



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J2896/18

In the matter between:

REGISTRAR OF LABOUR RELATIONS

Applicant

and

CHEMICAL, ENERGY, PAPER, PRINTING,

WOOD AND ALLIED WORKER'S UNION

Respondent

Date heard: 10 March 2020

Delivered: 4 June 2020

JUDGMENT

RABKIN-NAICKER, J

[1] The applicant seeks the following relief in the main application:

1. Placing the respondent under administration in terms of section 103A of the Labour Relations Act, No. 66 of 1995 ("*LRA*");
2. Appointing **Mrs. Thulisile Njapa Mashanda** as the Administrator of the respondent;
3. Granting to the said Administrator all such powers as are necessary to give effect to this order, including;

- 3.1 That she is authorised to take immediate control of, and in the place of the President of the respondent and/or the Deputy General Secretary and/or the National Office-Bearers Committee and/or or the National Executive Committee and/or any other body or person entitled to perform such functions, to manage the affairs of and concerning the respondent, together with all assets and interests relating to the business and/or affairs of the respondent, which powers may include –
- 3.1.1. The powers to set aside and cancel any contract purported to have been entered into for the benefit of the respondent;
 - 3.1.2. The power to take control of and to operate or close existing bank accounts of the respondent whether conducted in South Africa or offshore and to open and operate a new banking account for the purpose of the administration of the respondent pursuant to this Order;
 - 3.1.3. The power to control the funds and finances of the respondent;
 - 3.1.4. The power to borrow or raise money on behalf of the respondent or to invest the funds of the respondent;
 - 3.1.5. The power to determine the annual budget of the respondent;
 - and
 - 3.1.6. The power to approve monthly financial statements of the respondent as well as annually audited financial reports.
- 3.2 That she is vested with powers of control and management of the respondent which would ordinarily be vested in and exercised by the National Office-Bearers Committee;
- 3.3 That she is directed to exercise the powers vested in her with a view to conserving the affairs and business of the respondent and, with the leave of the applicant, to alienate or dispose of any property of the respondent;
- 3.4 That she is directed to take control of the cash, cash investments, shares and other securities as well as all other assets owned, held or administered by all on behalf of the respondent;

- 3.5 That she is authorised to incur such reasonable expenses and costs as may be necessary or expedient for the administration and control of the affairs of the respondent, and to pay same from the assets owned administered or held by or on behalf of the respondent;
- 3.6 That she is authorised to institute and defend legal proceedings on behalf of the respondent and, to this end, appoint attorneys and/or counsel;
- 3.7 That she is authorised to engage the assistance of legal, accounting, actuarial, administrative or other professional services, as she may reasonably deem necessary for the performance of her duties in terms of this order and to defray reasonable charges and expenses incurred from the assets owned, administered or held by or on behalf of the respondent;
- 3.8 That she is authorised to –
- 3.8.1. Commission the preparation of the respondents audited financial statements for the year ending 2014, 2015, 2016 and 2017, reflecting the income and expenditure in respect of
- (a) subscriptions received by the respondent from its members and (b) levies received by the respondent pursuant to any agency shop agreement to which the respondent is party; and
- 3.8.2. Submit such financial statements to the applicant.
- 3.9 That she is authorised, acting on her own and to the exclusion of the General Secretary and/or Deputy General Secretary and/or the President and/or any other official of the respondent to convene, by notice given in the manner and within the time periods contemplated in clause 44(3) of the Constitution of the respondent, on meeting or meetings of the National Executive Committee, for the purpose *inter alia* of –
- 3.9.1. Placing the audited financial statements for the years ending 2014, 2015, 2016 and 2017 before that Committee;

- 3.9.2. Consider any motions for the removal or reinstatement of a National Office-Bearer; and
- 3.9.3. Consider any other motions which she has, in the manner contemplated in the Constitution of the respondent, been requested to place upon the agenda of such meeting.
- 3.10 That she is authorised to investigate any financial irregularities relating to the assets or affairs of the respondent and, where necessary, to recommend that action be taken against any person guilty of misconduct or crime;
- 3.11 That she is directed to give consideration to the best interest of the members of the respondent;
- 3.12 That she is authorised at any time during her term of office, to apply on 48 (forty-eight) hours' notice or on an *ex parte* basis, for an amendment or amplification of the powers granted to her in terms of this Order in the event that it is necessary to do so for the effective exercise of her powers and responsibilities;
- 3.13 That she is authorised to receive a reasonable fee for her remuneration and disbursements, as may be allowed by the applicant, alternatively, failing such agreement, as may be determined by this Court, and that such remuneration and disbursements shall be paid by the respondent and shall be a first charge on the respondents' assets;
- 3.14 That she is directed to report on his administration to the applicant and the respondent within 12 (twelve) months from the date of this Order and to include in her report a statement of her findings and recommendations concerning the respondents' affairs and the continuation, if necessary of the administration;
- 3.15 That she is directed to report on the respondents' affairs to the applicant on a monthly basis during the aforesaid 12 months and such further period of administration.
4. Directing that the costs of this application be paid by the respondent should it oppose the application.

5. Granting further and/or alternative relief.”

[2] This matter served before me on the 12 March 2020 shortly before the commencement of the Covid-19 National Lockdown. The judgment will thus be handed down by means of an email to the parties.

[3] The application is to place the respondent (the Union) under administration in terms of section 103A of the LRA, is based on the failure of the Union to submit its audited financial statements for the years ending 2014, 2015, 2016 and 2017 as well as its Agency Shop audited financial statements for this period. It is undisputed that the Union's obligation to submit same arises from its Constitution as well as sections 98 and 100 of the LRA.

[4] Section 103A of the LRA provides as follows:

“103A Appointment of administrator

(1) The Labour Court may order that a suitable person, who may be a Commissioner, be appointed to administer a trade union or employers' organisation on such conditions as the Court may determine if the-

(a) Court is satisfied that it is just and equitable to do so; and

(b) trade union or employers' organisation has resolved that an administrator be appointed and has applied to the Court for an order to give effect to that resolution; or

(c) registrar has applied to the Court to appoint an administrator.

(2) Without limiting the generality of subsection (1) (a), it may be just and equitable to make an order in terms of subsection (1) if-

(a) the trade union or employers' organisation fails materially to perform its functions; or

(b) there is serious mismanagement of the finances of the trade union or employers' organisation.

(3) If there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection (1), the Court must consider their interests before deciding whether or not to grant the order.

(4) (a) The registrar of the Labour Court must determine the administrator's fees.

(b) The Labour Court, in chambers, may review the determination of the registrar of the Labour Court.

(c) The administrator's fees will be paid as an expense of the trade union or employers' organisation.

(5) The Labour Court may, on the application by the trade union, employer's organisation or registrar-

(a) vary or amend any prior order made in terms of this section; or

(b) if it is satisfied that an administrator is no longer required, terminate the appointment of the administrator, on appropriate conditions.”

[5] The Union does not dispute that it has failed to prepare and submit the outstanding audited financial statements for a period of 4 years. It attributes blame for its failure on its previous General Secretary who has subsequently been removed from office and as the end of August 2018, a new General Secretary, Mr Welile Noling, has been elected.

[6] In its opposing papers, deposed to on the 26 October 2018, the respondent further avers that it has taken steps to comply with its statutory obligations. In this regard it has instructed an independent firm of chartered accountants, Crowe Horwath, to prepare the requisite financial statements and conduct a forensic audit of the union's bank statements, books of account and financial transactions for the period 1 January 2010 to date. Mention is also made of the appointment of a second independent firm of auditors, Ngubane and Co., to audit the outstanding financial statements and prepare and audit report on these.

[7] When this matter came to Court before me on the 10 March 2020, the long standing obligations of the respondent had still not been complied with. The respondent sought that the Court grant them a further 90 days to provide the applicant with the respondent's audited financial statements for the financial years ending 2014, 2015, 2016 and 2017. Support for this proposition was also given by Counsel on behalf of Crowe Horwath. It was also submitted that the

Court should uphold the respondent's constitution and allow the union to deal with its obligations going forward and that the appointment of an administrator would be a drastic interference in rights of the respondent to conduct its affairs. Mr Mooki on behalf of the respondent argued that it would be equitable for the Court to grant the draft order prepared by the respondent and give the union the time to deal with the outstanding obligations it has.

- [8] In the replying papers, it is submitted that while it is not disputed that paragraph 37(5) of the union's constitution provides that the General Secretary is inter alia responsible for the keeping of books and accounts of the union as required by the LRA and the National Executive Committee (NEC), the applicant disputes that he was solely responsible for this.
- [9] It is further submitted that in accordance with paragraphs 71 and 72 of its Constitution, the respondent is also through its National Financial Committee (Fincom) obligated to prepare financial reports for the NEC and National Office Bearers Committee (NOBC). The Fincom is made up of the National Treasurer, the General Secretary or the Deputy General Secretary as may be determined by the NEC or the NOBC, the Regional Treasurers and no more than four other officials or employees appointed by the NEC. In addition the Constitution provides in its paragraph 36 for the composition of the National Office Bearers who are composed inter alia of the President and the General Secretary.
- [10] Tackling the notion that the problems the union has encountered rest on the failures of the previous General Secretary, the respondent also points out in reply that in terms of Paragraph 37(1)(b) of the Constitution it is the President who must ensure enforcement of the rules and orders of the Constitution. The President is also obligated by section 37(1)(c) to exercise supervision of the General Secretary's work. Thus it is the President who generally oversees the affairs of the union.
- [11] On the same theme the replying submissions also refer to those paragraphs of the Constitution that set out the duties of the National Treasurer in supervising the financial affairs of the union and submitting final audited reports to the National Congress. In addition in terms of clauses 37(1)(b), (c) and € of the Union's constitution the President is obliged to ensure enforcement and

observance of the rules and orders of the constitution; exercise supervision over the work of the General Secretary and generally supervise the affairs of the union.

[12] In the Court's view it is just and equitable that the application be granted given the very lengthy delays in making progress by the Union towards meeting its obligations. This application was launched in September 2018 and in March 2020 no concrete progress by the Union is discernable. I am not prepared to grant an indulgence of a further 90 days. My finding in this respect is premised on safeguarding the interests of the Union's membership and upholding the core principles protecting and promoting collective bargaining in our Constitution and the LRA.

[13] At the hearing of this matter, and in a separate application, the Court was asked to join certain individual members of the Union who filed lengthy papers in support of the Registrars application. In the Court's view, and taking into consideration the content of their papers, the granting of the application would only serve to draw the Court into factional battles within the Union and further inflame these at a time when it is necessary for the interests of whole membership of the Union to be served. Section 103(A) (3) of the LRA enjoins me to consider the interests of persons not before Court in making a determination. In considering the interests of the whole membership of the Union, I have determined to grant the main application and refuse to join the four individuals who sought to intervene. In my view, this approach is in line with the provisions of section 103(A) of the LRA and I am of the view that the individual members who have applied to intervene in these proceedings do not have standing to do so. I am disinclined to make a costs order in this matter given its nature and the interests involved in it.

[14] In the result I make the following order:

Order

1. The respondent is placed under administration in terms of section 103A of the Labour Relations Act, No. 66 of 1995 ("*LRA*");
2. Mrs. Thulisile Njapa Mashanda is appointed as the Administrator of the respondent;

3. The Administrator is granted all such powers as are necessary to give effect to this order, including;
 - 3.1 That she is authorised to take immediate control of, and in the place of the President of the respondent and/or the Deputy General Secretary and/or the National Office-Bearers Committee and/or or the National Executive Committee and/or any other body or person entitled to perform such functions, to manage the affairs of and concerning the respondent, together with all assets and interests relating to the business and/or affairs of the respondent, which powers may include –
 - 3.1.1. The powers to set aside and cancel any contract purported to have been entered into for the benefit of the respondent;
 - 3.1.2. The power to take control of and to operate or close existing bank accounts of the respondent whether conducted in South Africa or offshore and to open and operate a new banking account for the purpose of the administration of the respondent pursuant to this Order;
 - 3.1.3. The power to control the funds and finances of the respondent;
 - 3.1.4. The power to borrow or raise money on behalf of the respondent or to invest the funds of the respondent;
 - 3.1.5. The power to determine the annual budget of the respondent;
 - and
 - 3.1.6. The power to approve monthly financial statements of the respondent as well as annually audited financial reports.
 - 3.2 That she is vested with powers of control and management of the respondent which would ordinarily be vested in and exercised by the National Office-Bearers Committee;
 - 3.3 That she is directed to exercise the powers vested in her with a view to conserving the affairs and business of the respondent and, with the leave of the applicant, to alienate or dispose of any property of the respondent;

- 3.4 That she is directed to take control of the cash, cash investments, shares and other securities as well as all other assets owned, held or administered by all on behalf of the respondent;
- 3.5 That she is authorised to incur such reasonable expenses and costs as may be necessary or expedient for the administration and control of the affairs of the respondent, and to pay same from the assets owned administered or held by or on behalf of the respondent;
- 3.6 That she is authorised to institute and defend legal proceedings on behalf of the respondent and, to this end, appoint attorneys and/or counsel;
- 3.7 That she is authorised to engage the assistance of legal, accounting, actuarial, administrative or other professional services, as she may reasonably deem necessary for the performance of her duties in terms of this order and to defray reasonable charges and expenses incurred from the assets owned, administered or held by or on behalf of the respondent;
- 3.8 That she is authorised to –
- 3.8.1. Commission the preparation of the respondents audited financial statements for the year ending 2014, 2015, 2016 and 2017, reflecting the income and expenditure in respect of
- (a) subscriptions received by the respondent from its members and (b) levies received by the respondent pursuant to any agency shop agreement to which the respondent is party; and
- 3.8.2. Submit such financial statements to the applicant.
- 3.9 That she is authorised, acting on her own and to the exclusion of the General Secretary and/or Deputy General Secretary and/or the President and/or any other official of the respondent to convene, by notice given in the manner and within the time periods contemplated in clause 44(3) of the Constitution of the respondent, on meeting or meetings of the National Executive Committee, for the purpose *inter alia* of –

- 3.9.1. Placing the audited financial statements for the years ending 2014, 2015, 2016 and 2017 before that Committee;
- 3.9.2. Considering any motions for the removal or reinstatement of a National Office-Bearer; and
- 3.9.3. Considering any other motions which she has, in the manner contemplated in the Constitution of the respondent, been requested to place upon the agenda of such meeting.
- 3.10 That she is authorised to investigate any financial irregularities relating to the assets or affairs of the respondent and, where necessary, to recommend that action be taken against any person guilty of misconduct or crime;
- 3.11 That she is directed to give consideration to the best interest of the members of the respondent;
- 3.12 That she is authorised at any time during his term of office, to apply on 48 (forty-eight) hours' notice or on an *ex parte* basis, for an amendment or amplification of the powers granted to her in terms of this Order in the event that it is necessary to do so for the effective exercise of his powers and responsibilities;
- 3.13 That she is authorised to receive a reasonable fee for her remuneration and disbursements, as may be allowed by the applicant, alternatively, failing such agreement, as may be determined by this Court, and that such remuneration and disbursements shall be paid by the respondent and shall be a first charge on the respondents' assets;
- 3.14 That she is directed to report on her administration to the applicant and the respondent within 12 (twelve) months from the date of this Order and to include in her report a statement of his findings and recommendations concerning the respondents' affairs and the continuation, if necessary of the administration;
- 3.15 That she is directed to report on the respondents' affairs to the applicant on a monthly basis during the aforesaid 12 months and such further period of administration.

H. Rabkin-Naicker

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Cassim SC with Tilly instructed by State Attorney

Respondent: Mooki SC and M Naidoo instructed by CTH Inc

Intervening Parties: HM Viljoen instructed by Livingstone Crichton