THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: J 2065/2019

In the matter between:

JOSEPH PULE obo PUBLIC SERVANTS ASSOCIATION OF SA DEPARTMENT OF HOME AFFAIRS BRANCH **First Applicant**

DONALD MALEBYE obo PUBLIC SERVANTS ASSOCIATION OF SA DEPARTMENT OF BASIC EDUCATION BRANCH **Second Applicant**

DONALD MALEBYE obo PUBLIC SERVANTS ASSOCIATION OF SA DEPARTMENT OF SCIENCE AND TECHNOLOGY BRANCH **Third Applicant**

and

Labour Court

PUBLIC SERVANTS ASSOCIATION	**First Respondent**
GENERAL MANAGER FOR PSA *N.O*	**Second Respondent**
CHAIRPERSON OF THE PSA BOARD	
OF DIRECTORS	**Third Respondent**
CEBO MNTWINI	**Fourth Respondent**
MARCUS RAMAKGALE	**Fifth Respondent**
JUSTICE SHIBURI	**Sixth Respondent**
NOMABANDLA SILIYANE	**Seventh Respondent**
MOSALA SEELAMO	**Eighth Respondent**

Heard: 22 October 20

Judgment: 24 October 2019

JUDGMENT

VAN NIEKERK J

[1] On 19 September 2019, the first respondent (the PSA), held its annual general meeting. At the meeting, and election was held to fill five vacancies on the PSA's board. The applicants, being three branches of the PSA, contest the election. In particular, they challenge the number of spoilt votes recorded and have demanded access to the ballot papers. This has been refused, and a special board meeting was called for 9 October 2019.In these proceedings, the applicants seek interim relief, being an interdict restraining the first, second and third respondents from convening any further board meeting and filling the five vacancies on the board, pending the finalisation of an application to review and set aside the election of the board of directors at the annual general meeting.

Labour Court

[2] At the hearing of the application, the court raised (as it is obliged to do) a jurisdictional point. The point related to the document on which the applicant relies for their contention that the respondents have acted unlawfully – a document referred to as the PSA's 'statute' – which is described in the papers as the PSA's memorandum of incorporation. The PSA lives a dual life – it is a registered trade union under the LAbour Relations Act (LRA), but it is also an entity incorporated under the Companies Act. The definition of 'statute' provides that the statute is also the constitution of the PSA. It would appear therefore for present purposes, the applicant seek relief in terms of s 158(1)(e) of the LRA. That section provides that this court is empowered to -

> … determine a dispute between a registered trade union... and <u>any one of the members</u> or applicants for membership thereof, about any non-compliance with-
>
> (i) the constitution of that trade union… (own emphasis).

[3] The question that arises then is whether the applicants are members of the PSA, since it is only disputes between one or more members of a union and the union over which this court has jurisdiction. (I accept for present purposes that although s 158 is headed 'Powers of the Labour Court' that s 158 (1) has jurisdictional consequences.)

[4] The persons who hold themselves out as representatives of the applicant branches do not approach the court as individual members of the PSA, but rather in their positions as national chairpersons of branches of the PSA. In the founding affidavit, they describe themselves as representing the branch concerned, and 'acting in the interest of its members'. They further describe themselves as instituting these proceedings 'as a collective in pursuit of furthering the objectives of PSA to protect the rights and interest of its members'. The rights that they assert in support of the relief sought in the present application are asserted in the same capacity. This much is confirmed by the deponent to the replying affidavit, where at paragraph 15 and in response to a challenge to the locus *standi* of the branches to initiate these proceedings, he avers the following:

Labour Court

13.3 The deponent is to be reminded that none of the Chairpersons acting herein in their representative capacities have personal interests in the outcome of the matters complained but do so in the collective interest of the branches they represent…

15.1 A member who has a personal grievance with the PSA can correctly so if they are disgruntled with the PSA personally challenge the PSA in their individual capacities, in this case the Chairpersons who brought the application on behalf of their members are not personally or individually disgruntled towards the PSA.

15.2 They are not disputing the outcome of the elective congress in their individual capacities, but are raising the issues as they were delegates mandated by a collective.

15.3 I and the other chairpersons could therefore not risk employing our personal resources and/or getting costs orders against us when we have no individual and/or personal interest in the disputes raised with the First Respondent. …

[5] The capacity in which the applicant branches' representatives have filed these proceedings could not be more clearly stated. In their individual capacities, they are union members, but they do not approach the court in that capacity. On the contrary, they disavow that status and act in a representative capacity, on behalf of the three branches that are respectively applicants in these proceedings. It follows that in the absence of any claim by one or more members of the PSA (as opposed to one or more of its branches) concerning non-compliance with the PSA's constitution, the claim is not one that falls within the ambit of s 158 (1)(e). This court thus has no jurisdiction to entertain the application.

[6] Even if I am wrong in coming to this conclusion, there is a second and related basis on which the application stands to fail. This is the respondents' point related to *locus standi*. The applicants approach this court, as I have indicated, as branches of the PSA, aggrieved at the outcome of the election held at the annual general meeting and seeking remedial relief.

Labour Court

[7] In *Luvela and others v The African National Congress and others* [2011] JOL 26964 (ECM), Nhlangulela J said the following in respect of the locus *standi* of branches of a political party:

> The branches are not legal *personae*. They also do not have a life which is separate from that of the ANC. They have no constitution of their own which is separate from that of the ANC. There is no evidence available to show that the ANC has permitted its branches to institute these legal proceedings. Instead the ANC has been sued. I therefore held that the applicants have no right to sue for and on behalf of the branches of the ANC.

[8] This judgment was referred to with approval by Pickering J in *Bolman and another v The African National Congress and others* (813/2011, 31 March 2011) where the court upheld a challenge to the authority of the applicants, respectively the chairperson and secretary of a branch of a political party, to institute the proceedings in their representative capacities. The court referred to *Nasionale Party in die Oos Kaap en 'n ander v Port Elizabeth Oorgangsraad en andere* 1998 (2) BCLR 141 (SE), a challenge to the locus *standi* of the second applicant, a caucus of the first applicant, a political party, was similarly upheld on the basis that the second applicant was not a legal persona. The court pointed out that the power of a voluntary association to sue or be sued could be implied in certain circumstances even though the constitution concerned lacked any express provision empowering the association to sue, and that a power to sue could be implied where it was incidental to other express powers. On this basis, the court dismissed the challenge to the locus *standi* of the first applicant (the political party), but upheld the challenge in respect of the second applicant (the party caucus) on the basis that it had no constitution of its own, and was purely a structure within the first applicant to ensure internal discipline.

[9] In the present instance, the PSA's statute provides for the structures within which the PSA functions. A branch is one of those internal structures. The board is empowered to approve the establishment of branches, on the basis of one branch per national department or functional component as applies in the

Labour Court

national public service. In terms of s 29, no branch or any of its committees shall act autonomously against the employer, a term that is not defined but which presumably constitutes the state and any organ of state. Section 2 of the statute establishes the PSA as a legal persona and a body corporate with perpetual succession, capable of suing and being sued in its own name. There is nothing in the statute to suggest that any branch established by the board enjoys the same status, or has the same legal capacity.

[10] It is not in dispute that the applicant branches have not been authorised by the PSA to initiate these proceedings. To the extent that the applicants rely for that authority on s 30 (1) of the statute, which invests the management of the affairs of the branch in the management of the branch, this falls short of conferring legal personality on a branch. Counsel for the applicants further relied on s 38 of the constitution in support of the contention that the applicant branches enjoyed locus stand out. That section, part of the Bill of Rights, provides that persons listed in the section have the right to approach a competent court alleging that they write in the Bill of Rights has been infringed or threatened. The list includes anyone acting in their own interest, anyone acting on behalf of another person who cannot act in the own name, and anyone acting as a member of, or in the interest of, a group or class of persons. This section does not assist the applicants firstly because as the courts have held on a number of occasions, the principle of subsidiarity precludes a party from relying directly on the constitution to enforce a right where there is legislation giving effect to the right. Alternatively, the relevant legislation may be challenged on the basis that it is not constitutional. Secondly, this is not the case made out in the papers. The applicants do not contend that the PSA's conduct has infringed any fundamental right protected by the Bill of Rights. Insofar as counsel alluded during argument to an infringement of the right to freedom of association established and protected both by s 23 of the Constitution and s 4 of the LRA, that right is not unqualified and as s 4 (2) of the LRA stipulates, the right is one that is subject to the constitution of the trade union concerned.

Labour Court

[11] In summary: the PSA is a legal entity which is capable of suing and being sued. The branches of the PSA are not in and of themselves self-standing and discreet legal entities and they have no locus *standi* before the court. Of course, there is nothing to prevent any one or more member of the PSA from approaching this court in their personal capacities under s 158 (1)(e) to pursue any grievance related to any alleged non-compliance with the PSA's constitution. But that is not the basis on which the present application has been brought. Individual union members may not hide behind the structure of a union branch either to avoid the prospect of an adverse order for costs, or for the purpose of giving voice to a 'collective', as the individual representatives seek to do. The application stands to be dismissed.

[12] Finally, in relation to costs, the court has a broad discretion in terms of s 162 to make orders for costs in accordance with the law and fairness. I must necessarily take into account that the applicant branches were forewarned through correspondence addressed by its attorneys that the PSA disputed their locus *standi*, and the authority of those who held themselves out as their representatives to institute these proceedings, and to incur legal costs in doing so. This warning was simply ignored. The same concerns were raised in the answering affidavit, yet the applicant branches persisted with the application. In these circumstances it appears to me that the requirements of the law and fairness are best satisfied by an order for costs, on the ordinary scale.

I make the following order:

1. The application is dismissed.
2. The representatives of the applicant branches, Messers Pule, Malebye and Madikane, are ordered to pay the costs of the application in their personal capacities, jointly and severally, the one paying the other to be absolved.

Labour Court

André van Niekerk
Judge

APPEARANCES

For the applicants: Adv MJ Molapo, instructed by Mafa Attorneys

For the first, second and third respondents: Adv Z Ngwenya, instructed by Cliffe Dekker Hofmeyr.

Labour Court