IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA **CASE NO: 43671/12**

In the matter between:

NATIONAL AFRICAN FEDERATED CHAMBER OF COMMENCE AND INDUSTRY AND SEVEN OTHERS **Applicants**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
REVISED.
22/2/2013
DATE SIGNATURE

and

MKHIZE, VERONICA PINKY NOMASWAZI AND SEVENTY OTHERS **Respondents**

JUDGMENT

MONAMA J:

[1] The first applicant is a voluntary federal organization. Its affairs are governed by the Constitution of the National African Federal Chamber of Commerce and Industry[1] herein referred to as "the Constitution". The first applicant is a brand and is quintessentially South African.

[1] See Page 174 of the Record

[2] The remaining applicants are both the members of the National Executive Committee [2] and the National Council. Mr Sekwamo Gilbert Mosena, the fifth applicant deposed to the founding affidavit in **his personal** and official capacity as the secretary-general in the National Executive Committee.

[3] The remainder of the applicants are Lawrence Bhekinkosi Mavundla (second respondent), Sonyosi Skhosana (third applicant), Teme Letsoela (fourth applicant), Churchill Mrasi (sixth applicant), Daniel Kotze (seventh applicant) and Chuma Shweni (eighth applicant). They were all elected to National Executive Committee on 5 November 2009. They all confirm the allegations in the founding affidavit. Mavundla was the president, Skhosana was the deputy president, Mrasi was the senior vice president, Kotze and Shweni were additional members.[3]

[4] The respondents, like applicants two to eight are all members of the National Council. Mr DSD Makanda ["Makanda"] is the 27th respondent. He is the main deponent to the answering affidavit. He is also the part of the National Executive Committee.[4] They have been designated by their respective structures to represent them on the National Council.

[5] The first applicant was established in the 1960s. The purpose of its establishment and its creed are well documented in series of cases which appeared in this court.[5] I do not intend to repeat the history here.

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[2] See Pages 770 of the Record.
[3] See Page 735 of the Record.
[4] See Page 779 of the Record.
[5] See the unreported judgment of National Federal Chamber of Commerce and Industry vs Mavundla NO and Others Case No 1872/2012 (SGJ), Page 3 of the Record in Nafcoc (Limpopo) v Kgolane 35826/2011 (GNP).

[6] The organogram of the first applicant puts the National Council at the helm. It is the supreme body and is responsible for the decision making, the determination of policy and attainment of its objectives[6]. This body is made up of seventy-two members. [7]

[7] The next structure level below the National Council is the National Executive Committee. The executive committee consists of at least ten members. This committee is headed by a president.[8] The term of office of a president is three years. The other members of the committee hold office for a period of four years. I will revert to these two different terms later in the judgment.

[8] There is an office of a secretary-general. The functions and duties of a secretary-general are contained in the Constitution.[9] The functions include, *inter alia*, taking of minutes, keeping of the records and more importantly to, where appropriate, institute and defend legal proceedings on behalf of the first applicant.

[9] The Constitution[10] also provides for the establishment of the office of the chief executive officer. The responsibilities thereof include the facilitation and implementation of the policies, preparation of annual reports and communication of the information regarding the affairs of the first applicant.[11] His office exists *pari passu* with the office of the secretary-general.

[10] The administrative functions of the first applicant are performed by the secretariat which reports to the secretary-general, the executive committee and the national council of the

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[6] Clause 28 of the Constitution.
[7] See Footnote 6 above.
[8] Clause 29 of the Constitution.
[9] See Footnote 8 above.
[10] Clause 30.1 of the Constitution.
[11] Clause 30.4.1 to 30.5.

first applicant. There is also a provision for the establishment of subcommittees and the presidents' council.

[11] A constitution is an important document in the life of any organization. It defines the rights and obligations. It is the soul and engine thereof. As such, it ought to be drafted or crafted in simple language. It ought to be able to speak to and communicate with its constituents.

[12] However, the Constitution of the first applicant is very complicated and has strange provisions. It has more deputy-presidents than the Republic of South Africa. It is short on information as regards certain offices. Sometimes it refers even to non-existing clauses[12]. The provisions dealing with the National Council are pathetically inadequate. Consequently, there is a sufficient room to second guess the intention of founding fathers of this Constitution and worse still to speculation. It seeks to make the National Council subservient to the National Executive Committee. The former is like their parliament and the latter like the executive. I refer to comments in paragraphs 6 – 7 above. Even counsel are not in agreement as to what certain clauses are intended to convey. I will revert to those shortcomings later as and when it is necessary. However, I must reiterate that fundamentally one need the services of a constitutional lawyer to even begin to understand it.

[13] There is incontrovertible evidence that the above groups are at each other's throat. There is machination and they call one another names. Serious criminal conduct is alleged on both sides. There are alleged accusations and contra-accusations in these proceedings.[13] The applicants are accused of fraud and constitution tampering. This is with reference to the 2011 Constitution which is at the epicenter of the applicant's case..

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[12] See clause 31.5.1 of the Constitution.
[13] See Footnote 5 above.

[14] In early November 2012, Makanda distributed a notice of the special meeting of the National Council. He was acting on the requisition. The notice had an agenda and a series of resolution intended to be presented for adoption. The second to eight applicants received the notice and annexures or attachments thereto. They attempted unsuccessfully to stop the holding of the meeting. The failure culminated with an urgent application. The applicants sought for the following interdictory relief.

> *"1. Declaring that the convening by the Respondents of a meeting of the Council of the First Applicant ("NAFCOC") held on 6 December 2012 is invalid and of no force and effect;*
>
> *2. Declaring that the meeting held on 6 December 2012 purporting to be a meeting of the Council of NAFCOC and all resolutions passed thereat are invalid and of no force and effect;*
>
> *3. Interdicting the Respondents from convening a meeting of the Council of NAFCOC;*
>
> *4. Directing that the Respondents pay the costs of this application jointly and severally.-"*

The prayers sought were based on the new provisions contained in the alleged amended 2011 Constitution[14]. The applicants insisted that the procedure for the holding of the meetings was now regulated in terms of the so called 2011 Constitution.

[15] On or during the 22 November 2012 the pleadings were closed. On 4 December 2012 the following order was made, namely:

> *"-The resolution listed in the notice of the special meeting of the council of the first applicant to be held on 6 December 2012 and any other resolution adopted at that meeting is suspended and will not be implemented pending the hearing of the matter on [29 January 2013]"*

[14] See Footnote 16 below.

The costs were reserved as well as the respondent's right to argue the urgency of the application. The above order has an effect of rending prayers 1 – 2 moot. The only possible live issue may be prayer 3 as it is coughed in the tense capable of referring to the future.

[16] On 6 December 2012, the meeting was duly held. The applicants two to eight although invited did not attend. The drastic resolutions were adopted including their removal from the national office. Thereafter, further proceedings then occurred. The respondents filed further affidavits explaining the events that happened on 6 December 2012. Thereafter the applicants applied and were granted leave to join other persons who attended the meeting of 6 December 2012.

[17] Both parties are in agreement that relief sought was a final order. It is trite that in order to obtain the final relief sought, the applicants must prove a clear right on the balance of probabilities. The applicants relied for their clear right on the 2011 Constitution and nothing more.[15]They insisted in their founding and confirmatory affidavits that the first applicant:

> *"-has a clear right to enforce and protect the provisions of the 2011 Constitution and accordingly to prevent the respondents from unlawful convening and holding a meeting of the Council."*[16]

Incidentally, this was also their position in the case of **Nafcoc (Limpopo) v Kgolane and Others.** The respondents attacked the procedure followed in the alleged adoption of the 2011 Constitution. They make a formidable case of procedurally non-compliance. The

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[15] See Paragraphs 5 ;12; 16; 17; 21; to 25; 29 -31; 16; 84 and 108 of the Founding Affidavit

[16] See Paragraphs 187 Page 90 [Founding Affidavit], and Para14 -15 on Page 318 of the Record in the matter between Nafcoc (Limpopo) v Kgolane and Two Others Case No 35826/2011 (GNP)

applicants then recasted their case in their replying and confirmatory affidavits. I will revert to this aspect of repurposed case later.

[18] Before I deal with the matter further, I must comment on the voluminous papers herein. Prolixity is closely aligned to relevancy. Where a document is not relevant and is not advancing the case it is unnecessary to include same in the record. It merely makes the record voluminous. Unfortunately the parties did not observe the rule. This should have been avoided particularly because first the matter came to court on urgent basis. As stated below there were unnecessary duplications.

[19] Both parties are guilty in this regard. They both included unnecessary and irrelevant allegations. They attached unnecessary documents on the record. The allegations relating to Nafcoc Investment Holding Company Limited in the founding affidavit, the litigation between various groups setting up the parallel council were unnecessary. The respondents annexed yet another copy of the Constitution and various judgments and proceedings. This was strictly unnecessary. When the pleadings closed the record was approximately one thousand one hundred and fifty pages. When the matter was finally argued the record had increased to some approximately fifteen hundred pages. This was totally unnecessary and I must warn both parties that such conduct is unacceptable and will not be tolerated.

[20] The other factor which contributed to the prolixity is the manner of the citation of the respondents. The respondents are cited in their personal capacity. In my view they should have been cited in their constituent affiliate names. They are deployed by their constituencies. If that was done, it would have greatly reduced the record without comprising the quality of the evidence and the essence of their case.

[21] I now turn to the presentation of the case. The applicants chose to approach this court on motion proceedings. This procedure should not be adopted lavishly. It carries certain consequence. Motion proceeding are always followed by affidavit. It is trite that the applicant's affidavits constitute both the evidence and pleadings. The affidavits constitute essential evidence. Accordingly, the applicants must stand or fall by the founding affidavit and facts therein alleged. It is not permissible to make out new grounds in a replying affidavit.[17] The reason is not far to get for this proposition. The founding affidavit is and always the foundation. However, this rule is not absolute. It has been held that:

> *"-it is not a law of the Medes and Persians. The court has a discretion to allow new matter to remain..."*[18]

In order to be able to exercise the discretion aforesaid or the indulgence there must be special and or exceptional circumstances. *In casu*, no special circumstances were given.

[22] The applicant relied on the Constitution of 2011[19]. In his founding affidavit Masena stated that:

> "- **<u>The dispute over the 2011 Constitution</u>**
>
> 78. *As I have said above, the Respondents allege that the 2008 Constitution was unlawfully amended and accordingly, that the constitution of NAFCOC is the 2008 Constitution and not the 2011 Constitution. This issue is a recurring dispute between NAFCOC and the rebels. That the issue remains in dispute is apparently from item 3.3 of the Notice (included in annexure "SGM10") which reads as follows:*

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[17] See Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008(2) (SCA) 184 at 200 D-F.
[18] Shephard v Tuckers Land and Development Corporation (Pty) Ltd 1978(1) SA 173 (WLD) at 177(H) – 178 (A).
[19] See Paragraph 17 above and cases mentioned therein.

3.3.9 Unlawfully and underhandedly purported to amend the NAFCOC 2008 Constitution ("the Constitution")

> *79. This issue [of 2008 Constitution]is at the **center** of an application pending in the North Gauteng High court under case number 35826/2011. The issue will be decided in due course by that court. I submit that one of the reasons for holding the meeting that is planned for 6 December 2012 is to attempt to pre-empt and circumvent the consequences for the rebel of an unfavourable decision in that litigation. I deny that the executive committee purported to amend the 2008 Constitution as alleged in the Notice. As I have said above, the 2011 Constitutionwas adopted at a meeting of the Council on 17 March 2011 after a long process spanning over a year."*[20]

As stated above, the respondents built a formidable challenge to the validity of the 2011 Constitution. They even accused Mosena of having manipulated the records of the first respondent. They punched several holes through their case. The respondents were not merely interested in a pyrrhic victory in order to afford a cheap publicity to the applicants. They were indeed serious.

[23] The respondents submitted that the case argued was not made out in the founding affidavit but in the replying affidavit. In my view this submission is well founded because the applicants relied nothing else than 2011 Constitution. Further, to rely on certain provisions of the Constitution and reject others would be incorrect. Therefore, the argument that the provisions requesting the holding of the meeting is the same in both constitutions is misplaced and does not assist the applicants.

[24] During the argument the applicants attacked the authority of Makanda to call or convene and preside over the meeting. Prior to the filing of their replying affidavit the authority to convene the meeting was never an issue. The second to eighth applicants merely relied on

[20] Paragraph 79 on page 52 of the Record.

the 2011 Constitution. It was only in their reply that they now introduced the following new grounds or cause of action.

> "-34 *The central and only issue in this application is whether or not the December 2012 meeting has been validly convened. This issue can be determined without deciding which of the constitutions is the correct one."*
>
> ...
>
> *36 This interdict application does not require the resolution of dispute of fact as to which constitution applies.*[21]

They do not address what caused their Damascus conversion. They did not at all argue the principle that you do not built your case in the replying affidavit. They avoided it completely. This is surprising because the 2011 Constitution has always been the epicenter of their case. If that was not the case, they would have not spend considerable time and resources on procedure adopted in the preparation that let to and eventual adoption of the Constitution. The only inference that I can draw is that the applicants realized the weakness in their case and decided to abandon same.

[25] Similarly, the respondents would not have concentrated in their answering affidavit and their heads of argument on earlier cases dealing with the entrenched clause[22] and the Shifren-principle.[23] They embarked on this cause of action to demonstrate that the 2011 Constitution was nothing but a sham and a nullity. Consequently, so it was argued, it cannot give them the clear right. The applicants saw the light and had to do the Damuscus conversion. This let them to structure an escape route. They then made, in their replying and confirming affidavits another case. They introduced the *locus standi* of Makanda and

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[21] See Record Page 1143.
[22] Harris & Others v Minister of Interior 1952 (2) SA 428(A).
[23] S.A. Sentral Ko-op Graanmaatskappy BPK v Shifren En andere 1964 (4) SA 760(A).

powers of the National Council or its chairman to convene and preside the meetings. This cannot be allowed. The law is clear, you stand or fall by the allegations in the founding affidavit. This again demonstrates the importance of affidavits.[24] The argument that the applicants did not jettison their original cause of action is without merits and it stands to be rejected.

[26]] When the applicants launched this motion proceeding, they were aware of the existence of a very serious dispute of fact. On 5 October 2012 Saldulker, J warned and said:

> *"...from the outset the applicant [the Mavundla executive committee] launched motion proceedings to prepare for its legal skirmish against the respondents. It was at all times aware that there was a power-struggle within its ranks, yet it chose to launch the machinery of motion proceedings to fight its battle, knowing that there would be dispute of facts which are already apparent in this application."*[25]

Mosena and the second applicant were parties in that matter. Yet they embarked on this dangerous path. This is demonstration of their *mala fide* and their chutzpah. The arguing of a different case made in the replying affidavit and their choice of motion proceeding in the face of such serious dispute of facts are sufficient reasons to dismiss this application.

[27] I am persuaded and find that the applicants have recasted their case. I will briefly deal with certain issues raised. In this recasted case the applicants argued the *locus standi* of Makanda and his powers as a chairman of the National Council. The argument that the authority of Makanda has been part of their case is not borne by the evidence. The reliance on the lack of authority is red-herring. It tantamount to putting humpty-dumpty

[24] Director of Hospital Services v Mistry 1979(1) A 626 (A) at 636A.
[25] Page 629 of the Record-referring to unreported judgment of National African Federated Chamber of Commerce and Industry v Lawrence Bhekinkosi Mavundla and Others case no 1872/12 (SGJ).

together. It demonstrates Mosena's further stratagem. He denies that Makanda was the chairperson of the National council. This lacks substance. It stands to be rejected. Mosena, as the secretary-general was the custodian of the first applicant's records. The record that he presented and the notes of the returning officers who conducted the election in November 2009 do not support his stand. Mr Matlala, Mr Soviti and Mr Mbuli all endorsed that Mr Makanda was elected as a chairperson. Such a clearing and obvious omission demonstrate ulterior motive.

[28] I stated elsewhere in this judgment that the Constitution has very serious short comings. It is correct that the power of the chairperson of the National Council are not spelt out in the Constitution. Therefore, it is necessary to look at the Constitution in interpreting such powers. There are various components of the first applicant. The National Council is by far the most important component. Therefore, it is unreasonable to argue, using the language of the Constitution, that the chairperson thereof had no powers including the powers to convene and preside over the meetings. That would lead to absurdity.

[29] Similarly the term of office of the president must be determined regarding being had to the Constitution. The Constitution provides that the term of the National Executive committee is four years. It is also true that the president is also a member of the executive committee. On the face value his term should also be four years. However, this position is singled out for limited period. The language is clear and calls for no other interpretation. There is no contradiction in this regard. I find that the argument that the president term has expired is well founded. It is hereby confirmed that indeed his period expired on 4 November 2012.

[30] The support for the respondents is overwhelming.[26] Accordingly the allegation that the respondents are the rebel group is open to some doubts. The list of the provincial council

[26] See Pages 855 – 1128 of the Record.

members of the constituents affiliates presented during the 2009 and the list of supporters of the applicants' case do not correspond. However, this does not detract from the fact that meeting on 6 December 2012 was well attended.[27] The applicants' argument that meeting was not properly conducted is baseless. They were not in attendance. Accordingly I find that the meeting was properly called and properly conducted its affairs according to the Constitution.

[31] The Constitution has very serious short comings. The power of various structure of the first applicant is not properly stipulated. The Constitution provides that:

> *"-The President, subject to the provision of the Constitution. Chair all meetings of Nafcoc, Council, Executive Committee and the Annual General Meeting."*[28]

There are several kinds of meetings provided for in the Constitution.

[32] *In casu* it is the general and council meetings that needs attention. The applicants contention is that only the president who is empowered to convene the meetings and that it must be evaluated in terms of the Constitution. First, it is common cause that the National Council is the supreme body. It can even instruct the president of the National Executive Committee to do certain assignments. The National Council is the parliament of the constituents affiliate members. It is the body through which the members can influence the national policy. Therefore it could not have been the intention of the founding father of the first applicant not to allow the national council to convene or preside meetings. The Constitution provides that:

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[27] See Paragraph 10.3 on page 1132 of the Record.
[28] See Clause 28 of the Constitution.

> *"-The executive committee and/or council may, when it deems fit, convene other general meetings. They shall also convene a general meeting on a requisition thereto by a simple majority of members."*[29]

This clause is wide enough to include the chairperson of the council. Furthermore, regarding being had of the structures of the first applicant, every constituent part is clothed with authority to call and preside over the meeting.

[33] The executive Committee, the National Council and the majority of the members can requisition any meeting. A *fortiori*, it cannot be correct that the intention of the drafters of the constitution was to allow the president only to preside over the meeting alone. It negates the division of the structures of the first applicant. Accordingly it cannot have been their intention to rest such extensive power in the hands of the president. Such interpretation will lead to absurdity and is accordingly rejected. To concentrate such powers in one person in undesirable. That will amount to the outsourcing of the power, authority and responsibility of the supreme body.

[34] The applicants' contention that the institution of the national council existed on *ad hoc* basis lack merits. According to the state of the organization report compiled and presented during 2009 by Mosena clearly demonstrate that Makanda was the chairman of the council. Yet he denies under oath that:

> *"-Makanda is the chairperson of the Council or that he was ever elected to such a position."* [30]

This obvious misleading and untruthful statement strengthen the believe that he and other applicants were acting *mala fide*. I find that Makanda was indeed the chairperson of the National council.

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[29] Clause 17 of the Constitution.
[30] See Page 1136 of the Record.

[35] At the conclusion of the argument I invited both parties to submit further short heads of argument on the question of costs I took their respevtive views into consideration. I was worried whether parties were acting in pursuant of the individual interest or not. The parties have responded positively. I am thankful for their assistance. It is also clear that this matter is for some immense importance to the parties. The issues are complicated. The issue of the costs becomes relevant.

[36] It is obvious on the papers that the parties are involved in a tussle for the control of the first applicant. In the light of the said tussle, it becomes necessary to guard against the abuse of the first applicant's resources by either party to protect their personal interst. Mosena has stated in the founding affidavit that he:

> *"-bring[s] this application and deposed of his affidavit on* ***my own behalf and on behalf*** *of the other applicants."*

The other applicants have confirmed his affidavit insofar as it relates to him. Thereby they associate themselves with his actions. However, the first applicant is a natural person and can only act through the intervention of human agency. Mosena is the general secretary of the first applicant.

[37] The secretary general is clothes with powers and authority to institute and defended legal proceedings against the first applicant. There is a proviso to this power. That proviso is:

> *"-Except to the extent that Council of Nafcoc might determine otherwise."*

There is no evidence that the idea to institute this application was presented to the council for consideration. The presentation thereof to the council was necessary in the light of the allegations of serious power-struggle.

[38] The powers to institute legal proceeding should not be exercised in bad faith and for the pursuance of the personal interest. I find no demonstrable interest due to the first applicant arising from the struggle. On the contrary, the struggle would have benefitted the rival groups. The record is replete with evidence of bad faith. Mosena denies that Makanda was ever elected. This is not true. He jettisoned his original case. There is serious allegation of tempering with the Constitution. He is supported by the other applicants.

[39] The matter was of great importance to the parties. It was complex and deserved the employment of three counsel. Taking all the facts into consideration, in my view, it would be unfair to order the first applicant to pay the costs. In the circumstance, I make the following order.

(a) The application is dismissed with costs.

(b) The costs include the costs of all three counsel.

(c) The above costs are to be paid by the second to eighth applicants jointly and severally the one paying the other to be absolved.

RE MONAMA

JUDGE OF THE HIGH COURT

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Instructed by	Edward Nathan Sonnenburgs, Johannesburg
Counsel for the Respondent	Adv. CM Elloff SC, Adv. Luderitz SC and Adv E Rudolf
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