

SOUTH AFRICA / JUDGMENT

Mokgatla and Others v South African Municipal Workers Union and Others (21815/2014) [2014] ZAGPJHC 276 (29 September 2014)

[2014] ZAGPJHC 276

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vally

CASE / FILE NUMBER

21815/2014

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REPUBLIC

OF SOUTH AFRICA

GAUTENG

HIGH COURT, JOHANNESBURG LOCAL DIVISION

CASE

NO: 21815/2014

DATE:

29 SEPTEMBER 2014

In

the matter between:

Mohau

Williams Mokgatla.....First

Applicant

Nomfezo

Mdingi.....Second

Applicant

Dion

Makhura.....Third

Applicant

Phumlile

Shange.....Fourth

Applicant

Sello

Selepe.....Fifth

Applicant

Jacob

Modimoeng.....Sixth

Applicant

Lance

Veotte.....	Seventh
Applicant	
Andre	
Adams.....	Eighth
Applicant	
Zakhele	
Khumalo.....	Ninth
Applicant	
Wycliff	
Mabusela.....	Tenth
Applicant	
Kennedy	
Nkosi.....	E
leventh Applicant	
Kgosi	
Makwati.....	Twelfth
Applicant	
Thabisile	
Manqe.....	Thirteenth
Applicant	
Ntokozo	
Nzura.....	Fourteenth
Applicant	
Mampeti	
Malete.....	Fifteenth
Applicant	
Nomcebo	
Gumede.....	Sixteenth
Applicant	
And	
South	
African Municipal Workers Union.....	First
Respondent	
Samuel	
Molope.....	Second
Respondent	
John	
Dlamini.....	Third
Respondent	
Lorraine	
Baitsiwe.....	Fourth
Respondent	
Walter	
Theledi.....	Fifth
Respondent	
Moses	
Miya.....	Sixth
Respondent	

JUDGMENT

Vally J:

Introduction

1. Apart from the sixth, eighth and sixteenth applicants, the rest of the applicants approach this Court as members in good standing and as office bearers of the first respondent for relief directed at addressing their suspension, expulsion or “removal” as members of the first respondent. The sixth, eighth and sixteenth applicants are employees of the first respondent. The sixth and eighth applicants were also officebearers. The sixth applicant was suspended, while the eighth applicant was dismissed. They join in the application as they were officebearers and the actions taken against them affect their positions as officebearers. The sixteenth applicant wishes to challenge her suspension. The first respondent is a registered trade union. The second to sixth respondents are office bearers of the first respondent occupying the following positions: the President (second respondent); First Deputy President (third respondent); Second Deputy President (fourth respondent); General Secretary (fifth respondent) and the Deputy General Secretary (sixth respondent). All the applicants rely on the same facts for the relief they seek. All the applicants complain that they have been unlawfully denied their rights as members or as elected officebearers of the first respondent because they challenged the second to sixth respondents about alleged unlawful activities involving misappropriation of millions of rands belonging to the first respondent. The sixteenth applicant claims that, because she identified with the cause of the other applicants, the respondent saw fit to unlawfully suspend her. Unlike the other applicants she also relies on the remedies availed to her by the provisions of the Labour Relations Act 66 of 1995 (the LRA). For this reason, the applicants’ counsel, Mr Petlane, conceded that she should not have approached this Court for assistance, as in terms of the LRA she is excluded from doing so if she relies on any of the remedies availed to her by that Act. For that reason, it was submitted no relief should be granted to her even if the other applicants are successful. Essentially, the applicants ask that the decisions to suspend some of them, to expel some of them and the decision to “remove” one of them be set aside for being unlawful.

The approach adopted by the respondents with regard to these proceedings

2. The first and second respondents filed a notice of intention to oppose (the notice). Nothing is said in this notice about the fourth, fifth and sixth respondents. The notice reads:

“Kindly take notice that the 1st and 2nd Respondents hereby file their Notice of Intention to oppose the review application.

Kindly take further notice that the 3rd Respondent (sic) has appointed the below mentioned attorneys as its attorneys of record, at whose address it shall accept service of all notices is (sic) the above application."

3. This notice indicates that only the first, second and third respondents oppose the application. However, the answering affidavit is deposed to by the sixth respondent and, according to the filing sheet, is filed on his and the first respondent's behalf only. While no notice of intention to oppose is filed on behalf of the sixth respondent he, nevertheless, deposed to the answering affidavit which, according to the filing sheet, is the answering affidavit of the first and sixth respondents. In the affidavit he avers that he deposes "to this affidavit on my own behalf as well as on behalf of the first and third respondents." [1] This confusion was never cleared up. Both senior and junior counsel for the respondents who were in this matter from its inception were not able to explain this confusion save that senior counsel, Mr Raath SC, indicated that it should be accepted that only the first and sixth respondents have opposed the application. He argued that the issue is irrelevant in the light of the nature of their opposition, which is only a challenge to the jurisdiction of this Court to grant the applicants the relief they seek, for if they succeed it would be to the benefit of all the respondents. For that reason he submitted that this Court need not dwell any further on this issue. If this was the only challenge the conduct of the respondents posed I would have little hesitation in agreeing with their counsel and let the matter rest. As will be seen later the approach of the respondents posed many other challenges for the Court. In many ways they were tardy in the way they approached the matter and their tardiness continued right until the date of the hearing. It needs to be said that parties should out of courtesy and respect for the court, their opponents and the legal process make every effort to avoid being tardy.
4. The matter initially was called in the Urgent Court on 24 June 2014. The answering affidavit filed on their behalf raised two main points: firstly that the application was not urgent and secondly this Court lacked jurisdiction to entertain the matter. They succeeded on the first point. The matter was then placed on the normal opposed roll. In the answering affidavit, the sixth respondent said that if the matter is struck off for want of urgency, the respondents intended to file a supplementary answering affidavit prior to the hearing. They were afforded the necessary time period in terms of Rule 6 to file their supplementary answering affidavit. Their attorney then informed the applicants' attorney that "(i)n brief, our instructions are that the matter should follow the normal course and normal time periods for service and filing of the answering affidavits should be adhered to." Despite their insistence that the normal time periods be adhered to they themselves failed to do so. Upon the expiry of the time period afforded them by Rule 6, the attorneys of the applicant wrote several letters to the respondents asking them to serve and file their supplementary answering affidavit. They failed to take advantage of the further opportunity afforded them by the attorneys for the applicants. Eventually the patience of the applicants ran out resulting in them serving and filing their replying affidavit in a quest to get the matter ready for hearing. The replying affidavit was filed on 7 August 2014.

5. The applicants served and filed their heads of arguments as per the relevant Practice Directive of this Court. Their heads of argument

were delivered on 13 August 2014. They immediately set the matter down. The respondents decided not to serve and file their heads of argument. They were advised to serve and file a Rule 30 notice claiming that the set down was irregular because they had not yet served and filed their heads of argument. The matter was placed on my roll. I directed that the respondents file their heads of argument by 5 September 2014. I was informed that the respondents intended to file their supplementary answering affidavit by 5 September 2014 together with an application for condonation by 5 September 2014. However, on 5 September 2014 they served and filed only their heads of argument. These consisted of ten short paragraphs dealing with the issue of the jurisdiction of this Court to entertain the application. Two court days before the hearing, i.e. on 10 September 2014, the respondents served their supplementary answering affidavit together with an application for condonation. Their attorney attempted to place it in the court file but this was not allowed.

6. At the hearing the respondents sought leave to apply for condonation for the late delivery of their supplementary answering affidavit. This was opposed. They conceded that, should the application be granted, the matter would have to be postponed in order to allow the applicants time to deliver a reply to the supplementary answering affidavit. They tendered to pay the applicants wasted costs

occasioned by the postponement. However, it was pointed out to them that the claim for interim relief was still before the Court. Upon realising that the granting of this application could also result in the interim relief being granted in favour of the applicants, the respondents immediately withdrew their request to apply for condonation for the late filing of the supplementary answering

affidavit. Instead they asked that the matter be heard and decided solely on the issue of the jurisdiction of this Court to entertain

the matter. In essence, they specifically renounced any right to apply for condonation to deliver their supplementary answering

affidavit.

7. In the light of this election made by them, the issue of which respondent opposes the application, and which does not, is moot.
8. However, it is significant to note that they have not dealt with the factual allegations contained in the founding affidavit. From 24 June 2014 to 15 September 2014 they did nothing to present the factual material they rely upon to show that the applicants' cause of action is unworthy. Their counsel was not able to furnish any reason for their conduct. This is unfortunate.

The case of the applicants

9. Save for the sixth, eighth and sixteenth applicants, all applicants are or were members of the first respondent. All of them are/were office bearers of the first respondent.

9.1. Ten of them were “expelled” between the period 29 April 2014 and 6 June 2014. The applicant that was expelled and the position he/she held at the time of the expulsion is captured in the following table.

Applicant	Position	Date Expelled
First	Provincial Secretary, Gauteng Province	2 June 2014
Second	Deputy Provincial Secretary, Gauteng Province	29 May 2014
Third	Jo’burg Regional Chairperson	29 May 2014
Fifth	Provincial Chairperson, North West Province	29 May 2014
Seventh	Provincial Chairperson, Western Cape Province	29 May 2014
Ninth	Provincial Chairperson, Mpumalanga Province	29 May 2014
Tenth	Regional Chairperson, Mpumalanga Province	29 May 2014
Eleventh	Regional Chairperson, Mpumalanga Province	29 May 2014
Twelfth	Acting Provincial Secretary, Mpumalanga Province	29 May 2014
Thirteenth	Acting Deputy Provincial Secretary, Mpumalanga Province	29 May 2014

9.2. It appears that all the letters of expulsion received by the aforementioned applicants were signed by the sixth respondent on behalf of the fifth respondent. The fifth respondent is the General Secretary of the first respondent, and the letters were issued from

his office and signed on his behalf in his capacity as the General Secretary. In each of the letters the fifth respondent accused the respective applicant of engaging in conduct that he described as “unruly” and then proceeded to say the following:

“In the light of the above, the Union hereby expel you from the Union with immediate effect. The Union shall forthwith advise your employer of the expulsion and that it stops deducting your membership fee anymore as you are no longer its member.”

9.3. He furnished no details of the alleged “unruly” behaviour that each of them was found guilty of. The contents of the letter may have been curt and to the point, but they were hardly illuminating. There is no reference in the letter to the constitution of the first respondent or any other document on which the first, fifth or sixth respondent relied for taking the decision to expel these applicants. The author gives no information as to who took the decision, when it was taken and how it was taken.

9.4. The fourth, sixth, eighth and fourteenth applicants were each furnished with a letter of suspension. The details of their suspension are reflected in the following table:

Applicant	Position	Date Suspended
Fourth	Regional Deputy Chairperson, Johannesburg	29 May 2014
Sixth	North West Provincial Secretary	02 June 2014
Eighth	Western Cape Provincial Secretary	8 May 2014 (employment terminated on 29 May 2014)
Fourteenth	Regional Secretary, KwaZulu Natal	29 April 2014

9.5. The sixth and eighth applicants are also employees of the first respondent. The first respondent suspended the sixth applicant on 02 June 2014 and terminated the employment contract of the eighth applicant on 29 May 2014. Neither of them rely on their employment

rights as established in terms of the LRA. However, the unique character of their situation is dealt with in a shortwhile.

10. The fifteenth applicant was the National Treasurer of the first respondent and was “removed” during the sitting of its Special Central Executive Committee of the first respondent[2] held on the 23 25 April 2014. It is not clear whether “removed” bears the same meaning as “expelled”, or whether it merely means that she has retained her membership but has lost her position as an office bearer. In any case, given the conclusion I reach there is no need to resolve this question.
11. The applicants claim that the actions taken by the first respondent against them is in breach of the provisions of the constitution of the first respondent. They claim further that the constitution constitutes a contract between themselves and the first respondent.

Mr Raath SC conceded that this is so, but maintained that this does not alter the legal position which is that this Court has no

jurisdiction to entertain the application. Nevertheless, the respondents do not dispute that the applicants’ entire cause of action rests on the failure of the first respondent to comply with the provisions of its constitution.

12. The constitution of the first respondent establishes various hierarchical structures which allow for the participation of members in the decision making processes of the first respondent. They are also aimed at ensuring that the first respondent’s operations and day to day functions are carried out in a manner that protects, promotes and enhances the interests of its members. The first

respondent operates at a national level. The structures established by its constitution are based on a demarcation of the various

geographical regions within the Country in which the first respondent has a presence. For purposes of this application the following

structures are particularly pertinent:

- 12.1. Regional Shopstewards Council (“RSSC”)
- 12.2. Regional Executive Committee (“REC”)
- 12.3. Provinces of the Union
- 12.4. Provincial Congresses
- 12.5. Provincial Executive Committee (PEC)
- 12.6. Provincial Disciplinary Committee (“PDC”)
- 12.7. National Executive Committee (“NEC”)

12.8. Finance Committee (“Fincom”)

12.9. National Disciplinary Committee (“NDC”)

12.10. Central Executive Committee (“CEC”)

12.11. National Congress

13. Members of the first respondent are elected for a specified timeperiod to serve on one or more one of these structures. Most applicants have been duly elected to serve on one or more of these structures. The papers are very illuminating when it comes to identifying which structure a particular applicant has been duly elected to serve upon.
14. The applicants complain that the decisions to suspend, expel or “remove” (in the case of the fifteenth respondent) them were not in accordance with the provisions of the constitution. The clauses (referred to in the constitution as “Sections”) in the constitution relevant to this issue are clauses 3.5.3, 6.5.6, 7.3.9 and 16.

14.1. The provisions of clause 3.5.3 read:

“3.5.3 Members may be expelled or suspended from membership through a decision in terms of the disciplinary procedure of the union in Section 16 of this Constitution.”[3]

14.2. The provisions clause 6.5.6 reads

“6.5.6 One or more of the elected office bearers may be removed from office in the event that a majority of the Council voting by ballot should so decide. A motion to institute such ballot shall be passed by at least 20% of those entitled to vote. Both ballots must be preceded by full motivation.”[4]

14.3. The provisions of clause 7.3.9 read

“7.3.9 One or more of the elected Office Bearers may be removed from office in the event that a majority of the Congress, voting by ballot, should so decide. A motion to institute such ballot shall be passed by at least (twenty percent) 20% of those entitled to vote. Both ballots must be preceded by full motivation.”[5]

15. The provisions of the three subclauses are identical in terms, save for the fact that they refer to the different structures that are empowered to take the decision to “remove”, suspend or expel members of the first respondent.
16. Clause 16 specifies the processes to be followed should the first respondent elect to take disciplinary action against a member, shopsteward or office bearer. The clause also specifies the rights of each person against whom disciplinary action is anticipated, as well as the processes to be followed by that person should she be aggrieved by the punitive action imposed by the respective committee taking the decision to discipline her, by suspending, expelling or by “removing” her.

17. The applicants' claim that the provisions of the constitution, particularly those that make up subclauses 3.5.3, 6.5.6 and 7.3.9, have not been adhered to. These subclauses define their rights, and failure to comply with them is an unlawful breach. This warrants the relief they seek, namely to have the decisions taken declared as having no legal force and effect, and to have them set aside. They claim that the respondents took these decisions because they were unhappy that the applicants alleged abuse of powers by the second to sixth respondents and raised issues concerning the "financial mismanagement and possible corruption" of and by some or all of the second to sixth respondents. This, the applicants say, has resulted in the misappropriation of some One Hundred and Twenty Million Rands (R120 000 000.00). They allege further that the second to sixth respondents have refused to furnish the Fincom with copies of the bank statements of the first respondent on the basis that these constitute confidential information.[6] They allege that certain firms of attorneys may have been paid substantial sums without cause. They allege further that a substantial amount (no less than nineteen million rands (R19 000 000.00) of the first respondent's money was spent by the second to sixth respondents without authorisation. Finally, they allege that the second to sixth respondents irregularly concluded contracts on behalf of the first respondent for the hiring of photocopiers which resulted in the first respondent losing between four and six million rands (R4 000 000.00 – R6 000 000.00). The founding affidavit is replete with an averment inviting (though the word preferred by the deponent is "challenge" rather than "invite") the second to sixth respondents to deal with these factual allegations. The respondents, as we know, have declined the

invitation. The failure of the respondents to traverse these factual allegations means that this Court has no choice but to accept that they are true.

18. Of particular importance is the fact that the respondents do not dispute that the decisions taken by the first respondent were in accordance with the said provisions, or any other applicable provision, of the constitution. Their claim is that the issue to be decided lies within the exclusive jurisdiction of the Labour Court, and thus this Court lacks the jurisdiction to grant the relief sought. They concede, however, that if this Court comes to the conclusion that it has the necessary jurisdictional power to entertain the application, the relief should be granted as they have elected to present no defence on the merits of the applicants' claim. In the circumstances the only issue before this Court is the issue of "the power invested in (this) Court to adjudicate over, determine and dispose of"[7]the dispute between the applicants and the respondents, especially the first respondent.

The jurisdiction of this Court to determine the dispute brought to it

19. The respondents vigorously contend that this Court's jurisdiction to determine the dispute brought to it by the applicants has been ousted by the LRA. They rely on the provisions of s 158(1)(e)(i) read with ss 157(1) and (2) of the LRA to support their contention. Section 157 deals with the jurisdiction of the Labour Court. Section 158 deals with the powers of the Labour Court. The legislature deemed it necessary to keep the two distinct, and upon careful perusal of their respective provisions it becomes clear that they are also different. Section

157 deals with its authority over certain types of matters, whereas ss 158(1) deals in the main with the kinds of orders it may grant.

20. Before exploring the contents of these provisions it is important to take note of section 151 of the LRA as the Labour Court is established in terms of this section. According to this section, the Labour Court is “a court of law and equity.” This is the emblem of the Labour Court; it is its specific and unique characteristic. There is no equivalent provision concerning the High Court in either the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution) or the Supreme Court Act 59 of 1959.[8] In terms of these sections the High Court is simply vested with judicial authority and is, therefore, only a court of law. The fact that certain causes of action, such as, for example, unjustified enrichment, have embedded in them considerations of equity does not detract from the fact that the Court itself is not a court of equity.
21. The provisions of s 157 and s 158(1)(e)(i) read:
- “157(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.*
- (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from
- (a) employment and from labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible.”
- “158(1) The Labour Court may-*
- (e) determine a dispute between a registered trade union ... and any one of the members or applicants for membership thereof, about any alleged noncompliance with
- (i) the constitution of that trade union ...”
22. There can be little doubt that s 157(1) precludes jurisdiction of the High Court in respect of all matters that in terms of the LRA or any other law are to be determined by the Labour Court. This begs the question: which matters are to be determined “in terms of the LRA or any other law”? It is a question that has taxed the minds of many courts over the last twenty years, including that of the Constitutional Court. Unfortunately, the answers provided thus far have failed to end the controversy that surrounds this issue. Litigants, such as the present applicants,[9] continue to approach this Court even when they may have a tailor made remedy “in terms of the LRA or in terms of any other law” which can be obtained in

the Labour Court and their opponents often challenge the jurisdiction of this Court to entertain the matter.

23. The question before this Court is whether s 158 (1)(e)(i) compels the applicants to take their present complaint to the Labour Court. There can be little doubt that it affords them the opportunity to take it there, but this does not mean that that forum is the only one that can grant them the remedy they seek. There is substantial learning to the effect that because an employee has rights in terms of the LRA, it does not mean that she must bring her case on the terms prescribed in the LRA. She may have more than one cause of action open to her, such as a claim for unfair labour practice, or a claim for breach of contract pure and simple, in which case she may elect to rely on only one of those causes of action. She may choose to rely exclusively on her general common law contractual rights, and if she does so she is free to seek relief in the High Court rather than in the Labour Court. Instructive in this regard are the following authorities: *Fedlife Assurance Ltd v Wolfaardt*[10]; *United National Public Servants Association of SA v Digomo and Others*[11]; *Old Mutual Life Assurance Co SA Ltd v Gumbi*[12]; *Boxer Superstores Mthatha & Another v Mbenya*[13], *Transman v Dick and Another*[14] and *Makhanya v University of Zululand*. [15]
24. *Fedlife* laid the foundation for this principle. It has survived the development of the jurisprudence in this area over the last ten or more years. The rationale for its decision is aptly captured in the following two paragraphs:

“In considering whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the Legislature did not intend to interfere with existing law and a fortiori, not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only if that appears

expressly or by necessary implication (*Stadsraad van Pretoria v Van Wyk* 1973 (2) SA 779 (A) at 784D H). While the advent of the Constitution, and s 39(2) in particular, has not had the effect of prohibiting entirely the use of the presumption against legislative alteration of the existing law (whether common law or statute) when interpreting a statute which is less than clear, it nevertheless limits its field of application. To illustrate: where a statute is ambiguous as to whether or not an existing law or right has been repealed, abolished or altered and the existing law or right is not in harmony with 'the spirit, purport and objects of the Bill of Rights' there would appear to be no justification for invoking any such presumption. But where the existing law or right is not unharmonious the presumption will still find application. The continued existence of the commonlaw right of employees to be fully compensated for the damages they can prove they have suffered by reason of an unlawful premature termination by their employers of fixed term contracts of employment is not in conflict with the spirit, purport and objects of the Bill of Rights and it is appropriate to invoke the presumption in the present case.

The 1995 Act does not expressly abrogate an employee's commonlaw entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the Legislature had no intention of doing so.[16]

25. Once it is recognised that even with regard to unfair labour practice[17], which really constitutes the kernel of the LRA, the remedies provided therefor in the LRA “are not exhaustive of the remedies that might be available to employees in the course of the employment relationship,”[18] it becomes clear that the aggrieved employee remains free to take advantage of those remedies despite the ones available to her in the LRA. After all, as the majority judgment in Fedlife points out:

“Whether a particular dispute falls within the terms of s 191 depends upon what is in dispute, and the fact that an unlawful dismissal might also be unfair (at least as a matter of ordinary language) is irrelevant to that enquiry. A dispute falls within the terms of the section only if the ‘fairness’ of the dismissal is the subject of the employee’s complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair, is quite coincidental for that is not what the employee’s complaint is about.”[19]

26. The finding in Fedlife was endorsed by the Constitutional Court in *Federicks & Others v MEC for Education & Training, Eastern Cape and Others*. [20] In *Gcaba v Minister for Safety and Security*, too the Constitutional Court accepted this principle and further noted:

“Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in Chirwa speaks of a court for labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA creates

specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court,

can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers)

does not have the power to deal with the commonlaw or other statutory remedies.”[21]

27. The applicants disavow any reliance on s 158 (1)(e)(i) for the relief they seek. They have no desire to benefit from the equity

jurisdiction of the Labour Court. They have no interest in the unfairness of the decisions taken by the first respondent. They rely exclusively on its unlawfulness for the relief they seek. In other words, theirs is not a doublebarrelled application. It stands or falls on a single issue (that of the lawfulness of the first respondents’ decisions). Nor do they rely on their rights as trade union members as spelt out in the LRA, or on any of the other rights or protections afforded to them by any of the provisions of the LRA. The lawfulness of the decision is to be determined by having regard to the common law principles only.

28. Mr Raath SC argued that regardless of how the applicants have crafted their case, in essence it is a complaint about the alleged

noncompliance with the constitution of the first respondent, and, as the first respondent is a registered trade union, their complaint

falls squarely within the provisions of s 158(1)(e)(i) of the LRA and therefore within the exclusive purview of the Labour Court. This is the kind of matter for which the Labour Court has been established. The applicants should not be allowed to avoid the LRA by claiming to rely on common law rights when they find themselves in a situation envisaged by the LRA which deliberately and specifically provides them with a remedy to overcome their situation. This argument, in my view, fails to recognise that the election is for them to make. The LRA has not removed this elective power. It has merely offered them the opportunity to take their claim to the Labour Court and to take advantage of its equity jurisdiction. Section 158(1)(e)(i) is merely an invitation to call upon the Labour Court for assistance. They, nevertheless, are free to decline the invitation, but do so at their own peril. If they choose to sterilise their claims so that they fall exclusively within the confines of the contractual common law they can approach this Court. The LRA does not deprive them of their common law rights, nor does it deprive them of the right to invoke this Court's jurisdiction to secure those rights. This conclusion, I believe, is consistent with the learning established by the list of Supreme Court of Appeal cases referred to above and which has been endorsed by the Constitutional Court in *Fredericks*[22] and in *Gcaba*. [23]

29. In conclusion, I hold that this Court is invested with the necessary authority to determine and dispose of this matter. It is a

conclusion

that very recently has been reiterated by Mojaelo DJP in *Numsa*. [24]

The position of the sixth, eighth and sixteenth applicants

30. There is another clause that is particularly pertinent, namely, clause 16 which is headed "Discipline of members, shopstewards and office bearers". It is a lengthy clause. The substance of its provisions are that the first respondent is entitled to take disciplinary steps against any "member, shopsteward or office bearer", the consequence of which could be that the respective individual is suspended, expelled or "removed". The three structures established to attend to the disciplining of the "members, shopstewards or office bearers" are the Regional Disciplinary Committee (the RDC), the Provincial Disciplinary Committee (the PDC) and the National Disciplinary Committee (the NDC). The general provisions of this clause establishes the following three principles:

"Any member, shopsteward or office bearer of the union may have disciplinary steps taken against them if they act in a manner detrimental to the union or in contravention of its constitution or policies."[25]

"Nothing in this clause denies the right of any structure to recall an elected representative for any cause it deems fit."[26]

“Disciplinary Hearings shall be conducted through standing Regional (RDC) Provincial (PDC) and National (NDC) disciplinary committees

consisting of 5 members appointed by the REC, PEC and CEC respectively. Membership of these committees shall be reviewed annually.”[27]

31. It is common cause that the provisions of these clauses were not adhered to when the decision to suspend, expel or “remove” any of the applicants was taken. There is, however, a subclause that has a direct bearing on the claims of the sixth and eighth applicants. It is sub clause 16.5.5 and it reads:

“Notwithstanding this clause any Regional, Provincial or General Secretary, being employees of the union, shall be dealt with in terms of the Staff Disciplinary procedure and code as adopted in terms of clauses 9.3.2(h) and 15.5”

32. The sixth applicant is the North West Provincial Secretary and the eighth applicant is the Western Cape Provincial Secretary. The eighth applicant was dismissed as an employee. The provisions of the subclause 16.5.5 speak specifically to their situation. It provides that any action taken against them is taken in terms of the “Staff Disciplinary procedure”. Hence, to the extent that they rely on their contractual rights as expressed in the constitution they have to accept that in terms of that contract they have agreed to be bound by the “Staff Disciplinary procedure”. For all intents and purposes they are to be treated as employees and not as office bearers when any disciplinary action is taken against them. They cannot seek any remedy availed to them by virtue of the first respondent’s noncompliance with the provisions of the constitution, as it explicitly provides that they are bound by, and are to be dealt with, in their capacity as employees in terms of the “Staff Disciplinary procedure”. Their rights and remedies lie in the provisions of that document. Nothing has been placed before this Court to show that the provisions of that document have been breached. In that regard, their position is no different to that of the sixteenth applicant who, the applicants admit, should not be seeking, and cannot be granted, relief by this Court.

Discretion to refuse the relief

33. It was contended by Mr Raath SC that if this Court were to conclude that it is clothed with the necessary jurisdiction to entertain the application, it should nevertheless refuse to grant the relief sought, as the applicants are not without blame for the positions

they find themselves in. In this regard, he drew my attention to the fact that the first respondent has secured two interdicts from the Labour Court against some of the applicants for allegedly conducting themselves in a disruptive manner. To support his contention that this Court has discretionary power to refuse the relief he relied on administrative law principles which have been spelt out in *Judicial Service Commission v Cape Bar Council*, where the Court pointed out that “(t)he mere fact that an administrative decision was unlawful does not visit all its consequences with automatic invalidity.[28] I am of the view that this principle is not applicable to an act of unlawfulness arising from a breach of contract, however, even if I am wrong in this

regard, for reasons set out here I do not believe that it would be correct to exercise such discretion in favour of the respondents.

34. The applicants have painted a dire picture of the conduct of the second to sixth respondents and of the state of affairs of the first respondent. These respondents have elected not to take issue with the factual allegations placed before this Court by the applicants. They are accused of misappropriating millions of rands and when asked by the applicants to account for this they decided to secure the suspension, expulsion or “removal” of each of the applicants. This, no doubt, is designed not only to punish the applicants but also to deter any other member of the first respondent from raising any concerns about the alleged misappropriation of the funds, or calling for any action against

them. It may be one reason why the second to sixth respondents have shown such callous disregard for the relevant provisions of the constitution of the first respondent, and why they have adopted such a tardy approach to this litigation. If this Court has discretion to refuse the relief sought despite the illegality of the respondents’ conduct, it would not, in my view, be in the interests of justice to do so. It is in the public interest that the second to sixth respondents be made to account for the funds alleged to have been misappropriated. To refuse to grant the relief sought would mean that those calling for such accountability are the ones that are punished, and those that are responsible for the alleged misappropriation are allowed to escape scrutiny.

Order

35. For the reasons set out above the following orders are made:

1 The application of the sixth, eighth and sixteenth applicants is dismissed for want of jurisdiction.

2 The decision of the first respondent to expel the first, second, third, fifth, seventh, ninth, tenth, eleventh, twelfth and thirteenth

applicants is declared to be unlawful and invalid and is set aside.

3 The decision of the first respondent to suspend the fourth and fourteenth applicants is declared unlawful and is set aside

4 The decision of the first respondent to remove the fifteenth applicant is declared unlawful and is set aside.

5 The respondents are jointly and severally liable for the costs of this application, which costs are to include those occasioned by the employment of two counsel.

Vally J

Judge of the Gauteng High Court

29 September 2014

Appearances:

For the Applicants : Adv M MPetlane with Adv Sihlali

Instructed by : Mathope Attorneys

For the First Respondent : Adv R J Raath SC with Adv R Venter

Instructed by : Maenetja Attorneys

Date of hearing : 15 September 2014

Date of judgment : 29 September 2014

[1]Answering affidavit, p 300, para 4

[2]Answering affidavit, p 312, para 36.8

[3]p 106

[4]p 112

[5]p 114

[6]Founding affidavit, pp 2223, para 53.1

[7]Jurisdiction is defined in these terms in Ewing McDonald & Co Ltd v M & M Products Co

[1990] ZASCA 115; 1991 (1) SA 252 (A) at 256G

[8]The High Court is established in terms of s 2 of the Supreme Court Act as well as in terms of s 166 of the Constitution. The jurisdiction

of the High Court is dealt with in s 169 of the Constitution.

[9]Very recently, three trade unions affiliated to the Congress of South African Trade Unions (COSATU) together with the General Secretary of COSATU chose to approach this Court rather than the Labour Court to, inter alia, review and set aside the decision of the Central Executive Committee of COSATU to suspend the General Secretary and to institute

disciplinary proceedings against him for allegedly committing a misconduct during working hours at the workplace. See the unreported

judgment of Mojaelo DJP in National Union of Metal Workers of South Africa and 3 Others v Congress of South African Trade Unions and 7 Others (32567/13) [2014] ZAGPJHC 59 (4 April 2014)

[10] 2002

(1) SA 49 (SCA); ((2001) 22 ILJ 2407 (SCA))

[11](2005) 26 ILJ 1957 (SCA); ((2005) 12 BLLR 1669 (SCA))

[12] 2007

(5) SA 552 (SCA); ((2007) 8 BLLR 699 (SCA))

[13] 2007

(5) SA 450 (SCA)

[14] 2009

(4) SA 22 (SCA)

[15] 2010

(1) SA 62 (SCA)

[16]Fedlife, fn 10, at [16] and [17]

[17]This right is captured in s 185 of the LRA

[18]United Public Servants Association. fn 11, at {4}

[19]Fedlife, fn 10, at [27], See also Boxer Superstores, fn 13, at [5]

[20][2001] ZACC 6; 2002

(2) SA 693 (CC) at [38]

[21] 2010

(1) SA 238 at [73]

[22]See fn 20

[23]See fn 21

[24]See fn 9

[25]Clause 16.1.1, p 126

[26]Clause 16.1.2, p 126

[27]Clause 16.1.3, p 126

[28] 2013

(1) SA 170 (SCA) at [13]

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