

**IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD, JOHANNESBURG)**

**CASE NO:** \_\_\_\_\_

In the matter between:

**RUTH NTLOKOTSE**

Applicant

and

**NATIONAL UNION OF  
METALWORKERS OF SOUTH AFRICA**

First Respondent

**IRVIN JIM**

Second Respondent

**CHAIRPERSON OF THE NUMSA CENTRAL  
COMMITTEE - ANDREW CHIRWA**

Third Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**RUTH NTLOKOTSE**

hereby state under oath that:

- 1 I am the applicant in this matter, **RUTH NTLOKOTSE**, an adult female and the 2<sup>nd</sup> Deputy President of NUMSA, with the service address for purposes of these Court proceedings, c/o Ahmed Gani Attorneys Inc, situated at 83 Central Street, 1<sup>st</sup> Floor Houghton. As a result of my designation in NUMSA, I am the national office bearer. I am further the President of SAFTU, which is the federation where NUMSA is an affiliate.
- 2 The facts contained in this affidavit are, unless otherwise indicated or the converse appears from the context, within my personal knowledge and are to the best of my knowledge and belief both true and correct.
- 3 Where I make any submissions of a legal nature, I rely on the advice of my legal representatives, who's advice I accept as sound.
- 4 I, by virtue of my membership in NUMSA, have a vested right and interest in the proper and lawful functioning of the union in compliance with its constitution. I further am entitled to ensure that NUMSA complies with the provisions of the Labour Relations Act 66 of 1995 (the LRA) to the extent that same gives effect to sections 18 and 23 of the Constitution of the Republic of South Africa (Constitution of RSA). Lastly, I have a vested right and interest in ensuring that there is compliance with the core values of the Constitution of the RSA to the extent that there needs to be accountability, openness and transparency in the operations of NUMSA in the execution of its mandate.
- 5 I also have a right and interest to ensure that there is compliance with orders of this Honourable Court.

6 Furthermore, as part of the union membership that elects national office bearers (NOB's), I have a vested interest in who participates or is eligible to participate as a voting delegate in the election process.

## THE PARTIES

7 I am the applicant in this matter, **RUTH NTLOKOTSE**, an adult female and the 2<sup>nd</sup> Deputy President of NUMSA, with the service address for purposes of these Court proceedings, c/o Ahmed Gani Attorneys Inc, situated at 83 Central Street, 1<sup>st</sup> Floor, Houghton. As a result of my designation, I am the national office bearer of NUMSA. I am further the President of SAFTU, which is the federation where NUMSA is an affiliate.

8 The first respondent is the **NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA** a trade union duly registered and established in terms of the Labour Relations Act, 66 of 1965 (*“the LRA”*) with its head office at 153 Lillian Ngoyi Street, Cnr Gerald Sekoto Street, Newtown, Johannesburg.

9 The second respondent is **IRVIN JIM**, the General Secretary of the NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA, who is cited herein in his official capacity as such, with his place of employment at 153 Lillian Ngoyi Street, Cnr Gerald Sekoto Street, Newtown, Johannesburg.

10 The third respondent is the **CHAIRPERSON OF THE NUMSA SPECIAL CENTRAL COMMITTEE - ANDREW CHIRWA**, who is cited herein his official capacity as such, with his place of employment at 153 Lillian Ngoyi Street, Cnr Gerald Sekoto Street, Newtown, Johannesburg.

## JURISDICTION

- 11 Section 157(1) of the Labour Relations Act 66 of 1995 (the LRA) affords the Labour Court exclusive jurisdiction to deal with all matters in terms of the LRA. Section 158(1)(e) of the LRA provides that the Labour Court possess discretionary powers to determine a dispute between a registered trade union and any one of the members about non-compliance with the constitution of that trade union.
- 12 The dispute in this matter is one between a registered trade union (NUMSA) and its member concerning the union's non-compliance with its constitution, which resulted in an order being issued by his Lordship Justice Moshwana on 23 July 2022 under case number: **J885/22**.
- 13 The order of this Court was subsequently defied by NUMSA from 23 – 28 July 2022.

## NATURE OF THE DISPUTE

- 14 These are contempt of court proceedings against NUMSA and the second and third respondents for continuing with the 11<sup>th</sup> National Congress on 25 – 28 July 2022 despite this Honourable Court's order that the continuation of the 11<sup>th</sup> National Congress is interdicted and restrained until NUMSA fully complies with its own constitution en route the National Congress.
- 15 Despite the order of this Honourable Court, the NUMSA 11<sup>th</sup> National Congress commenced on 25 July 2022 and was adjourned to 27 July 2022. Furthermore, on 26 July 2022 the Special Central Committee appointed the Credentials Committee

supposedly to comply with the constitution. On 27 July 2022, the “accredited delegates” went ahead to elect new office bearers.

16 I thus seek an order that it be declared that NUMSA as well as second and third respondents are in contempt of court for failure to comply with the order made by this Court on 23 July 2022 under case number: **J885/22**.

17 I further seek an order declaring all that was done from 25 – 28 July 2022 under the guise of the 11<sup>th</sup> National Congress to be null and void *ab initio*, thus invalid and nullified for want of compliance with this Honourable Court’s order and the constitution of NUMSA. Further that all the resolutions passed thereat, including nominations and elections are invalid and of no force and effect.

18 I further ask of this Honourable Court to authorise a warrant of arrest committing the second and third respondents to imprisonment for contempt of court for a period of 30 days, which warrant is suspended on condition that the second to seventh respondents during the period of suspension:

18.1. not to be in contempt of the 23 July 2022 court order;

18.2. not be in contempt of this court order; and

18.3. not be found guilty of contempt of court.

### **BACKGROUND FACTS**

19 On 18 July 2022 I approached the above Honourable Court on an urgent basis seeking the following relief:

- 19.1. That the suspension of the applicant (Ruth Ntlokotse) be declared to be invalid *ab initio* and thus unlawful for want of compliance with the constitution of NUMSA.
- 19.2. As a consequence of the declaration of invalidity, that the applicant is entitled to attend the upcoming 11<sup>th</sup> National Congress currently scheduled for 25 – 29 July 2022, and further that she fully participate in those proceedings, including to vote and to accept nomination as a delegate in the National Congress.
- 19.3. That the other member's suspension – whose names have been provided in annexure **RN3**, including Tladi Martin Kgaladi – be declared to be invalid *ab initio* and thus unlawful for failure to comply with NUMSA's constitution. Further, that the members be also allowed to fully participate in the 11<sup>th</sup> National Congress currently scheduled for 25 – 29 July 2022, including being allowed to vote and stand for election.
- 19.3.1 Attached hereto is a copy of annexure "RN3" marked as **Annexure "RN3"** for your ease of reference.
- 19.4. That it be declared that the Locals from Mpumalanga region be permitted to attend and to fully participate in the upcoming 11<sup>th</sup> National Congress.
- 19.5. Alternatively to prayers 2 – 5, that the 11<sup>th</sup> National Congress be interdicted pending determination of the disputes involving the suspensions.

- 19.6. Costs in the event that the application is opposed, the one paying the other to be absolved;
- 19.7. Further and/or alternative relief.
- 20 The following was set out in the founding affidavit as constituting the basis for contending non-compliance by NUMSA with its own constitution:
- 20.1. “Chapter 1, clause 6(c)(i), of the constitution, which provides for the National Congress. The provision states that a National Congress consists of National Office Bearers and one shop steward for every 300 members in a Local. It is submitted that the current exclusion of the Mpumalanga Region – without exception of its Locals – is a direct violation of the constitution.
- 20.2. Most recently NUMSA has placed a number of its members under precautionary suspension despite the fact that the constitution does not provide for such but envisages a suspension as a form of a penalty. This occurs under chapter 2 - clause 4, chapter 4 – clause 4(1)(f), chapter 5 – clause (3)(e), chapter 6 – clause 3(c)(v) read with chapter 8 – clause 8(1), (2)(d)(v).
- 20.3. It is further of concern that as a national office bearer I was recently placed on precautionary suspension by the central committee despite the fact that those powers do not exist. Furthermore, only the national executive committee is vested with the powers to discipline a national office bearer as set out in chapter 8 – clause (2)(c) and (d) of the

constitution. However, the powers of the national executive committee do not extend to placing the national office bearer on precautionary suspension. It is submitted that a voluntary association such as NUMSA is bound by its own constitution and has no powers beyond the four corners of that document.

20.4. Lastly, chapter 6 – clause (1)(c)(iii) and (iv) of the constitution provides for the National Congress and states: *The accreditation of delegates will be determined by a Credentials Committee appointed by the Central Committee. Only delegates accredited by the Credentials Committee shall be entitled to vote at a National Congress.* In this instance and to date hereof, the central committee has not appointed the credentials committee and consequently no accreditation of delegates has been performed.”

21 On 23 July 2022 his Lordship Justice Moshoana granted the following order:

21.1. *The application is heard as one of urgency.*

21.2. *it is declared that the suspensions of Ntlokose and the other NUMSA members mentioned in this judgment are unconstitutional, invalid and unenforceable in law.*

21.3. *Numsa is interdicted and restrained from proceeding with the 11<sup>th</sup> National Congress scheduled to take place on 25 – 29 July 2022, until it fully complies with the terms of its own constitution.*

21.4. *There is no order as to costs.*

- 22 I have attached hereto marked as annexure “**CC1**” a copy of the judgment by his Lordship Justice Moshoana handed down on 23 July 2022.
- 23 In order to fully understand and contextualise the order it is important to mention the findings made in that regard especially under the heading: continuation of the congress. The following are the findings made by his Lordship Justice Moshoana under the aforementioned heading:

“[27] In terms of chapter 2 of the constitution all active members have full voting rights. In terms of clause 6 (1) (c) each Local may elect one shop steward per 300 members as a delegate for the region at the congress. The MRC has been disabled as such it shall not have delegates for the upcoming congress. Sub-clause (c) (iii) provides that the accreditation of delegates will be determined by a Credentials Committee appointed by the CC (Central Committee). In *casu*, the CC did not appoint a credentials committee, instead it acted as one. Such a conduct is unconstitutional. Sub-clause (c) (iv) provides that only delegates accredited by the Credentials Committee shall be entitled to vote. Since the CC arbitrarily usurped or approbated to itself the functions of the Credentials Committee – an unconstitutional act – it axiomatically follows that there are no accredited delegates to vote for – a further unconstitutional act.

[28] In the circumstances, the planned congress is more than likely to proceed along unconstitutional lines. This Court shall be failing in its duties if it were to allow this glaringly unlawful conduct to continue. This Court in *Tonyela* stated the following:

“[11]...A constitution of a trade union is a statutory document. Non-compliance with it equates non-compliance with the law and ultimately non-compliance with the rule of law.”

[29] Since an unlawful conduct is most apparent than not<sup>16</sup>, the applicant is entitled to an interdict of the congress – the continuation of which is unconstitutional – until Numsa complies with its own constitution *en route* the national congress. The fact that Numsa has already expended is not a consideration that will save the glaringly apparent unlawfulness. This Court has a Constitutional duty<sup>17</sup> to declare any unlawful conduct as such where one arises. The Court does not prevent Numsa to hold the national congress but it says Numsa can do so in line with its own constitution. It must be a just and equitable remedy for this Court to effectively suspend as it were the continuation of the congress until Numsa complies with its own constitution. Such an order champions the rule of law. As the saying goes *nothing about us without us*. How can a national congress that cycle once in four years proceed without the views of the biggest region, the MRC?”

- 24 On 23 July 2022 the above Honourable Court handed down the judgment, which was accordingly transmitted to the parties legal representatives. I also became aware of the judgment through my legal representatives. A copy of the email that transmitted the judgment to the respective legal representatives is attached hereto marked as annexure “**CC2**”.
- 25 In the morning of 25 July 2022 I noticed that there was no formal notice issued by the respondents informing the would be delegates of the cancellation of the National Congress in view of the court order.
- 26 I further was informed that in fact certain delegates were already traveling to the National Congress on 24 July 2022. The delegates who were travelling excluded some of the persons whose suspensions were uplifted by this Honourable Court on 23 July 2022. I deal with this later.
- 27 I then called for an urgent meeting with my legal representatives to discuss the developments that seemed to be in total disregard of the court order. The meeting was convened on 25 July 2022.
- 28 It was resolved by my legal representatives that a letter be sent to the respondents’ legal representatives, which letter is attached hereto marked as annexure “**CC3**”. The salient feature of the letter is:

“We remind you of the court order handed down by the honourable Judge Moshwana on the 23rd of July 2022, interdicting and restraining NUMSA from proceeding with its 11th National Congress which is

scheduled to take place between 25-29 July 2022. We attach hereto a copy of the judgement for your ease of reference.”

29 The respondents’ legal representatives duly responded as follows to the above correspondence:

“As per the court order, the National Congress will only go ahead once the Union fully complies with its constitution.

Our client anticipates that, after convening and concluding a Central Committee meeting tomorrow morning (26 July), the union will be in full compliance with its constitution and the order will no longer prevent the Union from proceeding with the congress later in the day.”

30 I have attached hereto marked as annexure “**CC4**” a copy of the letter from the respondents’ legal representatives.

31 Of further importance to note is that in the evening of 26 July 2022, the respondent’s legal representatives filed an application for leave to appeal the whole judgment and order of his Lordship Justice Moshoana that was granted on 23 July 2022. A copy of the said application is attached hereto marked as annexure “**CC5**”.

32 On 27 July 2022 my legal representatives transmitted another letter to the respondents, which is attached hereto marked as annexure “**CC6**”. Its contents are:

- “2. Our clients view remain that your clients have not complied with the order of the honourable Judge Moshwana in that your clients have not complied with their own constitution in totality.
3. Your clients have publicly, on the mainstream news and social media indicated that it will proceed with the 11th National Congress today in defiance of the court order.
4. Before we approach the court for the appropriate relief, we are instructed to demand that your offices provide us with the minutes of the Special Central Committee meeting which took place on Tuesday the 26th of July 2022 at 08h00.
5. We are informed that a further Credentials committee meeting took place subsequent to the Special Central Committee meeting. It is our instruction to request the minutes of the Credentials committee meeting also be provided to our offices.
6. Kindly ensure that the minutes of both meetings be forwarded to our offices by 1pm today at the latest.
7. As mentioned above, our clients maintain the view that your clients have not complied with the order. Should your clients assertion be that it is compliant, we ask for transparency demonstrating such compliance.”

33 The response that was received on that very same day, which is attached hereto marked as annexure “**CC7**”. The letter quintessentially states:

“Our clients have acted in compliance with the Constitution, and this will be evidenced by minutes of the meetings at which key approved decisions were taken. Our client is desirous to cooperate with your clients in the spirit of transparency that you allude to, but unfortunately the time constraint that you have set cannot be met. You will appreciate that the minutes must be properly adopted and signed off. We shall provide you with the relevant documents as soon as they become available.”

34 It is submitted that the above clearly shows that the respondents were aware of the court order. Importantly, that they had a clear intention to commence with the National Congress. I deal with this aspect further below to demonstrate wilful and *mala fide* non-compliance.

*Non-compliance with the court order*

35 Soon after receipt of the court order on 23 July 2022, the second respondent, acting on behalf of the third respondent, dispatched a notice calling for a meeting of the Special Central Committee. The meeting was to be on Tuesday 26 July 2022 at 08h00. The venue of the meeting was at the Cape Town International Convention Centre, which is the venue where the National Congress was held. I have attached hereto marked as annexure “**CC8**” a copy of the said notice.

36 The main item on the agenda was: Presentation by the General Secretary, Irvin Jim: The court order and the future of the 11<sup>th</sup> National Congress.

- 37 I became aware of this meeting by reason of being part of the National Office Bearer whatsapp group chat. The message merely stated: *ive just check with Shekka there's a flight for 06h00am*. This was sent on Monday (25 July 2022) at 17h44. I have attached hereto a copy of the whatsapp message marked as annexure "**CC9**". Needless to mention I viewed the "invite" as rather not genuine given its time of issue. Furthermore, a reading of the notice (annexure **CC8**) calling for a Special Central Committee meeting revealed that the National Office Bearers had met on 23 July 2022 and decided to call for the meeting in Cape Town. I was not invited to the meeting of 23 July 2022 despite the clear wording of the court order that my suspension was unconstitutional and unenforceable in law. In my view the respondents conduct in excluding me was in contempt of an order of this court.
- 38 As already stated herein above that on 24 July 2022 I was made aware of the traveling to Cape Town for the National Congress of the delegates who were permitted by the Special Central Committee. I hold the view that the failure to prevent such travel was a deliberate and a calculated act intended not to give effect to the order made by this Honourable Court on 23 July 2022.
- 39 I was further informed that on 25 July 2022 the delegates in attendance were briefed by Andrew Chirwa, the third respondent, at 12h50 regarding the court ruling. There was also a singing of the national anthem. The meeting was thereafter adjourned. I have attached hereto the original agenda for the National Congress marked as annexure "**CC10**". Needless to mention, the proceedings did not follow the proposed agenda and further they had not commenced at 09h00am as required. This constitutional issue is dealt with further below.

40 On 26 July 2022 the Special Central Committee reached certain key decisions, which are attached hereto marked as annexure “CC11”. I do not quote the entire key decisions reached but will focus on the important ones, which are paragraphs 1, 6, 7 and 8 thereof. I have further underlined the portions that I deem relevant for the purposes of this application. The following are the important key decisions:

“1. NUMSA had to accept that we influence and change the world, but not in conditions of our own choosing. As such, we have to accept that we are interfacing directly with the rule of law which we must respect and observe. In order for us to comply with the ruling of Justice Moshoana, the CC took a collective decision to constitute a Credentials Committee and the CC had to stand down and allow the Credentials Committee to deal with two important issues which form part of the judgement: accreditation of delegates by the Credentials Committee and to deal with whether the Mpumalanga region should be accredited to form part of the 11th NC, considering that it has failed to renew its mandate and that the union has on two occasions attempted to take the region through a successful Regional Congress. On both occasions, the congresses collapsed at a huge cost (millions of Rands) to the union. This discussion by the Credentials Committee had to engage with the ruling of the court to uplift the placing of the Mpumalanga region under administration and it had to take a decision on whether the Mpumalanga region ought to have accredited delegates to the 11th National congress. Following a discussion, the Credentials Committee resolved that the region should not be accredited delegates

to the congress as accreditation of delegates to all regions is a task first that gets to be coordinated by a properly constituted REC, a structure that is currently dysfunctional in this region and that the Credentials Committee arrived at a decision not to accredit Mpumalanga delegates to the congress as it would be practically impossible to do so. The Mpumalanga Regional Secretary in the Credentials Committee would have called on the Credentials Committee to note that no local in the region had demanded that they attend the 11th National Congress following the region having been placed under administration.

6. The CC, over and above these decisions that were taken after the GS' presentation, further allowed the Credentials Committee, appointed by the CC, to engage with all issues that judge Moshoana raised and the Credentials Committee returned to the CC to present a report on its work, discussions and recommendations and who formed part of the Credentials Committee. It called on the CC to reject or accept its recommendations. We share the recorded content of the Credentials Committee meeting that was submitted to the SCC for consideration (Annexure B) where the Credentials Committee accredited delegates to the 11th National Congress, which was further endorsed by the SCC of 26 July 2022.

7. The resolve of the majority of regions were endorsed by the CC in its majority. Only two regions, WC and Mpumalanga rejected some elements of the recommendations of the Credentials Committee. Where Ekurhuleni was clearly divided, the President refused to record their divisions in his capacity as the President promoting unity in the

union and noted that there was no reason for them to expose such division as the majority of the regions had adopted the recommendations of the Credentials Committee to continue with the National Congress having accredited 8 regions' delegations to the 11th National Congress, with the exception of Mpumalanga. The Credentials Committee in its wisdom agreed with the CC decision which was taken prior to the work of the Credentials Committee that if the Credentials Committee were to accredit delegates for the National Congress, as instructed by Judge Moshwana, the CC would support the continuation of the 11th National Congress as long as the union complies with the order of the court. As such, 943 delegates have been accredited to the National Congress by the Credentials Committee, endorsed by the SCC. Out of the 1020 delegates that would have been submitted by regions and studied by the Credentials Committee, subtracting 77 delegates of Mpumalanga which the Credentials Committee could not accredit to the 11th National Congress as a result of that region being unable to convene a Regional Congress in the lead up to this NC. The Credentials Committee noted and accepted the upliftment of the CC decision to put the region under administration. However, the Credentials Committee resolved that it was practically impossible to include Mpumalanga delegates as before any accreditation of delegates to the congress is granted, there are democratic processes to follow in electing delegates to represent members of the region. The Credentials Committee defined such criteria as nothing less than the accreditation of delegates by a properly constituted REC. Mpumalanga

therefore did not qualify for accreditation as it had failed to renew its mandate as a region through the Regional Congress.

8. The SCC having learnt its lessons in the interests of NUMSA as an organisation decided to present to the 11th National Congress critical amendments to definitions in its own constitution to address its own weaknesses as identified by Judge Moshwana. Below are the amendments made by the CC which the 11<sup>th</sup> National Congress must consider in the interests of the future of the union, and they are:

“Suspend” refers to both precautionary suspension and punitive suspension;

and

“Accreditation of delegates” includes the requirement that delegates have been confirmed as such by a properly constituted Regional Executive Committee.”

41 In turn the Credentials Committee reached the following regarding Mpumalanga Region, which are attached hereto marked as annexure “**CC12**”:

“Even though the SCC of 26 July 2022 has resolved to uplift the SCC decision to put the Mpumalanga region under administration, the Credentials Committee supported a motion moved by the JC Bez RS that he still did not believe that the Mpumalanga region should be accredited delegates to form part of the 11th National Congress. The decision was seconded and supported by the majority of the Credentials Committee which motivated that it was practically impossible for the organisation to accredit delegates from the

Mpumalanga region to the 11<sup>th</sup> National Congress as that should be done by a properly constituted REC. As such, the below table reflects this recommendation of the Credentials Committee of the number of delegates to be granted accreditation to the 11th National Congress to the Central Committee of 26 July 2022”

42 Pursuant to the above, the National Congress “re-convened” on 27 July 2022, which is perhaps viewed by the respondents as the actual date of the commencement of the National Congress. In the National Congress the following persons were nominated and elected as the new National Office Bearers:

- a. Andrew Chirwa – President;
- b. Mac Chavalala – 1<sup>st</sup> Deputy President;
- c. Puleng Phaka – 2<sup>nd</sup> Deputy President;
- d. Mphumzi Maqungo – National Treasurer;
- e. Irvin Jim – General Secretary; and
- f. Mbuso Ngubane – Deputy Secretary General

43 All the National Office Bearers were nominated and elected unopposed on 27 July 2022. This all happened at a time when his Lordship Justice Moshoana had already issued a directive that written submissions be provided by 18h00, further that the respective legal representatives avail themselves for oral submissions at 18h30.

44 Despite the directives of this Honourable Court demonstrating that the Court was set in dealing with the leave to appeal on an urgent basis, the respondents nevertheless ensured that the results of the election were announced around 20h00 whilst the parties were about to conclude their oral submissions. This was clearly all done in order to render the outcome of the application for leave to appeal *a brutum fulmen* (an ineffectual legal judgment). The rule of law is certainly not the agenda of the respondents, especially when dealing with the affairs of NUMSA, which is a deeply concerning trend extending even to the judgments and processes of this Court. This, I submit, is contempt of court that further renders the Judiciary ineffective and negates its legitimacy. Unless this Honourable Court grants the prayers set out in the notice of motion, a wrong message will be sent to the litigants and members of the public at large.

45 It is further interesting that Andrew Chirwa, Mphumzi Maqungo and Irvin Jim retained their positions subsequent to the uncontested elections. I was replaced by Puleng Phaka, and Basil Cele who is retired was replaced by Mac Chavalala. The office occupied by Mbuso Ngubane has been vacant since 1 October 2020.

### **On non-compliance with the court order and the constitution**

#### **Mpumalanga Region**

46 It is common cause that the Mpumalanga region was excluded again from the conference. The reason for its exclusion being that it was practically impossible for the organisation to accredit delegates from the Mpumalanga region to the 11<sup>th</sup> National Congress as that should be done by a properly constituted Regional Executive Congress. This was now done at the hands of the Credentials

Committee in order to avoid the finding of his Lordship Justice Moshoana at paragraph 26 of the judgment.

47 However, the respondents ignored paragraphs 27 and 29 of the judgment. At paragraph 27 his Lordship Justice Moshoana states that all active members have full voting rights. Further that *in terms of clause 6(1)(c) each Local may elect one shop steward per 300 members as a delegate for the region at the congress. **The MRC has been disabled as such it shall not have delegates for the upcoming congress.*** His Lordship Justice Moshoana thereafter went on to deal with the aspect of the non-appointment of the credentials committee.

48 At paragraphs 28 - 29, with reference to the two issues – Mpumalanga region and Credentials Committee – the Honourable Justice Moshoana concluded as follows:

*[28] In the circumstances, the planned congress is more than likely to proceed along unconstitutional lines. This Court shall be failing in its duties if it were to allow this glaringly unlawful conduct to continue. This Court in Tonyela stated the following*

“[11]...A constitution of a trade union is a statutory document. Non-compliance with it equates non-compliance with the law and ultimately non-compliance with the rule of law.”

*[29] **Since an unlawful conduct is most apparent than not, the applicant is entitled to an interdict of the congress – the continuation of which is unconstitutional – until Numsa complies with its own constitution en route the national congress.***

49 I submit that the respondents cannot claim that they complied with the court order. This is so in that the *disabling feature* already identified by his Lordship Justice Moshoana was used as the reason by the Credentials Committee for excluding the Mpumalanga Region. It was for the reason of this *disabling feature* that his Lordship Justice Moshoana stated that the National Congress be interdicted until NUMSA complies with its own constitution en route the national congress. More importantly, his Lordship Justice Moshoana did not pronounce that the 11<sup>th</sup> National Congress scheduled for 25 – 29 July 2022 could proceed once the issues of concern have been resolved. Instead, his Lordship Justice Moshoana stated: **it must be a just and equitable remedy for this Court to effectively suspend as it were the continuation of the congress until Numsa complies with its own constitution.**

50 I submit that the conduct of the respondents displays non-compliance with the findings and the resultant order of this Honourable Court, which renders the respondents guilty of contempt. The Central Committee, more particularly the second and third respondents being at the centre of contempt.

Exclusion of unsuspended members from the National Congress

51 The Court found that the suspensions are unconstitutional, invalid and unenforceable in law. This is at paragraph 24 of the judgement. Furthermore, that NUMSA is interdicted and restrained from proceeding with the 11<sup>th</sup> National Congress scheduled to take place on 25 – 29 July 2022, until it fully complies with the terms of its own constitution.

- 52 Despite the Court's finding, NUMSA failed to make any flight, transport and accommodation arrangements for twenty-two (22) of the members who were suspended. In fact, NUMSA did not communicate with any of them. The effect of all of this was to exclude such members from attending and participating in the National Congress, thus effectively keeping the members on precautionary suspension. It is important to mention that the decision not to include them in the travelling arrangements and accommodation was implemented by the Special Central Committee even before the filing of the application for leave to appeal. In the event that this is disputed as hearsay, confirmatory affidavits of the affected individual members will be provided. For current purposes I have attached hereto a list of the names of all those affected marked as annexure "**CC13**".
- 53 I submit that the respondents thus acted in contempt of court as the purpose of the order made by his Lordship Justice Moshwana was to ensure the participation of the suspended members in the National Congress. This is so in that I had approached the Honourable Court to also achieve that I wanted to participate in the elections of National Office Bearers as a candidate for President in NUMSA.
- 54 I further did not attend the interdicted National Congress as a reading of the judgment made it clear that the National Congress was interdicted. I was further aware of the fact that the Mpumalanga region had not travelled to Cape Town, including some of the members that had been suspended by Numsa. This further buttressed my view that NUMSA and the rest of the respondents were in contempt.

Other unconstitutional conduct during the period of 25 – 28 July 2022

- 55 A further issue of concern was the exclusion from the National Congress held on 25 – 28 July 2022 of members elected by the Locals from the Eastern Cape (7 members), Ekurhuleni (5 members), and Western Cape (4 members). Surely this could not have been in compliance with the constitution of Numsa, which states that the delegates of the National Congress shall include one shop steward per 300 members from each Local. The list of the names is already attached hereto marked as annexure “**CC13**”.
- 56 There was further a change of names by some of the Regions leading to exclusion from attendance of the National Congress for members that were initially included. All of this conduct is once more unconstitutional.
- 57 Perhaps this was all a well-planned strategy to ensure that certain National Office Bearers are re-elected unopposed.
- 58 The following “delegates” formed part of the National Congress and were entitled to vote despite not being in good standing:
- (a) Phangela Dlamini Bukula – Reagestwe in Rustenburg;
  - (b) Sindisile Nyathi – she is no longer employed;
  - (c) Nokwanda Mbatha – no longer employed due to her employer being liquidated;
  - (d) Enos Mbulaeni – works for Eskom in Summer Pan, Ekurhuleni. However, he was under the delegation of JCB; and

(e) Siya Mdleni – works for Eskom in Mpumalanga power station. However, he was under the delegation of JCB.

59 It is also of concern that in terms of Chapter 9 – clause (3) of the constitution of Numsa a quorum for a National Congress is constituted by two-thirds (2/3) of accredited delegates. Further, if after three-hours there is no quorum, the meeting must be adjourned and re-convened within eight weeks. I submit that this obviously is determined on the first day of the National Congress.

60 In this instance it is common cause that on 25 July 2022 the delegates were not accredited. Instead the accreditation only occurred on 26 July 2022. It therefore follows that the two-thirds (2/3) requirement within the three-hour period was not met, which thus entails that the meeting was supposed to have been adjourned. More so given the fact that the meeting started at 12h50 instead of 9h00. However, this was not done by the Special Central Committee.

61 Alternatively, if the respondents contend that the National Congress commenced on 27 July 2022, again this was not in compliance with Chapter 6 – clause (1)(b), which provides that the Central Committee shall give at least six months' written notice of the date and venue of the Congress to every Regional Executive Committee of the union. The change of the commencement date, if any, meant that the notice initially issued was no longer valid.

62 I have attached hereto marked as annexure “**CC14**” a copy of NUMSA constitution.

The relief sought

- 63 The conduct of the respondents is clearly in contempt of this Court from the moment the National Office Bearers convened in my absence, and called for an urgent Special Central Committee meeting summoned for 23 July 2022 to be held at the venue of the National Congress in Cape Town, and further to discuss the judgment handed down by his Lordship Justice Moshoana.
- 64 Furthermore, another contemptuous conduct was not to stop delegates from travelling from their respective regions to Cape Town. More so given the fact that it was anticipated that his Lordship Justice Moshoana would deliver judgment either on 23 or 24 July 2022. The Court delivered judgment on 23 July 2022 thus giving them sufficient time to cancel all travel arrangement. However, the respondents failed to do so as their sights was set on finding ways to continue with the National Congress despite the order of this Court. Instead the second respondents published on his twitter account a statement meant to encourage travel to Cape Town for the National Congress.
- 65 The contemptuous conduct further continued on 25 July 2022 at the “opening” of the National Congress, a session that was chaired by Basil Cele and the members were briefed by Irvin Jim (the second respondent) and Andrew Chirwa (third respondent). I submit that the session was certainly in contempt of the court order as it signifies what others construed as an opening of the interdicted National Congress or a feature of the interdicted National Congress.

66 The filing of the application for leave to appeal on Tuesday evening was obviously meant to further facilitate what had already commenced on 23 – 26 July 2022, which was a deliberate and concerted defiance of the court order issued by his Lordship Justice Moshoana. The judgment on the application for leave to appeal further shows that the application for leave to appeal was just a *mala fide* exercise. The findings of the Court at paragraph 27 illustrate this point. I have attached hereto a copy of the judgment on leave to appeal marked as annexure “CC15”. For the convenience of this Honourable Court, which hears this matter on urgent basis, I quote the following relevant extract from the judgment:

“[27] . . . 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.”

67 I submit that all of the above evidently demonstrates that the only appropriate relief that is just and equitable in view of flouting of the rule of law is to declare that the purported 11<sup>th</sup> National Congress held on 25 – 28 July 2022 was not lawfully

convened and all the resolutions passed thereat, including nominations and elections are invalid and of no force and effect.

68 Importantly, the conduct of the respondents shows that they have become constitutional delinquents, which justifies a coercive sanction of imprisonment in the event that such conduct is repeated during the course of one (1) year from the date of this order. The reason for submitting that a year is reasonable is to ensure that during such a period the union would prepare and hopefully hold a constitutionally compliant 11<sup>th</sup> National Congress, and not the sham that was held on 25 – 28 July 2022.

On urgency

69 I submit that besides the failure to comply with this Court's order not to proceed with the National Congress until NUMSA complies with its own constitution, there has been further unconstitutional conduct by the respondents as set out in paragraphs **55 – 62** herein above. I beg leave that paragraphs **55 – 62** be read as herein incorporated for the purposes of determining urgency.

70 This further unconstitutional conduct can only be dealt with through these urgent proceedings given the relief sought, which is coercive in nature. The coercive element is meant to ensure compliance with the constitution and to punish possible future conduct with imprisonment.

71 Furthermore, amongst the key decisions taken by the Central Committee at paragraph 8 thereof was:

“Below are the amendments made by the CC which the 11<sup>th</sup> National Congress must consider in the interests of the future of the union, and they are:

*“Suspend” refers to both precautionary suspension and punitive suspension;*

*and*

*“Accreditation of delegates” includes the requirement that delegates have been confirmed as such by a properly constituted Regional Executive Committee.”*

72 The above proposed amendments were not processed in compliance with the constitution. The constitution of NUMSA at Chapter 14 – clause (1) thereof provides:

*Provisions in the constitution may be amended, added or repealed at National Congress if:*

*(a) General Secretaries have received at least 90 days’ written notice of the proposed amendments; and*

*(b) At least 2/3 of members at National Congress agree.*

73 As I was not in attendance, I am unable to confirm if this amendment was adopted at the National Congress. Furthermore, I have not been able to obtain the minutes in that regard. Notwithstanding, this proposed amendment is solely with the intention of ensuring that the gains made by myself and other members whose suspensions were declared unlawful are reversed using unlawful means.

- 74 Furthermore, the proposed amendments are unlawful in that no prior notice envisage in the constitution was issued.
- 75 I deliberately waited until conclusion of the “National Congress”, which was supposed to be concluded on 29 July 2022 but appears to have been concluded on 28 July 2022. The reason for waiting for its conclusion was to ensure that I launch an urgent application that has all the transgressions of the constitution mentioned herein. I further expected more transgressions as it has become a habit of the Special Central Committee not to comply with the constitution as evidenced herein and in the judgment handed down on 23 July 2022 as well as the judgment on leave to appeal.
- 76 I further submit that it is perspicuous that my constitutional right of access to court will be rendered an illusion unless orders made by this Court are capable of being enforced.
- 77 I have been reliably advised that contempt of court is not merely a means by which a frustrated litigant is able to force his or her opponent to obey a court order. Instead, whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution of the Republic of South Africa. That, in turn, means that the Court that is called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.
- 78 I therefore humbly request that this matter be heard as one of urgency. Furthermore, that this Honourable Court exercise its discretion in favour of not

having to comply with Clause 13 of the Practice Manual on contempt of court applications. This is so in that this matter has drawn wide public interest to the extent that the members of the union and the public at large is aware that the “National Congress” proceeded despite it being interdicted.

79 I submit that it will serve the broader interests of justice and the public confidence in the Judiciary that this contempt of court application be determined without any delay so as to protect the dignity, repute and authority of our Courts.

80 I further submit that it is apposite for this Honourable Court to award an appropriate order as to costs for the *mala fide* and wilful defiance of its order.

**WHEREFORE** the Applicant pray for an Order as contained in the Notice of Motion to which this affidavit is attached.

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**DEPONENT**

**I HEREBY CERTIFY THAT THIS AFFIDAVIT WAS SIGNED AND SWORN TO BEFORE ME AT JOHANNESBURG ON THIS THE 1<sup>st</sup> DAY OF AUGUST 2022 BY THE DEPONENT WHO ACKNOWLEDGE THAT SHE KNOWS AND UNDERSTAND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHO HAD NO OBJECTION TAKING THIS OATH, CONSIDERED THIS OATH TO BE BINDING ON HER CONSCIENCE, AND THE REGULATIONS CONTAINED IN THE**

**GOVERNMENT NOTICE NO. R1258 OF 21 JULY 1972 AS AMENDED BY NOTICE R  
1648 DATED 19<sup>TH</sup> AUGUST 1977 HAVING BEEN FULLY COMPLIED WITH.**

**COMMISSIONER OF OATHS**