IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO. 395/14

In the matter between:

AARON MHLONTLO **Applicant**

and

SOUTH AFRICAN DEMOCRATIC TEACHERS' UNION **Respondent**

REASONS FOR ORDER

STRETCH J:

1. On 5 July 2014 I issued the following directive pursuant to a certificate of urgency from the applicant's counsel:
    a. That the proposed application would be heard on 8 July 2014;
    b. That the applicant was directed to issue and serve the proposed application, which had to be couched in the form of a *rule nisi* with appropriate interim relief, on the respondent by 15h00 on 7 July 2014.

2. On 8 July 2014 the applicant applied for a *rule nisi* to be issued, calling on the respondent to show cause on 17 July 2014 why an order in the following terms should not be granted:
    a. That the respondent's suspension of the applicant without a hearing be declared to have been unlawful;

b. That the decision of the respondent's National Executive Committee (the NEC) taken on 15-16 May 2014 to suspend the applicant be set aside.

c. That the respondent pays the costs of the application.

d. That paras a and b above operate as an interim interdict with immediate effect.

3. A return of service stated that the application papers had been served on the respondent's receptionist in Bhisho during the morning of the previous day.

4. The interim relief was granted in the absence of opposition, with the return date being 29 July 2014.

5. On 10 July 2014 the respondent anticipated the return date, likewise on an urgent basis.

6. Subsequent to extensive argument that night on the question of final relief, I discharged the *rule nisi* with costs, and indicated that if reasons for the order were required, they had to be applied for within seven days.

7. It transpired that reasons were indeed applied for during the period stipulated, but that this was not brought to my attention, until my registrar coincidentally enquired after the matter on 29 July 2014.

8. What follows then are my reasons for discharging the rule.

9. The applicant, who used to hold the office of the chair of the respondent's northern region executive committee in the Eastern Cape, received a letter from the respondent's general secretary on 26 June 2014 advising him that as a result of deliberations conducted by the NEC on 15-16 May 2014, he was being suspended with immediate effect pending disciplinary proceedings to be held against him. The letter, having outlined alleged unbecoming conduct on the applicant's behalf, prohibited him from engaging in the following conduct during the suspension period, unless authorised to do so by the general secretary:
   a. Represent the respondent in any capacity;
   b. Issue any media statements on the respondent's behalf;
   c. Interact with any of the respondent's structures;
   d. Interact with any of the respondent's members or staff;
   e. Have access to the respondent's offices.

10. On 29 June 2014 the applicant wrote a six-page response to the author of the suspension letter, therein also giving notice of intention to institute legal proceedings subject to certain conditions which had to be complied with by 1 July 2014.

11. The applicant, in his founding affidavit averred that no response was forthcoming by 1 July 2014, and that he felt himself bound by the suspension, despite the fact that it was unlawful. As a result of the suspension, he was precluded from attending an elective provincial conference scheduled to take place from 8 to 11 July 2014 where members and office bearers of the Provincial Executive Committee (PEC) were to be nominated and elected. The proceedings were scheduled to commence at 11h00 on 8 July 2014.

12. The applicant stated that having received no response by the aforesaid deadline, he approached the respondent's provincial secretary, who said that the issue of his suspension would be discussed at a meeting between the PEC and the NEC on 4 July 2014, and implored the applicant not to take any further steps as he was sure that "profound differences" were capable of resolution at this very meeting. However, when the applicant phoned the provincial secretary on the evening of 4 July to find out what had happened, he was told that the NEC had declined to deliberate on the issue of his suspension.

13. The applicant further averred that if the suspension was not set aside before the conference, any chance of his being nominated and elected to serve on the PEC would have been dealt a fatal blow.

14. It was further contended in his affidavit that the respondent's actions amounted to a "flagrant violation of [his] constitutionally protected right to freedom of association as provided in section 18 of the Constitution of the Republic of South Africa", and furthermore that the respondent's actions amount to a violation of the provisions of its own constitution relating to the procedure to be followed in disciplining its members.

15. The founding papers say that the applicant would suffer irreparable harm if the application is refused as the elective conference would only be held again after three years, and that the balance of convenience in any event favoured him because if there was any merit in the allegations against him, the respondent could still act on

them after the conference. However an application in the ordinary course would not be a satisfactory remedy as the NEC was the highest decision making body of the respondent and no other structure or member of the respondent had the power to overturn its decision.

16. When the matter was argued before me, the respondent raised the question of proper service of the application papers *in limine.* Subsequent to my finding that there had been substantial service the parties presented argument on the merits of the application.

17. On behalf of the respondent, it was contended that the rule ought to be discharged for the following reasons:
    a. That in terms of clause 13.3.4 of the respondent's Constitution, the NEC has the power to suspend any PEC for action contrary to the terms of the Constitution, or for action contrary to the policies or decisions of the National Congress, and that the NGC or the NBC would then take over the management of the affairs of the PEC pending the re-election of the committee.
    b. It was contended that these powers included the powers to suspend an individual without a hearing. Because the Constitution itself is silent on this aspect, the NEC in terms of the dictates of the very same Constitution, is at large to elect the procedure it wishes to follow when invoking what is referred to as "precautionary" suspension as opposed to suspension as a sanction, which takes place after a disciplinary enquiry has been held.

c. It was contended that it is clear from the applicant's letter of suspension that the suspension was with immediate effect pending disciplinary processes.

18. The applicant sought confirmation of the rule on the following grounds:

    a. That in terms of the respondent's Constitution, the NEC as a tribunal of first instance does not have the authority to suspend a PEC member. It was only empowered in terms of the respondent's Constitution to disband the PEC as a structure. It was up to the PEC itself to discipline and to suspend its own members. At best, the NEC was entitled to alert the PEC regarding allegations against its member, and to instruct the PEC then to take the necessary steps against that member, so that if the member was dissatisfied with the steps taken, he could appeal to the NEC.

    b. That in terms of this country's Constitution, the applicant has a right to freedom of association, which includes the right to attend meetings.

    c. Although the applicant had already been nominated and was indeed eligible to be elected to the PEC, the elections could not be carried out if the rule was not confirmed, which meant that the applicant would only have another bite at this cherry in three years' time. In the premises, the balance of convenience favoured the applicant.

    d. That if the applicant was elected to the PEC and it turned out subsequently that the outcome of his disciplinary hearing was not favourable to him, he could still be removed from office.

e. That the respondent owes a duty to its Eastern Cape members to allow their nominated candidate to participate in the elections.

f. That although it is correct that the respondent's NEC could decide on procedural issues which have not been addressed in its Constitution, this was not a procedural issue but a substantive one (despite the fact that the applicant specifically referred to it as a procedural issue in his founding affidavit).

g. That the applicant could not exhaust his internal remedy of taking the NEC's decision on appeal to the National General Council (NGC) or the National Congress (NC) because the NC only sits once every four years and the NGC once a year, which sittings had not been scheduled to take place before the election which goes to the root of the question of urgency.

19. When the matter was argued before me, it was common cause that:

a. Nominations had closed and voting had commenced, but that those in charge of the process would withhold announcing the results pending my ruling regarding the status of the *rule nisi;*

b. The applicant had not, in his motion papers, sought interim relief pending the proper ventilation of the challenge to his suspension (by way of an appropriate remedy which, according to the applicant would be review or appeal, and which, according to the respondent can only happen at the pending disciplinary enquiry itself).

20. It was argued on the respondent's behalf, that because the applicant had not approached this court seeking interim relief pending the proper determination and ventilation of the validity and

legality of his suspension, the relief which the applicant was seeking was of a final nature, and that balance of convenience, equity and fairness are not factors which I ought to consider in determining the outcome of the application. That certainly seems to be the position, and I cannot see that the application can be approached or considered from any other angle.

21. In reply to the applicant's contention that the NEC had the power to disband an entire council, but not to suspend an individual or an office bearer serving on that council, it was submitted in argument that such reasoning simply did not make sense, and that I should find that the NEC was indeed vested with such power.

22. In reply to the second crisp issue raised by the applicant, that he had a right to be heard before his suspension, it was contended on the respondent's behalf that the applicant was a member of a voluntary association, the affairs of which were conducted in terms of its own private constitution, and not in terms of labour legislation (dealing with the employer-employee relationship), or administrative justice legislation (dealing with the relationship between the State and individuals), or collective agreements and subordinate legislation, and accordingly, the applicant had failed to show that he had a clear right to bring the application, which is a requirement for the granting of the relief sought.

23. Much was also made about whether the hearing was as a result of an application for reconsideration or because the respondents were anticipating the return date. At the commencement of the hearing the issue of proper service was raised and this Court expressed the

view that if it was found that there had not been proper service on the respondents, the application may well have to be reconsidered because the respondents had indicated that they were only properly notified of the application after the interim relief had already been granted *ex parte*, and had they known in advance, they would have opposed the granting of the relief claimed at that stage. I have already indicated that I made a finding that there was substantial service on the respondent. This does not change the fact that the interim relief was granted (as opposed to sought) *ex parte* in that there was no appearance for the respondent.

24. Rule 6(8) of the uniform rules of this Court states that any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than 24 hours' notice. The question of whether the respondent was properly served was fully argued before me. The fact remains that the order was granted *ex parte* for various reasons in the sense that only one of the parties was present. This having been the case, the order was, quite simply, granted *ex parte,* and the respondent was, for the reasons which were canvassed before me, entitled to anticipate the return date. This was indeed the respondent's stance from the outset, which is borne out by the following extract from the application record (at 1:15-19):

> COURT: Just before you do that, so that I understand where you are coming from, you have said that you are here by way of anticipation in the sense of your anticipating the return date of the rule…?
> MR RAUTENBACH: Yes that is correct.

25. I now turn to deal with the respondent's Constitution. Clauses 2 and 4 thereof state that SADTU (the respondent) is a voluntary association constituted of a body corporate with perpetual succession, capable of entering into contractual and other relations and of suing and being sued in its own name. It is an association not for gain.

26. The following clauses of the Constitution are in my view particularly relevant to this application. With respect to the various objectives of the respondent, they are, amongst others:

> 6.13 to institute legal proceedings on behalf of the Union [being SADTU, the respondent] or its members in pursuance of the objects of the Union;
>
> 6.17 to do all such other things as are in the interests of the Union and its members, and which are consistent with the aims and objects of the Union.

27. The respondent's code of discipline states that all members, including office bearers, shall be subject to the SADTU code of discipline, which shall be determined by the respondent's NEC from time to time, and also to any disciplinary processes or sanctions defined in the code of discipline.

28. Clause 13.3 deals with the respondent's NEC. The relevant sub-clauses say the following:

> 13.3.1 The management of the affairs of the Union shall vest in the NEC.
>
> 13.3.2 The composition of the NEC shall be the National Office Bearers and the Chairperson and Secretary of each Province.

13.3.3 The NEC shall meet at least once every three months … If at least three Provinces deem it necessary to call an emergency meeting of the NEC, then they have a right to request that such a meeting be convened at the earliest possible date.

13.3.4 Subject to the provisions of this Constitution, the NEC shall have the power to:

(a) engage and dismiss any employees of the Union including the General Secretary and to determine their remuneration and to define their duties;

(j) decide on all matters of procedure on which this Constitution is silent;

(k) assess and determine the status of Office Bearers …;

(l) appoint acting Office Bearers should any of the persons not be able to carry out their functions;

(n) take such other decisions and actions as may in the opinion of the NEC be in the interest of the Union and which are consistent with the objects and any matter specifically provided for in this Constitution.

29. Clause 21 of the Constitution traverses the aspect of interpretation. Of relevance is the following:

21.1 Any matter not provided for in this Constitution shall be dealt with by the National Executive Committee and in the event of any doubt or dispute as to the meaning or interpretation of any phrase, clause, term or expression used in this Constitution, the resolution of the National Congress or National General Council, the interpretation thereof shall be made by the National Executive Committee and its decision shall be final.

21.2 In the event that there is conflict between decisions taken by the different representative structures of the Union, decisions of the more representative structures shall take precedence. The order of precedence nationally, in each Province, Region and in each Branch shall be:

National Congress

National General Council

National Executive Committee

National Working Committee

Provincial Conference

Provincial General Council

Provincial Executive Committee

Provincial Working Committee

Regional Biennial General Meeting

Regional Executive Committee

Branch Biennial General Meeting

Site Steward Council

Branch Executive Meeting

Site Meeting

Site Executive Committee

30. The respondent's code of conduct states that upon receipt of a written request for an investigation of unprofessional or unethical conduct, the NEC, PEC, REC or BEC as they may be, may direct that an investigation is conducted by the disciplinary committee provided that the member whose conduct is under investigation be informed of these actions.

31. The Constitution's guidelines for the functioning of disciplinary committees state that where necessary, and depending on the circumstances of each case, a disciplinary hearing may be preceded by a disciplinary enquiry, and that under such

circumstances the members of the disciplinary committee shall not be a part of the enquiry.

32. Clause 1.6 of these guidelines states that any structure has the right to recall an elected representative for any cause it deems fit.

33. The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal. In *Turner v Jockey Club of South Africa* 1974 (3) SA 634 AD, it was held that where the decision of an *Inquiry Board* (my emphasis) was vitiated by a disregard of the fundamental principles of justice, the matter could be corrected by a remittal or by further evidence, or in any other matter short of a hearing *de novo.* In that matter Botha JA referred to *Jockey Club of South Africa v Feldman* 1942 AD 340, where Tindall JA pointed out at pp 350-351, that in a case such as the present, the exclusion of the jurisdiction of the courts of law on the merits is not contrary to public policy, and that our courts have recognised that the decisions of such tribunals on the merits are final, provided the tribunals have not disregarded their own rules or fundamental principles of fairness, in which case the courts are entitled to interfere.

34. Similarly, in *Motaung v Mothiba NO* 1975 (1) SA 618 OPD it was held that in considering whether there had been a material breach

of the constitutional provisions of a voluntary association (such as the respondent), a court of law should not view the matter as if under a strong magnifying glass and should not carpingly ferret out and unduly enlarge every minor deviation from the strict letter of the constitutional provision being examined. It should much rather adopt a practical, common-sense approach to the matter, constantly bearing in mind that the persons called upon to administer such a constitution are usually laymen who are unversed in the ways of the law. Where, however, despite the adoption of this benevolent approach, the Court is satisfied that there has in fact been a *serious* (my emphasis) breach of the constitutional provisions of such an association and that such breach is therefore not a "mere matter of form without any interference with the substance" of the decision involved, it should not hesitate to give full effect to the legal consequences of such a breach (at 619A).

35. It is common cause in the matter before me that the applicant's suspension was precautionary pending the following of disciplinary proceedings (record 40: 1-9).

36. The applicant has referred to clause 3.0 under the respondent's guidelines for the functioning of disciplinary committees to support his argument that he had been suspended by the wrong body. It reads thus:

3.1 The BEC, PEC or NEC shall have the right to inform any of its members in writing of charges of misconduct and suspend such member/s for the duration of the meeting and institute a disciplinary hearing.

3.2 Such committee may, if it considers it necessary, suspend such a member from further participation at its meeting pending the outcome of such hearing.

3.3 Any person so disciplined shall have the right to appeal to the immediate Executive Committee.

3.4 Member/s dissatisfied with the decision of the NEC shall have to right to appeal to the NGC or National Congress, which ever *(sic)* comes first.

37. In contending that the applicant ought to have been suspended by the PEC and not the NEC, it was submitted on behalf of the applicant (correctly in my view) that the Constitution is not a model of clarity. Indeed, when I pointed out to the applicant's legal representative that the above-quoted paragraph is simply nonsensical, he candidly agreed. It was contended in the alternative, that if the NEC had made a decision to suspend the applicant, the NEC ought to have conveyed its dissatisfaction with the applicant to the PEC to deal with him, so that if he in turn was dissatisfied with the PEC's decision, he could appeal back to the NEC, where the decision to suspend had emanated from at the outset in any event. In my view, the practicality and the fairness of such a course of conduct is even more difficult to comprehend than what was intended by referring to suspending an executive committee member from a meeting which had not been described at all.

38. It was further contended on the applicant's behalf that the effect of the precautionary suspension was to interfere with the right which

he had to freedom of association, in terms of clause 18 of the South African Constitution. This despite the fact that the respondent's own constitution makes it clear that he can be suspended in this fashion from further participation in meetings.

39. Notwithstanding the fact that the respondent's constitution is vague on the issue of disciplining executive committee members, it seems to me that the Constitution is very clear on the point that all members, including office bearers such as the applicant, are subject to a code of discipline which is determined by an NEC in which management of all the affairs of the respondent vests, which includes the power to engage and dismiss any employees of the respondent, and to suspend entire committees if necessary. The drafters of the respondent's constitution clearly intended for the NEC to have extremely wide powers, including the power to decide on all matters of procedure on which the Constitution was silent. This power vested in the NEC is twice repeated in its Constitution: firstly at clause 13.3.4(j) thereof which states that the NEC shall have the power to decide on all matters of procedure on which the Constitution is silent, and secondly, at clause 21.1 of the section dealing with interpretation, which states that any matter not provided for in the constitution shall be dealt with by the NEC.

40. In my view there is no reason why the NEC did not have the power to make the decision which it did to suspend the applicant as a matter of precaution. The reasoning which has developed from the *Jockey Club* line of cases and even before, in any event makes it

clear that this court may only interfere with the suspension for the reasons which I have already referred to. This having been a precautionary suspension only, this court is not in a position to say that the applicant has not received a fair hearing. Differently put, the hearing had not yet taken place when the applicant approached the court for final relief. Having approached the court for final relief, it was also not open to the applicant to argue that the balance of convenience favoured him. It goes without saying that the reason this matter was so vociferously argued before me was on the main issue between the parties relating to the powers of the NEC. Any doubt regarding these powers must be dispelled by the contents of clause 21.1 of the respondent's constitution under the heading "interpretation". For purposes of emphasis in concluding, I repeat it:

> "Any matter not provided for in this Constitution shall be dealt with by the National Executive Committee and in the event of any doubt or dispute as to the meaning or interpretation of any phrase, clause, term or expression used in this Constitution, the resolution of the National Congress or National General Council, the interpretation thereof shall be made by the National Executive Committee, and its decision shall be final."

41. Having said that, I also agree with the respondent's counsel that there is nothing in the Constitution to suggest that that the applicant was entitled to a hearing before he was suspended (as a matter of precaution), pending his hearing. Indeed, I would have been surprised if the constitution had contained such a cumbersome provision.

42. For all these reasons, and having heard full argument from both sides, I discharged the *rule nisi* with costs.

I.T STRETCH **11 November 2014**
JUDGE OF THE HIGH COURT