THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 805/13

In the matter between Reportable

NATIONAL AFRICAN FEDERATED CHAMBER OF COMMERCE AND INDUSTRY AND SEVEN OTHERS **FIRST TO EIGHTH APPELLANTS**

and

VERONICA PINKY NOMASWAZI MKHIZE AND SEVENTY OTHERS **FIRST TO SEVENTY-FIRST RESPONDENTS**

Neutral citation: *National African Federated Chamber of Commerce and Industry v Mkhize* (805/13) [2014] ZASCA 177 (21 November 2014)

Coram: Mpati P, Majiedt, Willis and Mbha JJA and Schoeman AJA

Heard: **3 NOVEMBER 2014**

Delivered: **21 NOVEMBER 2014**

Summary: Interpretation of the provisions of the constitution of a voluntary association – principles restated – to be interpreted like any other document – sensible and businesslike interpretation is required – on application of these principles held that a purported meeting of the appellant's council on 6 December 2012 had not been lawfully convened and that the resolutions taken at that meeting were invalid and of no force and effect.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Monama J, sitting as court of first instance):

The following order is made:

1. The appeal is upheld.
2. The order of the High Court is set aside and substituted with the following order:
   '(a) It is declared that the purported meeting of the Council of the National African Federated Chamber of Commerce and Industry on 6 December 2012 was not lawfully convened and that all the resolutions passed thereat are invalid and of no force and effect.
   (b) The respondents are ordered, jointly and severally, to pay the costs of the application, including the costs of two counsel.'
3. The respondents are ordered, jointly and severally, to pay the appellants' costs of appeal, including the costs of two counsel.
4. The respondents are ordered, jointly and severally, to pay the appellants' costs occasioned by the application for leave to appeal before the South Gauteng High Court and the subsequent application to this Court for leave to appeal.

JUDGMENT

Majiedt JA (Mpati P, Willis and Mbha JJA and Schoeman AJA concurring):

Introduction:

[1] The first appellant, the National African Federated Chamber of Commerce and Industry (NAFCOC), is an organisation at war with itself. Its

members have, not for the first time, split into two factions. This internecine strife has culminated in a litany of court cases of which the present matter is one. The appellants appeal with leave of this court against the dismissal of its application in the South Gauteng High Court, Johannesburg (Monama J). In that application the appellants sought declaratory orders that a meeting of the NAFCOC Council, which was to be held on 6 December 2012 (the December 2012 meeting), had been unlawfully convened and therefore invalid and that the resolutions passed thereat are invalid and of no force and effect. It also sought an interdict restraining the respondents from convening a meeting of the NAFCOC Council.

The parties

[2] NAFCOC is a voluntary association, governed by a constitution. It was established in 1964 for the economic empowerment of Black businesspeople. NAFCOC is a federation, consisting of affiliated sectoral members, corporate members, honorary members and any other individuals or associations admitted to membership. The 18 sectoral affiliates are themselves also voluntary associations – nine of them represent the provinces and the other nine represent various sectors of the economy. The second appellant, Mr Lawrence Bhekinkosi Mavundla (Mr Mavundla), was NAFCOC's president until recently (there is a dispute as to when exactly his term of office ended, an aspect to which I will revert shortly). The 3rd to 8th appellants are members of NAFCOC's Executive Committee (Exco) and of its Council.[1] The 3rd, 4th and 5th appellants withdrew their appeal shortly before the matter was heard. The 5th appellant had deposed to the founding affidavit on behalf of NAFCOC as its duly authorised representative, and on behalf of himself and the other appellants.

[1]The 3rd appellant, Mr Sonyosi Stephens Skosana, is NAFCOC's Deputy President; the 4th appellant, Mr Teme Emmanuel Letsoela, is its Treasurer General; the 5th appellant, Mr Sekwano Gilbert Mosena, is NAFCOC's Secretary General; the 6th appellant, Mr Churchill Mrasi, is NAFCOC's Senior Vice-President; the 7th appellant, Mr Daniel Kotze, is an additional NAFCOC Exco member, as is the 8th appellant, Mr Chuma Shweni.

[3] The 1st to 50th respondents are all signatories to a notice purporting to requisition and convene the December 2012 meeting. The 51st to 71st respondents attended the December 2012 meeting and voted in favour of the resolutions there. They were joined as parties after the December 2012 meeting had been held. The 1st to 62nd, the 64th and the 68th to 71st respondents were all represented by one set of counsel and these respondents were referred to during argument as 'the main respondents'. The 63rd and the 65th to 67th respondents were represented by another set of counsel. Those respondents were referred to in argument as 'the Mpumalanga respondents'. Where necessary, I shall adopt this nomenclature in the judgment. In the founding affidavit, Mr Sekwano Gilbert Mosena (Mr Mosena), the erstwhile 5th appellant, describes the respondents as 'rebels' or, in the case of the 1st to the 50th respondents, as 'members of the parallel NAFCOC Council'. All of the respondents are allegedly aligned to the Leaf-Hlongwane faction while the appellants are Mavundla (the 2nd appellant) loyalists. Mr Michael Edward Leaf is the Chief Executive Officer of NAFCOC Investment Holding Company Limited (NAFHOLD) and Mr Khesane Johannes Hlongwane is its Chairman. NAFHOLD was incorporated during October 1994 as an investment holding company with the objective of acquiring business and investment opportunities for NAFCOC and its members. Its sole shareholder is the National African Federated Chamber of Commerce Investment Trust (the Trust). The Trust effectively funds NAFCOC by making discretionary distributions to it in order to fund its expenses. NAFHOLD holds numerous valuable assets, including investments in Uthingo (which runs the national lottery) and Phumelela (a large operator in the horseracing industry). During 2009 NAFHOLD disposed of an investment in Tsogo Investment Holding Company for the considerable amount of R1.2 billion.

The issues

[4] The central issue for determination is whether the December 2012 meeting was lawfully convened. If not, all resolutions emanating from it are invalid and of no force and effect. The main resolutions passed thereat are the election of a new President (purportedly to replace Mr Mavundla) and the

removal of the 3rd to 8th appellants from the NAFCOC Exco for a variety of reasons which need not be repeated here. Mr Mavundla's position as NAFCOC President also requires determination since it has a direct bearing on the outcome of the case.

[5] The interpretation of the NAFCOC constitution, as its governing instrument, is key to the determination of the central issue. But, as will presently appear, even the question of which constitution applies, was a bone of contention between the parties.

The background factual matrix

[6] A poorly drafted constitution and an apparent pot of gold in NAFHOLD have seemingly fuelled the fires of the battle within NAFCOC. The two factions accuse each other of unlawfully setting up parallel structures with the sole objective of gaining control over NAFCOC. At the epicentre of this battle is control of the NAFCOC Council, the organisation's supreme decision-making body. There are also accusations back and forth concerning the one or the other faction's alleged unlawful misappropriation of NAFCOC's moneys. And there are serious allegations of numerous acts of malfeasance having been committed by various individuals in this unseemly battle. It is hardly surprising then that not only has this resulted in an unnecessarily prolix record (strongly deprecated by the high court and rightly so), but there are also wide ranging disputes of fact on the papers. The appellants sought final relief in the high court but, for the reasons that follow, it is not necessary to resolve these factual disputes. In essence, the material facts are either common cause or have not been seriously disputed.

[7] The appellants were duly elected as Exco members in 2009. Save for Mr Mavundla's disputed position, there is unanimity between the parties that the other appellants were office bearers and NAFCOC Exco and Council members at the time of the notice of the meeting (6 November 2012) and of the December 2012 meeting itself. This is an important common cause fact to which I shall revert shortly.

[8] Notice of the December 2012 meeting was given on 6 November 2012 to Council members via an electronic mail message from a NAFHOLD employee, Ms Dianne Ingram. Attached to the message was a letter on a NAFHOLD letterhead from a Mr M. Liphosa with the notice attached. In relevant part the notice reads as follows:

'Notice of a special meeting of the Council of NAFCOC ("the meeting")

1. The meeting has been convened on the requisition of the majority of Council members, whose signatures are appended hereto . . .'

As stated above, the December 2012 meeting was aimed at filling Mr Mavundla's disputed vacant position and the removal of the 3rd to 8th appellants as Exco members. The resolutions were passed unanimously. But there was an important and material judicial intervention prior to the December 2012 meeting. The appellants launched the present application, as a matter of urgency, for declaratory and interdictory relief on a final, alternatively interim, basis. The appellants were not able to have their case heard before the December 2012 meeting. They did, however as a consequence of the urgent application, procure an order by agreement on 4 December 2012 before Mojapelo DJP, designed to preserve the status quo pending the hearing of the application. In relevant part this order, in terms whereof Mojapelo DJP postponed the application to 29 January 2013, reads as follows:

'The resolutions listed in the notice of the special meeting of the Council of the First Applicant [NAFCOC] to be held on 6 December 2012 and any other resolution adopted at that meeting is **suspended and will not be implemented pending the hearing of the matter** [on 29 January 2013]' (my emphasis).

[9] The appellants consequently amended their application to provide for the changed circumstances. They sought the declarators and interdict mentioned in para 1 above. As stated, they also joined the 51st to 71st respondents. At the hearing they abandoned the interdictory relief and persisted only in seeking the declarators. In dismissing the application, Monama J made several key findings, which I discuss next.

The judgment of the high court

[10] The high court held that:

(a) the appellants had placed reliance solely on the 2011 NAFCOC constitution and that, in a "[Damascan] conversion" the appellants had recast their case by invoking the 2008 NAFCOC constitution in their replying affidavits;

(b) The effect of the order of Mojapelo DJP on 4 December 2012[2] was to render the prayers for declaratory relief moot and that the only remaining aspect for adjudication was the interdictory relief;

(c) The NAFCOC President's term, unlike that of the rest of the Exco members which was four years, was only three years and had expired on 4 November 2012; and

(d) The "Chairperson of the Council" had the requisite constitutional powers to convene and preside over Council meetings and the December 2012 meeting was thus "properly called and properly conducted its affairs according to the constitution."

The respondents disavowed any reliance on the findings and underlying reasoning of Monama J, save to a limited extent in respect of (c) and (d) above. This is hardly surprising. The learned Judge regrettably misconstrued and seriously misdirected himself on several aspects which I find convenient to deal with now.

[11] First, as I have stated, the appellants had abandoned the interdictory relief at the hearing and had pressed ahead, apparently with considerable vigour, with their pursuit of declaratory relief. And the consensual order made by Mojapelo DJP was not only designed to preserve the status quo and to reserve the appellants' rights, but in truth and in fact had the effect of doing so, until the final determination of the *lis* between the parties. The finding by Monama J that that order had rendered the declaratory relief moot is a grave misdirection.[3]

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[2]Referred to in para 8 above.

[3]Before us counsel for the main respondents wisely abandoned their quite startling initial support in their heads of argument for the high court's finding set out in para 10(b) above.

[12] Second, while it is true that the appellants had primarily based their case on the 2011 constitution, they had expressly and unequivocally added a second string to their bow by invoking the 2008 constitution as an alternative basis for their contentions in their founding papers. They came to court on the alternative basis that, even if the 2008 constitution is found to be of application, they were nonetheless still entitled to relief due to non-compliance with that constitution. It is well established that a litigant may plead in the alternative, although he or she or it may not adduce evidence on alternative bases. In the end, counsel for all the respondents rightly conceded that the high court was wrong in its finding in 10(a) above and the matter was argued on the 2008 constitution. The findings set out in 10(c) and 10(d) are at the heart of this matter and require fuller deliberation. A useful starting point is the relevant provisions of the 2008 constitution.

The NAFCOC governing structure as contained in the 2008 constitution

[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. It was not difficult at all for the parties to advance completely different interpretations of the material provisions. The point is best illustrated by the fact that the two groups of respondents were able to attach differing interpretations to a key clause, for reasons that will become evident later. But this is what is before us and we are called upon to decide the issues as best we can. As this case concerns the question whether or not a NAFCOC Council meeting has been validly convened the primary focus will be on the provisions concerning meetings. But ancillary related provisions concerning membership, definitions and the like also require consideration.

[14] As stated, NAFCOC is a federal body with three classes of membership. Its highest decision–making structure is the Council which is dealt with in clause 28. Clause 28.2 makes it clear that the Council:

(a) is NAFCOC's supreme decision–making body;

(b) determines NAFCOC policy;

(c) has the power to approve the admission of members to NAFCOC;
(d) shall facilitate the establishment of subsidiary NAFCOC chambers;
(e) shall perform any other related function for the benefit and interest of NAFCOC.

The Council consists of 72 members, ie four delegates from each of the 18 constituent affiliate members. In instances where, for example, the constitution must be amended, the constituent affiliate members may delegate up to 10 members to a Council meeting.

[15] In terms of clause 28.4.4:

'Council meetings shall be held at such times and places **as the President may determine**; provided that Council shall meet no less than FOUR (4) times in each calendar year' (my emphasis).

The appellants rely heavily on this clause for their case. For their part, the main respondents' principal contentions are based on clause 17.1 which, under the heading 'Calling of meetings', reads:

'The Executive Committee and/or Council may, whenever it deems fit, convene other General Meetings. **They shall also convene a General Meeting on a requisition thereto by a simple majority of members.**' (my emphasis – this is the part on which the main respondents rely).

The Mpumalanga respondents, in turn, rely on the common law for their contentions on this central issue. I shall discuss these different contentions shortly. Before I do so and to add to the conundrum, it is necessary to consider the position of the 'Chairperson of the Council'. The main respondents' case is that, having been duly requisitioned by 'a simple majority of members' as envisaged in clause 17.1, the 'Chairperson' had convened the December 2012 meeting, as he was constitutionally empowered to do.

[16] It is striking that such a designation, 'Chairperson of the Council' is nowhere to be found in the 2008 constitution, not even in clause 28 where one would have expected to find it, dealing as it does with, inter alia, the composition of the Council. It does not appear in clauses 29 or 30 which list the members of the NAFCOC Exco (which is responsible for the day to day administration of the organisation's affairs) and regulate their elections and

terms of office and set out the functions and responsibilities of the various office-bearers. The Exco consists, in terms of clause 29.1, of the President, Deputy-President, First Vice-President, Second Vice-President, Treasurer, Secretary General, Assistant Secretary General, three additional Council members and the Chief Executive Officer (CEO), elected by these office bearers.

[17] The deponent to the main answering affidavit, Mr Douglas Stewart Duma Makanda (Mr Makanda) describes himself as the 'duly elected chairperson of the NAFCOC council'. He asserts that he has, in that capacity, duly convened the December 2012 meeting upon the requisition of a simple majority of NAFCOC's Council members, in terms of clause 17.1 above. This 'simple majority of council members' is alleged to be the 1st to 50th respondents. Mr Makanda concedes that there are 'certain ambiguities in the language used in the 2008 constitution', but he says they 'can be resolved through a purposive interpretation'. According to him the 'chairperson of the council' is elected to that position for a period of four years by the Council in terms of clause 29.6.1. He says that the 'chairperson' is not a member of Exco, but 'he or she is simply the designated representative of the council when it is not in session and the only power that the chairperson may exercise outside of a meeting of the council (save for specially delegated powers) is to call a meeting thereof'. The reference to clause 29.6.1 is incomprehensible since that clause reads as follows:

'29.6.1 Both the Council and the Executive Committee members shall be elected for a period of 4 (FOUR) years'.

[18] This aspect is further complicated by the appellants' response to Mr Makanda's aforementioned averments. They say the constitution makes no provision for such a position and that the Council has 'created' a position of 'Chairperson of the Provinces' in order to placate Mr Makanda and that they have gratuitously permitted him to chair some meetings of Council. This cavalier approach regrettably appears to be symptomatic of how NAFCOC's affairs are being run.

[19] The only place in the constitution where mention is made of a 'Chairperson of the Council' is in clause 29.8.9.1 which reads:

'The Chairperson of the Council and the Executive Committee shall have an ordinary vote as well as the casting vote'.

This clause is perplexing, since it is out of kilter with the rest of the constitution. As stated, nowhere in the constitution is such a position established. I think the appellants are correct when they suggest that this is but one of a plethora of drafting errors and that the clause, when read in context, can only be referring to the President of NAFCOC whose functions, in terms of clause 29.8.1.3 includes the responsibility to 'chair all meetings of NAFCOC, Council, the Executive Committee and the Annual General Meeting'. It is also conceivable that the drafters of the constitution intended simply to provide that the official who chairs a Council meeting would have an ordinary as well as a casting vote. There was no intention to create a position such as 'Chairperson of the Council' in the clause.

I am not persuaded:

(a) that the 2008 constitution creates a position of 'Chairperson of the Council' and, as a result,

(b) that Mr Makanda has any constitutional powers in that purported capacity.

I shall revert to this finding presently. I consider next the correct interpretation of clause 17.1, thereafter the Mpumalanga respondents' reliance on the common law and then the central question, namely who is constitutionally empowered to convene a meeting of the Council of NAFCOC and under what circumstances.

[20] In respect of clause 17.1 (cited above), Monama J held that the clause is 'wide enough to include the chairperson of the council'. He further held that '. . . . [regard] being had [to] the structures of [NAFCOC], every constituent part is clothed with authority to call and preside over the meeting'. This finding is, with respect, clearly wrong. Absent the clear, unequivocal establishment of that position and in view of the unambiguous provisions dealing with the establishment of the NAFCOC Exco and its Council, there is no legal basis to find that there is a NAFCOC office bearer known as 'the Chairperson of the

Council' created by the 2008 constitution and even less that such a phantom office bearer can exercise any constitutional powers on behalf of NAFCOC. One would have expected such an office bearer to have been defined in the definitions clause (clause 11) as is the case with all other office bearers (clauses 11.1.18 – 11.1.22) and to have been included in the list of Exco members set out in clause 29.1. 'Office bearers' is defined in clause 11.1.16 as 'collectively, members of the Executive Committee'. The unavoidable conclusion is that such a position does not exist in the 2008 constitution.

[21] It is trite that the constitution of a voluntary association together with all the rules or regulations collectively forms the agreement entered into by that association's members.[4] The constitution must be interpreted in accordance with the ordinary rules of construction applying to contracts in general.[5] This requires giving effect to the plain language of the document, objectively ascertained within its context.[6] In the course of interpretation, preference should be given to a sensible meaning over 'one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'.[7]

[22] In applying these principles, it is plain that clause 17.1 refers to general meetings of the general NAFCOC membership and not to general meetings of the NAFCOC Council.[8] The main respondents' reliance on this clause is misplaced. Clause 17 deals with the 'calling of meetings'. Clause 17.1 refers to 'other general meetings' that can in my view only mean general meetings of NAFCOC members other than the annual general meeting of NAFCOC, which is dealt with in detail in clause 14. The 2008 constitution pertinently distinguishes between general meetings of all NAFCOC members and Council meetings. The latter is stipulated in clause 28.4 ('Meetings of the Council') which, in turn, falls under the heading to clause 28: 'The Council of NAFCOC'. Counsel for the main respondents had considerable difficulty

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[4] *Turner v Jockey Club of SA* 1974 (3) SA 63 3(A) at 644G – 645C; *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 440 F – G.
[5] *Wilken v Brebner & others* 1935 AD 175 at 187.
[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[7] Ibid.
[8] In this regard counsel for the appellants found an unlikely ally in counsel for the Mpumalanga respondents who also subscribe to this interpretation.

explaining to us why the requisitioning and convening of a Council meeting would be located in such a peculiar place as clause 17.1 and not, as one would expect, in clause 28.4. This distinction is fortified by clause 20.1 which, in dealing with the conduct of NAFCOC's affairs, provides that the Exco 'may exercise all such powers of NAFCOC as are not, by this constitution, required to be exercised by **the Council in General Meeting** . . . .' (my emphasis). There is, in addition, clause 21.1 which, in dealing with the delegation of NAFCOC's powers to the Exco, provides that such delegation shall occur '[s]ubject to any other provision in this constitution, and subject to any resolution of **a General Meeting or a Council Meeting**' (my emphasis). Finally and conclusively, clause 11.1.12 defines 'General Meeting' as 'a general meeting **convened for all members of NAFCOC** entitled to attend and vote at general meetings in terms of this constitution. . . .' (my emphasis).
I am therefore driven to the conclusion that clause 17.1 concerns the requisitioning of a general meeting of the NAFCOC membership by a simple majority of NAFCOC members. It did not and could not have formed the constitutional basis for the convening of the December 2012 meeting. The next aspect for consideration is the Mpumalanga respondents' reliance on the common law.

[23] In an ably presented argument which at first blush appeared quite attractive, counsel for the Mpumalanga respondents invoked the common law on the basis that neither clause 28.4.4 (on which the appellants rely) nor clause 17.1 (on which the main respondents rely) find application in the present case on the central issue. We were urged, generally, to give effect to the plain wording of the constitution through the application of a purposive approach.[9] In respect of the central issue, the argument went like this: neither clause 28.4.4 nor clause 17.1 applies to the requisitioning and convening of the December 2012 meeting; in fact the constitution is silent on this aspect, hence the common law applies. Clause 28.4.4 does not envisage the requisitioning of a Council meeting, since it constitutionally prescribes a minimum of four Council meetings per year. All that the President is

[9]In this regard we were referred to *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 93.

empowered to do in terms of clause 28.4.4 is to determine the times and the venues of these meetings. Clause 17.1 concerns general meetings of the NAFCOC membership. The manner of the requisitioning and convening of other Council meetings (ie other than those stipulated in clause 28.4.4) is not provided for in the constitution. On the common law authorities the December 2012 meeting was duly convened by a majority of legitimate Council members (on the Mpumalanga respondents' version, since there is a material dispute of fact on this aspect) and there was no need to have approached the President in this regard. Counsel placed reliance primarily on *Lewin*[10], *Osman v Jhavary*[11] and *Padayichie v Pavadai*[12] for these submissions.

[24] Upon closer analysis the argument loses much of its lustre. It is, as I will presently demonstrate, sound only in respect of the requisitioning of Council meetings, but not in respect of its convening. We were referred to part of an extract from a minority judgment by Steyn JA in *Cape United Sick Fund Society v Forrest.*[13] But when read in full and in context, the dictum goes no further than to confirm the well-established principle that one must first and foremost find the powers and functions of an association's organs in its constitution.[14] In the present matter the Mpumalanga respondents argue that it is appropriate to turn to the common law since the constitution is silent on the central issue for consideration. The following passage from *Lewin*, relying on *Jonker v Ackerman en andere*[15] was cited in support of the proposition:

'An annual general meeting which has been called by the secretary of a club, **in the absence of any provision in the constitution** that this could be done by the committee only, is just as valid as one which has been called or authorized by the committee.'[16] (my emphasis).

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[10]Lewin A, *The Law, Procedure and Conduct of Meetings,* 5th ed, Juta Cape Town (1985).
[11]*Osman v Jhavary* 1939 AD 351.
[12]*Padayichie v Pavadai NO and another* 1994 (1) SA 662 (W).
[13]*Cape United Sick Fund Society v Forrest* 1956(4) SA 519(A).
[14]At 533H: 'It has not been seriously contested that the scope of the functions of the numerous organs of this society is determined, primarily if not exclusively, by its written constitution. It is conceivable that the rules of the common law may supplement the express terms of a corporation's constitution, but we have not been referred to any common law authorities setting forth any rule which would be applicable in this case'.
[15]*Jonker v Ackerman en andere* 1979(3) SA 575 (O).
[16]Lewin, op cit, at 9.

Reliance was also placed on *Osman* at 358. In that case this court held that there are compelling grounds to read into the trust deed of the Grey Street Mosque an implied term that 15 or more regular worshippers should have the authority to call a meeting of the congregation to pass certain resolutions in circumstances where the defendant trustees had refused to do so, despite having been requisitioned to convene the meeting. Lastly, we were referred to *Padayichie* where the court held that the members of the Johannesburg Melrose Shri Siva Subrahmanyar Temple (a voluntary association) were entitled to call a special general meeting themselves in circumstances where the duly empowered authorities (one trustee, the secretary and the president) refused to heed a requisition for such meeting to be held. For the reasons that follow these authorities do not assist the Mpumalanga respondents on the common cause facts in this case. They are either distinguishable on the facts and/or the law or they find no application on the present facts.

[25] It is important, in the context of the facts of the case before us and for purposes of deciding the central issue, to distinguish between the requisitioning and the convening of a NAFCOC Council meeting. In the former instance there is a call for a meeting to be held and in the latter, a meeting is called. This distinction is decisive of the central issue before us. The 2008 constitution makes no mention anywhere of the requesting or requisitioning of Council meetings. It does so, however, as I have found above, in respect of general NAFCOC members' meetings in clause 17.1. Where it is silent in respect of the requisitioning of Council meetings the common law rules may indeed be used to remedy that shortcoming. I think it is self – evident that in any organisation members should have the power to request a meeting of the organisation or of its decision-making structures. But this is not the question to be decided here. The issue for determination is whether the December 2012 was lawfully convened. I discuss next, in brief, the authorities cited above, against the backdrop of the central issue.

[26] The extract from *Lewin*, quoted above, must be understood in terms of the proviso which I have highlighted in the text. The common law cannot supersede the express provisions of a constitution. We must be satisfied that

the constitution is indeed silent on the question of who is entitled to convene Council meetings, before that authority finds application. That is not the case here. Clause 28.4.4 is plain and unambiguous that such power vests in the President. I will discuss in due course whether the President was still in office at the relevant time and, if not, whether the Deputy President was constitutionally empowered to convene a Council meeting. It was suggested during argument on behalf of both sets of respondents that such an interpretation of clause 28.4.4 would make it unnecessarily difficult, and even impossible, to have Council meetings convened. For this submission reliance was placed on *Government Workers' Union v de Vries*.[17] This submission has no merit, in fact the interpretation propounded by the respondents (relying on clause 17.1 and the common law respectively) would lead to that result. The notion that a group of members of either NAFCOC in general or of the Council in particular, even a majority thereof, can convene Council meetings is simply unworkable in practice. It can conceivably lead to chaos and disorder. Moreover and in any event, it flies directly in the face of clause 28.4.4.

[27] It is important to remind oneself that the present matter is not a situation such as the one that existed in *Osman* and in *Padayichie*, above. There the members had requisitioned a meeting (of the congregation of the Mosque and for a special general meeting of the Temple members respectively) and they were turned down by those in authority. It is necessary to briefly consider the facts in those cases.

[28] In *Osman* the management of the affairs and property of the Grey Street Mosque in Durban was regulated by a trust deed. It provided that the trust was to be managed by a board of nine trustees, five of whom would form a quorum to transact the trust's business. The nine original trustees were appointed in the trust deed which provided, inter alia, that in the event that five or more trustees resign or retire either individually or *en bloc*, the remaining trustees shall *ipso facto* cease to hold office and their positions would become vacant. The trust deed was, however, silent on how the nine vacancies were to be filled. The trust deed determined the manner in which meetings of the

[17] *Government Workers' Union v de Vries* 1949 (1) SA 1110 (W) at 1129.

congregation were to be convened. One such instance was by virtue of clause 19 which required the trustees to call a meeting on a requisition signed by not less than 15 regular worshippers which states the business for which the meeting is required. In the event that the trustees fail to heed the requisition within the time specified, the requisitioners may themselves give 14 days' notice to the members of the congregation and may then proceed with the business at that meeting. The plaintiff, who was a member of the congregation, and his associates were appointed in 1937 as trustees at a meeting called by 15 members of the congregation, after five trustees had retired or resigned (thus resulting in all nine trustee positions becoming vacant). This meeting was convened by the 15 congregants after the remaining trustees refused to heed the requisition calling for a meeting. The plaintiff and his associates sought a declaratory order that they were the lawful trustees. To this the defendant trustees successfully excepted in the Provincial Division, inter alia on the basis that they had been validly appointed as trustees during the 1933, 1934 and 1935 annual general meetings on the basis of an implied term that the remaining four trustees could appoint them, despite having ceased to hold office.

[29] It is against this factual backdrop that this court upheld the appeal and disallowed the exceptions. In the course of doing so Tindall JA, writing for a unanimous court, held that there are strong grounds to read into the trust deed an implied term that in the circumstances 15 or more regular worshippers should have the authority to call a meeting of the congregation. The judgment must be understood in the context that:

(a) there were no trustees lawfully in office;

(b) the trust deed was silent as to how the trustees' vacancies were to be filled; and

(c) in the resulting legal stalemate the purportedly appointed defendant trustees declined the 15 congregants' request for a meeting to be held.

Osman is thus clearly distinguishable from the present matter and reliance thereon is misplaced.

[30] In *Padayichie* there was a similar factual situation in that those empowered to do so, had failed to call a special general meeting within 14 days, as requisitioned by the applicant and others. That case is similarly distinguishable on the facts.

[31] To summarize: neither clause 17.1 nor the common law find application in this case – meetings of the NAFCOC Council can be convened only by the President in terms of clause 28.4.4. That is not to say that members are not permitted in law to call for or to requisition such meetings, an aspect which is not before us. The 'Chairperson of the Council', a phantom office bearer, had no power to convene a meeting of the NAFCOC Council.

Was the NAFCOC President or his deputy constitutionally empowered to convene the December 2012 meeting?

[32] It is not necessary to consider and decide the material factual disputes as to whether or not the 1st to 50th respondents were legitimate Council members at the time. The preceding finding is decisive of the central issue before us. But I deem it necessary to consider briefly the legal position relating to the President (Mr Mavundla) and the Deputy President (Mr Skhosana, the 3rd appellant) at the relevant time (ie November and December 2012). Clause 29.1 lists the Exco members and it includes the President (clause 29.1.1.1). The term of office of all Exco members (ie including the President) is four years (clause 29.2.2 – 'Members of the Executive Committee shall be elected once in every four year period at a Council meeting to be held within 60 (sixty) days from the date of expiry of term of office of the Executive Committee'). Clause 29.6.1 confirms this: 'Both the Council and the Executive members shall be elected for a period of 4(four) years'. It is significant that immediately following on this clause, the next clause, 29.6.2 reads: 'No person shall be President of NAFCOC for more than 2(two) consecutive terms of office'.

[33] But clauses 29.2.2 (read with clause 29.1.1.1) and 29.6.1 are at variance with clause 23.7.5 which reads: 'the President shall be elected to

hold office for a period of three (3) years and this shall be limited to two (2) consecutive or combined terms of office.'

The first two clauses appear under the general heading to clause 29 'Executive Committee' and under the specific headings to clause 29.1 'Composition of the Executive Committee' and to clause 29.6 'Term of office' respectively. Clause 23.7.5 appears under the heading to clause 23 'Election of President'.

[34] The appellants argue that clause 23.7.5 is simply one of the many drafting errors which abound in the constitution and that the President's term of office, like that of the rest of Exco, is four years. I agree. Such an interpretation would be sensible in the overall structure of NAFCOC. Why, one might ask, should there be a difference between the terms of office of the President who, after all, is an integral part of Exco, and the rest of Exco? I am not persuaded by the main respondents' argument that the drafting error is in fact to be found in clause 29.6.1 because Council and Exco members are not 'elected' (the word used in clause 29.6.1), but they are nominated by NAFCOC's constituent affiliates. This argument fails to explain why there should be such a discrepancy in the respective terms of office. It is also not consonant with the structure of the document as depicted in the various headings referred to above. And lastly, it also loses sight of the fact that it was common cause that the present Exco was still in office during November and December 2012. The same holds true for the Mpumalanga respondents' argument. They emphasized the distinction between the position of the President of NAFCOC and the President's *ex officio* membership of Exco. But this begs the very question. In clause 29.1.1 all 10 members of Exco are referred to as '*ex officio*' members of Exco. The distinction contended for does not, to my mind, resolve the problem. I am not persuaded that the President's term of office was intended to be different to that of the rest of Exco, namely four years. This being the case, it means that Mr Mavundla was still in office as the NAFCOC President at the time of issuing of the notice in respect of the December 2012 meeting and of the meeting itself. The next issue I discuss briefly is the Deputy President's position.

[35] Clause 23.1 envisages that there may be occasions when the office of the President becomes vacant due to, for example, a normal effluxion of time where the President's term of office expires or when the President dies or vacates his or her office prior to the expiry of the term of office. Clauses 23.1.1 and 23.1.2 provide in these two respective instances for elections to be held by a majority of Council members in attendance. Such election must be held not more than one month after the office became vacant (clause 23.1.1) and not more than two months after such vacancy has arisen (clause 23.1.2). It is inconceivable that, in such instances, a large organisation like NAFCOC can be without someone at the helm. Clauses 29.8.2.1 and 29.8.2.2 provide for that eventuality. They read as follows under the heading: 'Functions of the Executive Committee and Office Bearers':

'29.8.2 The Deputy President:

29.8.2.1 shall assist and, where necessary, deputise the President in respect of his duties;

29.8.2.2 in the absence or inability of the President to perform his functions, assume all responsibilities of the [President] . . .'

The Deputy President is clothed with the constitutional authority to act in the President's stead when that position is vacant. I cannot conceive any other 'sensible or businesslike'[18] interpretation of these two clauses. The interpretation advanced by the main respondents that clause 29.8.2.2 above means the physical absence of the President is wholly untenable. It is an unnecessarily strained interpretation of a plain, unambiguous clause which must be contextualised properly. The sensible interpretation has the result that, even if Counsel are correct in their contentions that the President's term of office is three years and that Mr Mavundla was thus not in office when the December 2012 meeting was purportedly convened, the Deputy President, Mr Skhosana was the only other NAFCOC office bearer who had the requisite power to convene that meeting. On the common cause facts neither Mr Mavundla nor Mr Skhosana had been requested to convene the December 2012 meeting.

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[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality,* fn 6 above.

[36] The main respondents contended that the appellants had, in any event, failed to prove that any irregularity in the convening of the December 2012 meeting had caused them any prejudice in respect of 'their civil rights and/or interests'. Counsel relied on *Jockey Club of South Africa and others v Feldman*[19] and *Jonker v Ackerman en andere*, above[20] for this submission. The contention was made with considerably less vigour during oral argument than was the case in the written heads of argument. This is hardly surprising. The prejudice is self-evident. The appellants, as office bearers of NAFCOC, acted properly in ensuring that far reaching decisions (filling the vacant President's post which turns out not to have been vacant at all and replacing the most senior office bearers in Exco) were only taken within the parameters of the constitution. The potential prejudice in a failure to do so is abundantly clear. To borrow from Tindall JA in *Osman*:[21]

'[u]nder such circumstances it is obvious that the Court cannot refuse to interfere on the ground that the dispute is a matter of internal management . . . . a situation has arisen which cannot be settled without the intervention of the Court . . . .'

Moreover and in any event, the authorities cited are against the main respondents – they, and not the appellants, bore the onus, as the party seeking to preserve the irregularly held meeting, to show that the irregularity had caused the appellants as the complaining party no prejudice. In *Feldman*, Tindall JA held as follows:

'In respect of civil cases, a test has been formulated in various decisions in Provincial Courts . . . where it was held that if the irregularity complained of is calculated to prejudice a party he is entitled to have the proceedings set aside unless the Court is satisfied that the irregularity did not prejudice him. This, in my judgment, is the correct test and we adopt it.'[22]

And in *Jonker* the court (per Lichtenberg AJ) held as follows:

'From the aforegoing it is, in my view, clear that the onus rests on an applicant to show that the irregularity upon which he relies, was calculated to prejudice him in his civil rights or interests. If he has discharged this onus, he would be entitled to have the impugned proceedings set aside by the Court. If the Court is however persuaded by the respondent that the irregularity in question did not prejudice the applicant –

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[19] *Jockey Club of South Africa and others v Feldman* 1942 AD 340 at 359.
[20] Fn 15 above, at 603F-G.
[21] *Osman v Jhavary*, supra, at 361.
[22] *Jockey Club of South Africa and others v Feldman,* supra at 359.

and the last-mentioned onus is one that rests on the respondent – then the application must fail.'[23]

The court referred in this regard to *Feldman* and to *Stephan v Amalgamated Society of Woodworkers of South Africa.*[24]

[37] To summarise and in conclusion: the December 2012 meeting was unlawfully convened since only the NAFCOC President Mr Mavundla or, in his absence, its Deputy President, Mr Skhosana, had the requisite constitutional power to convene a NAFCOC Council meeting. As a consequence, all the resolutions passed at the December 2012 meeting are invalid and of no force and effect. I deem it necessary to express my deep disquiet at the raging war within NAFCOC. Its indisputably laudable objective of creating business opportunities for historically disadvantaged businesspeople is being steadily undermined by this battle for control of the organisation for apparently opportunistic reasons. The flood of cases and concomitant considerable legal costs will not solve the organisation's internal problems; on the contrary it will do inestimable harm and very little, if any, good. One can only implore the protagonists on both sides to let sanity prevail and to put NAFCOC's interests first.

[38] I issue the following order:

1. The appeal is upheld.
2. The order of the High Court is set aside and substituted with the following order:

'(a) It is declared that the purported meeting of the Council of the National African Federated Chamber of Commerce and Industry on 6 December 2012 was not lawfully convened and that all the resolutions passed thereat are invalid and of no force and effect.

(b) The respondents are ordered, jointly and severally, to pay the costs of the application, including the costs of two counsel.'

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[23] *Jonker v Ackerman en andere*, supra at 603F-G (own translation).

[24] *Stephan v Amalgamated Society of Woodworkers of South Africa* 126 CPD 402 at 406, per Fagan J: 'The onus of showing that there was no prejudice is on the respondent, according to the various decisions, one of which is [the] case of *Jockey Club of South Africa and others v Feldman* 1942 AD 340.'

3. The respondents are ordered, jointly and severally, to pay the appellants' costs of appeal, including the costs of two counsel.

4. The respondents are ordered, jointly and severally, to pay the appellants' costs occasioned by the application for leave to appeal before the South Gauteng High Court and the subsequent application to this Court for leave to appeal.

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S A MAJIEDT

JUDGE OF APPEAL

APPEARANCES

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For 1st – 62nd, 64th and 68th to 71st Respondents:	K W Lüderitz SC with E Rudolph Werksmans Attorneys, Johannesburg Symington & De Kok, Bloemfontein
For 63rd, 65th – 67th Respondents: Instructed by:	A Subel SC with R Moultrie Garlicke & Bousfield Inc, La Lucia Symington & De Kok, Bloemfontein