REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

JHB

CASE NO: 06046/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE DATE 29/8/2016

29/8/2016

CHEMICAL, ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS' UNION	First Applicant
SIMON MOFOKENG	Second Applicant
THAMSANQA MHLONGO	Third Applicant
and	
SAMUAL CHIEF SEATHLOLO	First Respondent
THULASIZWE SIBANDE	Second Respondent

SCOTCH MPONENG DIBETSO N.O.	Third Respondent
JOHANNES DUBE N.O.	Fourth Respondent
LAWRENCE NZELE N.O.	Fifth Respondent
SAMUEL XABA	Sixth Respondent
JACKSON MAKHUBELA	Seventh Respondent
CHARLES MATULUDI	Eight Respondent
PETJE MASHEGOANE	Ninth Respondent
THERESA PILUSA	Tenth Respondent
LEMMY MOKOENA	Eleventh Respondent
MATHEWS SOHOPU	Twelfth Respondent

JUDGMENT

AC BASSON, J

[1] This application is for the setting aside of an interim interdict granted by Modiba, J on 15 April 2016. The application is brought by the Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (hereinafter referred to as "the union"). The second applicant is Mr Simon Mofokeng (the

General Secretary of the union - hereinafter referred to as "Mofokeng"). Mofokeng is the deponent to the founding affidavit. The third applicant is Mr Thamsanqa Mhlongo (the elected president of the union - hereinafter referred to as "Mhlongo"). (Where appropriate, I will refer to the three applicants collectively as "the applicants".)

[2] The first respondent is Mr Seatlholo. He is the union's former General Secretary. The second respondent is the union's former treasurer. The first respondent was summarily dismissed on 21 April 2016. The second respondent was expelled from the union on 1 June 2016. Seatlholo's dismissal (according to Mofokeng) is a direct result of a resolution taken at an NEC meeting of the union on 14 January 2016 to institute disciplinary action against Seathlolo and others. The third, fourth, seventh, eight, tenth, eleventh and twelfth respondents have also been expelled from the union. The sixth respondent was suspended on 1 June 2016. The ninth respondent was dismissed. Of the 12 respondents only the fifth respondent therefore remains a member in good standing.

[3] In essence this application is for an order to set aside the order made by Modiba, J (dated 15 April 2016) interdicting the union from convening a meeting of its National Executive Committee (hereinafter referred to as "the NEC") pending the determination of the relief sought in Part A of the main application. The application is opposed.

[4] The applicants are seeking to discharge the order primarily on the basis that, as a result of material changes in circumstances that occurred subsequent to the granting of the order on 15 April 2016, the balance of convenience no longer favours the interim interdict. As will be pointed out hereinbelow, it is the respondents' submission that this allegation is false and without any merit. With reference to the judgment of Modiba, J, the respondents submitted that the interim order was granted on the premise that fraud was committed by Mofokeng at the time when the resolutions were taken.

Interlocutory applications

[5] Before I turn to the merits of this application, brief reference should be made to the four interlocutory applications that also served before the court. The first was an application brought by 12 individuals to intervene as respondents in the present urgent application. Despite the fact that the papers in that application were filed on 5 August 2016, they sought to intervene and then only thereafter be granted an opportunity to oppose the urgent application. Effectively the applicants sought an indulgence from this court to file their answering papers only on 19 August 2016. This would have had the effect of delaying the present urgent application. No persuasive reason was advanced in the papers as to why opposing papers could not have been filed timeously in the present urgent application. I have considered the application and dismissed the application to intervene with costs which costs include the costs of two counsel.

[6] The three remaining applications dealt with applications to discover. I do not intend dealing with them in detail. Suffice to point out that all three applications have been granted and discovery of the documents have been made on the same day.

[7] I should also briefly mention that the respondents sought to formally introduce the relief sought in Part A as a counter-application in this application. I have indicated to the parties that I will not entertain Part A as part of this application and that the parties should approach the Deputy Judge President for a special allocation of Part A. I have likewise refused to entertain the counter-applications filed by the various individual respondents relating to their expulsions or dismissals. These applications can be set down in the normal course.

[8] I do not intend dealing with the issue of urgency in detail. Suffice to point out that I am of the view that this application is sufficiently urgent to be dealt with on the urgent role.

Chronology

[9] The present urgent application is preceded by an acrimonious history of litigation between the parties. It is not necessary to deal with this history in detail but in order to place the *interim* order granted by Modiba, J in context it is necessary to briefly refer to the chronology that preceded this urgent application. It is also necessary to deal in some detail with the findings made by Modiba, J in her judgment in so far as those findings are relevant to decide the question before this court.

[10] The Registrar of Labour Relations addressed a letter to Mofokeng in 2014 advising him of the fact that the union was not operating as envisaged in the Labour Relations Act ("the LRA")[1] and that the union had failed to prepare audited financial statements since 2009 and that the union had failed to comply with its statutory obligations under the LRA regarding the filing of audited financial statements.

[11] On 9 October 2015 Van Niekerk, J of the Labour Court ordered the union, *inter alia,* to submit its annual audited financial statements to the Registrar of Labour Relations for the years 2010 – 2013 and to do so within 90 days of its order failing which the registrar may approach the Labour Court for an order placing the union under administration.

[12] On 14 January 2016 the union's NEC took a number of resolutions. These resolutions form the crux of the dispute between the parties (which dispute is not before this court). In brief it is the respondents' submission that Mofokeng and Mhlongo fraudulently created a number of fictitious resolutions after the NEC meeting of the union. The respondents allege that Mofokeng fraudulently created fictitious resolutions in terms of which the NEC purportedly (i) approved the draft audited financial statements of the union for the years 2010 – 2013; (ii) suspended some of the respondents from attending NEC meetings and to institute disciplinary proceedings

[1] Act 66 of 1995.

against them; and (iii) allowed the NEC, and more particularly Mofokeng, to take over complete control of unspecified regions of the union.

[13] On 19 January 2016 the respondents launched the main application which is referred to as "Part A". An amended Notice of Motion was filed on 24 February 2016 together with a supplementary affidavit in respect of Part A. In Part A the respondents claim urgent relief suspending the implementation of the disputed resolutions and interdicting certain meetings of the NEC. In Part B the respondents seek declaratory relief directed at undoing the resolutions taken by the NEC on 14 January 2016.

[14] On 25 February 2016 Part A was struck from the role for lack of urgency.

[15] On 24 March 2016 Mofokeng sent out a notice convening a special NEC meeting for 18 and 19 April 2016.

[16] On 31 March 2016 the respondents served an application for urgent interim relief.

[17] On 11 April 2016 the respondents set down Part A for hearing on 16 May 2016. Part A was therefore set down for hearing prior to the hearing of the urgent application by Modiba, J.

[18] On 13 and 14 April 2016 the urgent application was argued before Modiba, J. She delivered her judgment on 15 April 2016.

[19] The respondents (the applicants in the urgent application before Modiba, J) approached the court on an urgent basis to interdict the NEC meeting called by Mofokeng or "any other NEC meeting of the first respondent [the union], pending the determination of part A of the main application set down for hearing on 16 May 2016".[2]

[2] Page 1-2 of the Modiba, J judgment.

[20] At the time 12 NEC members, including regional representatives were disqualified from attending the intended meeting. It was submitted to Modiba, J that, had the resolutions not been taken, they would have enjoyed a right not to have the NEC meeting held in their absence.

[21] In respect of urgency, Modiba, J was of the view that the respondents may not be afforded substantial relief at a hearing in due course in light of the fact that, should the meeting be allowed to proceed in the respondents' absence, they will suffer prejudice that cannot be remedied by substantial relief at a hearing in due course.[3] In coming to this finding Modiba, J also took into account the fact that some of the respondents, have been elected by the regions of the union to represent the respective regions in the NEC. She concluded that –

> "*Prima facie* the adoption of a resolution to suspend the applicants taken under circumstances alleged by the applicants is a violation of the Constitution of the first respondent [the union]. Therefore, their disqualification to attend NEC meetings is also *prima facie ultra vires* the first respondent's Constitution."

[22] In respect of irreparable harm Modiba, J held that, because the regions are represented by some of the respondents, their interests will not be heard as a result of their disqualification. This, according to Modiba, J, is not in the broad interest of the union as required by section 42(3) of the union's constitution. Should resolutions be taken under these circumstances, such resolutions will not only create irreparable harm to the respondents, but also to the regions represented by some of the respondents.[4]

[23] In respect of the balance of convenience the court took into account that the NEC was not involved in the day to day functioning of the union and that the

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[3] *Ibid* at page 6.
[4] *Ibid* at page 14.

union was only required to meet three times a year. In light of the fact that Part A was set down for 16 May 2016, the Court concluded that -[5]

> "The balance of convenience strongly favours the [respondents]. I do not see how delaying the holding of a NEC meeting for one month [the approximate period between the date of her judgment and 16 May 2016] can cause more inconvenience to the [applicants] than it will cause to the [respondents], especially as the NEC is not involved in the day to day functioning of the first [applicant]. In terms of the first [applicant's] Constitution, the NEC is required to meet three time a year. In the intervening period the first [applicant] continues to function. In the month leading to the hearing of the main application, if the interim interdict is grated, the first [applicant] will continue to function."

[24] On 16 May 2016 Part A was postponed *sine die* by agreement between the parties. There is a dispute as to who is responsible for the postponement as both parties blame the other for the postponement. According to the respondents, although they agreed to the postponement, they did not initiate the postponement.

[25] On 24 May 2016 the applicants' attorneys in a letter recorded that it is imperative that Part B be set down without delay and set out the reasons as to why the applicants are of the view that it is no longer apposite to prosecute Part A whilst failing to prosecute Part B. More in particular, the applicants contended that the respondents have wilfully failed to prosecute Part B for final relief and that their dilatory approach to having Part A heard constitutes good grounds on which to find that they (the respondents) have now forfeited their right to interim relief *pendente lite.*[6] The respondents

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[5] *Ibid* at page 15.

[6] *Juta & Co Ltd v Legal & Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C) at 445A – B: "Relief *pendente lite* is a special remedy: it grants relief between the time of the order and the final determination of the dispute between the parties in order to avoid undue prejudice while proceedings are pending." Further at 445E – F: "There is such a thing as the tyranny of litigation, and a Court of law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an interdict *pendente lite*, which, from its very nature, requires the maximum expedition on the part of an applicant.

replied to this letter stating that the respondents intend approaching the Deputy Judge President once they have finalised their supplementary founding affidavit.

[26] On 10 June 2016 the respondents filed a further supplementary affidavit in respect of Part A. In this affidavit it is alluded to that an action is to be instituted.

[27] On 14 July 2016 the applicants launched this urgent application to have the *interim* order of Madiba, J set aside.

[28] On 20 July 2016 the respondents made a proposal in writing to the applicants that a joint approach to the Deputy Judge President be formulated for an expedited hearing of Part A of the main application and that the joint approach should be made by no later than 27 July 2016. On 22 July 2016 the applicants rejected the proposal. This, according to the respondents, demonstrates the *mala fides* of the applicants and illustrates that the applicants do not wish Part A to be heard.

[29] On 10 August 2016 the combined summons in the action referred to in the supplementary affidavit of 10 June 2016 in respect of Part A is served on the union.

[30] On 12 August 2016 the respondents gave notice of their intention to amend the Notice of Motion in the main application and afforded the applicants 10 days to object to the proposed amendment.

Interim interdict

[31] As already pointed out, the purpose of the application for interim relief was to interdict a special meeting of the union's NEC scheduled to be held on 18 and 19 April 2016 as well as any further meetings of the NEC pending the determination of Part A.

[32] It is clear from the judgment of Modiba, J that the fact that the hearing of Part A was merely a month away was considered by her as relevant in deciding the balance of convenience at the time. More in particular, as already pointed out, Modiba, J was of the view that the union was able to function in the intervening period in light of the fact that the hearing of Part A was only a month away.

[33] On behalf of the applicants it was submitted that the interim order should be reconsidered in light of the material changes in the circumstances which is primarily the fact that Part A has not been heard and because Part A has not yet been set down for hearing. Moreover, it was submitted that the respondents failed to prosecute their challenge to the NEC resolutions of 14 January in Part B of the main application in a diligent and timeous manner. It was that the respondents are now using the order of Modiba, J to render the union dysfunctional for an indeterminate period of time and that it has now become vital to the union that NEC meetings be held. In summary therefore, apart from the fact that circumstances have changed, preventing the union for an indeterminate period of time to hold meetings have now accordingly to the applicants materially affected the balance of convenience as it was before Modiba, J and therefore, the basis on which urgent relief was granted, are now materially different.

[34] The respondents disputed that there was a strategy to render the union dysfunctional and submitted that the union was already dysfunctional as a result of Mofokeng's refusal to comply with the union's constitution and his complicity in manufacturing fraudulent resolutions.

NEC meetings

[35] It is accepted that the union's constitution entrusts the union's national executive functions to the NEC.[7] The constitution further requires the NEC to meet three times a year.[8] From the papers it is clear the NEC has only met once this year having been interdicted to meet pending the outcome of Part

[7] Clause 42 of the constitution.
[8] *Ibid* clause 44.1.

A. I have already referred to the applicants 'submission that, as a result of the *interim* order and in light of the fact that Part A has not been enrolled, the union has now effectively been paralyzed from holding any NEC meetings: Had Part A been heard on 16 May 2016, the order of Modiba, J would have been discharged and the present application would not have been necessary.

[36] In support of the submission that it is vital for the union that an NEC meeting be called, the union referred to the following consequences flowing from an inability to hold NEC meetings: Firstly, the union is unable to use its Nedbank internet banking facilities; secondly, the union is unable to comply with its obligations as per the Labour Court order and thirdly, an NEC meeting is necessary in order to call for a National Congress.

Bank account

[37] It was submitted on behalf of the union that by not being able to hold an NEC meeting, the union is effectively hamstrung from operating the union's internet banking facilities with Nedbank. In this regard it is common cause that the employees who are authorised to operate the internet banking facilities have been suspended. These suspended employees are not only in possession of the Nedbank devises that enable them to operate the internet banking facilities, they are the only individuals that have been authorised to operate the internet banking facilities. As a result of their suspension and their refusal to hand over the Nedbank devices, the union is unable to transact on the internet. The union has been advised by Nedbank to remove the employees who are on record at Nedbank as the authorised users of the Nedbank devises and to replace them with new authorised users. This the union can only do pursuant to the adoption of an NEC resolution. Because the union is interdicted from holding NEC meetings pending the outcome of Part A, they are unable to hold an NEC meeting.

[38] The respondents dispute the applicants' contentions in respect of the bank account and submitted that there is no need to pass a resolution to nominate new internet banking administrators. Furthermore, the respondents dispute

that the issue of access to internet banking renders this application urgent in light of the fact that the applicants have been aware of this issue as far back as April 2016. In this regard the court was referred to the fact that the union in an email to Nedbank stated that salaries, rentals and other payments to service providers were not paid since April 2016. Despite having been advised by Nedbank on more than one occasion – the last time on 31 May 2016 - the applicants have made no attempt as a matter of urgency to approach the court. Furthermore, although two of the employees authorised to make electronic transfers have been suspended, both of them remain willing and have in fact tendered their services to make the electronic transfers upon receipt of instructions to do so. Mofokeng, however, states that he no longer trust the employees. Lastly, the respondents submitted that the union can in any event transact by giving instructions to Nedbank to do the necessary payments.

[39] With reference to the respondents' replying affidavit in the main application it was further submitted on behalf of the respondents that, in any event, for the most part of Mofokeng's tenure, he has failed to schedule meetings as required by the constitution and more in particular, he has failed to schedule at least three effective NEC meetings annually as required by section 44(1) of the constitution.

Compliance with the Labour Court order

[40] I have already referred to the order of the Labour Court dated 9 October 2015 in terms of which the union was ordered to submit its annual audited financial statements to the Registrar failing which the Registrar is granted leave to approach the Labour Court for an order placing the union under administration. According to the applicants they are unable to comply with this obligation without a meeting of the NEC.

[41] In respect of the submission that an NEC meeting must be called in order to ensure that it complies with its obligations in terms of the LRA and to approve the financial and auditing reports it was submitted on behalf of the respondents that, in light of the common cause fact that the financial

statements have already been approved and have been submitted to the Registrar (in compliance with the order of the Labour Court), there is no need to call an NEC meeting for this purpose.

National Congress

[42] In respect of the submission that an NEC meeting must be called as this is the only entity that can determine the place and date of the next National Congress,[9] it was submitted on behalf of the respondents that it is common cause that no steps have been taken by Mofokeng to call a National Congress. In this regard reference was made to the fact that that a National Congress should have been called two years ago but that no steps have been taken to do so. The court was also referred to the fact that Mofokeng offers no explanation in the papers as to why a National Congress was not convened in September 2014 or any date subsequent thereto.

Non-prosecution of Part A and Part B

[43] The respondents disputed that it failed to prosecute the hearing of part A and furthermore disputed that circumstances have changed significantly to the extent that the balance of convenience no longer favours them.

[44] In respect of the postponement of the hearing of part A, it was submitted on behalf of the respondents that the hearing was postponed at the instance of the applicants. If the hearing had not been postponed, the need for this urgent application would not have been necessary. It was further submitted that, when the hearing of part A was postponed, the applicants were fully aware of the fact that the *interim* interdict would remain operative for a significant period of time. Moreover, if the union was of the view that the respondents were delaying the enrolment of Part A, nothing prevented them from approaching the Deputy Judge President for directions relating to the management of the matter.

[9] Section 51(1) of the constitution.

Merits

[45] Although reference in some detail have been made to the events that culminated in this urgent application, only the events *after* the granting of the order by Modiba, J on 15 April 2016 and especially after 16 May 2016, are important in considering the question whether circumstances have changed significantly as alleged by the applicants to the extent that the balance of convenience no longer favours the respondents. The applicants, as already pointed out, contended that the changed circumstances shifted the balance of convenience in their favour and that the order of Modiba, J should therefore be set aside.

[46] At the outset I should point out that, although the balance of convenience is an important consideration in this application, it is but one of the factors that has to be taken into account in considering whether to set aside the order of Modiba, J.

[47] I have already referred to the judgment of Modiba, J in some detail. For purposes of evaluating the merits of this application the following three damning findings by Modiba, J remain, in my view important: Firstly, the applicants are likely to succeed in establishing that their version is more probable. More in particular, her finding that the resolutions of 14 January 2016 are, *prima facie*, fraudulent remain extant. Secondly, the adoption of the resolutions to suspend the respondents are *prima facie ultra vires* in terms of the union's constitution. Thirdly, the resolutions had the potential to perpetuate an environment of abuse of power and poor governance. In this regard I have already referred to the fact that Modiba, J has placed great emphasis on the fact that some of the 12 NEC members who were suspended at the time of the hearing of the urgent application are the elected representatives of certain regions and excluding them from an NEC meeting would not be in the broad interests of the union.

[48] These findings of Modiba, J stand and they remain relevant. The court cannot overlook the fact that a *prima facie* case has been made out before Modiba, J that the resolutions taken on 14 January 2016 were fraudulent.

The court also cannot ignore the fact that it was not (at the time) in the interest of the union to allow meetings to take place in circumstances where the representatives of some regions have been suspended and therefore disqualified from attending such meetings.

[49] It is common cause that the NEC consists of 48 members. Also common cause is the fact that 25 NEC members form part of the so-called "dissenting faction". The 12 applicants before the court in this application are part of the so-called "dissenting faction". At the time of the hearing before Modiba, J 12 NEC members including regional representatives were disqualified from attending meetings pursuant to a resolution taken under circumstances that are not in the broad interest of the union.

[50] Since the hearing before Modiba, J nine of the respondents before this court have either been dismissed or expelled. Only the fifth respondent appears to remain to be a member in good standing. Therefore, of the 12 applicants only one applicant remains a member in good standing.

[51] The subsequent expulsions and dismissals constitute in my view a significant change in circumstances and one that has to be taken into account together with the findings of Modiba, J.

[52] Turning now to the requirements for an interim interdict. As far as the applicant's prospects of success is concerned, nothing has changed and the finding of Modiba, J that the respondents have prospects of success remains. More in particular, the finding that the resolutions taken on 14 February 2016 are *prima facie* fraudulent also remain extant. As far as the balance of convenience is concerned, I am not persuaded that the examples of circumstances that have, according to the applicants, materially changed, are supportive of the applicants' case: Briefly, the union can operate its bank account albeit by giving instructions to the bank. Moreover, as already indicated, the union has been aware of this fact as far back as April 2016. In respect of the need to call a National Congress, I am likewise of the view

that in light of the union's history of inaction in calling a National Congress, there is no pressing need for an NEC meeting.

[53] In conclusion, the fact that all the respondents (except for one) have since the order of Modiba, J either been dismissed or expelled, has, in my view, only served to aggravate the potential prejudice to the respondents and especially to those who represent certain regions. It is not only the potential prejudice to the respondents that must be considered, it is also the potential prejudice to the regions and to the union that should be considered should decisions and resolutions be taken on issues in which the regions are entitled to participate.

[54] Unions are by their very nature democratic institutions and should therefore be seen to act democratically and in the interest of all its members and not only in the interest of a selected few. By excluding the respondents from participation in NEC meetings by virtue of their expulsion and/or dismissal, especially against the background of resolutions that have been found to have (*prima facie*) been taken fraudulently, is not in the broader interest of the union and its members. The balance of convenience therefore remain, in my view, in favour of the respondents. I am therefore of the view that there exists no persuasive reason to set aside the order of Modiba, J at this stage.

[55] Lastly, I am not persuaded by the allegation that it is the respondents that are delaying the enrolment of Part A. To the extent that it is necessary, I have made it part of my order that the parties jointly on an expedited basis approach the Deputy Judge President for a preferential date.

[56] In the event the following order is made:

1. The application to set aside the order of this court dated 15 April 2016 interdicting the first applicant from convening a meeting of its National Executive Committee, is dismissed.

2. The parties are directed to jointly approach the Deputy Judge President on an expedited basis for a special allocation of the hearing of Part A.

3. The applicants are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.

AC BASSON
JUDGE OF THE HIGH COURT

Appearances:

For the applicants	:	Adv CE Watt-Pringle SC Adv HM Viljoen
Instructed by	:	Cowan – Harper Attorneys
For the respondents	:	Adv. MM Antonie SC Adv. M V-J Chauke
Instructed by	:	Mpoyana Ledwaba Inc.