

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Johannesburg

Appeal Case no.: JA 71/98

In the matter between:

Staff Association for the Motor and Related Industries

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and

Motor Industry Staff Association

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Registrar of Labour Relations

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Judgment

Ngcobo AJP

[1] Two issues arose on appeal. They are:

- (a) what is the nature of the appeal from the decision of the Registrar of Labour Relations to the Labour Court as contemplated in section 111(3) of the Labour Relations Act No 66 of 1995 (LRA); and
- b) whether the appellant's name so closely resembles the name or shortened name of the first respondent with the result that it is likely to mislead or cause confusion.

[2] These issues arose in the following manner: the appellant, Staff Association for the Motor and Related Industries, applied to the Registrar of Labour Relations, the second respondent, to be

registered as a trade union. The name it proposed to be registered under is “Staff Association for the Motor and Related Industries”, and its shortened name or acronym is SAMRI. The Motor Industry Staff Association, first respondent, objected to the registration of the appellant.

[3] It must be mentioned here that this application was made on 13 May 1996 and was thus made in terms of the 1956 Labour Relations Act. It was initially dealt with under that Act. However, the decision to register the appellant was made under the LRA. On appeal, as in the court below, the parties dealt with the matter on the footing that the appellant’s application was properly dealt with by the second respondent under the LRA. Indeed, this was the proper course to follow as Item 6(1) of Schedule 7 (Transitional Arrangements) to the LRA provides that a pending application for the registration of the trade union “must be dealt with by the [second respondent] as if the application had been made in terms of [the LRA].

[4] Despite the said objection the second respondent registered the appellant on 6 March 1997 and issued the certificate of registration. Subsequently, the registration of the appellant was published in the Government Gazette.

[5] When the registration of the name of the appellant came to its

attention, the first respondent requested the second respondent to provide its written reasons for its decision to register the appellant. This it did in terms of section 111 (1) of the LRA. In response, the Deputy Registrar of Labour Relations advised the first respondent that the decision to approve the name of the appellant “was based upon the following reasons:

- (i) the application complied with the requirements of the Act relating to the application for registration;
- (ii) the Union’s constitution complied with the provisions of the Act; and
- (iii) the Union’s name it intended to register did not to my mind so closely resemble the name or shortened name of another trade union that it is likely to mislead or cause confusion.”

[6] Thereupon the first respondent appealed against the decision to register the appellant to the Labour Court in terms of section 111 (3). The appeal was directed against the finding that the appellant’s name does not so closely resemble the name of the first respondent so as to mislead or cause confusion.

[7] Revelas J, before whom the matter came on appeal, held that :

- a) the nature of the appeal contemplated in section 111(3) is an ordinary appeal in the sense of a rehearing on the merits but

- limited to the evidence or information on which the decision under appeal was given and in which the only issue for determination is whether that decision was wrong or right; and
- b) the name of the appellant so closely resembles that of the first respondent that it is likely to mislead or cause confusion.

[8] The appeal is against the said findings.

[9] Before dealing with the main issues raised in this appeal, it is necessary to deal with certain preliminary issues raised by Mr Pillemer, who appeared on behalf of the appellant. He made two preliminary submissions, firstly, that the decision envisaged in section 111 (3) is not a decision to register a trade union but a decision refusing such registration; and secondly, since it is an applicant for registration who may be aggrieved by such a decision, section 111 (3) may only be invoked by such applicant. In consequence, the words “any person” in section 111 must be construed to mean the applicant for registration.

[10] Section 111 of the LRA provides:

- 1) Within 30 days of the written notice of a decision of the *registrar*, any person who is aggrieved by the decision may demand in writing that the *registrar* provide written reasons for the decision.

- 2)The *registrar* must give the applicant written reasons for the decision within 30 days of receiving a demand in terms of subsection (1).
- 3)Any person who is aggrieved by a decision of the *registrar* may appeal to the Labour Court against that decision, within 60 days of –
- (a) the date of the *registrar's* decision; or
 - (b) if written reasons for the decision are demanded, the date of those reasons.
- 4)The Labour Court, on good cause shown, may extend the period within which a person may note an appeal against a decision of the *registrar*.”

[11] The validity of the preliminary submissions made by Mr Pillemer depends upon the proper construction of the words “any person” in section 111 (3) which echo the same expression in section 111(1). It is trite that words in a statute must be given their ordinary grammatical meaning unless the context indicates otherwise. Union Government (Minister of Finance) v Mark 1917 AD 731 at 739; Public Carriers Association v Toll Road Concessionaries 1990 (1) SA 925 (A) at 942I - 943A. In its natural and ordinary sense, the word “any” - unless restricted by the context - is an indefinite term which includes all persons to whom it relates. (Compare Hayne & Co v Kaffrarian Steam Mill Co Ltd 1914 AD 363 at 371.) It is a word of wide and unqualified generality. R v Hugo 1926 AD 268 at 271). There is no reason why a limited or restricted meaning should be given to the words “any person” in subsection (3). These words in their plain ordinary grammatical meaning include a union which seeks to object to the registration of another trade union on the basis that the name to

which it objects is likely to mislead or cause confusion. There is nothing to indicate clearly that the words under consideration were intended to bear the restricted meaning contended for by Mr Pillemer. The contrary appears to be the case.

[12] What section 111 contemplates is that any person who is aggrieved by the decision of the second respondent may demand reasons for the decision in terms of section 111 (1). The applicant for registration would have received the reasons in terms of section 96 (4) (a) which require the second respondent in the event of a refusal to register the union, to furnish such applicant with the written notice of the decision and reasons for the decision. The applicant would therefore not require any reasons. However, if within 30 days of the decision refusing registration the applicant attempts to, but fails to comply with the registration requirement, the applicant may be content with the reasons already furnished. If the applicant is not so content, it is open to such applicant to demand reasons for the subsequent refusal like “any person” who is aggrieved by the decision of the second respondent.

[13] To construe “any person” as referring to an applicant for registration would result in other persons who might be aggrieved by the decision of the second respondent being left without a remedy under the LRA. In particular, a trade union which might have a

legitimate complaint that the name registered so closely resembles its name that it is likely to mislead or cause confusion. Yet there can be no doubt that the prohibition against the registration of a union by a name that resembles another with the result that it is likely to mislead or cause confusion was, *inter alia*, intended to protect such a union. In my view, it would require plain and unambiguous language to prevent any aggrieved union or person from challenging the registration under the LRA.

[14] It seems to me that had the legislature intended the words “any person” to mean the applicant for registration it would have said so as it did in section 96. Its failure to do so, indicates that it intended these words to bear their ordinary grammatical meaning. Once it is determined that “any person” is not restricted to an applicant for registration, the words “the applicant” in subsection (2) must, in the context of section 111, mean an applicant for written reasons. To construe this word otherwise would lead to an absurdity. The result would be that there is no time limit within which reasons are to be furnished to other persons who demand these in term of subsection (1) while there is a time limit in respect of an applicant for registration.

[15] I conclude, therefore, that the decision contemplated in section 111 is not limited to a decision refusing registration and that the words “any person” are not restricted to the applicant for registration.

[16] With these preliminary issues out of the way, I now return to the main issues presented in this appeal.

Nature of the appeal

[17] The problem confronting us in this regard is essentially one of construction of section 111, in particular, the meaning to be given to the word “appeal” in that section. The sense in which that word is used in the section must be determined from its context.

[18] It is by now axiomatic that the word “appeal” can, as a general matter, have three connotations. They are:

- (a) An appeal in the wide sense, that is, in the sense of a complete rehearing and adjudication of the merits with or without additional evidence or information;
- (b) An appeal in the ordinary narrow and technical sense referring to a rehearing on the merits, but one that is limited to the evidence or information on which the decision appealed against was given and in which the only issue to determine is whether that decision was right or wrong; and
- (c) a review, that is, a limited rehearing, with or without

additional evidence or information to determine, not whether the decision appealed against was right or wrong, but whether the official who made the decision had exercised his or her powers and discretion honestly and properly.

Tikly and Others v Johannes, NO, and Others, 1963 (2) SA (T) 588 at 590F - 591A.(in which the court considered the nature of the appeal to the revision court in terms of section 19(5) of the Group Areas Development Act 61 of 1955); S v Mohamed 1977 (2) SA 531 (A) at 538 D - G. (in which the court considered the nature of the appeal in terms of section 97 of the Criminal Procedure Act 56 of 1955, as amended, which made provision for an appeal against the decision of a magistrate refusing bail); and National Union of Textile Workers v Textile Workers Industrial Union SA & Others 1988 (1) SA 925 (A), at 937 C - G, (in which the court considered the nature of the appeal to the Industrial Court in term of section 21 (A) of the 1956 Labour Relations Act against the decision of the Industrial Council refusing membership on the Council).

[19] What must be determined in this appeal, therefore, is which of the connotations referred to in Tikly's case must be given to the word "appeal" in section 111(3).

[20] Unlike its predecessor the LRA makes no provision for objectors to

be heard before the decision to register the name is made. The result is that potential objectors only become aware of the application to register the name and the decision thereon after the decision had been made. In addition, there is no provision in the LRA for requesting the second respondent to reconsider his decision in light of objections which may be submitted by an objector subsequent to the receipt of the reasons requested in terms of section 111 (1). What an objector is required to do is to request written reasons for the decision in terms of section 111 (1) and thereafter to appeal to the Labour Court in terms of section 111 (3). Once the objector is in receipt of such reasons, the matter is then governed by the rules of the Labour Court. Rule 9 makes provision for a notice of appeal setting out particulars of the decision appealed against, findings of facts appealed against including conclusions of law challenged. In addition, the appellant is required to deliver written representations in respect of the appeal. The respondent may deliver a response.

- [21] What, therefore, emerges from the procedure contemplated in the LRA is that the decision of the second respondent will only be based upon the information submitted by the applicant for registration. When the matter goes to the Labour Court, the objector will for the first time have the opportunity to put his or her case before a tribunal. The applicant may reply. This procedure effectively

excludes the appeal in the ordinary sense. There is no record. The record is only developed before the Labour Court.

[22] Nor is the appeal contemplated in the nature of a review. Once the second respondent is satisfied that the applicant meets the requirement for registration, he is obliged to register the name of the applicant. This is the plain meaning of section 96(3)(b) - “if satisfied that the applicant meets the requirements for registration, [the registrar] must register the applicant....” (underlining added). As a matter of language, the subsection is imperative. Compare: Commercial Staff (Cape) v Minister of Labour and another 1946 CPD 632 at 643-4. (Construing section 4(2) of the Industrial Conciliation Act 36 of 1937 dealing with the registration of trade unions). The first respondent has no discretion. The enquiry before him is whether, on the information submitted to him, the applicant meets the requirements for registration. This can be determined objectively by having regard to section 95 which sets out the requirements for registration. The Labour Court, on appeal, must determine whether the decision was correct and not merely to ascertain whether the first respondent exercised his discretion honestly and properly. Commercial Staffs (Cape) v Minister of Labour and another, supra at 643 - 644. This effectively eliminates the appeal being a review.

- [23] Mr Pillemer submitted that the word “satisfied” in section 96 (4) must be interpreted to mean “if in the opinion of the respondent”. In my view, having regard to the context in which this word occurs, this word means no more than that the second respondent must determine whether the requirements for registration have been met with. It does not import any discretion on the part of the second respondent.
- [24] In my view the absence of the record, the lack of procedure for lodging objections with the second respondent, the absence of power on the part of the second respondent to reconsider the decision in the light of objections, and the lack of discretion on the part of the second respondent, show that the appeal contemplated in section 111 (3) is an appeal in the wide sense. It is a complete rehearing and adjudication of the merits with or without additional evidence or information. This procedure allows the objectors who were not parties before the second respondent to present such evidence or information as they may wish to place before the Labour Court in support of their objections.
- [25] Mr Pillemer relied heavily upon the decision in Shenker v The Master, 1936 AD 136, in particular, the passage which occurs at page 139, for the contention that the “appeal” was merely a review.

In Tikly's case, Trollip J, as he then was, considered a similar argument and rejected it. I can do no more than repeat what he said on that occasion:

“Sec. 34 (2) of the Administration of Estates Act empowers the Master to appoint ‘such person as he deems fit and proper to be executor dative’; and sec. 107 provides that, *inter alia*, every appointment by the Master was subject to ‘appeal or review by’ the Court which could confirm, set aside or vary it. In *Shenker's* case the Appellate Division held that in relation to an appointment under sec. 34 (2) “appeal” means in effect merely a review of the Master’s appointment because sec. 34 (2) committed that appointment so entirely to the Master’s discretion that it could never have been contemplated by the Legislature that the Court could and should under sec. 107 re-try the merits of the appointment and substitute its own appointment for that of the Master (pp. 146-7). That decision, therefore, turned on the particular wording of the Administration of Estates Act. In the present case, in my view, for the reasons given above, sec. 19 and the regulations clearly enact that the revision court on appeal must rehear the matter on the merits and substitute its own determination for that of the valuers. *Shenker's* case is therefore obviously distinguishable.”

The foregoing passage applies equally to the argument advanced by Mr Pillemer.

[26] I conclude, therefore, that the decision of the court below on the first issue was wrong. The appeal contemplated in section 111 (3) is an appeal in the wide sense of a complete rehearing and adjudication on the merits with or without additional evidence or

information.

The resemblance between the appellant's name and the first respondent's name

[27] In terms of section 95(4):

“Any trade union...that intends to register may not have a name or shortened form of the name that so closely resembles the name or shortened form of the name of another trade union...that it is likely to mislead or cause confusion.”

[28] What the LRA seeks to prevent is the registration of a trade union by a name that so resembles that of another trade union that there is a reasonable likelihood that the one union may be confused for the other. Whether there is a reasonable likelihood of such confusion arising is, of course, a question of law which will have to be determined in the light of the facts of each case.

[29] The question to be decided in this appeal is, therefore, whether the appellant's name so closely resembles that of the first respondent so as to mislead or cause confusion. The meaning of the words “is likely to mislead or cause confusion” and the general principles governing their application to the facts of a particular case have not earlier been considered by the Labour Courts or this court.

[30] However, a phrase substantially similar to the one at issue in this

appeal occurred in section 44 (1) (a) of the Trade Marks Act 62 of 1963, which has since been repealed by the Trade Marks Act 194 of 1993. That section provided that rights acquired by registration of a trade mark shall be infringed by:

“(a) unauthorised use as a trade mark in relation to goods ... in respect of which the trademark is registered, if the mark so nearly resembling it as to be likely to deceive or cause confusion.”

The meaning of the phrase “as to be likely to deceive or cause confusion” and the general principles governing its application to the facts, was frequently canvassed in courts. See International Power Marketing [Pty] Ltd v Searles Industrials [Pty] Ltd, 1983 (4) SA 163 (T) at pp. 165G - 170B, (in which Margo J, delivering the judgement of the Transvaal Provincial Division, gave a full review of the legal principles applicable to such an issue); Plascon-Evans Paints Ltd v Van Riebeeck Paints 1984 (3) SA 623 (A) at 640G - 641E.

It seems to me, therefore, that some assistance may be derived, by way of analogy, from cases which have considered the meaning of that phrase in the context of section 44(1) of the Trade Marks Act 62 of 1963. The general principles governing its application to the facts of each particular case provide a useful guide.

[31] In Plascon-Evans Paints Ltd v Van Riebeeck Paints, supra, at 640G -

641E, Corbett JA, as he then was, summarised the main legal principles as follows:

“In an infringement action the *onus* is on the plaintiff to show the probability or likelihood of deception or confusion. It is not incumbent upon the plaintiff to show that every person interested or concerned (usually as customer) in the class of goods for which his trade mark has been registered would probably be deceived or confused. It is sufficient if the probabilities establish that a substantial number of such persons will be deceived or confused. The concept of deception or confusion is not limited to inducing in the minds of interested persons the erroneous belief or impression that the goods in relation to which the defendant’s mark is used are the goods of the proprietor of the registered trade mark, ie the plaintiff, or that there is a material connection between the defendant’s goods and the proprietor of the registered mark; it is enough for the plaintiff to show that a substantial number of persons will probably be confused as to the origin of the goods or the existence or non-existence of such a connection.

The determination of these questions involves essentially a comparison between the mark used by the defendant and the registered mark and, having regard to the similarities and differences in the two marks, an assessment of the impact which the defendant’s mark would make upon the average type of customer who would be likely to purchase the kind of goods to which the marks are applied. This notional customer must be conceived of as a person of average intelligence, having proper eyesight and buying with ordinary caution. The comparison must be made with reference to the sense, sound and appearance of the marks. The marks must be viewed as they would be encountered in the market place and against the background of relevant surrounding circumstances. The marks

must not only be considered side by side, but also separately. It must be borne in mind that the ordinary purchaser may encounter goods, bearing the defendant's mark, with an imperfect recollection of the registered mark and due allowance must be made for this. If each of the marks contains a main or dominant feature or idea the likely impact made by this on the mind of the customer must be taken into account. As it has been put, marks are remembered rather by general impressions or by some significant or striking feature than by a photographic recollection of the whole. And finally consideration must be given to the manner in which the marks are likely to be employed as, for example, the use of name marks in conjunction with a generic description of the goods."

(See also International Power Marketing (Pty) Ltd v Searles Industrials (Pty) Ltd, supra, at pp. 165G - 170B.)

- [32] While in certain cases the dominant feature of each mark may be the determining factor, the true rule is a broader one, namely, that the comparison is to be made between the main idea or impression left on the mind by each name, having regard to any essential or salient or leading or striking feature or features in each.

(International Power Marketing v Searles Industrial, supra, at 168 H.)

When the court is called upon to consider resemblance between the two names, it must be mindful of the fact that the advantages which it has after considering arguments from Counsel and the ample time for full consideration, comparison of the two names carry their own dangers. These advantages may cause the court to look at the names with greater care than they would be looked at by those

whose probable reactions the court is required to assess and with far keener awareness of similarities and dissimilarities than such people would probably have as they go about their daily lives. See Laboratoire Lechartre SA v Armour-Dial Incorporated, 1976 (2) SA 744 (T) at 746B - H.

[33] With these legal principles as a guide, I now turn to the facts.

[34] Viewed side by side the names exhibit marked similarities.

Comparison must, however, not be confined to viewing the names side by side. I must transport myself notionally to the industry where they will be used and ask myself whether the average use is likely to lead to confusion. Here I must take into consideration the relevant surrounding circumstances such as the way the unions are referred to in the industry, that the two trade unions will be organising in the same industry and in closely associated industries and that the first respondent has been organising in the industry for some 45 years.

[35] The dominant features or ideas conveyed by each name centre around “staff association” and “motor industry”. Both convey the impression of a staff association which operates in the motor industry. This is the main idea or general impression conveyed by each name. It is true, the difference between the two names are, firstly, the word order; and secondly, the words “and related”.

Indeed these differences were emphasised by Mr Pillemer who also added that their visual appearance and their length differ. In my view, these are matters of detail. They do not detract from the general impression conveyed by both names. One must make due allowance for imperfect recollection. In all probability, what is likely to remain in the mind of an average person are the words “staff association” and “motor industry”. The difference between them is, in any event, a detail scarcely striking the average person with the force their similarities generate: what people are likely to remember is that they are dealing with a staff association for the motor industry. The only staff association for the motor industry of which they are aware is the second respondent - a factor which broadens the margin of confusion. Indeed, according to the first respondent, on the day of the publication of the registration of the appellant, an official of the first respondent’s bargaining council contacted their Durban offices to enquire about the “new Staff Association in the Motor Industry”.

- [36] Mr Pillemer, submitted that small differences should be decisive in this case because the names are descriptive. The similarities, he contended, in the names are inevitable because both unions organise in the same industry and their names must reflect the industry in which they organise. The likelihood of confusion is greatly reduced, he submitted, by the word order and the words

“and related” in appellant’s name. Their visual appearance and the length of the names differ, he maintained.

[37] I accept that there is bound to be similarities where both unions organise in the same industry since their names would be descriptive of the industry in which they operate. Here the appellant organises workers in the automotive manufacturing industry, clause 5 of its constitution says so. Had the appellant used automotive manufacturing in its name, this would have been sufficiently descriptive of the industry in which it operates and would have significantly reduced the risk of confusion. Instead it chose to use a broad description covering a wider area than that in which it operates. In the result the broad description is not only misleading but it is likely to confuse.

[38] Mr Pillemer relied, for the proposition that small differences should matter here because the names are descriptive, upon two cases namely, Office Cleaning Services v Office Cleaning Association [1944] 2 All ER 269 (CA) and African Market Agency v Union Market Agency 1926 CPD 245. I must sound a note of caution at the outset. A preoccupation with decided authorities in cases of this nature is likely to obscure the fact that cases depend upon a simple legal principle and that they depend upon the facts of each particular case. The legal principle at issue here is whether the name of the

appellant so closely resembles that of the first respondent as to mislead or cause confusion.

[39] The cases relied upon by Mr Pillemer are distinguishable on the facts. In the Office Cleaning Services case, the enquiry was whether the word “association” when used in connection with the descriptive words “office cleaning” is sufficient to distinguish them from the name “Office Cleaning Services, Ltd”. The court found that the word “association” bears no resemblance in appearance or sense to the word “services”. That is the ratio for the decision. African Market Agency case, is similarly distinguishable on the facts. There, the comparison was between the use of “African” as opposed to “Union” as a distinguishing feature. The court found that there could be no objection to the use of the word “union” and that the words “market agency” were merely descriptive of the business carried on by the applicant in that case. The word “union” did not bear any resemblance to the word “African” and, therefore, there could be no objections to use of the word “union”.

[40] Accordingly, I conclude that the name “Staff Association for the Motor and Related Industries” so closely resembles the name “Motor Industry Staff Association” that it is likely to mislead or cause confusion.

[41] In the event the appeal is dismissed with costs, such costs to include costs of the application for leave to appeal.

Ngcobo AJP

I agree

Froneman DJP