THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of interest to other Judges

CASE NO: J1714/19

In the matter between:

VUYOLWETHU MSI AND 8 OTHERS **Applicant**

and

NATIONAL UNION OF MINEWORKERS

NATIONAL EXECUTIVE COMMITTEE

Respondent

Heard: 14 August 2019

Delivered: 16 August 2019

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JUDGMENT

VAN NIEKERK J

[1] The applicants are office bearers of the respondent (the union). On 11 July 2019, the union suspended the applicants. They seek an interim order reinstating them to their previous positions pending 'the finalization of Part B of this application…'. There is no Part B to the notice of motion, but for the heading. The founding affidavit discloses that the nature of the final relief to be sought is that of a review 'in respect of the unlawful disciplinary procedure'. The basis of that application is said to be that the disciplinary process was unlawful on account of a failure to comply with the union's constitution, that the applicants were not afforded an opportunity to properly conduct their defence, and that they were not afforded an opportunity to make representations.

[2] The application is brought in terms of s 158 (1) (e) of the Labour Relations Act (LRA), in terms of which this court is empowered to determine a dispute between a registered trade union and any one or more of its members about any alleged non-compliance with the constitution of that trade union. I accept that the applicants are not guilty of any undue delay in filing the present application, and that the application is urgent.

[3] The nature of the application is such that the applicants' case must necessarily be founded on the union's constitution. The union is a voluntary association and its constitution is definitive of the rights and obligations of its members and office bearers. Annexure 3 to the Constitution provides in item 64 precautionary suspension. That provision reads as follows:

> 6. Precautionary Suspension
>
> 6.1 The President or General Secretary, after consulting with other national office bearers and elected officials, may suspend a member, elected official or

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> office-bearer as a precautionary measure if this is in the interests of the union and the investigation of the matter with the prosecution of the disciplinary proceedings.
>
> 6.2 The President or General Secretary may determine the terms and conditions of the suspension except that where applicable such a suspension must be on full pay.

[4] Clause 24 of the constitution establishes the office of the deputy general secretary. In terms of clause 12.4.2.2, the deputy general secretary must exercise the power and perform the duties of the general secretary in the latter's absence.

[5] The applicants were suspended, as I have indicated, on 11 July 2019 in terms of a letter addressed to each of them by the deputy general secretary. The letter reads as follows:

> Your attention is drawn to the NEC decision of the 27th and 28th of June 2019 and further consultation with national office bearers on Monday, 8 July 2019 a decision was taken that you are suspended to participate in all union activities pending further investigation of the matter and possible charges on your behaviour and conduct in the union.
>
> You are immediately suspended from 11 July 2019 but you will remain a union member until the prosecution of the disciplinary proceedings all suspension is lifted.

[6] The requirements for interim relief are well-established. The purpose of interim relief is to preserve or restore the status quo pending the final determination of the rights of the parties. Although it is not clear to me, as I have indicated, precisely what final relief the applicants seek, I would assume in their favour that they intend to have their dispute determined in terms of s 158(1)(e), and that the final relief they seek is an order to the effect that they were suspended in breach of the union's constitution. Whether the proceedings ought appropriately to assume the form of a review is not a matter that need be decided at this point.

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[7] The requirements for interim relief are well-established. For an applicant to succeed, he or she must establish a prima facie right, though open to some doubt, a well-grounded apprehension of irreparable injury in the absence of an ordinary remedy. Further, in the exercise of its discretion, the court must weigh the prejudice to the applicant if the interdict is withheld, against the prejudice to the respondent if it is granted, sometimes referred to as the balance of convenience.

[8] In the present instance, I am not persuaded that the applicants have cleared the first hurdle, i.e. a prima facie right though open to some doubt. The high watermark in the application is the assertion that the letter of suspension was signed by the deputy general secretary and not the general secretary. As the constitution makes clear, the deputy general secretary is authorised to act on behalf of the general secretary in his or her absence. In the present instance, the general secretary has annexed a copy of a letter addressed to the deputy general secretary in which he records that he would be out of the country and it had slipped his mind to forward letters of suspension to the applicants consequent on the union's NEC endorsing the recommendation that they be suspended.

[9] In so far as the applicants appear to submit that in substance, their suspension constitutes a disciplinary penalty, this is simply not the case. The constitution draws a distinction between disciplinary proceedings and sanctions, and precautionary suspensions. The applicants' suspensions have been effected in terms of item 6 of schedule 3 referred to above, which contemplates suspension other than as a disciplinary sanction. Further, the applicant's reliance on an alleged internal appeal of the decision to suspend them is misplaced. There is nothing in the union's constitution that affords suspended office bearers or members the right to appeal a precautionary suspension and the applicants ought reasonably to have been aware of that fact. The appeal procedure applies only to those persons found guilty of disciplinary offences and entitles such persons to submit an appeal within seven days of the notice of the decision

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sought to be appealed. The terms of the letters of suspension make clear that the applicants have been suspended pending further investigation into possible charges. It is manifestly clear that they have not been found guilty of any offence.

[10] In so far as the applicants contend that they were denied the right to be heard prior to the suspension or otherwise denied the opportunity to make representations, it should be recalled that the applicants are not before the court in their capacity as employees, nor is the dispute one that concerned an alleged unfair labour practice. None of the rules developed under the rubric of the definition of unfair labour practice in the LRA as they relate to precautionary suspension apply in the present instance. The right to suspend in terms of the union's constitution is broadly expressed and confers broad powers on the president and general secretary. The applicants have been unable to demonstrate that these powers were exceeded or that their suspensions were effected other than in accordance with the terms of the constitution.

[11] Having failed to establish a prima facie right to the relief they seek, it is not necessary for me to consider the remaining requirements as they pertain to interim relief. The application stands to be dismissed.

[12] Finally, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The respondent has succeeded in its opposition to the application and there is no reason why costs ought not to follow the result.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge

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APPEARANCES

For the applicant: Adv N.D Sekwakweng, instructed by MNM & Associates

For the respondent: Adv C Orr SC, instructed by CTH Inc

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