



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 616/22

In the matter between:

**PUBLIC SERVANTS ASSOCIATION
OF SOUTH AFRICA**

Applicant

and

DEPARTMENT OF EMPLOYMENT AND LABOUR

First Respondent

REGISTRAR OF LABOUR RELATIONS

Second Respondent

Heard: 09 January 2024

Delivered: 02 May 2024

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 02 May 2024

JUDGMENT

STEENKAMP, AJ

Introduction

- [1] Trade unions are important for various reasons. Historically, trade unions were instrumental in bringing about democracy in South Africa. It is for this

reason that the predecessors to the Labour Relations Act¹ (LRA) were mostly aimed at keeping trade unions at bay and stopped short of banning them altogether.

- [2] In order to ensure that citizens could freely associate, either politically or with any other organisation, such as a trade union, freedom of association was enshrined as a fundamental human right in our Constitution.
- [3] Trade unions are further the custodians of employee rights. Membership of a trade union is for most, the only shield they have against unfair treatment in the workplace. It is the only power they have to try and ensure that they are subjected to fair labour practices. There can be no doubt that trade unions are important and that they should be held to a high standard of accountability.
- [4] I am certainly not suggesting that all trade unions are created equal. There are trade unions who flout the lofty ideals that their constitutions impose upon them, the LRA requires, and their members demand from them. The number of trade unions who do more harm than good in the workplace and do the most objectionable disservice to their members is on the increase. But that is a subject for another day.
- [5] In the current matter, this Court must determine whether the Second Respondent erred in law and in fact in the decision to refuse registration of the Appellant's amended constitution.

The facts

- [6] The Appellant is a trade union, duly registered as such in accordance with Sections 95 and 96(3) of the LRA. The Appellant is further compliant with Sections 95(5) and 95(6).
- [7] The Appellant has been a duly registered trade union in South Africa since 1993.

¹ Act 66 of 1995, as amended.

- [8] Further, the Appellant has been incorporated as a non-profit company since 1942, and the *status quo* remains.
- [9] As such, the Appellant's dual registration (both under the LRA and the Companies Act² and its successor³) has subsisted for approximately 29 years.
- [10] The Appellant is a party to the Public Service Co-ordinating Bargaining Council, as well as other bargaining councils in the public service sector and is an affiliate of FEDUSA.
- [11] The Appellant contends that it is a genuine trade union.
- [12] The Appellant's constituency adopted a resolution to amend its constitution in accordance with Section 91 of the LRA, at the Annual General Meeting (AGM) duly convened on 16 June 2021 and 20 September 2021.
- [13] On 1 December 2021, the Appellant applied to the Second Respondent for the approval, registration and endorsement of the amended constitution in accordance with Section 101(3)(a) and Section 101(3)(b) of the LRA.
- [14] The Second Respondent refused the application and accordingly refused to approve and register the Appellant's amended constitution.
- [15] In a written decision dated 31 March 2022, the Second Respondent stated that:

'In light of this dual registration which PSA enjoys in terms of the LRA and a Company in terms of the Companies Act which is in direct contrary (*sic*) to the provisions of the LRA, this Office will not be in a position to certify any application for amendment/replacement of the Constitution in terms of section 101 of the LRA with this dual registration under the LRA and as a Company under the Companies Act still in place.

You are hereby informed that your application for replacement of the Constitution in terms of the LRA is refused with effect from 31 March 2022.'

² Act 61 of 1973.

³ Companies Act 71 of 2008.

[16] On 29 April 2022, the Appellant requested reasons for the decision from the Second Respondent, which reasons were furnished by the Second Respondent on or about 13 May 2022.

[17] The Second Respondent, in addition to quoting content from the refusal notification of 31 March 2022, stated that:

‘The auditors further report that these annual financial statements have been audited in compliance with the applicable requirements of the Companies Act, 71 of 2008. It is the conclusion of this office that the Union cannot be regarded to have complied with the LRA regarding audits and submission to this Office which is attributed to this dual registration under the LRA and as a Company in terms of the Companies Act. The audited financial statements submitted were not audited in terms of 98 of the LRA.’

[18] The Appellant subsequently launched the appeal against the entire decision of the Second Respondent to this Court in terms of Section 111(3) of the LRA, based on alleged errors of law and errors of fact.

The applicable legal framework

[19] The drafters of the LRA intended for the process of registration of a trade union to be a simple one.⁴ The intention was that authorities should merely verify the fulfilment of certain formalities. The Registrar would thus be obliged to register a trade union if all the statutory formalities are met.

[20] The following excerpt from the explanatory memorandum demonstrates the intention of the legislator at the time of enactment of the LRA:

‘The proposed system of registration is simple and quick and complies with the right to freedom of association as guaranteed in the Constitution and by international labour standards.’

[21] Consequently, Section 95(1) of the LRA permits any trade union to apply to the Registrar –

⁴ Explanatory memorandum (1995) 16 ILJ 278 at p 324.

‘...for registration if –

- (a) it has adopted a name that meets the requirements of subsection (4);
- (b) it has adopted a constitution that meets the requirements of subsections (5) and (6);
- (c) it has an address in the Republic; and
- (d) it is independent.’

[22] Section 95(2) of the LRA sets out when a trade union is considered to be independent. The section is worded as follows:

‘A trade union is independent if –

- (a) It is not under the direct or indirect control of any employer or employer’s organisation; and
- (b) It is free of any interference or influence of any kind from any employer or employer’s organisation.’

[23] Whilst an employer is not defined in the LRA, an ‘*employers’ organisation*’ is defined in Section 213 as:

‘any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions.’

[24] A ‘*trade union*’ is defined as:

‘an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ organisations.’

[25] The Minister of Labour issues guidelines, in consultation with Nedlac, that are to be applied by the Second Respondent in determining whether or not an applicant for registration, such as a trade union, is a genuine trade union. The Second Respondent may only register a trade union if the Second Respondent is satisfied that it is a “genuine” trade union. A distinction is drawn between existing trade unions and applications for the registration of “new” trade unions.

[26] The guidelines applicable *in casu* are the guidelines published on 12 December 2018⁵ (Guidelines).

[27] Paragraph 3 of the Guidelines states the following:

‘In order to determine whether an organisation is genuine, it will be necessary for the Registrar to examine the actual operation of the organisation. In the case of an applicant, particular attention will have to be paid to the manner in which the organisation was established and formed. In the case of an existing organisation, attention will have to be paid to its actual activities and functioning. In evaluating whether a trade union or employer’s organisation is genuine, the Registrar must take into account all relevant factors.’

[28] The Guidelines further state in paragraph 6 thereof that:

‘Therefore, an organisation cannot be registered as a trade union or continue to operate as a registered trade union unless –

- (a) It is in fact an association of employees;
- (b) The principal purpose of the activities is to regulate relations between its members and their employers (or employers’ organisation representing those employers).

It will therefore be necessary to raise and examine the actual process of forming a trade union, its composition and membership and the activities it undertakes on behalf of its members....’

[29] This is the nub of the Second Respondent’s issue with the Appellant. The Second Respondent refused registration of the Appellant’s amended constitution, not based on the content thereof, but on the fact that the Appellant is registered as a non-profit company under the Companies Act, as well as a trade union under the LRA. From that fact, the Second Respondent then deduced that the Appellant was not independent and refused to register the amended constitution of the Appellant.

⁵ Government Gazette No 42121 of 19 December 2018.

- [30] Section 111(3) of the LRA provides that any person aggrieved by a decision of the Registrar may appeal against such decision to this Court within a specified time period, as the case may be.
- [31] In *Staff Association for the Motor & Related Industries v Motor Industry Staff Association and another*⁶ (*Motor Industry*), the Labour Appeal Court (LAC) said that matters such as the current must be decided on a “*simple legal principle and that they depend on the facts of each particular case*”.
- [32] The LAC concluded that an appeal in terms of Section 111(3) of the LRA is not an appeal in the narrow sense, nor is it a review. Instead, it is an appeal in the broad sense and essentially amounts to a re-hearing and adjudication on the merits with or without additional evidence or information.⁷
- [33] That being said, *Motor Industry* must be understood in its proper context as it concerned an objecting party, a rival union, who was not before the registrar when the decision was taken. As such, the procedure allows for such an objecting party to present evidence before this Court after the decision has already been taken. This is however not *carte blanche* for the Second Respondent to proffer new reasons why a decision was taken, after the fact, when, as a matter of fact, those were not the reasons upon which the decision was taken.
- [34] I was referred to the matters of *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁸ (*Endumeni*) and *Cool Ideas 1186 CC v Hubbard and Another*⁹ (*Cool Ideas*) by counsel for the Respondents in respect of the interpretation of section 95(2)(a) and (b) of the LRA, and it was argued that in accordance with *Endumeni* and *Cool Ideas*, the ordinary grammatical meaning of the words used in a statute or other statutory instrument must be ascribed to those words in order to give effect to objective process of interpretation.¹⁰ Whilst the legal principles set out in *Endumeni* and *Cool Ideas*

⁶ [1999] ZALAC 13; (1999) 20 ILJ 2552 (LAC) at para 38.

⁷ Ibid at paras 20 – 22.

⁸ [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

⁹ [2014] ZACC 16; 2014 (4) SA 474 (CC).

¹⁰ *Endumeni* at para 18.

are sound, it does not find strict application *in casu*, for reasons that I will deal with hereunder.

- [35] In *Municipal & Allied Trade Union of SA v Crouse NO and others*¹¹ (*Crouse*), the late Steenkamp, J stated that:

‘The right to freedom of association must be interpreted generously and the requirements of registration, insofar as they restrict that right, should be interpreted restrictively.’¹²

- [36] In simple terms, this Court in *Crouse*, prescribed a specific formula or method of interpretation germane to sections 95 and 96 of the LRA, in that freedom of association must be interpreted generously, and the requirements of registration be interpreted restrictively. In my view, *Endumeni* and *Cool Ideas* set out a general or over-arching method of interpretation, it does not find application *in casu* because a specific method for interpretation of the aforesaid sections has previously been determined by this Court.

- [37] The right to register a trade union flows directly from the right to freedom of association which is enshrined in the Constitution. The words used in the LRA are deliberate and sections 95(2)(a) and (b) of the LRA are clear and concise. There is no ambiguity. Correctly construed, the content of section 95(2)(a) and (b) of the LRA, read with the relevant paragraphs of the Guidelines as already quoted hereinbefore, do not support an interpretation that would broaden the scope of “*employer*” to include any entity.

- [38] The Second Respondent also stated that the Appellant enjoys “*dual registration*” in direct contravention of the statute. This is patently incorrect, as there is no prohibition on registration as a separate non-profit entity in the LRA. What is prohibited is a trade union being registered as a front to advance the interests of a particular employer or employers’ organisation. There is a clear distinction.

¹¹ [2015] ZALCCT 56; (2015) 36 ILJ 3122 (LC).

¹² *Ibid* at para 23.

[39] The Second Respondent was misdirected in refusing registration of the amended constitution of the Appellant.

Analysis

[40] In order to determine whether a trade union is genuine, the Second Respondent is enjoined to undertake an examination of the “*actual operation of the organisation*”. In undertaking such ‘examination’ in respect of an existing trade union, the Second Respondent needs to pay ‘attention’ to the “*actual activities and functioning*” of the organisation.¹³

[41] The Guidelines in effect set out what the Second Respondent needs to take into account in determining whether or not an existing trade union continues to be a genuine trade union.

[42] As already set out hereinabove, the Guidelines make it clear that it is necessary for an examination of three issues to determine whether a trade union is genuine:

- 42.1 The actual process of formation thereof;
- 42.2 the composition and membership thereof; and
- 42.3 the activities undertaken on behalf of its members.

[43] These three issues are dealt with in some detail in the Guidelines. For the purposes of this judgment, the most important factor is dealt with in paragraph 16 thereof. Tellingly, the paragraph is headed “*Independence from employers*”.

[44] The Minister, in consultation with Nedlac, intended the factors listed in paragraph 16(a) – (c) to be considered by the Second Respondent and/or his delegates, to determine whether or not a trade union is independent (from employers).

[45] It is useful for the current purpose to quote this paragraph:

¹³ Paragraph 3 of the Guidelines *ibid*.

‘A trade union may only be registered and continue to operate as a registered trade union if it is independent. In terms of section 95(2), a trade union is not independent if it is under the direct or indirect control of any employer or employers’ organisation and is not free of interference or influence of any kind from any employer or employers’ organisation. Factors that would indicate that a trade union is not independent are –

- (a) That any of the officials or office-bearers of a trade union are also officials or office-bearers of an employers’ organisation;
- (b) That the trade union operates from the same premises or shares facilities with an employers’ organisation;
- (c) An employer assisted with the formation of the trade union or that the trade union operates as a “sweetheart” union (i.e. a trade union that exists to further the interests of the employer or to undermine independent trade unions).’

[46] The Guidelines also, with reference to the requirement of section 95(5)(a) of the LRA which requires a trade union to be an association not for gain, set out some of the factors that may indicate that a trade union is operating for gain, or put differently, for the enrichment of some individuals or as a front for a profit-making business.¹⁴

[47] These factors include unrealistically high salaries and allowances paid to the officials, office-bearers or employees of the trade union; the provision of interest-free or low-interest loans to officials, office-bearers or employees of the trade union, without such loans being repaid; family members of office-bearers or officials being employed by the trade union and income earned by the trade union not being used for the benefit of the organisation and its members, but it is paid out to officials, office-bearers or employees.

[48] The Guidelines further set out what is not in and of itself indicative of a lack of independence. These factors include that it is not inappropriate to pay competitive salaries to attract competent and qualified officials or employees;

¹⁴ Paragraph 18(a) – (d) of the Guidelines.

that there may be circumstances in which the provision of loans on favourable conditions to officials, office-bearers or employees may be permissible, that a trade union may have other sources of income, such as investments and that in certain circumstances, a member may be required to make a realistic contribution to the cost associated with cases brought on their behalf.¹⁵

- [49] Finally, the Guidelines state that affiliation with a trade union federation, where the other members of such federation are genuine trade unions, is an indicator that the trade union is a genuine trade union.¹⁶
- [50] There is nothing in the record which demonstrates that the Second Respondent considered any of the factors set out in the Guidelines, or that any examination of the process of forming the Appellant, its composition and membership and the activities it undertakes on behalf of its members took place. This is a significant failure by the Second Respondent, as the decision was not taken based on evidence after a proper process was followed. On this basis alone, the appeal must succeed.
- [51] The Second Respondent took the decision to refuse registration of the Appellant's amended constitution on the basis that the Appellant is registered both as a non-profit entity in terms of the Companies Act, as well as a trade union in terms of the LRA. The Second Respondent deduced that the mere fact of the Appellant's incorporation as a non-profit entity, demonstrates a lack of independence from the direct or indirect control or influence of an employer's organisation or *"any entity for that matter and any interference or influence from such entities"*. (Own emphasis)
- [52] The Second Respondent erred in this regard. Section 95(2)(a) and (b) of the LRA states that a trade union is independent if it is not under the direct or indirect control of an employer or employer's organisation, and it is free from interference or influence from any employer or employer's organisation. The use of the word "entity" by the Second Respondent is unfortunate. The LRA specifically states that a trade union must be independent from the influence

¹⁵ Paragraphs 19 – 21 of the Guidelines *ibid*.

¹⁶ Paragraph 22 of the Guidelines *ibid*.

or control of an employer, or employer's organisation, and not an "entity" as referred to by the Second Respondent.

- [53] Be that as it may, there is nothing in the record which demonstrates that the Appellant may be under the control of an employer, or employers' organisation, and consequently, there is no evidence to support the Second Respondent's view that the Appellant lacked independence as set out in the LRA.
- [54] The LRA further contains no prohibition on registration as a non-profit company in terms of the Companies Act in addition to registration as a trade union under the LRA. The Second Respondent erred in concluding that the "*dual registration*" of the Appellant contravenes legislation or the law.
- [55] The Second Respondent further erred in concluding that the Appellant is not an independent or "genuine" trade union by virtue of the fact that the financial statements of the Appellant were audited in accordance with the Companies Act, and not in accordance with the LRA. This was raised for the first time when the Second Respondent issued reasons for the refusal to register the Appellant's amended constitution.
- [56] The only evidence before the Second Respondent in this regard is the note of the auditors on the financial statements of the Appellant, which states that the financial statements were audited in compliance with the applicable legal requirements of the Companies Act.
- [57] I agree with the submission of Mr Malan that the audit standards detailed in sections 29 and 30 of the Companies Act are in line with standards set out in sections 98(1) and 98(2) of the LRA. The standard is the standard of generally accepted accounting practices, principles and procedures. The LRA does not set out more onerous accounting standards than required by the Companies Act, and this belated "reason" for having refused registration of the Appellant's constitution equally does not pass muster.

[58] The appeal must succeed on all scores. The Second Respondent erred in refusing to register the amended constitution of the Appellant, both in respect of issues of fact and issues of law.

Conclusion

[59] As I already stated, the appeal must succeed.

[60] The only remaining issue is the issue of costs.

[61] The LRA prescribes factors the Court should consider in making an award for costs.¹⁷ These include whether the matter ought to have been referred to statutory arbitration, and if so, whether the referral to court occasioned additional costs; the conduct of the parties in proceeding with, or defending the matter before court and the conduct of the parties during the proceedings before court.

[62] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*¹⁸, the Apex Court said the following:

‘The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:

‘The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties

¹⁷ See: section 162(2)(a) and (b)(i) and (ii) of the LRA.

¹⁸ [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

to bring to the Labour Court and this Court frivolous cases that should not be brought to Court.’¹⁹

[63] In *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others*²⁰, the Apex Court said:

[33] These principles find expression in section 162 of the LRA, which rejects the ordinary rule of litigation that costs should follow the result in favour of an approach based on “law and fairness”. When we pay heed to this fairness standard, we do so because we are obliged by the LRA and the above constitutional imperatives. Hence, I repeat: when making costs orders in labour matters, courts are enjoined to apply the fairness standard in the LRA as a matter of constitutional and statutory obligation.

[34] What, then, are the implications of what I have said in this judgment? Do the principles I have enunciated dictate that costs can never be ordered against a party in labour matters? I think it is clear from this Court’s jurisprudence that the answer to this question is a resounding “no”. This Court has previously affirmed the principle that costs are discretionary to the court adjudicating a matter. What applies no differently to labour matters. But, like all exercises of discretion, a court exercising its discretion to award costs must do so judicially.

[35] In the labour context, the judicial exercise of a court’s discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in section 162, and the constitutional and statutory imperatives that underpin it. Where a court fails to do so, it commits an error of law and thus misdirects itself. This Court explained this in *Long*:

“[W]hen making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness

¹⁹ See also: *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O.* [2007] ZALAC 41; (2008) 29 ILJ 1707 (LAC) at para 19.

²⁰ [2021] ZACC 26; 2021 (11) BCLR 1249 (CC) at paras 33 – 37.

and have due regard to the conduct of the parties. This, the Labour Court failed to do. There is no reasoning on the question of costs beyond an indication that costs are to follow the result. This is a misdirection of law and it follows that the Labour Court's discretion in respect of costs was not judicially exercised and must be set aside."

- [36] An instructive approach to a court's exercise of its discretion on the question of costs can be found in the Labour Appeal Court's decision in *Bester*. In determining the question of costs in that case, the Court held:

"The appellant seeks a costs order. The question falls to be decided with reference to law and equity. As an individual, bearing her own costs without the help of a trade union, it is appropriate to give consideration thereto, even though the usual approach is that costs do not simply follow the result. It seems to us that fairness dictates that she be granted costs in the review and in the appeal because of the burden such costs would be on an individual. Moreover, the appellant is a single parent with three children.

In defending the award in the review proceedings and in prosecuting the appeal, the appellant has represented herself. To the extent that she has incurred legal costs, she can recover them, including, in principle, the value of her own legal expertise, as a legal practitioner, devoted to the case. It is unnecessary to specify what these costs might include. Thus, the appropriate costs order is one that is subject to taxation in the absence of an agreement between the parties about a sum." (Footnotes omitted.)

- [37] Here, the Labour Appeal Court demonstrated its cognisance of the correct point of departure when dealing with costs in labour matters, being *Zungu*, and provided detailed reasons for its costs award. This approach to costs is an example of a court that has applied its mind to the constitutional and statutory principles enunciated in this Court's jurisprudence, which are affirmed in this judgment...'

- [64] I am convinced that this is one of those matters where costs should follow the result.
- [65] The Appellant has had to approach this Court on appeal as contemplated in section 111(3) of the LRA to vindicate its rights. The fact that the Second Respondent has no genuine justification for the refusal to register the Appellant's amended constitution is a factor that tips the scales in favour of allowing the Appellant its legal costs.
- [66] The words of Birch Bayh²¹ ring true *in casu*. He famously said: "*You shouldn't have to sue somebody to get justice. It ought to come through administrative process*".
- [67] When the administrative process fails you, it unfortunately becomes necessary to approach the Court to right the wrongs of justice denied, but that justice then comes at a cost, sounding both in money and time.
- [68] The Second Respondent made a decision which is not justifiable on any construction of the facts and is completely incorrect in law. The Second Respondent, being the Registrar of Labour Relations, is not a lay litigant. A conscious and calculated decision was made to oppose the Appeal, with the parties each seeking cost against the other.
- [69] It would be unfair to saddle the Appellant with costs when it had no choice but to approach this Court for relief, in circumstances where there was no genuine reason to refuse registration of the Appellant's amended constitution.
- [70] In the premises, I make the following order:

²¹ B Bayh, "*Personal Insights and Experiences regarding the passage of Title IX*", 55 Clev. St. L. Rev. 463" (2007) Lawyer and American Democrat Senator (1963 – 1981), the author of Title IX, the landmark law that banned discrimination against women in college admission and sports in the USA.

Order

1. The Appeal is upheld;
2. The Second Respondent is ordered to approve and register the Appellant's amendments to its constitution in terms of Section 101(3)(a) of the LRA within 14 (fourteen) days from the date of this order and to send the Appellant a copy of the resolution endorsed by the Second Respondent, certifying that the amendments have been registered in terms of section 101(3)(b) of the LRA within 10 (ten) days from the date upon which the amendments are approved and registered;
3. The Respondents are ordered to pay the costs of this appeal on a party-and-party scale, which costs include the costs occasioned by the employment of counsel, where so employed.

L Steenkamp

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate L M Malan SC
Instructed by:	Bowman Gilfillan Inc. Attorneys
For the Respondent:	Advocate E B Ndebele
Instructed by:	The State Attorney