



IN THE INDUSTRIAL COURT OF SWAZILAND

CASE NO.69/14

In the matter between:-

JUSTICE MTSETFWA	1 st Applicant
ZWELI SIHLONGONYANE	2 nd Applicant
THABSILE MAMBA	3 rd Applicant
ALFRED DLAMINI	4 th Applicant
MELFORD SITHOLE	5 th Applicant
SUBJECT GININDZA	6 th Applicant
FAITH MSIBI	7 th Applicant
ROSE RADEBE	8 th Applicant
DONALD MNCINA	9 th Applicant
SIPHIWE ZWANE	10 th Applicant
JOSEPH SIBANDZE	11 th Applicant
GABSILE MKHONTA	12 th Applicant
MANTOMBI MBINGO	13 th Applicant
ZANDILE DLAMINI	14 th Applicant
SWAZILAND MANUFACTURING AND ALLIED WORKERS UNION	15 th Applicant
And	
NJABULO DLAMINI	1 st Respondent
SIKHUMBUZO SIMELANE	2 nd Respondent

MIRRIAM ZWANE

3rd Respondent

SABELO SIKHONDZE

4th Respondent

MUSA MNCINA

5th Respondent

Neutral citation: Justice Mtsetfwa & 14 Others V Njabulo Dlamini and 4 others
(69/2014) [2014] SZIC 35 (2014)

CORAM: D. MAZIBUKO

(Sitting with A. Nkambule & M.T.E. Mtetwa)
(Members of the Court)

Heard: 26th April 2014

Delivered: 29th August 2014

Summary: *A National Executive Committee of a trade union was suspended from office unlawfully. A faction of the union members convened a meeting in secret, suspended the National Executive Committee and appointed an interim National Executive Committee- contrary to the provisions of the constitution of the union.*

Held; meeting declared illegal and resolutions taken thereat, set aside.

Held further; a fair and lawful disciplinary action against a member of the National Executive Committee is permissible in terms of the constitution.

JUDGMENT 29th AUGUST 2014

1. The Swaziland Manufacturing and Allied Workers Union (hereinafter referred to as the union) is a registered trade union, established in terms of its Constitution which has been filed of record. The union is the 15th Applicant in the matter before Court. The 1st to the 14th Applicants are union members.
2. The 1st to 5th Respondents are also union members. The Respondents regard themselves as an Interim National Executive Committee of the union.
3. Prior to the 15th February 2014 the 1st to 14th Applicants occupied the position of National Executive Committee in the union. Their appointment into this position is not subject of dispute before this Court. The Court will accordingly treat them as having been lawfully appointed into office.
4. About the 10th February 2014 a written notice of a meeting of certain Branch Committees of the union was issued by a union member named Joseph Sikhosana.

- 4.1 The meeting was scheduled for the 15th February 2014 and was organized by Mr Joseph Sikhosana who circulated a letter to various Branch Committees of the union inviting them to attend. The letter is attached to the Applicant's founding affidavit and is marked annexure C.
- 4.2 It is not clear as to which of the Branch Committees of the union received the letter (annexure C). However some of those Branch Committees that received the invitation- letter attended that meeting.
- 4.3 At that meeting, (15th February 2014) the National Executive Committee (1st to the 14th Applicant) was suspended from office. An Interim National Executive Committee (1st to 5th Respondents) were appointed to replace the suspended committee.
- 4.4 The 1st to the 14th Applicant were subsequently notified by letter that they had been suspended from office as National Executive Committee.

The 1st, 2nd and 3rd Applicants were each served a letter informing them about their suspension. The 4th to the 14th Applicants were informed indirectly i.e. by letter addressed to a 3rd party (the Human Resources Manager of Mondelez International (Pty) Ltd), that the entire National Executive Committee had been suspended.

4.5 Upon receipt of the notification, the Applicants moved an urgent application before this Court in which they claimed relief as follows:

“1. *Dispensing with the Rules of Court as relate to forms, service and time limits and enrolling this matter as one of urgency;*

2. *That pending finalization of these proceedings, a rule nisi operative with immediate and interim effect and returnable on date to be determined by the above Honourable Court do hereby issue as follows:*

2.1 *Interdicting and restraining the Respondents, jointly and severally, from directly or indirectly interfering with the Applicants:*

exercise of their powers and execution of their duties as the National Executive Committee of SMAWU;

2.2 Interdicting and Restraining the Respondents from occupying the offices of SMAWU and allowing the Applicants to remain in office;

3. That prayers 2.1 and 2.2 above operates with immediate and interim effect pending the return date of the rule nisi whereof the Respondents are called upon to show cause why:

3.1 The election and/or accession to office of the Respondents should not be declared illegal and of no force or effect;

3.2 The Respondents should not be removed from office as the Interim Committee of SMAWU;

3.3 The Applicants should not be re-instated into office and that the status quo ante 17th February 2014 should not be restored;

3.4 The Respondents should not be ordered to pay costs of this application on the scale as between attorney and own client;

4. *Granting Applicants such further and/or alternative relief as the Court may deem [deem] fit”*

(Record page 5-6)

5. The founding affidavit of the Applicants was deposed to by Mr Justice Mtsetfwa, the President of the suspended National Executive Committee. The 2nd to 14th Applicants have filed confirmatory affidavits in support of the founding affidavit.
6. The application is opposed. The answering affidavit is deposed to by Mr Njabulo Dlamini, the 1st Respondent, and who has also referred to himself as Chairman of the Interim Committee of the union. The 5th Respondent has filed a confirmatory affidavit in support of the answering affidavit. There are three (3) other confirmatory affidavits filed by witnesses who have not been cited as Respondents. The application is therefore opposed by 1st and 5th Respondents only. The Interim Committee which the 1st Respondent refers to in the answering affidavit is the National Executive Committee. This fact appears clearly in annexure F which the Court shall refer to later in this judgment.

7. The Respondents have raised points in *limine* in order to challenge the application. The first point raised was that of misjoinder. According to the Respondents, the 5th to the 14th Applicant have been joined irregularly in these proceedings. It is only the 1st to 4th Applicants who have been served with letters informing them of their suspension. The 5th to 14th Applicants have failed to show how they feature in these proceedings; they have no *locus standi* therefore to institute the present application.

8. In response, the 5th to 14th Applicants have argued that they have good grounds to institute the present application or even join as Co-Applicants any person who has already instituted the application, i.e. the 1st to 4th Applicants.

8.1 The Applicants referred the Court to Annexure F in the founding affidavit. This is a letter written by the 1st Respondent (Mr Njabulo Dlamini) to the Human Resources Manager of Mondelez International (Pty) Ltd. This company (Mondelez International (Pty) Ltd), is one of the companies in which the Union is actively operating and has a branch committee.

8.2 The letter (annexure F) reads as follows:

“The Human Resources Manager

Mondelez International Pty Ltd

P.O.Box

Dear Sir,

INTERIM COMMITTEE

The above subject matter is hereby referred.

Please take note that since the NEC led by Mr. Justice Mtseftwa has been suspended from office an interim NEC has taken over, their names are inter alia;

Mr. Njabulo Dlamini President

Mr. Sikhumbuzo Simelane Vice President

Ms. Mirriam Zwane Secretary General

Mr. Sabelo Sikhondze Vice Secretary General

Mr. Musa Mncina Treasurer

Thank you for your cooperation and we wish you a happy working relationship with them.

Yours Faithfully

Signed

Njabulo Dlamini

Interim President

Cc: Commissioner of Labour”

(Record page 31)

8.3 There is no date on the letter (annexure F). There is no doubt however that it was written after the meeting of some of the Branch Committees of the union which was held on the 15th February 2014. Over and above annexure F, the 1st to 3rd Applicants were served with individual letters of suspension which have also been annexed to the founding affidavit marked A,B and B1 respectively. A letter confirming the suspension of the 4th Applicant was written by the 1st Respondent to the Human Resources Manager of Exipro Swaziland (Pty) Ltd where the 4th Applicant is employed.

8.4 The letter (annexure F), discloses the following facts;

8.4.1 that the National Executive Committee which is led by Mr Justice Mtsetfwa (1st Applicant) has been suspended, and

8.4.2 that an Interim Committee has been formed to take over work of the suspended National Executive Committee,

8.4.3 the names and positions of the interim committee members are listed in the letter,

8.4.4 the letter is signed by the 1st Respondent as Interim Committee President.

8.5 The 1st Respondent has admitted writing the letter to Mondelez International (Pty) Ltd. The 1st Respondent states clearly in annexure F that the entire National Executive Committee that is led by Mr Justice Mtsetfwa (1st Applicant) has been suspended. The 5th to the 14th Applicants are members of the suspended National Executive Committee.

8.6 The 1st Respondent stated as follows in paragraph 22 of his affidavit:

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“Contents hereof are denied and Applicants are put into strict proof hereof.

In as much as there is information circulating to the effect that the NEC has been suspended, such information does not in any manner damage the reputation of the Applicant.

It is a fact that they are suspended.....”

(Underlining added)

(Record page 72)

8.7. The 1st Respondent refers to information circulating to the effect that: the National Executive Committee has been suspended. In actual fact it is the 1st Respondent who reported this fact by means of a letter (annexure F).

8.8 The 1st Respondent states clearly under oath and by letter (annexure F) that the entire National Executive Committee was suspended. This admission contradicts what the Respondents have said in their first point *in limine*. The effect of the Respondents' argument is that though the 5th to 14th Applicants have been suspended together with the 1st to 4th Applicants still they do not have *locus standi in judicio* to challenge their suspension. The Respondents' argument is untenable.

8.9 The 5th to 14th Applicants are entitled to institute legal action to challenge their suspension from office. They are further entitled to join any litigant who has instituted a similar legal action.

8.10 The Respondent's point *in limine* of misjoinder is without merit and it is accordingly dismissed.

9. The second point taken *in limine* was that the application before Court has been filed prematurely. According to the Respondents, the Applicants have failed to exhaust the internal remedies that are available to union members (who have been suspended), before they approach the Court for relief. In particular, the Respondents have argued that the Applicants have failed to lodge an appeal to challenge their suspension, before the Annual or Special General Meeting, yet they are required to do so by the constitution.

9.1 The Court was referred to section 6.8.1 of the constitution, which (according to the Respondents) makes provision for union members who have been suspended or expelled from the union to appeal an adverse decision affecting them. On the contrary, the Applicants have argued that section 6.8.1 of the constitution does not apply in their case, but applies in a case of a union member or members who have been lawfully disciplined by the National Executive Committee. According to the Applicants, they have not been suspended or disciplined in any manner by the National Executive Committee, neither lawfully nor otherwise.

9.2 The Court has noted that section 6.8.1 of the constitution should not be read in isolation,

as it would lead to an absurdity. This section must be read with sections 6.1 and 8.2.3. The aforementioned sections read as follows:

9.2.1 “Rule 6: ANNUAL GENERAL MEETING

6.1 The Supreme authority of the Union in all matters shall be vested in the Annual General Meeting, and subject to that authority the management of the affairs of the Union shall be in the hands of the National Executive Committee, as provided under Rule 8.”

9.2.2 “Rule 6.8.1 Appeals brought by members against any decision of the National Executive Committee, will be advised to the Special or Annual General Meeting which shall nominate a Committee of five members from amongst those attending such meeting to consider such appeal.”

9.2.3 “Rule 8.2 FUNCTIONS OF THE NATIONAL EXECUTIVE COMMITTEE

8.2.1.....

8.2.2

8.2.3 *[The National Executive Committee]*

shall give instructions to the Secretary – General and other officers for the conduct of the business of the Union. It may appoint such organizers, workers, educators and clerical employees, as it may consider necessary. It may fine, suspend or dismiss any officer or member for neglect of duty, dishonesty, incompetence, refusal to carry out the decisions of the National Executive Committee, or any other reason which it deems good and sufficient in the interests of the Union.

However, such persons shall have a right of appeal to the Annual General Meeting or Special General Meeting convened for, among other things, that purpose.

9.3 Both the Annual and the Special General Meeting have power and authority to determine appeals from members of the union who are aggrieved by a decision of the National Executive Committee in the exercise of its disciplinary function. The National Executive Committee has power to impose a fine, suspend or dismiss a member for misconduct. Such misconduct may include the following offences; neglect of duty, dishonesty, incompetence, refusal to carry out the decision of the National Executive Committee.

9.4 The difficulty that the Respondent is facing in their argument is that the Applicants were not suspended by the National Executive Committee. The 1st to 14th Applicants constituted the National Executive Committee at the time they were suspended. The Applicants did not suspend themselves. The National Executive Committee was suspended by a group of concerned Branch Committee members of the union who purported to exercise authority which they did not have.

9.5 An appeal to the Annual or Special General Meeting as provided for in Section 6.8.1 of the constitution applies in a case where disciplinary action has been taken against a union member by the National Executive Committee. In this case the decision to suspend the Applicants was taken by an unauthorized group of union members including the Respondents. The Applicants are accordingly entitled to challenge that decision in Court. There is no need for the Applicants to lodge an appeal with the Annual or Special General Meeting in order to challenge their suspension. The Respondents' second point *in limine* fails as well.

10. The Respondents have further argued that the Applicants were suspended from office pending investigation of alleged gross irregularities and mismanagement of union funds. The Applicants' presence in office will therefore negatively affect the investigation. It is in the interest of justice and fairness that the Applicants be suspended while investigation is ongoing. If they are cleared of wrongdoing in the investigation they will return to office. The Respondents added that the Applicants have failed to show any prejudice that they would suffer if they remain suspended pending finalisation of the investigation.

10.1 The Respondents have acted irregularly in suspending the National Executive Committee without lawful authority. That irregularity cannot be cured by the Respondents' assertion that the suspension of the Applicants was pending finalisation of the investigation. Whether a suspension of a union member is pending investigation or not, it must be carried out lawfully and fairly by an authorized official.

10.2 The Applicants as National Executive Committee are entitled to remain in office until suspended or removed by lawful means. There is clear prejudice that the Applicants are suffering. The prejudice is that they have been unlawfully suspended from office by an unauthorized group of union members. The third point raised by the Respondent cannot succeed. It is accordingly dismissed together with the two (2) points *in limine* aforementioned. We now turn to the merits.

11. The main facts in this matter are not in dispute. A certain union member called Joseph Sikhosana circulated a letter to certain Branch Committees of the union. The letter is undated.

However there is no doubt that the letter (annexure C) was written before the 15th February 2014.

12. The letter (annexure C) invited branch committees to a meeting on the 15th February 2014 at a venue known as Caritas. The letter reads thus:

“FROM: MONDELEZ/KRAFT FOODS BRANCH COMMITTEE

TO: ALL SMAWU BRANCH COMMITTEES

VENUE: CARITAS

TIME: 10:00 AM

BRANCH COMMITTEES MEETING ACCORDING TO RULE9:/RULE

9.1.4/RULE 9.2.1/RULE 9.3.1.12 AND SMAWU CONSTITUTION

COMRADES,

YOU ARE ALL REQUESTED TO ATTEND A BRANCH COMMITTEES MEETING AT CARITAS ON THE 15TH FEBRUARY 2014, TO ADDRESS SENSITIVE ISSUES WE FIND OURSELVES IN DUE TO IMPROPER RUNNING OF THE ORGANIZATION.

AGENDA:

- 1. BRANCHES SHOULD DISCUSS PROBLEMS THEY HAVE IN THEIR WORK PLACE.*
- 2. DISCUSSES AND FIND A SOLUTION ABOUT THE NATIONAL EXECUTIVE COMMITTEE WAY OF RUNNING THE ORGANIZATION.*

3. *CONTITUTIONAL WAYS TO DEAL WITH MONITORING THE MONEY CONTRIBUTED BY THE MEMBERS. DISCUSS WAYS AND SET DATES TO APPLY RULE 9.1.4 OF THE CONSTITUTION*

4. *SET RESOLUTIONS BASED ON THE ABOVE ISSUES.*

REGARDS,

MONDELEZ/KRAFT FOODS, Joseph Sikhosana”

(Records page 26)

13. A meeting involving some of the Branch Committees proceeded as scheduled on 15th February 2014. A resolution was taken at that meeting to suspend the National Executive Committee. That resolution was eventually implemented by the Respondents. The meeting further appointed the Respondents to serve as Interim National Executive Committee. The Applicants have challenged the Respondents at three (3) level viz. the manner the meeting of the 15th February 2014 was called, the manner the Applicants were suspended from office and the manner the Respondents ascended to the office of Interim National Executive Committee.

14. Annexure C is the only letter that has been presented before Court in terms of which the Respondents called a meeting of the 15th February 2014.

The attention of the Court was drawn to the wording in annexure C. It appears *ex facie* annexure C that the meeting was called in terms of rules 9, 9.1.4, 9.2.1 and 9.3.1.12 of the constitution of the union. It is accordingly necessary to look closely into the rules in the constitution which have been cited in the letter.

14.1 Rule 9 defines both a Branch Committee and a Joint Branch Committee.

14.2 Rule 9.1.4 lists the office bearers of the Joint Branch Committee.

14.3 Rule 9.2.1 lists both the mandatory and the optional meetings of the Branch Committees.

14.4 Rule 9.3.1.12 defines the procedure in terms of which a Joint Branch Committee may call a Special General Meeting. That rule is relevant in this case and it deserves to be reproduced in full. It reads as follows:

“The Joint Branch Committee may call for a Special General Meeting provided that more than half of the individual Branch Committees have obtained an approval by the majority in their constituencies for such a meeting to be called.

The call must be addressed to the National Executive Committee through the Secretary-General. Rules 7.2, 7.3 and 7.4 of the Constitution shall apply for such a meeting;

(Underlining added)

(Record page 135)

- 14.5 According to rule 9.3.1.12 it is crucial that a Special General Meeting that has been called by a Joint Branch Committee be constitutionally compliant. Among the requirements that are mentioned in Rule 9.3.1.12, which are mandatory, is that the call for a Special General Meeting must be addressed to the National Executive Committee through the Secretary General. That requirement has not been met in this case. When calling the meeting of the 15th February 2014, Mr Joseph Sikhosana acting in concert with the Respondents, simply addressed the letter (annexure C) to the Branch Committees and clearly bypassed the National Executive Committee and its Secretary-General.
- 14.6 The meeting of the 15th February 2014 is therefore in breach of the constitution for failure by Mr Joseph Sikhosana to comply with clause 9.3.1.12 therein.
15. The Applicants have identified further irregularities in the manner the meeting of the 15th February 2014 was called.

According to rule 9.3.1.12 a Special General Meeting which has been called by Joint Branch Committees should also comply with the requirements of rules 7.2, 7.3 and 7.4 of the Constitution. These rules read as follows:

“7.1 A Special General Meeting may be called by the National Executive Committee, or the membership through the Joint Branch Committee provided that at least half of the individual Branch Committees have obtained an approval by a simple majority in their constituencies for such a meeting to be called.

7.2 In calling such a meeting, the Secretary –General shall give at least ten days’ notice in writing to all members. Such notice shall contain items on the Agenda, the date, time and venue of the meeting.

7.3 No other issues, other than those on the Agenda shall be raised or discussed at a Special General Meeting.”

(Underlining added)

(Record pages 130-131)

15.1 The requirements of article 7.2 of the constitution are also mandatory. The requirement that the Special General Meeting should be called by the Secretary-General, in writing, was not complied with.

As aforementioned, the meeting of 15th February 2014 was called by Mr Joseph Sikhosana by letter-annexure C. Mr Joseph Sikhosana is not the Secretary General of the union. Mr Sikhosana had no mandate therefore to call a Special General Meeting. This breach of the constitution also renders the meeting irregular and any resolution that was taken at that meeting is thereby rendered irregular.

15.2 In terms of article 7.2 of the constitution, it is compulsory that all the members of the union be given at least ten (10) days notice in writing of the meeting. The Respondents as well as Mr Joseph Skhosana have failed to satisfy the Court that they have complied with this requirement. In order to defend their appointment into the office of Interim National Executive Committee the Respondents had to demonstrate that they were appointed in a properly constituted meeting.

15.3 The notice in terms of which Mr Skhosana called the meeting is undated. Mr Skhosana also failed to state in his confirmatory affidavit the date he served the notice (annexure C) to those branch committees which he managed to contact and invite to the meeting.

The fact that Mr Joseph Skhosana filed a confirmatory affidavit in support of the answering affidavit shows that he was given an opportunity to respond to the allegations made in the founding affidavit. There is no evidence before Court that the ten (10) days' notice was complied with. Mr Skhosana did not address this matter at all in his affidavit, yet he had a duty and an opportunity to do so, in order to defend his conduct-preceding and during the meeting.

15.4 The onus is on Mr Skhosana to show that the manner he called the meeting of the 15th February 2014 was legally as well as constitutionally compliant. This principle is clearly illustrated in the following statement of law:

“Burden of Proof.

The most prominent Canon of evidence is, that the point in issue is to be proved by the party who asserts the affirmative, .The burden of proof lies on the person who has to support his case by proof of a fact which is peculiarly within his own knowledge, or which he is supposed to be cognizant.”

AGGS W.H. WHARTON'S LAW LEXICON, 11th edition
1911 (STEVENS AND SONS) (ISBN not available) at
page 135.

Mr Skhosana has failed to discharge that onus.

15.5 There is a further requirement in article 7.2 of the constitution, namely that all the union members should be notified regarding the agenda for the meeting. The agenda that was drafted by Mr Joseph Skhosana appears clearly in annexure C, (which has been reproduced in paragraph 12).

15.5.1 There is no indication in annexure C that disciplinary action would be taken against the National Executive Committee (the 1st to 14 Applicants) at the meeting and which may include suspension of the Applicants from office.

15.5.2 There is further no indication in annexure C that an Interim Executive Committee would be appointed or elected to replace the 1st to 14th Applicants.

15.6 The meeting of the 15th February 2014 contravened section 7.2 as read with 7.3 of the constitution in that disciplinary action against the National Executive Committee was discussed and implemented at that meeting yet it was not an item in the agenda.

15.7 The appointment or election of an Interim Executive Committee was also not on the agenda. Consequently, the suspension of the National Executive Committee as well as the elevation of the Respondents to Interim Executive Committee were irregular proceedings and should be set aside.

15.8 The elevation of the Respondents into the position of Interim National Executive Committee is a result of a meeting that was conducted irregularly, by a person who lacked authority to convene that meeting or direct its proceedings. There is undisputed evidence before Court that at the meeting of the 15th February 2014 Mr Skhosana became the electoral officer. Mr Skhosana directed the programme at the meeting which culminated in the removal of the National Executive Committee and the appointment of the Respondents into an Interim National Executive Committee.

15.9 Another irregularity in the meeting is that the Applicants were denied a chance to defend themselves before a decision was taken to remove them from office.

The purpose of a notice is to warn the union members in advance concerning items on the agenda that will be tabled at their meeting. Failure to observe the requirements of the constitution was a fundamental irregularity that vitiated the legality of the meeting.

15.10 The *Audi alteram partem* rule was not followed at the meeting of the 15th February 2014. This rule, which should by now be celebrated worldwide, provides as follows:

15.10.1 “***Audi alteram partem***, *hear the other side; a maxim of universal application in the administration of justice, according to which a man is entitled to have an opportunity of being heard before he is condemned in his person or property.*

BELL W H S: SOUTH AFRICAN LEGAL DICTIONARY, 2nd edition, 1925 (Juta) (ISBN not available) at pages 53-54.

15.10.2 “***Audi alteram partem***. (*hear the other side- i.e. no man should be condemned unheard.*)”

AGGS W H: WHARTON’S LAW LEXICON, (Supra) at page 89.

15.10.3 In the matter of NKOSINGIPHILE SIMELANE VS SPECTRUM PTY LTD t/a Master Hardware SZIC 681/2006 (unreported) at page 11 the Industrial Court explained the application of the Audi rule(to which we agree) as follows:

“The audi principle is but one facet of the general requirement of natural justice that a person must be treated fairly. Since the Industrial Court has an equitable jurisdiction which requires it to promote fairness and equity in labour relations, the court is required to apply the rules of natural justice, including audi alteram partem rule. See Section 8(4) of the Industrial Relations Act 2000 (as amended), read together with Section 4(1) (b).

However one characterizes the rule, it is a fundamental requirement of fair labour practice that a person who may be adversely affected by a decision should have an opportunity to make representations on his own behalf.”

15.11 According to annexure C the meeting was scheduled to proceed at a venue known as Caritas.

The President of the Interim Executive Committee, who is also the 1st Respondent, has denied that the meeting of the 15th February 2014 was held at Caritas.

15.11.1 In paragraph 11 of his answering affidavit the 1st Respondent stated as follows;

“Ad Paragraphs 25 and 26.

“Save to deny that the meeting was held at Caritas, the contents hereof are noted”.

(Underlining added)

(Record page 65)

15.11.2 The 1st Respondent was responding to an allegation contained in paragraph 26 of the founding affidavit which reads as follows:

“It transpired through our Communication with the various Branch Committees of SMAWU (the union) that a meeting was held on the 15th February 2014 at CARITAS ...”

(Underlining added)

(Record page 15)

- 15.11.3 The 1st Respondent's denial means that the meeting of the 15th February 2014 did not take place at Caritas, contrary to what was stated in the notice (annexure C). Instead the meeting took place at a secret venue. The 1st Respondent deliberately withheld (in his affidavit) the name of the venue where the meeting was held.
- 15.11.4 The 1st Respondent has annexed to his answering affidavit- minutes of the meeting of the 15th February 2014. The minutes are marked annexure IC3. The minutes are signed by three (3) signatories whose names and positions have not been disclosed. According to the minutes, the meeting of 15th February 2014 took place at venue called Bosco Study Centre.
- 15.11.5 The evidence of the 1st Respondent clearly indicates that the venue of the meeting was changed from Caritas. There is no notice that

was circulated to Branch Committees to notify them about the change.

The conclusion is inescapable that Mr Joseph Skhosana, and the Respondents wanted the venue of their meeting to remain secret. It is only selected Branch Committee representatives that were informed of- Bosco Study Centre as the correct venue for the meeting. The remaining Branch Committees were misled by annexure C.

15.11.6 The conduct of Mr Joseph Skhosana was clearly in breach of clause 7.2 of the Constitution.

Mr Skhosana failed to give notice to the Branch Committees in writing of venue for the meeting. This breach of constitution renders the meeting unlawful.

15.12 The manner the meeting of the 15th February 2014 was convened and conducted contravened both the common law and the constitution of the union. All the resolutions that were

taken therein are a product of an irregular and illegal meeting and should accordingly be set aside.

15.13 The Respondents together with Mr Skhosana must have realised that their conduct (in calling the meeting of the 15th February 2014), as well as their motives were unlawful. Mr Skhosana was not acting alone in this plot. He acted in concert with the Respondents. According to the minutes (annexure IC3) it is the 1st Respondent who chaired the meeting and the 4th Respondent was appointed Secretary. The 1st Respondent allowed the meeting to proceed despite the glaring irregularities in the manner it was organized, as aforementioned.

15.14 Mr Skhosana and the Respondents must have realised further that they would face difficulty if they were to try and suspend the National Executive Committee in a properly constituted meeting – hence they convened a clandestine meeting.

The conduct of Mr Skhosana acting in concert with the Respondents was unfair, unlawful and devoid of honest intentions. The Respondents deserve to be mulcted in costs for their conduct.

15.15 The Respondents are not without remedy, provided they have a genuine grievance, against the National Executive Committee, with evidence to support it. The constitution has provided lawful means of taking disciplinary action against any member of the National Executive Committee, subject to the proviso aforementioned. There is no office bearer in the union who is above the law. The conduct of the Respondents therefore of taking irregular steps in suspending the National Executive Committee is unjustifiable and deserve the Court's censure.

16. The Court has noted that though there are five (5) Respondents cited in this application only two (2) of them actually filed affidavits to oppose the matter. Mr Njabulo Dlamini (1st Respondent) filed the answering affidavit. Mr Musa Mncina (5th Respondent) filed a confirmatory affidavit. The other confirmatory affidavits were filed by persons who are not parties to the legal suit, they filed merely as witnesses. The Court will therefore focus on the 1st and 5th Respondents as the parties to the legal suit who opposed the

application. The general rule is that costs follow the event. The general rule should apply in this case.

17. After the parties had argued this matter, three (3) other urgent applications were brought before Court between the same parties, arising from the power struggle that existed between the suspended National Executive Committee and the Interim National Executive Committee. The Court issued orders in relation to the first two (2) applications. The Court refused to entertain the third application on the basis that it involves the same issues of law and fact as those that the Court has to determine in this application. A lot of the Court's time was spent on the intervening applications which eventually delayed finalisation of this matter. When Counsel is seized with instruction from client, Counsel has a duty to give advice and guidance which will assist the client in resolving the dispute in a cheap and speedy manner as opposed to going to Court. The intervening urgent applications could have been avoided if Counsel from both sides were equally committed in applying logic, common sense and maturity. The Applicants incurred legal costs in prosecuting a matter which should have been settled.

A reading of the constitution, with proper guidance, should have revealed to the Respondents the numerous errors which they committed in relation to the meeting of the 15th February 2014. It is fair and proper that the Applicants be awarded costs.

18. Wherefore the Court orders as follows:

18.1 The suspension of the National Executive Committee (1st to 14th Applicants) from office is hereby declared irregular and it is set aside.

18.2 The National Executive Committee is hereby reinstated forthwith.

18.3 The appointment of the Interim National Executive Committee (1st to 5th Respondents) is hereby set aside.

18.4 The 1st to 5th Respondents shall, forthwith, handover to the National Executive Committee all assets, equipment and facilities of the union (14th Respondents) which are in their possession or control.

18.5 The 1st and 5th Respondents shall pay the costs of suit jointly and severally, the one paying the other to be absolved.

Members agree

D. MAZIBUKO
INDUSTRIAL COURT-JUDGE

Applicants' Attorney: Mr T Mavuso
Motsa Mavuso Attorneys

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