IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA29/2021

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA)	**First Appellant**
R G MALULEKE & 13 OTHERS	**Second to Further Appellants**
and	
AFGRI ANIMAL FEEDS (PTY) LTD	**Respondent**
Heard:	**31 March 2022**
Delivered:	**17 June 2022**
Coram:	**Phatshoane ADJP, Savage and Phatudi AJJA**

JUDGMENT

SAVAGE AJA

[1] This appeal, with the leave of this Court, is against the judgment and order of the Labour Court (Mahosi J) delivered on 20 January 2021 which upheld a preliminary point raised by the respondent, Afgri Animal Feeds (Pty) Ltd. The Court found that the first appellant, the National Union of Metalworkers of South Africa ('NUMSA') "*lacked the requisite locus standi to refer this matter and to represent"* the second to further appellants ('the employees') in their unfair dismissal claim before the Labour Court in that they were employed in a sector which fell outside the scope of NUMSA's constitution. Costs were awarded against the appellants.

Background

[2] The respondent conducts business in the agricultural sector, manufacturing and distributing animal feeds.

[3] Clause 1(2) of NUMSA's constitution provides that "(t)he scope of the union is as per Annexure B of this document. The Central Committee may amend the scope from time to time".

[4] Clause 2.2 provides that:

> 'All workers who are or were working within the scope as set out in Annexure B are eligible for membership of the Union subject to the discretion of the relevant Shop Stewards Council. There are three kinds of membership: Active, Associate and Continuation.'

[5] The clause continues that an "active member" is a form of "membership available for workers currently employed in the metal or related industry".

[6] Annexure B to NUMSA's constitution provides, in relation to "the scope of the Union", that "the Union shall be open to all workers employed in any of the following industries". The annexure lists a number of different industries including the Iron, Steel, Engineering and Metallurgical industry; Electrical Engineering; Plastics; Automobile Manufacturing; Motor industry; Transport; Cleaning industry; Security industry; the Building and Construction; Industrial Chemicals, which include Base Chemicals, Fertilizers and Glass, Speciality Chemicals, including those for industrial or agricultural use, and Pharmaceuticals; Renewable Energy; Mining; IT; Health Services and Canteen Services. The list does not include the manufacture of animal feeds.

[7] After the respondent refused to grant NUMSA workplace organisational rights, 137 employees embarked on an unprotected strike at the respondent's premises from 12 to 14 September 2017. The employees were given notice to attend a disciplinary hearing, at which they were initially represented by a NUMSA official until the chairperson directed that the official leaves the hearing apparently due to his disruptive behaviour. Following the hearing, on 1 December 2017, the employees were dismissed from their employment with the respondent. Some of the 137 employees who had embarked on the strike received a final written warning arising from their conduct. Aggrieved with their dismissal, the employees referred an unfair

dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). On 5 February 2018, the CCMA issued a certificate declaring the dispute unresolved.

[8] Thereafter, NUMSA, as the first applicant, and the employees, as the second to further applicants, referred an unfair dismissal dispute to the Labour Court for adjudication. The statement of case filed for the appellants in May 2018, was signed by their attorney of record. It recorded that the employees had become members of NUMSA in July 2017 and remained members in good standing. An order was sought that the dismissal of the employees be declared procedurally and substantively unfair; and that they be retrospectively reinstated into their employment with the respondent, alternatively receive the maximum compensation payable, with costs.

[9] The respondent opposed the matter and in its statement of defence raised two preliminary points. The first was resolved when the Labour Court, on 7 September 2018, condoned the late filing of the appellants' statement of case. The second preliminary point, which is the subject of this appeal, was that both NUMSA *"and the Applicants' legal representative lack locus standi and authority to act on behalf of* [the employees]". In support of this preliminary point, the respondent pleaded that it had received union membership forms from five of the employees on 10 July 2017, which were attached to NUMSA's application in terms of section 21 of the Labour Relations Act 66 of 1995 (the LRA) for organisational rights. No further membership forms were received, no membership numbers were affixed to the forms received and there was no other confirmation that the remaining employees were NUMSA members. Proof of *locus standi* and authority to act was therefore sought, with the respondent noting its risk of prejudice in relation to costs should NUMSA decide not to conduct the litigation to conclusion.

[10] The respondent thereafter filed a notice in terms of rule 7(1) of the Uniform Rules of Court in which it raised an objection to NUMSA's authority to act on behalf of the employees and invited it to furnish proof of such authority to act. In response, NUMSA provided powers of attorney signed by the employees recording NUMSA to be their "lawful trade union and agent" to enter into any legal proceedings and take any steps related to such proceedings.

[11] In the pre-trial minute signed by the parties' respective legal representatives, amongst other issues, it was stated to be in dispute whether NUMSA was entitled to register the employees as its members.

Judgment of the Labour Court

[12] The Labour Court recorded the preliminary point raised to concern whether "*NUMSA lacked the requisite locus standi to refer this matter and to represent the employees*" and whether the principles set out by the Constitutional Court in *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others (Lufil),*[1] which concerned organisational rights, applied *"to the employees' right to representation*". The Court considered the enquiry to be two-fold:

> 'Firstly, whether NUMSA has a right to refer the matter in its own interest and those of its members' interests (sic) and secondly, whether it has a right to represent the employees in this matter.'

[13] The Court took the view that the principle emanating from *Lufil* remains valid for "all enquiries". It noted that in terms of section 191(1) of the LRA, the employees could refer their dismissal dispute to the CCMA for conciliation; and that thereafter, if unresolved, given that the matter concerned a strike dismissal, "the employee may refer the dispute to the Labour Court for adjudication…" in terms of section 191(5)(b). Having regard to the definition of a "party" in rule 1 of the Labour Court Rules[2] and section 161 of the LRA, the Court stated that "a referral may be made by the individual dismissed employees themselves or by their registered union". It continued that:

> 'A reading of sections 161 and 200 of the LRA together with rule 1 of the Rules clearly show that a union may only refer or represent a dismissed employee if that union is registered and if the dismissed employee who is a party to the matter is a member of that union'.

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[1] [2020] ZACC 7; 2020 (6) BCLR 725 (CC); [2020] 7 BLLR 645 (CC); (2020) 41 (ILJ) 1846 (CC)
[2] Rule 1 of the Rules for the Conduct of Proceedings in the Labour Court defines a 'party' as any party to court proceedings and includes a person representing a party in terms of section 161 of the Act.

[14] The Court accepted that the dismissed employees had a right to be represented during legal proceedings against the respondent, but that sections 161 and 200 of the LRA, read with Labour Court rule 1, "clearly provide that a dismissed employee may only be represented by the registered trade union of which the dismissed employee is a member".

[15] Placing reliance on *Lufil*, the Court found that membership of a union by an employee who is employed in a sector which falls outside of the scope of the union's constitution, is invalid and void *ab initio*; and that any act said to have been taken as a consequence of such purported membership would be invalid. This is so in that, as was made clear in *Lufil*, a voluntary association, such as NUMSA, is bound by its constitution and has no powers beyond the four corners of it. Since the employees were employed in a sector which fell outside of the scope of NUMSA's constitution, "*its act of referring the matter in terms of section 200 of the LRA is invalid and void ab initio. As such NUMSA is precluded from these proceedings and has no locus standi to bring this matter*". The preliminary point was therefore upheld, with costs ordered against the union given the "inexplicable" stance adopted by it in the matter and the fact that the employment relationship had long since ended.[3]

Submissions on appeal

[16] The appellants took issue on appeal with the reliance placed on *Lufil* by the Labour Court when that matter concerned organisational rights and not whether NUMSA could represent individual employees in unfair dismissal proceedings. The current matter, it was contended, is distinguishable in that it concerns the individual right of an employee to representation, which does not affect the employer or any third party. It was argued that the Labour Court failed to balance the rights of parties to representation in circumstances in which membership status is not relevant to and has no bearing on representation, is of no concern to the employer and thus is not a valid consideration. It was submitted that the Court was bound to follow *MacDonald's*

[3] With reference to *AMCU and others v Ngululu Bulk Carriers (Pty) Ltd (In liquidation) and others* 2020 (7) BCLR 779 (CC).

Transport Upington (Pty) Ltd v AMCU and others (MacDonald's Transport),[4] *Kalahari Country Club v NUM (Kalahari),*[5] and more recently, *Multiquip (Pty) Ltd and another v NUMSA (Multiquip),*[6] to interpret section 200(1) purposively. For these reasons, the appellants sought that the appeal succeeds with costs.

[17] In opposing the appeal, the respondent stated that the issue before this Court is whether a union can "ignore its own constitution, by purporting to represent employees who do not qualify for membership, and in breach of s161 of the LRA?". It argued that the Labour Court was correct in finding that the referral of an unfair dismissal dispute to the Labour Court is regulated by sections 191(1), (5) and (11) of the LRA, read with rule 1 of the Labour Court Rules; and that representation before the Labour Court is regulated by section 161 read with section 200 of the LRA. The respondent contended that NUMSA is therefore prevented from referring an unfair dismissal dispute to the Labour Court when the employees concerned are precluded from membership of the union in terms of its constitution. The wording of section 161 is clear and it would invite "chaos and confusion" if unions had legal standing to act for employees excluded from the union's constitutional scope when this is in breach of the union's constitution and therefore the legality rule.

[18] The respondent relied on the decision in *Lufil* to contend that as a voluntary association, NUMSA is bound by the terms of its own constitution and is precluded from concluding membership agreements with workers who fall outside its registered scope.

[19] In *NUM v Hernic Exploration (Pty) Ltd,*[7] this Court confirmed that s 200(1) grants a union the right to represent its members in an unfair dismissal dispute even where the employees are not cited as applicants. The respondent argued, however, that such standing was subject to the union's organisational scope as set out in its constitution; and that the LRA only permits registered unions to represent their members, with membership determined by the scope set out in the union's constitution. NUMSA lacked legal standing to act for the employees since they did

[4] [2016] ZALAC 32; (2016) 37 (ILJ) 2593 (LAC); [2017] 2 BLLR 105 (LAC).
[5] (2015) 36 ILJ 1210 (LAC) at para 1.
[6] [2021] ZALCD 67 at paras 18 – 23.
[7] (2003) 24 ILJ 787 (LAC) at paras 14 - 17.

not qualify for membership as they were employed in an industry which fell outside of the union's registered scope. As a result, it was submitted that the LRA does not permit NUMSA to represent the employees when they did not qualify for membership of the union.

[20] The respondent contended further that *MacDonald's Transport* was distinguishable in that the matter did not turn on the union's constitutional scope, since the employees in that matter were permitted to be members of the union.[8] *Kalahari* was also distinguishable in that the employee was represented at arbitration by a union recognised by the employer, which had deducted union subscriptions and fees. *Multiquip* was similarly distinguished in that it did not require the application of section 161. The current matter, it was submitted, concerns legal standing in the Labour Court, as opposed to at arbitration, which is regulated by section 161. If the provisions of section 161 are not satisfied, legal standing has not been established. The decision of the Labour Court accords with judicial authority on the issue and is consistent with the plain wording of section 161. NUMSA failed to comply with the requirements for legal standing in the Labour Court as set out in section 161. Consequently, the respondent sought that the appeal be dismissed with costs ordered against the union.

Evaluation

[21] The employees referred their unfair dismissal dispute to the Labour Court for adjudication in terms of section 191(5)(b),[9] which provides that "the employee" may refer such a dispute to the Labour Court if the reason for dismissal is alleged to concern the employee's participation in an unprotected strike. As a trade union, NUMSA was not "the employee" for purposes of section 191(5)(b). NUMSA was cited as the first applicant to the proceedings on the basis of section 200, which provides that:

[8] It was argued the same applied to *AMCU v Patcon Construction & Civil Engineering Contractors (Pty) Ltd* (2018) 39 ILJ 586 (LC).

[9] Section 191(5)(b) provides that "…the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—(i) automatically unfair; (ii) based on the employer's operational requirements; (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.

'(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party —

(a) in its own interest;

(b) on behalf of any of its members;

(c) in the interest of any of its members.

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings.'

[22] NUMSA was a party to the proceedings in terms of section 200(2). In being cited as such the union acted "on behalf of any of its members" and/or "in the interest of any of its members" in terms of sections 200(1)(b) and (c).

[23] Both NUMSA and the employees were represented by their attorney of record, in the referral of the matter to the Labour Court and in the proceedings before that Court, in accordance with section 161(1), which states:

'(1) In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by -

(a) a legal practitioner;

(b) a director or employee of the party;

(c) any office-bearer or official of that party's registered trade union or registered employers' organisation;[10]…'.

[10] Section 161(1)(c) was substituted by s 28(a) of Act 6 of 2014 to exclude the reference to representation by a member of a trade union.

[24] Given their legal representation, the employees were not represented in the proceedings by an "office-bearer or official of that party's registered trade union" in terms of section 161(1)(c). Rather, NUMSA's representation of the employees took the form contemplated in section 200(1)(b) and (c) and section 200(2), in that the union acted as a party to the proceedings on behalf of or in the interest of the employees. Where a union chooses to "represent" employees on this basis, this Court has recognised that it acts collectively with its members, asserting its members' rights and not its own.[11]

[25] The issue, for current purposes, is whether NUMSA can do so when the employees are employed in an industry which falls outside the scope provided in the union's constitution.

[26] The LRA distinguishes between individual employee rights and collective bargaining rights. In *MacDonald's Transport,*[12] in the context of arbitration proceedings, it was stated:

> 'Certainly, when a union demands organisational rights which accord to it a particular status as a collective bargaining agent vis à vis an employer, it asserts and must establish [that] it …has a right to speak for workers by proving they are its members; sections 11 - 22 of the LRA regulate that right. But in dismissal proceedings (which, plainly, are not about collective bargaining) before the CCMA or a Bargaining Council forum, the union is not (usually) the party, but rather the worker is the party. It is the worker's right to choose a representative, subject to restrictions on being represented by a legal practitioner, itself subject to a proper exercise of a discretion to allow such representation. When an individual applicant wants a particular union to represent him in a dismissal proceeding, the only relevant question is that worker's right to choose that union.'[13]

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[11] *MacDonald's Transport* at para 36.
[12] *MacDonald's Transport* at para 35.
[13] *MacDonald's Transport* at para 35.

[27] The Court took the view that it is not the business of an employer to concern itself with the relationship between individual employees and their union,[14] in that employees enjoy a right to choose their own representatives in unfair dismissal or unfair labour practice disputes.[15] This was said to be so in that, distinct from those circumstances in which the union needs to prove membership for collective bargaining purposes, the relationship between a trade union and its members is a private matter; and that to justify interference with such a private contractual relationship, some delictual harm would have to be proved. If the employer had sought an interdict, it would not have been able to demonstrate either a right or a harm, which justified relief being granted in that its interest in the validity of membership related only to whether it was obliged to accord the union representative status.[16]

[28] This Court, in the context of representation in arbitration proceedings, had regard to CCMA rule 25(1)(a)(ii) and (b)(iii) which provides that a party to a dispute may be represented at arbitration proceedings by "any member of that party's registered trade union … as defined in the Act. It was found that a union's constitution is no more than a contract between the union and its members, the provisions of which the union or its members, but not the employer, ought to be able, at its election, to decide whether to invoke or not.[17]

[29] The Labour Court in *NUM obo Mabote v CCMA,*[18] also in the context of arbitration proceedings, found that section 200(1)(b) and CCMA rule 25(1)(b)(iii), on the face of it, grant an employee and his or her chosen trade union "an unfettered right for the union to represent the employee in arbitration proceedings", noting that this right accorded with the right to freedom of association guaranteed in the LRA, the Constitution and ILO Convention 87.

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[14] At para 40.
[15] *Kalahari Country Club v NUM (*2015) 36 ILJ 1210 (LAC) upholding the decision of the Labour Court in *NUM obo Mabote) v CCMA* (2013) 34 ILJ 3296 (LC*)* at para 30.
[16] At para 42.
[17] At para 43.
[18] [2013] ZALCCT 22; [2013] 10 BLLR 1020 (LC); (2013) 34 ILJ 3296 (LC) at paras 26 -29.

[30] The Court found that the restriction in s 4(1)(b) that an employee may join a trade union "subject to its constitution" regulates the relationship between the trade union and its members *inter se,* with it –

> '…for the trade union to decide whether or not to accept an application for membership and whether or not that member is covered by its constitution. It could not have been the intention of the legislature unduly to restrict the right to representation by a trade union to the extent that it is up to a third party — such as an employers' organization — to deny a worker that right, based on the trade union's constitution'.[19]

[31] The Court noted that:

> 'It is up to the union and its branch committee to deal with any challenge to membership. It is not for an employer to interfere with the internal decisions of a trade union as to whom to allow to become a member.'[20]

[32] In *GIWUSA v Maseko and others,*[21] the Labour Court affirmed the approach to interpreting a constitution of a voluntary organisation as one of benevolence, rather than of nit-picking, which ought to be aimed at the promotion of convenience and the preservation of rights.[22] This is to be contrasted with the approach taken by the Constitutional Court in *Lufil*:

> 'The contractual purpose of a union's constitution and its impact on the right to freedom of association of its current members is founded in its constitution. A voluntary association, such as NUMSA, is bound by its own constitution. It has no powers beyond the four corners of that document. Having elected to define the eligibility for membership in its scope, it manifestly limited its eligibility for membership. When it comes to

[19] *Mabote* at para 27.
[20] *Mabote* at para 28.
[21] *General Industries Workers Union of SA v Maseko and others* (2015) 38 ILJ 2874 (LC) at para 23.
[22] *MacDonald's Transport* at para 20.

organisational rights, NUMSA is bound to the categories of membership set out in its scope.'[23]

[33] *Lufil* did not concern "NUMSA's suitability to represent its employees"[24] in unfair dismissal or unfair labour practice disputes. Rather, it was concerned with the role of a union's constitution in giving effect to a legitimate government policy of orderly collective bargaining at sectoral level.[25] The Court noted that NUMSA relied on cases which were -

> '…distinguishable on the facts of this case. These cases dealt with representation at arbitration hearings. This is noteworthy as in those cases the court had to balance the interests of the employees to have legal representation at arbitration hearings against that of the employer.'[26]

[34] There is a clear distinction between the exercise by a union of organisational rights and the representation of an employee by a union in an unfair dismissal dispute. A union relies on organisational rights granted to it in order to exercise its constitutional right to engage in collective bargaining.[27] As was noted in *Lufil*, where a union operates within a specified constitutional scope, in bargaining collectively on behalf of its members the union relies on its particular knowledge of the industry in which it operates and employees may seek membership of the union for this reason.

[35] However, when an employee elects to be represented by a trade union in an unfair dismissal dispute, different considerations apply. In determining whether an employee is entitled to be represented by a trade union in terms of section 200 or section 161(1)(c), fairness and the right of the employee to representation in individual dispute proceedings are relevant considerations.

[36] The relationship between a trade union as a voluntary association and its members *inter se* is consensual in nature. If a trade union has accepted the

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[23] At para 47.
[24] At para 52.
[25] At para 37.
[26] At para 67.
[27] Section 23(5) of the Constitution, 1996.

employee as a member outside of its constitutionally-prescribed scope of operation, it does so on the basis that the trade union is limited in the representation that it may provide to the employee. Following *Lufil*, where an employee obtains membership of a union, the scope of operation of which does not include the industry in which the employee is employed, that union will not be entitled to bargain collectively with the employer on behalf of that employee.

[37] However, when an employee is represented in an individual dispute with their employer by such a union, such representation is aimed at providing effective access to justice and redress to the employee, where it is due, in accordance with both sections 23 and 38 of the Constitution and prevailing labour legislation. Unlike the exercise of organisational rights in an employer's workplace, the employer has no interest, in an individual dispute between it and an employee, in holding the union to the terms of the union's constitution in order to limit the employee's right to representation. This is so in that the union's scope of operation relates to the industries in which the union is entitled to organise and bargain collectively. That scope does not bar the representation of a union member by that union in an individual dispute with their employer. In the context of labour relations, and given the balance of power which exists between employer and employee in the workplace, to find differently would be manifestly unfair.

[38] It follows that the Labour Court erred in finding that the employees' membership of NUMSA was invalid and void ab initio. It similarly erred in finding that NUMSA's referral of the matter to the Labour Court was invalid and void ab initio and in finding that the union was precluded from the proceedings before it on the basis that it lacked *locus standi*.

[39] For these reasons, the appeal must succeed. Having regard to considerations of law and fairness, there is no reason why costs ought to be awarded in this matter.

Order

[40] The following order is made:

1. The appeal succeeds.

2. The order of the Labour Court is set aside and replaced as follows:

"The respondent's point *in limine* is dismissed".

SAVAGE AJA

Phatshoane ADJP and Phatudi AJA agree.

APPEARANCES:

APPELLANTS:	F A Boda SC and S Bismilla
	Instructed by Seena Chetty Incorporated Attorneys
RESPONDENT:	T J Bruinders SC and J P Prinsloo
	Instructed by Annelie Grundlingh Attorneys