented the following undisputed version relating to the regions, that the "eNkangala Region" supported by the "Eastern Cape Region" raised the motion and "in fact the position of which the regions had caucused and decided to raise a vote of no confidence against Mr Joni as he had brought AMCU into disrepute". It is further undisputed that a "total of 14/18 regions supported the motion". I must also indicate that some of those allegedly irregularly appointed within AMCU were not cited in proceedings, and Mr Joni presented no supporting evidence to these allegations.

[49] In the circumstances, I am satisfied with the Respondents' version that the agenda did include the issue of Mr Joni and that the Regions raised this point.

[50] In terms of the constitution, the President is the one that is supposed to preside at all the meetings of the CEC. In addition to these duties, he has a right to:

“delegate powers to any office bearers and officials of AMCU to perform any duty where necessary”.[44]

[51] These powers are also given to him in terms of clause 20.2.1.3 (vii) “perform any such duties as are prescribed in the constitution of AMCU...” and the Deputy President is only expected to perform duties of the President if delegated to him by the President, and only performs duties of the President if the latter is not available or is unable to perform duties due to ill health or incapacity. In this matter, it is undisputed that at the time of the CEC, Mr Joni was on suspension, and therefore he could not perform the duties of the President and as such the President was within his rights to delegate his duties.

[52] In respect of the ineligibility of the President, as much as it has been found that his election is invalid, due to the prospective order that is made below and supported by the reasons in this judgment, the meeting and its related outcome cannot be set aside.

[53] Some serious allegations were made against Mr Joni by AMCU, which resulted in the investigation conducted. Mr Joni was given an opportunity to state his case during the disciplinary hearing, and subsequent to that, the CEC met where the vote of no confidence was raised and subsequently approved. The President called the meeting, and the same clause referred to above provides that once a CEC confirms a vote of no confidence, then such member should vacate his position. Clauses 23.1. 4 and 6 do not stipulate that an NEC member should be given a right to be heard if a vote of no confidence is raised against him. How 23.1.6 is crafted suggests that a vote of no confidence may be raised even in a meeting. It does not suggest that when a vote of confidence is raised, there should be a formal notification to the NEC members and a certain period be given.

[54] As indicated above, AMCU was within its right to call for a vote of no confidence against Mr Joni. I conclude that the subsequent process by the relevant structure of AMCU to confirm such action and his expulsion is an internal workings, which is immune from attack. Consequently, this Court also cannot grant the “amended prayer”.

Costs:

[55] The Applicant partly succeeded in this matter and the Respondents too. As much as both parties ask for costs order against each other, I think it will be in the interests of justice not to make a costs order.

[56] I, therefore, make the following order:

Order:

1. The Respondent point in limine that the Applicant lacks locus standi to approach this Court seeking an order in terms of section 103A of the Labour Relations Act 66 of 1995 is upheld.
2. It is declared that the election of Mr Joseph Mathunjwa as the President of the First Respondent, in the Congress held at Birchwood Hotel in September 2019, is ultra vires the Constitution of the First Respondent and the provisions of the Labour Relations Act 66 of 1995, and is accordingly unlawful, unconstitutional and invalid, and is set aside.
3. The Applicant has failed to prove a case against the Third Respondent, Mr Jimmy Gama.
4. The order in paragraph 2 above will apply from the date of this order.
5. The remaining prayers are dismissed.
6. No costs order is made.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For Applicant: Mr

Z Z Matebese SC

Instructed by: S

Ngomane Inc. Attorneys.

For First to Fourth Respondents: Messrs Paul Kennedy SC and Feroze Boda

SC(assisted by Adv Riaz Itzkin)

Instructed by: Larry

Dave Inc.

- [1] National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others 2020 (6) BCLR 725 (CC) ("Isithebe")
- [2] ("Prayer 1 to 3")
- [3] ("Prayer 4 and 5")
- [4] ("Prayer 6")
- [5] ("Prayer 7")
- [6] ("Additional Prayer"). Application to amend the Notice of Motion. p 578.

[7] Respondents hereinafter refer to First to Fourth Respondents, and I agree with the Respondents that Fifth to Twentieth, Twenty-Fifth and Twenty-Sixth Respondents are breaches so are not separate legal entities capable of being sued.

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Fifth to Twentieth, Twenty-Fifth and Twenty-Sixth Respondents are breaches so are not separate legal

entities capable of being sued.

[8] AMCU's General Secretary.

[9] Founding affidavit.

[10] Section 38 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) provides the following regarding locus standi: Enforcement of rights 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and (e) an association acting in the interest of its members. Own emphasis)

[10] Section 38 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) provides the following regarding locus standi:

Enforcement of rights

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and (e) an association acting in the interest of its members. Own emphasis)

[11] Of the LRA.

[12] S 103A(1)(c).

[13] 1996 (1) SA 984 (CC)

[14] Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012)

[15] For the sake of brevity, I propose to cite the relevant portion of section 103A of the LRA, thus: "103A. Appointment of Administrator.— (1) The Labour Court may order that a suitable person, who may be a Commissioner, be appointed to administer a trade union or employers' organization on such conditions as the Court may determine if the— (a) Court is satisfied that it is just and equitable to do so; and (b) trade union or employers' organization has resolved that an administrator be appointed and has applied to the Court for an order to give effect to that resolution; or (c) registrar has applied to the Court to appoint an administrator."

[15] For the sake of brevity, I propose to cite the relevant portion of section 103A of the LRA, thus:

"103A. Appointment of Administrator.—

- (1) The Labour Court may order that a suitable person, who may be a Commissioner, be appointed to administer a trade union or employers' organization on such conditions as the Court may determine if the—
 - (a) Court is satisfied that it is just and equitable to do so; and
 - (b) trade union or employers' organization has resolved that an administrator be appointed and has applied to the Court for an order to give effect to that resolution; or
 - (c) registrar has applied to the Court to appoint an administrator."

[16]

[2016] 8 BLLR 758 (LAC), at para 55.

[17] "After all, the holding of a general meeting is only the formal machinery for securing the assent of members or the required majority of them, and, if the assent of all the members is otherwise obtained, why should that not be just as effective? Because the principle, as applied in those cases, is a sound one, giving effect to the substance rather than the mere form of the members' assent, I think that we should accept it as being settled law. Consequently, the assent of all the members and Sarusas, as evinced by the agreement of 28th January, 1965, rendered clause 8 binding on all of them just as if they had approved it by ordinary resolution in general meeting."

[18] S 95(5)(b)(c) of the LRA.

[19] S 95(5)(k) of the LRA.

[20] Own emphasis.

[21] S 213 and 78 of the LRA defines an employee as (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer,

[22] Clause 7.1 of the Constitution. Is a person that the National Congress of AMCU has bestowed membership status on such for recognition of the contribution by made by such an individual to AMCU.

[23] In terms of the LRA, s 213, provides the following clarity: “employed” and “employment” have meanings corresponding to that of “employee”

[24] A person who was a member for at two years and has either retired due to ill health or age.

[25] See Clauses 7.4.2.

[26] The first five will be collectively hereinafter referred to as “the Top Five”.

[27] Clause 19.2.1.

[28] “office-bearer” means a person who holds office in a trade union, employers’ organisation, federation of trade unions, federation of employers’ organisations or council and who is not an official. Official is defined as: a person employed as the secretary, assistant secretary or organiser of a trade union. See s 213 of the LRA.

[29] Hereinafter referred to as “Sector Membership”.

[30] Hereinafter referred to as “Status Membership”.

[31] *Lufil Packaging (Isithebe) (A division of Bidvest Paperplus (Pty) Ltd) v Commission for Conciliation, Mediation and Arbitration*

(2019) 40 ILJ 2306 (LAC), at para 32-3 [also reported at [2019] 11 BLLR 1212 (LAC)]

[32] Pleadings bundle: p 468.

[33] See Clause 7.1.3 read with 7.4.7.

[34] Own emphasis.

[35]

[1997] 7 BLLR 906 (LC) where held thus: “If there is such a custom it cannot be a valid and binding custom. A trade union in the circumstances of the Motor Transport Workers Union (SA) is constituted in terms of its written constitution and has no powers save for those which are found in its constitution. See in this regard the contribution by L R Caney and P E J Brooks on “Associations” in *The Law of South Africa* 1st re-issue, Volume 1, paragraphs 456 and 462. Paragraph 456 reads as follows: “The constitution of an association together with all rules or regulations collectively constitute the agreement which is entered into by its members. This agreement is a crucial factor in the existence of

an association. It not only determines the nature and scope of the association's existence and activities but also, where necessary, prescribes and demarcates the powers of, inter alia, the executive committee, secretary, and general meeting, expresses and regulates the rights of members and provides for certain procedural aspects." Paragraph 462 dealing with eligibility states: "It is the rules of an association that in the first instance determine which persons are eligible for membership of an association. However, a person qualified for membership is not necessarily a person entitled to membership...It is clear to me that when the General Secretary and Deputy General Secretary and other office-bearers or officials of the union purported to admit Gary van Wyk and Mr K Marais to membership of the union they were acting ultra vires and that these persons are not in law members of the Motor Transport Workers Union (SA)."

[36] Minister of Police and Others v Kunjana (CCT253/15) [2016] ZACC 21; 2016 (9) BCLR 1237 (CC); 2016 (2) SACR 473 (CC) (27 July 2016)

[37] S v Zuma and Others (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995)

[38] Minister of Police and Others v Kunjana (CCT253/15) [2016] ZACC 21; 2016 (9) BCLR 1237 (CC); 2016 (2) SACR 473 (CC) (27 July 2016)

[39] Langa v Premier, Limpopo and Others (CCT 174/20) [2021] ZACC 38 (5 November 2021).

[40] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 3 SA 623 (A)

[41] Mtolo and Another v Lombard and Others (CCT 269/21) [2021] ZACC 39 (8 November 2021)

[42] Page 145 and 376

[43] Clause 16.1.1

[44] Own emphasis.

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