

SOUTH AFRICA / JUDGMENT

Nkosi and Others v Nkabinde and Others; In re: Nkabinde and Others v Mhlongo and Others (J1932/17) [2017] ZALCJHB 369 (10 October 2017) [2017] ZALCJHB 369

COURT

Labour Court Johannesburg

BEFORE

E Tlhotlhamajane

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:

EDUCATED NKOSI & 14 OTHERS Applicants and MANDLA NKABINDE & 8 OTHERS Respondents
in re: MANDLA NKABINDE & 8 OTHERS Applicants and THAMSANQA MHLONGO First
Respondent LUCAS MASHEGO Second Respondent SAMUEL CHIEF SEATLHOLO Third
Respondent CHEMICAL ENERGY PAPER PRINTING WOOD AND ALLIED WORKERS UNION
(CEPPAWAWU) Fourth Respondent

Heard: 22 September 2017

Delivered: 10 October 2017

JUDGMENT:

APPLICATION TO INTERVENE

TLHOTLHALEMAJE, J:

Introduction:

- [1] This is an application in terms of Rule 22(3)[1] of the Rules of this Court. The applicants (Intervening parties) seek leave to intervene in the main application which came before the Court on an urgent basis on 18 August 2017. They further seek an order that judgment in the main application be stayed pending the determination of the application for leave to intervene. Answering and replying affidavits were duly filed and served by 20 September 2017.
- [2] The application to intervene flowed from an urgent application (Main application) heard on 18 August 2017 in which the respondents sought a declaratory;
- a) that the National Office Bearers Committee (“the NOBC”) of CEPPWAWU was not currently composed in accordance with the relevant provisions of the Union’s constitution and is thus inquorate;
- b) the first to third respondents be interdicted from taking any action which purported to be actions of the NOBC until and unless the NOBC was properly reconstituted and quorate in accordance with the constitution of the Union;
- c) that the notices of intention to suspend the applicants on or about 11 August 2017 and 14 August 2017 be declared null and void;
- d) that the First to Third Respondents be 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; and
- e) that the respondents be interdicted from preventing the applicants from executing their duties as office bearers and employees of the union.
- [3] Judgement in the main application was reserved, with a directive being issued that the current NOBC would not take any action against the respondents in accordance with the impugned resolution pending delivery of judgment.
- [4] On 21 August 2017, the respondents in the main application through their attorneys of record, Mpoyana Ledwana Inc, addressed a letter to the Court seeking leave to file further written submissions in respect of the application already heard. An exchange of correspondence between the parties’ legal representatives resulted in an agreement in terms of which parties had to file their further written submissions by no later than 29 August 2017.

- [5] Following the filing of the application to intervene on 28 August 2017, a directive was also issued to all the parties, in terms of which they were given ten days to indicate whether they would oppose the application. The respondents opposed the application to intervene, and the matter was then set down for a hearing on 22 September 2017.
- [6] The Respondents in the main application did not per se oppose the application to intervene. They had however filed an affidavit in response to certain allegations made against them by the respondents in the application to intervene. These allegations pertained to whether they in their capacity, represented a minority faction in the Union; issues surrounding the source of funding for the majority faction; and whether they had colluded with intervening parties. These issues have in the main, no bearing on the ultimate determination of the main application, other than to further

demonstrate the fissures prevalent in the Union.

The

submissions:

- [7] The application to intervene was supported by an affidavit deposed to by Mr. Educated Thethelele Nkosi, the Regional Secretary of the Wits Region of CEPPWAWU. He averred that the intervening parties are leaders of the Union's regional structures throughout the Republic, including Western Cape, Free State, Eastern Cape and North West Province or are employees of CEPPWAWU at National level.

- [8] The grounds upon which the intervention is sought are as follows;

8.1. The respondents launched the main application on 16 August 2017 against the Union, its, President, First Vice President and the Deputy General Secretary, who also comprise the Union's NOBC. The NOBC is a six member committee in accordance with the Union's constitution[2], and comprise of the President, First and Second Vice President, the General Secretary, the Deputy Secretary and the National Treasurer.

8.2. Currently there are only three (3) members forming the NOBC, as a result of the General Secretary (Mofokeng) having been dismissed by the Union. The National Treasurer (Sibande) had resigned from his employment and no longer qualified to hold that position, and the Second Vice President, (Dlodlo) had resigned from the Union.

8.3. The National Congress is the highest decision making body of the Union and the National Executive Committee (NEC) must call for the convening of the National Congress every three (3) years. However, the National Congress has not been convened since the year 2011.

8.4. There are minimal prospects that the National Congress may be called in the near future as a result of an order issued by the High Court Gauteng Local Division, Johannesburg (per Modiba J), which interdicted the NEC from holding meetings pending the final determination of a review of certain resolutions.

8.5. The applicants have a direct and substantial interest in the urgent proceedings as the subject matter of those proceedings may have prejudicial effect upon the applicants in that:

8.5.1. If this Court grants the relief as sought in the urgent proceedings, the consequence thereof is that the Union may be paralysed and non-functional;

8.5.2. Only the NEC may convene a National Congress, as such if no National Congress is convened, there can be no election of (new) NOBC

members.

8.5.3. If the NOBC is interdicted from conducting its function, as the last national structure of the Union, CEPPWAWU will effectively collapse. There will be no body to distribute funds to regions, to pay salaries and to represent it at national level.

8.6. The applicants in their capacities as NEC, Regional Executive Committee (REC) members and as employees of the Union are in a position to assist in the proper interpretation of the constitution. They seek to achieve that by opposing the urgent proceedings, adducing evidence from the drafters of the constitution regarding the intended meaning of the NOBC clauses in the constitution, and present an interpretation from a neutral perspective.

8.7. If this Court refused the application to intervene, the applicants risk being severely prejudiced by any order of this Court granted without the applicants being given a hearing in terms of the audi alteram partem principle read with section 34[3] of the Constitution of the Republic.[4]

[9] In his answering affidavit, Mr Mandla Nkabinde opposed the application to intervene on the following grounds;

9.1. The application for intervention is not necessary. The Union is a voluntary association with legal personality. There is no need for every member of the association to be joined to these legal proceedings.

9.2. The application to intervene in these proceedings is not convenient. The timing and manner of the applicants' proposed intervention is calculated at frustrating the urgent proceedings.

9.3. The applicants offer the Court no new factual and material averments and do not propose new grounds upon which the urgent proceedings may be dismissed. The application to intervene is designed by the faction within the Union to prevent this Court from determining the lawfulness of the conduct of this faction. The application is mala fide.

The applicable legal principles and evaluation:

[10] The principles to be considered in applications to intervene in proceedings were succinctly summarised by the Constitutional Court in *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others*[5] as follows;

“It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially

affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely

to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will

succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre decision

hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In Greyvenouw CC this principle was formulated in these terms:

“In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter

of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties

having such legally recognised interests.””[6] [Authorities and citations omitted]

[11] Other considerations in such applications include that;

- a) A party seeking to intervene must demonstrate that he/she is specifically concerned in the issue; that the matter is of common interest to him/her and the party he/she desires to join; and that the issues are the same;[7]
- b) A party must establish that he or she has standing, whether as an applicant or plaintiff or as a respondent or defendant, the test being ‘whether the party has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned’.[8]
- c) Any person may at any stage of the proceedings, seek leave to intervene, provided it can be demonstrated that such a person has a direct and substantial interest in the proceedings.
- d) The application is not frivolous and was made seriously.

[12] The application to intervene has to be considered against the above legal principles and the circumstances of this case which point out that;

- a) The Union is currently facing implosion, and is in effect, in a state of paralysis as a result of a variety of factors. Central to this paralysis and discord is factionalism that is eating at the very core of the Union.
- b) It cannot be seriously disputed that the Union has a long history of division that has spawned extensive litigation between various opposing factions. There are currently numerous matters pending

before this Court, the Commission for Conciliation Mediation and Arbitration (CCMA), and the Gauteng High Courts, involving the Union against several of its members, office bearers and employees.

- c) Further reasons for this untenable state of affairs vary, depending

on which version, various factions seek to advance. The respondents in the application to intervene attribute the divisions to the involvement of a third party (Letsema Investment (Pty) Ltd) in the internal affairs of the Union. In this regard, it is alleged that Letsema has laid claim to 27.5% share in the Union's investments amounting to several billion Rands held in CEPPWAWU

Investments (Pty) Ltd. The 27.5% share is alleged to be worth in excess of R1bn, which allegedly constitutes Letsema's remuneration for 'investment advice' provided to the Union.

- d) The Unions' untenable state of affairs did not escape the attention of the Registrar of Labour Relations, who had in 2015, applied to this Court for an order in terms of section 103 of the LRA to place the Union under administration. It is common cause that the Minister of Labour intervened in that process.
- e) Another contributing factor to the state that the Union finds itself in is that it has not held a National Congress since September 2011, and part of the reason is that the one faction had in April 2016, obtained a court interdict in terms of which an NEC meeting could not be convened pending the outcome of another application to have certain NEC resolutions set aside. At the hearing of this application, the Court was advised, albeit based on unconfirmed reports at the time, that by agreement between the warring factions, the interdict has since been lifted.
- f) Sadly, amidst all the factionalism, squabbles and fights, whether for power or control of the Union investments, the interests of its ordinary members, who are the actual source of that power and main contributors to the investments in question through their hard earned subscriptions, have become secondary if not forgotten.
- g) In the face of the interdict against the convening of a National

Congress and the depletion of the structure of the National Office Bearers, the only functioning structure with the highest authority is accordingly the NOBC, as is provided by Clause 6 of the Union's constitution. This clause provides that the Union's structures and general spheres of authority comprise of;

- i. Members
- ii. Shop stewards and shop stewards committees
- iii. Local shop stewards councils (LSSC)
- iv. Regional Executive Committees (REC)
- v. National Executive Committee (NEC); National Office Bearers Committee (NOBC) and National Congress (NEC)

h) Arising from the main application are in essence, the

consequences of an order to be granted, should the applicants in that case be successful. The main issue for consideration in that

application is the function and authority of the NOBC in accordance with the Union's constitution, in the absence of a properly

constituted NEC, NOB and itself.

- i) The outcome in the main application obviously has consequences not only for the protagonists in this and other various matters before the Courts and the CCMA, but also for ordinary members of the Union, who are basically the casualties of a war of attrition between the warring factions. Also invariably affected are the Union's employees and the overall general functioning of the Union as a whole.
- j) The respondents in opposing the application to intervene had contended that since the union is a voluntary association with legal personality, it may litigate in its own name and was the appropriate party to be joined to litigation by members asserting a violation of the constitution, and that it was therefore not necessary to join all other members.
- k) The difficulty however with that proposition is that on the

respondents' own version, the NOBC, which in effect is running the affairs of the Union in the absence of anything else does not have authority to do so, as it is currently inquorate. The question to be posed therefore is that if the respondents speak of a Union can litigate or defend litigation in its own and members' rights, which Union in the light of this quagmire is being referred to?

- l) It is therefore apparent that everybody associated with the Union in whatever capacity, and more specifically the ordinary members, clearly have a direct and substantial interest in the proceedings of the main application as all would be affected in one way or the other by any outcome arising therefrom. This is even moreso, since the very existence of the Union or its authority through the NOBC is being questioned and challenged.
- m) The 15 intervening parties by virtue of their various capacities clearly have a standing, and their legal interest may clearly be affected prejudicially by the judgment of the Court in the proceedings concerned. They consist of a variety of individuals country-wide including ordinary members, chairpersons of the ROBs, members of the NEC, employees of the union, organisers or administrators, and shop stewards.
- n) It is appreciated that this application was brought before the Court after the main application was heard. However, whilst judgment was pending, the respondents in that application had sought leave to file further heads of argument which the parties had consented to. The respondents therefore cannot complain of delays in the finalisation of the main application.
- o) There can therefore be no prejudice to the applicants in the main application nor this application for that matter if leave to intervene is granted albeit at this belated stage. I further have no reason to hold that the application is frivolous, and the seriousness with which this matter demands attention, inclusive of the need for intervention cannot be emphasised in the light of the issues to be determined in the main application.

[13] In conclusion therefore, and having considered the background and circumstances of this case, and upon a consideration of the

applicable legal principles, I am satisfied that the applicants in this case have demonstrated direct and legal rights, which would be affected by the order to be granted in the main application.

[14] There is therefore no basis to hold that there is a distinction between the Union and its members as former cannot exist without the latter. The issues surrounding the motives for the application to intervene, and which faction support which, or was funded by whom, are entirely irrelevant for our present purpose, and there is further no basis for a conclusion to be reached that the intervention at this stage is not convenient.

[15] In opposing the application, and to the extent that the Court was inclined to grant the intervention, it was submitted that the Court should also join two other pending applications to this Court that touch upon the quorum and powers of the NOBC in accordance with their notice of a contingent counter-application. These are matters under case number J1470/17 concerning the 'unlawful disciplinary action' against the Union's General Secretary (Mofokeng), and case number J1893/13 concerning 'the unlawful reinstatement by the inquorate NOBC of the Union members and employees previously expelled and dismissed'.

[16] The respondents in the main application did not necessarily oppose the counter application, other than to point out various issues that militated against a joinder. Central to that concern is that those pending applications were not ripe for a hearing. Other than that, it is my view that an application to intervene should not be seen as a bargaining arena to push up matters that are waiting for their turn in the litigation queue. Furthermore, I am not convinced that sufficient grounds have been advanced to demonstrate that the merits of the two cases sought to be joined to the main application are exclusively confined to the determination of the powers of the NOBC to take the disciplinary actions it took leading to the disputes in those cases. The counter application therefore ought to be dismissed. In regards to costs, it is my view that these should be determined together with the costs in the main application.

Order:

[17] Accordingly, the following order is made;

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 seven (7) 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 seven (7) 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.

E Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

Adv. D Mpofu SC with Adv. K Pillay

Instructed by:

Sefalafala Inc. Attorneys

For the First to Ninth Respondents: Adv. H Viljoen

Instructed by:

Stephen Hardie Attorneys

For the Tenth to Further Respondent: Adv. M Chauke

Instructed by:

Mpoyana Ledwaba Inc. Attorneys

[1] Rule 22: Joinder of parties, intervention as applicant or respondent, amendment of citation and substitution of parties (1)... (2)... (3) Any person entitled to join as a party in any proceedings may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party and the court may make an order, including any order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit.

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(1)...

(2)...

(3) Any person entitled to join as a party in any proceedings may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party and the court may make an order, including any order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit.

[2] Chapter 12

[3] Section 34: Access to courts Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

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[4] Constitution Of The Republic Of South Africa, 1996

[5] 2017 (8) BCLR 1053 (CC)

[6] At paragraphs 9 – 11. See also *Snyders v De Jager* (joinder) 2017 (5) BCLR 604 (CC) at paragraph 9

[7] See *Harms: Civil Procedure in the Supreme Court* at page B-III [issue 37] at par. B 12. 3; *Shapiro v South African Recording Rights Association Ltd* (Galeta Intervening) 2008 (4) SA 145 (W).

[8] Bowring NO v Vrededorp Properties CC & another 2007 (5) SA 391 (SCA) para 21.

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