

SOUTH AFRICA / JUDGMENT

Nkabinde and Others v Mhlongo and Others (J1932/17) [2018] ZALCJHB 267 (13 February 2018) [2018] ZALCJHB 267

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

J1932/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J 1932/17

In

the matter between:

MANDLA

NKABINDE

First Applicant

VUSI

NKOSI

Second Applicant

CHRIS

MOROPA

Third Applicant

FRANK

MAKAMOLE

Fourth Applicant

GLORIA

MAHLANGU

Fifth

Applicant

JOSEPH

MARAPE

Sixth Applicant

WAYNE

TSHABALALA
Seventh Applicant
SELLO
PEEGE
Eight Applicant
SASA
MKHUMA
EDUCATED
NKOSI & 14 OTHERS
Ninth
Applicant
Intervening
Parties
and
THAMSANQA
MHLONGO
First Respondent
LUCAS
MASHEGO
Second Respondent
SAMUEL
SEATHLOLO
Third Respondent
CHEMICAL
ENERGY PAPER PRINTING
WOOD
AND ALLIED WORKERS UNION
Fourth Respondent

Heard: 18 August 2017 & 22 September 2017

Delivered: 13 February 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The applicants initially approached the Court on 16 August 2017 on an urgent basis to seek an order in the following terms:

“...

2. The national office Bearers’ committee (“the NOBC”) of the fourth respondent is not currently composed in accordance with the fourth respondent’s constitution and is currently inquorate;

3. The first, second and third respondents are interdicted from taking any action which purport to be action of the NOBC until and unless the NOBC is properly constituted and quorate in accordance with the fourth respondent's constitution;
 4. The notices of intention to suspend issued to the applicants on or about 11 August 2017 and 14 August 2017 be declared null and void;
 5. The first, second and third respondents are interdicted from taking any action purporting to suspend the applicants' employment by and/ or membership of the union and/ or suspending the applicants from their elected positions within the union;
 6. The respondents are interdicted from preventing the applicants from executing their duties as office bearers and employees of the respondent;
 7. ..."
- [2] The application was opposed by the respondents. At the conclusion of the proceedings, judgment was reserved, and a directive was issued to the effect that the first to fourth respondents were barred from acting upon the notices of intention to suspend the applicants issued on 11 August 2017 and 14 August 2017, or to take any action against the applicants, pursuant to the resolution taken by the National Office Bearers' Committee on 14 July 2014, pending the delivery of judgment in this matter.
- [3] The urgency of the application nonetheless evaporated after the hearing on 18 August 2017 due to a variety of factors.

Chief amongst these was an application to intervene brought by the Intervening Parties on 28 August 2017. Following the filing of an opposition to the application to intervene and further directives from the Court to the parties to file heads of argument,

the application to intervene was heard on 22 September 2017. Judgment was delivered in respect of that application on

10 October 2017. The following order was issued;

1. The Applicants are granted leave to intervene as the Fifth to Twentieth Respondents in the urgent application instituted under the present case number.
2. The Applicants are granted leave within 14 days from the date of this order, to file any further submissions in respect of the urgent application.
3. The Respondents in this application are to within ten (10) days from receipt of the Applicants' submissions in terms of (2) above, ordered to file a response thereto.
4. The parties in the application to intervene are excused from Court, and the urgent application will be determined based on the submissions already made on 18 August 2017, together with those as shall be submitted in terms of paragraphs 2 and 3 above.

5. The Respondents' counter application is dismissed.
6. Costs in respect of this application will be determined together with those of the urgent application.

Background:

- [4] The applicants, apart from the fifth and eighth applicants are the office bearers and employees of the Union based in Mpumalanga

Province. The first applicant, Mr Mandla Nkabinde, is the chairperson of Regional Executive Committee (REC). The second applicant, Mr Vusi Nkosi (Nkosi) is the Deputy Chairperson. The third applicant, Mr Chris Moropa is Secunda Local Chairperson of the Union. The fourth applicant, Mr Frans Makamole is a Shop Steward in Sasol Mining. The fifth applicant, Ms Gloria Mahlangu is the Union's Regional Administrator in Mpumalanga. The sixth applicant, Mr Joseph Marape, is the Regional Secretary. The seventh applicant, Mr Wayne Tshabalala is a Shop Steward. The eighth applicant Mr Sello Peege, is employed as a Union Official. The ninth applicant, Sasa Mkhuma, is a Shop Steward.

- [5] The Intervening Parties are members of CEPPWAWU in different capacities ranging from Chairpersons of Provincial and/ or Regions

and by virtue of their positions, also National Executive Committee members of the Union. Others amongst the Intervening Parties include local organisers; a head office National Coordinator, shop stewards and ordinary Union officials.

- [6] The first respondent, Mr Thamsanqa Mhlongo is the Union's president. The second respondent, Mr Lucas Mashego is the First Deputy President. The third respondent, Mr Samuel Seathlolo is Deputy General Secretary. They form the National Office Bearers Committee of the fourth respondent, CEPPWAWU, a trade union registered in terms of the relevant provisions of the Labour Relations Act (LRA).[1]

- [7] The Union has a history of internal strife and disputes which I do not deem necessary to elaborate on except to highlight the following significant events;

- a) Flowing from the National Congress held in September 2008, the Union had elected its National Office Bearers in terms of its constitution. Its then General Secretary, Mr. Mofokeng is accused of a variety of misconduct pertaining to the running of the affairs of the Union. The allegations included financial mismanagement and fraud, which conduct had placed the registration of the Union in jeopardy.
- b) Mofokeng is further accused of perpetrating a purge against some of his co-office bearers, including having purportedly dismissed the Deputy General Secretary, the National Treasurer, and a host of other employees and Union members.

c) Those allegedly purged by Mofokeng obtained a court order in the High Court on 15 April 2016. The effect of that order was that Mofokeng and the Union were interdicted from convening an NEC pending inter alia, the outcome of an application to set aside what were deemed to be fraudulent resolutions taken by the office bearers. That order as at the hearing of this application stood, and thus, the Union has not held an NEC meeting since January 2016.

d) The Deputy General Secretary, Seatlholo was subsequently reinstated

as Deputy General Secretary in terms of a resolution taken by the National Office Bearers Committee (NOBC) in May 2017. Seatlholo,

The Union's President and Vice President thereafter as members of the NOBC took a decision to suspend Mofokeng and instituted

disciplinary proceedings against him. A series of litigation followed between Mofokeng, the Union and its other office bearers in the High Courts and this Court. Ultimately, and after more litigation, Mofokeng appeared before a disciplinary enquiry on 7 August 2017.

He was subsequently dismissed.

e) As at the hearing of this application, the NOBC structure of the Union consisted of only three officials, viz, the President, the Vice President and the Deputy General Secretary. This was because of the dismissal of Mofokeng and the subsequent retirement of the Union's National Treasurer.

[8] What triggered the urgent application before this court was a notice of intention to suspend the applicants dated 11 August 2017.

The notice was issued by first to third respondent acting under the auspices of the Union and/ or the NOBC. The notice reads as follows:

"NOTICE OF INTENTION TO SUSPEND

1. It has come to the attention of the National Officer Bearers Committee ("NOBC") that you have been misconducted yourself in relation to your duties. (Sic)
2. The NOBC has resolved to offer you an opportunity to make representations as to why you should not be suspended pending an investigation into the allegations of misconduct made against you.
3. The aforesaid resolution, annexed hereto marked "A" details the allegations of misconduct made against you and several other Union employees and members.
4. Please have careful regard to the resolution and provide the Union's Deputy General Secretary, Comrade Chief Seatlholo, with written representation as to why you should not be placed on precautionary suspension.

5. You are required to email your representations to [...] by no later than Monday, 14 August 2017 at 12h00. Should you fail to furnish the representations as requested, the Union will proceed to make a decision on your suspension without your input”.

[9] The detailed allegations levelled against the applicants are contained in a Resolution taken by the remaining NOBC members as

attached in the letter of intention to suspend. The crux of which are as follows:

6.1 It is alleged that Nkabinde, Tshabalala, Moropa, Makamole and Mkhuma intentionally defied an instruction by Mashego to vacate CEPPWAWU’s head offices on 8 June 2017, resulting in Mashego having to procure the services of a locksmith in order to gain access to the building.

6.2 Marape, Peege and Mahlangu failed to adhere to an instruction from the NOBC to report to the head offices on 5 July 2017.

6.3 At a meeting on 5 July 2017, at a Sasol Shop steward Council in Secunda, Nkabinde, Moropa and Makamole made spurious and disrespectful allegations against the NOBC, Mhlongo and Mashego. Further, in the same meeting Moropa demonstrated an insubordinate behaviour towards Mashego and together with Makamole and Mkhuma staged a walk out.

6.4 At meetings held on 16 and 17 June 2017, Nkabinde and Marape attended meetings with the suspended General Secretary, with the intention of removing the NOBC unconstitutionally and unlawfully from office...”

[7] In an undated response by Marape on behalf of all the applicants, stated the following:

“..

It should be recorded that it is unreasonable to expect them to respond by 12h00, given the short time to consider and respond.

Whilst the comrades referred herein requires time to apply their mind and fully reflect on the contents of the letters of the notice of intention to suspend, request is hereby made, without prejudice, for an extension of five (5) days to respond appropriately.

Notwithstanding the above, herewith find for the record:

The “NOBC” that is alleged to have taken the resolution is no longer constitutionally quorate.

1. There has been no consultation with the regional leadership on the envisaged “disciplinary action, which is contrary to the Union constitution and the disciplinary code.
2. The majority of comrades referred herein are NEC members and only the NEC have the requisite authority to institute any disciplinary action against them.
3. The said “NOBC” lacks powers and authority to institute disciplinary actions against elected members / office bearers.

...”

[8] The applicants essentially dispute the authority of the current NOBC to either take resolutions or to issue suspension notices. Their main contentions are:

8.1 The notices of intention to suspend were issued on behalf of the NOBC pursuant to a purported resolution of the NOBC dated 14 July 2017. The resolution of the NOBC is accordingly null and void as it was passed where an insufficient number of the members of the NOBC were present to constitute a quorum in terms of the Constitution.

8.2 The NOBC lacks the authority under the guise of disciplinary body to take control over a particular region. Therefore, even if the NOBC were quorate, the resolution mandating the issuing of the notices of intention to suspend was ultra vires. In the result, this Court ought to declare the notices of intention to suspend null and void.

8.3 The requirement as contained in clause 41(3) of the Union’s

constitution provides that at least two thirds of the members ought to be present in order to constitute a quorum. It is contended in the meeting of 14 July 2017, which took the resolution to suspend the applicant, there were at best only three (3) members present. At worst there were only two (2) members present, taking into account that Seathlolo had been dismissed for misconduct.

[9] The applicants’ contentions are grounded in the provisions of the Union’s Constitution in terms of which it was submitted, it functioned on four levels, being plant, branch, regional and national. According to the applicants, the regional congress is the supreme decision-making body of the Union at regional level, with the REC being responsible for managing the affairs of the Union at regional level between meetings of the regional committee.

The relevant provisions of constitution relied upon:

[10] The constitution provides for the establishment of different leadership spheres within the union. Chapter two (2) of the constitution outlines the terms of operation of each sphere of leadership. In terms of the provisions of section 6, the following leadership spheres are contemplated:

“6. Structures within the union

The union is organised into the following structures and general spheres of authority:

- (a) Members, who collectively are the foundation of democratic organisation in the workplace and in the union.
- (b) Shop stewards and shop steward committees, which operate within the different business enterprises in which members work.
- (c) Local shop steward councils (referred to as “LSSC”), which operate in groups of business enterprises within a local area.

- (d) Regional executive committee (referred to as “REC”) a regional office bearers committee (referred to as the “ROBC”) and the regional congress (referred to as “RC”) which operate within each region.
 - (e) A national executive committee (referred to as “NEC”), a national office-bearers committee (referred to as “NOBC”) and a national congress (referred to as “NC”) which operate nationally.
7. Spheres of authority within the union
- (1) Within the union, authority is allocated as follows:
 - (a) ...
 - (b) ...
 - (c) Within the regional sphere of operation-
 - (i) The management of the affairs of the union between meetings of the RC, is exercised by the REC and ROBC subject to the decisions of the RC, NOBC, and the policies of the NEC and NC; and
 - (d) Within the national sphere of operation:
 - (i) The policy making authority of the union is exercised by the NC and NEC.
 - (ii) The management of the affairs of the union between meetings of the NC is exercised by the NEC and the NOBC, subject to the decisions and policies of the NC;
 - (iii) The executive authority of the union is exercised by the NOBC, subject to the decisions of the NEC and policies of the NC”
 - [11] The establishment of the NOBC and its powers are contained in chapter 12 of the constitution. The relevant provisions are as follows:

39. Establishment and powers

The NOBC exercises the day to day administrative functions of the union between NEC and meetings and must carry out the functions and duties assigned to it by the NEC. In addition, the NOBC may-

- (a) Take decisions on administrative and organisational matters of the union;
- (b) Set dates for and convene national meetings; and
- (c) Recruit staff to assist in the administration of the union after consultation with the relevant structures;
- (d) NOB’s and ROB’s will jointly shortlist; interview and recommend staff employment to the NEC.

- (e) NOBC must be required to submit copies of their deliberations to the NEC and consistency is needed,

40. Composition

The NOBC is composed of national office-bearers.

41. Meetings

- (1) The NOBC will meet at least once a month and must determine its rules of procedure.
 - (2) The General Secretary or Deputy General Secretary in consultation with the President must convene NOBC meetings. These meetings must be presided on by the President or in his absence by one of his Vice-Presidents.
 - (3) The quorum to commence meetings is two thirds of the members present.
- [12] To the extent that it may be necessary to deal in earnest with the merits of this application, a few observations need to be made which according to the respondents and the Intervening parties, may render the application before the Court academic.

Mootness:

- [13] The principles applicable to whether a matter is moot are trite. In *Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[2]

‘A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law’

- [14] Further principles developed over time are that;

- a) Save in exceptional circumstances, a court will only entertain a dispute as long as such dispute remains live between the parties. It is so because a court does not need to make an order that will be incapable of execution by virtue of the matter having become academic[3].
- b) Exceptional circumstances should be present for a judgment to be given on the merits of a matter when such a matter is patently moot. It is the exercise of a discretion in the service of the interests of justice whether to give a judgment. Thus, the court even in such circumstances may determine the merits if it would be in the interests of justice to do so, and if any order which [it] may make will have some practical effect either on the parties or on others[4].

- c) The test to decide whether to give a judgment is whether there is a discrete legal issue of public importance arising, that would affect matters in the future, and on which the adjudication of the court was required. Thus, the question to be posed is whether it is necessary and prudent to give judgment in order to address the risk of the point in dispute being the bone of litigation in future because the policy motivation to do so is to avoid future litigation over the legal point[5].
- d) Even if there may still be existing disputes in the future, the matter may be moot if future cases would present different factual matrixes in the determination of such disputes and thus no purpose would be served in resolving any existing disputes[6].

[15] Subsequent to the judgment in the application to intervene, and despite the specific orders in respect of the filing of further

submissions as directed by the court, the applicants nonetheless failed to file any further submissions. On the further submissions

made by the Intervening Parties and the respondents, the following important undisputed developments have since taken place;

- a) As already indicated, an interdict was obtained in the High Court by some of the applicants on 15 April 2016. Amongst the implications of that interdictory order was that the Union could not hold NEC meetings. The matters under case numbers 06046/16 and 26960/16 which came before Modiba J in the High Court (Gauteng South) were settled by the parties on 21 September 2017. The nub of the settlement agreement was that;

- The interim interdict granted on 16 April 2016 (in terms of which the Union was interdicted from holding meetings) was discharged;

- The dismissal of Seatlholo was set aside

- The suspension of the sixth, seventh and tenth respondents (intervening parties) and their dismissal from the NEC was set aside

- b) On 21 September 2017, and after the interdict was discharged, the NEC held its meeting and took certain resolutions including;

- Ratifying previous resolutions taken by the NOBC over the period 23 May to 21 September 2017;

- Resolving that the NOBC as currently constituted was empowered to act and to take decisions of the NOBC on behalf of the Union;

- Resolving that the interpretation of section 41 (3) of the Constitution, which relates to the quorum of the NOBC should be read and interpreted to mean;

“The quorum to commence a meeting is two thirds of the NOBs presently in office”

- The NEC to intervene and take over the full operation of the Mpumalanga Region in accordance with the provisions of Section 42 (2) of the Constitution
- That the applicants (in this case) are suspended
- The Union's Deputy General Secretary is authorized and mandated to effect the suspension of the applicants, and to prosecute the disciplinary proceedings contemplated in the suspension letters

- [16] The intervening applicants contended that the effect of ratifying previous resolutions including the impugned resolution, and the setting aside of its decision to suspend the applicants effectively rendered this application moot and ought therefore not be granted. The respondents in the main also agreed with the intervening applicants that the resolutions of the NEC had rendered the application academic.
- [17] Whether the application is moot must be considered within the context of the relief sought by the applicants. To recap, the first prayer sought was in a sense, to declare that the NOBC as it was prior to 21 September 2017, as being inquorate in accordance with the constitution of the Union. The second was that the remaining members of the NOBC were to be interdicted from taking any decisions unless the NOBC was properly reconstituted and quorate. The third was for the notices of intention to suspend as issued in accordance with a resolution taken by the NOBC to be declared null and void, and fourth, for the members of the NOBC to be interdicted from taking any action purporting to suspend the applicants' membership from the Union from their elected positions
- [18] The interdict obtained in the High Court having been discharged, and the NEC consequently being able to convene meetings, it had done so for the purposes of the resolutions taken after 21 September 2017, in accordance with the provisions of section 59 (4) of the Union's constitution.
- [19] Thus, once the NEC was able to convene meetings and had subsequently taken resolutions insofar as they pertained to the functioning of the NOBC, more specifically in regard to what constituted a quorate NOBC, the issue surrounding whether it was in fact quorate, as at the time that the resolution in terms of which the applicants were suspended, becomes moot.
- [20] The above conclusion as correctly pointed out in the submissions made on behalf of the respondents and the Intervening Parties puts an end to the issue of the status of the NOBC. Thus, once the NEC had resolved to impute an interpretation of the quorum provisions of the Union's constitution as meaning that all that was required was for the NOBC to be quorate was the presence of two thirds of the members of the NOBC, the implications thereof were that the remaining three members of the NOBC (taking into account that Seatlholo's dismissal was set aside) were deemed to be quorate for the purposes of taking authorised decisions on behalf of the NEC and the Union.

[21] Further implications of the resolutions taken on 21 September 2017 were that since all the resolutions taken by the NOBC between 23 May 2017 and 21 September 2017 were ratified, in accordance with the resolution taken on 14 July 2017,

the applicants' suspension remained in effect. Furthermore, the Deputy General Secretary was authorised and mandated to put into effect the applicants' suspensions, and to also prosecute the disciplinary proceedings in accordance with the now validated letters of suspension.

[22] The net effect of the resolutions taken on 21 September 2017 is that the NOBC in its current form is recognised as being in compliant with the provisions of the section 41 (3) of the Union's constitution, and thus authorised to take any action or decisions on behalf of the NEC and the Union. There is therefore no basis from the papers as they are currently before the court, for the applicants to challenge the NEC's or NOBS' authority to either take any resolutions, suspend or subject them to a disciplinary process.

[23] The mootness of this application becomes plain in the light of the events of 21 September 2017. All forms of relief sought by the applicants in their Notice of Motion have been overtaken by events. The NOBC in its current form has been legitimised and the impugned resolution on the basis of which the applicants had approached the Court has since been validated by its retrospective

ratification. There is no longer any basis for a dispute or lis between the parties, and the relief which the applicants sought is now incapable of execution by virtue of the matter having become academic.

[24] What remains to be determined is whether there are exceptional circumstances in this case requiring a judgment despite the matter being moot. As previously indicated, the applicants failed to make any further submissions subsequent to the order in the application to intervene, and there is therefore no basis for a conclusion to be reached that the interests of justice dictate that a discretion be accordingly exercised in favour of a judgment. It is not known what practical effect any judgment would have on the parties in this application and the general membership of the Union.

[25] In regard to whether there is a discrete legal issue of public importance arising, that would affect matters in the future, and on which the adjudication of the court was required, must be determined on the basis of the issues the Court was required to determine.

[26] In my view, even if there is a possibility of the applicants approaching the court in future in respect of the same or similar

matter, the difficulty they will be faced with is that the factual matrixes have changed after 21 September 2017. Any further disputes turning on the authority of the NOBC to take any disciplinary measures against them or removing them from their Union positions clearly presents a different factual matrix which, in itself is bound to give rise to a different set of arguments.

[27] Thus, no purpose would be served in resolving this dispute, as any attempt do so would merely pronounce upon abstract questions, or needlessly advise upon differing contentions, which is not the function of this court[7].

Costs:

[28] In making an award of costs, the court is to take into account the requirements of law and fairness. Until 21 September 2017,

the Union was in some form of state of paralysis as a result of the High Court order issued on 15 April 2016. Irrespective of the different views on the motivation for bringing this application, and in the light of the uncertainties surrounding the status of the NOBC, the applicants as bona fide members and officials of the Union were entitled to approach the court to contest the authority of that structure to take adverse decisions against them. Given these and other considerations, it is my view that any cost order in the circumstances is not warranted.

Order:

[29] In the premises, the following order is made;

1. The interim directive issued by this Court on 18 August 2017

is discharged.

2. The applicants' application is dismissed.

3. There is no order as to costs.

E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

Adv. P. Kennedy SC with Adv. H Viljoen

Instructed by:

Stephen Hardie Attorneys

For the Respondents:

Adv. M Antonie SC with Adv. M Chauke

Instructed by:

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For the Intervening Parties:

Adv. D Mpofu SC with Adv K Pillay

Instructed by:

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[1] Act 66 of 1995

[2] 2000 (2) SA 1 (CC) at 18, fn18

[3] Potgietersrus Platinum Limited (Makgalakwena Section) v Godfrey Ditsela & 2 Others (case number JA 66/12) at para 9

[4] Qoboshiyane N.O. v Avusa Publishing Eastern Cape and Others 2013 (3) SA 315 (SCA) at para 7; MEC for Education, KwaZulu-Natal and Others v Pillay

[2007] ZACC 21; (2008 (1) SA 474 (CC) at para 32

[5] Qoboshiyane at para 5

[6] Independent Electoral Commission v Langeberg Municipality (2001)

(3) SA 925 (CC)

[7] See Geldenhuys and Neethling v Beuthin 1918 AD 426 at 441

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Prepared on 14 October 2026 · Esheria