

Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Case No: CIV APP FB 12/2023

Case No: (Court *a quo*): UM 138/22

In the matter between:

POLICE AND PRISONS CIVIL RIGHTS UNION (POPCRU)	1 st Appellant
POLICE & PRISONS CIVIL RIGHTS UNION NATIONAL EXECUTIVE COMMITTEE (MEC)	2 nd Appellant
JEFF DLADLA	3 rd Appellant
OUMA MOKOKONG	4 th Appellant
THULANI NTSELE	5 th Appellant
LIFE MONINI	6 th Appellant
BOITUMELO PHELEU	7 th Appellant
VUSI TSHABALALA	8 th Appellant
BOTSHELO ISAK	9 th Appellant

NTWAGAE MOGOROSI	10 th Appellant
MOHASE ISHMAEL MAHAPELA	11 th Appellant
LESLEY SWARTS	12 th Appellant
ZAMIKHAYA SKADE	13 th Appellant
and	
GAOLEPE SEOKOLO	1 st Respondent
SAHIMANYANA GIFT MABOGOLA	2 nd Respondent
KELEBOGILE LEBOTSE	3 rd Respondent
MIKE TEBOGO MOKGETHI	4 th Respondent
STEVEN MALOLO	5 th Respondent
JACKY TLHOAELE	6 th Respondent
TEBOGO STEMME MAINE	7 th Respondent
MOLEME SELEKE	8 th Respondent
LETSHOLO JOY MOGOLA	9 th Respondent
SOLOMON LEKHU	10 th Respondent
DESIREE THEBE	11 th Respondent

DANIEL SAM TSELENYANE

12th Respondent

CORAM: DJAJE AJP, REID J *et* KHAN AJ

Heard: 10 NOVEMBER 2023

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **10 MAY 2024**

ORDER

I make the following order:

- (i) The appeal is upheld.
- (ii) The order of the court *a quo* is set aside and replaced with the following:
 - "1. *This application is struck off the roll due to the lack of jurisdiction of this Court.*
 - 2. *Each party is ordered to pay its own costs*"
- (iii) Each party is ordered to pay its own costs of this appeal, which costs are to include the application for leave to appeal.

JUDGMENT

KHAN AJ

Introduction

- [1] The respondents (who were the applicants in the court *a quo*) approached this Court on 21 July 2022, seeking urgent interim interdictory relief against the appellants' in the following terms, pending the determination of Part B of the application:-
- 1.1 An order interdicting the convening of the North-West Province Congress scheduled for the 27th - 29th of July 2022;
 - 1.2 That the 6th, 7th and 8th appellants be interdicted from executing the mandate given to them by the Executive Council;
 - 1.3 The first and second appellant be ordered to reinstate the North West Provincial Executive Committee;
 - 1.4 The suspension of all office bearers be lifted;
 - 1.5 The first and second appellants be interdicted from instituting any consequence management against any office bearer in the North West Province.

- [2] This application has its genesis in the suspension of the Chairperson of the North West Provincial Executive Committee ("PEC"). The respondents only became aware of this on or about the 25th April 2022 when a conference was convened. Credentials were read and adopted at the conference. There was no objection from the members of the National Executive Committee, ("NEC") who were present. It appears that the suspension of the Chairperson occurred as far back as 4 July 2021. The respondents later heard that the NEC had scheduled the disciplinary hearing of the chairperson for the 25 April 2022, which fell within the three conference days, commencing on the 24 April 2022. The respondents argued that the aim of the appellants in scheduling the date of the disciplinary to coincide with the date of the conference, was to prevent the chairperson from participating in the conference. The chairperson was asked to address the conference on the evening of the 24 April 2022 and this was objected to by members of the NEC on the basis that the chairperson was under suspension.
- [3] On 25 April 2022, before the congress could reconvene, members of the NEC proposed that a special PEC must convene before the conference could proceed. The respondents' objected to this without the approval of the Congress. As soon as the conference reconvened, the general secretary of the NEC declared the North West Provincial Executive was being disbanded with immediate effect, the conference was dissolved and all office bearers were disbanded.

[4] Judgment was granted in favour of the respondents on 26 July 2022. The appellants now appeal against the whole judgment of Justice Gura to the Full Court of this Division. The findings of fact and rulings of law relied on by the appellants are that the court *a quo* erred in:-

- 4.1 Entertaining the respondents' application and granting the relief sought in Part A thereof pending the finalisation of Part B of the application.
- 4.2 Confirming the jurisdiction of the North West Division of the High Court, whereas, the respondents' failed to make out a case for the North West Division to be clothed with the jurisdiction to adjudicate on the complaints outlined in the respondents' founding affidavit.
- 4.3 On the pleadings which served before the court *a quo*, the material facts which were common cause between the parties, were that:-
 - 4.3.1 The first appellant is a registered trade union, with its employees/officials and members who carry out certain duties for the benefit of its members;
 - 4.3.2 The relationship between the respondents' and the appellants is governed by the Constitution of the first appellant, which is registered in terms of the

provisions of the *Labour Relations Act* 66 of 1995 as amended; and

4.3.3 The respondents' case before the court *a quo* was about the alleged failure of the appellants' compliance with the Constitution of the first appellant;

4.3.4 The court *a quo* erred in law and misdirected itself by assuming jurisdiction and entertained the respondents' application despite the court *a quo* not having jurisdiction to adjudicate the application.

4.3.5 The respondents' made no case whatsoever in the founding affidavit to clothe the court *a quo* with the necessary competency to adjudicate on the dispute raised by the applicants against the respondents.

4.3.6 The court *a quo* materially misdirected itself on the basis that had the court *a quo* considered the nature of the dispute raised by the respondents in the pleadings served before it. The court *a quo* should have found, or ought to have found, that such disputes fell within the exclusive jurisdiction of the Labour Court of South Africa and not the court *a quo*, more so when, such disputes relate to the provision, application and/or implementation of the discipline within the first appellant's Constitution.

4.3.7 The *court a quo* ought to have found that the respondents failed to make out a case which would clothe the *court a quo* with jurisdiction to adjudicate over the dispute between the appellants and the respondents as stated in the affidavits.

4.3.8 Despite the fact that the court order granted by the *court a quo* is of an interim nature and as such is ordinarily not appealable, the effect of the court order is material to the day-to-day operations of the first appellant and its constituency structures. As such the first appellant and other appellants would suffer prejudice and injustice if the interlocutory order granted by the *court a quo* remains extant.

4.3.9 The issue of jurisdiction is detached from the substance of the case and has to be decided *in limine* before the merits are considered. It is in the interest of justice that the point *in limine* of jurisdiction be adjudicated to finality before adjudication of the merits of part B of the respondents' application.

[5] In this appeal the appellants' seek an order declaring that "*the court does not have the necessary jurisdiction to hear the respondents' application, therefore it is dismissed with costs on an attorney and client scale*", further that the respondents pay the

cost of the appeal on an attorney and client scale, such costs to include the cost of the leave to appeal.

[6] The application for leave to appeal was set down for 10 November 2023. This application was opposed by the respondents. On 8 November 2023, the respondents' served a Notice to Abide, with an affidavit in which the respondents' sought an order that each party pay its own cost on the basis that:-

- 6.1 The respondents have not wasted the Courts' time and the matter may be decided in chambers without a formal hearing;
- 6.2 It is clear from the pleadings and the judgement that jurisdiction was not a controversy which was alive when the urgent application was heard;
- 6.3 The Appellants' failed to raise a point *in limine* on jurisdiction when they filed their answering affidavit;
- 6.4 A point of law can be raised from the bar and the appellants' failed to raise the issue of jurisdiction from the bar when the urgent application was heard;
- 6.5 It cannot be correct to contend that the court *a quo* erred when counsel failed to assist the court in narrowing down the issues for determination. The court relies on counsel, on applicable law and the issues of determination, although

it may in some instances raise certain issues *mero motu*,(sic) the court cannot be faulted for having relied on pleadings and submissions from counsel;

- 6.6 The jurisdictional issue was raised for the first time on appeal. Even after lodging the appeal, the appellants' continued to participate in Part B of the urgent application (the review) by filing the record. They thus continued to submit themselves to the jurisdiction of the court;
- 6.7 The urgent application was granted in favour of the respondents' with a costs order. Should the court find in favour of the appellants, they have approached the appeal court with unclean hands, whereas an appeal procedure is available to the appellants it imposes a strain to the resources of the court as the bench is now constituted of three judges who could have been presiding on other matters. The applicants could have availed themselves with a rule 42(1)(b) read with (c) application which could have been presided over by a single judge, they chose an appeal process which is costly and straining on the resources of the court.
- 6.8 A jurisdictional ruling in favour of the appellants will not be the end of the matter as the respondents will continue to pursue relief in the Labour Court and they are already financially strained through the litigation in this court;

6.9 The merits finding by Justice Gura cannot be faulted. There was merit in the application and the judgment on merits and the respondents must not be burdened with an adverse cost order when they brought the application in good faith;

6.10 Should the court rule in favour of the appellants, the respondents take no issue with the reversal of the cost order granted in favour of the appellants in the urgent application.

6.11 The court should accordingly order each party to pay its own costs.

[7] On 9 November 2023, the respondents withdrew its Notice to Oppose. This Court notes that the court *a quo* did not order costs in favour of the respondents as alleged by the appellant. The cost order of the court *a quo*, was that the, “*costs of this application shall be costs in Part B application*”. It is accordingly incorrect that the court *a quo* awarded costs in favour of the respondents, such costs were only to be determined in Part B. The offer by the respondents to abandon such costs is accordingly untenable.

[8] Having regard to the heads of argument and the affidavit in support of the Notice to abide, it is common cause between the parties that the court *a quo* did not have the jurisdiction to grant the urgent interim interdict, this is evidenced by section 157 (1)

of the *Labour Relations Act* 66 of 1995 (“LRA”)¹ read with section 158 (1)(e)². The respondents’ pleaded case was based on an alleged breach of the Constitution of the first appellant.

- [9] In *Motor Industry Staff Association v Macun NO & Others*³ the SCA, referring to the Constitutional Court in *Gcaba*⁴, considered the tensions that might arise in relation to the interpretation of s 157 of the LRA and related provisions. Van der Westhuizen J noted the principle that

“Legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of Constitutional rights’ Alongside that, however, is the consideration that ‘the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law’ (para 56). The following paragraph in Gcaba is significant:

‘... Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution. Different kinds of relationships between citizens and the State and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed

¹ S157(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court

² 158(1)(e), the Labour Court may 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); or (ii) section 26(5)(b);

³ (20819/2014) [2015] ZASCA 190; (2016) 37 ILJ 625 (SCA); [2016] 3 BLLR 284 (SCA); 2016 (5) SA 76 (SCA) (30 November 2015), at paragraphs 5, 9, 20, 56

⁴ *Gcaba v Minister for Safety and Security and Others* (CCT64/08) [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) ; (2010) 31 ILJ 296 (CC) ; [2009] 12 BLLR 1145 (CC) (7 October 2009)

legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in Chirwa by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees.' (footnotes omitted.)

The approach to be followed, in summary, is as follows: The LRA is legislation envisaged by the Constitution. In construing the provisions of the LRA the two objectives referred to above must be kept in mind. Section 157(2) of the LRA was enacted to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the high court. The Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA. Forum shopping is to be discouraged. When the Constitution prescribes legislation in promotion of specific constitutional values and objectives then, in general terms, that legislation is the point of entry rather than the Constitutional provision itself."

[10] In *South African Municipal Workers' Union and Others v Mokgatla and Others*⁵, the SCA held that in disputes based on non-adherence to disciplinary procedures provided in the constitution of a trade union, s158(1)(e) of the Labour Relations Act 66 of 1995, the matter is within the exclusive jurisdiction of the Labour Court.

[11] Having regard to the afore stated, it is apparent that the North West Division of the High Court did not have the necessary jurisdiction to hear this matter. The court *a quo*, the appellants and the respondents all laboured under the same misapprehension when the application was instituted and judgment was handed down.

Cost

[12] The only issue that remains for determination by this Court, is whether the respondents should pay the costs on an attorney and own client scale as requested by the appellants, including the costs of the appeal or whether each party should pay its own costs as requested by the respondents. It is trite that in awarding costs the court of first instance exercises a judicial discretion and a court of appeal will not readily interfere with the exercise of that

⁵ (20810/2014) [2016] ZASCA 24; [2016] 2 All SA 451 (SCA); [2016] 6 BLLR 560 (SCA); (2016) 37 ILJ 1317 (SCA); 2016 (5) SA 89 (SCA) (18 March 2016)

discretion.⁶ The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The court of appeal cannot interfere merely on the ground that it would itself have made a different order.⁷

- [13] In *Hotz and Others v University of Cape Town*,⁸ the Constitutional Court, considering the discretion of the High Court on the issue of cost, stated:

"A cautious approach is, therefore, required. A court of Appeal may have a different view on whether the cost award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court's exercise of discretion."

- [14] As indicated, the court *a quo* did not make an order as to costs but deferred the issue of costs to the court hearing the Application in Part B. Given that this Court has no jurisdiction to hear the matter, no costs will be recoverable by either party in Part B and the matter will have to commence *de novo* in the Labour Court.

⁶ Attorney General Eastern Cape v Bloem 1988 (4) SA 645 A at 670 D-E

⁷ Protea Assurance Co Ltd v Matinise 1978 (1) SA 963 (A), at p 976 H; Minister of Prisons and Another v Jongilanga 1985 (3) SA 117 (A), at p 124 B and the authorities cited in these two cases.

⁸ 2018(1) SA 369 (CC) at para 28

- [15] The appellants seek costs on the basis that the court *a quo* was not clothed with jurisdiction to hear this matter, the respondents argue that it is clear from the affidavits and the judgment that jurisdiction was not a controversy which was alive when the urgent application was heard and that the appellants failed to raise the point *in limine* on jurisdiction when they filed their answering affidavit.
- [16] The respondents' argue that each party should pay its own costs, as the appellants ought to have brought an application for rescission of the order in terms of Uniform Rule 42(1)(b)⁹ read with (c)¹⁰. This subsection is not so much intended for the courts to reconsider or to change the substance of its judgment or order but limits the court's powers specifically to the exclusion of the ambiguity, error, or omission¹¹.
- [17] In *Tralex Limited v Maloney and Another*¹² an application premised on the fact that the court granting the initial order did not have jurisdiction to do so. The SCA held that a rescission application was unnecessary because the court that granted the initial order lacked jurisdiction and that the initial order was, therefore, a nullity and could simply be ignored. At paragraphs

⁹ Rule 42(1)(b) *a court may on its own initiative or on application by the parties, rescind or vary an order or judgment in which there is an ambiguity, error, or omission.*

¹⁰ Rule 42(1)(c) *an order of judgement granted as a result of a mistake common to the parties*

¹¹ *Victor and Another v Wonderhoek Farms (Pty) Ltd and Others* (5049/2014) [2022] ZAFSHC 153 (10 June 2022).

¹² (823/2015) [2016] ZASCA 128 (27 September 2016)

11 to 13 the court referred to *Campbell v Botha*, Streicher JA quoted with approval the following passage by Innes CJ in *Lewis & Marks v Middel* 1904 TS 291 at 303:

"[T]he authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2. 4. 14, and 66; 49. 8. 1 and 3. . . .

Voet 49:8:3 says:

'But by the customs of today such over stressful and pettifogging discussion on fine points of law as to whether a decision is ipso jure void, or holds good by strict law and must be set aside through the remedy of an appeal, has been as far as possible abolished. The ruling has rather prevailed that decisions are never annulled under cover of nullity without appealing. There are exceptions when the nullity arises from a lack of jurisdiction, or of summons or of an attorney's mandate.' (My emphasis.)

This was again emphasised in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others*, when Ponnar JA said, 'As long ago as 1883 Connor CJ stated in *Willis v Cauvin* at 98 – 99: "The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null. . . ."

Willis v Cauvin was cited with approval in *Lewis & Marks v Middel* 1904 TS 291; and *Sliom v Wallach's Printing & Publishing Co, Ltd* 1925 TPD 650. In the former, Mason J (with whom Innes CJ and Bristowe J concurred) held at 303:

"It was maintained that the only remedy was to appeal against the decision of the Land Commission; but we think that the authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2, 4, 14; and 66; 49, 8, 1, and 3; Groenewegen, ad Cod. 2; 41; 7, 54; Willis v Cauvin, 4 N.L.R. 98; Rex v Stockwell, [1903] T.S. 177; Barnett & Co. v Burmester & Co., [1903] T.H. 30).

(footnotes omitted)"

- [18] The Constitutional Court in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute*,¹³ affirmed this approach:

'In The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others 2012 (3) SA 325 (SCA) the Supreme Court of Appeal, reaffirming a line of cases more than a century old, held that judicial decisions issued without jurisdiction or without the citation of a necessary party are nullities that a later court may refuse to enforce (without the need for a formal setting-aside by a court of equal standing). This seems paradoxical but is not. The court, as the fount of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help.'

¹³ [2014] ZACC 6; 2014 (3) SA 481 (CC).

and further at paragraph 16:

"I incline to the view that if a judgment or order has been granted by a court that lacks jurisdiction, such order or judgment is a nullity and it is not required to be set aside. However, I agree with the view expressed in Erasmus Superior Court Practice, that if the parties do not agree as to the status of the impugned judgment or order, it should be rescinded."

[19] The argument that the Appellants should pay the costs as they acted in terms of the Court Order by filing the record is unsustainable, the Respondent in opposing the application for leave to appeal as far back as 12 August 2022, acted in a similar fashion. It is in any event trite that orders of any Court should be obeyed unless and until overturned by a Court of higher jurisdiction, regardless of the parties' view of their correctness or legality.¹⁴ An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong¹⁵.

[20] Having regard to the aforesaid it is apparent that the judgement of the court *a quo*, is a nullity that a later court may refuse to enforce without the need for a formal setting aside of such order. The parties should have come together and agreed on setting the judgement aside. Neither the appellants nor the respondents,

¹⁴ Kotze v Kotze 1953 (2) SA 184 (C) at 187F; Culverwell v Beira 1992 (4) SA 490 (W) at 494 A-E; Bezuidenhout v Patensie Sitrus Beherend Bpk 2001 (2) SA 224 (E) at 228f to 230;

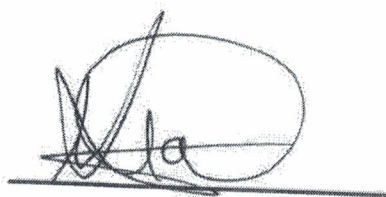
¹⁵ Culverwell v Beira 1992 (4) SA 490 (W) at 494A - C

objected to the lack of jurisdiction of the Court *a quo*, they failed to bring this to the attention of the Court and then compounded such error by filing and opposing an appeal in circumstances where the judgement was a nullity. This in itself is sufficient reason for mulcting both the Appellants and the Respondents with costs.

Order

[21] In the result, the following order is made:

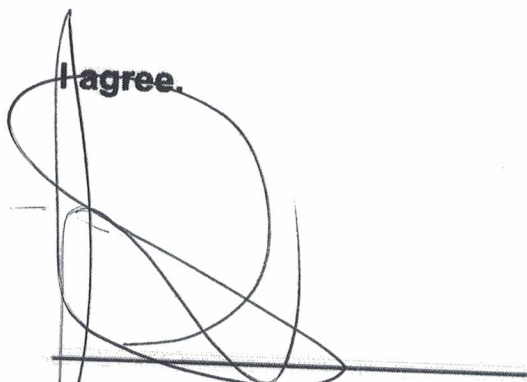
- i) The appeal is upheld,
- ii) The order of the court *a quo* is set aside and replaced with the following:
 - "1. This application is struck off the roll due to the lack of jurisdiction of this Court.*
 - 2. Each party is ordered to pay its own costs"*
- iii) Each party is ordered to pay its own costs of this appeal, which costs are to include the application for leave to appeal.



J L KHAN

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION
MAHIKENG**

I agree.



JT DJAJE

**ACTING JUDGE PRESIDENT
NORTH WEST DIVISION
HIGH COURT OF SOUTH AFRICA
MAHIKENG**

I agree.


FMM REID

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION
MAHIKENG**

Appearances:

For the appellants:	Mr S Mabaso
Instructed by:	S Mabaso Inc Attorneys
For the respondents:	Adv Maropeng Mpya
Instructed by:	Kgomo Attorneys Inc.