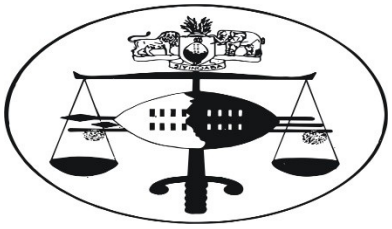

IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 323/2019(B)

In the matter between:

MENZI NKOMO Applicant

And

SWAZILAND NURSES ASSOCIATION (SNA) Respondent

Neutral citation: Menzi Nkomo v Swaziland Nurses Association (SNA) [2020] *SZIC 06* (11 February 2020)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini
Nominated Members of the Court)

Date Heard: 11 November 2019

Date Delivered: 11 February 2020

Summary: ***Member of organisation challenging organisation's failure to uphold its own constitution in holding Extra Ordinary congress and General Congress.***

Held that – A trade union can not act outside the provisions of its constitution and if it purports to do so it acts ultra vires and the act has no validity Member's application granted.

JUDGMENT

[1] The Applicant is an adult male Swazi of Manzini area and is a member of the Respondent. He is also a shop steward of the Shiselweni Regional Executive Committee of the Respondent and a Regional Organiser of the Shiselweni Region.

[2] The Respondent is an employee organisation registered as such in terms of **The Industrial Relations Act 2000 (as amended)**, having its offices from which it operates in Manzini.

[3] The Applicant being aggrieved by the Respondent allegedly disregarding its own *constitution approached the Court for an order in the following terms;*

"1. That an order be and is hereby issued dispensing with the normal forms of services, time limits and other relevant practice directives, condoning

the Applicant's non-compliance with said rules applicable in application proceedings and hearing this matter on urgent basis.

2. *Declaring that the Extra Ordinary congress meeting held by the Applicant (sic) on Saturday the 19th October 2019 as contrary to the Constitution of the Respondent for the reasons appearing in the Applicant's founding affidavit.*
3. *Setting aside the resolution made by the Respondent in there (sic) aforesaid Extra Ordinary Congress amending clause 11.5.3.2 of the Constitution as unlawful and contrary to the Constitution of the 1st Respondent.*

4. *That an order be hereby issued interdicting the 1st Respondent from holding the General Congress scheduled from 23rd to 25th October 2019 at Esibayeni Lodge pending the final determination of this application and/or postponing the meeting sine/die until the same has been finalised.*

5. *Declaring that the proposed General Congress mentioned in paragraph 4 above is unconstitutional for failure by the Respondents to allow the national nominations in terms of articles 13 of the Respondent's Constitution.*

6. *Declaring that the dismissal of the Applicant from the position of Regional Organising Secretary was unlawful, and an incident of unfair Union Practice (sic) for the reasons appearing on the Founding Affidavit.*

7. *Setting aside the decision of the Respondent removing Applicant from his position described in paragraph 6 above.*

8. *Costs of the application at attorney and own client scale.*

9. *Pending finalisation of this application rule nisi do hereby issue with immediate effect as an interim order in terms of prayers 1,2,3,4,5 and 6 above calling upon the Respondents to show cause on a date to be determined by the above Honourable Court why:*

   (1) Prayer 1,2,3,4,5 and 6 should not be granted and made final.

10. *Granting Applicant any further and/or alternative relief that this Court may deem appropriate."*

[4] On 22nd October 2019, after arguments by the parties, the Court issued a *rule nisi* interdicting the General Congress pending finalisation of the application. The *rule nisi* was to operate with immediate and interim effect. The parties

then filed full sets of pleadings and the matter was set down for argument on 4th November 2019. Arguments were eventually heard on the 11th November 2019.

[5] At the onset of the arguments, the Respondent indicated that the Applicant had not been dismissed from the position of Regional Organising Secretary. Consequently the Applicant withdrew prayers 6 and 7 of the notice of motion. The Court was, therefore left to consider whether the extra-ordinary congress held on 19th October 2019 and the General Congress that had been scheduled for 23-25 October 2019 were, constitutionally speaking, lawfully arranged.

[6] The application is brought in terms of **Section 35(2)** of **The Industrial Relations Act of 2000 (as amended)**. **Section 35 (2)** reads as follows:

"Upon application by an affected party or by the Commissioner of Labour, the Court may make an order which it deems necessary to prevent or stop a violation of any provision of the Constitution of an organisation or federation."

[7] **<u>The Extra-Ordinary Congress</u>**

The extra-ordinary congress was held on 19th October 2019 as prelude to the main congress the General Congress which was to be held on between 23-25

October 2019. The extra-ordinary congress is challenged on the basis that it was improperly convened in contravention of **clause 11.2.2** of the Respondent's constitution. Clause 11.2.2 reads as follows:

***11.2 Extra-Ordinary Congress*: -**

"*11.2.1 Shall have the same powers as the General Congress.*

11.2.2 It may be called by the ¾ of the existing SWADNU regions.

11.2.3 It may be called to fill vacant positions in the National Office Bearers (NOBs).

11.2.4 Only in exceptional cases, the Extra-Ordinary Congress may be called by ¾ regions of the Union to address matters affecting the Union at National level."

[8] The Applicant's complaint is that the contrary to **articles 11.2.2** and **11.2.4** of the Respondent's constitution the extra-ordinary congress was called by less than ¾ of the regions of the union. It is common cause that in May 2019, the leadership of the Respondent proposed that an Extra-Ordinary Congress be held for purposes of making amendments to certain clauses of its constitution. It is common cause that three regions – Hhohho, Lubombo and Shiselweni (the Applicant's region) supported the proposal. The Manzini region objected to the Congress. Applicant avers that the Shiselweni region approved the Congress with certain conditions and that, when the National leadership failed

to address those conditions, the Shiselweni region withdrew it approval of the Congress. This, according to the Applicant, meant that there were now only 2 regions supporting the Extra-Ordinary General Congress and that by proceeding to hold the Congress, the Respondent acted contrary to the provisions of **article 11.2.2** of its own constitution. The Applicant submitted that in the absence of ¾ of the existing SWADNU regions calling the Extra-Ordinary Congress, the congress held on 19th October lacked constitutional compliance and was therefore not an Extra-Ordinary Congress and any resolutions taken thereat are unenforceable.

[9] The Respondent's response herein was that there was no resolution of the Shiselweni Regional Council that withdrew the support of the Extra-Ordinary Congress; that, even if there was such a resolution taken, it would be a nullity as the Shiselweni Regional Council meeting was presided over by the Treasurer when he does not have power, in terms of the Respondent's constitution to do so. In submissions the Respondent also directed the Court to a letter written by the Nhlangano Health Centre Branch in which the Branch Secretary "*disputes the contents of a correspondent* (sic) *written to the national leadership by the Shiselweni Regional Executive Committee. The contents lack facts, are non-original and do not present the actual resolution of the Regional Council meeting which we had on the 16th October 2019."*

In submissions the Respondent's attorney pointed out that the letter was not challenged by the Applicant in its reply and that it puts the legitimacy of the letter of withdrawal by the Shiselweni Region into question. It was further argued that the withdrawal of the support by the Shiselweni Region is not provided for in the Respondent's constitution.

[10] In response, the Applicant submitted that the said author of the letter had denied writing the letter and that in any event even if it were to be said that she had written it, she represented a branch of the Shiselweni Region and not the Shiselweni Region itself. In argument the Applicant added that the author had not confirmed the letter by affidavit. It was argued that the branch Secretary does not speak for the Region and that the Court should disregard the letter on the basis that it was not even on letter head.

[11] It is common cause that the Extra-Ordinary Congress may be called by the ¾ of the existing SWADNU regions. It is also common cause that the Shiselweni Region expressed its support for the motion to convene the Extra Ordinary Congress (*albeit* conditionally) by letter dated 17th July 2019. In terms of Applicant's annexure **"MNO2"**, it appears that the Shiselweni Region first brought the withdrawal of its support for the Extra-Ordinary Congress to the Respondent's attention by letter dated 14th July 2019 after it

concluded that the Respondent was failing to meet the condition it had given. This letter was unacceptable to the Organisation because an argument was raised that the decision to withdraw the support was not a decision of the Regional General Council. In view of the rejection of this letter the Shiselweni Region then advised the organisation by letter dated 17th October 2019 that – ***"… our RGC met on 16th October 2019 and retaliated (sic) its stance in withdrawing our support for the EOC as stipulated in our letter, this then leaves two regions in support of the proposed EOC as opposed to the three (3) out of four (4) regions in accordance with article 11.2.2 of our constitution. You are then requested to halt all your plans to convene the EOC. By copy of this letter, all the union regions are thereby informed of our decision.***"

It appears to us that it is not a requirement of the Respondent that its Regions file formal written resolutions of their decisions. We say so because the Shiselweni Regions support the Extra-Ordinary Council was communicated to the Respondent by letter dated 17th July 2019. The letter was accepted by the organisation as the Region's expression of support for the Congress. The Region then withdrew its support by letter dated 14th September 2019. This withdrawal was said to be unacceptable and the letter was rejected. The Region then met and again withdrew its support and communicated to the organisation accordingly, by letter dated 17th October 2019.

It appears to us to be disingenuous for the organisation to seek a resolution when the parties have been communicating through letters and the initial support (which the organisation accepts) was in letter form. Secondly the letter/memorandum filed by the organisation as **annexure B** to its answering affidavit is sent by a branch of the Shiselweni Region and is not on letter head. The author of the memorandum did not file an affidavit confirming that the Region did not take a resolution to withdraw its support for the Congress. No explanation for the failure to file such affidavit was given.

In the circumstances we find that the Shiselweni Region withdrew its support for the Congress and that the Congress did not have the required ¾ threshold required by the constitution. It appears to us that the submission by Respondent that the constitution does not provide for the withdrawal of support is untenable. It would, in our view be extremely unreasonable to hold the view that Regions cannot change their minds and withdraw support for a particular position particularly in the current circumstances where the Shiselweni Region indicated that its support for the congress was conditional. We can therefore only come to the conclusion that the Extra-Ordinary Council was held against the dictates of the Respondent's Constitution and was therefore unlawful. All the resolutions taken at that Congress are therefore unlawful and cannot be enforceable.

[12] **<u>The General Congress</u>**

It is common cause that there has been no nomination process as envisaged by **article 13. 1.4** of the Constitution of Respondent. The article reads:

"***13.1.4 Regions shall submit nominees to the national office four (4) weeks ahead of the General Congress."***

The Applicant submitted that the Respondent is not ready for the General Congress because this nomination process has not taken place.

The Respondents submission was that a resolution was taken on 9th October 2019 in terms of which it was specifically agreed that nominations would be made at the Congress in terms of **article 13.1.5 of the constitution**. It was submitted that the Shiselweni Region was present at that meeting where the resolution was taken. In terms of **13.1.5**

"There shall be an allowance for nominations from the Congress floor, accompanied by a secondment of at least two (2) quarters of present branches/units in the congress."

[13] The Respondent's submission was that **article 13.1.5** allows for nominations to be made from the Congress floor and that therefore the Congress could be held even when **article 13.1.4** had not been complied with i.e. there had been no nomination process.

[14] The Applicant's contention was that in terms of the Constitution it was obligatory that the Regions submit the nominations in terms of **article 13.1.4;** that **article 13.1.5** was meant to be used only when the need to nominate from the floor arose at the Congress – for example where one of the nominees had to withdraw for some unforeseen reason.

[15] It is trite that in interpreting the Respondent's constitution the Court has to give plain meaning of the language therein. In **Adampol (Pty) Ltd v Administrator, Transvaal 1989(4) ALL SA 776.** It was put thus:

"According to the general rule of construction the words of a statute must be given their ordinary literal and grammatical meaning and if by doing so it is ascertained that the words are clear and unambiguous then effect should be given to the ordinary meaning unless it is apparent that such literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to part from such a literal construction e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent."

[16] **Article 13.1.4** needs no interpretation. It calls for Regions to submit nominees for elections to the national office four weeks ahead of the General

Congress. It is the meaning of **article 13.1.5** that requires interpretation particular regard being had to the fact that **article 13.1.4** states that Regions shall submit nominees to the national office four weeks ahead of the General Congress.

[17] The Court has to answer the question; *"what is the ordinary grammatic meaning of the words of article?"* If such a meaning is apparent, and if it produces no obvious absurdity the enquiry ends there.

[18] The **Free Dictionary** by **Failex** interprets 'making an allowance for someone or something to mean *"to be forgiving or accepting of someone or something due to special circumstances."*

The MacMillan Dictionary defines it as *"to accept behaviour that you would not normally accept because you know why someone' has acted that way."*

[19] It appears to us, from a reading of the nominations article in full that **article 13.1.5** would mean that the Respondent would accept the nominations from the floor of the congress due only to special circumstances. Such interpretation makes sense in that it is inconceivable that the Respondent's constitution would seek to create two means of nominating. It is more reasonable that **article 13.1.5** would entitle nominations from the floor under

special circumstances and that it is not acceptable under normal circumstances.

We therefore come to the conclusion that the Respondent breached **article 13.1.4** and that it is not entitled to hold the General Congress in circumstances where it has not complied with its own constitution.

[20] In terms of **The Industrial Relations Act 2000 (as amended)** organisations must prepare and adopt a written constitution within 3 months of formation, which is then submitted to the Commissioner of Labour for Registration. The Act sets out what must be contained in such constitutions and **Section 35(2)** entitles a member to apply to Court for an order to prevent or atop a violation of any provision of the Constitution of the organisation. The effect of this is that organisations cannot simply ignore provisions of their constitutions. They do so at the risk of challenge from members. As stated in **Lufil Packaging (Isithebe) v Commissioner for Conciliation Mediation and Arbitration, Leon Pillary N.O and National Union of Metal Workers of South Africa Labour Appeal Court of SA Case No. DA8/2018:**

'Trade Unions at common law have only those powers and capacities that are conferred on them by their constitutions. The LRA requires unions to determine in their constitutions which employees are eligible to join them and by necessary implication precludes them from admitting as members

employees who are not eligible to be admitted as member in terms of the trade unions registered constitution. If it is shown that the persons concerned are precluded by the union's constitution from becoming members, any purported admission of such employers as members is ultra vires the union constitution and invalid."

We align ourselves with the reasoning of the Court in the above matter. The Respondent can not act outside its own constitution. Any action that is taken contrary to its constitution is *ultra vires* and therefore invalid.

In the circumstances we make the following order:-

1. **The Extra-Ordinary Congress held on 19th October 2019 is hereby declared unlawful.**
2. **All resolution taken at the said Extra Ordinary Congress are hereby set aside as invalid.**
3. **The General Congress sought to be held without nomination in terms of articles 13.1.4 of the Respondents constitution is invalid and unlawful.**
4. **There is no order as to costs.**

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. P. Msibi (Dlamini Kunene Associated)

For Respondent: Mr. S. Madzinane (Madzinane Attorneys)