THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Of interest to other Judges

CASE NO: J728/2020

In the matter between:

THULANI HLUNGWANI Applicant

and

SOUTH AFRICAN POLICING UNION First Respondent

THANDI MZIMELA Second Respondent

Heard: 5 August 2020 (via Zoom)
Delivered: 13 August 2020 (via Email)

JUDGMENT

VAN NIEKERK J

[1] On 7 July 2020, the first respondent's national office bearers decided to place the president of the first respondent (the union) on special leave. On 9 July 2020, the union's national executive committee decided to recall the president. On 24 July

2020, the president was expelled from the union. In these proceedings, the applicant, a member of the union, seeks to have these decisions declared unlawful and set aside, and to have the president reinstated to his position and as a union member.

[2] The dispute is one that concerns a member of a registered trade union and the union about alleged non-compliance with the union's constitution, and the court thus has jurisdiction in terms of s 158 (1) (e) of the LRA.

[3] The material facts are not in dispute. During November 2018, Mr Mpho Kwinika (Kwinika) was elected as the president of the union. His term of office would ordinarily expire in November 2022. By virtue of his office, Kwinika is also a national office bearer ("NOB") and a member of the union's national executive council ("NEC").

[4] On 22 March 2019, Kwinika met the national commissioner of the SAPS to discuss the relationship between him and the union. Later that evening, Kwinika met his friends outside a block of flats in Pretoria when he was approached by a contingent of police vehicles. Members of the SAPS accused him and his friends of public disturbance in the neighbourhood. Kwinika was badly assaulted by police and arrested on charges of public disturbance, resisting arrest, assault of a police officer and drinking in public. He was released from custody at about 4:00 and was admitted at the hospital on the basis of the serious injuries sustained during the attack by the police.

[5] Kwinika was subsequently criminally and departmentally charged for various crimes and for allegedly committing various forms of misconduct. The criminal charges were withdrawn and it would appear that the disciplinary action instituted against Kwinika remains pending.

[6] The events described above took place in March 2019. On 7 July 2020, without any prior warning or notice, the union wrote a letter to Kwinika advising him that at the normal meeting of NOB's held that morning, Kwinika was to be placed on special leave with immediate effect, and that the matter would be further discussed on 10 July 2020 at an NEC video conference. No reason was given for the decision other than that it 'was taken to protect the interest of the organisation'. Kwinika addressed a lengthy letter to the NEC recording his concern at the decision and the manner in which it was taken. There was no response to this correspondence. On 9 July 2020, the union's general secretary addressed a letter to Kwinika advising him that in terms of the decision taken by the NEC, he was recalled as the president of the union with immediate effect. At a further meeting of the NEC on 24 July 2020 it was agreed that Kwinika 'has been bringing the organisation into disrepute which is causing division by his actions after his removal as the president of SAPU'. The NEC agreed on that basis that Kwinika's membership of the union was to be terminated with immediate effect, that the legal services provided to him in respect of the pending cases was withdrawn with immediate effect and that a full-time shop steward would be allocated to him to finalise his departmental matter.

[7] On 9 July 2020, by a majority vote, the NEC took a decision to recall Kwinika from his position as president, with immediate effect. On 24 July 2020 the general secretary of the first respondent sent an email to Kwinika informing him that the NEC had agreed that he had brought the organisation into disrepute and that his removal from office was causing division amongst its members. As a result, the NEC had agreed that Kwinika's membership would be terminated with immediate effect, that an instruction to represent him in both criminal and departmental hearing was revoked, and that a shop steward would be allocated to him to finalise the departmental hearing to which he remained subject.

[8] In these proceedings, the applicant contends that the decisions to place him on special leave, recall him as president and dismiss him as a union member were

decisions taken in breach of the union's constitution. The applicant seeks to be reinstated as a member of the union and into his post as president.

[9] The union's constitution regulates the circumstances and the manner in which office bearers or union representatives may be removed from office. Section 1 of chapter 4 of the union's constitution provides as follows:

> 1.1. An office-bearer, official or trade union representative may be removed from office: (a) if he/she infringes any of the provisions of this Constitution; and (b) if he/she acts in a manner which is detrimental to the interest of the trade union.
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> 1.2. Any member, shop steward, office-bearer or official of the Union may have disciplinary steps taken against them in terms of the Disciplinary Code and Procedure for both Employees and Structures if they act contrary to the code of conduct as determined by the National Executive Committee, Constitution or policies.
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> 1.3. Nothing in this clause denies the right of any structure to recall an elected representative for any cause it deems fit after such an elected structure is given an opportunity to state his case. this will happen by a majority decision…
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> 1.10 Before any elected Office Bearer who is accused of contravening the provisions of this constitution or acted in a manner that is detrimental to the interest of the union can be removed in terms of clause 1.1 of section 1 from the office, he or she shall be entitled to be heard by the National Executive Committee before such member can be expelled from the organisation or removed from their posts. . . (own emphasis)

[10] Also relevant in the present instance is chapter 7 of the union's constitution, which provides as follows:

> 1.8 A shop steward / office bearer may be removed from office through a recall ballot. To effect such ballot, members in a constituency must lodge a petition signed by at least 50% + 1 of the members in the constituency with the relevant structure, whom the Chairperson of that structure shall forward a copy to the General or Provincial Secretary for administration purposes.
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> 1.9 The General or Provincial Secretary shall ensure that within 14 days of receipt of the petition, an election by ballot is held. The office bearer / shop steward shall be entitled to contest such election if nominated.

[11] The respondents, the union and its deputy president respectively, have not filed an answering affidavit. Instead, they filed a notice of intention to raise a number of points of law. The first is whether the applicant has *locus standi* in these proceedings. The second is whether the relief sought by the applicant is legally competent; the third is whether a petition annexed to the founding affidavit is admissible. (The petition appears to comprise a petition from some members if the Vhembe region to re-instate Kwinika as president.) Finally, the respondents place urgency in dispute.

[12] I accept that the application is urgent, if only because the applicant will not obtain relief if the application were to be heard in the normal course. The applicant has not unduly delayed in filing the application after the events that give rise to these proceedings.

[13] *Locus standi* is a matter divorced from the merits of the dispute, and must necessarily be determined prior to any consideration of the merits. The applicant is a member of the union and brings the application in that capacity. Kwinika has signed a confirmatory affidavit confirming the contents of the founding affidavit in so far as they relate to him, but he is not cited as an applicant. In essence, the respondents contend that none of the steps to place Kwinika on special leave, to recall him and to terminate his membership have been challenged by him, and that

there is thus no *lis* as between them and Kwinika. Further, the respondents submit that given that the rights conferred on Kwinika by the union's constitution are contractual and thus personal in nature, they are not capable of being exercised by a third party and in particular, by the applicant, who is not subject to any of the decisions sought to be impugned.

[14] The respondents rely on *Ramakatsa and others v Magashule and Others* 2013 (2) BCLR 2020 (CC), in which the court confirmed that in the case of a political party, the legal relationship between the party, a voluntary association, and its members, is contractual. As in the case of an ordinary contract, if the constitution and rules of the party were breached to the prejudice of certain members, they are entitled to approach the court for relief (at paragraph 80 of the judgment). Further, in *Giant Concert CC v Rivaldo Investments (Pty) Ltd* 2017 (6) SA 621 (CC), the court said the following:

> …an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge the appellate e: a successful challenge to the public decision can only be brought if 'the right remedy is sought by the right person in the right proceedings'.

[15] The applicant contends that he is 'entitled to mount the challenge' by virtue of his status as a member of the union. He relies on *National Union of Metalworkers of* SA v *Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd* [2020] 7 BLLR 645 (CC) to contend that he has standing to challenge what he contends to be a breach of the union's constitution by its structures and office bearers.

[16] *Rivaldo* concerned a challenge to a decision by a local municipality to dispose of land and an objection lodged by the appellant to the sale. The SCA had found that only those with an interest in the interests of the borough had standing to challenge decisions made under the applicable ordinance since it concerns itself with local

interests, and was designed to protect the interests of the local community only. The appellant did not enjoy ratepayer status and did not have the right to object to the sale or to seek to review the decision in issue. The Constitutional Court recorded that the appellant sought to vindicate the constitutional right and a reference to s 38 of the Constitution, which lists those persons who may approach the court when it is alleged that a right in the Bill of Rights has been infringed or threatened. The judgment acknowledged that s 38 broadened the category of those parties standing as compared with the common law. The court noted that s 38 does not require that a litigant must be the person whose constitutional right has been infringed or threatened; rather, what the section required was that the person concerned should make the challenge in his or her interest. The court made reference to *Kruger v President of the Republic of South Africa and others* 2009 (1) SA 417 (CC), where an attorney was held to have personal standing to challenge presidential proclamations that were of direct and central importance to the field in which he practised. In that case, s 38 did not apply since the challenge had been brought on the grounds of rationality and the law, but the court held that a generous approach to standing was nonetheless necessary. The court nevertheless cautioned that legal practitioners asserting personal standing to challenge legislative acts had to show that the challenge was brought in the interest of the administration of justice (e.g. a need for legal certainty) and not purely on financial self-interest (see paragraph 40). The court concluded that it was plain that constitutional own interest-standing is broader than the traditional common law concept of standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct, i.e. show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests (at paragraph 41).

[17] The founding affidavit does not make any reference to the Constitution nor any threat to or infringement of a fundamental right. But it does not necessarily follow that the present case is to be considered in a constitutional vacuum. In *National Lufil Packaging (*supra), the Constitutional Court considered a challenge by an

employer to a trade union's demand for organisational rights in circumstances where the union's members fell outside the union's registered scope as defined by its constitution. The court stated as follows:

> [37] The Constitution, through section 23(4), recognises the creation of both unions and employers' organisations. This is provided for in the LRA which makes it peremptory for a union to have a constitution in order to qualify for registration. The constitution of a union or employers' organisation must determine a number of substantive matters, including the nature, scope and powers of the organisation. The constitution, together with any rules and regulations, "collectively constitute the agreement which is entered into by its members". When members have formally adopted a constitution, it becomes legally binding on them. It governs the relationship between the members and on registration it becomes public and is available for inspection by outsiders.
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> [47] The contractual purpose of a union's constitution and its impact on the right to freedom of association of its current members is founded in its constitution. A voluntary association, such as NUMSA, is bound by its own constitution. It has no powers beyond the four corners of that document. . . (own emphasis)
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> [56] As a matter of common law and based on the LRA, NUMSA's constitution precludes membership outside of those industries listed in Annexure B. Any admission of members outside the terms of the constitution is ultra vires and invalid…

[18] In so far as third parties are concerned (in this instance, the employer against whom the demand for organisational rights had been directed), the court said:

> [64] Additionally, while the constitution of a union is seen to be a contract between the union and its members, it serves more than that purpose. NUMSA's argument loses sight of the position of outsiders. The registration of a union has also been said to promote the public's access to its constitution. The constitution of the union thus also serves an important purpose for employers, as they are informed of the different industries within which unions operate. To allow unions to operate outside their constitutions, at their discretion, would go

against core constitutional values such as accountability, transparency and openness. (own emphasis) Fergus and Godfrey are helpful on this point:

"[T]he purposes of the statutory requirements for the registration of trade unions . . . extend beyond the simple regulation of relationships between unions and their members to include promoting accountability, transparency and democracy in unions' internal processes and procedures. Allowing unions to recruit or organise workers on an ad hoc basis without regard for their constitutions subverts these purposes to the potential detriment of their members and the public at large."

[65] Furthermore, as Bendix notes:

"[The LRA] attempts to protect members of unions from malpractice by office-bearers and officials. It does so firstly by providing that unions should register if they want to achieve legal representation rights and, secondly, by requiring that registration is dependent on the adoption of a proper constitution and on adherence to the certain formalities."

[66] NUMSA's own constitution as currently worded is perfectly reconcilable with the goals and values of sections 18 and 23 of the Constitution.

[19] The values of accountability, openness and transparency referred to by the court suggest a broad approach to the question of standing when disputes about the alleged non-compliance of a union's constitution are adjudicated under s 158 (1) (e). On this approach, a member of a union has *locus standi* to seek an order that a union comply with its own constitution, even if the subject of the action complained of is another union member. Each union member has an interest in the lawfulness of any action undertaken by a union's structures, and its officials and office-bearers, and each stands to be prejudiced if union structures, office bearers and officials are permitted to conduct themselves as if the constitution did not exist. The well-known slogan 'An injury to one is an injury to all' is apposite in this context. Union members are entitled to be satisfied that any action taken against one of their number is consistent with the constitution, as indeed are third parties, at least in some instances, as the judgment in *Lufil Packaging* discloses.

In short: the *lis* is not one that is between the wronged members and the union; it is one between the concerned member and the union, and arises from the allegation of a failure to uphold the constitution, which of necessity binds all members.

[20] For these reasons, I find that the applicant, in his capacity as a member of the union, has *locus standi* to challenge the union's failure to comply with its own constitution.

[21] Turning then to the remaining points in *limine* raised by the respondents, in regard to the respondents' objection to the petition that is attached to the founding affidavit, that objection is well-founded. The petition is not supported by confirmatory affidavits, names have obviously been duplicated and in any event, to the extent that it was annexed to indicate a degree of support for Kwinika, the petition takes matters no further.

[22] The respondents' point that the relief sought by the applicant is any event incompetent is linked to the *locus standi* point. In essence and relying on *Majola Cricket South Africa and Others* [2013] 12 BLLR 36 (LC), the respondents contend that the fact that Kwinika has not impugned any of the relevant decisions in question poses an insuperable obstacle to the relief sought. In particular, the respondents contend that the decisions of 7 July 2020 and 9 July 2020 have been overtaken by events in the form of the decision to terminate Kwinika's membership of the union taken on 24 July 2020. Since Kwinika has not challenged that decision, the remedy of reinstatement is not competent.

[23] The founding affidavit make reference to the termination of Kwinika's membership of the union, and the notice of motion specifically seeks Kwinika's reinstatement as a member and as president of the union. Chapter 4 of the union's constitution as recorded above, makes specific reference to the establishment of a disciplinary committee and the right of a member and office bearer to state a case before the

committee prior to expulsion from the union. Indeed, it is not disputed that the union failed to comply with the relevant provisions of chapters 4 and 7 prior to placing Kwinika on leave, and recalling him. As I have indicated, these averments are not disputed by the respondents, and I must necessarily accept that the union has acted in breach of its constitution in all three instances.

[24] The union's decisions to place Kwinika on special leave, to recall him and to expel him from the union were all taken in breach of the union's constitution. It follows that the decisions were null and void and should be set aside, and that the applicant is entitled to seek to have Kwinika restored to his positions as a union member and as president of the union.

[25] Finally, in relation to costs, these is no reason why costs ought not to follow the result. The applicant has had to incur costs in enforcing the terms of the union's constitution against those of its structures and office-bears that have acted in flagrant disregard of its terms.

I make the following order:

1. The decision taken by the first respondent's national office bearers on 7 July 2020 to place the president of the union on special leave without his consent is declared unlawful and set aside.
2. The decision taken by the first respondent's national executive committee on 9 July 2020 to recall the president of the union is declared unlawful and set aside.
3. Mr Mpho Kwinika is reinstated as the president of the first respondent
4. Mr Mpho Kwinika is reinstated as a member of the first respondent
5. The first respondent is to pay the costs of these proceedings, limited to the costs of one counsel.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv S Nhlapo, with him, Adv. BK Hlangwane, instructed by Hajibey Bhyat Attorneys

for the respondents: Adv T Motau SC, with him Adv. M Qofa, instructed by Peyper Attorneys Inc.