THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J885/22

In the matter between:

RUTH NTLOKOSE **Applicant**

and

NATIONAL UNION OF
METAL WORKERS OF SOUTH AFRICA
(NUMSA) **First Respondent**

IRVIN JIM **Second Respondent**

CHAIRPERSON OF THE NUMSA SPECIAL
CENTRAL COMMITTEE **Third Respondent**

Heard: **22 July 2022**

Delivered: **23 July 2022**

Summary: Application in terms of section 157 (1) read with section 158 (1) of the Labour Relations Act (LRA)[1]. Powers of trade union structures – compliance with the trade union constitution – consequences of non-compliance. *Locus standi* – entails (a) right to sue and to be sued as well as (b)

[1] Act 66 of 1995 as amended.

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capacity to act – direct and substantial interest. Where there is non-compliance with the constitution of the trade union every member of the trade union has the necessary capacity to act on behalf of all members to ensure compliance. Holding of a congress contrary the any provision of a trade union constitution is unlawful and ought to be interdicted until full compliance with the trade union's constitution. Any act performed outside the four corners of a trade union's constitution is invalid and unenforceable in law – the suspension of trade union members contrary to the provisions of the constitution is susceptible to be set aside. Held (1): The application is heard as one of urgency. (2): The suspension of the trade union members is invalid and unenforceable in law. (3): The continuation of the congress scheduled from 25 July 2022 is interdicted until the trade union complies with its constitution. (4): There is no order as to costs.

JUDGMENT

MOSHOANA, J

<u>Introduction</u>

[1] A trade union is a continuous association of wage-earners for the purpose of maintaining or improving the conditions of their employment[2]. Thus trade unions do not exist for the leaders but for the workers. The more that social democracy develops, grows, and becomes stronger, the more the enlightened masses of workers will take their own destinies, the leadership of their own movement, the determination of its direction into their own hands[3]. The masses are in reality their own leaders, dialectically creating their own development process[4]. It is increasingly becoming evident that bunfights within trade union movements are gaining prominence and taking a centre

[2] Sidney and Beatrice Webb: The History of Trade Unionism 1894 chapter 1.

[3] Rosa Luxemburg.

[4] Rosa Luxemburg.

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stage. Lately, this Court has experienced an avalanche of trade union leadership tussles much to the chagrin of the workers on behalf of whom trade unions prevail. On 17 June 1948, the International Labour Organisation (ILO) adopted the Freedom of Association and Protection of the Right to Organise Convention No 87 of 1948. Article 2 of the Convention explicitly states that workers shall have the right to establish and subject only to the rules of the organisation concerned, to join an organisation of their own choosing. Article 3 provides that workers shall have the right to draw up constitution and rules, to elect their representatives in full freedom.

[2] As a sequel of the above, section 23 (2) of the Constitution of the Republic of South Africa, 1996 explicitly provides that every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union. All the above bares testimony to the undeniable fact that a trade union prevails for the workers and not the leaders of the trade union. The bedrock of trade unionism is the enjoyment of full rights of freedom of association which ultimately metamorphose into worker control of their own movement.

[3] That said, before me is an urgent application launched by a member of Numsa, Ruth Ntlokose (Ntlokose). What ignited the present application is the suspension of Ntlokose by one of the structures of Numsa, namely the Central Committee (CC) on or about 14 July 2022. Ntlokose contends that in suspending her and other union members there was non-compliance with the provisions of the constitution of Numsa. In a matter of days, from 25-29 July 2022, Numsa is to hold its national congress. Ntlokose harbours an intention to contest for positions in the up-coming congress. The application is duly opposed by Numsa and its General Secretary, Mr Irvin Jim (Jim). After hearing submissions from the parties, this Court reserved its judgment. What follows hereunder are the reasons and the order of this Court. Although parties have filed voluminous papers[5], this application fulcrums on a rudimentary issue of compliance with the constitution of Numsa. Put

[5] A practice discouraged in the urgent Court.

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differently, the matter oscillates on the lawfulness of the actions of Numsa through its constitutional structures. Ntlokose contends that Numsa has failed to comply with various provisions of the constitution. Numsa and Jim disputes any non-compliance with the constitution.

[4] Section 157 (1) of the LRA affords the Labour Court exclusive jurisdiction to deal with all matters in terms of the LRA. Section 158 (1) (e) of the LRA provides that the Labour Court possess discretionary powers to determine a dispute between a registered trade union and any one of the members about non-compliance with the constitution of that trade union. The dispute raised by Ntlokose as "*any one of the members*" is about non-compliance with the constitution of Numsa. The jurisdictional powers of the Labour Court are not placed in dispute. What was fervently placed in dispute was the *locus standi in iudicio* of Ntlokose to act on behalf of the other members who equally allege non-compliance with the constitution. Additionally the need for an urgent relief in respect of those other members was oppugned.

[5] Over and above dealing with the central non-compliance issue, this judgment shall address the issue of *locus standi in iudicio* as well as the urgency of the matter.

Background facts

[6] Owing to the limited basis upon which the current dispute oscillates, it is obsolete to give a detailed narration of the facts relevant to the dispute. There are a barrage of allegations and counter-allegations, hence the application ran into hundreds of pages. A full rendition of the facts will serve no laudable purpose but only to elongate this judgment. It suffices to mention that Ntlokose is the elected second Deputy President of Numsa. As indicated above on or about 14 July 2022, Jim communicated the decision of the CC to her, which decision was taken on 11-12 July 2022. The decision was to immediately suspend her membership pending a disciplinary hearing into her conduct regarding the South African Federation of Trade Unions (SAFTU)

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presidency. Allegedly, Ntlokose contested for a position contrary to the caucused position of Numsa to field and support another candidate[6].

[7] Prior to her suspension, Numsa had suspended about 25 of its members in various regions. Additionally, the CC had placed the Mpumalanga Regional Council (MRC) under "administration". The CC also adopted the credentials for the congress which is scheduled to commence on 25-29 July 2022.

[8] As indicated earlier Ntlokose was discontented by the actions of Numsa and its structures to unconstitutionally (a) suspend other members; (b) suspend her; (c) place the biggest region, RMC under administration; and (d) adopting the credentials for the congress. She contended that the upcoming congress would be unconstitutional and it deserves an injunction. On or about 20 July 2022 some 30 members were identified as being not accredited and not permitted to attend the national congress because they are suspended. Those members encased Ntlokose and the 25 members identified in this application. On or about 18 July 2022, Ntlokose launched the present application seeking audience on an urgent basis for declaratory and interdictory reliefs. As outlined above, Numsa and Jim opposes the granting of the reliefs. The above sums up the pertinent facts of the current dispute.

<u>Argument</u>

[9] Both representatives provided this Court with efficacious and erudite heads of argument. This Court expresses gratification to such a benevolent gesture from both erudite counsel. Both counsel are applauded for that. Given the robust but inexorable engagements of counsel by the Court this matter was sufficiently ventilated in Court. In summary, the submissions of Mr Nhlapo, who ably appeared on behalf of Ntlokose are that the matter is urgent;

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[6] Allegedly, this conduct impeaches on democratic centralism. The concept itself is a practice in which political decisions reached by voting process are binding upon all members of the political party. One wonders whether there is a place for democratic centralism in worker associations.

Ntlokose has the necessary *locus standi in iudicio*; Numsa has had various breaches of its constitution; and that the continuation of the planned congress will be in further breach of the constitution. He implored this Court to declare as invalid the suspensions of Ntlokose and others and to interdict the continuation of the planned congress.

[10] In retort, Mr Meyerowitz, who equally dexterously appeared on behalf of Numsa, Jim and the chairperson of the CC made compelling arguments. Briefly, his submissions were quintessentially that the relief sought by the 25 members is not urgent; Ntlokose lacks *locus standi in iudicio* in respect of the 25 members; Numsa has not breached any of the clauses of its constitution; and that the planned congress must continue, since the workers would lose huge sums of money already expended. He beseeched the Court to dismiss the present application with no order as to costs.

<u>Evaluation</u>

[11] There is a saying that difficult matters arise in the urgent Court, where the presiding judge does not enjoy the luxury to pen an adequately reasoned judgment. Should it become necessary, this Court shall in due course augment the reasons for the order to be made hereinafter. As indicated above, this judgment shall consider issues of (a) urgency; (b) *locus standi in iudicio*; (c) breaches or non-compliance; and (d) injunction of the congress.

Urgency issue

[12] The impugn on the urgency is narrowed to the urgent relief sought by the 25 members. When it comes to urgency, this Court is guided by rule 8 of the Labour Court Rules. There is no dispute that a national congress is looming[7]. As such there is a need for an urgent relief for both Ntlokose and the other

[7] See *Tonyela and others v Numsa* (J300/22) [2022] ZALCJHB 67 (18 March 2022) (*Tonyela*).

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members. On this basis alone and in the exercise of my judicial discretion I heard this matter as one of urgency.

Locus standi in iudicio issue

[13] The respondents contends that Ntlokose is bereft of *locus standi* to bring the present application on behalf of the other members and members of the Mpumalanga locals. They further contend that Ntlokose has no direct and substantial interest in the outcome. In a perfect response to this contention, Nhlapo placed reliance on the decision of my brother Van Niekerk J in *Hlungwani v SAPS and another*[8]. Meyerowitz submitted that the decision is distinguishable and actually wrongly decided. I cannot agree. In fact I plentifully agree with the sentiments expressed by my brother. I find no reason why, on application of the *stare decisis et movere* principle, I should not follow this binding authority.

[14] The conclusion I reach is that Ntlokose has the necessary capacity to act. *Locus standi* connotes two senses. Primarily, it refers to the capacity to litigate – capacity to sue or to be sued. Secondarily it denotes whether a person has a sufficient interest in the subject matter of the case[9]. The subject matter for both the members and Ntlokose is the non-compliance with the constitution of Numsa. I reiterate the views of Van Niekerk J that "*each union member has an interest in the lawfulness of any action undertaken by a union's structures…and each stands to be prejudiced*..." The veritable issue here is a failure to uphold the constitution which of necessity binds all members.

[15] If the contentions of Meyerowitz were to be upheld, it would mean that each and every member of a union who complains about the failure to uphold the constitution must come to this Court to himself or herself inform the Court about the non-compliance. Section 158 (1) (e) of the LRA expressly states

[8] (2020) 41 ILJ 2662 (LC).

[9] See M*inister of Safety and Security v Lupacchini and others* [2015] JOL 33825 (FD)

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that *any one of the members* may bring the dispute about non-compliance for determination. Like the 25 members, Ntlokose is equally prejudiced by their unconstitutional suspensions, the unconstitutional placing of MRC under administration. All of those actions are about the non-compliance with the Numsa constitution.

[16] The conclusion I reach is that Ntlokose has a secondary sense capacity in the present dispute in respect of the non-compliance which directly affects the other members. She is equally prejudiced by the non-compliance with the constitution of Numsa. The powers in section 158 (1) (e) of the LRA are not about granting reliefs to individual members of a trade union but it is about the sanctity of the constitution of a trade union. What this Court is exalted to insulate is not the individual rights but the statutory founding document. Meyerowitz suggested that this is a typical class action, which requires certification by each affected member. I disagree. The members and or Ntlokose are not suing for any form of damages[10]. The application is not about personal gratification. Van Niekerk J equated these type of applications as giving content and meaning to the well-known slogan of "*an injury to one is an injury to all*". I plentifully agree.

Breaches or non-compliance

[17] Four issues of non-compliance shall be considered in this judgment. Those are (a) suspension of Ntlokose; (b) suspension of the other members; (c) placing MRC under administration; and (d) the continuation of the congress. It must be stated upfront that even if a single non- compliance is proven, the powers in section 158 (1) (e) of the LRA.

Suspension of Ntlokose

[10] See *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and others* 2013 (2) SA 213 (SCA)

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[18] There is sufficient comity between the parties that the CC does not have express powers emanating from the constitution to suspend Ntlokose. Meyerowitz suggested that there are implied powers in the constitution to suspend her. I am unable to agree. In law a term may not be implied in a contract if it is in direct contrast with the expressed term. The test to be applied is that of the officious bystander[11].

[19] The expressed terms of the constitution are that the power to suspend Ntlokose lies with the National Executive Committee (NEC). Recently, the Constitutional Court in *Minister of Finance v Afribusiness NPC*[12] reaffirmed the principle that where a functionary is not empowered to act, acting *ultra vires* is unlawful and abysmal to the rule of law. In the majority judgment penned by Madlanga J, the Court said:

> "[119] The Minister cannot – just because she or he feels that her or his idea of preferential procurement policy is not being introduced by organs of state – arrogate to her- or himself a power that she or he does not have under the Procurement Act."

[20] The principle of legality cuts across all the spheres in the constitutional order we now live under. An implied or tacit term is that term which the parties failed to express. If the argument of the respondents is upheld, it would mean that the unexpressed term is that the power to suspend Ntlokose also lies with the CC. Discernably a perspicuous conflict arises between the expressed term and the implied term. It suffices to *echo* the sentiments expressed by Madlanga J in *Afribusiness* when he said:

> "[123] …The conundrum that does arise on the approach adopted by the first judgment serves to illustrate that the Minister has no business creating a system preference: the power lies elsewhere. I can conceive of no

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[11] See *Alfred McAlpine and Son (Pty) Ltd v TPA* 1974 (3) SA 506 (A).

[12] (CCT279/20) [2022] ZACC 4 (16 February 2022)

> reason why same power would vest in the Minister and individual organs of state. That is a recipe for disaster.[13]

[21] This Court rejects an argument that the powers of the CC are to be implied. The CC simply does not have powers constitutionally to suspend Ntlokose. Having done so, the CC breached the constitution. Such conduct offends the principle of legality and is invalid and should be declared as such. Accordingly, an irresistible conclusion to reach is that the suspension of Ntlokose is unconstitutional and unenforceable in law.

Suspension of others

[22] There is no doubt in my mind that in seeking to suspend these members, Numsa is raising issues of discipline. In its ebullient view, these members are guilty of lack of organizational discipline. Chapter 8 of the constitution deals with the issue of discipline. In terms of chapter 2 (4) (a) (i) a committee having jurisdiction is empowered to amongst others suspend a member as a disciplinary measure. Clause 8 (2) (d) sets out the procedure for discipline. In terms of sub-clause (d) (iv) and (v) a person must be charged, and the charge must be determined, and if an opinion is formed that the charge has been satisfactorily proven only then may a member be suspended.

[23] In *casu*, the disciplinary suspension of all the members involved herein did not comply with the constitutional provisions outlined above. What Numsa did was to put the cart before the horse. Meyerowitz suggested to this Court that elsewhere in the constitution, structures have powers to suspend. What the submission is with respect oblivious of is that a suspension as a result of disciplinary issues must comply with the process outlined above. The conclusion that this Court must reach is that the suspensions are unconstitutional. Meyerowitz referred to some practice of placing members on

[13] *Ibid* at para 123.

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what he termed precautionary suspension. Sadly for him, the constitution on any benign interpretation does not reflect that practice. It follows that such a practice is unconstitutional and cannot be upheld by this Court.

[24] Accordingly the suspensions are invalid and unenforceable in law.

Placing the MRC under administration

[25] Again Meyerowitz placed reliance on implied terms on this one. The Constitutional Court in *Numsa v Lufil Packaging (Isithebe)*[14] under the hand of the erudite Victor AJ, felicitously stated the following.

> "[47]…A voluntary association, such as NUMSA, is bound by its own constitution. It has no power beyond the four corners of that document. "

[26] Being bound by the above sentiments, I reiterate, Numsa is bound by what is in the constitution. Nothing more nothing less. Accordingly placing MRC under administration without the necessary powers to do so is unconstitutional, invalid and unenforceable in law.

Continuation of the congress

[27] In terms of chapter 2 of the constitution all active members have full voting rights. In terms of clause 6 (1) (c) each Local may elect one shopsteward per 300 members as a delegate for the region at the congress. The MRC has been disabled as such it shall not have delegates for the upcoming congress. Sub-clause (c) (iii) provides that the accreditation of delegates will be determined by a Credentials Committee appointed by the CC. In *casu*, the CC did not appoint a credentials committee, instead it acted as one. Such a

[14] [2020] 7 BLLR 645 (CC)

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conduct is unconstitutional. Sub-clause (c) (iv) provides that only delegates accredited by the Credentials Committee shall be entitled to vote. Since the CC arbitrarily usurped or approbated to itself the functions of the Credentials Committee – an unconstitutional act – it axiomatically follows that there are no accredited delegates to vote for – a further unconstitutional act.

[28] In the circumstances, the planned congress is more than likely to proceed along unconstitutional lines. This Court shall be failing in its duties[15] if it were to allow this glaringly unlawful conduct to continue. This Court in *Tonyela* stated the following:

> "[11]…A constitution of a trade union is a statutory document. Non-compliance with it equates non-compliance with the law and ultimately non-compliance with the rule of law."

[29] Since an unlawful conduct is most apparent than not[16], the applicant is entitled to an interdict of the congress – the continuation of which is unconstitutional – until Numsa complies with its own constitution *en route* the national congress. The fact that Numsa has already expended is not a consideration that will save the glaringly apparent unlawfulness. This Court has a Constitutional duty[17] to declare any unlawful conduct as such where one arises. The Court does not prevent Numsa to hold the national congress but it says Numsa can do so in line with its own constitution. It must be a just and equitable remedy for this Court to effectively suspend as it were the continuation of the congress until Numsa complies with its own constitution. Such an order champions the rule of law. As the saying goes *nothing about us*

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[15] Section 165 (1) of the Constitution.

[16] There is a clear reasonable apprehension of injury and only interdict may assist the aggrieved members. See *Tonyela* judgment and *CSAAWU and others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7 (1 March 2022) at paras 19, 20.

[17] Section 172 (1) (a) of the Constitution. The conduct of Numsa offends the provisions of section 1 (c) of the Constitution.

without us. How can a national congress that cycle once in four years proceed without the views of the biggest region, the MRC?

Concluding remarks.

[30] At the opening of this judgment I remarked that a trade union exists for the workers and not for the leadership. The respondents in their opposing papers suggested that Ntlokose brought a political matter before Court. This suggestion is with respect preposterous in the extreme. The case of Ntlokose is nothing more or less than a lament for compliance with the Numsa constitution. Nhlapo in his submissions was unrelenting and did not mince his words when he suggested that the CC became law unto itself. Meyerowitz did not help the situation when he unabatedly continued with a submission that the CC as the supreme body is mandated by the workers to do as they wish. This cannot be correct. The leadership tussle within worker organisations is becoming cancerous in this country and it certainly diverts what is supposed to be a worker association into, as ably submitted by Nhlapo, personal *fiefdoms*. The CC must carefully reflect and do a serious introspection, of course with the guidance of its own constitution. The leadership tussle often times does not serve the best interests of an ordinary worker, who looks upon a worker association as a body that shall vindicate his or her rights without, I may add, fear, favour or compromise.

[31] The members of Numsa deserve a better and proper protection. To have a leadership or structure that unashamedly flout the founding document of the constitution is not in the best interest of the general membership. One of the aims and objects of Numsa are to promote the interests of its members in relation to employers. In an atmosphere of untrammeled leadership tussles, this aim and object can only be a pipe dream in my view. Nhlapo is correct in his submission that members join a trade union with a fervent, I would say, desire for the trade union to comply with its own constitution. As section 4 (1)

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(b) of the LRA provides, a member is subject to the constitution of a trade union. This Court in *Afgri Operations Ltd v Macgregor NO*[18] said:

> "The right in section 4 (1) (b) is an individual right which has been limited within the contemplation of section 36 of the Constitution to it being subjected to the trade union constitution."[19]

[32] Trade unions must begin to rid themselves of the trepidation of leadership tussles so as to ensure that their compliance with their own constitutions is sanitized.

[33] Having said that the conclusion to reach is that the suspensions are declared to be invalid. The actions of placing the MRC under administration and usurping accreditation function are unconstitutional. In the circumstances, the upcoming congress cannot continue until there is full compliance with the constitution of Numsa.

[34] In the results the following order is made:

<u>Order</u>

1. The application is heard as one of urgency.

2. It is declared that the suspensions of Ntlokose and the other Numsa members mentioned in this judgment are unconstitutional, invalid and unenforceable in law.

3. Numsa is interdicted and restrained from proceeding with the 11th National Congress scheduled to take place on 25-29 July 2022, until it fully complies with the terms of its own constitution.

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[18] (2013) 34 ILJ (LC).

[19] Cited with approval by the Constitutional Court in the *Lufil* judgment.

4. There is no order as to costs.

G. N. Moshoana

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Mr S B Nhlapo
Instructed by:	Ahmed Gani Attorneys, Houghton.
For the Respondent:	Mr M Meyerowitz
Instructed by:	Serfontein Viljoen & Swart, Brooklyn