



**THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 1591/20P

In the matter between:

**NATIONAL AFRICAN FEDERATED CHAMBERS
OF COMMERCE AND INDUSTRY- KWAZULU-NATAL
(NAFCOC KZN)**

**MUSAWENKOSI ROBERT MEYIWA
WALTER NSELE
PATIENCE BONGEKILE MZIMELA
MANDLA THUSHINI
QAPHELA MTHEMBU
SIPHO CYPRIAN HLOPHE
DR MANDLA MKHIZE
MUSAWENKOSI ROBERT MEYIWA N.O.
SIPHO CYPRIAN HLOPHE N.O.**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT
SIXTH APPLICANT
SEVENTH APPLICANT
EIGHTH APPLICANT
NINTH APPLICANT
TENTH APPLICANT**

and

**NAFCOC: KWAZULU-NATAL
MANDLAKAYISE BUTHELEZI
MBONGELENI ENOCK CHISANE
JABULANI NXUMALO
HAPPINESS ZANDILE CHONCO (nee NKABINDE)
THOKOZANI DLAMINI
PAULUS NGEMA
KHEHLA MTSHALI**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT**

NONTO MKHIZE	NINTH RESPONDENT
THANDUXOLO NCANE	TENTH RESPONDENT
SIBUSISO MPISANE	ELEVENTH RESPONDENT
SIBUSISO MAVUNDLA	TWELFTH RESPONDENT
NORMAN SIBETHA	THIRTEENTH RESPONDENT
BIGBOY MBUYAZI	FOURTEENTH RESPONDENT
VUSIMUZI SAKHOKWAKHE CHONCO	FIFTEENTH RESPONDENT
MANDLA DLADLA	SIXTEENTH RESPONDENT
THANDI NDLOVU	SEVENTEENTH RESPONDENT
FAITH NENE	EIGHTEENTH RESPONDENT
NHLANHLO DOKO	NINETEENTH RESPONDENT
THE MASTER OF THE HIGH COURT	
NORTH GAUTENG	TWENTIETH RESPONDENT
TSOGO INVESTMENT HOLDING CO (PTY) LTD	TWENTY-FIRST RESPONDENT
NATIONAL AFRICAN FEDERATED CHAMBER	
CHAMBER OF COMMERCE	
AND INDUSTRY	TWENTY-SECOND RESPONDENT

ORDER

The following orders are granted:

1. The applicants' application is dismissed with costs. The first to tenth applicants are directed to pay the respondents and twenty second respondent's costs occasioned by the dismissal of the main application and the respondents and twenty second respondent's costs of the counter-applications, jointly and severally, the one paying the other to be absolved. Such costs are to be on an attorney client scale and are to include the costs of both senior and junior counsel where so employed and the costs of the intervention application.
2. The first respondent is the lawfully constituted National African Federated Chamber of Commerce and Industry for the KwaZulu-Natal Region (NAFCOC KZN).

3. The first respondent is a beneficiary of the NAFCOC KwaZulu-Natal Investment Trust.
4. The first applicant is not an affiliate of NAFCOC and is not entitled to appoint trustees in terms of the Trust Deed of the NAFCOC KwaZulu-Natal Investment Trust as amended.
5. The first to tenth applicants are interdicted and restrained from holding themselves out as NAFCOC KZN and as its executive council or as executive committee members.
6. The first respondent is the only entity entitled to appoint the trustees of the NAFCOC KwaZulu-Natal Investment Trust.
7. The first to tenth applicants are interdicted and restrained from making any appointment of trustees to the NAFCOC KwaZulu-Natal Investment Trust.
8. The voluntary association known as NAFCOC KZN that elected its interim provincial leader, Mr Themba Ngcobo on 19 August 2010, followed by Dr Mandla Buthelezi, and recently by Mr Paul Ngema who was elected on 18 March 2020, and all its successors in title is a properly and lawfully recognised affiliate of NAFCOC and is entitled to appoint trustees to the NAFCOC KwaZulu-Natal Investment Trust in terms of the trust deed.

JUDGMENT

HENRIQUES J

Introduction

[1] 'It is vital that we avoid any hint of moral superiority in our dealings with one another . . . if it developed into factionalism it would destroy us, as factionalism has destroyed so many progressive movements in [history].'¹

[2] This quotation aptly describes the dispute in the application that served before the court as an opposed motion. *Apropos* the application, declaratory and interdictory

¹ E Abbey *Postcards from Ed: Dispatches and Salvos from an American Iconoclast* (2006) at 92.

relief is sought by the applicants² which is foreshadowed in the notice of motion as follows:

‘1.

That the First Applicant be declared to be the National African Federated Chamber of Commerce and Industry for the KwaZulu-Natal Region, duly constituted as an association not for gain pursuant to the provisions of the National African Federated Chamber of Commerce and Industry Constitution (Second Amendment 2008).

2.

That the First Applicant be declared as the entity named as the beneficiary of the NAFCOC KwaZulu-Natal Investment Trust.

3.

That the Second to Eighth Applicants, inclusive, be declared as the duly elected executive committee for the time being of the First Applicant.

4.

That the First Respondent be interdicted and restrained from holding itself out as the First Applicant.

5.

That the Second to Nineteenth Respondents, inclusive, be interdicted and restrained from holding themselves out to be members of the executive committee of the First Applicant.’

[3] The relief is opposed by the first, third, fourth, sixth, seventh, thirteenth, sixteenth and seventeenth respondents.³ The respondents, in addition to their opposition, have instituted a counter-application in which the following relief is sought:

- ‘1. That the first respondent be declared to be the lawfully constituted National African Federated Chamber of Commerce and Industry for the KwaZulu-Natal Region (NAFCOC KZN);
2. That the first respondent be declared as the entity referred to as the beneficiary of the NAFCOC KZN Investment Trust (“the Trust”);
3. That the applicants be interdicted and restrained from holding themselves out as NAFCOC KwaZulu-Natal and as its executive council or executive committee members;
4. It is declared that the first respondent is the only entity entitled to appoint the Trustees

² This is a reference to the first to tenth applicants, either in their personal or their representative capacities.

³ For ease of reference, these respondents will be referred to as ‘the respondents’. The intervening party the twenty second respondent will for the sake of convenience be referred to as the twenty second respondent or NAFCOC National.

- of the Trust and the applicants are interdicted from making any such appointment;
5. That the applicants be ordered and directed to pay the costs of this counter-application jointly and severally the one paying the others to be absolved and such costs to be costs on a scale between attorney and client including the costs consequent upon the employment of two counsel.'

[4] Whilst these proceedings were pending, an application was instituted by the twenty-second respondent, the National African Federated Chamber of Commerce and Industry (NAFCOC), in its capacity as the national NAFCOC body, to intervene in the proceedings (the intervening party). An order was granted by Masipa J on 26 November 2020 authorising such intervention. The costs of such intervention application were ordered to be costs in the cause.

[5] The intervening party subsequently filed its own counter-application seeking the following relief⁴:

- '1. That a declaratory order be granted to the effect that:
 - a. The First Applicant in the application is not an affiliate of NAFCOC, and is not entitled to appoint trustees in terms of the Trust Deed of the NAFCOC KwaZulu-Natal Investment Trust as amended (registration number IT1455/05) ("the Trust Deed");
 - b. The voluntary association known as NAFCOC KwaZulu-Natal that elected as interim provincial leader Themba Ngcobo on 19 August 2010 followed, by Dr Mandla Buthelezi and recently by Paul Ngema duly elected on 18 March 2020, and that is still led by the latter as provincial leader, and all its successors in title ("the recognised affiliate"), is a properly and lawfully recognised affiliate of NAFCOC, and the only body entitled to appoint trustees in terms of the Trust Deed;
 - c. Only trustees appointed by the recognised affiliate in terms of the Trust Deed, are entitled to be granted letters of authority by the Master of the High Court, and to administer the benefits due to the trust.'
2. That the Applicants be directed to pay the Twenty-Second Respondent's costs in the main and counter-application.'

⁴ Index Volume 10 amended pages 952 to 953

The parties

NAFCOC (National African Federated Chamber of Commerce and Industry) National
(the intervening party)

[6] It is common cause that NAFCOC is a voluntary association established in 1964 for the economic empowerment of historically disadvantaged black business people throughout the Republic of South Africa. It is a voluntary association governed by a constitution and has as its objectives, the organization of business persons and businesses, particularly small businesses, to place them under one umbrella body to represent, develop, and protect their interests, and to promote the economic growth and to uplift them and enable them to obtain economic freedom.

[7] In 1964, individual members of the black business community in various provinces throughout the Republic of South Africa joined NAFCOC. It is a federation consisting of affiliated sectoral members, corporate members, honorary members and any other individual or associations which are admitted to membership. The sectoral affiliates are also voluntary associations represented by the nine provinces and the other nine represent various sectors of the economy.

[8] Subsequent to the 1994 first democratic general elections in South Africa, the leadership of NAFCOC National embarked on a process to realign the focus of the existing associations and establish further associations to accord with the new provincial divisions. As a consequence of such process, all provincial structures were requested to change their names to NAFCOC and NAFCOC National also amended its constitution and adopted a constitution in 2008 (the 2008 constitution). It is alleged that the first applicant was formed prior to a subsequent amendment by NAFCOC National of its constitution in 2011. The applicants allege that they did not adopt the 2011 constitution although it is alleged to have been adopted at a meeting held by NAFCOC National on 17 March 2011.

[9] As it was an organization not for gain, NAFCOC Investment Holdings (NAFHOLD) was formed to pursue investment opportunities on behalf of members of NAFCOC. It is common cause that NAFHOLD was incorporated in October 1994 as an investment holding company with its main objective being to acquire business and

investment opportunities for NAFCOC and its members. The sole shareholder of NAFHOLD is the National African Federated Chamber of Commerce Investment Trust which funds NAFCOC by making discretionary distributions from time to time to fund its expenses.

[10] NAFHOLD has various valuable assets including investments in Uthingo which ran the National Lottery, and Phumelela a large operator in the horse racing industry to name but a few. In 2009, NAFHOLD disposed of its investment in Tsogo Investment Holding Company, the twenty-first respondent. It is common cause that the NAFCOC KZN Trust was previously the holder of 830 preferent shares in the twenty-first respondent which have been redeemed for an amount of R27 694 538.84. Such amount is being held in the twenty-first respondent's attorneys trust account pending the resolution of the dispute between the parties.

[11] Various provincial trusts were formed to enable the NAFCOC structure, as well as the various provincial structures, to participate in investment opportunities. One such trust established in February 2005 was the NAFCOC KwaZulu-Natal Investment Trust (the NAFCOC KZN Trust), which was established in terms of the Trust Property Control Act 57 of 1988.

The applicants

[12] The first applicant is the National African Federated Chamber of Commerce and Industry for the Kwazulu-Natal region, described in the papers as a voluntary organization not for profit, with legal personality and perpetual succession based in Pietermaritzburg.

[13] It is common cause that the second to eighth applicants are office bearers of the first applicant which were elected at an elective conference held on 11 September 2019 and are members in good standing. The second applicant is the president, the third applicant the vice president, the fourth applicant the second vice president, the fifth applicant the secretary general, the sixth applicant the deputy secretary general, the seventh applicant the treasurer and the eighth applicant the deputy president.

[14] The ninth and tenth applicants are trustees of the NAFCOC KZN Trust which has its registered address at 100 Church Street, Pietermaritzburg.

The respondents

[15] The first respondent is NAFCOC: KwaZulu-Natal which has its address at both Maritzburg Arch, 39 Chief Albert Luthuli Street Pietermaritzburg, and 5 Samora Michel Street, Durban. The second to nineteenth respondents are described as executive committee members and office bearers of the first respondent.

[16] The second respondent is the chairperson/president, the third respondent its assistant chairperson, the fourth respondent its first vice chairperson, the fifth respondent the assistant secretary, the sixth respondent the treasurer, the seventh respondent the secretary general, the eighth respondent the deputy president, the ninth respondent the senior vice president, the tenth respondent the second vice president, the eleventh respondent the deputy secretary general, the twelfth respondent the secretary general, the thirteenth respondent the treasurer general, the fourteenth respondent is the chairperson of districts of the first respondent, the fifteenth, sixteenth and seventeenth respondents are additional members of the first respondent, the eighteenth respondent is a women's representative member and the nineteenth respondent is a youth representative member of the first respondent.

[17] The twentieth respondent is the Master of the High Court, North Gauteng cited in his official capacity, and the twenty-first respondent is Tsogo Investment Company Limited, represented by its attorneys ENS Africa. No relief is sought against the twenty-first respondent however it is cited in the proceedings as it has an interest in the outcome of the matter. The twenty-second respondent is NAFCOC, the national mother body established for the whole of South Africa who was granted leave to intervene in these proceedings.

The dispute

[18] The dispute in this matter relates to what has been termed a faction fight between two bodies in the province of KwaZulu-Natal both claiming to be the duly affiliated constituent members of NAFCOC.

Antecedents

[19] The antecedents to the dispute, most of which are common cause and which are relevant to the determination of the relief sought in the main application and counter-applications are the following.

[20] It is common cause that there were two parallel structures in KwaZulu-Natal and in 2009, the first applicant was embroiled in a dispute concerning its leadership. It was agreed between the various parties of these parallel structures to end the disputes and internal divisions, and to convene a joint provincial council with a view to electing a new executive committee. To achieve this, on 18 November 2009, a general meeting was held at the Coastlands Hotel, Durban which resolved to officially dissolve the two parallel structures existing in Kwa-Zulu Natal at the time. In attendance at such meeting were representatives of NAFCOC National being Mr B Letsoela, Mr C Mrasi and Mr SS Sakhosane.

[21] At such general meeting, Ms Pinky Mkhize, Mr Musawenkosi Meyiwa, Mr Mandla Buthelezi, Mr Thulani Kubheka, Ms Patience Bongekile Mzimela, Mr Thozani E Dlamini and Mr Paul Ngema were all elected as executive committee members of NAFCOC KZN.

[22] Ms Pinky Mkhize and Mr Musawenkosi Meyiwa, the second applicant, were respectively elected as the president and deputy president, Mr Paul Ngema, the seventh respondent was elected as the secretary general, Mr Mandla Buthelezi was elected as the first vice president, Mr Thulani Kubheka the second vice president, Ms Patience Mzimela the deputy secretary, and Mr Thokozani Dlamini as the treasurer.

[23] It is interesting to note that this is not denied by the applicants but they aver that the aforesaid executive committee members were the executive members of the first applicant. The first respondent was an affiliate of NAFCOC National, did not have its own constitution and operated under the NAFCOC National 2008 constitution. Such arrangement is catered for in the 2008 constitution in clause 24.6.⁵

⁵ Annexure 'MM5', volume 2 of the indexed papers at 111-112.

[24] Ms Mkhize, Mr Ngema and Mrs Mzimela, the fourth applicant, were appointed to represent NAFCOC KZN on the NAFCOC National Council. On 23 July 2010, Ms Mkhize and the second applicant, Mr Meyiwa, were suspended by the NAFCOC National executive committee. The second applicant, Mr Meyiwa, disputes such suspension. He submits that annexures 'PM10' and 'PM11' do not constitute letters of suspension but are an invitation to him and Ms Mkhize to attend a disciplinary hearing initiated by NAFCOC National.

[25] This denial by the second applicant is not borne out by annexure 'PM12' which was issued after the initial date of the hearing which reads as follows:

'Further to the notice of your disciplinary hearing, served upon you on 23 July 2010 you are hereby notified of your suspension, with immediate effect, from participating in all NAFCOC activities both nationally and provincially pending the outcome of the disciplinary processes that are currently underway.

This has been necessitated by the fact that it had not been anticipated that the disciplinary process would drag as it appears to be now. In order to enable you to adequately prepare for the hearing and to safeguard against the occurrence of similar events that led to the disciplinary action it is only fair to relieve you of your duties as Chairperson of NAFCOC (KZN) and 2nd Vice President NAFCOC.'

[26] Such correspondence is dated 28 July 2010. The contents of annexure 'PM12' are not disputed and consequently must be common cause. In addition although 'PM12' is addressed only to Miss Mkhize, it is evident from 'PM 15' that disciplinary hearings were held in respect of both of them pursuant to which they were both suspended. Similarly, this has not been disputed nor the termination of their membership.

[27] Clause 13 of the NAFCOC 2008 constitution deals with the termination and suspension of membership. Clause 13.3 provides that a member shall cease to be a member of NAFCOC 'if the Council decides to terminate the membership of a member ... and gives written notice to the member of such termination'. Clause 13.4 makes provision for the summary suspension of any member if the Council is of the opinion that 'such member is guilty of conduct which has brought or is likely to bring NAFCOC or any of its Constituent Affiliate Members or Associate Members into disrepute'.

[28] Clause 13.5 of the NAFCOC 2008 constitution provides that

‘a member on suspension and/or expulsion shall immediately cease to hold himself out as a NAFCOC member and/or affiliate and shall also cease to use the name NAFCOC and/or its emblem and shall cease to participate or cause to participate in any activity and/or structure of NAFCOC whilst the suspension and/or expulsion is in force.’

Consequently, with effect from 28 July 2010, Ms Mkhize and Mr Meyiwa were precluded from holding themselves out as members of NAFCOC or from participating in any of the activities of NAFCOC, both at national and provincial levels, including its meetings.

[29] As a consequence of the suspension of Ms Mkhize and Mr Meyiwa, NAFCOC KZN through the office of the secretary general, the seventh respondent being Mr Paul Ngema, issued a notice to all council members of NAFCOC KZN, to attend a meeting at the Edward Hotel Durban on 19 August 2010. This second meeting was to be held after the general meeting.

[30] In attendance at such general meeting were members of NAFCOC National, represented by Mr Mavundla and other members of the national executive council of NAFCOC. It is undisputed that at the time, Mr Mavundla was the president of NAFCOC. It is not disputed that the seventh respondent attended the general meeting with a small contingent of persons who sought a vote of no confidence to remove Ms Mkhize as NAFCOC KZN’s president. Ms Mkhize and the second applicant gained knowledge of the general meeting and also attended the meeting, accompanied by a large contingent of persons.

[31] As a consequence of the arrival of Ms Mkhize, the second applicant and the contingent of persons who supported them, the members of the executive council of KZN NAFCOC met in an effort to avoid confrontation and to determine a peaceful way forward for the meeting. At such second council meeting a vote of no confidence was passed in respect of Ms Mkhize and Mr Meyiwa and new members were elected to fill the vacancies which had arisen.

[32] At such general meeting, the National president of NAFCOC, Mr Mavundla, addressed the meeting and in such address, inter alia, mentioned that the suspension

of Ms Mkhize and the second applicant, Mr Meyiwa, was erroneous and needed to be uplifted at national level. The respondents confirm that this statement was made.

[33] It is not in dispute that the national executive committee of NAFCOC National never met and never uplifted the suspension (whether lawful or unlawful) of Ms Mkhize and Mr Meyiwa. On the contrary, a decision was taken to permanently terminate their membership on 30 September 2010 at a NAFCOC federal council meeting held in Sandton, Johannesburg. This is evident having regard to the contents of annexures 'PM14' and 'PM15'. This has not been denied by Ms Mkhize and Mr Meyiwa.

[34] It is common cause that neither Ms Mkhize nor Mr Meyiwa challenged either the findings of the disciplinary committee, their suspension and termination of their membership by NAFCOC national. An attempt by Ms Mkhize to appeal such decision was unsuccessful. As a consequence, the *de facto* position is that both Ms Mkhize and Mr Meyiwa's membership of NAFCOC has been terminated and such termination has not been set aside.

[35] It is common cause that on 16 September 2010, Ms Mkhize and Mr Meyiwa convened a separate and parallel meeting purporting to be a NAFCOC KZN meeting. Such meeting was held at the Seth Mokitimi Seminary in Pietermaritzburg and was presided over by her. At such meeting, a resolution was passed that all members of the executive committee who had participated in the second meeting of 19 August 2010 were expelled. This included the second, sixth and seventh respondents.

[36] It is at this meeting called by Ms Mkhize and presided over by her, whilst on suspension, that a vote of no confidence was passed against the executive committee members of the first respondent. On 12 May 2011 the provincial executive committee of the first applicant convened an annual general conference at the Golden Horse Casino in Pietermaritzburg.

[37] At such conference, the provincial council members passed various resolutions which inter alia affirmed that the first applicant's members did not

recognise the parallel structure formed by the seventh respondent. The resolution taken at such meeting is recorded on annexure 'MM16'.⁶

[38] Subsequently at an elective conference held on 13 November 2012, Ms Mkhize and Mr Meyiwa were appointed as executive committee members. Subsequently on 25 May 2016 the first applicant and its members took decisions that the executive committee members elected at the meeting convened on 16 September 2010's term of office would be extended and they would be re-appointed for a further term of office.⁷

[39] The applicants submit that the first respondent was formed at an illegitimate second meeting convened on 19 August 2010 and is a parallel structure formed by the seventh respondent. It does not recognise the legitimacy of the first respondent as an affiliate member of the twenty-second respondent. The respondents and twenty-second respondent on the other hand submit that the meeting convened on 16 September 2010 was neither a legitimate meeting of NAFCOC KZN nor that of NAFCOC or any of its affiliates as it could not have been properly constituted or convened by Ms Mkhize as she was suspended and no longer entitled to participate in any activity and structure of NAFCOC in terms of clause 13.5 of the 2008 constitution.

Applicants' submissions

[40] The applicants submit that the first applicant is a constituent affiliate member of the intervening party and is an autonomous and distinct persona from NAFCOC National. The applicants' application largely revolves around two meetings held on 19 August 2010 at the Edward Hotel. The applicants submit that at this watershed event, the issue of factionalism arose.

[41] The applicants exhaustively deal with the events that transpired at such meeting, however contend that such meeting was not properly convened as same was in conflict with the provisions encapsulated in the 2008 constitution, coupled with the allegation that the second meeting held in the afternoon was inquorate.

⁶ Volume 3 of the indexed papers at 219-2213.

⁷ Annexure 'MM18': Minutes of the meeting, volume 3 of the indexed papers at 242.

[42] The applicants further contend that the purported suspension of Mr Meyiwa and Ms Mkhize was unlawful as the notices sent to them did not constitute suspension letters nor were disciplinary proceedings ever instituted against them.

[43] The applicants, in gainsaying the suspension of Mr Meyiwa and Ms Mkhize, placed reliance on the comments of the president of NAFCOC (Mr Mavundla), to the extent that the suspensions were a mistake and should be uplifted.

Respondents' submissions

[44] The respondents, through the seventh respondent, join issue with the applicants' allegations regarding the meetings at the Edward Hotel on 19 August 2010. The respondents rely on the suspension of Ms Mkhize and Mr Meyiwa and their automatic bar from participating in any activity or structure of NAFCOC whilst their suspension and/or expulsion was in force.

[45] The respondents disassociate themselves from the comments made by Mr Mavundla on the basis that such comments were neither authorised nor of any legal effect. On the contrary, the respondents contend that no evidence was presented that the national executive committee of NAFCOC National ever met to uplift the suspension of Ms Mkhize and Mr Meyiwa.

[46] The respondents notified Ms Mkhize and Mr Meyiwa of the disciplinary hearing (which they elected not to attend) and their suspension with immediate effect from participating in all NAFCOC activities - both nationally and provincially. On 30 September 2010, in a NAFCOC federal council meeting held in Sandton, Johannesburg, Ms Mkhize's and Mr Meyiwa's membership was terminated which position still subsists.

The intervening party

[47] The intervening party, in its capacity as the national body, recognises the first respondent as its true affiliate member. It submits that the instructive regulatory document is the constitution adopted in 2011 at a federal council meeting held on 17 March 2011.

[48] It reaffirms the suspension and ultimate termination of the membership of Ms Mkhize and Mr Meyiwa which position still subsists. The intervening party sets out in extensive detail the relationship between NAFCOC National, its provincial constituent affiliate members, and the relationship with members and communities.

[49] As a voluntary association governed by a constitution, it determines the rights and obligations. The intervening party disavows the first applicant's rights to enjoy the benefits of its affiliate membership in the absence of complying with its reciprocal obligations, including but not limited to the payment of membership subscriptions.

Analysis

[50] It warrants recordal that the application papers are in excess of 3 000 pages and most of the issues are irrelevant and do not warrant exhaustive consideration for the reasons that appear hereinafter. The voluminous nature of the papers and the manner in which issues were pleaded unnecessarily delayed the court.

[51] In relation to the relevant constitution and the requirements for affiliate membership, these must be interpreted in line with the *locus classicus* on interpretation being *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁸ in which the following was held:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[52] Bearing such sage dicta in mind, this court has objectively applied itself to the provisions of the constitutions by giving to it its sensible meaning.

Non-joinder

[53] In considering the relief sought by the applicants, it is surprising to note that the intervening party was not initially cited in the main application. The failure to include the intervening party as a respondent in the main application would have constituted a material non-joinder, considering the applicants’ contentions and reliance on being a constituent affiliate member of NAFCOC National.

[54] It is abundantly clear that NAFCOC National body has a direct and substantial interest in the merits of the application and concomitantly in the relief sought by the applicants. In this court’s view, Masipa J correctly granted leave to intervene which without suggestion of pasquinade rendered the issue of joinder academic, to the benefit of the applicants in not having to overcome this obvious hurdle. These comments are made by way of observation and are not germane to a determination of the issues.

The requirements for an interdict and the declarator

[55] The dictum in *Setlogelo v Setlogelo*⁹ has entrenched itself in our law and endured for a period in excess of 100 years in relation to the requirement for an interdict. It is trite that the requirements for a final interdict are as follows namely (a) a clear right, (b) an injury actually committed or reasonably apprehended and (c) the absence of similar protection by any other ordinary remedy.

⁹ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[56] In seeking declaratory relief, section 21 of the Superior Courts Act 10 of 2013 deals with the requirements for the granting of a declaratory order. Van Der Westhuizen J summed up the requirements for declaratory relief as follows:

- ‘(a) The court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and
- (b) once a court is so satisfied, it must be considered whether or not the order should be granted.’¹⁰

The suspension of Ms Mkhize and Mr Meyiwa

[57] As alluded to earlier, the dispute between the applicants, respondents and the intervening party relates to the effect of annexures ‘PM10’ and ‘PM11’. The respondents and intervening party contend that these constituted suspension notices, which the second applicant countenances in his submission that such letters were an invitation to attend disciplinary proceedings and did not have the effect of a suspension notice of himself and Ms Mkhize.

[58] This dispute however, does not require judicial intervention as the contents of annexure ‘PM 12’ and subsequently annexures ‘PM14’ and ‘PM15’ make it explicitly clear what the position is. The respondents and intervening party’s contentions regarding the second applicant and Ms Mkhize is re-enforced by the contents of annexures ‘PM 14’ and ‘PM 15’ which records their termination as members of the NAFCOC national entity pursuant to their suspension and disciplinary proceedings.

[59] In line with the NAFCOC 2008 constitution, which the applicants contend is the prevailing constitution, on the basis that it never adopted the 2011 constitution, the second applicant and Ms Mkhize were precluded from participating in any activities of NAFCOC, irrespective of the level - be it national or provincial in view of their suspension and subsequent termination of their memberships.

¹⁰ *Mahlangu and another v Minister of Defence and Military Veterans and another* [2019] ZAGPPHC 418 para 9. See also *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA).

[60] It is common cause that such *de facto* position subsists and has not been set aside or rescinded.

[61] In *Cathcart Residents Association v Municipal Manager for the Amahlathi Municipality and others*¹¹ Plasket J referred with approval to *Shunmugam and others v The Newcastle Local Municipality and others*; *The National Democratic Convention v Mathew Shunumugam and others*¹² where it was stated that

‘... a member of a voluntary association or organisation such as a political party who has been expelled and who both contends that the expulsion was unlawful and wishes to enforce his or her membership rights, must, if the organisation does not concede the unlawfulness of the expulsion, take steps to have the expulsion reviewed and set aside. Such a person is put to an election. If the person, notwithstanding the contention that the expulsion was unlawful, decides not to challenge it, he or she is taken to have accepted the expulsion, and the expulsion will stand notwithstanding the fact that it may not have been lawful.’¹³

[62] Such situation is analogous to the one described in *Oudekraal Estates (Pty) Ltd v City of Cape Town*¹⁴ where Howie P and Nugent JA opined that

‘The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.’

[63] As previously set out, the application must be determined on the facts, notwithstanding the fact that the affidavits filed by the parties are replete with allegations and counter allegations, most of which are irrelevant to the germane issues that falls to be decided. The parties have agreed that on the relevant facts there are no genuine disputes of fact.

¹¹ *Cathcart Residents Association v Municipal Manager for the Amahlathi Municipality and others* [2014] ZAECHGHC 18 para 14.

¹² *Shunmugam and others v The Newcastle Local Municipality and others*; *The National Democratic Convention v Mathew Shunumugam and others* [2008] 2 All SA 106 (N) para 42.

¹³ This matter was taken on appeal and is reported as *Shunmugam and others v National Democratic Convention* [2009] 2 All SA 285 (SCA). Although the SCA overturned the order of the court a quo, this was only in relation to the main application. It upheld the counter-application which related to declaratory relief declaring their expulsions unlawful and reviewing and setting aside the decision to expel them as members of NADECO. The counter application was the relief referred to in para 42 of the judgement of Rall AJ namely the challenge to their expulsion.

¹⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) para 26.

[64] Considering the authorities referred to above and applying the principles to the present application, it is patently clear that the second applicant and Ms Mkhize's suspension and termination rendered them incapable of participating in the affairs of NAFCOC. The irresistible conclusion is that the applicants, represented by the second applicant, cannot establish a clear right and falls at the first hurdle in seeking the relief it claims.

[65] Such finding is dispositive of the application, however, the court deems it necessary to cursorily deal with other issues raised by the applicant for the sake of completeness.

The convening of the second meeting on 19 August 2010

[66] Although the applicants make much of the fact that this second meeting was not properly convened and quorate in my view, these submissions are without merit. Firstly, I align myself with the sentiments expressed by Majiedt JA in *National African Federated Chamber of Commerce and Industry v Mkhize* (805/13) [2014] ZASCA 177 (21 November 2014) at paragraph 13 'It bears repetition that the 2008 constitution is hardly a model of clarity. It is perplexingly contradictory on key aspects and most importantly, bewilderingly unclear on important issues of governance' and that it is not surprising that two opposing parties are able to attach two different interpretations to certain of its clauses.

[67] One must remember that two meetings were convened. A general meeting at which Mr Mavundla addressed the members and then a second meeting of the members of the KZN NAFCOC executive council which did not include Mrs Mkhize and Mr Meyiwa. This meeting was called to deal with inter alia certain resolutions including the vote of no confidence and the filling of vacancies. This meeting was not a general meeting required to be called by the President and was called at short notice. The minutes clearly reflect that the parties were fully aware of this and the complied with the 2008 constitution in relation to the convening of the meeting and that it was quorate.¹⁵

¹⁵ Annexure MM19 pges 244 to 247

The nexus between the affiliate member and NAFCOC and its endorsement of the first respondent as a proper affiliate

[68] The applicants' contention that the first applicant is autonomous and independent of the intervening party is specious at best, and devoid of merit at its worst.

[69] Clause 12 of the 2008 constitution clearly sets out the requirements for membership. The applicants contend that such constitution is the prevailing governance document, as same was adopted affording it constituent affiliate membership.

[70] The benefit of being a recognised affiliate of NAFCOC lies in the deed of trust of the NAFCOC KZN Trust (the trust deed), in that only the executive committee of a

recognised' provincial affiliate of NAFCOC can appoint trustees in terms of the trust deed.¹⁶

[71] Based on the definitions in the 2008 constitution and the trust deed, it is clear that NAFCOC KZN (the first applicant) finds it status as an affiliate of NAFCOC. On this basis, the applicants' contention of independence and autonomous functioning cannot be sustainable.

[72] Even if there is merit in the applicants' contention, the common cause fact that the constitution of NAFCOC was amended in 2011, albeit not adopted by the applicants, renders the first applicant incapable of being an affiliate member or for that matter a member of NAFCOC National, hence it is incapable of appointing trustees in terms of the trust deed.

¹⁶ Clause 1.1.2.5 of the trust deeds defines 'executive committee' as 'the executive committee for the time being of the Nafcoc affiliate or such committee's successors in title from time to time', and clause 1.1.2.8 defines 'Nafcoc affiliate' as 'Nafcoc KwaZulu-Natal, a provincial affiliate of Nafcoc'.

Clause 6 sets out the procedure for the appointment and resignation of trustees and provides as follows: '6.1 The initial trustees shall (subject to the proviso to 7) hold office until the expiry of five years from the signature date.

6.2 Each of the trustees, other than the initial trustees, shall (subject to 1.2 and 7) be appointed from time to time after the signature date in terms of a resolution of the executive committee for a period of three years from the date of such resolution.

6.3 The trustees shall (subject to 1.2 and 7) be entitled from time to time (by written resolution to that effect and with the prior written approval (in the form of a written resolution in accordance with 1.2) of the executive committee) to appoint any independent person (who is not a member of the Nafcoc affiliate) as a trustee for a period of three years from the date of the trustees; resolution appointing such person.

6.4 Subject to 12 and the Act, a trustee shall remain in office (and may not be removed from office) as such until his term of office in terms of 6.1, 6.2 and 6.3 (as the case may be) has expired.

6.5 The appointment of each trustee shall (subject to the proviso 7) automatically terminate at the end of his period of office in terms of 6.1, 6.2 or 6.3 (as the case may be); provided that the executive committee may (by written resolution passed in accordance with 1.2) re-appoint all or any of the trustees for a further period/s of office in terms of 6.2.

6.6 Each trustee shall be entitled to appoint any person who is a Nafcoc member to act as his alternate during his absence or inability to act as trustee; provided that –

6.6.1 such alternate shall be approved in writing by a majority of the other trustees and shall comply with all applicable requirements of the Act for his appointment (including any requirements to obtain letter of authority from the Master);

6.6.2 a trustee shall not have more than one alternate at any time; and

6.6.3 the appointment of an alternate shall automatically cease of the trustee who appointed him –

6.6.3.1 ceases to be a trustee for any reason whatever;

6.6.3.2 gives written notice of termination of such appointment to the other trustees.

6.7 No trustee shall have the right during his lifetime or by his last will and testament to appoint his successor.

Subject to 12.9, any trustee shall be entitled to resign as such in writing without an order of court.'

[73] On the applicants' own version, by disassociating itself from the 2011 constitution and consequently the NAFCOC National structure, it is rendered incapable of being recognised and able to derive the benefits of a recognised affiliated member.

[74] The recognition by the intervening party of the first respondent as the recognised constituent affiliate member cannot be discounted. The first respondent and its members have been the recognised affiliate, and the consequences of granting the applicants' application will result in financial and other benefits being managed by a body who is not recognised as the constituent legal affiliate of the intervening party.

[75] The interpretation of the 2008 and 2011 constitutions, together with the trust deed, could never have intended such consequences arising. As suggested by the intervening party, the applicants cannot enjoy the rights and benefits of being a 'recognised' member of NAFCOC without discharging its concomitant obligations. The NAFCOC constitution does not and could not have envisaged such a situation.

Failure to challenge the resolutions passed at the Edward Hotel – failure to review

[76] The applicant exhaustively dealt with its version of what transpired at the two meetings held on the same day at the Edward Hotel and the invalidity of the resolutions taken thereat.

[77] The applicants have not presented any evidence of having challenged or set aside such resolutions, save for adopting the stance of refusing to recognise the resolutions and to give effect thereto. As such resolutions have not been set aside, they remain in force.

Conclusion

[78] The parties are *ad idem* that the main application and counter-applications are symbiotically and intricately linked. The order granted in the main application will automatically have a bearing on the result in the respective counter-applications.

[79] After careful analysis set out above, the court holds the view that the applicants have not met the requirements for an interdict or the declaratory relief, and in the first instance, the applicants have failed to discharge the onus of proving a clear right. Having failed in establishing a right to interdictory relief the applicants must likewise fail in establishing a right to the declaratory relief they seek.

[80] Having concluded that the applicants have not made out a case for the relief sought and for reasons already alluded to in this judgment, it must follow that the respondents and the twenty-second respondent have made out a case factually and legally for the relief sought in the respective counter-applications and are thus entitled to both the interdictory and declaratory relief.

Costs

[81] It is abundantly clear that the sole motivation of the applicants in seeking such relief is to gain control of the NAFCOC KZN Trust, which is vested of a substantial amount of money. Such motivation cannot be construed as a bona fide act to enhance and promote NAFCOC or its members in the fulfilment of their objectives.

[82] In the court's considered view the applicants are motivated by self-interest and not by acts of benevolence. The punitive cost order sought by both the respondents and intervening party are justified in the circumstances.

Order

[83] In the result I grant the following orders:

1. The applicants' application is dismissed with costs. The first to tenth applicants are directed to pay the respondents and twenty second respondent's costs occasioned by the dismissal of the main application and the respondents and twenty second respondent's costs of the counter-applications, jointly and severally, the one paying the other to be absolved. Such costs are to be on an attorney client scale and are to include the costs of both senior and junior counsel where so employed and the costs of the intervention application
2. The first respondent is the lawfully constituted National African Federated Chamber of Commerce and Industry for the KwaZulu-Natal Region (NAFCOC KZN).

3. The first respondent is a beneficiary of the NAFCOC KwaZulu-Natal Investment Trust.
4. The first applicant is not an affiliate of NAFCOC and is not entitled to appoint trustees in terms of the Trust Deed of the NAFCOC KwaZulu-Natal Investment Trust as amended.
5. The first to tenth applicants are interdicted and restrained from holding themselves out as NAFCOC KZN and as its executive council or as executive committee members.
6. The first respondent is the only entity entitled to appoint the trustees of the NAFOC KwaZulu-Natal Investment Trust.
7. The first to tenth applicants are interdicted and restrained from making any appointment of trustees to the NAFCOC KwaZulu-Natal Investment Trust.
8. The voluntary association known as NAFCOC KZN that elected its interim provincial leader, Mr Themba Ngcobo on 19 August 2010, followed by Dr Mandla Buthelezi, and recently by Mr Paul Ngema who was elected on 18 March 2020, and all its successors in title is a properly and lawfully recognised affiliate of NAFCOC and is entitled to appoint trustees to the NAFCOC KwaZulu-Natal Investment Trust in terms of the trust deed.



HENRIQUES J

Case Information

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Date of Judgment:	15 December 2022
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This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 15 December 2022.