

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A104/23

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 24/10/24

SIGNATURE

In the matter between:

**SOUTH AFRICAN MEDICAL ASSOCIATION
TRADE UNION**

First Appellant

GERHARD VOSLOO N. O

Second Appellant

and

SOUTH AFRICAN MEDICAL ASSOCIATION NPC

First Respondent

Summary: Appeal against an urgent order interdicting and restraining the appellants to unlawfully or “otherwise” interfere with the business of the respondent by distributing any communication about the business; interfering with “unspecified” rights; unlawfully competing; and taking any steps “whatsoever” to encourage cancelation or renewal of membership. An order cast in wide and unspecified terms defeats the doctrine of effectiveness. Trade union membership is not equivalent to being a business client. A trade union is entitled to communicate with its members. In doing so, a trade union does not act unlawfully and is incapable of being restrained in law. A trade union does not compete unlawfully when it seeks to protect continuation of trade union membership. Held: (1) The appeal is upheld. Held: (2) The order of the

Court below is set aside and replaced with an order dismissing the application with costs.

JUDGMENT

MOSHOANA, J (POTTERILL, J AND ENGELBRECHT, AJ CONCURRING)

Introduction

- [1] This is an appeal against an order issued by a single judge of this Division. As an opening gambit, it suffices to regurgitate what the Labour Court in *Ntlokose v National Union of Metal Workers of South Africa (NUMSA) and Others (Ntlokose)*¹ said, which somewhat sets the tone of the present matter on appeal:

A trade union is a continuous association of wage-earners for the purpose of maintaining or improving the conditions of their employment². Thus trade unions do *not exist for the leaders but for the workers*. The more that social democracy develops, grows, and becomes stronger, the more the enlightened masses of workers will take their own destinies, the leadership of their own movement, the determination of its *direction into their own hands*³. The masses are in reality their own leaders, dialectically creating their own development process⁴.

- [2] On 16 February 2023, the Supreme Court of Appeal (SCA) (per Zondi and Weiner JJA) granted the appellants, the South African Medical Association Trade Union (SAMATU) and Gerhard Vosloo N.O leave to appeal against the order made by Bam AJ on 9 March 2021. The written reasons for the impugned order were provided by Bam AJ on 28 May 2021. Having obtained leave to

¹ (2022) ILJ 2562 (LC) at para 1.

² Sidney and Beatrice Webb: The History of Trade Unionism 1894 chapter 1.

³ Rosa Luxemburg.

⁴ Rosa Luxemburg.

appeal, on or about 6 March 2023, the appellants launched the present appeal. The present appeal is opposed by the South African Medical Association Non-profit Company (SAMA NPC).

Pertinent background facts to the present appeal

- [3] The acrimony between the SAMATU and the SAMA NPC comes a long way. For the purposes of this judgment, it shall be obsolete to chronicle the whole controversy appertaining the present appeal. A brief summation of the salient facts shall suffice. More than a century ago, in 1927, the SAMA NPC was registered as a legal entity and attracted medical professionals as its members. Owing to the fact that the SAMA NPC was unable to represent its members in labour disputes, on 07 October 2002, SAMATU was established and registered as a trade union in terms of the provisions of section 96(7)(a) of the Labour Relations Act, 1995 (LRA).
- [4] During 2016, the relationship between the SAMA NPC and the SAMATU began to show cracks and took a downward spiral. Such led to resolutions taken by the SAMA NPC to dissolve the SAMATU. Ultimately, on 19 October 2019, the SAMATU was placed under administration within the contemplation of section 103A of the LRA. The second appellant, Mr Gerhard Vosloo was appointed as an administrator of the SAMATU. That notwithstanding, the fight between the SAMA NPC and the SAMATU continued unabated. Such controversy culminated in an order issued by Van Niekerk J, as he then was, sitting at the Labour Court in Johannesburg, which order effectively directed the SAMA NPC to provide the SAMATU with certain records and information as well as directing it to remit subscriptions and levies in terms of section 13 of the LRA to the SAMATU.
- [5] Additionally, the Labour Court declared that the SAMA NPC members in respect of whom stop order deductions are made through the PERSAL payroll system are and remain members of the SAMATU. The SAMA NPC unsuccessfully attempted to overturn the order of the Labour Court. Despite various court orders, the fight continued and allegations and counter-allegations of poaching each other's members were made. Ultimately, on 9 February 2021,

the SAMATU penned and distributed a circular to its members, which ignited the urgent proceedings that came before Bam AJ.

- [6] The proceedings before Bam AJ were initiated by way of a motion on or about 23 February 2021. The SAMA NPC sought to be heard on an urgent basis and to be granted interdictory reliefs. The SAMA NPC specifically sought an injunction against the alleged unlawful interfering with its business by distributing communication about its business; interfering with its rights; encouraging its members to cancel or not to renew membership. As indicated at the dawn of this judgment, the SAMA NPC, obtained the order which is now the subject of the present appeal.

Analysis of the issues arising from this appeal

- [7] Before this Court engages with the merits of this appeal, it suffices to mention that while the SAMA NPC contends that the appellants interfered with its business, when regard is had to the contents of the offending circular, this case involves union membership as opposed to business activity of any form. In order to contextualise the present appeal, it behoves this Court to consider the activities of both warring entities and the legal framework within which they both operate.

The SAMA NPC and its “business” activities

- [8] The SAMA NPC is a non-profit Company. Regard being had to its memorandum of incorporation (memorandum), its main objectives may be summarised as, (a) represent the medical profession; (b) serve the needs of the members to enable them to function optimally as professionals; (c) promote certain listed interests; (d) regulate relations between members and employers’ organisation; and (e) various ancillary objectives aimed at influencing, shaping and promoting certain policy matters in the health profession.
- [9] In ordinary parlance, a business means a commercial activity. Commercial means making or intending to make profit. A profit means a financial gain. Regard being had to that, the SAMA NPC is not an entity involved in

commercial activity and does not exist for financial gain. Members of the SAMA NPC do not constitute *per se* a business component.

- [10] In terms of the memorandum, two classes of members are contemplated; namely voting and non-voting members. Unlawful competition encompasses a wide range of unfair and deceptive business practices aimed at gaining an unfair advantage over competitors. It includes actions that violate trade laws, intellectual property rights or the principle of good faith and honest dealing in business.
- [11] Seeking to protect membership of a trade union, cannot be equated to any form of business practice, let alone one that is deceptive. It cannot be seen as offending good faith or honest business dealing. Inasmuch as the SAMA NPC and the SAMATU may target the same member, given their functions and purposes, they are incapable of competing for a member. In fact, one member may be a member of both. The one is a professional body with different objectives and the other is a trade union advancing the interest of a member differently.
- [12] This is typically not a case of two trade unions fighting over organising same members. Having said that, this Court does appreciate that if the SAMA NPC, seek to perform the same trade union functions as performed by the SAMATU as a trade union, then, and only then, there could be a speak of competition. In a business world competition arises in a situation where one entity is trying to be more successful than another. In my view, the factual situation in this case, which hinges entirely on the contents of the 9 February 2021 circular, does not give rise to competition properly understood. In short, the SAMATU in the circular seeks to warn its members of being misled.
- [13] Thus, the business activity of the SAMA NPC is to advance and promote the interests of its own members. To the extent that it may be argued that members of the SAMA NPC resources or financially sustain the SAMA NPC, in a case like this, it was incumbent for the SAMA NPC to allege and prove that the

members to whom the circular of 9 February 2021 was directed were its members. Nowhere in its founding papers does the SAMA NPC allege that the recipients of the circular were its members. In alleging unlawfulness on the part of the SAMATU, the SAMA NPC testified thus:

“A *mere* reading of the circular makes it clear that SAMATU is attempting to convince *SAMA members not to renew their membership* with SAMA.”

- [14] This allegation is not supported by the contents of the circular. The circular reads: “*Dear SAMATU Member*” as opposed to “*Dear SAMA NPC member*”. Thus, there is no way in which a circular directed to the SAMATU members can convince a SAMA NPC member to do anything. If anything, if a member of the SAMA NPC fortuitously received the circular, if he or she is not also a trade union member, he or she will simply ignore the circular. Members of both entities are literate and actually professionals. They cannot be lured into oblivion by a mere read of the circular. A further difficulty with the above allegation is that nowhere does the circular remotely suggest that the SAMA NPC members must not renew their membership. Accordingly, even if this Court were to accept that members of the SAMA NPC constitutes a business activity, there is no objective evidence to support any interference with members of the SAMA NPC.

The SAMATU and its business activities.

- [15] In terms of section 4(1)(b) of the LRA, every employee has the right to join a trade union subject to its constitution. Therefore, every employee who joins a trade union is constrained by the terms of its constitution. In terms of section 95(5)(b) of the LRA, a constitution of a trade union must prescribe qualification for, and admission to membership. Section 4(2)(a) of the LRA provides that every member has the right subject to the constitution of that trade union to participate in the lawful activities of the trade union.
- [16] Section 12(2) of the LRA entitles a representative trade union to hold meetings with its members. This organisational right simply implies an entitlement to communicate with members of a trade union. Communication may be in a form

of face to face or physical meeting or written communication. It is common cause that the SAMATU is a registered trade union. The legal effect thereof is that it becomes a body corporate in terms of section 97(1) of the LRA. Section 95(5)(f) of the LRA provides that the constitution of a trade union must provide for membership fees and the method of determining membership fees and other payments by members. Undoubtedly, membership fees are the financial nerve of any trade union. As correctly found by the Labour Court, the membership fees collected from the members of the SAMATU are transmittable to it. Van Niekerk J has already declared that all the SAMA NPC members in respect of whom deductions were and continue to be made through a PERSAL payroll system are and remain members of the SAMATU.

- [17] Based on the order of the Labour Court any person in respect of whom deductions are made through a payroll system is a member of the SAMATU. This must be so because in terms of section 13 of the LRA, deductions of subscriptions and levies by an employer is an organisational right available to a registered trade union. The SAMA NPC is not a registered trade union as such it is not entitled to any organisational rights as provided for in the LRA. It must follow axiomatically that the SAMATU, in terms of its constitution can only be joined by workers and or employees. A professional medical practitioner, if not employed in the sector within which the SAMATU may organise in terms of its constitution, such medical practitioner may not join the SAMATU. However, by virtue of being a medical practitioner, he or she may join the SAMA NPC.

Alleged unlawful activities

- [18] This allegation of unlawfulness constitutes the merits of the present appeal. The SAMA NPC, hinged its case for an interdict and unlawful competition claim on alleged injurious falsehood paddled by the SAMATU in the 9 February circular. In motion proceedings, an applicant makes its case in the founding papers. Earlier, in this judgment, the allegation that the SAMATU is attempting to convince the SAMA NPC members not to renew membership was dealt with. During argument, counsel for the SAMA NPC submitted that although there is no express statement in support of this allegation, this Court must find that such is implied. Sadly, this Court does not agree with such a submission. It cannot

be implied that a correspondence addressed to members of the SAMATU could be attempting to convince non-addressees. It is simply illogical to conclude as such.

[19] The SAMA NPC allege that the circular is factually incorrect. Other than making this bald allegation of factual incorrectness, no evidence was provided in support of the allegation. In the circumstances of this matter, it is difficult to understand how a trade union can communicate incorrect statement to its members. Even if what was communicated to the members of the SAMATU is factually incorrect, such has nothing to do with the SAMA NPC. The allegation of factual incorrectness is denuded of any support. Having scoured the founding affidavits together with the allegations made by the SAMATU, which are not far-fetched, the allegations of unlawful activities remain unsupported and did not justify an order sought in motion proceedings. What emerges from the founding papers is an interpretation of the contents of the circular. Counsel for the SAMA NPC, unerringly conceded that the circular does not expressly states what the SAMA NPC allege to be falsehood. When quizzed by the bench on this significant aspect, counsel resorted to implication.

[20] A term in a written document, contract included, is implied if it is an unexpressed provision inferred by a Court from the expressed terms and the surrounding circumstances. It requires application of the “officious bystander test”⁵. On application of this test, this Court is unable to conclude that such an implication proposed by counsel can be made.

[21] The judgment of the Court below is, with respect, difficult to comprehend. It became common cause that the SAMA NPC had issued renewal of membership notices to some of the members of the SAMATU. It also became common cause that the renewal of membership was for the membership of the SAMA NPC and not the SAMATU. In the 9 February circular, the SAMATU, as it should, advised its members that such a renewal notice is not from them. This is factually correct.

⁵ See *Alfred McAlpine and Son (Pty) Ltd v TPA* 1974 (3) SA 506 (A).

[22] The SAMATU informs its members that it views the undisputed sending of renewal notices to its members as a motive to coerce termination of the SAMATU membership and joining the SAMA NPC. A motive is a reason for doing something. In other words, what the SAMATU was communicating to its members is what it considers to be the reason of its members receiving the renewal notices from the SAMA NPC, when it cannot do such an act towards its members. Clearly the SAMA NPC disagrees with the reason. This disagreement brought to the fore a dispute of fact as to what the reason for renewal notice was. In recognising this clear dispute of fact, the Court below states the following:

“15 Could the content of the renewal notice, as reproduced in paragraph 12 of this judgment⁶, *be said to be an act of coercing* members of SAMATU to terminate their membership with the latter in desperate attempt to remain relevant on the part of SAMA?

[23] After dealing extensively with the pleaded case of the SAMATU in support of its claim for the motive, the learned judge does not reject those claims as being far-fetched, regard being had that the learned judge was dealing with motion proceedings. Instead the learned judge concludes thus:

“19 ... Besides, the issue before this Court concerns SAMATU’s notice viewed against SAMA’s renewal notice, which, as I have already found with respect to the latter, contains nothing amounting to the conduct described in SAMATU’s notice... I conclude that the notice must be read for what it is, *falsehood published by SAMATU...*”

[24] It is unclear as to why the learned judge reached a conclusion on falsehood particularly at the back of the following finding made before considering the pleaded version of the SAMATU:

⁶ Paragraph 12 of the judgment does not do so instead paragraph 13 does reproduce the renewal notice.

“15 ... Nothing in the *content of the cover letter* of the renewal notice can, by any stretch of imagination, *be calculated to coerce members to terminate their membership* with SAMATU...”

[25] It is more apparent than not that the above finding was reached by an interpretation process as opposed to considering the facts as admitted by the applicant as well as those averred by the SAMATU. It is indeed so that an interpretation is a matter of law and not fact. It involves a consideration of language, context and purpose.⁷ However, the enquiry was not directed at an intention of the parties but the factual question of falsehood. Falsehood is the state of being untrue. Determining falsehood involves a factual enquiry. Nowhere in the reasons for the order does this Court find an engagement in a factual enquiry on this issue of falsehood. To the extent that the Court below reached a conclusion that the contents of the circular in so far as the motive of the renewal notice being sent to the members of the SAMATU is concerned amounts to falsehood, the Court below erred. On the contrary, falsehood as a fact was not established.

[26] This Court finds that there is no falsehood contained in the circular of 9 February 2021. The statement that the SAMA NPC cannot represent members on employer and employee relationship related matters since it has no legal standing in the public service to function as a trade union, is not only factually correct, it is also legally correct. Section 200(1) of the LRA buttresses this point. The learned judge seems to have adopted, with respect, what appears to be contextually a cavalier approach. When the SAMATU refers to legal standing such must be understood to mean exactly that. It is an equivalent of a *locus standi* challenge mentioned in the preceding sentences in the self-same circular. The Constitutional Court has already concluded in *Numsa v Lufil*

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) case and *University of Johannesburg v Auckland Park Theological Seminary and Another* (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) (11 June 2021) case.

*Packages (Isithebe) and others (Lufil)*⁸ that where the constitution of a trade union does not allow it to organise in a particular sector, it cannot admit members from the not allowed sector. Such a statement of lack of legal standing cannot be dismissed by simply having regard to what voluntary associations could do. Having done, the Court below was in error.

[27] Something rings hollow if it seems untruthful nor insincere. The statement about lack of legal standing, viewed textually; contextually and purposively cannot ring hollow. Thus, the learned judge also erred in that regard. Having reached a conclusion that there is nothing that equates falsehood in the notice, it is unnecessary for this Court to consider the claim's remaining elements of intention; loss; and causation. Accordingly, the conduct of the SAMATU as expressed by the notice of 9 February 2021 is not unlawful.

Was the SAMA entitled to a final relief of an interdict?

[28] Although the issue of hearing the application as one of urgency has not been squarely challenged before us, this Court expresses doubt as to whether the requirements of rule 6(12)(a)-(b) of the Uniform Rules were met. Motion proceedings are not suitable where a final relief is sought⁹.

[29] Since the decision of *Setlogelo v Setlogelo*¹⁰, the discretionary remedy of interdict existed to prevent any continuation of unlawfulness. More recently, the Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*¹¹, felicitously stated the law as follows:

“An interdict is an order by a court prohibiting or compelling the doing of a particular act for the purposes of *protecting legally enforceable right*, which is threatened by continuing or anticipated harm.

...

⁸ [2020] 7 BLLR 645 (CC).

⁹ See *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243 (SCA).

¹⁰ 1914 AD 221.

¹¹ An unreported judgment (CCT 39/21) [2022] ZACC 34 (22 September 2022) at para 47 and 48.

In granting an interdict, the court must exercise its discretion judicially upon consideration of all the facts and circumstances. An interdict is 'not a remedy for the past invasion of rights: it is concerned with the present and the future'. The past invasion should be addressed by an action of damages. An interdict is appropriate only when future injury is feared."

[30] This Court has already reached a conclusion that the issuing of the circular does not amount to an unlawful act. There is no proven falsehood in the contents of the circular. As demonstrated above, the SAMATU as a trade union has a right to communicate with its members about any matter that seeks to threaten the financial nerve (union membership) of the trade union. This right stems deep from the constitutional right of workers to participate in the activities and programmes of a trade union. This right is also realised by every member of a trade union having a right, subject to the constitution of the trade union, to participate in the lawful activities of the trade union. It is a lawful activity of a trade union to, in line with its constitution, protect its membership where it is threatened.

[31] When a trade union seeks to protect its union membership which is under a threat of any nature, it cannot be said that there is unlawful competition. Trade unions are institutions that owe their origin from the Constitution. Section 23(4) of the Constitution specifically accords trade unions a right to determine their own programmes and activities and the right to organise. The right to organise is illusory if trade unions are unable to protect their membership base when threatened. Section 25 and 26 of the LRA provides a clear intention that a membership base is important to trade unionism and is worthy of protection.

The doctrine of effectiveness

[32] Section 165(5) of the Constitution provides that an order or decision issued by a Court binds all persons to whom it applies. This provision enjoins a Court to issue an effective judgment. A judgment is effective if it is clear and executable. Usage of statements like "otherwise" and "interfering with rights of the applicant" renders an order of Court unintelligible, ambiguous and ultimately ineffective. In *Hulisani Viccel Sithangu v Capricorn District Municipality*

(*Hulisani*)¹², the Court concluded that Court orders are required to be clear and unambiguous¹³. An order prohibiting interference of rights that are not specified is ambiguous and unclear. Nevertheless, this Court interferes with the order of the Court below on the basis that it was not justified on application of the *Plascon Evans* principle; namely a relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavit justifies the order. On the facts of the present appeal the principle was not satisfied.

Conclusions

[33] In summary, the Court below erred in concluding that there was any falsehood in the circular of 9 February 2021. Since no falsehood was demonstrated the actions of the SAMATU were not unlawful. The SAMATU was entitled to protect its membership base which was clearly under threat by communicating with its members and warning them of the traps laying ahead.

[34] For all the above reasons, I propose the following order:

1. The appeal is upheld.
2. The order made by Bam AJ on 9 March 2021 is set aside in its entirety.
3. It is replaced with an order dismissing the application with costs, which costs includes the costs of employment of two counsel taxable at scale C.
4. The respondent is to pay the costs of this appeal, which costs include the costs of employing two counsel taxable at scale C.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

S POTTERILL

¹² (593/2022) [2023 ZASCA 151 (14 November 2023)]

¹³ At paragraph 16 of *Hulisani*.

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

(I agree and it is so ordered)

**ENGELBRECHT AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

(I agree and it is so ordered)

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 25 October 2024.

APPEARANCES:

For the Appellant:	Mr D Groenewald
Instructed by:	Serfontein Viljoen & Swart Attorneys, Brooklyn
For the Respondents:	Mr TP Kruger SC
Instructed by:	Welman & Bloem Inc, Garsfontein
Date of the hearing:	09 October 2024
Date of judgment:	25 October 2024