

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**(HELD AT JOHANNESBURG)**

**Case Number: J941/22**

In the matter between:

**RUTH NTLOKOTSE**

Applicant

and

**THE NATIONAL UNION OF METALWORKERS  
OF SOUTH AFRICA (“NUMSA”)**

First Respondent

**IRVIN JIM**

Second Respondent

**CHAIRPERSON OF THE NUMSA  
SPECIAL CENTRAL COMMITTEE – ANDREW CHIRWA**

Third Respondent

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**ANSWERING AFFIDAVIT**

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I, the undersigned,

**IRVIN JIM**

do hereby make oath and say:

1. I am the second respondent in this matter, and the duly elected general secretary of the first respondent (“**NUMSA**” or “***the Union***”).

2. The facts herein contained lie within my own personal knowledge (save where the context indicates the contrary), and are to the best of my knowledge and belief both true and correct.
3. I have read the founding affidavit of Ruth Ntlokotse and I respond thereto as set out below. Before dealing with the allegations *ad seriatim* it will be useful to first deal with them on a thematic basis.
4. Where I make legal submissions I do so on the advice of my attorneys of record, which advice I rely on for the purposes of this application.
5. The applicant has only provided the respondents with three days to prepare this answering affidavit. As a result the Union (as a vast national bureaucratic organisation) has simply not had enough time to:
  - 5.1. properly consult on this matter with all the relevant people;
  - 5.2. identify and obtain all relevant documentation;
  - 5.3. carefully peruse the applicable documentation;
  - 5.4. properly consult with its legal advisors regarding the established facts and the law; *and*
  - 5.5. prepare a fully informed and comprehensive answer to the founding affidavit.
6. This affidavit is merely the best the respondents have been able to produce in the space of less than three days. As such, the respondents shall beg leave to supplement these papers should the opportunity arise.

7. At the outset I should signal that there is no basis for the application to be entertained, leaving aside the merits of the application (which in submission are poor):
  - 7.1. first, the applicants failed to comply with the prescripts of the Practice Manual in respect of contempt proceedings, and has offered no explanation for this failure; and
  - 7.2. second, the applicants failed to make out any case that this matter deserves the attention of the urgent court, particularly in respect of the relief that is sought; and
  - 7.3. third, no attempt was made to indicate that the shortening of the time periods was commensurate with the urgency of the matter (the respondents say it is not urgent at all), and as I have explained this approach has placed the respondents in a position where they are unable to defend themselves adequately in a matter where an order for incarceration is sought, which is simply untenable.

#### **AUTHORITY TO OPPOSE**

8. In my capacity as general secretary I am responsible for the day-to-day running of NUMSA on a national basis. This includes ensuring proper administration and co-ordination of NUMSA's activities, as well as managing its operations and resources. The activities that I render at NUMSA are similar to those rendered by a chief executive office or managing director of a company.
9. I depose to this affidavit on behalf of NUMSA, who has authorised me to do so. My authority to depose to this affidavit (and to oppose this application on behalf

of NUMSA) is derived from my holding the office of the general secretary. NUMSA's constitution sets out my functions and responsibilities. In particular, under chapter 7, clause 2(d)(iv)(14) of the constitution I am given broad powers to "*perform other duties required by the Constitution or the National Congress Central Committee or National Executive Committee*". In practice this power also includes my authority to depose to affidavits and to institute and defend legal proceedings on behalf of NUMSA in urgent proceedings.

10. I am authorised to oppose this application on behalf of the third respondent (Mr Andrew Chirwa ("**Chirwa**" – the President of NUMSA) by virtue of my elected office. However, *ex abundante cautela*, I attach hereto an affidavit from Chirwa (marked "**IJ1**") confirming my authority to act on his behalf.
11. In any event, all three respondents have mandated their attorneys of record, Serfontein Viljoen & Swart, to oppose this application on their behalf.

## **INTRODUCTION AND BASIS FOR OPPOSITION**

12. It is important to explain from the outset that the first to third respondents ("**the respondents**") have at all times fully complied with the judgment and order issued by Justice Moshwana on 23 July 2022 (hereafter "**the Judgment**"), and they will continue to do so unless and until the Judgment is set aside on appeal.
13. The Judgment interdicted NUMSA from proceeding with its 11<sup>th</sup> National Congress (hereafter "**the Congress**") "*until it fully complies with the terms of its own constitution*". NUMSA accordingly delayed the start of the Congress by two days so as to convene a special central committee ("**CC**") meeting, at which

meeting NUMSA rectified all of the constitutional defects identified by Justice Moshoana in his Judgment (discussed in more detail below). Having now fully complied with its constitution, NUMSA was free to convene the Congress uninhibited by the Judgment.

14. I am advised, and I accept this advice, that the case precedent on contempt establishes that:

14.1. the requirements for contempt, which include (i) non-compliance, and (ii) wilfulness and *mala fides*, must be established *beyond reasonable doubt*;

14.2. the requirement of wilfulness and *mala fides* implies that contempt is committed not merely by disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces; *and*

14.3. a respondent in contempt proceedings may present evidence to show that any non-compliance that may be found was not wilful or *mala fide*.

15. Quite simply, the applicants cannot discharge the burden of showing, beyond reasonable doubt, that there was non-compliance with the order here invoked. On a proper consideration of all the facts in this matter, it is also clearly apparent that the requirements of wilfulness and *mala fides* cannot be met.

16. Furthermore, and in any event, the applicant has failed to set out why this matter should be heard on an urgent basis. Specifically, the applicant has:

16.1. failed to explain why she will not be able to obtain substantial relief in the normal course; *and*

- 16.2. failed to justify why this matter is so urgent that it must be heard on a Friday on four days' notice (instead of on a Tuesday or Thursday on reasonable notice of at least a full week or more).
17. Furthermore, the applicant has failed to justify her complete departure from this Honourable Court's Practice Manual regarding contempt of court proceedings. Those procedures, in submission, have been put in place so as to allow persons accused of contempt sufficient time to defend themselves against a criminal conviction (which time has not been afforded to the respondents in this case).
18. Finally, the applicant now also seeks to implement a common law review of the proceedings of the Congress "*through the back door*" in urgent proceedings by attempting have the goings-on of the entire Congress declared null and void *in toto*, not as an interim measure but as final relief. Such complex and far-reaching relief is simply not suited to these extremely urgent proceedings and, in submission, it would not be in the interests of justice to grant such relief (particularly when the matter can be properly ventilated in normal review proceedings).
19. As a result of the above, the respondents will be asking that the application be struck from the urgent roll, alternatively dismissed, with a punitive costs order against the applicant.

## RECEIPT OF THE JUDGMENT AND DECISION TO RECTIFY CONSTITUTIONAL DEFECTS

20. The respondents indeed received the Judgment on Saturday, 23 July 2022. I then immediately discussed the matter with the President (Chirwa) who agreed with me that the Union should call a special CC on an emergency basis. I then solicited support for the calling of this meeting from Basil Cele (1<sup>st</sup> Deputy President) and Mphumzi Maqungo (National Treasurer), who both agreed with the decision (copies of their respective confirmatory affidavits are annexed hereto marked “**IJ2**” and “**IJ3**”).
21. With the support of four out of five of the extant national officers bearers (“**NOBs**”) – the position of Deputy General Secretary has been vacant since January 2021 – I was duly empowered by sections 9(1)(b) and 9(2)(b) of the Union’s constitution to convene a special CC on 48 hours’ notice.
22. In terms of the above sections I issued the notice and agenda for the special CC in the early hours of Sunday 24 July 2022 (see annexure CC8 to the founding affidavit), which meeting was scheduled to start at 08h00 on Tuesday, 26 July 2022. This notice went out to the email addresses of all members of the CC and NOBs. The notice also specified that *“attendance confirmations, replacements and apologies [must] be emailed to the office of the National Treasurer and the General Secretary prior to the start of the SCC”*.
23. Starting on Saturday 23 July 2022 some delegates and attendees for the Congress were already flying in and on Sunday, 24 July 2022 other delegates

and attendees for the Congress (more than 1000 people) were also busy flying into Cape Town from all over the country. The delegates were very concerned by media reports of the Congress being interdicted, and I did my best to spread the word that the President would address the delegates the following day (Monday, 25 July 2022) to explain the contents of the Judgment and how exactly NUMSA intended to comply with the Judgment.

24. On Monday, 25 July 2022, the President addressed the delegates in the main auditorium of the Cape Town International Convention Centre (“**CTICC**”) and explained that, indeed, the Congress had been interdicted and that the Congress could not begin until such time as NUMSA had fully complied with its constitution. The President then explained that NUMSA planned to hold a special CC the following day at which meeting NUMSA would be able to remedy all of the constitutional defects identified in the Judgment. Once the special CC had concluded its business, the President anticipated that the Congress could then commence on Wednesday, 27 July 2022. Unfortunately, until then, the delegates would simply have to wait around until the Congress commenced.
25. Later that day (Monday, 25 July 2022), the National Treasurer (Maqungo) noticed that the applicant (the 2<sup>nd</sup> Deputy President) had not confirmed her attendance at the upcoming emergency CC. The Treasurer then sent a message on the NOBs Whatsapp group reminding her of the meeting and stating that he had even arranged a flight for her early the next day (see annexure CC9 to the founding affidavit). However, the applicant simply ignored this message from the Treasurer.



26. The Special CC duly convened on Tuesday, 26 July 2022 and remedied all of the constitutional defects identified by Justice Moshoana in his Judgment (discussed in full detail below).
27. Thereafter, the Congress began on Wednesday, 27 July 2022 at approximately 10h00 and concluded on Thursday, 28 July 2022 at approximately 19h00.

### **APPLICATION FOR LEAVE TO APPEAL**

28. It is correct that the respondents herein (also the respondents to the Judgment) issued an application for leave to appeal on Tuesday, 26 July 2022 and that leave to appeal was denied on Thursday, 27 July 2022.
29. However, the application for leave to appeal was not issued with the intention of suspending operation of the Judgment so as to allow the Congress to continue while the application was pending. On the contrary, the respondents felt duty bound to fully abide by the terms of the Judgment unless and until it is set aside on appeal, and that is precisely what we have done (and what we will continue to do).
30. Having fully complied with its constitution by the time the Special CC concluded late on the evening of Tuesday, 26 July 2022, NUMSA was at liberty to proceed with commencing the Congress the following morning (and this would have been true even if the Judgment had not been subject to an application for leave to appeal).
31. The respondents do now intend petitioning the Labour Appeal Court for leave to appeal, but only because we respectfully disagree with the Judgment and

are concerned about the authoritative interpretations of the Union's constitution which, in submission, have been wrongly made.

## **JUSTICE MOSHOANA'S FINDINGS AND ORDER, AND THE RESPONDENTS' REACTION THERETO**

32. In his Judgment Justice Moshwana eschewed the political overtones of that application (hereafter referred to as "*the Interdict proceedings*") and held that the only issue before the court was whether NUMSA was empowered by its constitution to do what it did. Ultimately it was a matter of constitutional interpretation, and nothing more.

33. The decisions impugned by the applicant in the Interdict proceedings were as follows:

33.1. decisions by the NEC<sup>1</sup>, CC<sup>2</sup> and various RECs<sup>3</sup> to place certain members (including the applicant) on precautionary suspension pending a disciplinary hearing;

33.2. the decision by the CC to place its Mpumalanga region under administration (and consequently not allow any delegates from Mpumalanga to attend the National Congress); *and*

33.3. the decision by the CC to perform the function of the Union's credentials committee for the purposes of accrediting delegates to the National

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<sup>1</sup> The National Executive Committee contemplated by section 6(3) of the Union's constitution.

<sup>2</sup> The Central Committee contemplated by section 6(2) of the Union's constitution.

<sup>3</sup> The Regional Executive Committee for each region contemplated by section 5(3) of the Union's constitution.

Congress (instead of appointing a credentials committee to perform that function).

34. The primary relief sought by the applicant was:
  - 34.1. a declaration that the NEC's, CC's and RECs' respective suspensions of 27 union members ("***the suspended members***") were unlawful (and consequently that those members must be allowed to attend the National Congress); *and*
  - 34.2. a declaration that the Locals from the Union's Mpumalanga region be allowed to attend and fully participate in the National Congress.
35. *The alternative relief* sought by the applicant was that the "*National Congress be interdicted pending determination of the disputes involving the suspensions*".
36. A copy of the notice of motion in the Interdict proceedings is annexed hereto marked "***IJ4***".
37. Justice Moshwana granted the relief described in paragraph 31.1 above and declined to grant the relief described in paragraph 31.2. Furthermore, although the relief that follows was not sought in the notice of motion, the learned judge made the following order:

*"Numsa is interdicted and restrained from proceeding with the 11th National Congress scheduled to take place on 25-29 July 2022, until it fully complies with the terms of its own constitution."*
38. Unfortunately, the learned judge goes no further to explain what precisely would constitute full compliance with NUMSA's constitution in this particular instance.

However, what is clear, is that once NUMSA fully complied with its own constitution it would no longer be interdicted from proceeding with its 11<sup>th</sup> National Congress.

39. Under the circumstances one must have regard to how Justice Moshoana interpreted the Union's constitution in order to identify what may or may not constitute full compliance. In this regard,:

39.1. Justice Moshoana held that the CC does not have the power to perform the function of the Union's credentials committee, and that any accreditation of delegates for the National Congress must be conducted by a credentials committee duly appointed by the CC (sections 6(1)(c)(iii) and (iv) state that "*The accreditation of delegates will be determined by a Credentials Committee appointed by the Central Committee*" and "*Only delegates accredited by the Credentials Committee shall be entitled to vote at a National Congress*").

39.2. Justice Moshoana also held that the CC does not have the power to place the Mpumalanga Regional Council ("**the MRC**") under administration. This is despite the constitution expressly stating that the CC has the power to "*take over the management of the affairs of any region where an REC has been suspended until such time as another regional committee has been constitutionally elected*"<sup>4</sup>.

40. In light of the above findings, the respondents formed the *bona fide* belief that:

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<sup>4</sup> Chapter 6, section 6(2)(d)(iv)

- 40.1. the various suspensions of the suspended members were now void *ab initio* and their respective suspensions were to be treated as if they had never taken place;
- 40.2. the CC's decision to perform the function of the credentials committee was not in compliance with the Union's constitution;
- 40.3. the CC's decision to place the Mpumalanga region under administration was not in compliance with the Union's constitution; *and*
- 40.4. until such time as the decisions taken in paragraphs 37.2 and 37.3 were somehow rectified, the Union could not proceed with its 11<sup>th</sup> National Congress.
41. After considering the judgment at length, the President and I agreed that we had no option but to delay the start of the National Congress so as to comply with the Judgment. However, we also recognised that an emergency meeting of the CC would be able to rectify the two outstanding issues of non-compliance; namely the placing of Mpumalanga under administration and the issue of the credentials committee.
42. We determined, in good faith and with the utmost respect for the Rule of Law, that the Union would not have to waste nearly R40 million of its members' money in setting up the Congress if the CC could rectify these deficiencies within the next few days. We accordingly set into motion the Special CC meeting described above.

## THE SPECIAL CC MEETING AND THE CREDENTIALS COMMITTEE MEETING

43. The Special CC meeting on Tuesday, 26 July 2022 was fully quorate and was attended by the regional secretaries from all nine of NUMSA's regions. This included Vuyo Lufele, Andile Bloko and Mziyanda Twani who, up until Judgment was delivered on 23 July 2022, had been placed on precautionary suspension.

44. At the initial sitting of this meeting (where I was present):

44.1. the President and I confirmed to the attendees that the suspended members (including the applicant and the other delegates to the CC) were no longer suspended as per the Judgment; *and*

44.2. the CC took a decision, by majority vote, that:

44.2.1. the placing of Mpumalanga under administration was invalid because it was not in compliance with the Union's constitution as per the Judgment;

44.2.2. the CC would hereby appoint a credentials committee composed of all nine regional secretaries (with the general secretary being present as secretary of the meeting – without voting rights); *and*

44.2.3. annexure A to the union's constitution would hereby be amended, in terms of the CC's powers to amend the annexures to the constitution under section 6(2)(d)(xiv), to include the following definition:

*"Accreditation of delegates" includes the requirement that delegates have been confirmed as such by a properly constituted Regional Executive Committee.*

45. The CC then adjourned to allow the credentials committee to do its job. The credentials committee made the following decisions by way of majority vote:
- 45.1. the credentials committee confirmed the membership numbers for each region as at March 2022 (allocating one delegate per 300 members), while noting that the figures had increased by an effective three delegates in the Ekurhuleni region and by one delegate in the Hlanganani region;
  - 45.2. the credentials committee resolved to include the regional office bearers ("**ROBs**") within the allocated number of delegates for each region; *and*
  - 45.3. the delegates for each region (including Mpumalanga and the NOBs) would have made up a total of 1020 delegates (the exact breakdown of these figures is contained in annexure CC12 to the founding affidavit).
46. However, the credentials committee then resolved further, by way of majority vote, to not accredit the delegates from Mpumalanga because that region has tried and failed twice to hold a regional congress ("**RC**") *en route* to the National Congress. With the last RC having been held in 2016, the extant REC (which is the body that confirms *which individuals will be delegates* for each region) did not, and still does not, represent the will of the members of Mpumalanga.
47. The credentials committee reasoned that it would be unfair for the eight other regions to all have delegates confirmed by newly elected RECs while the Mpumalanga REC does not represent the current will of the members. Allowing various delegates from Mpumalanga to attend without confirmation from a democratically elected REC would represent a fraud on the members of

Mpumalanga. It would also be practically impossible to allow every Local Shop Steward's Council from Mpumalanga to arrive at the Congress and claim the right to a delegate without verification from a democratically elected REC.

48. Under the circumstances, the credentials committee reasoned that the National Congress must go ahead without Mpumalanga or otherwise one or more dysfunctional regions would forever be able to stop a National Congress from taking place.
49. As a result of the exclusion of Mpumalanga's 77 delegates, the total number of delegates to the National Congress was confirmed by the credentials committee as 943 (including the five NOBs – which includes the applicant).
50. The credentials committee meeting then concluded and a report on its deliberations (annexure CC12 to the founding affidavit) was presented to the CC at a second sitting later that day (Tuesday, 26 July 2022), and the outcome was adopted by the CC on the basis of a majority vote.
51. The credentials committee and the CC having concluded its business, the National Congress was ready to proceed the following day (Wednesday, 26 July 2022) uninhibited by the Judgment.

#### **POWER OF THE CREDENTIALS COMMITTEE TO EXCLUDE MPUMALANGA**

52. Justice Moshwana made it very clear in his reasoning regarding the CC's powers to place Mpumalanga under administration that "*Numsa is bound by what is in its constitution. Nothing more and nothing less*". The learned judge then held that such power simply does not exist.



53. Justice Moshwana's finding was in spite of the fact that NUMSA's constitution provides that that the CC may "*take over the management of the affairs of any region where a Regional Executive Committee has been suspended*"<sup>5</sup>. Given that only a regional congress (RC) can suspend a regional executive committee (REC) per section 5(2)(c)(viii), Justice Moshwana's interpretation can only be that the CC is empowered to "*take over the management of the affairs of any region*" – known colloquially as "*placing under administration*" – when, and only when, an RC has already placed an REC on suspension.<sup>6</sup>
54. Using the same rules of interpretation set out by Justice Moshwana, the credentials committee expressly has very wide powers with regard to accrediting delegates for the National Congress – "*Only delegates accredited by the Credentials Committee shall be entitled to vote at a National Congress*"<sup>7</sup>.
55. The only thing fettering the discretion of the credentials committee, in submission, is that the power must not be exercised capriciously or in bad faith, and that the decision must be rationally connected to the purpose of the empowering provision.
56. In this present scenario, the credentials committee exercised its power to exclude the Mpumalanga delegates with the *bona fide* intention to:

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<sup>5</sup> Section 6(2)(d)(iv)

<sup>6</sup> This authoritative interpretation is, with respect, going to cause NUMSA all kinds of problems going forward and that is why NUMSA will be petitioning the LAC. NUMSA is now faced with an untenable situation where the CC can only intervene and regularise a region when an RC is able to quorate and suspend its REC. Given that the last two RCs in Mpumalanga failed to quorate, the CC (representing the majority of the union's membership) is now powerless to intervene in a region that is completely dysfunctional.

<sup>7</sup> Section 6(1)(c)(iv)

- 56.1. avoid a scenario where the delegates from one region do not represent the will of the members of that region;
- 56.2. avoid the administrative chaos that would ensue if every Local Shop Steward's Council from Mpumalanga were to claim the right to delegates at the National Congress without verification from a democratically elected REC; *and*
- 56.3. avoid a scenario where one or more dysfunctional regions would forever be able to stop a National Congress from taking place.

#### **PREVIOUSLY SUSPENDED MEMBERS WERE NOT EXCLUDED FROM THE NC**

57. The previously suspended members were not excluded from the 11<sup>th</sup> National Congress.
58. To prove that the previously suspended comrades were allowed to attend the National Congress, Vuyo Lufele, Andile Bloko and Mziyanda Twani were invited to attend the CC which discussed the future of the congress, and the CC they attended made it very clear that they were allowed to participate in the congress which included their right to be nominated and elected for office in the National Congress. But strangely, after the CC took a decision for the Congress to proceed, Andile Bloko and Mziyanda Twani chose to leave Cape Town and not to participate in the National Congress. This was consistent with the call they and the Western Cape leadership made to the NOBs through written letters (annexed hereto marked "**IJ5**") that the Congress must not continue. However just before the Congress officially began (i.e. immediately after the National Treasurer confirmed that the meeting was quorate) Vuyo Lufele took the

platform to implore the delegates from his region not to participate in the 11<sup>th</sup> National Congress, erroneously citing that the Congress was continuing illegally. Revolting against the majority decision taken by the CC he led a walk-out out of the Congress. However other delegates from the Western Cape continued with the Congress.

59. Furthermore, the delegates from each region had already been confirmed by that region's REC (with the notable exception of Mpumalanga – discussed above). That is to say, *the RECs had already chosen which individual people would attend the National Congress* as delegates from that region.
60. The regional secretaries from the Hlanganani and Sedibeng regions (who had full knowledge of the Judgment on Saturday, 23 July 2022 and who were present at the Special CC), confirm that they received no requests for a delegates change in their respective regions with regard to previously suspended members, and they were in any event satisfied that the delegates representing their respective regions had been properly elected as such by the relevant Local Shop Steward Councils. Confirmatory affidavits from both regional secretaries are annexed hereto marked “**IJ6**” an “**IJ7**”.
61. The applicant, in her capacity as 2<sup>nd</sup> Deputy President, was aware on Saturday, 23 July 2022 that her suspension had been declared unlawful, and she was invited to attend the Special CC on Tuesday, 26 July 2022 (with transport having been arranged for her). Despite this she went public on radio, television and print media stating lies that she had not been invited to attend the CC or the National Congress as per paragraph 22 *et seq* above. By way of example, on Tuesday, 26 July 2022 the applicant told GroundUp that she would not be

attend the National Congress because in her erroneous and self-serving view, the National Congress would be unconstitutional (see the GroundUp article annexed hereto marked “IJ8”).

62. The applicant therefore made an informed and deliberate decision to boycott the Special CC and the National Congress on the *mala fide* (and incorrect) assumption that the Special CC would not be able to rectify the constitutional defects identified by Justice Moshoana.
63. Consistent with her media appearances and her attorneys letter (annexures CC3 and CC6) – where the applicant indicates that she has no intention of attending the National Congress because, in her view, the National Congress would be unconstitutional – the applicant instructed the previously suspended members from Sedibeng and Hlanganani to deliberately boycott the National Congress. This is because all of the previously suspended members from Sedibeng and Hlanganani constitute the applicant’s key supporter base (a “coalition of the wounded” whom she has co-opted for political convenience, and who were instrumental in electing her as President of SAFTU – against the wishes of NUMSA’s wishes).
64. This conduct was consistent with all of the previously suspended members who staged a walk out just before the Congress began.

## **AD SERIATIM RESPONSE TO THE FOUNDING AFFIDAVIT**

### Introduction

65. Insofar as I do not deal with each and every allegation contained in the founding affidavit, such is not to be taken as an admission or concession of any kind.

66. In fact, the respondents' legal team has simple not had enough time to:
- 66.1. properly consult on the contents of the founding affidavit with all the relevant people;
  - 66.2. fully research and advise on the law;
  - 66.3. prepare a draft response to every paragraph *ad seriatim*; and
  - 66.4. thereafter convene further consultations with the respondents to finalise this affidavit.
67. Accordingly, I have little option but to rely on what is stated above and canvass in broad strokes, as best I can, the allegations in the founding affidavit *ad seriatim*.
68. The respondent therefore denies each and every allegation contained in the founding affidavit that is contrary to the version set out in this affidavit (or by necessary implication is contrary to the version set out herein). Furthermore, where it may be necessary to provide evidence in substantiation of such a denial, that substantiation is contained elsewhere in this affidavit.

Ad paragraphs 1 to 10

69. I do not dispute the citations of the parties, save to state that as of Wednesday, 27 July 2022 the applicant is no longer the 2<sup>nd</sup> Deputy President of NUMSA (the applicant having deliberately boycotted the National Congress, thereby choosing to not stand for re-election).
70. The remaining allegations under reply are denied.

Ad paragraphs 11 to 14

71. The respondents do not dispute this court's jurisdiction but denies "*defying*" the Judgment (as explained above).

Ad paragraph 15

72. As explained above, the National Congress did not commence on Monday, 25 July 2022. Rather, the start of the National Congress was postponed to Wednesday, 27 July 2022 in compliance with the Judgment.

73. I confirm that the Special CC sat on Tuesday, 26 July 2022 and appointed a credentials committee (as described above), and the National Congress then commenced on Wednesday, 27 July 2022 and elected new office bearers.

Ad paragraphs 16 to 18

74. The contents of these paragraphs are denied and, by virtue of what is stated above, the applicant is not entitled to any of the relief she seeks.

Ad paragraphs 19 to 23

75. I admit only that these paragraphs constitute what was set out in the founding affidavit and in the Judgment of the Interdict proceedings, but I deny that the applicant is correct regarding the meaning and import she wishes to give to these quotations.

76. I pause to note that Justice Moshona was explicit in stating that "*The Court does not prevent Numsa to hold the national congress but it says Numsa can do so in line with its own constitution*".

77. I also note that Justice Moshwana's lament that "*How can a national congress that cycle[s] once in four years proceed without the views of the biggest region, [Mpumalanga]?*" is a rhetorical question made *obiter dictum* and did not form part of the *ratio decidendi* on this point. That *ratio* was the fact that the CC does not have express powers to place a region under administration (unless an RC suspends its REC first).
78. Justice Moshwana made it very clear that he was not interested in the purported "*politics*" of this matter, and that he was only interested in correctly interpreting the constitution.
79. Furthermore, an allegation that Mpumalanga is NUMSA's biggest region was not before court and, in reaching this conclusion the learned judge, with respect, made an erroneous assumption. As is clear from the report of the credentials committee Mpumalanga is one of the three smallest regions of NUMSA with only 23232 members in relation to KZN which is NUMSA's biggest region with 56088 members.
80. It is deplorable that the applicant continues to make herself a self-appointed spokesperson of the Mpumalanga Region when in the credentials committee which discussed and dealt with this matter, the Regional Secretary of Mpumalanga (whose confirmatory affidavit is annexed hereto marked "**IJ9**") was very explicit that since the organization handled organizational challenges in Mpumalanga and put them under administration after the collapse of 2 Regional Congresses, there has not been a single local from Mpumalanga that demanded to attend the National Congress. The point one is making is that the applicant has no *locus standi* to be representing Mpumalanga Region in terms

of Chapter 5 (3) (e) (vi) of the NUMSA Constitution which reads “A *Regional Executive Committee shall have the following powers and duties: where it deems appropriate: 1 to institute or defend legal proceedings by or against the 2 to institute or defend legal proceedings on behalf of individual members or against individual members*”. However, this point is not made to challenge Judge Moshwana’s ruling, the CC in compliance with the judgment uplifted the administration of Mpumalanga.

Ad paragraphs 24 to 37

81. As described above, the respondents were aware of the Judgment from the moment it was handed down. I vehemently deny that the unsubstantiated allegation that NUMSA indicated to the media that it would proceed with the National Congress in defiance of the Judgment.
82. As a member of the CC the applicant should have made every effort to attend to Special CC scheduled for Tuesday, 26 July 2022. She is now, with respect, obfuscating her deliberate boycotting of the meeting by making reference to letters sent by her legal representatives.
83. After winning a political victory in court, the applicant made the *mala fide* assumption that the CC meeting would not rectify the constitutional defects identified by Justice Moshwana, and consequently assumed that the respondents would be *ipso facto* in contempt of court. Her assumption was politically convenient but factually inaccurate.
84. As explained above, there was no meeting of the NOBs. The constitution does not provide for meetings of the NOBs. Indeed, when the constitution demands



that the NOBs take certain actions it provides no mechanism for reaching a decision as a collective. Accordingly, to fill this *lacuna* the practice has emerged over decades that consensus among a majority of NOBs is sufficient to discharge the duty placed on the NOBs (as a collective) to take action.

85. My meeting with the President was simply that, a bilateral meeting. The applicant, although her suspension had indeed been uplifted, had no constitutional right to attend that meeting between the two of us.
86. It is also important to state that the 2<sup>nd</sup> Deputy President was sent the notice convening the SCC which was sent within 48 hours and is called at the discretion of the President as per Chapter 9 (2) b of the NUMSA constitution. The 2<sup>nd</sup> Deputy President was emailed the notice convening the SCC along with all NOBs and CC delegates on Sunday 24 July 2022 at 00:24. She was subsequently phoned on Monday 25 July 2022 by the travel agent, on instruction from the National Treasurer, in order to make travel arrangements for her to travel to Cape Town for the SCC and the National Congress. She responded that she would not go to Cape Town as she did not receive an invitation. The National Treasurer then went further by putting the Notice of the SCC on the NOB Whatsapp Group and communicating to her that there is a flight for 6 am none of which she responded to.
87. The remaining allegations under reply are denied and have been dealt with elsewhere in this affidavit.

Ad paragraph 38

88. There was no need to prevent delegates from travelling to Cape Town because NUMSA's leadership had a plan to proceed with the National Congress after a delay of two days (during which time the CC would remedy the constitutional defects identified by Justice Moshoana). In any event, travel by delegates did not fall within the ambit of the interdict that was granted.

Ad paragraph 39

89. As explained above, the National Congress did not commence on Monday, 25 July 2022 because NUMSA had been interdicted from doing so. The commencement date was postponed until such time as NUMSA fully complied with its constitution, as envisaged in the order issued by Justice Moshoana.

Ad paragraphs 40 to 41

90. I do not dispute the contents of the reports on both the Special CC and the credentials committee.

Ad paragraphs 42 to 45

91. The 11<sup>th</sup> National Congress convened for the first time on 27 July 2022 and the elections results are correctly recorded in the paragraphs under reply.

92. I confirm that the election proceedings took place while the Judgment was subject to an application for leave to appeal. However, this fact is irrelevant because NUMSA was nevertheless in full compliance with the Judgment (and

would still have been in full compliance with the Judgment even if operation of the Judgment had not been suspended by the application for leave to appeal).

93. The respondents take considerable umbrage at the unfounded allegations of disrespect for this court. While the allegations may be politically convenient for the applicant, they are factually incorrect.

Ad paragraphs 46 to 48

94. I have already set out above exactly how the Special CC and the credentials committee remedied the constitutional defects identified by Justice Moshwana.

Ad paragraphs 49 to 50

95. The “*disabling feature*” of the Judgment, such as it is, was categorially not the fact that Mpumalanga would be absent from the National Congress. The learned judge lamented this eventuality by stating rhetorically, and *obiter dictum* that, ““*How can a national congress that cycle[s] once in four years proceed without the views of the biggest region, [Mpumalanga]?*”.
96. However, the *ratio decidendi* of the learned judge’s decision was the fact that, on his interpretation, the CC did not have the power to place the region under administration. Importantly, the learned judge specifically declined to grant prayer 5 of the applicant’s notice of motion; namely “*That it be declared that the Locals from Mpumalanga region be permitted to attend and fully participate in the upcoming 11<sup>th</sup> National Congress*”.
97. The fact that Justice Moshwana failed to grant this prayer (and instead interdicted the National Congress until the Union complied with its constitution),

demonstrates that the learned judge intended to leave the decision of delegate accreditation to the credentials committee.

98. Justice Moshwana was, with respect, correct to confine his duties to interpretation of the Union's constitution. The fact that NUMSA's subsequent compliance with its constitution resulted in Mpumalanga being excluded from the National Congress (for very good reason I might add), does not create non-compliance with its constitution, and it does not create contempt of court.
99. Indeed, this court has repeatedly stated that internal battles within a union do not concern the Labour Court, the court is only concerned with non-compliance with a union's constitution.
100. The remaining contents of the paragraphs under reply are denied.

Ad paragraphs 51 to 54

101. The purpose of the Judgment was not "*to ensure participation of the suspended members in the National Congress*" but rather to ensure that NUMSA complied with its constitution *en route* to its National Congress (the Labour Court, with respect, would not have jurisdiction to do anything more than this).
102. I deny that there was any "*decision to not to include [the previously suspended members]*". As explained above, the previously suspended members from the Eastern and Western Cape did indeed attend the National Congress, and the regional secretaries from Hlanganani and Sedibeng did not wish to replace their region's delegates with the previously suspended members from their regions. If the regional secretaries had asked for their delegates to be replaced then the

Union would have made the applicable arrangements for travel and accommodation.

103. I have also explained above that the applicant made a fully informed decision to boycott the Special CC and the National Congress on the *mala fide* (and incorrect) assumption that the Special CC would not be able to rectify the constitutional defects identified by Justice Moshwana.

104. The applicant's claim that 22 of the 31 members listed in annexure CC13 were not provided with travel and accommodation, and were therefore "*effectively*" kept on precautionary suspension is vague and embarrassing, and falls to be struck out. The respondents do not know which members the applicant is referring to and, in any event, I deny that anyone other than the 27 previously suspended members had ever been placed on precautionary suspension.

105. In any event, the allegations regarding the 31 members listed in annexure CC13 constitute inadmissible hearsay and fall to be struck out.

106. The remaining allegations under reply are denied.

Ad paragraph 55

107. The applicant clearly has no first-hand knowledge of what took place at various unspecified local shop steward council meetings across the Eastern Cape, Western Cape and Ekurhuleni regions. The allegations therefore constitute inadmissible hearsay and fall to be struck out.

108. In any event, the contents of this paragraph are denied. In fact, it is blatant lie that the 7 Eastern Cape members listed in annexure CC13 were excluded from

the National Congress. Attached hereto marked “**IJ6**” is the attendance register for the Special CC where Andile Bloko and Mziyanda Twani have signed their names and were present in their capacity as the leadership of their region. I also saw them both with my own eyes at the National Congress (and video evidence to this effect can be produced if necessary).

Ad paragraphs 56 to 57

109. The contents of these paragraph are vague and embarrassing, and they constitute inadmissible hearsay that falls to be struck out. The allegations are, in any event, denied.
110. The allegation that “*There was further a change of names by some of the Regions*” is impossible to answer to. In any event, confirming which individuals from a particular region are going to be delegates to the National Congress is indeed the job of the REC (which decision must be communicated by the regional secretary to the office of the general secretary).
111. If the applicant is claiming some sort of conspiracy involving the regional leaders, then those leaders need to be cited in this application.
112. The reason why the national leaders were elected unopposed was because the applicant, Mziyanda Twani (regional secretary of the Eastern cape region who expressed the intention of becoming the DGS of the Union) and Andile Bloko (chairperson of the Eastern Cape region who has expressed an interest in becoming President of the Union) deliberately chose to not run for office on the *mala fide* (and incorrect) assumption that the Special CC had not rectified the constitutional defects identified by Justice Moshoana.

Ad paragraph 58

113. The contents of this paragraph constitute inadmissible hearsay that falls to be struck out (the applicant obviously has no personal knowledge about the working arrangements of the individuals mentioned in this paragraph). Furthermore, the failure to cite these individuals (who clearly have a direct and substantial interest in the outcome of this application) constitutes a material non-joinder.

114. The allegations are, in any event, denied.

115. We challenge the applicant that among the listed names as follows:

115.1. Phangela Bukula is working for Newrak Mining in Rustenburg and is the chairperson of Newrak (see attached document as annexure “**IJ9**”), so at the National Congress he was a member in good standing.

115.2. Sindisile Nyathi remains employed by Anglo American, (see attached document as annexure “**IJ10**”), so at the National Congress she was a member in good standing.

115.3. The last time Nokwanda Mbatha paid subscriptions to NUMSA was in February 2022. Accordingly, she was not an accredited delegate to the Congress. She was therefore present at the Congress under false pretences. In any event, she did not participate in the Congress because, after the national treasurer confirmed that the meeting was quorate, but before the 1<sup>st</sup> Deputy President officially opened the Congress, Mbatha joined Lufele and others in their staged walk out.

- 115.4. Enos Mbulaeni remains employed by Eskom in Braamfontein (see attached document as annexure “**IJ11**”), so at the National Congress he correctly part of the JC Bez delegation.
- 115.5. Siya Mdleni moved from Mpumalanga in 2018 to Johannesburg (see attached document as annexure “**IJ12**”), so at the National Congress he correctly part of the JC Bez delegation.
116. The RECs from the relevant regions all confirmed to the office of the general secretary that the individuals mentioned in the paragraph under reply would be delegates for their respective regions. Once that decision is made by the REC the national office cannot query that decision (and, in any event, the respondents simply do not have time in these urgent proceedings to fact-check the broad allegations made by the applicant regarding the purported liquidation of employers, etc).
117. If the applicant believes that the individuals in question may not be members in good standing, the applicant is free to challenge the respective decisions of the RECs. However, I should point out that, as long as the decision of the REC was made in good faith, there would be no reason to set aside that decision (and certainly no reason to set aside an entire National Congress).
118. It is well established that minor irregularities in elections that, if declared invalid, would not have a material effect on the outcome of the election, cannot constitute a basis to set aside an entire election. In the present matter the applicant has failed to make the allegation (let alone substantiate such an allegation) that excluding the five individuals in question and replacing them



with other delegates would have had a material effect on the outcome of NUMSA's national elections.

119. It is also important to state that the EISA<sup>8</sup> official when reading out the results stated that the leadership was duly elected and unopposed therefore no voting took place at the 11<sup>th</sup> National Congress which elected new leadership. Ad paragraphs 59 to 62
120. I repeat that the start of the National Congress was delayed by two days so as to comply with the Judgment. The requirement that the congress must quorate within three hours of its commencement only applies from when the meeting actually commenced: namely on Wednesday, 27 July 2022 at 10h00 (and it did so quorate).
121. The applicant's claim that a delay of two days means that the original notice to attend the conference no longer applies (and consequently NUMSA was obliged to issue a new notice on six months' notice) constitutes a self-serving and incorrect interpretation of the Union's constitution.
122. There is nothing in the provisions of the constitution that prevents NUMSA from delaying the start of a National Congress. The congress was scheduled to take place between 25 and 29 July 2022; provided the congress commenced within that time period, the original Notice remained valid. In this case it could not simply proceed on Monday 25 July 2022 in violation of the court ruling.

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<sup>8</sup> Electoral Institute for Sustainable Democracy in Africa

Ad paragraphs 63 to 64

123. The contents of these paragraphs are denied and have been dealt with elsewhere in this affidavit.

124. I repeat that there was no need to cancel travel arrangements because the respondents believed, in good faith, that the Special CC would be able to remedy the constitutional defects identified by Justice Moshwana. I reiterate further that travel by delegates was not interdicted by Justice Moshwana, and nor could it be.

Ad paragraph 65

125. As set out above, the President did not open the National Congress on Monday, 25 July 2022 but instead explained to the delegates that the congress had been interdicted and that the congress could not begin until such time as NUMSA had fully complied with its constitution.

126. In any event, the applicant is unable to make allegations about what took place at the CTICC on Monday, 25 July 2022 (or how the attendees might have construed the meeting) because the applicant chose not to be there despite the efforts made by the NUMSA NOBs.

Ad paragraph 66

127. As described above, the issue of leave to appeal is irrelevant to the present matter because, having fully complied with its constitution by the conclusion of the Special CC meeting late on the evening of Tuesday, 26 July 2022, NUMSA was at liberty to proceed with commencing its National Congress the following

morning (whether the Judgment was subject to an application for leave to appeal or not).

Ad paragraph 67

128. Granting a final order setting aside all of the resolutions taken at the National Congress would be incredibly prejudicial to the respondents and, in submission, it is an order that should not be granted in urgent court on only a few days' notice. It is an issue that requires full and timeous ventilation in proper review proceedings (with all the procedural protections afforded to respondents in review applications including examining the record of what took place at the Special CC, the credentials committee and the National Congress itself).
129. In any event, as described in great detail above, the Union fully complied with its constitution. Accordingly, the applicant has failed to prove that the National Congress was unconstitutional (particularly, in submission, when regard is had to the *Plascon-Evans Rule*).

Ad paragraph 68

130. There is no basis for a finding of contempt against any of the respondents.
131. The applicant has failed to prove beyond a reasonable doubt that the respondents failed to comply with the Judgment. However, even if failure to comply has been proven (and this has been vigorously denied above), the respondents' actions were at all times undertaken with the utmost good faith and in what they believed to be full compliance with the Judgment.

132. The applicant has therefore failed to prove beyond a reasonable doubt that the respondents' actions were wilful and *mala fide*.

Ad paragraphs 69 to 80

133. I confirm that annexure A to the Union's constitution was amended by the CC in terms of the CC's powers to amend the annexures to the constitution under section 6(2)(d)(xiv). This amendment was presented and confirmed at the National Congress.

134. The amendments were made in full compliance with the Union's constitution and are therefore not "*unlawful*" as alleged by the applicant. The amendments also do not reverse any "*gains*" made by the applicant in the Interdict proceedings: the only gains made by the applicant was an order directing NUMSA to comply with its constitution (which it has now done).

135. I deny that a departure from section 13 of the Practice Manual is warranted in this case. Bringing this application on an *ex parte* basis on a Friday, and then allowing the respondents a full opportunity to defend themselves over several months against a criminal conviction constitutes the bare minimum that the respondents are entitled to by way of procedural rights.

136. While I admit that there is some confusion in the media about the National Congress proceeding despite being interdicted (a narrative that has been engineered by the applicant – for example in an interview on eNCA where she falsely claimed that Justice Moshona had ordered that delegates from Mpumalanga must attend the National Congress), there is no reason why the contempt proceedings cannot be heard over the course of several months. To

do so on four days' notice constitutes a direct infringement of the rights of the accused under section 35 of the South African Constitution.

137. Furthermore, if an *ex parte* order is granted requiring the respondents to show cause why they should not be placed in contempt of court, the media will understand that the court has exerted its authority over the issue.
138. Finally, there are no grounds to proceed on an urgent basis to have the goings-on of the National Congress reviewed and set aside. The applicant has failed to set out any harm that will befall her (let alone any irreparable harm) if this particular claim is dealt with in normal review proceedings over the course of several months.

**WHEREFORE** the respondents pray for an order that:

- a) paragraphs 52, 55, 56, 57 and 58 of the applicant's founding affidavit be struck from the record of proceedings before this court; *and*
- b) the application be struck from the urgent roll for lack of urgency, *alternatively* dismissed on the merits, with costs on a punitive scale.

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**DEPONENT**

I CERTIFY that this affidavit was SIGNED and SWORN TO before me at \_\_\_\_\_ on this the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, the deponent having acknowledged that he/she knows and understands the content of this Affidavit, the Regulations contained in Government Notice No 1258 of 21 July 1972 and R1648 of 19 August 1977, having been complied with.

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**COMMISSIONER OF OATHS**