THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 2896 / 2018

In the matter between:

CHEMICAL, ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS' UNION	First Applicant
WELILE NOLINGO	Second Applicant
THAMSANQA VUMANI MHLONGO	Third Applicant
LUCAS MASHEGO	Fourth Applicant
JOHANNES DUBE	Fifth Applicant
NDZIMENI NOMNQA	Sixth Applicant
SEBENZILE SAM XABA	Seventh Applicant
PETRUS PETJE	Eighth Applicant
SIPHIWE MAPHUMULO	Ninth Applicant

SGIDI MNGADI Tenth Applicant

PHILLIP KHOZA Eleventh Applicant

BHEKI DLUDLU Twelfth Applicant

XOLANI MNYANDU Thirteenth Applicant

LUCKY MONI Fourteenth Applicant

PERSONS LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION Fifteenth to Thirty Fourth Applicants

and

THULISILE NJAPA MASHANDA *N.O.* First Respondent

REGISTRAR OF LABOUR RELATIONS Second Respondent

SIPHO SONO *N.O.* Third Respondent

ARNAUSE MOHLALA *N.O.* Fourth Respondent

THABO KWINANA Fifth Respondent

SIMON MOFOKENG Sixth Respondent

MBULELO PAPI DANIEL NKOYIYANA Seventh Respondent

Heard: **29 November 2022**

Delivered: **7 December 2022**

Summary: **Locus standi – section 158(1)(e) considered – individual union members having locus standi to bring application – dispute involving case of alleged non-compliance with constitution of union – constitutes dispute between members and union**

Administration application – section 103A of LRA considered – only Registrar / trade union can apply to for Court to appoint or remove administrator – not competent for individual applicants to seek the removal of administrator and replacement with administrator of their choosing – individual applicants can only express their interests for consideration by the Court

Administration of trade union – position of administrator considered – duties of administrator considered – circumstances when administrator may be removed considered – no proper grounds made out for removal of administrator

Appointment of administrator – principles considered – meaning of 'just and equitable' considered – Registrar satisfied with administrator – no cause or reason not to appoint such administrator

Reinstatement – dismissals challenged on basis of being unlawful – Court has no jurisdiction to decide a claim based on unlawful dismissals – individual applicants required to challenge their dismissal in terms of ordinary dispute resolution processes of LRA – relief of reinstatement not competent

Section 189A(13) – principles considered – intervention in terms of section 189A(13) exists in this case – judgment however only applies to two individual applicants – administrators obliged to comply with such judgment – case that order a nullity that can simply be disregarded rejected

***Lis pendens* – principles considered – compliance with judgment under section 189A(13) already subject to contempt proceedings for purposes of enforcement**

– such contempt proceedings currently pending on appeal – applicants now in essence seeking same enforcement under different guise – issue *lis pendens*

Relief sought – relief of reinstatement and removal and replacement of administrator not competent – application refused – further appointment of administrator proposed by Registrar granted – amended order issued

Costs – principles considered – no order as to costs fair

JUDGMENT

SNYMAN, AJ

Introduction

[1] What is before the Court in this matter is the epitome of a truly sorry state of affairs. The tale starts with yet another dysfunctional trade union, debilitated by in-fighting for control which in turn led of a failure of proper administration of the union, to the extent that it required intervention by the Registrar of Labour in the form of seeking an appointment of an administrator by this Court. However, the story does not get better after the appointment of the administrator, but it in fact gets worse, in that it appears there were problems with this administrator, resulting in all kinds of litigation, ultimately culminating in the removal of that administrator. What is now at the core of the current matter is the appointment of a new administrator, but because of the unfortunate history, even this new appointment has turned out to be controversial. And in the course of all of this, the only ones who suffer are members of the trade union, who diligently pay their membership fees for assistance by the trade union, and whose services they are supposed to receive from the union are compromised.

[2] This current matter came first came before this Court by way of an urgent application brought by the applicants on 19 August 2022, with the notice of motion being casted in three parts. In Part A, the applicants sought relief in the form of an interim interdict. In terms of this interim interdict, the third respondent would be interdicted from convening any national or regional congresses in the name of the first applicant, pending the final determination of the relief sought

in prayer 5 of part B of the notice of motion. The application in terms of part A came before me on 25 August 2022, and on the same day, I gave an *ex tempore* judgment in terms of which I granted the applicants the interim relief sought. What now remains is the determination of part B of the notice of motion.

[3] The applicants have indicated that they no longer seek the relief sought in the entire prayer 7, and prayers 8, 9, 10 and 11, as contained in part B of the notice of motion. The applicants have also abandoned the relief sought in part C of the notice of motion. Therefore, all that remains is to decide whether the applicants are entitled to the relief sought in prayers 5 and 6 in part B of the notice of motion, which I will deal with below.

[4] What is also before me is an application brought by the second respondent to extend the period of appointment of the third respondent as the appointed administrator of the first applicant in terms of section 103A of the Labour Relations Act (LRA)[1].

[5] Because of the multiplicity of different parties in this matter, I will simplify the references to the main players in the proceedings by way of references made by name. The first applicant, the Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union, will be referred to as 'CEPPWAWU'. The first respondent, being the firstly appointed administrator of CEPPWAWU, will be referred to as 'Mashanda'. The Registrar of Labour (the second respondent) will be referred to as 'the Registrar'. The current administrator of CEPPWAWU, being the third respondent, will be referred to as 'Sono'. All the other individual applicants will be jointly referred to as 'the individual applicants', but in the case of a referral to a specific individual applicant, that applicant will be referred to by name.

[6] In presenting argument before me, the urgency of the application was not placed in dispute by any of the parties.[2] It is in any event undeniable that it is necessary that this matter be urgently determined, as the current period of administration of Sono comes to an end on 12 December 2022. All the parties have had the

[1] Act 66 of 1995 (as amended).
[2] In his heads of argument, the third respondent did take issue with urgency relating to the prayer for reinstatement, however I see no reason to separate this from the overall application when deciding this matter on an urgent basis.

opportunity to properly place their respective cases before Court, so it is appropriate and proper to finally dispose of the case on the merits. I will now proceed to decide this matter by first setting out the relevant background facts.[3]

Background facts

[7] In 2018, the Registrar made application to this Court to place CEPPWAWU under administration in terms of section 103A(1) of the LRA. This application was motivated by maladministration considered by the Registrar to have existed in CEPPWAWU. In particular, CEPPWAWU failed to submit annual financial statements for the entire period between 2014 to 2017. It also failed to comply with some of the provisions of its constitution, and had failed to provide the Registrar with the information prescribed by section 98 and 100 of the LRA.

[8] The administration application came before Rabkin-Naicker J on 12 March 2020. In a judgment handed down on 4 June 2020, the learned Judge granted the application. The learned Judge found in favour of administration, despite protest by CEPPWAWU at the time, and the fact that blame was placed by it at the door of a previous general secretary had now been removed. The learned Judge considered it just and equitable to grant the order sought by the Registrar, and made particular reference to the fact that despite the original administration application having been brought in September 2018, by the time the application came before the learned Judge in March 2020, there had hardly been any progress on the part of CEPPWAWU to get its house in order.

[9] Rabkin-Naicker J granted a comprehensive administration order on 4 June 2022. I do not intend to repeat the entire content of that order. Suffice it to say, Mashanda was appointed as the administrator of CEPPWAWU, and given broad powers, which included that she took control of CEPPWAWU in the place of all its constitutional institutions and offices, and to manage all the affairs, business and assets of CEPPWAWU. She was also authorised to institute and defend any legal proceedings by or against CEPPWAWU, in its name and / or

[3] The various affidavits in this case encompass some 2 000 pages. I will thus not set out all the factual averments contained therein in this judgment, but will only summarize what I consider essential.

on its behalf. For all intents and purposes, Mashanda fully stepped into the shoes of CEPPWAWU.

[10] Unfortunately, the appointment of Mashanda as administrator did not seem to have the effect as desired. There were substantial complaints about her conduct, the costs incurred by her in the administration of CEPPWAWU, the fact that she exhibited a conflict of interest and that she actually committed financial mismanagement. The individual applicants said that she '*failed spectacularly*'. I need not delve into the detail of any of these allegations, because she was subsequently removed as an administrator, and these allegations have little relevance in deciding the current case.

[11] What still remain relevant in the current proceedings are some actions taken by Mashanda, after her appointment, relating to dismissal of a number of the employees of CEPPWAWU. On 14 June 2021, Musi Bengu (Bengu), the deputy general secretary, was dismissed for misconduct. On 27 July 2021, Samuel Seatlholo (Seatlholo), the international relations officer, was dismissed. On 3 August 2021, the Mpumalanga regional secretary, Seatlholo Bheki Dludlu (Dludlu) was dismissed. However, and on the facts, none of these employees ever challenged their dismissals at the time it happened. They never referred an unfair dismissal dispute to the CCMA, or approached this Court for relief in this regard, until the current application was brought on 19 August 2022.

[12] On 13 August 2021, Mashanda instituted restructuring (retrenchment) proceedings at CEPPWAWU, by way of a section 189(3) notice issued on that date. This restructuring involved all the other individual applicants (save for Bengu, Seatlholo and Dludlu).

[13] The individual applicants have contended that the restructuring of CEPPWAWU, and the dismissal of the three individual applicants as referred to above, was not lawful because the National Executive Committee (NEC) of CEPPWAWU was not consulted and did not approve any this conduct. The applicants contend that in terms of paragraph 3.9 of the administration order of 4 June 2020, as well as the constitution of CEPPWAWU, Mashanda was

required to involve the NEC in this, obtain its approval, and could not act unilaterally. This contention will be dealt with later in this judgment.

[14] Where it came to the restructuring initiated on 13 August 2021, only two of the individual applicants, being Sakhiwo Zako (Zako) and Mzwandile Mpofu (Mpofu), sought to challenge the retrenchment process initiated by Mashanda. As the retrenchment process attracted the application of section 189A of the LRA, Zako and Mpofu brought an application in terms of section 189A(13) of the LRA seeking to declare the restructuring process unfair. The basis for this application was that Mashanda was not entitled to restructure the union or retrench any of its employees without consultation with, and then approval by, the NEC of CEPPWAWU.

[15] The section 189A(13) application by Zako and Mpofu came before Mabenge AJ on 3 September 2021. The learned Judge handed down judgment in this application on 8 September 2021. She considered the provisions of the administration order of 4 June 2020, and in particular paragraph 3.9 thereof. The learned Judge reasoned that paragraph 3.9 compelled Mashanda to table her proposals on restructuring before the NEC of CEPPWAWU and convene a meeting for such purpose. The learned Judge concluded as follows: '*… it is my view that an appropriate order would be that to compel the administrator to comply with a fair procedure and interdicting or restraining the administrator from dismissing employees prior to complying with a fair procedure*'. The learned Judge then made an order compelling Mashanda to comply with clause 3.9 of the administration order of 4 June 2020, and ordered her to comply with a fair procedure.

[16] It follows from the judgment of Mabenge AJ that Mashanda was not entitled to retrench Zako and Mpofu until she had followed a fair procedure, which entailed that she had to place the issue of restructuring before the NEC of CEPPWAWU for approval. The learned Judge did not grant an interdict against dismissal, pending compliance with a fair procedure, *per se*.

[17] On 21 September 2021, Mashanda placed Nolingo, Moseri and Phillips on compulsory retirement. None of these three individual applicants challenged

their retirement as an unfair dismissal under the LRA, either to the CCMA or the Labour Court, at that time, and also came to the fore for the first time when the current application was launched on 19 August 2022 to challenge that termination of employment.

[18] On 30 September 2021, Mashanda filed an application for leave to appeal the order granted by Mabenge AJ on 8 September 2021. It appears that this application for leave to appeal was erroneously never served on the two individual applicants. The filing of this application for leave to appeal was followed on 6 October 2021 by Mashanda retrenching a number of the other individual applicants, being a total of 15 employees. This retrenchment was effective 14 October 2021.

[19] In response to the application for leave to appeal and the retrenchment of the other individual applicants, the individual applicants brought what I consider to be a rather strange application, on 12 October 2021. In this application, the individual applicants sought interim interdictory relief, in terms of which it was applied that Mashanda be interdicted from retrenching any of the individual applicants, on any grounds, pending an application in terms of section 18(3) of the Superior Courts Act,[4] which the individual applicants intended to bring for the interim enforcement of the order of 8 September 2021 by Mabenge AJ. So, in short, what was sought was an interim interdict against dismissal pending an application for interim enforcement in turn pending the application for leave to appeal. What makes it stranger is that, as discussed below, the judgment of Mabenge AJ of 8 September 2021, to which any interim enforcement would apply to, could only be applied to Zako and Mpofu as parties thereto, yet the application involved other applicants as well.

[20] This application for an interim interdict came before Lallie J on 14 October 2021. In an *ex tempore* judgment handed down by the learned Judge on the same date, the learned Judge held that the individual applicants effectively sought to assert their rights under section 18(3) of the Superior Courts Act. The application was opposed by Mashanda on a number of grounds, including that

[4] Act 10 of 2013.

the relief fell outside the parameters of section 18(3) and there was no authority to bring the application on behalf of other employees. Lallie J was not convinced by the opposition of Mashanda. The learned Judge held that it was competent to grant the application relating to individual applicants other than only Zako and Mpofu, as not doing this would have the effect of '*altering*' the order of Mabenge AJ. The learned Judge further held that because the application for leave to appeal was not served on the individual applicants, there was no need to have brought a section 18(3) application to substantiate the relief now sought. Finally, the learned Judge accepted that the order of Mabenge AJ directed Mashanda to take '*certain steps*' and follow a fair procedure. Consequently, Lallie J made an order interdicting and restraining Mashanda from '*retrenching and / or interdicting and / or retiring*' any of the employees of CEPPWAWU, '*pending the final outcome of an application in terms of section 18(3) of the Superior Courts Act'*, which application was to be filed by the individual applicants within 15 days of the application for leave to appeal being served on them.

[21] The application for leave to appeal by Mashanda was then served on the individual applicants on 20 October 2021, however without a condonation application. On 4 November 2021, Mashanda then applied for condonation for the late service of the application for leave to appeal on the individual applicants. This was swiftly followed by the application by the individual applicants in terms of section 18(3) of the Superior Courts Act, as contemplated by the order of Lallie J of 14 October 2021, brought on 12 November 2021.

[22] Prior to the hearing of the section 18(3) application by the individual applicants, and on 17 November 2021, Mabenge AJ refused the application for condonation by Mashanda for the late service of the application for leave to appeal on the individual applicants. As a result, the individual applicants did not pursue their application in terms of section 18(3) to finality, and on 18 November 2021 removed it from the roll. Mashanda then applied for leave to appeal in respect the refusal by Mabenge AJ of the condonation application for the late service of the application for leave to appeal. This application for leave to appeal is still pending before Mabenge AJ, now more than a year later.

[23] Back to the judgment of Mabenge AJ on the merits thereof, Zako and Mpofu sought to enforce this judgment against Mashanda by way of a contempt application. A *Rule Nisi* was issued on 4 November 2021 calling upon Mashanda to appear on 25 November 2021 and show cause why she should not be held in contempt of court for failing to comply with paragraphs 2 and 3 of the judgment of 8 September 2021 and paragraph 2 of the judgment of 14 October 2021.

[24] Mashanda opposed the confirmation of the *Rule Nisi* on the basis of three points *in limine*. The one ground on which this opposition was founded was that the order of 14 October 2021 had lapsed, because the application in terms of section 18(3) was filed outside the 15 days' time limit as prescribed in that order. A further point was that there was defective service of the order and that there had been substantial compliance with the order, as the Court needed to go beyond just the literal wording of the order of 8 September 2021. The final point was that the true dispute had nothing to do with section 189A(13) of the LRA but was rather a dispute concerning compliance with the constitution of CEPPWAWU, and thus the Court had no jurisdiction to entertain this true claim under the auspices of the provisions of section 18(3) of the Superior Courts Act.

[25] The *Rule Nisi* came before Lallie J on 25 November 2021. The learned Judge first dealt with two of the points *in limine*, being the point relating to substantial compliance with the order and the fact that the Court had no jurisdiction to grant the order due to the fact that the true issue in dispute did not concern section 189A(13). The learned Judge dismissed the two points *in limine* in a judgment handed down on 30 November 2021. The *Rule Nisi* was extended to 9 December 2021 for the determination of the issue of contempt.

[26] The matter again came before Lallie J on 9 December 2021. In a judgment handed down on 23 December 2021, the learned Judge dealt with the remaining issue that the application in terms of section 18(3) had been filed only after the order of 14 October 2021 had expired. The learned Judge rejected this point, on the basis of reasoning that the application for leave to appeal could only be considered to have been properly served when the condonation application for the late service of the application for leave to appeal was served

and filed, which was on 4 November 2021. According to the learned Judge, it thus meant that the application in terms of section 18(3) served and filed on 12 November 2021 was within the time limit contemplated by the order of 14 October 2021.

[27] Lallie J then turned to the issue of contempt. The learned Judge rejected the explanation by Mashanda that she was not in wilful and mala fide non-compliance with the orders referred to, as she was of the *bona fide* belief the orders had been suspended, that the order of 8 September 2021 was vague and her interpretation of the order could not be seen to be unreasonable and *mala fide*. The learned Judge held that the conduct of Mashanda was that of her simply disregarding an order of Court because she believed it was nullity, which is not acceptable and cannot serve to dispel being in contempt. The learned Judge believed that Mashanda deliberately acted in contravention of the order of 14 October 2021 when she retired the employees referred to above. The learned Judge then concluded that Mashanda was in contempt of the Court orders referred to, and sentenced her to imprisonment of three months, suspended for 12 months on the condition that she complied with such orders.

[28] Mashanda sought leave to appeal against both judgments of Lallie J of 30 November 2021 and 23 December 2021. The learned Judge granted leave to appeal in a judgment handed down on 29 March 2022. That appeal has since been prosecuted to the Labour Appeal Court under case number PA 10 / 22, which appeal is still pending.

[29] Whilst all the above litigation was ongoing, several of the current individual applicants brought an application against Mashanda and the Registrar, for Mashanda to be removed as administrator and replaced with one Afzul Ebrahim Soobedaar (Soobedaar). The application was opposed the Registrar and Mashanda. The grounds for the individual applicants seeking this removal need not be dealt with in this judgment, as all the parties ultimately agreed to an order, in terms of which Mashanda was removed as administrator and replaced with Sono. In an agreed order granted on 24 March 2022, Tlhotlhalemaje J ordered that the termination of the appointment of Mashanda by the Registrar was confirmed, that Sono be appointed as an interim administrator for a term

of 180 days, and that Mashanda take all reasonable steps necessary to conduct a handover to Sono. The order of 24 March 2022 made the terms of the administration order of 4 June 2020 applicable to Sono's tenure as administrator, but added some additional duties. These duties included consulting interested parties to ensure that all governance issues in the union are put in place, and to appoint a reputable and experienced facilitator to ensure that CEPPWAWU convene a congress within the period of 180 days so that a new leadership is elected, and then to hand over the affairs and control of CEPPWAWU to such new leadership.

[30] With Sono having been appointed as interim administrator, Zako and Mpofu then brought an application for contempt of Court against Sono, as administrator, for failing to comply with the same two judgments (orders) referred to above. A *Rule Nisi* was issued on 17 June 2022 calling upon Sono to appear on 29 July 2022 and show cause why he should not be held in contempt of court for failing to comply with paragraphs 2 and 3 of the judgment of 8 September 2021 and paragraph 2 of the judgment of 14 October 2021.

[31] This contempt application came before Lallie J on 29 July 2022. It was opposed by Sono. The basis for the opposition is that Zako's services were already terminated on 1 November 2021 and that of Mpofu on 14 October 2021. The said two applicants countered this by stating that this in itself was in violation of the order of 8 September 2021. Sono answered that this order predated his appointment, that he could not be held in contempt of orders that were in place long before his appointment, and there was no new basis for holding him in contempt.

[32] In a judgment handed down on 5 August 2022, Lallie J accepted that Sono acted in breach of the orders referred to. She rejected his defence that he could not be held in contempt because the orders pre-dated his appointment. The learned Judge further held that as the successor in title to Mashanda, Sono had a legal obligation to comply with the orders. The learned Judge further held that despite Sono contending that the orders were invalid, these orders stood and needed to be complied with until these orders were set aside. The learned Judge gave a number of further reasons for finding against Sono, which need

not be addressed herein. Suffice it say, the learned Judge held that Sono was in contempt of the orders referred to, and sentenced him to imprisonment of three months, suspended for 12 months on the condition that he complied with such orders.

[33] In a pattern that once again repeated itself, Sono sought leave to appeal against the judgment of Lallie J of 5 August 2022, which leave to appeal application was granted by the learned Judge. This appeal has also been prosecuted to the Labour Appeal Court under case number PA 10 / 22, which appeal is still pending.

[34] On 19 August 2022, the individual applicants brought the current application, referred to in the introduction to this judgment, to reinstate the individual applicants and to remove Sono as administrator and replace him with Soobedaar, which is the application now before me.

[35] In the founding affidavit to this application, the individual applicants *inter alia* rely on the conduct of Mashanda as a basis for seeking the removal of Sono. This is not appropriate, as these complaints / issues were disposed of when Sono replaced Mashanda in terms of the administration order of 24 March 2022, which was an order the individual applicants, as said, agreed to. None of these facts are therefore relevant in deciding whether or not Sono should be removed as administrator.

[36] Where it comes to other reasons the individual applicants sought the removal of Sono, the facts relief on are rather thin. It is contended that Sono was seeking to advance the '*nefarious agenda*' of Mashanda. The reason for this contention is that he was unwilling to '*undo*' previous decisions made by Mashanda. It is also contended that Sono asked CEPPWAWU Investments (Pty) Ltd (CI), the independent investment company managing investments on behalf of CEPPWAWU, for a R107 million loan, which, according to the individual applicants, is entirely out of kilter with what is really needed to run the affairs of CEPPWAWU. The third complaint is that Sono '*purged*' two essential employees (the legal officer and head of education) and replaced them with consultants at a much higher cost. The fourth complaint relates to Sono

appointing Mohlala as facilitator, whom the individual applicants consider not to be independent and being involved in a fraudulent settlement. There was also an issue with Sono retaining several of the members of Mashanda's administration team. And finally, the individual applicants contend that Sono acted in an entirely unacceptable manner when he refused to reinstate the individual applicants in terms of the earlier orders discussed above, and was held in contempt of Court as a result.

[37] As stated above, the application of 19 August 2022 came before me on 25 August 2022 where I granted an interim order, effectively staying the congresses sought to be convened by Sono, until part B of the application could be decided.

[38] On 9 September 2022, the Registrar applied to have Sono's appointment as administrator extended for a further period of 12 months, when his current term comes to an end on 12 December 2022. This application has been opposed by the individual applicants. This application is also now before me to decide.

[39] In the light of all the above, the determination of part B of the individual applicant's notice of motion now falls to be decided, which I will turn to by first dealing with the issue of the *locus standi* of the individual applicants.

Locus standi

[40] The second and third respondents raised an issue that the individual applicants did not have *locus standi* to bring this application. This is despite the fact that most of the individual applicants are members of CAPPWAWU. Further, and in this case, there can be little doubt that alleged non-compliance with the constitution of CEPPWAWU by Mashanda and / or Sono looms large in the dispute. It is specifically contended by the individual applicants that this constitution has been breached. Broadly speaking, it is contended that the termination of employment of the individual applicants, where applicable, was not in compliance with such constitution. It is also contended that the restructuring of CEPPWAWU needed to be approved by the NEC in terms of the constitution of CEPPWAWU, and that the restructuring itself was in contravention of the constitution of CEPPWAWU. The fact is that as administrators (which will be dealt with further below), Mashanda

and Sono effectively act on behalf of and in the name of CEPPWAWU and any of their actions that are contended by the individual applicants to be in violation of the constitution of CEPPWAWU, would be a dispute between this union and such members.

[41] What one therefore has in this case, as an essential component to the issue in dispute, is a dispute between the individual applicants as members of CEPPWAWU, and CEPPWAWU as registered trade union. That brings section 158(1)(e) of the LRA into play, which reads:

> 'The Labour Court may — … *(e)* determine a dispute between a registered trade union or registered employers' organisation and any one of the members or applicants for membership thereof, about any alleged non-compliance with — (i) the constitution of that trade union or employers' organisation (as the case may be) …'

[42] In *Elias and Others v Morifi and Others*[5] the Court held that for section 158(1)(e) to apply, there must be a dispute between the members of the union and their union,[6] and not between members themselves, or as the Court called it, factions of members, and the relief sought must be against the union. *In casu*, the dispute is, as stated, between the individual applicants as members, against Mashanda and Sono acting in the stead and in name of the union. The relief sought in prayer 5 of part B of the notice of motion would apply against Sono (currently) in that capacity. It follows that the requisite requirements for the application of section 158(1)(e) are present.

[43] The individual applicants have approached this Court in their personal capacities as members, and have not sought to approach the Court in some or other official and / or administrative capacity they may occupy in terms of the constitution of CEPPWAWU. Of course, and with CEPPWAWU being under administration, it would not be possible for the individual applicants in any event to act in any such capacities. It would however be competent for the individual

[5] (2022) 43 ILJ 382 (LC) at para 16.
[6] See also *National Entitled Workers Union v Sithole and Others* (2004) 25 ILJ 2201 (LAC) at para 10; *Zondo and Others v SA Transport and Allied Workers Union* (2015) 36 ILJ 2916 (LC) at para 18; *City of Johannesburg v SA Municipal Workers Union and Others* (2017) 38 ILJ 1342 (LC) at para 14.

applicants to approach this Court as members of CEPPWAWU to consider their grievance concerning an alleged non-compliance with the constitution of CEPPWAWU.[7] An example comparable to the case of the individual applicants *in casu* as contained in prayer 5 of part B of the notice of motion can be found in *SA Transport and Allied Workers Union v Zondo and Others*[8] where the Court held as follows, having accepted that the dispute is one as between the union and its members:

> 'For these reasons, in my view, the resolution adopted in August 2012 by the CEC is ultra vires the union's constitution. It follows that the resolution adopted by the union's Gauteng PEC in terms of which the respondents were expelled from the union is of no force and effect. It follows too that the respondents retain, at least until some legitimate form of disciplinary action is taken against them, their offices as shop stewards and that they remain entitled to discharge the functions of that office as prescribed by the union's constitution, its policies and the terms of relevant collective agreements. …'

[44] The individual applicants thus have the necessary capacity to act in this case, and to bring the current litigation before Court, especially where it comes to the relief sought in terms of prayer 5 of part B of the notice of motion. This was described in *Ntlokose v National Union of Metalworkers of SA and Others*[9] as follows:

> 'The conclusion I reach is that Ntlokose has the necessary capacity to act. Locus standi connotes two senses. Primarily, it refers to thecapacity to litigate — capacity to sue or to be sued. Secondarily it denotes whether a person has a sufficient interest in the subject-matter of the case. The subject-matter for both the members and Ntlokose is the non-compliance with the constitution of NUMSA. I reiterate the views of Van Niekerk J that 'each union member has an interest in the lawfulness of any action undertaken by a union's structures … and each stands to be prejudiced'. The veritable issue here is a failure to uphold the constitution which of necessity binds all members …'

[7] See *Pule on Behalf of Public Servants Association of SA, Department of Home Affairs Branch and Others v Public Servants Association of SA and Others* (2020) 41 ILJ 488 (LC) at para 11.
[8] (2015) 36 ILJ 2348 (LC) at para 26.
[9] (2022) 43 ILJ 2562 (LC) at para 14.

[45] In the end, and in *Hlungwani v SA Policing Union and Another*[10], the Court had the following to say, which in my view can equally applied to the case *in casu*:

> 'The values of accountability, openness and transparency referred to by the court suggest a broad approach to the question of standing when disputes about the alleged non-compliance of a union's constitution are adjudicated under s 158(1)*(e)*. On this approach, a member of a union has locus standi to seek an order that a union comply with its own constitution, even if the subject of the action complained of is another union member. Each union member has an interest in the lawfulness of any action undertaken by a union's structures, and its officials and office-bearers, and each stands to be prejudiced if union structures, office-bearers and officials are permitted to conduct themselves as if the constitution did not exist. The well-known slogan 'An injury to one is an injury to all' is apposite in this context. Union members are entitled to be satisfied that any action taken against one of their number is consistent with the constitution, as indeed are third parties, at least in some instances, as the judgment in *Lufil Packaging* discloses. In short: the lis is not one that is between the wronged members and the union; it is one between the concerned member and the union, and arises from the allegation of a failure to uphold the constitution, which of necessity binds all members …'

[46] There is also another factor that comes into play. As the matter also involves an issue under section 103A(1) of the LRA, the actual participants to the case would be the trade union (CEPPWAWU) and the Registrar, and not the individual members of CEPPWAWU. The individual applicants would therefore not qualify as persons represented before Court in this part of the dispute. That being so, the individual applicants, as such excluded persons, considering their interest in the matter as CEPPWAWU members, would be the kind of persons as contemplated by section 103A(3) of the LRA, which reads: '*If there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection (1), the Court must consider their interests before deciding whether or not to grant the order'*. The individual applicants must therefore, at the very least, be afforded the opportunity of placing information before this Court so that their interests can be considered

[10] (2020) 41 ILJ 2662 (LC) at para 19.

where it comes to the appointment of an administrator in terms of section 103A(1).

[47] In sum, I thus conclude that the individual applicants have the necessary *locus standi* to have brought this application before Court for determination. As members of CEPPWAWU, they are entitled to do so in terms of section 158(1)(e), and in any event, they are entitled to place their interests before the Court for consideration as contemplated by section 103A(3), where it comes to the appointment of an administrator.

Analysis: Section 103A

[48] In this case, and as appears from the facts summarized above, CEPPWAWU is already placed under administration by this Court in terms of section 103A(1), pursuant to a request by the Registrar, as far back as 4 June 2020. Despite some evasive statements by the individual applicants' counsel in argument, it was however clear to me that all parties were *ad idem* that it was justified that CEPPWAWU should still remain under administration, and the termination of administration was currently not a viable option nor even on the table. It is therefore not necessary to go into the whole exercise of deciding whether it is just and equitable to place CEPPWAWU under administration *per se*.

[49] In simple terms, what this case is all about is who must be appointed as an administrator, going forward. From the facts as appears from the voluminous pleadings filed by the parties, there seems to be some kind of consensus that the first administrator, Mashanda, was not a suitable person. There are a plethora of allegations about mismanagement, conflict of interest and even financial misconduct on her part. It is not necessary to delve into any of this, for the simple reason that in earlier proceedings, she had been removed as administrator and replaced with Sono as interim administrator. It is also significant that the appointment of Sono came about by agreement between the parties, meaning that the Registrar indeed requested his appointment.

[50] What has however now come to pass is that the individual applicants are have, as described in their papers, come to '*regret*' their agreement to the appointment of Sono. It must be said that CEPPWAWU itself, although cited as

first applicant, cannot be an applicant in this context, as it is still under administration and thus, as matters stand, fully represented by Sono. It cannot bring legal proceedings as an applicant independent of Sono, who squarely stands in its shoes. It follows that the only applicants that can competently stand before Court on this issue are the individual applicants.

[51] The individual applicants have raised a number contentions as to why they are not satisfied with the continued appointment of Sono as administrator of CEPPWAWU. Once again, and for the reasons to follow, I do not intend to deal with this in detail. Just in summary, these allegations include that he has somehow aligned himself with Mashanda, that he has not given effect to Court orders, which would have been expected and required of him as responsible administrator to do, and that the costs he has intimated he would incur in the running of CEPPWAWU was grossly excessive. There is also criticism about the fact that he has asked for a loan from CI, when there has been no proper accounting for a previous loan granted to Mashanda. There is also dissatisfaction with some of the appointments he had made.

[52] The upshot of the individual applicants' complaints, and as contained in prayer 6 of part B of the notice of motion, is a demand that the appointment of Sono as interim administrator not be extended, and that instead Soobedaar be appointed as the administrator. So, and in short, the individual applicants want Sono to be replaced with Soobedaar.

[53] As dealt with in the background facts above, the Registrar has applied for the extension of the appointment of Sono for a further 12 months. Considering that Sono's current term of appointment expires on 12 December 2022, this request for extension is nothing more than an appointment in terms of section 103A(1), for the further envisaged period.

[54] In my view, this entire issue can be disposed of by answering one central question. This question is whether the individual applicants are entitled, or simply put have the right, to apply to this Court to in effect request the removal of one administrator and then to request the appointment of another

administrator of their choosing. If they are not entitled to do so, then the relief sought by the applicants in prayer 6 of part B of the notice of motion must fail.

[55] In is appropriate at this juncture to consider the nature of administration proceedings under section 103A of the LRA. In my view, administration of a trade union under section 103A is an alternative to the winding up of a trade union and is a more recent addition to the LRA.[11] In terms of section 103(1) of the LRA, a trade union is wound up where there exists a reason, that cannot be remedied, which caused the trade union to be unable to continue to function.[12] It follows that in the case of administration under section 103A, the reason adversely impacting on the ability of the trade union to function is capable of being remedied, and the trade union, for intents and purposes, is capable of being saved.

[56] The above being the case, administration of a trade union under section 103A is akin to business rescue proceedings under Chapter 6 of the Companies Act[13], and the administrator may be compared to a business rescue practitioner.[14] As held in *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union v Master of the High Court*[15]:

> 'Section 103A offers 'an alternative to the winding-up procedure in s 103 and 'creates a more appropriate process if the circumstances facing the trade union or employers' organisation are capable of being remedied.' Myburgh AJ explained in *Public Servants Association of South Africa and another v Minister of Labour and another* that the appointment of an administrator may be compared to the appointment of a business rescue practitioner in the case of an ailing company. It is a mechanism that attempts to avoid a trade union being deregistered and wound up. Van Niekerk J explained in *Vosloo N.O. and another v The South African Medical Association and another* that s 103A of the LRA has as its primary objective the regaining of a trade union's viability and the fulfilment of the purpose for which the Union was established. Conradie

[11] Section 103A was inserted by section 16 of Act 6 of 2014, with effect from 1 January 2015.
[12] The trade union may itself request to be wound up – see section 103(1)(a).
[13] Act 71 of 2008 (as amended).
[14] See also *Public Servants Association of SA and Another v Minister of Labour and Another* (2016) 37 *ILJ* 185 (LC) at para 7; *Vosloo NO and Another v SA Medical Association NPC and Another* (2020) 41 ILJ 2482 (LC) at para 17.
[15] 2021 JDR 1445 (GP) at para 12.

stated in *Labour Relations Law – A Comprehensive Guide* that the Administrator's function is by implication to remedy the irregularities that gave rise to his or her appointment …'

[57] Similarly, and in *Solidarity v Metal and Engineering Industries Bargaining Council and Others*[16] it was said:

'Administration is intended to save the organisation concerned from being wound up or liquidated. It recognises that there is still a viable entity serving a legitimate purpose, which is just in need of proper intervention and assistance to bring it back on track so that the organisation can fulfil the purpose for which it was established. That would be in the interest of all stakeholders, as it would avoid all the negative consequences that are bound to follow from liquidation or winding-up. …'

[58] In Chapter 6 of the Companies Act, there exists a fairly detailed exposition as to how business rescue practitioners are appointed. In section 128(1)(a) of the Companies Act, an '*affected person'* entitled to participate in the appointment or removal of a business rescue practitioner, is defined as a shareholder or creditor of the company, any registered trade union representing employees of the company, or if any of the employees of the company are not represented by a registered trade union each of those employees or their respective representatives. A business rescue practitioner under the Companies Act can be appointed in one of two ways, described in *Diener NO v Minister of Justice and Others*[17] as follows:

'Chapter 6 creates two ways in which business rescue may begin. First, the board of directors of a company may pass a resolution 'that the company voluntarily begin business rescue proceedings' provided the board has 'reasonable grounds to believe' that two circumstances exist — that the company is financially distressed and that 'there appears to be a reasonable prospect of rescuing the company'. …

The second way in which business rescue begins is by means of a court order. In terms of s 131(1), an affected person 'may apply to a court at any time for an

[16] (2017) 38 ILJ 2109 (LC) at para 39.
[17] 2018 (2) SA 399 (SCA) at paras 21 and 24.

> order placing the company under supervision and commencing business rescue proceedings'. The court may grant the relief sought if it is satisfied that the company is financially distressed, or it has 'failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters', or it is 'otherwise just and equitable to do so for financial reasons, and there are reasonable prospects for rescuing the company'.

[59] Similarly, and although lacking the kind of detail found in the Companies Act, section 103A contemplates the appointment of an administrator in one of two ways. In *Public Servants Association of SA and Another v Minister of Labour and Another*[18] it was said:

> '… Section 103A was introduced into the LRA by way of the 2014 amendments, which came into operation on 1 January 2015. Subsection (1) provides that this court may order the appointment of a person to administer a trade union or employers' organisation if: the court is satisfied that it is just and equitable to do so; and either the trade union/employers' organisation has resolved to be placed under administration and applied to court to give effect to the resolution, or the registrar has applied to court to appoint an administrator. Without limiting the generality of the circumstances under which it will be just and equitable for the court to place a trade union under administration, subsection (2) provides that it may be just and equitable to grant such an order if the trade union materially fails to perform its functions or there is serious mismanagement of the finances of the trade union.

[60] Applying the above, it is my view that administration can only be sought by the persons specifically permitted to do so. In terms of section 103A(1)(b) and (c) of the LRA, this can only be the trade union of its own accord, of the Registrar as an interventionary measure.[19] Unlike the case under the Companies Act

---

[18] (2016) 37 ILJ 185 (LC) at paras 6 – 7. An appeal against this judgment was dismissed by the LAC in *Minister of Labour and Another v Public Servants Association of SA and Another* (2017) 38 ILJ 1075 (LAC).

[19] The section reads: '*The Labour Court may order that a suitable person, who may be a Commissioner, be appointed to administer a trade union or employers' organisation on such conditions as the Court may determine if the- (a) Court is satisfied that it is just and equitable to do so; and (b) trade union or employers' organisation has resolved that an administrator be appointed and has applied to the Court for an order to give effect to that resolution; or (c) registrar has applied to the Court to appoint an administrator.'*

where a broadly defined '*affected person*' may bring an application for business rescue, this kind of entitlement has not been copied in the LRA, despite the fact that administration under section 103A is for all intents and purposes intended to be like business rescue. There is clearly a reason for this having been the case considering that the introduction of section 103A was brought about after the amendments to the Companies Act introducing the new concept of business rescue.

[61] This reason must be that it was specifically intended to limit the kind of persons entitled to seek administration, and not to open this entitlement up to each and every individual trade union member to approach this Court seeking administration. One shudders to think the kind of chaos that will ensue if individual trade union members, officials or office bearers could approach this Court to seek administration of their trade union, and then propose administrators of their choosing. There are many examples in the case law of internal trade union strife and factionalism, and to allow individuals to seek administration and propose an administrator of their choosing would be open to abuse as a mechanism to gain control of the union by other means. This would also, considering the objectives of administration as set out above, undermine the very purpose why the concept of administration was introduced.

[62] The above is why the application to appoint an administrator can only be brought by the trade union itself, having properly and lawfully resolved to do so in terms of the processes prescribed by its constitution. Any dispute as to whether there was a proper resolution to seek the appointment of an administrator would be an entirely separate issue, and need not concern this judgment. The point is simply that only an application by the trade union itself is competent, and it is not competent for individuals to seek this kind of relief.

[63] The other way administration can come about is upon application by the Registrar. It must be remembered that the Registrar is put in a position to exercise a measure of supervision over trade unions, by the LRA.[20] This

[20] In fulfilling his duties under the LRA, the Registrar, under section 108(4), is considered independent, subject only to the Constitution and the law, and must be impartial and must exercise his powers and perform his functions without fear, favour or prejudice.

supervision is conducted in the context that the trade union must provide certain prescribed information to the Registrar,[21] and the Registrar may cancel the registration of a trade union if he is satisfied that the trade union is not or has ceased to function as, a genuine trade union.[22]

[64] The Companies Act has no similar supervisory oversight of corporate entities. That is why the net of affected persons who may seek business rescue is spanned wider. It must be accepted that if there are issues relating to mismanagement, financial irregularities, other forms of malfeasance, or poor administration of a trade union, these should be reported to the Registrar as part of his oversight duties. It would then be up to the Registrar to decide whether circumstances justify intervention in the form of seeking the appointment of an administrator by this Court in terms of section 103A(1)(c) of the LRA (of course always subject to the condition that the Court itself considers it just and equitable to do so).

[65] In the above context, I conclude that only the trade union in the case of an application under section 103A(1)(b), or the Registrar in the case of an application under section 103A(1)(c), can propose an administrator for appointment.[23] It is not for this Court to put forward an administrator. It is also not competent for any other party or person to propose an administrator. What this Court would be entitled to do, under its 'just and equitable' powers under section 103A(1)(a), is to decline to appoint a particular person proposed to be appointed as an administrator, if circumstances dictate, for example where the proposed administrator is not, according to the Court, sufficiently qualified.[24] If the Court is not so satisfied, then it would then up to the applicant who sought the appointment of the administrator to find and propose another administrator, if that party intends to continue with seeking administration.

---

[21] Sections 99 and 100(a) to (f) of the LRA.
[22] See section 106(2A) of the LRA.
[23] See *Joni v Association of Mine Workers and Construction Union and others* [2021] JOL 51636 (LC) at paras 5 and 9.
[24] This is very broad and general power, considering the provisions of section 103A(2), which reads: '*Without limiting the generality of subsection (1) (a), it may be just and equitable to make an order in terms of subsection (1) if- (a) the trade union or employers' organisation fails materially to perform its functions; or (b) there is serious mismanagement of the finances of the trade union or employers' organisation*'.

[66] The matter *in casu* is a case where the Registrar sought intervention and applied for the appointment of an administrator. There was no resolution nor request by CEPPWAWU to do so. When CEPPWAWU was first placed in administration on 4 June 2020, it meant that the administrator (at the time Mashanda) for all intents and purposes stepped into the shoes of CEPPWAWU, and it could only act though this administrator. In *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others*[25], The Court in dealing with a situation of business rescue, explained it as follows:

> '… The BRPs take over full management control of the company in business rescue, in substitution of its board of directors and pre-existing management. The BRP is tasked with developing and then implementing a business rescue plan which is in the best interests of all affected parties, which includes creditors, employees, trade unions and shareholders. All the while the board of directors retains obligations in terms of the Companies Act while the BRPs take full control.
>
> The role of governance versus management requires analysis in the business rescue process. In essence, *outside* of the business rescue context, governance by the board involves the strategic aspects of the company, while management attends to the running of the company. The duties and responsibilities of management are quite different from those of the directors. Where ch 6 of the Companies Act applies, those duties and responsibilities of the directors have to be interpreted within the overarching purpose of ch 6. Whilst ch 6 does not spell out in minute detail the different roles of directors and BRPs, there is sufficient certainty in the provisions of ch 6 to enable an interpretation within the business rescue context that suggests that directors must yield to the BRPs. …'

[67] There is no provision in section 103A which allows any third party, other than the parties specifically referred to in that section, to object to the appointment of an administrator or have such an administrator removed, or the administrator replaced with another administrator of their choosing. Once again, this is different from the Companies Act, where any '*affected person*' may apply for the removal of a business rescue practitioner under the circumstances as

[25] 2022 (3) SA 512 (GJ) at paras 3 – 4.

contemplated by section 139(2) of the Companies Act.[26] This suggests yet again that there was a specifically designed limitation on this kind of intervention in the case of administration under section 103A of the LRA. The reason for this would the same as discussed above, relating to the appointment of an administrator in the first place.

[68] In amplification, the facts of this case illustrate the very reason why the intervention of third parties, and especially individual members and / or trade union office bearers or officials, where it comes to the removal of an administrator, is not a palatable state of affairs. No doubt, someone will always be unhappy with what an administrator does. What constitutes mismanagement or inflict of interest is often dependant on a particular point of view of individual persons. It also does not take much insight to appreciate the kind of difficulties that would be caused if, on each occasion of such dissatisfaction on the part of such individuals, this Court is approached for the removal of one administrator and then the appointment of another. It would undermine the efficiency of the entire administration process and purpose sought to be achieved by it. This was in fact recognized, in my view correctly, by Rabkin-Naicker J in her judgment of 4 June 2020 when the learned Judge first placed CEPPWAWU under administration, where the learned Judge had the following to say:[27]

> '… the Court was asked to join certain individual members of the Union who filed lengthy papers in support of the Registrar's application. In the Court's view, and taking into consideration the content of their papers, the granting of this application will only serve to draw the Court into factional battles within the Union and inflame these at a time when it is necessary for the interests of the whole membership of the Union to be served. …'

[26] The section reads: '*Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds: (a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company; (b) failure to exercise the proper degree of care in the performance of the practitioner's functions; (c) engaging in illegal acts or conduct; (d) if the practitioner no longer satisfies the requirements set out in section 138 (1); (e) conflict of interest or lack of independence; or (f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time'*. See also *Knoop NO and Another v Gupta and Another* 2021 (3) SA 88 (SCA) at para 16; *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd* 2021 JDR 0947 (SCA) at para 18.

[27] See para 13 of the judgment.

[69] An administrator, once appointed, stands in a unique fiduciary relationship to the entity being administered. In *Standard Bank v Master of the High Court*[28], the Court dealt with this relationship in the case of an appointed liquidator, and said:

> 'In Commentary on the Companies Act the following appears: The liquidator stands in a fiduciary relationship to the company of which he is the liquidator, to the body of the creditors as a whole, and to the body of its members as a whole. As a fiduciary, the liquidator must at all times act openly and in good faith, and must exercise his powers for the benefit of the company and the creditors as a whole, and not for his own benefit or the benefit of a third party or for any other collateral purpose. He must act in the interests of the company and all creditors, both as individuals and as a group. He must not make a decision which would prejudice one creditor and be of no advantage to any other creditors or to the company. He may not act in any matter in which he has a personal interest or a duty which conflicts, or which might possible conflict, with his duties as a liquidator'

[70] In my view, the same considerations would apply to an administrator appointed under section 103A of the LRA. If the administrator violates such duties, or acts contrary to what is expected of him or her in such a relationship, then it may well expose the administrator to ultimate liability to the trade union or its members, if they suffer prejudice as a result. But that is another dispute for another day. However, and in the absence of having been given the power to do so under section 103A, any third party, other that the trade union itself (where it initiated the administration) or the Registrar (in the case of intervention), would not be entitled to rely on a violation of these duties as a basis to approach this Court effect a removal of the administrator.

[71] But despite all the above, the individual members and / or trade union office bearers or officials, are not simply left in the dark without any opportunity to air their views. As already touched on above, section 103A(3) provides that the interests any persons not represented before the Court whose interests may be affected must be considered by the Court. Even though this provision would not

[28] [2010] 3 All SA 135 (SCA) at para 112.

allow such persons to apply for the appointment or removal of an administrator, it would allow such persons to place representations and information before the Court, as an interested party in the proceedings, for the Court to consider when deciding whether or not to grant the order requested by the applicant competent to apply for the order. The Court would then of course consider that information and representations in deciding what would be just and equitable. But the entitlement to place this information and representations before Court does not entitle such party to seek the substantive relief as contemplated by section 103A(1).

[72] Section 103A(5) equally cannot assist the individual applicants.[29] The simple reason is that the appointment of an administrator is done in terms of section 103A(1), and not section 103A(5). Section 103A(5) only deals with the variation or amendment of administration orders that have already been granted under section 103A(1), or ending the administration when it is no longer required. The current application concerns none of these scenarios. It is clear from the relief sought by the individual applicants in prayer 6 of Part B of the notice of motion that they do not seek the variation of any of the terms of the administration orders granted on 4 June 2020 and 24 March 2022. The notice of motion in fact prays that the terms of these orders continue to apply *mutatis mutandis*. All that the individual applicants seek is a replacement of the administrator. However, and unfortunately, that they cannot do.

[73] The Registrar, as the initiating party in the original administration order, has indeed brought an application as contemplated by section 103A(1) for the appointment of Sono as an administrator for a period of 12 months, as from 12 December 2022. That is all this Court needs to consider. The only proviso is that this Court must still consider whether it just and equitable that Sono be so appointed.

[74] At best for the individual applicants, the plethora of paperwork and affidavits filed in this case, could be seen to concern the issue as to whether it would be

[29] The section reads: '*The Labour Court may, on the application by the trade union, employer's organisation or registrar- (a) vary or amend any prior order made in terms of this section; or (b) if it is satisfied that an administrator is no longer required, terminate the appointment of the administrator, on appropriate conditions*.'

just and equitable to appoint Sono as administrator. In deciding this issue, I consider that Sono was first appointed as recently as 24 March 2022, and then still had to do a handover with Mashanda. The application was launched on 19 August 2022. This is less than five months after his appointment, which is very little time to reasonably and justifiably establish whether he is able to properly discharge his duties. I also consider that there is no suggestion that Sono is not a fit and proper person to be appointed as administrator or that he is not qualified to fulfil this task. And finally, the applicants themselves agreed to the appointment of Sono, despite initially insisting in the earlier litigation on the appointment of Soobedaar. For these reasons, there is no justifiable reason why the appointment of Sono could simply be extended by way of his appointment for the further period as applied for by the Registrar.

[75] Even considering the facts as raised by the individual applicants in support of the application, the bulk of the complaints of irregularities, financial mismanagement and conflict of interest are aimed against Mashanda. This does not assist the individual applicants when seeking to remove Sono. The allegation that Sono was perpetuating the '*nefarious agenda*' of Mashanda is nothing else but conjecture and speculation, and not backed up by substantive facts. In simple terms, all the individual applicants in reality have against Sono is that he asked for a loan of R107 million which they consider grossly excessive where it comes to what is needed for the running the affairs of the union, and that he retained personnel of Mashanda. Further, much of the complaints are also about Sono not undoing what Mashanda had done and him not having complied with the Court orders of 8 September 2021 and 14 October 2021. In my view, none of these complaints point to the kind of misconduct that would justify the removal of Sono as administrator, especially considering that the previous orders were, and still remain, hotly contested and there is an appeal pending on the same. As to the loan requested, it is always in the discretion / decision of CI whether to grant the loan or not, and Sono has little control in this

regard.[30] In *Knoop NO and Another v Gupta and Another*[31] the Court dealt with the power the Court always had under common law, to remove *inter alia* administrators of estates, and held:

> '… Two general principles will be that removal is not something to be ordered lightly and that the primary reason justifying removal will be actual or potential prejudice or harm to the interests of the estate, trust or company, and those in whose interests the administration was established, such as heirs in an estate or creditors in circumstances of insolvency …'

[76] Considering what is stated in the affidavits by all the interested parties, which includes even the parties that are not *per se* parties to the dispute as prescribed by section 103A, and also includes the affidavit filed by CI, I am not convinced that Sono, in his short tenure as administrator so far, has shown conflict of interest or negligence or mismanagement that would justify his removal as administrator.[32] There is also little evidence of sufficient prejudice to CEPPWAWU should Sono be afforded the opportunity to continue as administrator. As to Sono asking for funds from CI, it is always up to CI as independent party to decide whether to make such funds available, on whatever conditions it may stipulate. And finally, insofar as there may an issue as to whether the fees of the Sono as administrator is reasonable, this is subject to taxation by the Registrar of the Labour Court in terms of section 103A(4) of the LRA, which taxation is also subject to review by the Labour Court. This Court should not be called upon in proceedings such as these to decide whether the fees levied by the administrator is reasonable.

[77] As to the facts relating to the alleged association of Sono with Mofokeng, the issue of the R107 million loan sought, and the appointment of Mohlala, Sono has offered proper explanations. I do not intend to set out the details of these

---

[30] In *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union v Master of the High Court* (*supra*), Van Der Schyff J held that the administrator of CEPPWAWU can exercise little control over CI and its investment portfolio of close on R1.9 billion, as the administration order did not empower the administrator to take control of CI, as CI was a distinct and separate legal entity – see para 31 of the judgment.

[31] 2021 (3) SA 88 (SCA) at para 18.

[32] In *Knoop* (*supra*) at para 22, it was said that: *'… A failure to exercise a proper degree of care in the performance of their functions will in most instances require proof of negligence … in the absence of harm it may be difficult for a court to conclude that the BRP has not exercised a proper degree of care …*'

explanations in this judgment, save for saying that these explanations are in my view, overall considered, acceptable. In any event, and considering these are opposed motion proceedings, the application of the test in *Plascon Evans Paints v Van Riebeeck Paints*[33], means that any factual dispute in this regard must be determined in favour of Sono. In the end, the Registrar, as the responsible person in this case under section 103A, is satisfied with the appointment of Sono, and there is no reason why this view should not prevail.

[78] For all the reasons as set out above, the application for relief as sought in prayer 6 of part B of the notice of motion must fail. It is not competent for the individual applicants to ask for such relief. Since the administration of CEPPWAWU was initiated by the Registrar, the granting of the administration order meant that CEPPWAWU itself and in its own name can no longer apply, independent of the administrator, for any relief in terms of section 103A(1) and 103A(5) of the LRA. Only the Registrar can continue to do so, which the Registrar did. There is also no legitimate basis upon which it can be said that the further appointment of Sono would not be just and equitable. The individual applicants' application for relief in terms of prayer 6 of part B of the notice of motion must be dismissed, and the Registrar's application for the further appointment of Sono must be granted.

Analysis: Dismissed Employees

[79] I will now turn to the relief sought by the individual applicants in prayer 5 of part B of the notice of motion. This relief entails that this Court must grant an order reinstating a number of individual applicants that had been dismissed by Mashanda, to their positions they held as employees of CEPPWAWU prior to their dismissal by Mashanda.

[33] 1984 (3) SA 623 (A) at 634E-635C. These principles are, in sum, that the facts as stated by the respondent party together with the admitted or facts that are not denied in the applicant party's founding affidavit constitute the factual basis for making a determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not creditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable, that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.

[80] The gravamen of the individual applicants' case in this regard is that Mashanda proceeded to reorganize CEPPWAWU, after being appointed as administrator, without the necessary power to do so. The individual applicants argue that despite the administration order, the power to decide whether or not to reorganize CEPPWAWU and any consequent retrenchments that may follow, still vests in the NEC of CEPPWAWU. It is contended that when Mashanda decided to reorganize CEPPWAWU and then either retrenched or forcibly retired the affected individual applicants as a result, she did not consult the NEC which was actually required by the 4 June 2020 administration order and the CEPPWAWU constitution, and thus behaved either unfairly or unlawfully. As to the individual applicants dismissed outside of the retrenchment process for other reasons, the individual applicants similarly argue that this needs to be approved by the NEC in terms of the CEPPWAWU constitution, which did not happen. Consequently, the case is that all these dismissed individual applicants fell to be reinstated.

[81] The first difficulty the individual applicants face is that insofar as the affected individual applicants rely on an unlawful dismissal, it is has been consistently held by this Court that it has no jurisdiction to intervene in a dismissal that is alleged to have been unlawfully brought about.[34] In *Ngubane v Safety and Security Sectoral Bargaining Council and Others*[35] it was held as follows

> 'Insofar as the applicant seeks to rely on the assertion that his dismissal is unlawful, it is now trite that this court does not have jurisdiction to entertain a challenge to the dismissal of an employee, under the LRA, on the basis that such dismissal is unlawful …'

The reason for this was aptly articulated in *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*[36] as follows:

[34] See *Phahlane v SA Police Service and Others* (2021) 42 ILJ 569 (LC) at paras 9 – 10; *Botes v City of Johannesburg Property Co SOC Ltd and Another* (2021) 42 ILJ 530 (LC) at para 16 and 20; *Shezi v SA Police Service and Others* (2021) 42 *ILJ* 184 (LC) at para 12; *National Education Health and Allied Workers Union and Others v University of SA and Another University of SA* (2022) 43 ILJ 2351 (LC) at para 28; *Singhala v Ernst & Young Inc and Another* (2019) 40 *ILJ* 1083 (LC) at para 29.
[35] (2022) 43 ILJ 2543 (LC) at para 27
[36] (2016) 37 ILJ 564 (CC) at para 116.

> 'I think that the rationale for the policy decision to exclude unlawful or invalid dismissals under the LRA was that through the LRA the legislature sought to create a dispensation that would be fair to both employers and employees, having regard to all the circumstances, including the power imbalance between them. In this regard a declaration of invalidity is based on a "winner takes all" approach. The fairness which forms the foundation of the LRA has sufficient flexibility built into it to enable a court or arbitrator to do justice between employer and employee.'

[82] Insofar as the individual applicants may rely on an unfair dismissal for the reasons set out above, the difficulty is that as a general proposition, the individual applicants simply cannot approach this Court directly seeking their reinstatement. The concept of an unfair dismissal is a concept established, and then regulated, by the LRA. As such, it can only be pursued in terms of the processes prescribed by the LRA. In *Chirwa v Transnet Ltd and Others*,[37] the Court said:

> 'The LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is, and includes the state and its organs as employers.
>
> Ms Chirwa's case is based on an allegation of an unfair dismissal for alleged poor work performance. The LRA specifically legislates the requirements in respect of disciplinary enquiries and provides guidelines in cases of dismissal for poor work performance. She had access to the procedures, institutions and remedies specifically designed to address the alleged procedural unfairness in the process of effecting her dismissal. She was, in my view, not at liberty to relegate the finely tuned dispute-resolution structures created by the LRA. If this is allowed, a dual system of law would fester in cases of dismissal of employees by employers, one applicable in civil courts and the other applicable in the forums and mechanisms established by the LRA …'

[83] The aforesaid means that the LRA has a unique scheme where it comes to resolving disputes that arise in the scope of the employment relationship. The

[37] (2008) 29 ILJ 73 (CC) at 64 – 65. See also *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at para 56; *Hendricks v Overstrand Municipality and Another* (2015) 36 *ILJ* 163 (LAC) at paras 10 – 12.

LRA creates a right to a fair dismissal and then provides for a prescribed dispute-resolution process to give effect to such right. At the heart of this dispute-resolution process lies the notion of fairness as between both employer and employee, which notion is incompatible with concepts such as unlawfulness or illegality or invalidity.[38] That dispute must be resolved by way of the proper prescribed processes under chapter VIII of the LRA in the forum properly and specifically designated to deal with such a dispute.

[84] It is of course true that under exceptional circumstances, this Court may decide to directly intervene in dismissal disputes placed before it by employees.[39] However, and in such a case, the employee party must make out a proper case of exceptional circumstances in the founding affidavit, which is of course dependent on the facts of every case.[40] However, important considerations would be issues such as whether failure to intervene would lead to grave injustice or whether it would be impossible to attain justice by other means.[41]

[85] *In casu*, none of the affected individual applicants, save for Zako and Mpofu, which will be dealt with below, have made out any case of exceptional circumstances justifying intervention. There is simply no reason why any of the dismissed individual applicants in the case of those retrenched, could not have pursued an unfair dismissal dispute in the ordinary course, first to the CCMA, and then considering it was a retrenchment of multiple employees, to the Labour Court. In those proceedings, and as part of any case of a substantively unfair dismissal, the individual applicants could raise that the restructuring of CEPPWAWU or their retrenchment was never approved by the NEC of CAPPWAWU, which could most certainly justify a conclusion that there was no substantive rationale to retrench them (or forcibly retire them as the case may be). There is no reason to run to this Court directly to establish this and seek

[38] *Mohlomi v Ventersdorp/Tlokwe Municipality and Another* (2018) 39 ILJ 1096 (LC) at para 39.
[39] *Booysen v Minister of Safety and Security and Others* (2011) 32 ILJ 112 (LAC) at para 54; *Minister of Labour and Another v Public Servants Association of SA and Another* (2017) 38 ILJ 1075 (LAC) at para 52; *Mohlomi* (*supra*) at para 44.
[40] *Mohlomi* (*supra*) at para 47.
[41] See *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) at para 46; *Madzonga v Mobile Telephone Networks (Pty) Ltd* [2013] ZALCJHB 232 at para 63; *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 17.

relief accordingly. As to those individual applicants dismissed for other reasons, those disputes could equally have been referred to the CCMA for conciliation, followed by arbitration, with no need or entitlement to approach this Court directly.

[86] I also consider that none of the individual applicants, save for Zako and Mpofu, whose situation will be discussed below, ever sought to even challenge their dismissals, until the current application was brought on 19 August 2022. Considering that they were dismissed as far back as the period between July and October 2021, on their own version, this kind of delay, and then seeking final relief in the form of reinstatement in essence on an urgent basis and on motion, is entirely unacceptable. It completely undermines the jurisdictional time limits imposed by the LRA, which requires the referral of an unfair dismissal dispute to conciliation within 30 days of date of dismissal,[42] followed by a referral to this Court by way of a statement of claim, or a referral to arbitration, as the case may be, within 90 days after failure to settle.[43] There is also no compliance with the imperative of the prescribed conciliation process having happened.[44] Absent truly exceptional circumstances, which do not exist *in casu*, it inappropriate and impermissible to bypass this process. Apposite is the following *dictum* in *Member of the Executive Council for Education North West Provincial Government v Gradwell*[45] where the Court held as follows:

> '… A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will really be easy or prudent in motion proceedings.'

[87] For all these reasons, it must follow that the affected individual applicants (save for Zako and Mpofu), who were dismissed in the course of 2021, are simply not

---

[42] Section 191(1).
[43] Section 191(5)(b) as read with section 191(11), or section 191(1) as read with sections 136 and 191(5)(a), as the case may be.
[44] In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC) at para 32, it was held: *'… Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication …*'.
[45] (2012) 33 ILJ 2033 (LAC) at para 46.

entitled to the relief sought in prayer 5 of Part B of the notice of motion, and the application must be dismissed against them.

[88] The situation is however different where it comes the two individual applicants, being Zako and Mpofu. They had in fact challenged their dismissal as contemplated by the LRA, considering it was a group retrenchment that attracted the application of section 189A of the LRA. They had approached this Court in September 2021 in terms of section 189A(13) of the LRA to challenge the retrenchment process in terms of which they were contemplated to be retrenched.[46] This section is intended to be a proactive intervention in retrenchment proceedings that have derailed. Its purpose is to remedy procedural irregularities in the restructuring consultation process preferably before, or at the very least immediately after, the dismissal of employees have been implemented, with the Court adopting a supervisory and intervention based role in this regard.[47] As held in *SA Society of Bank Officials v Standard Bank of SA*[48]: *'… The introduction of the s 189A procedure has a short-term preventative aim of proactively fostering proper consultation, as opposed to a long-term remedial one of compensating employees, following a belated 'post-mortem' examination on what was wrong with the process, long after workers have been retrenched. …*'. As also said in *SA Airways (SOC) Ltd (In Business Rescue) and Others v National Union of Metalworkers of SA on behalf of Members and Others*[49]: '*… The court would correct any procedural irregularity as and when it arises so that the integrity of the consultation process can be restored and the consultation process forced back on track …*'. In *Steenkamp and Others v Edcon Ltd*[50] the Court dealt with these objectives as follows:

[46] The section reads: '*If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order – (a) compelling the employer to comply with a fair procedure; (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure; (c) directing the employer to reinstate an employee until it has complied with a fair procedure; (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate*'.
[47] See *National Union of Mineworkers v Anglo American Platinum Ltd and Others* (2014) 35 ILJ 1024 (LC) at para 19.
[48] (2011) 32 ILJ 1236 (LC) at para 29. See also *Retail and Associated Workers Union of SA v Schuurman Metal Pressing (Pty) Ltd* (2004) 25 ILJ 2376 (LC) at para 32; *Zero Appliances (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2007) 28 ILJ 1836 (LC) at para 23.
[49] (2020) 41 ILJ 2113 (LAC) at para 23.
[50] (2019) 40 ILJ 1731 (CC) at para 54.

> 'In exercising its powers in terms of s 189A(13) of the LRA, the Labour Court thus acts 'as the guardian of the process' and exercises a 'degree of judicial' management or oversight over the process. The aim is to proactively foster the consultation process by allowing parties to seek the intervention of the Labour Court on an expedited basis to ensure that procedural irregularities do not undermine or derail the consultation process before it ends. …'

[89] In the above context, the section 189A(13) application before Mabenge AJ must be considered. Applying these principles, and in short, the learned Judge held that the administration order of 4 June 2020 required that Mashanda consult the NEC on any restructuring and retrenchments, and without this having happened, there was no fair procedure followed. As a proactive measure and intervention, Mashanda was ordered to comply with a fair procedure before dismissing the two individual applicants.

[90] Dissatisfied with this judgment, Mashanda sought leave to appeal. The leave to appeal application was served out of time and condonation was applied for. That condonation application was dismissed by Mabenge AJ. Mashanda then sought leave to appeal the refusal of the condonation ruling which application for leave to appeal is still pending.

[91] It is clear from the case before Mabenge AJ that it was only brought by Zako and Mpofu, as the only individual applicants to that dispute. None of the other individual applicants were party to the dispute of the application before Mabenge AJ. Also, the application was not brought by CEPPWAWU as union on behalf of members, and under such circumstances, section 200 of the LRA could not apply, which could have made all the individual union members party to the dispute, despite them not having been individually and specifically cited.[51] Accordingly, the judgment of Mabenge AJ can only apply between these two individual applicants, being Zako and Mpofu, and Mashanda, as administrator of CEPPWAWU at the time, as the respondent party.

[51] In *National Union of Mineworkers v Hernic Exploration (Pty) Ltd* (2003) 24 ILJ 787 (LAC) at para 40, the Court held: ' *I conclude in the end that on the basis of s 200(1) of the Act a trade union has a right to refer a dismissal dispute relating to its members to the CCMA for conciliation and to the Labour Court for adjudication as the referring party or as applicant without citing its dismissed members as co-applicants*'.

[92] The individual applicants have argued that despite there only being these two individual applicants in the section 189A(13) proceedings, it had to follow that the judgment applied to all retrenched employees, considering it was a group retrenchment to which section 189A applied. I cannot agree with this argument. This kind of situation is specifically catered for in section 200 of the LRA, which is the only basis upon which a judgment can be applied to individual members of a trade union where the case was litigated by their union without necessarily joining them to the proceedings. But where it comes to litigation by individuals themselves, the only parties that can benefit from the judgment or in respect of whom the judgment would apply and could competently be enforced, are those parties that have specifically declared their participation in the case and are actually cited and identified as a party to the proceedings. In *Librapac CC v Moletsane NO and Others*[52] the Court said:

> 'The new Act 66 of 1995, has a number of provisions which indicate that greater clarity in respect of the parties is now required. There is good reason for this. A dispute comprises not only a set of averments and submissions relating to issues. It comprises also the persons who are parties to the dispute. Those who seek to be part of the dispute resolution possibilities contained in the Act, must identify themselves and declare their participation.
>
> There are compelling practical considerations underlying this. Where, for instance, applicants are described merely as "union A and X others", who are not otherwise properly identified as parties in the action, serious problems of locus standi emerge in the event of some individuals resigning from the union in the course of pre-litigation periods or, by way of further example, in the event of the union in its own right electing not to conduct the litigation to conclusion. That holds the potential of prejudice for the individuals concerned. It also contains potential prejudice for a respondent party, who may seek counter-relief against individuals or, ultimately, relief by way of costs against them …'

[52] (1998) 19 *ILJ* 1159 (LC) at paras 43 – 44.

[93] Similarly, and in *Candy and Others v Coca Cola Fortune (Pty) Ltd*[53] the Court applied the aforesaid *dictum* in *Librapac*, and held as follows:

> 'In my view, it was essential for the individual applicants to be properly cited and described in this matter, especially as there was no trade union involved. This entails that the individual applicants must each be properly identified by name and be listed as individual applicants, either in the statement of claim or as an annexure thereto. Any individual applicant not so listed simply cannot be considered to be properly a party to the proceedings …'

[94] It must follow that the judgment given by Mabenge AJ on 8 September 2021 only applies to Zako and Mpofu, and not to any of the other dismissed individual applicants. The next question is whether Zako and Mpofu are entitled to relief in terms of prayer 5 of part B of the notice of motion on this basis.

[95] Counsel for Sono argued that the judgment by Mabenge AJ was a nullity, and for that reason could simply be disregarded. The basis for this contention is that the Court (Mabenge AJ) simply had no jurisdiction to have made the order that was made on 8 September 2021, because under section 189A(13), the Court could only decide a case based on alleged non-compliance with sections 189 / 189A of the LRA, which was not the case actually before the Court. Sono contends that in this instance, the case before the Court was in reality about non-compliance with the 4 June 2020 administration order and the alleged non-compliance with the constitution of CEPPWAWU, and the Court had no jurisdiction to decide these issues in a section 189A(13) application.

[96] It is true that there is authority for the proposition that in the case where a Court acts outside the parameters of what is prescribed by an empowering statute, a finding made by that Court constitutes a nullity and can competently be disregarded without having to first set aside that finding. In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others*[54] the Court held as follows:

---

[53] (2015) 36 ILJ 677 (LC) at para 31. A similar approach was followed in *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Express Payroll CC* (2011) 32 *ILJ* 2959 (LC) at paras 29 – 30 and 36, and *Danone Southern Africa (Pty) Ltd and Another v Commission for Conciliation, Mediation and Arbitration and Others* (JR2177/16) [2017] ZALCJHB 252 (30 June 2017) at para 42.
[54] 2012 (3) SA 325 (SCA) at para 14. See also *Knoop* (*supra*) at para 34.

> 'In my view, as I have demonstrated, Kruger AJ was not empowered to issue, and therefore it was incompetent for him to have issued, the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect (*Schierhout v Minister of Justice* 1926 AD 99 at 109). Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing …'

[97] However, and *in casu*, the judgment of Mabenge AJ is simply not such an instance as envisaged by the judgment in *Motala supra*. These kinds of situations must be considered and scrutinised with the utmost care, or the rule of law can unduly suffer. The Constitutional Court recently in *Municipal Manager O.R. Tambo District Municipality v Ndabeni*[55] considered the *ratio* in *Motala supra*, and dispensed the following warning:

> 'Trite, but necessary it is to emphasise this court's repeated exhortation that constitutional rights and court orders must be respected. An appeal or review — the latter being an option in the case of an order from the Magistrates' Court — would be the proper process to contest an order. A court would not compel compliance with an order if that would be '*patently* at odds with the rule of law'. Notwithstanding, no one should be left with the impression that court orders — including flawed court orders — are not binding, or that they can be flouted with impunity.
>
> This court in *State Capture* reaffirmed that irrespective of their validity, under s 165(5) of the Constitution, court orders are binding until set aside. Similarly, *Tasima* held that wrongly issued judicial orders are not nullities. They are not void or nothingness, but exist in fact with possible legal consequences. If the judges had the authority to make the decisions at the time that they made them, then those orders would be enforceable.'

[55] (2022) 43 ILJ 1019 (CC) at paras 23 – 24.

[98] In this instance, Mabenge AJ clearly had the authority (jurisdiction), under the LRA, to decide the section 189A(13) application and afford the relief that the learned Judge ultimately did. That is what was before her to decide. The fact that Sono attempted to label the dispute as something else does not detract from her jurisdiction to decide a section 189A(13) application. From the judgment, it is clear that the learned Judge simply considered the administration order as part of the evidence before her in deciding whether there was a fair process, and interpreted that order in that context. The learned Judge, as part of her ordinary duties of deciding whether there had been compliance with a fair consultation process, decided that the administration order meant that the NEC had to be consulted. If she was wrong in so finding, or misconstrued and misinterpreted the administration order, it does not render her ultimate order a nullity. Even if she should not even have considered the administration order, it equally does not render her order to be a nullity, but would rather be a basis to challenge the order on appeal. The distinction can be best illustrated by the approach adopted by the Court in *Ndabeni supra*, where the Court found as follows:[56]

> 'Coupled with the evidence about Ms Ndabeni's employment with the Municipality, Mjali J had jurisdiction to decide that the effect of Resolution 10/11 was to convert Ms Ndabeni's status to that of permanent employment. Once Mjali J had jurisdiction, her order could not be impugned as a nullity. Whether that decision was right or wrong on the merits did not affect the binding force of the order, unless it was set aside on appeal. …
>
> Manifestly, the Mjali J order is not a nullity; it is indeed a lawful order, issued by a properly constituted Court having jurisdiction. On the facts, this case falls squarely within the ambit of the ruling in *Tasima*. *Motala* is distinguishable. Unlike *Motala*, the Mjali J order does not exceed the powers of the Court. Hence the Mjali J order is competent …'

[99] Accordingly, the judgment of Mabenge AJ handed down on 8 September 2021, and the order contained therein, stands, and on that basis, it cannot be simply disregarded by either Mashanda or Sono as a nullity. As it stands, it must be

[56] Id at paras 33 – 34.

complied with and be given effect to. Although rather inelegantly worded, and not specifically issuing an interdict against dismissal, the order in the judgment contemplated that Zako and Mpofu could not be retrenched, until the fair procedure envisaged by the learned Judge had been complied with. This was in line with the supervisory duties of the Court under section 189A(13), as discussed above. In *Eke v Parsons*[57] the Court held:

> 'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

The point is that the order given by Mabenge AJ must be construed to grant effective relief and be construed to give effect to the purpose for which it was intended. In *Mashaba v Citibank Na SA Branch and Others*[58] the Court held:

> '… it must always be borne in mind that court orders must grant effective relief, and the order as it stands must be capable of being construed so as to give effect to the purpose for which it was intended. …'

[100] Considering all the facts set out above, Mashanda did seek leave to appeal against the judgment of Mabenge AJ, and Zako and Mpofu applied for interim enforcement in terms of section 18(3) of the Superior Courts Act. However, and ultimately, the interim enforcement was not pursued to finality after Mabenge AJ dismissed the condonation application for the late service of the application for leave to appeal. Even though Mashanda sought leave to appeal against the refusal of the condonation application, and this leave to appeal application still being pending, the ordinary principle that an application for leave to appeal suspends the original judgment, does not apply in this case. This is because an application for leave to appeal that is bought late does not suspend the original judgment until condonation is granted. In *Panayiotou v Shoprite Checkers (Pty)*

[57] 2016 (3) SA 37 (CC) at para 29
[58] (2019) 40 ILJ 2762 (LC) at para 17. See also *SOS Support Public Broadcasting Coalition and Others v SA Broadcasting Corporation (SOC) Ltd and Others* 2019 (1) SA 370 (CC) at para 52.

Ltd[59] the Court was dealing with an application for interim enforcement under section 18(3) of the Superior Courts Act, and declined to do so, on the basis that the application for leave to appeal was made out of time and condonation had not been decided, meaning the original judgment was not suspended. The Court held:[60]

> 'The inherent logic of the position is unassailable. It can be tested by asking what would happen if many months or years were to pass before an application for condonation is lodged. It is untenable that upon the service of a condonation application the judgment would then be suspended. Accordingly the application fails for want of even a prima facie right that the judgment of Legodi J be suspended.'

[101] The Court in *Brodie v Kgomasang*[61] considered the above dictum in *Panayiotou supra*, and had the following to say:[62]

> 'The circumstances of this case demonstrate why that judgment is entirely correct. An applicant for leave to appeal and condonation then becomes able to delay the execution of a judgment for an inordinately long time, which can never be in the interests of justice …'

[102] Accordingly, and as matters stand now, there is nothing suspending the judgment of Mabenge AJ in favour of Zako and Mpofu. That judgment is enforceable, and in terms of that judgment, their dismissal would be in contravention of the order granted by Mabenge AJ on 8 September 2021. There is no reason why both Mashanda and Sono could and should not have given effect to this judgment, by reinstating Zako and Mpofu, pending compliance with a fair process as contemplated by the order of 8 September 2021.

[103] Sono has argued that the provisions of paragraph 3.9 of the 4 June 2020 administration order, which lies at the very heart of the fair process case, is merely permissive and not prescriptive, as the actual power of Mashanda was

---

[59] 2016 (3) SA 110 (GJ).
[60] Id at para 15. See also *Trendy Greenies (Pty) Ltd t/a Sorbet George v De Bruyn and Others* (2021) 42 ILJ 1771 (LC) at para 16; *Myeni v Organisation Undoing Tax Abuse NPC* 2021 JDR 0258 (GP) at para 19.
[61] 2019 JDR 2612 (GJ) at para 17.
[62] Id at para 18.

found in paragraph 3.1 and 3.2 of that same order. It thus follows, as argued, that Mashanda was simply given the power to place the issues referred to in paragraph 3.9 before the NEC, if she considered this appropriate or necessary. But she was legally prescribed to do so. I must confess that I find substance in this contention, because to read paragraph 3.9 to be prescriptive may undermine the very point of administration and basically render it ineffective. That being said, I expressly state that I make no finding on this, as this issue is a central component to the defence of Mashanda and Sono to the contempt applications, currently on appeal, and will be considered and decided by the Labour Appeal Court in due course. This determination must be left up to that Court.

[104] Therefore, it is simply not for me to enforce the judgment of 8 September 2021 in favour of Zako and Mpofu at this stage. The reason for this is simple, being that such enforcement proceedings have already been instituted by way of the contempt applications referred to above, and have already been enforced by Lallie J by way of the learned Judge finding Mashanda and Sono in contempt of Court. The learned Judge has however granted leave to appeal against those judgments and an appeal has been filed by Mashanda and Sono with the Labour Appeal Court. It is therefore quite simply in the hands of the Labour Appeal Court to decide if the judgment of Mabenge AJ in favour of Zako and Mpofu is to be enforced, and they as a result be reinstated pursuant thereto.

[105] In my view, the relief sought in clause 5 of Part B of the notice of motion is in effect nothing else but an enforcement claim under another guise. However, this enforcement claim, for the reasons discussed above, is *lis pendens.* It would be inappropriate for me, in such circumstances, to pre-empt the determination as to whether the judgments of 8 September 2019 and 14 October 2019 are enforceable, as there are pending proceedings on exactly that same issue before another Court. The Court in *Nestlé (SA) (Pty) Ltd v Mars Inc*[63] held as follows:

[63] 2001 (4) SA 542 (SCA) at para 16.

> '… Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). …'

Similarly, in *National Union of Metalworkers of SA and Others v Bumatech Calcium Aluminates*[64] the Court held:

> 'Therefore, in order for the defence of lis pendens (or lis alibi pendens) to apply, there must be two separate proceedings either in the same court or in different courts, between the same parties, based on the same factual matrix, and seeking materially the same relief. …'

[106] Therefore, the relief sought by the individual applications in prayer 5 of part B of the notice of motion, in respect of Zako and Mpofu, must fail as well. The reason for this is that this very issue is *lis pendens* before the Labour Appeal Court, and that Court will ultimately decide this issue.

[107] For all the reasons as discussed above, the inevitable result must be that the relief sought by all the individual applicants in prayer 5 of part B of the notice of motion must fail, and is therefore dismissed.

Conclusion

[108] Based on all the aforesaid considerations, I am not satisfied that the individual applicants have made out a case for the relief sought in both prayers 5 and 6 of Part B of the notice of motion.

[109] In summary, it is simply not competent to afford the individual applicants who were dismissed, the relief sought in prayer 5 of part B of the notice of motion, for two main reasons. First, this Court has no jurisdiction to entertain an unlawful dismissal claim, and where it comes to an unfair dismissal claim the individual applicants are compelled to follow the prescribed dispute resolution processes under the LRA in the absence of truly exceptional circumstances, which does not exist in this case. Where it comes to Zako and Mpofu who have the judgment of 8 September 2021 in their favour, which judgment stands and

[64] (2016) 37 ILJ 2862 (LC) at para 38. See also *Dreyer and Others v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (1) SA 1219 (T) at 1231.

is operative, the issue is one of enforcement which is *lis pendens* before the Labour Appeal Court.

[110] Where it comes to the relief sought under prayer 6 of part B of the notice of motion, it is simply not competent for the individual applicants to approach this Court under section 103A of the LRA to remove Sono as administrator and request this Court to appoint Soobedaar in his stead. Only the Registrar, in this case, had the competence to approach this Court to seek this kind relief.

[111] Where it comes to the application by the Registrar to extend the appointment of Sono as administrator for a period of 12 months as from 12 December 2022, there is simply no feasible reason, even exercising a discretion based on what would be just and equitable, for such an order not to be granted. I am therefore convinced that Sono be appointed for a further 12 months' period, as requested by the Registrar.

[112] Because prayer 5 of Part B of the notice of motion has been decided against the individual applicants, the interim order granted on 25 August 2022 must be discharged, so that Sono can fulfil the task bestowed upon in terms of paragraph 3.3 of the second administration order dated 24 March 2022.

[113] In the interest of clarity going forward, I also intend to consolidate the two administration orders of 4 June 2020 and 24 March 2022 where their terms supplement one another. In particular, paragraphs 1, 2, 3.1 and 4 of the administration order of 24 March 2022 no longer have any practical application, and need not be repeated. I shall also amend the applicable time period of appointment of Sono, as reflected in the administration order of 24 March 2022, to correspond with the 12 months' appointment period applied for by the Registrar. The fact is that because of the appointment of Sono under the administration order of 24 March 2022 was an interim appointment that had already expired, I would be free, as part of the wide discretion I have under section 103A(1), to make any order I deem appropriate where it comes to the current appointment of Sono in terms of this judgment, going forward.

Costs

[114] This then only leaves the issue of costs. The competing parties sought costs against each other. I however have a wide discretion in terms of section 162(1) of the LRA where it comes to the issue of costs. In my view, even though the individual applicants were not successful, I am not inclined to make a costs order against them. I consider that a costs order may well make matters worse and simply create more friction, especially considering that hopefully the matter is now proceeding to the point where there can be an election of the new leadership of CEPPWAWU to take it out of administration. I also do not think the individual applicants were *mala fide* in this matter.

[115] The Constitutional Court in *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*[65] said:

> 'In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it …

As a general proposition in this case, and considering the dictates of fairness to all parties, I can see no legitimate reason to depart from the aforesaid general principle that costs do not follow the result in employment disputes before this Court.[66] Therefore, I consider it to be in the interest of fairness that no costs order should be made.

[116] In all of the above circumstances, I accordingly make the following order:

Order

1. The interim order of 25 August 2022 is discharged in its entirety.

2. The application by the individual applicants for the relief sought in prayers 5 and 6 of Part B of the notice of motion is dismissed.

[65] (2021) 42 ILJ 2371 (CC) at para 35.
[66] See *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC) at para 60.

3. The administration order of 4 June 2020 in terms of which Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU) is placed under administration in terms of section 103A is extended to 12 December 2023.

4. Mr Sipho Eric Sono (Sono) is appointed as the administrator of CEPPWAWU for the period ending 12 December 2023.

5. The provisions of the entire paragraph 3, including all subparagraphs thereof, of the administration order granted on 4 June 2020, shall equally and without exception apply to Sono in the course of his tenure as administrator in terms of this order.

6. Save for paragraph 6 of the administration order of 24 March 2022 in terms of which no order as to costs was made, the entire administration order of 24 March 2022 is substituted with the following order:

    6.1 Sono shall appoint an experienced and reputable facilitator to ensure that congresses be convened in terms of the constitution of CEPPWAWU for the purposes of electing a new national leadership of CEPPWAWU.

    6.2 The congresses contemplated by paragraph 6.1 of this order shall be convened and then concluded prior to 30 September 2023.

    6.3 The control, management and affairs of CEPPWAWU shall be handed to the new leadership elected in terms of paragraph 6.1 of this order, upon expiry of the period of administration under this order on 12 December 2023, unless extended further by this Court on application by the Registrar.

    6.4 Sono shall be required to consult with interested parties when deciding the proper and effective governance and administration requirements to be put in place for CEPPWAWU.

7. There is no order as to costs.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants	Advocate A. Redding SC
(save for Eleventh Applicant):	Together with Advocate M Chauke
	Together with Advocate M Meyerowitz
Instructed by:	Minnaar Niehaus Attorneys
For the Eleventh Applicant:	Advocate M Dollie
Instructed by:	Afzal Lahree Attorneys
For the Second Respondent:	Advocate T Madima SC
	Together with Advocate S Tilly
Instructed by:	The State Attorney
For the Third Respondent:	Advocate F Boda SC
	Together with Advocate S Bismilla
Instructed by:	KMNS Attorneys
For the Seventh Respondent:	Mr A Roskam of Haffegee Roskam Savage Attorneys