DELETE WHICHEVER IS NOT APPLICABLE

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

28/7/2022
DATE SIGNATURE

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J885/22

In the matter between:

RUTH NTLOKOSE **Applicant**

and

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA) **First Respondent**

IRVIN JIM **Second Respondent**

CHAIRPERSON OF THE NUMSA SPECIAL CENTRAL COMMITTEE **Third Respondent**

Heard: 27 July 2022
Delivered: 28 July 2022

Summary: Application for leave to appeal. Where the heightened test is not satisfied leave to appeal must be refused. A trade union's constitution is not to be interpreted like a commercial contract. There is no place for *implied terms* in a trade union constitution. It is a statutory document subject to the statutory requirements. The test for the granting of leave to appeal has not been met.

Held (1): The application for leave to appeal is refused. (2): There is no order as to costs.

JUDGMENT (LEAVE TO APPEAL)

MOSHOANA, J

Introduction

[1] It is by now trite that the test for the granting of leave to appeal has been heightened. Before me is an application seeking leave to appeal against the whole judgment and order of this Court handed down on 23 July 2022. The application stands opposed. The applicants raise six grounds upon which they predicate the present application. For brevity reasons all the six grounds shall not be repeated in this judgment. The Court shall address them in *seriatim* in due course.

[2] Given the fact that, this Court heard the matter that produced the impugned judgment on an urgent basis, it was befitting for this Court to provide the parties with an urgent hearing of the present application. The Court afforded the parties an opportunity to make written and oral submissions. The oral submissions were listened to virtually on 27 July 2022.

Applicable legal principles.

[3] Before this Court can deal with the grounds punted for in this application, it is befitting to restate some of the applicable principles that guided my opinion in this regard. This matter concerns itself with a constitution of a trade union. In law, a contract is consummated by offer and acceptance. A constitution requires adoption and not an offer and acceptance. Section 95 (1) (b) of the LRA provides that a trade union may apply for registration if it has adopted a

constitution that meets certain requirements. I take a view that a constitution is not a collective agreement. Section 213 of the LRA defines a collective agreement as a written agreement concerning terms and conditions of employment or any matter of mutual interest concluded by one or more registered trade unions and the employer or employer's organisation.

[4] The Constitutional Court in *Lufil Packages* had the following to say:

> "The constitution of a trade union is legally binding, and effect must be given to the ordinary language of the document. In order to be registered, a trade union must have a constitution that governs substantive matters including the nature, scope and powers of the organisation. The trade union's constitution is an important instrument to give effect to the legitimate government policy of orderly collective bargaining..."

[5] Given the nature of the document, it must follow that its express terms, more particularly in relation to powers, must be given effect in full. A member of a trade union joins a trade union and does not conclude a contract with a trade union. Thus, it cannot be said that a member is a party to a contract as it were. In my view, it is difficult to employ the language of "implied terms" in a constitution as if it is a commercial contract.

[6] As a point of departure, when one deals with a constitution of a trade union, one must speak about its provisions, which must be given their ordinary meaning. In *Alfred McAlpine & Son (Pty) Ltd v TPA*[1], the learned Corbett AJA had the following to say about the expression of implied terms:

> "In legal parlance the expression 'implied term' is an ambiguous one in that it is often used, without discrimination, to denote, possibly three

[1] 1974 3 SA 506 (A) at 531

> distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual *consensus*. It is imposed by the law from without. Indeed terms are often implied by law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contract..."

[7] As indicated in the main judgment, a member attracts the binding effect of the provisions of a constitution of a trade union by simply joining it. Section 4 (1) (b) of the LRA expressly provides that an employee joins a trade union subject to its constitution. In practical terms, it must be so that before a member joins a trade union he or she must like the provisions of its constitution as it were. If for an example, a constitution provides that "the President of the trade union may suspend a member", an employee will join with full knowledge that only the President is empowered to suspend him or her. Thus, it is incongruent with the right to freedom of association to later inform an employee that actually when reference is made to the President; it includes the Chairperson of a Region. Certainly, Joe Soap (employee member) would react by saying I joined the union because I liked the idea of being suspended by the President as opposed to the Chairperson. Had I known that the Chairperson also have powers I would have joined trade union X.

[8] Given the nature of "implied terms" as felicitously set out by the erudite Corbett AJA, such terms, in my view, have no place in a trade union constitution which owes its existence from a statute. In *Tonyela* this Court stated that the duty of the Labour Court in section 158 (1) (e) of the LRA is not to interpret the constitution but to ensure compliance with the provisions of the constitution in the event there is a dispute about compliance.

[9] In the Canadian jurisdiction, a Board deals with issues about the constitution of trade unions. In one of the Board's decisions of *Alcorn and Detwiler v Grain Services Union*[2], the Board observed that:

> "...Though the constitution of a trade union is still described as creating a relationship of a contractual nature between the trade union and its members the courts have imposed restrictions on the possible character and content of such an agreement.

[10] In *Hill and Rattray v Saskatchewan Government and General Employees' Union*[3], the Board commented thus:

> "[7] The Board is the monitor of union membership disputes within the unionised setting only to the extent of determining if the process used to discipline union members meet the basic contextual requirements of natural justice. The Board's role is not to provide *definitive interpretations of a union's constitution*, which is a fluid, political document, subject to change each annual convention of the union.

[11] I plentifully agree. In a congress, members of a trade union may amend any provision of the constitution. Chapter 14 of the constitution of NUMSA deals with amendments. Therefore, if any provision does not mean what it reads, a Court must shy away from an interpretative exercise but must defer to the members during national congress to clarify the provisions by either amending or repealing those provisions. Engaging in an interpretative exercise is for the sole purpose of giving meaning to the words appearing in a document and to ascertain the ever-elusive intention of the drafters. Once clear meaning is

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[2] [1995] 2nd QSLP 141 LRB File No 247-95 at 151

[3] [2003] Sask LRBR 371.

achieved, an intention emerges and it is unnecessary for a Court to employ those other fanciful canons of construction.

[12] It is beckoning for this Court at this stage to reflect on what the British Columbia Board said in *Coleman and Leaney v Office and Technical Employees' Union, Local 378*[4]. It said:

> "110 Trade unions have emerged as significant social and political forces of our society. They have statutory rights unlike any other voluntary unincorporated association. Throughout the workplace they embody the principle of freedom of association; and the collective agreements they negotiate set out what has often been described as "the rule of law" in the workplace...
>
> 113 There are different, and indeed higher social expectations of trade unions. No matter how efficient authoritarian decision making may be in other legal organisational settings, trade unions are accepted (statutorily and socially) for the purpose of employees fulfilling their desire for freedom of association at the workplace. Therefore trade unions are expected to reflect this principle in the manner in which they conduct themselves...

[13] This Court maintains that trade union constitutions must be interpreted in line with the provisions of the section that allows a trade union to adopt a constitution (section 195 of the LRA). Harrison J in *Local 1571 I.L.A v International Longshoremen's Association and others*[5] enigmatically stated the following, which is relevant to the powers of a trade union.

> "No doubt persons who join a voluntary organisation such as the I.L.A agree to be bound by the terms of its Constitution. All disputes regarding the conduct of such organisation must be decided by the *proper officers as provided by such constitution...*"

[4] [1995] BCLRB No 282/95.

[5] [1951] 3 D.L.R 50 at p57.

[14] My reading of the *Lufil Packaging* judgment does not suggest that a Court dealing with a constitution of a trade union must strictly deal with it as if it is a commercial agreement. The Constitutional Court in stating that the constitution must be interpreted in accordance with the ordinary rules of construction applying to contracts, it was quoting with approval the judgment of the then Appellate Division in *Wilken v Brebner*[6]. The ordinary rule of construction is that words must be given their ordinary meaning unless an absurdity arises.[7]

[15] This position remains true to this day. Even the *locus classicus* case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[8] still ranks language used higher. It suggests that consideration must be given to the language used in the light of the ordinary rules of grammar and syntax.

Grounds considered

[16] As indicated earlier, the applicants peg the present application on six grounds. They shall be considered hereunder.

NEC power to suspend

[17] The applicants contends that this Court erred when it interpreted the clause of the NUMSA constitution regarding the power to suspend that such excludes the power to place members on a precautionary suspension. The Supreme Court of Appeal in *NAFCOC and Industry v Mkhize*[9] stated the following, which applies with equal vigour in this matter.

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[6] 1935 AD 175.

[7] *Volschenk v Volschenk* 1946 TPD 486.

[8] [2012] 2 All SA 262 (SCA).

[9] (805/13) [2014] ZASCA 177 (21 November 2014).

> [25] ...The common law cannot supersede the 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.

[18] In *casu,* the constitution of NUMSA does not refer to a precautionary suspension. Most importantly, clause 6 (3) (c) (v) specifies that the suspension must be for sufficient cause. The phrase "sufficient cause" refers to a legal determination that there exists sufficient reason to support a decision. Ordinarily, precautionary suspensions happen in the workplace. Their sole purpose is to ensure that an employee's presence at the workplace does not obstruct the investigation and/or that the employee does not interfere with the gathering of evidence.

[19] The relationship between the trade union and its member is not akin to an employment one. If a precautionary suspension was implied as argued, then clause 8 (1) (f) of the NUMSA constitution will be meaningless. In terms thereof, a suspended member shall no longer hold position. Normally, an employee suspended on a precautionary basis continues to hold a position. Clearly section 95 (5) of the LRA does not envisage that a constitution of a trade union must provide for precautionary suspension. It envisages a termination of membership. Membership may be terminated by suspension or expulsion. Counsel for NUMSA submitted that the fact that section 95 does not refer to a precautionary suspension does not mean that a constitution may not make provision for that. The difficulty with that submission, although true, is that the constitution of NUMSA does not make provision for precautionary suspension by any of its constitutional bodies.

[20] Applying the heightened test, I am unable to hold an opinion that another Court would apply the common law principle and imply a clause that overrides

the constitution of NUMSA. It would not do so. It was not done in *NAFCOC*. Accordingly, this ground is bound to fail.

Central Committee's power to suspend.

[21] The same sentiments echoed above applies herein *mutatis mutandis*. Another Court may not imply powers that are in direct conflict with the expressed terms. This ground falters on a similar basis.

Regional Executive Committee's power to suspend.

[22] Yet again absent express provisions the Regional Executive Committee may not act. Numsa chose that state of affairs. That of course does not imply that its wishes may not happen. As it was held in *Lufil Packages* that *"NUMSA's definition of its scope is binding on it. It follows that it could amend its scope of membership without limitation provided it follows its prescribed procedure"*. Another Court would not reach a different conclusion.

Central Committee's power to place under administration.

[23] If a Court were to imply powers that are not expressed in the constitution of a trade union that Court would in effect be drawing a constitution for the trade Union. There is nothing that would prevent NUMSA to seek an amendment of its own constitution to provide for powers to place a region under administration. Another Court would not reach a different conclusion, even if this Court were to apply the jettisoned dispassionate decision approach[10].

Assumption of credential committee's powers

[10] See *Smith v S* 2012 (1) SACR (SCA).

[24] Likewise, this ground must fail. The law is simply that where a power is afforded to a particular functionary another body may not usurp that power. NUMSA seeks to avoid that trite principle of law through a canon of construction. Another Court would not reach a different conclusion.

Locus standi issue

[25] The difficulty with this ground is that it is confined only to a portion of this case. A Court of appeal must not be burdened with moot points. The *Wilken* case has received approval in the *Lufil Package* case. Wessels CJ in that case had the following to say:

> "...and if the constitution does not deprive the individual member of a say in the matter, then our law[11] will assist him to see that no injustice is done to the minority. It is however essential to consider whether an individual member of the party or even several members of the party have the right to ask this Court to interfere with the resolutions of the Congress of the party. The question whether an individual member has such a right depends on the nature of the voluntary association and the terms of the constitution"

[26] The above quoted is a complete answer to this ground. The constitution of NUMSA does not stop Ntlokose to approach this Court in order to ensure that no injustice happens to the minority. Accordingly, this ground must fail.

Conclusions

[27] Having exhausted all the grounds punted for, it must follow that this application must fail. Before I conclude, I must deal with a disturbing revelation made during the virtual hearing that despite this Court's earlier order, NUMSA has proceeded and is proceeding with the conference without full compliance with its constitution. Should that be the case, what happened

[11] This was our law in 1935 and it remains our law to this day.

in *NAFCOC* may visit NUMSA. In my view, that was an unguided and unwise move. Judicial authority in this country vests in the Courts. The ideal situation is that if a matter still receives judicial attention, parties must patiently wait. Counsel for NUMSA confirmed that the congress is proceeding to a point that this Court may take its time to deliver its judgment on the dispute. This of course suggested that the judgment would be academic for NUMSA. Of course this over and above putting the Court's authority into question, begs another question why seek leave to appeal. If leave is granted the decision of the LAC will have no practical effect for the parties. The conference would be over in a matter of two days. For this reason too, leave must be refused. The matter would be moot and provide the parties with no practical effect. In *Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[12], the Constitutional Court affirmed that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy, which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. The Labour Appeal Court (LAC) in *NEASA v MEIBC* and others embraced this principle[13]. In embracing the principle, Sutherland JA, now DJP, stated the following:

> "[7] In my view, the mootness of this appeal is plain. The interdictory relief sought has been overtaken by events. The action which it was formulated to prevent has occurred. The relief which was sought is now perfectly academic."

[28] In the results the following order is made:

Order

1. The application for leave to appeal is refused.
2. There is no order as to costs.

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[12] 2000 (2) SA 1 (CC).

[13] [2015] 36 ILJ 2032 (LAC).

G. N. Moshoana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr S B Nhlapo
Instructed by:	Ahmed Gani Attorneys, Houghton.
For the Respondent:	Mrs. S Engelbrecht SC with her Mr M Meyerowitz
Instructed by:	Serfontein Viljoen & Swart, Brooklyn