



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 5526/2019

In the matter between:

MOKHESENG ERNEST LEMPETJE	1ST APPLICANT
LEBOHANG THAKHELI	2ND APPLICANT
MAKGAUTA MOHOBELI	3RD APPLICANT
THABANG SELALEDI	4TH APPLICANT
SELLO MALIEHE	5TH APPLICANT
PHAKAMILE MXOSANA	6TH APPLICANT
TSHEPO MONOKO	7TH APPLICANT
PAKISO THULO	8TH APPLICANT
BRENDA LESENYEHO	9TH APPLICANT
SELLO RAMPAKU	10TH APPLICANT
SELLO PULE	11TH APPLICANT
KESIPILE MONGANA	12TH APPLICANT

WELLINGTON MOFOKENG	13TH APPLICANT
THAKANE MODUKA	14TH APPLICANT
THABANG LESIA	15TH APPLICANT
KHWASA MOTHALOSA	16TH APPLICANT
PALESA SHAI	17TH APPLICANT
NKALIMENG SEKHOB	18TH APPLICANT
JANE MOSIME	19TH APPLICANT
THABO MAKHOOE	20TH APPLICANT
BUKIWE MANXIWA	21ST APPLICANT
THABO MAKHOOE	22ND APPLICANT
 And	
NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS UNION- FREE STATE PROVINCE (“NEHAWU”)	1ST RESPONDENT
KHOTSO MAEMA N.O	2ND RESPONDENT
JUSTICE SELLO N.O	3RD RESPONDENT
MATHANG NQOKO	4TH RESPONDENT
KONSTABLE SELEBEDI N.O	5TH RESPONDENT
NTEBOHENG SEKHONYANA N.O	6TH RESPONDENT

HEARD ON: 22 OCTOBER 2020

JUDGMENT BY: MBHELE, J

DELIVERED ON: 08 FEBRUARY 2021

- [1] The applicants launched an application in this Court, seeking to declare an elective congress held on the 16th and 17th October 2019 (the congress) under the auspices of the National Health And Allied Workers Union (NEHAWU) Central Western Region, Free State null and void *ab initio* and that all decisions taken at such congress be reviewed and set aside as well as the election of the Second to Sixth Respondents into office.
- [2] The first applicant is an expelled member of NEHAWU who has since appealed his expulsion to the national body which appeal was at the time of this hearing not finalised. He deposed to the affidavit on behalf of the second to the 22nd applicant.
- [3] The applicants' heads of argument were only filed a day before the hearing of this matter. Mr. Mpahlwa, on behalf of the applicants, moved an application for condonation of the late filing of the applicants' heads of argument from the bar, with no papers filed. I considered arguments from both Mr. Mpahlwa and Mr Merabe, on behalf of the respondents, and found no demonstrable prejudice suffered by the respondents as a result of the late filing of the said heads of argument. In the interest of

justice the late filing of the applicants' heads of argument is condoned.

The respondents brought a substantive application for condonation of the late filing of the respondents' answering affidavit. Although the notice of intention to oppose was filed by the applicants no opposing affidavit followed thereafter and no argument was brought by the applicants in opposition of the application. I considered the degree of lateness and the reasons advanced by the respondents in support of the application. In the interest of justice, the late filing of the answering affidavit by the applicants is condoned.

- [4] The first applicant was an Acting Regional Secretary of the NEHAWU Central West Region, Free State (Central West Region) before his expulsion. The status of the 2nd to 22nd applicant is not pleaded in the founding affidavit, as such it is not clear how they are affected by these proceedings. The applicants assail the validity of the congress on the basis that it was not convened in compliance with the constitution of NEHAWU
- [5] Subsequent to the expulsion of the Acting Regional Secretary the remaining office bearers relocated to other regions leaving the Central West Region with no office bearers. The mass exodus of the office bearers was followed by the expiry of the term of office of the erstwhile REC. The second to sixth respondent are the current office bearers of the Central West Region, elected at the impugned congress.

- [6] With the collapse of the leadership of the Central West Region, the Provincial Executive Committee (PEC) deployed the Provincial Deputy Secretary (PDS) and the Provincial Head of Organizing (PHO) to take care of the affairs of the region. The PDS and the PHO assumed the responsibility of coordinating all logistics necessary for the convening of the regional congress which was held on 16 and 17 October 2019.

- [7] Central to the relief sought in this matter is the question of whether the PEC's decision to deploy the PDS and the PHO to see to the affairs of the region pending the elective regional congress was in violation of the constitution of NEHAWU. The applicants assail the regional congress on the basis that the notices specifying the date, time and place of the regional congress were not sent out by the Regional Secretary and further that no proper branch audits were done prior to the congress. The applicants assert that 18 of the branches falling under the Central West Region were not audited prior to the convening of the congress. Their submission is that there could not have been properly constituted regional congress if it was not organised by the Regional Secretary as prescribed by the constitution.

- [8] **POINTS IN LIMINE**

Locus Standi

The respondents, in the answering affidavit, took issue with the first applicant's capacity to institute these proceedings. They

submit that at the time when the Central Western Regional Congress was held the 1st, 11th and 19th applicants were expelled from the organisation and did not enjoy benefits allotted to members in good standing. They, further, challenge the status of the rest of the applicants alleging that they are either in arrears with their subscriptions to NEHAWU or their branches failed to convene their Branch Congresses disqualifying them from challenging the impugned regional congress.

Upon reading the founding affidavit, no allegations were made of how the second to twenty second applicants are related to NEHAWU. There was no allegation that they belong to any branch of NEHAWU neither was it demonstrated how the outcome of this matter will affect them directly.

- [9] When dealing with *Locus standi* one has to establish whether the applicants have an interest in the relief claimed which give them a right to institute these proceedings. The aforementioned applicants must have a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. See (**Kolbatschenko v King NO and Another 2001 (4) SA 336 at 346 G – H** and **D E van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* 2 ed vol 1 at D1-186.**

- [10] In **Dalrymple & others v Colonial Treasurer 1910 TS 372 at 379** the court remarked as follows when dealing with *locus standi* :

‘The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.

- [11] The applicants have a duty to prove *locus standi*. The 2nd to 22nd applicants failed to show that they have a direct and substantial interest in the matter. The founding affidavit failed to show how closely related they are to this matter. The first applicant’s appeal against his expulsion was still pending before the National Executive Committee of NEHAWU at the time of hearing this matter. It is that body that has the power to confirm, vary or reverse his expulsion. Although his expulsion is effective immediately in terms of the NEHAWU constitution such expulsion has not been confirmed.

[12] **Non joinder**

The respondents take issue with the applicants’ failure to join the National Executive Committee of NEHAWU (NEC) and assert that NEHAWU has a substantial interest in the outcome of this matter. It is common cause that NEHAWU is a corporate body having perpetual succession and all legal powers of a juristic person. The NEC is the highest governing body of the organisation and is responsible for the day to day running thereof. The respondents are just structures and functionaries of NEHAWU.

- [13] Section 51 (h) of the constitution of NEHAWU gives the NEC powers to institute and defend legal proceedings in the name of the union and to appoint attorneys to act for the union and appoint

any person to sign a document in connection with or on behalf of the union. No other structure of the organisation is bestowed with such powers.

[14] It has become settled that the joinder of a party to the proceedings is required as a matter of necessity- as opposed to convenience- if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned it is necessary to join that party. See **(Judicial Service Commission and Another v Cape Bar Council and another 2013 (1) SA 170 (SCA))**.

[15] It is a fundamental principle of law that the court should not at the instance of another party grant an order whereby another party's interests may be directly affected without formal judicial notice of the proceedings. See **(Economic Freedom Fighters and Others v Speaker of the National Assembly And Others 2016 (1) All SA 520 WCC)**.

[16] The NEC has a substantial interest in the matter in view of the powers vested in it by the constitution. All the other structures of NEHAWU function at the behest of the NEC and with powers delegated by the NEC. Failure to join NEHAWU is fatal to these proceedings. Although non joinder may be dispositive of this matter I intend dealing with the merits for the sake of finality.

[17] **Application to strike out**

The respondents filed an application for striking out requesting an order in the following terms:

“ **Ad replying Affidavit**

4. In paragraph 17, the applicants allege that the contents of paragraphs 18 to 41 are for the ‘**edification**’ of the court and constitute ‘**a restatement**’ of the applicants’ case. On the basis of the applicants’ own description, the allegations made in the paragraphs in question are irrelevant.

5. Paragraphs 23, 24, 25, 26, 27, 28, 29, 30, and 31 as a whole, constitute new material as the applicants’ place reliance on the provisions of the constitution to which no reference is made in the founding affidavit. To that extent, the applicants impermissibly make a new case in the replying affidavit.

6. Paragraph 32.2, to the extent that the applicants’ place reliance for the first time in the replying affidavit – on section 34 of the constitution.

7. Paragraph 32.3, to the extent that the applicants make a new case by:

7.1. Placing reliance – for the first time in the replying affidavit – on section 34(1) of the constitution; and

7.2. Alleging that the powers of the regional secretary were usurped

8. Paragraphs 32.5 and 34 as a whole, constitute new material which ought to have been set out in the founding affidavit.” (sic)

[18] The impugned paragraphs are mainly responding to the allegations set out in the answering affidavit. Some of the paragraphs deal with the contents of the constitution following the document purporting to be the constitution of NEHAWU that the respondents introduced into the proceedings. It is the respondents who attached the wrong constitution to the answering affidavit and it became necessary for the applicants to restate the terms of the constitution.

[19] Rule **6(15)** of the Uniform Rules of Court provides as follows:

“(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.”

[20] In **Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm)** at p 566B – E the following was said:

“All those words, 'scandalous', 'vexatious', 'irrelevant' and 'prejudice' are words used almost every day in courts of law. The context in which they are used can lead to variations of meaning but basically they have the meanings allotted to them by *The Shorter Oxford English Dictionary*.

In Rule 6(15) the meaning of these terms can be briefly stated as follows:

Scandalous matter - allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

Vexatious matter - allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

Irrelevant matter - allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.”

- [21] In **Golding v Torch Printing and Publishing Co (Pty) Ltd and Others Ogilvie** Thompson AJ, as he then was, said:

“In deciding whether any particular passage in a pleading sought to be struck out on the ground of irrelevance is relevant or not, the Court should, I think, determine whether the particular passage is relevant to an issue in the action. (See *Stephens v de Wet* (1920 AD 279 at p. 282). Cf. the remarks of WESSELS, C.J., in *Meintjes v Wallachs, Ltd.* (1913 TPD 282).) A decisive test is whether evidence could at the trial be led on the allegations now challenged in the plea. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded.”

- [22] I cannot find that the impugned paragraphs do not apply to the matter at hand and that they introduce a new issue that was not dealt with in the founding affidavit. Neither am I able to discern the prejudice that the respondents are likely to suffer if they are not struck out. The relevant paragraphs are merely shedding light on the preliminary procedures to be followed in preparation for convening a regional congress.

- [23] Mr. Mpahlwa contended that in the absence of the regional secretary the regional congress was irregularly convened. He submitted, further, that in the absence of a functional Regional Executive Committee (REC) a special regional congress should have been convened to fill the vacant Regional Executive Committee positions before the ordinary congress could be convened.

- [24] The relevant sections of the NEHAWU constitution provide as follows:

39. Meetings of the Regional Congress.

- (1) The RC must meet at least once every four (4) years at the place and on the time fixed by the REC.

(2) The Regional Secretary must give notice of a RC Meeting in writing to each branch in the region:

(a) at least 30 days before an ordinary RC meeting; or

(b) at least 14 days before a special RC meeting.

(3) For purposes of commencing a RC meeting and, in order for the meeting to continue, from at least a majority of the branches must be present, and. For the purpose of this section, the calculation of the number of delegates representing a branch may include only persons:

(a) who are members in good standing; and

(b) whose names were previously provided to the Regional Secretary in terms of this section.

CHAPTER 14: PROVINCIAL EXECUTIVE COMMITTEE

42. Establishment and Powers.

(1) The PEC exercises the management of the affairs of the union between meetings of the PC within the provincial sphere and has the necessary powers usual for such an executive body to give effect to the aims and objectives of the union, including the powers to:

(a) approve monthly financial statements;

(b) Open, operate and close banking accounts in the name of the province, subject to approval, direction and ultimate control by the NEC;

(c) recruit members in the province and generally promote the interests of the members and the union;

(d) supervise the affairs of the regions and branches;

(e) ensure that proper communication occurs between the province, its branches and the national office;

(f) do all further things as it considers are in the interests of the union and which are not in conflict with the decisions and policy of the NC, CEC. NEC and PC, Nor inconsistent with the provisions of the constitution;

67. Vacancies arising from Removal

(1) Vacancies in any position shall be filled in the manner prescribed for that position.

- (2) A member elected to fill a vacant position shall hold office for the unexpired period of the term of office of that member's predecessor.

[25] There is no procedure set out for when the REC has collapsed and its term has expired. The constitution provides for the filling of vacant positions before the expiry of the term of office of the elected office bearers. Normally special elections are held to fill an office that has become vacant between general elections. There were no vacancies in the REC when the regional congress was convened because the term of office of the people who vacated the positions had expired. It would have been amiss for the PEC to call a special congress to replace people whose term had expired. There could not have been notices sent out by the Regional Secretary because none was available. Consequently, the PEC had to step in and supervise the affairs of the region as it is required by the constitution. The PEC is enjoined by the NEHAWU constitution to run the affairs of branches and do all other things that it considers to be in the interest of the union. In my view, arranging and convening a congress in a situation where the REC is non-existent is within the powers conferred on the PEC by the constitution. The PEC would have failed in their duties had they allowed the region to run without proper leadership structure in perpetuity.

[26] It was not denied by the applicants that at the time the congress was held the 18 branches that are said to have not been audited had not held their branch congresses in compliance with the constitution. The reliance on **Ramakatsa & Others v Magashule & Others [2012] ZACC 31; 2013 (2) BCLR 202 (CC)** by the

applicants is misplaced if branches failed to meet their constitutional obligations to form part of the regional congress. Upon reading the constitution alone the applicants' argument cannot stand.

[27] The applicants assert that there was no quorum at the congress as only 23 of the 49 branches of the region were in attendance. The available evidence shows that the relevant 18 branches failed to comply with the directive from the central office to convene their branch congresses. The members of these branches failed to exercise their democratic right to hold branch congresses which would have ensured that they qualify to attend the regional congress. In the version of the respondents which is not controverted the majority of branches qualifying to attend the conference were in attendance at the congress. As such the validity of the regional congress cannot be assailed. I am unable to find that the convening of the regional congress by the organisers deployed by the PEC was unlawful. The main application must fail. There is no reason why the costs should not follow the event.

[28] Therefore, the following order is made:

[29] **Order**

1. The applicants' application for condonation of the late filing of the heads of argument is granted;
2. The respondents' application for condonation of the late filing of the answering affidavit is granted;
3. No order as to costs in respect of the aforementioned condonation applications;

4. The respondents' application to strike out is dismissed with costs;
5. The applicants' main application is dismissed with costs;
6. Costs to include those occasioned by the employment of Counsel.

N.M. MBHELE, J

On behalf of the Applicant:

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