THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2648 / 18

In the matter between:

CALGAN LOUNGE (PTY) LTD	**Applicant**
and	
NATIONAL UNION OF FURNITURE AND ALLIED WORKERS UNION OF SOUTH AFRICA (NUFAWSA)	**First Respondent**
INDIVIDUAL RESPONDENTS LISTED IN ANNEXURE "A"	**Second to Further Respondents**
ROY MASHALA	**Third Respondent**
MASHUDU MATSHEVHA	**Fourth Respondent**
ECONOMIC FREEDOM FIGHTERS	**Fifth Respondent**

Heard: **20 September 2018**

Delivered: **9 October 2018**

Summary: Strike – complete failure to comply with section 64 of the LRA – strike persisting after interim order granted – strike remained unprotected – *rule nisi* confirmed

Strike – involvement of political party in the instigating and driving of strike – political party has no *locus standi* in the workplace – inappropriate for political party to become involved in workplace issues especially where the workplace has recognized union – conduct of political party unacceptable

Costs – conduct of respondents without any cause or justification – conduct also unlawful – costs order justified

Interdict – final order – principles considered – clear right shown and other requirements satisfied – interim order confirmed with costs

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter arose from an urgent application brought by the applicant on 6 August 2018 to interdict strike action embarked upon and/or instigated by the respondents, which application was brought in terms of Section 68 of the LRA.[1] The application came before me on 7 August 2018. Although the respondents did not file any opposing affidavits, a large number of the individual respondents attended at Court, together with the third and fourth respondents.

[2] In the hearing on 7 August 2018, the third and fourth respondents each asked to address the court, and I afforded them the opportunity to do so. In addressing me, it became apparent that the third and fourth respondents, on behalf of the fifth respondent, were driving the strike action of the individual second to further respondents at the applicant, and had made no attempt to ensure compliance with the LRA. I was in fact informed that no matter what this court may order, the strike action would continue until the applicant had acceded to all demands. I explained to the third and fourth respondents, with the individual respondents present in court, that a failure to comply with an

[1] Labour Relations Act 66 of 1995.

order of this court would constitute contempt of court and could lead to severe penalties.

[3] Having regard to the submissions made in Court, and considering what was contained in the applicant's application, I was satisfied that the applicant had made out a proper case for interim relief, condoned any non-compliance with Section 68(2) of the LRA, and issued a *Rule Nisi* with a return date of 20 September 2018, calling on the respondents to show cause why the following final order should not be granted:

> '3.1 The ongoing strike action, which the Second Respondents are currently embarking on, and fully described in the affidavit annexed to the notice of motion, is declared to constitute an unprotected strike which is not in compliance with the relevant provisions of section 64 of the Labour Relations Act 66 of 1995;
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> 3.2 The Second, Third and Fourth Respondents are interdicted from blocking the entrance and egress of the Applicant's premises situated at 10 Martin Street, Selby, Johannesburg, continuing with, participating in, instigating or promoting the unlawful and unprotected go-slow / strike action;
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> 3.3 The Second, Third and Fourth Respondents are interdicted and restrained from acting in an unlawful manner whilst participating in the unlawful strike;
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> 3.4 The Second, Third and Fourth Respondents are interdicted and restrained from unlawfully interfering with or obstructing the conduct of the business of the Applicant;
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> 3.5 The Second, Third and Fourth Respondents are interdicted and restrained from blockading or obstructing the entrances to the Applicant's premises and hindering the entrance and exit of vehicles from the Applicant's premises;
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> 3.6 The Second, Third and Fourth Respondents are interdicted and restrained from inciting the Individual Respondents and other employees

and other individuals from participating in the unprotected strike action or any other unlawful conduct;

3.7 The Third, Fourth and Fifth Respondents are interdicted from unlawfully interfering with the employment relationship between the Applicant and the Second to Further Respondents and conducting any unlawful activities outside the premises of the Applicant;

4. The Respondents shall pay the costs hereof, jointly and severally, the one paying the other to be absolved.'

[4] I also explained to the respondents that they were entitled to anticipate the *Rule Nisi* should they wish to do, and explained what they needed to do if they wished to oppose the application on the return date. I urged the respondents to take proper legal advice.

[5] The matter came before me again on the return date on 20 September 2018. A number of the respondents again attended at court, and this time, the respondents were represented by Mr Stephen Tawana, an attorney. But once again, no answering affidavit was filed by the respondents. Mr Tawana indicated that the respondents would oppose the matter without filing an answering affidavit.

[6] The applicant sought to introduce a supplementary affidavit in the application, in order to give particulars of further conduct of the respondents after I granted the *Rule Nisi*. Mr Tawana objected to the introduction of the supplementary affidavit, and in the interest of finally resolving the matter, advocate Snider, representing the applicant, indicated that the applicant withdraws the supplementary affidavit, and would move for a final order based only on the application as filed. I shall therefore have no regard to the supplementary affidavit in deciding this matter.

[7] The applicant sought confirmation of the entire *Rule Nisi*. The respondents, in a roundabout way as will be discussed hereunder, seemed to suggest that the *Rule Nisi* be discharged. Since the applicant was seeking final relief, the applicant was required to satisfy three essential requirements, being: (a) a

clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[2]

[8] Having considered all the pleadings filed, and after hearing argument by the parties, I made the following order on 20 September 2018:

> '1. The rule nisi dated 7 August 2018 is confirmed in its entirety.
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> 2. The Respondents shall pay the costs of the Applicant's appearance on 20 September 2018.
>
> 3. All costs ordered in terms of this order and the rule nisi of 7 August 2018 shall be paid by the Respondents jointly and severally, the one paying the other to be absolved.
>
> 4. Written reasons for this order will be handed down on 9 October 2018.'

[9] This judgment now constitutes the written reasons referred to in paragraph 4 of my order, *supra*.

Background facts

[10] For the sake of convenience in this judgment, I will refer to the second to further respondents as 'the employees', the third respondent as 'Mashala', the fourth respondent as 'Matshevha' and the fifth respondent as the 'EFF'.

[11] The applicant conducts the business as a manufacturer of furniture, employing some 604 employees. Its customers are furniture retailers.

[12] On 28 June 2018, representatives from the EFF arrived at the applicant's premises, without any prior indication. It held a meeting with several of the employees during lunch time, in the street outside the applicant's premises. This meeting was clearly the catalyst for a letter from the EFF which was then sent the following day, 29 June 2018, to the applicant. The letter, written on an

[2] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) at para 2.

EFF letterhead and *inter alia* signed by Matshevha, recorded that the EFF had been 'mandated' by the employees to intervene and that a memorandum containing a 'barrage' of demands and grievances would be presented to the applicant on 3 July 2018.

[13] In response, the applicant sought to rather address this issue directly with all its employees, placing a notice on the company notice boards on 2 July 2018 urging employees to follow the prescribed procures and approach the relevant institutions established by the LRA, should they have difficulties.

[14] The EFF representatives then arrived at the applicant's premises on 3 July 2018, and when the employees broke for tea at 10h00, they gathered with the EFF in the street outside the premises, and only returned to work at 12h54, despite tea ending at 10h20. In the course of this meeting, the employees were addressed over a loudhailer by *inter alia* Mashala. At the conclusion of this meeting, a memorandum was presented on to the CEO of the applicant, Cecil Kegan ('Kegan').

[15] The memorandum itself was again typed on an EFF letterhead and clearly prepared well beforehand, encompassing some nine typed pages. In the memorandum, the applicant was accused of exploiting and victimizing the employees, and subjecting the employees to 'appalling and unethical' working conditions. Much of the language used in the memorandum was inflammatory, and contained a plethora of the kind of political rhetoric conveyed by the EFF in the public sphere on a daily basis. However, and in general terms, it is stated that the EFF would 'unashamedly' take up the plight of the employees who was allegedly suffering an injustice in the workplace at the hands of the applicant.

[16] I interpose to mention, at this stage, that the applicant's workplace is in fact organized, with the first respondent being the recognized and majority representative trade union in the applicant, and with whom the applicant had an established collective bargaining relationship. In the memorandum, the EFF accuses the first respondent of collaborating with the applicant to advance the interests of the applicant, to the detriment of the workers that it is supposed to protect. It was further said that the first respondent was forced on the employees in contravention of section 23 of the LRA.

[17] What is also contained in the memorandum is a complaint about the applicant's head of human resources, one Don Williams, who it is said exploits his powers to marginalize employees and to dismiss employees without cause, referring to a recent example where 30 employees were dismissed. It is said that the applicant does not comply with safety standards and the 'National Occupational Safety Act'[3]. There is an accusation of female employees being required to exchange sex for jobs. Further individual complaints/demands include the staff not having a canteen, labour brokers being banned, unfair deductions being made from employees' salaries, employees being forced to make up for lost production when it was not their fault, and a plethora of other issues. The LRA is called a 'flawed regulation'.

[18] The memorandum then records a number of actual demands, including an issue resolving the wage gap / living wage and equal pay for equal work, permanent positions, 'discontinuation' of the relationship with the first respondent, compliance with the BCEA, reimbursement of money deducted from employees' salaries, reinstatement of employees that had been dismissed, development of skills programs, and terminating exploitative and unjust policies.

[19] The applicant is then given seven days by the EFF to comply, with the following being recorded as a concluding statement in the memorandum:

> 'However, the EFF will not take kind, celebrate nor welcome the defiance of this memorandum which will result in intensifying on the next P.O.A. (mass protest action) …' (sic)

[20] The applicant instructed its attorneys to respond to this memorandum. In a letter dated 10 July 2018, it is written that the applicant undertook to investigate the serious allegations contained in the memorandum. It was however specifically stated that the EFF was not a registered trade union and lacked the necessary legal status and entitlement to engage with the applicant on workplace related issues. The attention of the EFF was also drawn to the fact that there was a majority and recognized trade union in the applicant with

[3] Presumably referring to the Occupational Health and Safety Act 85 of 1993.

whom the applicant already had a relationship and with whom workplace disputes were effectively resolved. The following is said in conclusion:

> '… any employee that believes they have genuine and unresolved concerns, are invited to take these matters up in accordance with our client's established policies and procedures, or through a trade union, or follow the established and recognised legal procedures as prescribed by the Labour Relations Act …'

[21] The EFF, undeterred by the response from the applicant's attorneys, answered on 12 July 2018. The EFF labelled the answer from the applicant's attorneys nonsensical. Some of the content of this response of the EFF is rather insulting. But it is important to highlight the following statement made:

> '… We will defend that with conviction and undeterred while in pursuit of justice for the abused, victimised and exploited employee's at Calgan. … under no circumstances shall we allow ourselves to be undetermined and dedicated upon by an individual, company or an organization that promotes and protects unethical business practices at the expense of the workers …' (sic)

The same demands as before are then also repeated in this response.

[22] In the interim, and as from 9 July 2018, the applicant started experiencing a go-slow on its manufacturing line. Also, the applicant's management started experiencing what it called 'negative responses' from the employees, which included refusing to obey instructions and claiming the EFF would protect them.

[23] On 20 July 2018 EFF escalated its action, with what it called a 'notification of intent', in which it is stated that that because of the applicant's 'defiance' of the memorandum, the EFF informs the applicant that it would be intensifying its next program of action, supported by a new mandate of the employees.

[24] In attempt to try and restore some semblance of normality, the applicant sought the assistance of the first respondent. At the request of the applicant, the first respondent's official, Bashier de Klerk ('de Klerk'), came to the

applicant's premises on 27 July 2018 to address the employees, together with the first respondent's shop stewards. He was shouted down, and forced to leave the premises at about 10h30. The employees followed de Klerk outside, and remained there until 11h20, when Mashala and Matshevha arrived. The employees were briefed by Mashala and Matshevha that they would be participating in a march organized by the EFF on 3 August 2018, and after being addressed, the employees only returned to work some time later that afternoon, and therefore for most of the day did not work.

[25] On 27 July 2018, the applicant notified the employees that their conduct on the day was unlawful and that the no-work-no-pay principle would be applied. On 31 July 2018, the applicant wrote to the chief whip of the EFF, Mr Floyd Shivambu, requesting his urgent intervention, but no response or intervention was forthcoming.

[26] In the founding affidavit, the applicant has set out an unchallenged case of how this unlawful conduct was causing it prejudice, which included an inability to fill already scarce orders, and even having to implement short time for all the employees on 1 August 2018.

[27] On 1 August 2018, the employees downed tools completely, and proceeded to protest by singing and dancing inside the premises. The applicant's COO, Larry Bass ('Bass') attempted to address them, but this was fruitless, and Bass was instead met with further demands that Ryan (one of the managers accused of being a sex pest) must go, the union (first respondent) must go, and a monthly meeting must be held with employees to address their issues. The work stoppage persisted throughout the day of 1 August 2018, with a number of instances of damage to company property and intimidation occurring. Later on that day, the employees went into the street to continue their protest there, with EFF representatives present.

[28] On 3 August 2018, the protest march called by the EFF then happed, with the employees participating. It was overheard that employees were asked to have their money ready to pay over to the EFF. The employees' refusal to work persisted until the time this application was brought to Court, and continued even when it was filed.

[29] When this matter came before me on 7 August 2018, and as touched on above, Mashala and Matshevha attended in Court. Each of them asked to address the Court, but never filed any process or affidavits. I gave both of them an opportunity to each address the Court, and of concern to me was the fact that despite what was contained in the applicant's application, they indicated that no matter what, the employees would continue to refuse to resume their duties, as supported by the EFF, irrespective of what this Court may order. The argument was that they had the constitutional right to do this, no matter what the LRA may provide.

[30] When the matter came before me again on the return date on 20 September 2018, Mr Tawana indicated that the employees had been dismissed by the applicant, and that this Court should not only refuse the relief sought by the applicant, but protect the rights of the employees by immediately reinstating them and compelling the applicant to negotiate with them about their demands. As touched on above, none of this was contained in an affidavit. There was clearly no indication, even from the bar, that the employees and the EFF, Mashala and Matshevha, had any intention of resuming or causing the employees to resume their duties, and if anything, they were all resolute in persisting with their current course of action.

[31] The aforesaid constituting the relevant factual matrix, I need only further mention that the issues of urgency and compliance with the notice provisions as contemplated by Section 68(2) of the LRA had been already disposed of when the *Rule Nisi* referred to above was granted, I need not dwell on the facts relating to this any further. I will therefore turn directly to the applicant's prayer for final relief, starting with a consideration of the issue of a clear right.

The issue of a clear right

[32] There can be no doubt that the employees had embarked upon both a cessation and retardation of work.[4] They commenced this conduct / action firstly with a partial retardation of work in the form of a go-slow, as from 9 July 2018. This escalated into a complete work stoppage as from 1 August 2018,

[4] See *National Union of Mineworkers on behalf of Employees v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2104 (LAC) at paras 15 – 16.

which continued to persist until even after the *Rule Nisi* was granted, and still remained live when this matter was heard on the return date.

[33] The reason for this retardation and then total cessation of work was related to a number of demands which I shall try and categorise as simply as possible. Firstly, a number of demands included the resolution of grievances relating to alleged victimization, discrimination and sexual harassment of employees. Secondly, further demands were the refund of alleged unlawful deductions, the reinstatement of dismissed employees, the removal of a manager, the termination of the relationship with the majority union and the banning of labour brokers. A final issue raised is a compliant that the applicant was not complying with occupational health and safety and was subjecting the employees to poor working conditions. The applicant was given seven days to adhere to these demands.

[34] In section 213 of the LRA, a strike is defined as:

> '… the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee …'

What happened in this case falls squarely within the ambit of this definition.

[35] Accordingly, there can be no doubt that the employees were embarking upon strike action as contemplated by chapter IV of the LRA, which strike action persists to date.

[36] Further, there equally can be no doubt that this strike action is unprotected as contemplated by section 68 of the LRA.[5] Firstly, and immediately, none of the prescribed procedures as required by section 64 of the LRA have been

[5] Section 68(1) renders strike action that does not comply with the provisions of chapter IV of the LRA to be unprotected.

followed. There has been no referral of any of demands made to conciliation, and there has been no strike notice, thus rendering the strike unprotected.[6]

[37] When regard is had to the demands themselves, there are all the kind of demands that simply cannot legitimately form the subject matter of protected strike action. All of the demands relate to issues that are capable of being determined and/or resolved by way of adjudication or arbitration, either in terms of the LRA, or in terms of a number of other available employment statutes.[7] Also, some of the demands are simply unlawful. It is trite that to simply demand the removal of a member of management without proper cause and fair process is an unlawful demand,[8] and certainly to demand from an employer to simply in effect expel a majority recognized trade union flies in the face of the right of freedom of association and chapter III of the LRA.[9] This kind of demand relating to the first respondent can only be seen as anti-union activity which is expressly prohibited by the LRA.[10]

[38] Because the strike action is clearly unprotected, and as stated above still persists, the applicant has demonstrated a clear right to the relief sought, insofar as it concerns the work stoppage / strike itself.

[39] This then only leaves the issue of the unlawful conduct of the employees, the EFF, the employees, Mashala and Matshevha, which is part of the relief afforded to the applicant in the *Rule Nisi*. I am equally satisfied that the applicant has demonstrated a clear right to the relief sought in this regard. Where it comes to the conduct of employees when committing acts of intimidation, obstruction and blockading of premises, and damage to company

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[6] See Section 64(1)(a) and (b) of the LRA; *Putco (Pty) Limited v Transport and Allied Workers Union of South Africa (obo its members) and Another* [2015] JOL 33221 (LAC) at para 54; *SAFCEC obo members v NUM and Another* [2009] 11 BLLR 1104 (LC) at para 22.

[7] Section 65(1)(c) reads: 'No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if- … the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law …'. See also *CSS Tactical (Pty) Ltd v Security Officers Civil Rights and Allied Workers Union and Others* (2015) 36 *ILJ* 2764 (LAC) at paras 17; *Mawethu Civils (Pty) Ltd and Another v National Union of Mineworkers and Others* (2016) 37 *ILJ* 1851 (LAC) at para 19 and 21.

[8] *TSI Holdings (Pty) Ltd and Others v National Union of Metalworkers of SA and Others* (2006) 27 ILJ 1483 (LAC) at para 48.

[9] Freedom of association under the LRA specifically applies to trade unions – see section 4 of the LRA. See also the comments of the Court in *Association of Mineworkers and Construction Union and others v Royal Bafokeng Platinum Ltd and Others* (2018) 39 ILJ 2205 (LAC) at paras 24 – 26 in this regard.

[10] See section 5(2)(a) of the LRA; *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight and Dock Workers Union* (2013) 34 ILJ 335 (LAC) at para 30.

property, the situation is not controversial because this Court has made it clear that such conduct is simply not acceptable and has no place in our employment law dispensation.[11]

[40] But it is where it comes to the involvement of the EFF and its two representatives, Mashala and Matshevha, there are several issues that need to be addressed. There can be no doubt, on the evidence, that these respondents were directly involved in, if not the instigators of, all the events that followed giving rise to this matter. All the correspondence to the applicant were written on EFF letterheads, and it was made clear that it was the EFF that was championing the cause of the employees, so to speak. Fortunately, and in this case, the applicant was sufficiently prudent in actually joining these parties as respondents to the proceedings, and seeking relief against them directly.[12]

[41] The first question that must be asked is what was the EFF doing getting involved in workplace issues in the first place, especially considering that the applicant's workplace is organized with the first respondent as majority representative and recognized trade union? The simple answer has to be that the EFF has no business in doing so. It is not a registered trade union. The deliberate and specific design of the LRA is to designate the task of dealing with workplace disputes and grievances to employers' organisations, trade unions and workplace forums.[13] There is no place in this structure for the involvement of political parties. In fact, it is my view that the practicing of any form of politics, be it under the guise of protecting employee rights or other socio-economic aspirations, in the workplace, is an untenable proposition.[14] The workplace should be free of these kind of influences. This is evident from the purpose of LRA, defined in section 1 as follows:

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[11] See *National Union of Food Beverage Wine Spirits and Allied Workers and Others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits and Allied Workers and Others* (2016) 37 ILJ 476 (LC) at para 37; *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union and Others* (2012) 33 ILJ 998 (LC) at para 13; *Verulam Sawmills (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 246 (LC) at para 15.

[12] Compare to the contrary *Universal Product Network* (*supra*) at para 42.

[13] See *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) at paras 40 – 41.

[14] See the comments of Van Niekerk J in *Universal Product Network* (*supra*) at para 45.

> 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-
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> *(a)* to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996 …
>
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (d) to promote-
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> (i) orderly collective bargaining;
>
> (ii) collective bargaining at sectoral level;
>
> (iii) employee participation in decision-making in the workplace; and
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> (iv) the effective resolution of labour disputes.'

[42] What is clear from the memorandum of grievances submitted by the EFF to the applicant, is that it reads more like a political manifesto than a genuine grievance designed to resolve workplace grievances and disputes. It even takes issue with the legitimacy of the LRA as a regulatory measure. The approach adopted by the EFF is that the Constitution entitles the EFF to conduct itself as it did in this case. It is sadly mistaken in this respect. It is by now trite law that direct reliance on the Constitution is not permissible where there is a specific stature regulating the constitutional right. In this case, the rights under section 23 of the Constitution are regulated by the LRA and other related employment law statutes, and it is incumbent and prescribed that all the provisions of these statutes must be complied with in pursuit of these rights. The Constitution thus lends no support for the EFF to have become involved in this matter in the first place. As said in *SA National Defence Union v Minister of Defence and Others*[15]:

> **'**Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under s 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on s 23(5). If the legislation is wanting in its protection of the s 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the

[15] (2007) 28 ILJ 1909 (CC) at para 52. See also para 51 of the judgment.

> litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognize the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.'

[43] Trade unions must be registered under the LRA, for good reason. It ensures that such institutions fulfil the duties as prescribed by the LRA, and gives effect to its primary objectives. Registration places trade unions under a number of regulatory provisions and placed them trade under the supervision of the Registrar of Labour.[16] The penalty for non-compliance could be deregistration in the case of serious contravention.[17] It also places such institutions under the supervision of this Court.[18] By seeking to assume this role which is reserved for trade unions under the LRA, the EFF in effect bypasses all these regulatory provisions that trade unions must comply with. This can never be what the legislature had intended when seeking to regulate the rights under section 23 of the Constitution by way of the LRA. In writing for the majority in *National Union of Public Service and Allied Workers on behalf of Mani and Others v National Lotteries Board*[19], Zondo J (as he then was) held as follows:

> **'**Earlier I referred to every trade union's right in s 23(5) of the Constitution 'to engage in collective bargaining' and the fact that the LRA was enacted to give effect to the rights in s 23 of the Constitution. About collective bargaining it has been said:
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> '[B]y bargaining collectively with organized labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc should not be frustrated through interruptions of work. By bargaining collectively with management, organized labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and has to be compatible with the physical integrity and moral dignity of the individual, and also the job should be reasonably secure. This definition is not intended to be exhaustive. It is intended to indicate (and this is important for the law) that the principal interest of management in collective bargaining has always been the

[16] See part A of chapter VI of the LRA.
[17] Section 106 of the LRA. See also *National Entitled Workers Union v Ministry of Labour and Others* (2012) 33 ILJ 2585 (LAC) at paras 31 – 38.
[18] See *Motor Industry Staff Association v Macun NO and Others* (2016) 37 ILJ 625 (SCA) at para 20; *Food and Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 ILJ 2767 (LAC) at para 6; *In2Food (Pty) Ltd v Food and Allied Workers Union and Others* (2013) 34 ILJ 2589 (LC) at 2591H-I.
[19] (2014) 35 ILJ 1885 (CC) at para 142 – 143.

maintenance of industrial peace over a given area and period, and that the principal interest of labour has always been the creation and the maintenance of certain standards over a given area and period, standards of distribution of work, of rewards, and of stability of employment.'

As to what collective bargaining entails, it has also been said:
'By collective bargaining we mean those social structures whereby employers (either alone or in coalition with other employers) bargain with the representatives of their employees about terms and conditions of employment, about rules governing the working environment (eg the ratio of apprentices to skilled men) and about the procedures that should govern the relations between unions and employer. Such bargaining is called "collective" bargaining because on the workers' side the representative acts on behalf of a group of workers.'

In chapter III the LRA seeks to give effect to trade unions' and employers' constitutional right to collective bargaining …'

[44] What the EFF did in this case was to undermine orderly collective bargaining and dispute resolution, which are cornerstones of the LRA. As an employer, the applicant is entitled to expect it employees to comply with these objectives of the LRA when seeking to resolve any disputes they may have with the applicant as employer. And for the EFF to simply negate all of this based on some misguided view of what the Constitution allows it to do, is simply unacceptable, and cannot be permitted. The applicant specifically, in writing, warned the EFF that this course of action was not permitted in law, but still the EFF pressed on nonetheless. In this regards, it can be hardly better said than the following *dictum* in *Gcaba v Minister for Safety and Security and Others*[20]:

'However, another principle or policy consideration is that the Constitution recognizes the need for specificity and specialisation in a modern and complex society under the rule of law. Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognized 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 legislation for

[20] (2010) 31 ILJ 296 (CC) at para 56.

> a particular area, like equality, 84 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 emphasized in *Chirwa* by both Skweyiya J and Ngcobo J. …'

[45] If it is true that the employees lost their jobs with the applicant because of all of this, as suggested by Mr Tawana, then this can be laid squarely at the door of the EFF. It sent the employees down a path they should never have been on, and involved itself in matters that did not concern it. The EFF is not entitled to organize employees in the workplace in matters concerning the employment relationship. If it wants to do so, it must register as a trade union, and comply with the LRA.

[46] Finally, as and was evident throughout this matter, the EFF has not given up. It made this clear in its correspondence with the applicant in any event. I am satisfied that without the granting of final relief, the EFF will simply continue with its current course of action. The applicant has therefore also made out a clear right to the relief sought as against the EFF, and its two representatives, Mashala and Matshevha.

[47] In sum, the applicant has made out a proper case for final relief, where it comes to the issue of a clear right. The applicant is entitled to expect and require its employees to comply with the LRA, insofar as they may have disputes or grievances against the applicant, which the employees did not do, and have no intention of doing. The applicant is equally entitled to expect the EFF not be become involved in matters that do not concern it, and in respect of which it simply has no place in becoming involved in.

Other requirements

[48] As to the other considerations of prejudice, balance of convenience and an alternative remedy, I am also convinced that the applicant has satisfied these requirements. There can be no doubt that if the current situation is allowed to continue, persist or in any way resurrect itself, the applicant would suffer severe financial prejudice in an already difficult market place. It is difficult for the applicant to protect itself against such undue external influences, which

only compounds the prejudice. I may also add that there is a broader occurrence of prejudice, being the undermining of the dispute resolution mechanisms under the LRA, which leads to undue instability in the employment environment and the reputational prejudice associated with it. Prejudice, in my view, is thus a reality, and manifest.

[49] As opposed to this, the respondents are not left stranded if final relief is granted. All that the employees always needed to do is simply to comply with the dispute resolution mechanisms prescribed by the LRA to have their disputes and grievances properly and lawfully address, and there is no reason why this still cannot be the case. If the employees were dismissed, as suggested, they have the unfair dismissal provisions under chapter VIII of the LRA available to them.

[50] Where it comes to the EFF and its functionaries, it simply should not stick in its nose where it does not belong. Nothing in this judgment can serve to in any way prejudice the legitimate functions and activities of the EFF, in the arena where it belongs.

[51] Finally, it is clear that the applicant has no alternative remedy available to stop the unlawful, unacceptable and prejudicial conduct as summarized above. Only this Court came some to its assistance, by way of the kind of application brought in this instance.

[52] The applicant has thus satisfied all of the other requirements in order to justify the granting of the final relief sought.

Costs

[53] This then only leaves the issue of costs. Advocate Snider, for the applicant, asked for an award of costs. Based on what happened in the earlier proceedings on August 2018, I already made an interim order that costs be awarded against the respondents, and the respondents had the opportunity to show cause why this should not be the case. The respondents simply did not avail themselves of this opportunity, leaving this Court with in essence no other alternative but to confirm this costs order.

[54] But the issue of costs does not end just there. Despite all that happened earlier, the respondents still came to Court without filing any affidavits, and sought relief never prayed for and which in effect once again bypasses all the dispute resolution processes prescribed by the LRA. In short, and despite all that has gone before, it is simply more of the same. There is no prospect of any kind of rehabilitation on the part of the respondents. This also justifies a costs order.

[55] I am alive to what the Constitutional Court said in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[21] where it comes to costs orders in employment law disputes. But in this case the applicant effectively engaged with the respondents in order to bring them to other insights, before launching these proceedings, which they flouted. The applicant should not be left entirely out of pocket as a result of the respondents' persistent unlawful conduct.

[56] In any event, I have a wide discretion, under section 162 of the LRA, where it comes to the issue of costs, and this is a case where I believe that a proper exercise of this discretion compels me to make a costs order against the respondents.

Order

[57] It is for all the reasons above that I made the order that I did on 20 September 2018, as follows:

1. The *rule nisi* dated 7 August 2018 is confirmed in its entirety.

2. The Respondents shall pay the costs of the Applicant's appearance on 20 September 2018.

3. All costs ordered in terms of this order and the *rule nisi* of 7 August 2018 shall be paid by the Respondents jointly and severally, the one paying the other to be absolved.

[21] (2018) 39 ILJ 523 (CC) at paras 23 – 25.

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Sean Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate A Snider
Instructed by:	Cliffe Dekker Hofmeyr Inc Attorneys
For the Respondents:	Attorney Stephen Tawana