

DELETE WHICHEVER IS NOT APPLICABLE

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

23/08/2022

DATE

SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of interest to other Judges

Case No: J 941/2022

In the matter between:

RUTH NTLOKOTSE

Applicant

And

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA**

1st Respondent

IRVIN JIM

2nd Respondent

**CHAIRPERSON OF THE NUMSA SPECIAL
CENTRAL COMMITTEE**

3rd Respondent

Heard: 19 August 2022

Delivered: 23 August 2022

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 23 August 2022.)

JUDGMENT

VAN NIEKERK, JIntroduction

- [1] On 23 July 2022, Moshwana J delivered a judgment under case number J 885/2022. He issued the following order:
1. The application is heard as one of urgency.
 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.
 3. Numsa is interdicted and restrained from proceeding with the 11th National Congress scheduled to take place on 25 – 29 July 2022, unless it fully complies with the terms of its own constitution.
 4. There is no order as to costs.
- [2] In the application before Moshwana J, the applicant in the present application sought an order setting aside her suspension from the first respondent (the union), and that of other identified members. The applicant contended that her suspension had been effected contrary to the provisions of the union's constitution and was motivated by an attempt on the part of the respondents to deny her and the other members the right to attend the forthcoming 11th national congress of the union, to be held in Cape Town from 25 to 29 July 2022. In prayer 5 of the notice of motion the applicant sought a declaratory order that the 'locals' from the Mpumalanga region be permitted to attend and fully participate in the union's national congress. In the alternative, the applicant sought an order that the national congress be interdicted pending the determination of the disputes involving the suspensions.
- [3] In so far as the applicant's suspension was concerned, Moshwana J held that the union's central committee was not empowered in terms of the union's constitution to suspend the applicant and that her suspension, and that of the other suspended members, was *'invalid and unenforceable in law'*. In paragraphs 25 and 26 of the judgment, the court considered the placing of the Mpumalanga regional committee under administration. This had been effected by the union's central committee. The judgment does not identify any particular provision of the union's constitution that

may have been breached, but records that *'placing MRC under administration without the necessary powers to do so is unconstitutional, invalid and unenforceable in law.'* Insofar as the pending national congress was concerned, the court found that it was *'more than likely to proceed along unconstitutional lines.'* Although the notice of motion sought only in the alternative that the national congress be interdicted pending determination of *'the disputes involving the suspensions'*, the court went further by not only declaring the suspensions invalid but also interdicting the national congress until the union *'fully complies with the terms of its own constitution.'*

- [4] In these proceedings, the applicant seeks an order to the effect that the union and the second and third respondents (respectively the union's general secretary and chairperson of the central committee) are in contempt of the order made by this court on 23 July 2022. Further, the applicant seeks an order that *'all that was done as from 25 – 28 July 2022 under the guise of the 11th National Congress be declared 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 the NUMSA. Further that all the resolutions passed thereat, including nominations and elections are invalid and of no force and effect.'* The remedy sought in this prayer assumes the form of a civil contempt remedy. Finally, the applicant seeks to have a warrant of arrest issued, committing the second and third respondents to prison for a period of 30 days, suspended on condition that they comply with the order granted on 23 July 2022 and any order granted by this court.

Urgency and application of the practice manual

- [5] I deal first with the issue of urgency and the application of clause 13 of the practice manual. The present application was filed on 1 August 2022, requiring the respondents to file an answering affidavit by close of business on 3 August 2022 and enrolling the matter for hearing on 5 August 2022. The respondents filed an answering affidavit on 5 August 2022, the same date on which a brief replying affidavit was filed and the matter stood down for argument on 19 August 2022.

- [6] Clause 13.2 of the practice manual provides that an application in which an order is sought that a party is in contempt of court must be made *ex parte* by way of notice of motion, accompanied by a founding affidavit. The notice of motion must call on the respondent to show cause, on a date allocated by the registrar, why he or she should not be found guilty of contempt. The respondent may explain his or her conduct by way of affidavit filed on or before the date of the hearing. The founding affidavit must clearly set out how service of the order in question was effected on the respondent, and the respects in which the respondent is alleged to have failed to comply with the order. The practice manual is binding. The applicant has failed to comply with the prescribed procedure in circumstances where she has not sought formal condonation for this failure, and seeks to rely on the wide public interest that she says the matter has drawn.
- [7] The practice manual is carefully crafted and calls upon a respondent party alleged to be in contempt of an order of this court to attend at court to proffer an explanation for any non-compliance of an order that is found to exist. In other words, the purpose of clause 13 is primarily to secure the attendance of a respondent in court, given that the consequences of a finding of contempt will inevitably involve the imposition of a sanction (which may extend to a period of imprisonment) and to afford the respondent an opportunity to answer to the charge of contempt.¹
- [8] To the extent that the applicant contends that the procedure prescribed by clause 13 would have the result of an unavoidable delay in the determination of any act of contempt, this is not so. It is not uncommon in disputes where enforcement by way of contempt proceedings is obviously urgent (for example, in the case of a restraint of trade agreement that is appealed by way of an order of court in

¹ See, in general, the judgment by Tlhothalemaje J in *Nompumelelo Petunia Phasa v South African Broadcasting Corporation (SOC) Ltd and others* (JA 1149/2021, 4 October 2021) at paragraph 8.

circumstances where the restraint is of limited duration), for the court to accommodate that urgency by fixing an expedited return date.

- [9] Despite these observations, little purpose would be served by striking the present application from the roll and requiring the applicant to proceed in terms of the practice manual. To do so would result in unnecessary duplication and cost. It is not disputed that the order that forms the subject of these proceedings was served, and that the respondents are aware of it; indeed, the second respondent deposed to the answering affidavit. In these circumstances, with some reluctance, I am prepared to overlook the applicant's non-compliance with clause 13 of the practice manual and to entertain the application in its present form.
- [10] The question of urgency is intertwined with the issues that relate to the application of clause 13 of the practice manual. Again, the applicant's appeal to exceptional circumstances is misplaced. If every application in which exceptionality is pleaded was entertained, few applications would be heard in the normal course. If the relief sought by the applicant is granted in due course, it would make little difference given that the national congress has been held, and that everything the applicant complains of has already occurred. This is not a matter, unlike for example an application to hold a party in contempt for the failure to comply with an order to reinstate an employee or to comply with a restraint and confidentiality undertaking in a restraint of trade dispute, where the sanction serves the purpose of inducing the non-complying party to fulfil the terms of the court's order. In those instances, since the anterior order will ordinarily cause the applicant irreparable harm, a degree of urgency might be conceivable. Having said that, I have elected to deal with the application on an urgent basis, again with some reluctance and despite my view that the application borders on an abuse of the process of this court. I do so only because there is some public interest in the proceedings and because the merits have been fully canvassed, in circumstances where an order to strike the matter from the roll would result in avoidable delay, duplication and cost, and burden an already overburdened motion court in the future.

Applicable legal principles

[11] The rule of law requires that the dignity and authority of the courts be respected and upheld.² The principles that regulate contempt proceedings were authoritatively stated by the Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd*³ where the court explained at paragraph 6 of the judgment (footnotes omitted):

It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional 'stamp of approval', since the rule of law – a founding the value of the Constitution – requires that the dignity and authority of the courts, as well as the capacity to carry out their functions, should always be maintained'.

The court went on to observe that a contempt of court application:

...is a most valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not to do something (*ad factum praestandum*), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, as the object of inducing the non-compliant to fulfil the terms of the previous order.

In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since this regard sullies the authority of the courts and detracts from the rule of law.⁴

² *Pheko and Others v Ekurhuleni City* 2015(5) SA 600 (CC)); *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and others* 2021 (5) SA 327 (CC).

³ 2006 (4) SA 326 (SCA)).

⁴ At paragraphs 7 to 8 of the judgment.

- [12] The *Fakie* judgment also neatly summarises the requirements for contempt of court. The court order must exist, the order must have come to the knowledge of the respondent, there must be non-compliance with the order and the failure to comply must be both *mala fide* and wilful. All of these elements must be proven beyond a reasonable doubt.⁵ Once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden to adduce evidence to rebut the inference that the non-compliance was not wilful and *mala fide*. If the respondent fails to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.⁶ To establish non-compliance requires more than a failure to comply with the order - in *Matjhabeng Local Municipality v Eskom Holdings Ltd and others*⁷ the Constitutional Court recently affirmed that contempt of court does not consist of mere disobedience of a court order, but of '*contumacious disrespect for judicial authority*'. Put another way, the requirement of wilfulness and *mala fides* means that contempt is committed not by a mere disregard of the court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.⁸
- [13] To the extent that the applicant in these proceedings seeks a civil remedy in the form of an order declaring the decisions of the national congress invalid, in *Burchell v Burchell*⁹ Froneman J observed that the potential effectiveness of using a civil declaratory order that an offending litigant is in contempt of court order should not be underestimated. For example, the offending litigant could be prohibited from using the civil courts and other litigation until he or she has purged the contempt, or, in the case of an appeal against such an order, an order that the usual suspension of the order pending the determination of the appeal should not come

⁵ See also *Uncedo Taxi Service Association v Maninjwa & others* [1998] BCLR 683 (E); *Bruckner v Dept of Health and others* [2003] 12 BLLR 1229 (LC).

⁶ See paragraph 42 of the judgment.

⁷ 2018 (1) SA 1 (CC),

⁸ *Dibakoane N.O v Van den Bos and Others; Van den Bos and Others v Gugulethu and Others* (2021/2054; 2020/28772) [2021] ZAGPJHC 652 (17 August 2021) at para 29.5.

⁹ [2005] ZAECHC 35 (3 November 2005)

into operation. In the case concerned, the court in addition to a declaration that the respondent was in contempt of the court order, granted the respondent 10 days to purge the contempt but also called on the respondent to show cause why a further order should not issue in terms of which he be prohibited from proceeding in any other litigation in any other matter in which he might be involved in the High Court until he had purged his contempt. In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd*¹⁰ the Constitutional Court recognised the availability of civil contempt remedies (for example, declaratory relief, a *mandamus* or a structural interdict) that did not have the consequence of depriving an individual of the right to freedom and security of person. Where a remedy of this nature is granted, the test is the civil standard of proof, i.e., contempt is established on a balance of probabilities.

Factual background

- [14] The antecedent order comprises two elements. The first is that the impugned suspensions were declared invalid. The formulation of this part of the order does not impose any obligation on the respondents; the applicant is the beneficiary of a substantive declaratory order to the effect that her suspension is of no legal force and effect. The respondents were thus required to treat the beneficiaries of the order as if they had not been suspended. It is not disputed that the suspensions concerned were lifted. There was therefore no breach of the first part of the order, a conclusion that the applicant does not contest.
- [15] The second element of the antecedent order is to interdict the national congress until the union fully complied with its constitution. The applicant submits that the respondents have failed to comply with this part of the order; the respondents contend that they are not in breach of the order and that the constitutional shortcomings identified by the court have been rectified. What is to be determined in these proceedings therefore are the latter two components of the *Fakie* enquiry

¹⁰ 2018 (1) SA 1 (CC).

– whether the respondents have complied with the order, and whether any non-compliance found to exist is both *mala fide* and wilful.

- [16] After Moshwana J's judgment was delivered on Saturday, 23 July 2022, the union's general secretary, the second respondent in these proceedings, after discussion with the president, decided to call a special meeting of the union's central committee. The second respondent avers that he was empowered to call such a meeting, on 48 hours' notice, in terms of clauses 9 (1) (b) and 9 (2) (b) of the union's constitution. The notice and agenda for the meeting were issued in the early hours of Sunday, 24 July 2022 for the meeting, scheduled to start at 8 am on 26 July 2022. On Monday, 25 July 2022, the union's president addressed delegates who had arrived in Cape Town in anticipation of the congress scheduled to start on the same date and explained that in terms of the court order, the congress had been interdicted and could not commence until such time as the union had fully complied with its constitution. Delegates were advised that a special meeting of the central committee would be held the following day at which all of the constitutional defects identified in the judgement would be remedied. It was anticipated that the national congress would then commence on Wednesday, 27 July 2022.
- [17] At the special meeting of the central committee convened on Tuesday, 26 July 2022, as far as the respondents are concerned, all of the constitutional defects identified by the court's judgment were identified and rectified.
- [18] The respondents identified the decisions called into question by the antecedent judgment as first, the decision to place certain members of the union (including the applicant) on precautionary suspension pending a disciplinary hearing; secondly, the decision by the central committee to place the Mpumalanga region under administration (the consequence being that delegates from Mpumalanga would not be permitted to attend the national congress); and thirdly the decision by the central committee to perform the function of the union's credentials committee for

the purposes of accrediting delegates to the national congress (as opposed to the appointment of the credentials committee to perform that function).

[19] In the light of these findings, the respondents aver that they unconditionally accepted that the various suspensions of the affected members were void *ab initio* and were to be treated as if they had never taken place; that the central committee's decision to perform the functions of the credentials committee did not comply with the union's constitution; that the central committee's decision to place the Mpumalanga region under administration was not in compliance with the union's constitution; and finally, that until such time as these constitutional shortcomings had been rectified, the union could not proceed with its 11th national congress.

[20] The meeting of the central committee on Tuesday, 26 July 2022 decided, by majority vote, that the placing of the Mpumalanga region under administration was invalid. Secondly, the central committee resolved to appoint a credentials committee composed of the nine regional secretaries. Thirdly, the central committee resolved that annexure A to the union's constitution should be amended by the committee, exercising its powers in terms of clause 6 (2) (d) (iv) of the union's constitution, to read:

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

[21] The central committee then adjourned, after which a meeting of the credentials committee was convened. The credentials committee confirmed membership numbers for each region as at March 2022 and resolved, by way of majority vote, not to accredit the delegates from Mpumalanga because that region had tried and twice failed to hold a regional congress prior to the national congress. The respondents contend that given that the last Mpumalanga regional council was held in 2016, the extant regional executive committee, the body that confirms which individuals will be delegates for each region did not, and does not, represent the will of the union's members in Mpumalanga. The view of the credentials

committee was that to allow various delegates from Mpumalanga to attend the national congress without confirmation from a democratically elected regional executive committee would be problematic and in the circumstances, the committee resolved that the national congress should go ahead with the exclusion of Mpumalanga's delegates. The respondents contend that the credentials committee has wide powers with regard to accrediting delegates to the national congress and that its discretion is fettered only by an obligation not to exercise its powers capriciously or in bad faith, and to ensure that its decisions are rationally connected to the purpose of the empowering provision contained in the union's constitution. The respondents submit that the exclusion of the Mpumalanga delegates from the National Congress was effected with the *bona fide* intention to avoid an outcome where delegates from one region do not represent the will of members of that region, and to avoid the potential administrative chaos that might occur should members from Mpumalanga claim the right to be appointed as delegates at the national congress without verification from a democratically elected regional executive committee. The committee was also concerned to avoid an outcome where one or more dysfunctional regions would forever be able to prevent a national congress from taking place.

- [22] What is significant for present purposes is that the previously suspended members (including the applicant) were not excluded from the national congress. The respondents aver that it was made clear to the previously suspended members that they were permitted to participate in the congress, and to be nominated and elected for office. In particular, the respondents aver that the applicant was aware on Saturday, 23 July 2022 that her suspension had been declared unlawful and that she had been invited to attend the special meeting of the central committee. The respondents aver that despite this, the applicant issued public statements to the effect that she had not been invited to attend the meeting of the central committee, or the national congress, on account of her view that the national congress would be unconstitutional. As matters transpired, the national congress commenced on Wednesday, 27 July 2022 when a number of disaffected delegates staged a walkout just before the commencement of the proceedings.

The issue

- [23] Given the history of this matter and the mutual recriminations that have been generated, it is important to emphasise that in these proceedings, this court is required only to determine whether the respondents are in non-compliance with the order granted on 23 July 2022 and if so, whether the respondents have adduced sufficient evidence to establish a reasonable doubt whether their non-compliance was wilful and *mala fide*. To the extent that the applicant seeks a civil remedy for contempt in the form of an order that all that was done between 25 to 28 July 2022 '*under the guise of the 11th National Congress be declared to be null and void ab initio*', the test to be applied, as indicated above, is a balance of probabilities.

Analysis

- [24] The applicant submits that the respondents have failed to comply with the order granted on 23 July 2022 in a number of respects. First, she contends that the meeting of the union's national office bearers on 23 July 2022, when it was decided to convene a special meeting of the central committee on 26 July 2022, was held in her absence and in breach of the constitution and in defiance of the court's order. Secondly, the applicant contends that the respondent's failure to inform delegates that the national congress would not take place on account of the interdict granted on 23 July 2022 and failure to provide those members whose suspension was uplifted by the court with travel and accommodation arrangements in effect entailed that they remained on suspension, despite the judgment of the court. Thirdly, the applicant contends that on 25 July 2022, at 17:44, she was sent a message to the effect that her flight to enable her to attend at the special meeting of the central committee was scheduled for 6:00 the next morning. The applicant submits that this was not a genuine invitation intended to achieve substantial compliance with the order uplifting her suspension. Fourthly, the applicant contends that on 25 July 2022, the national congress convened at 12:50 when delegates were addressed by the third respondent, who adjourned the congress

to 27 July 2022, despite the finding of the court that the applicant was entitled to an order interdicting the congress. Fifthly, the applicant contends that the decision taken by the credentials committee on 26 July 2022 to exclude the Mpumalanga region from the national congress was made despite the finding that the national congress could not continue in the absence of that region. Finally, the applicant contends that the continuation with the nomination and election of new office-bearers and the announcements of the results of the election at 20:00 on 27 July 2022 constituted an act of contempt, in that the respondents were aware that an application for leave to appeal was being argued on an urgent basis at this time.

[25] A useful point of departure in any assessment of the existence of a breach of the court's order is the notice of motion filed on 18 July 2022 by which the proceedings before Moshwana J were initiated. The applicant in these proceedings was the sole applicant in those proceedings. She sought a declaratory order to the effect that her suspension be declared invalid and unlawful for want of compliance with the union's constitution, and that in consequence, an order that she was entitled to attend the 11th national congress and fully participate in those proceedings. The applicant also sought to have the suspension of the other members provided in an annexure to the declared invalid and unlawful and for those members to fully participate in the national congress. Finally, the applicant sought an order to the effect that the '*locals from Mpumalanga region*' be permitted to attend and fully participate in the national congress. In the alternative, the applicant sought an order that the national congress be interdicted '*pending determination of the disputes involving the suspensions*'.

[26] It is evident from the terms of the order that the court granted the substantive relief sought in respect of the suspension of the applicant and the other members to whom she referred. The terms of the order make clear that the suspensions were not effected in terms of the union's constitution and thus unlawful. That finding notwithstanding, the court then proceeded to grant the order sought in the alternative (an order interdicting the national congress from proceeding), not until the dispute concerning the suspensions was determined (the relief sought and

granted in terms of paragraph 2 of the order), but until the union '*fully complies with the terms of its own constitution*'. In other words, the court went beyond the relief sought in the notice of motion and the dispute concerning the suspension of the applicant's and her colleagues, to other constitutional shortcomings more broadly affecting the Mpumalanga region. The terms of the order do not make clear precisely which provisions of the union's constitution were found to have been contravened, and what action the respondents were required to take to bring the union into full compliance. The applicant's contention that the respondents are in breach of the order must necessarily be appreciated in this context.

- [27] In regard to the applicant's contention that the respondents breached the court order on account of her exclusion from a meeting of the national office bearers convened on 23 July 2022 to convene a special meeting of the central committee, the antecedent judgment makes no reference to any meeting of the national office-bearers, nor does it oblige the respondents to permit the applicant to attend any such meeting. In any event, the respondents explain that there was no meeting of the national office-bearers, nor does the constitution provide for such a meeting. What transpired was a meeting between the second and third respondents, after which 48 hours' notice of the special meeting of the central committee was given.
- [28] To the extent that the applicant contends that the respondents breached the order because they did not inform delegates that the national congress would not take place on account of the interdict, it should be recalled that the terms of the interdict are not unconditional. The court did not interdict the national congress from taking place, and there was no obligation on the respondents to advise delegates that the congress would not take place. What occurred is that the start of the congress was delayed so as to enable the central committee and later the credentials committee to meet. In so far as the applicant complains that she and other delegates received notice of the meeting too late for travel arrangements to be made timeously, and that the invitation extended to her to attend the national congress was not genuine, a rather different version emerges from the answering affidavit, which in terms of the rules regulating the resolution of factual disputes in motion proceedings I must

necessarily accept. The respondents aver that the notice of the special meeting of the central committee was emailed to all members of the central committee and national office-bearers early in the morning of 24 July 2022 and that the applicant was subsequently telephoned, on Monday, 25 July 2022 by the union's travel agent, on instruction from the national treasurer, in order to make travel arrangements for her to travel to Cape Town for the meeting of the central committee and the national congress. The applicant responded that she would not go to Cape Town as she had not received an invitation. These averments are confirmed by a contributory affidavit filed by the travel agent concerned. The national treasurer went further by placing the notice of the special meeting of the central committee on a WhatsApp group and communicated to the applicant that there was a flight at 6 am the following morning. The applicant did not respond to that message. The respondents aver that the applicant took a calculated decision not to attend the national congress, a conclusion they draw on the basis of the applicant's public statements and the fact that other previously suspended members were not excluded from the national congress. On the evidence before me, there is at least a reasonable doubt that the respondents' conduct had the effect that the applicant and other beneficiaries of the court's order were denied the benefits of that order.

[29] In so far as the applicant contends that the resolutions adopted by the special meeting of the central committee and the reconvening of the national congress on 27 July 2022 all constitute breaches of the court order and thus acts of contempt of court, it does not seem to me that a decision taken to postpone the commencement of the national congress until such time as the union fully complied with its constitution constitutes a breach of the order. On the contrary, it is indicative of compliance with the order.

[30] In so far as the applicant alleges non-compliance with the order in relation to the Mpumalanga region, it is important to scrutinise the antecedent judgment to determine precisely what it was that gave rise to the order interdicting the national congress. To the extent that the applicant contends that the court identified a

'disabling feature' in the form of the absence of delegates to the national congress from the Mpumalanga regional council, the court did not grant the order it did only because the Mpumalanga region would not be represented at the national congress, nor did the court order that delegates from Mpumalanga should be accredited and entitled to full participation in the national congress. While the court questioned, in the abstract, how a national congress could proceed without the views of the Mpumalanga region, the judgment does not disclose any particular remedial action that the court required to be taken, or any specific directives issued in the order as to how this was to be achieved, save that the union was required to comply fully with the terms of its own constitution. As I have observed, the court specifically declined to grant prayer 5 of the applicant's notice of motion in which a declarator was sought that *'the locals from Mpumalanga region be permitted to attend and fully participate'* in the upcoming congress. The fact that the court refused to grant this prayer cannot be ignored; the necessary implication is that the court intended to leave the decision of delegate accreditation to the credentials committee. To the extent that the applicant contests the validity of the amendment to the definitions clause in the union's constitution (which had the effect that accreditation would be limited to delegates who had been confirmed as such by a properly constituted regional executive committee, I am not able on the papers before me to make any assessment of whether that amendment is constitutionally compliant. It would appear, on the face of it, that in terms of clause 6 (2) (d) (xiv) the union's constitution the central committee is empowered to amend annexures to the constitution. As I have indicated below, these are matters that the applicant is free to pursue in the form of proceedings against the union outside of the ambit of an application to hold the respondents in contempt of the order granted on 23 July 2022.

- [31] In summary, I am not persuaded that the applicant has established a breach of the order beyond reasonable doubt. Given that finding, it is not necessary for me to consider the issue of *mala fides* and wilful default, or the civil remedy sought by the applicant by way of prayer 3 of the notice of motion

- [32] To the extent that the applicant in its pursuit of a civil remedy pressed for the determination of any contempt on a balance of probabilities, I would observe that in terms of the authorities referred to above, a civil remedy does not appear to extend to a substantive finding in a dispute between the parties. Rather, the remedies of a denial of access to the courts pending compliance or a structural interdict, all appear to be more narrowly directed at means by which the court order in question might be enforced by way of inducements, negative or positive, to ensure compliance. In the present instance, the applicant appears to seek a civil remedy that requires the court to make a substantive and punitive order of invalidity in relation to decisions of the national congress in circumstances where no basis for that invalidity is made out in the papers, and where an order to this effect would not likely induce compliance should any breach of the order be proved. In any event, to grant final relief with such far-reaching consequences is not appropriate in urgent proceedings, particularly since, as I have indicated, the validity of the decisions of the national congress is not a matter that has been canvassed in the papers before me.
- [33] In regard to the applicant's complaints about resolutions, nominations and elections after the commencement of the national congress, these are not matters that served before the court when the order dated 23 July 2022 was made. It follows that they are of no relevance to these proceedings.
- [34] To the extent that the applicant's counsel submitted that this court is the last refuge of disaffected union members and that the court to uphold the rights of individual union members against conduct by union officials and office bearers in breach of the union's constitution, this is indeed so, but the applicant is not without a remedy. Section 158 (1) (e) of the Labour Relations Act empowers this court to determine a dispute between a registered trade union (or a registered employers' organisation) and any of its members or applicants for membership, about any alleged non-compliance with the constitution of that organisation. This court has frequently intervened in such disputes to protect the rights of union members

against acts by the union and its office bearers and officials in breach of the terms of the union's constitution.

- [35] Finally, nothing in this judgment should be construed to constitute a finding on the substantive validity of any of the decisions taken by the special meeting of the union's central committee, the credentials committee, or by the national congress once the proceedings of the congress got underway. As I have indicated above, these proceedings concern only the narrow issue of any contempt committed by the respondents, where the test applicable to determine any breach of the court's order is one of proof beyond a reasonable doubt. The applicant is thus not precluded from resorting to any remedy that she may have under common law or the Labour Relations Act, to pursue her interests and those of other disaffected union members.

Costs

- [36] In terms of section 162 of the Labour Relations Act, this court has the discretion to make orders for costs according to the requirements of the law and fairness. This formulation has the consequence that unlike the civil courts, an order for costs does not ordinarily follow the result. In the present instance, the proceedings represent what counsel for the applicant termed a 'family fight', and that in the circumstances, an order for costs might not be appropriate. In these circumstances, and given that the dispute between the parties has yet to reach a stage of final resolution, the requirements of the law and fairness are best served by each party bearing its own costs.

Order

1. The application is dismissed.



André van Niekerk
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: S Nhlapo

Instructed by: Gani Attorneys

For the respondents: MJ Engelbrecht SC, with her M Meyerowitz

Instructed by: Serfontein Viljoen & Swart Attorneys