**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JA5/13

In the matter between:

**THE REGISTRAR OF LABOUR RELATIONS** **Appellant**

and

**CONSOLIDATED ASSOCIATION OF EMPLOYERS**

**OF SOUTH AFRICAN REGION (CAESAR)** **Respondent**

**Heard:** **27 August 2013**

**Delivered:** **18 September 2014**

**Summary: Deregistration of employer's organisation. Registrar deregistering respondent because no functioning as a genuine employer's organisation. Labour Court setting aside deregistration and finding that registrar relying on unfounded facts and mere rumours. Appeal. Evidence showing that respondent not a genuine employer's organisation – respondent a labour consultancy organisation clothed as an employer's organisation. Appeal upheld with costs- Labour Court's judgment set aside. Respondent deregistration confirmed.**

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**JUDGMENT**

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FRANCIS AJA

Introduction

[1] This is an appeal against the judgement and order of the court *a quo* by Molahlehi J after he upheld an appeal by the respondent - the Consolidated Association of Employers of South African Region (CAESAR) in terms of section 111(3) of the Labour Relations Act 66 of 1995 (the LRA) against the decision of the appellant, the Registrar of Labour Relations (the registrar), to deregister the respondent. CAESAR was deregistered on the basis that it had ceased to be a genuine employer's organisation. The appellant was granted leave to appeal by the court *a quo.*

[2] The appellant has applied for condonation for the late filing of the record and heads of argument which was opposed. A proper case has been made out for condonation and is granted in the circumstances.

The background facts

[3]. An organisation called "Konfederasie van Wergewers van Suidelike Afrika" (COFESA) was registered as a confederation by the registrar on 6 November 1990 in terms of section 80(1) of the Labour Relations Act 1956. In January 1996, COFESA resolved to form an employers' organisation called CAESAR as an arm of COFESA to assist in its activities and/or to represent it at negotiations and/or discussions and/or mediations and/or conciliations and/or arbitrations. CAESAR was registered as an employer's organisation by the registrar on 11 February 1997 in terms of section 96(7)(a) of the LRA.

[4]. In a letter dated 13 July 2004, the registrar raised certain queries with CAESAR after it had received CAESAR's documentation, including the financial statements for the year ended 31 December 2003. CAESAR replied to the registrar's letter with theirs dated 6 August 2004, including certain financial statements for the years 1998 to 2004, minutes of meetings, membership lists and contracts for employees.

[5]. After the registrar had received further documents and correspondences from CAESAR, the registrar filed a submission on 20 July 2007 and a notice in terms of section 106(2)(B) of the LRA was forwarded to CAESAR with an

accompanying letter on 20 July 2007. The registrar advised that as a result of the documentation before him, he was of the opinion that CAESAR was an organisation for gain of individuals and was no longer functioning as a genuine employers' organisation as envisaged in the LRA. All interested parties were invited to make written representations within 60 days of the date of the notice about why CAESAR's registration should not be cancelled. Although the registrar was not obliged to furnish reasons why he intended to cancel the registration of CAESAR, he furnished certain further information to CAESAR by letter dated 30 July 2007.

[6]. CAESAR brought an urgent application in the Labour Court requesting *inter alia* that the Court make an order that the registrar be interdicted and be restrained from publishing a notice in terms of section 106(2)(B) of the LRA on 27 July 2007. The registrar filed an answering affidavit to this application with certain annexures. The application was thereafter settled between the parties in terms of a settlement agreement dated 17 August 2007 which was made an order. In terms of the said settlement agreement, CAESAR was to make written representations to the registrar on or before 7 September 2007. In terms of paragraph 3 of the order, the registrar would consider CAESAR's representations and would furnish CAESAR with his decision whether or not to proceed with section 106(2B) LRA notice. CAESAR submitted written representations to the registrar on 7 September 2007.

[7]. Thereafter on 20 May 2009, the registrar forwarded a further letter to CAESAR stating that he was still of the opinion that CAESAR was an organisation for gain and not a genuine employer's organisation as envisaged by the LRA. The registrar attached a notice in terms of section 106(2B) to be published in the Government Gazette on 29 May 2009. A supplement to the first submission was also submitted to CAESAR.

[8] On 3 July 2009, the registrar forwarded a further letter to CAESAR stating that on 30 July 2007 a letter was sent to CAESAR setting out the reasons for the decision to publish the notice of intention to cancel the registration. CAESAR was also given a list of all documents on which the registrar relied for his decision. In terms of the settlement agreement, CAESAR would then file its

representations for consideration and after the registrar had considered those representations, he would furnish CAESAR with his decision whether or not to proceed with section 106(2B). The registrar had considered those representations on 20 May 2009 and took a decision to proceed with the section 106(2)(B) notice. The registrar's decision was communicated to CAESAR in a letter dated 20 May 2009 in terms of the settlement agreement and a notice of intention to cancel was published on 29 May 2009. A copy of the reasons for the decision to publish the notice of his intention to cancel the registration of CAESAR was also attached to the notice.

[9] On 13 July 2009, CAESAR submitted a report by a company called Tsedo Commercial Investigations (Pty) Ltd about the registrar's notice of intention to cancel CAESAR's registration. On 16 July 2009, it submitted further representations to the registrar.

[10] The registrar replied to those representations on 20 July 2009 stating that all the representations submitted by CAESAR within the timeframes mentioned in the Government notice would be taken into consideration before a decision to cancel its registration was made. The letter also stated that the office of the registrar would make a decision to cancel or not to cancel the registration of CAESAR in terms of the provisions of section 106(2A) after all the legislative requirements had been complied with. On 31 July 2009, CAESAR made certain further representations to the Minister of Labour.

[11] In a letter dated 31 August 2009 to CAESAR, the registrar advised that CAESAR's representations to the Minister had been forwarded to him and that the contents thereof would be considered before making a decision whether to cancel its registration.

[12] The registrar thereafter drafted a final submission on 13 November 2009 and submitted a letter to CAESAR in terms of section 106(2A) in terms of which CAESAR's registration was cancelled effective from 13 November 2009. The registrar advised that interested parties were invited to make written representations within 60 days of the date of notice about why CAESAR's registration should not be cancelled. The registrar considered representations

made by CAESAR and other interested parties. The registrar stated that he was satisfied that CAESAR was an organisation for gain and not a genuine employers' organisation, as envisaged by the LRA.

[13] On 16 November 2009, CAESAR lodged an appeal to the Labour Court against the decision of the registrar and later filed an amended appeal.

[14] On 3 December 2009, the registrar forwarded a letter to CAESAR's attorney, B J Coetzee, stating that after he had considered all the facts, he was satisfied that it had ceased to function as a genuine employer's organisation. The letter also dealt with certain developments from time to time and *inter alia* dealt with the reasons why it concluded that CAESAR was not functioning as a genuine employers' organisation.

[15] On 5 August 2010, CAESAR filed an urgent application in the Labour Court against the registrar, seeking *inter alia* an order declaring that the operation of the decision of the registrar to cancel its registration, be suspended pending the outcome of its appeal against the registrar's decision. The application was dismissed by Steenkamp J on 16 August 2010.

<u>The decision of the court a quo</u>

[16] CAESAR proceeded with the appeal, which was heard by Molahlehi J. The court *a quo* said that the registrar had found that CAESAR was not a genuine employer's organisation but one for gain because of its relationship with COFESA. CAESAR did not dispute that it has a relationship with COFESA but contended that the relationship was not for an ulterior motive but was a relationship based on the right to freely associate. The court held that there is nothing in the guidelines that prohibits the two organisations from associating with each other. The legal problem in the relationship would arise if it was to be shown that the relationship is for the purposes other than that provided for in the law, i.e. the right to form an employer's organisation is used as a sham for profit making. At best for the registrar, the problem it has with the relationship is based on suspicion particularly on the history of COFESA.

[17] The court *a quo* said that the registrar had said that by its nature the relationship between CAESAR and COFESA was based on a 'retainer' in terms of which CAESAR's members appear on a fee at the CCMA in the dispute process. CAESAR does not deny that members who require assistance at the CCMA are charged a fee by agreement because its R20.00 membership fee per annum was insufficient to cover its running costs. The court said that the only evidence which the registrar had relied on about the issue of the relationship between the two organisations which suggests some profit motive, was the arbitration award wherein some individuals appeared before the CCMA commissioner and claimed to be representing both COFESA and CAESAR. The court said that the commissioner's finding remained his or her opinion and could not properly be regarded as being definitive of the nature of the relationship between the two organisations. At best for the registrar, it should have regarded the contents of the arbitration award as nothing but an allegation that required further investigation on his part. The issue that the commissioner was confronted with during the arbitration proceedings was not to determine whether the relationship between the two organisations was for the purposes of making a profit. The court said that the evidence before the registrar was therefore insufficient to conclude that the relationship between COFESA and CAESAR was such that it could on the basis of the arbitration award make CAESAR not to be a genuine employer's organisation.

[18] The court said that the same applied to the report of the audit of Tsedo Commercial Investigator (Pty) Ltd (Tsedo). The registrar had overlooked the fact that it is stated amongst others in the report under the heading: "Restriction and Limitation", that they, Tsedo were not required to undertake an audit or a review made in accordance with International Standards on auditing or International Standard on Review Engagements (or relevant national standards or practices) and they consequently they do not express any audits. They stated that the scope of their work was limited to a review and analysis of documentation and information made available to them and specific enquiries undertaken to pursue their mandate. They did not verify the authenticity and validity of the documentation made available to them. They

included information that they had obtained verbally in their report. They cannot verify that the information is credible or truthful and said that they had referred to various legal provisions in the report. Since they are not a legal practice, they would refer to their legal representative to make any legal interpretations with respect to their findings. They said that any recommendation made in the report should only be acted upon after consultation with their legal advisors. They said that they did not discuss the contents of the report with the subject of the investigation.

[19] The court *a quo* held that similarly, a failure to comply with the provisions of clause (1) of CAESAR's constitution is not a proper basis to conclude that it was an organisation operating for gain. The same applies to the issue of membership of CAESAR. The registrar had found that CAESAR is an organisation for gain because it failed to place appropriate qualifications on its membership. The court held further that more was required than a simple accusation that an organisation is profit driven simply because of its failure to state the qualification for its membership in its constitution. On the question of the leadership of CAESAR, the registrar had relied on the allegation that a Mr Moody was not an employer and that besides it being raised late in the process of deregistration of CAESAR, it is not clear why it could be said that it is indicative of the fact that CAESAR is disguised as an organisation for gain. There is no evidence indicating how much Moody was earning and whether the position he occupied was intended to be as a disguise to benefit someone else.

[20] The court *a quo* said that when looking at the issue of the financial statements of CAESAR, it is clear that CAESAR recorded a nominal profit over the period between 1998 and 2008 which averaged R173.12 per month. The question that arises is whether that nominal profit could be regarded as a "gain". The LRA does not define the word 'gain' and the literal meaning of the word 'gain' involves something more than a mere receipt of payment. The court referred to various authorities dealing with the concept not for gain and said that the making of a 'gain' is not necessarily a contravention of the object, 'not for gain' as envisaged in the law. What is determinative of the nature of the object 'not

for gain' is the manner in which the 'gain' is utilised or distributed. The object would be defeated or undermined if the 'gain' was distributed or used for the purposes other than those of advancing the interest of the organisation and or its members. In other words the object of 'not gain' would be defeated if the 'gain' is shared amongst the officials of the organisation in the form of bonuses or other terms of payment to them.

[21] The court *a quo* concluded that except for the finding that the respondent made a profit, there is no indication why that constituted contravention of the law. There was no evidence about how the profit was distributed or used. The court upheld the appeal with costs and set aside the registrar's decision to cancel CAESAR's registration.

<u>The grounds of appeal</u>

[22] The appellant has raised several grounds of appeal. It is not necessary to repeat those grounds of appeal. The main complaint is that the court *a quo* erred in failing to find on the facts that CAESAR is not a genuine employer's organisation and that COFESA was using CAESAR for an ulterior motive. The court *a quo* should have found that COFESA was using CAESAR as a vehicle for enriching individuals as set out in clause 32 of the guidelines. The court *a quo* had placed too much emphasis on the question whether CAESAR was an organisation for gain. This was only one of the factors that the registrar took into consideration when determining whether CAESAR could be described as a genuine employers' organisation.

*The parties contentions*

[23] It was contended on behalf of the appellant that CAESAR is not a genuine employer's organisation but was a labour consultancy. COFESA was using CAESAR for an ulterior motive and using it as a vehicle to enrich individuals as set out in the guidelines. The appellant therefore submits that the appeal should be upheld.

[24] The respondent contended that the registrar's decision to cancel CAESAR's registration is an administrative action. The entire process of the registration

was unfair in that the registrar failed to disclose to CEASAR the source of documents relied on for his conclusions; relied on documents that were unidentifiable, contrary to a court order to supply a complete list of all documents he relied upon and his own assurance that he relied only specific documents, relied on documents that were never disclosed to the respondent; failed to apply the *audi partem* rule before he made a final decision; relied on documents that are historic and failed to take cognisance of facts and circumstances that have changed; misinterpreted documents and failed to apply his mind properly to the documents before him and took unduly long from invoking the provisions of the LRA to cancel CAESAR's registration until deregistering it.

[25] It was further contended on behalf of the respondent that CAESAR was an organisation to gain and had a profit motive without sufficient and reliable evidence to substantiate the claim.

[26] It was contended that the formation of CAESAR must be viewed in context. After the 1995 LRA was implemented, COFESA which used to be a confederation could no longer be so in terms of the LRA. It had lost its status and it is not an employer's organisation. The members of COFESA took the decision to register an employers' organisation to represent them at the bargaining councils and at the CCMA. This was prior to the guidelines. Before that there were just mere guidelines. The guidelines were issued and it was a question about how they now had to behave themselves. The guidelines had not been implemented at the time and they had acted without guidelines. The registrar had to look at their conduct after the guidelines were promulgated on 10 October 2003. They were entitled to charge a fee in terms of the ILO guidelines.

*Analysis of facts and arguments raised*

[27] The registrar is a creature of statute. He derives his powers from the LRA and guidelines promulgated in terms of the LRA. 25. During the period 1996 to 2002, the function of the registrar was restricted to determine whether a trade union or employers' organisation had adopted a name that met the

requirements of the LRA and other certain requirements. If those requirements were met, the registrar was obliged to register the trade union or employers' organisation. Certain amendments to the LRA came into force in 2002 and the registrar was then given the additional authority in terms of section 95(7) of the LRA not to register any trade union or employers' organisation unless he was satisfied that the applicant was a genuine trade union or employer's organisation. In the explanatory memorandum to the bill the following was stated:

> 'There are also strong indications that some financial and insurance brokers have become active in the establishment and the affairs of trade unions and employers' organisations in order to market financial or insurance products. In one instance a Magistrate's Court ordered the transfer of a union's assets and all records (in effect the registration and management) to an insurance broker. This broker then attempted to continue by cloaking its activities under the banner of a union. The status quo was partially restored but only after a lengthy, resource-absorbing and time-consuming process.
>
> The operation of certain labour consultancies that have registered as employers' organisation undermine effective dispute resolutions. These organisations tend to recruit their members from small businesses that are inexperienced in respect of labour relations matters. Once gullible employers have joined, they are frequently faced with exorbitant fees. This creates a negative impression of the Labour Relations Act and its dispute resolution institutions and undermines the efforts of genuine organisations participating in collective bargaining structures to recruit such employers. This in turn negatively impacts on the participation by certain employers' including small employers in bargaining councils.
>
> The proposed amendments to s 95 are intended to discourage the formation and registration of trade unions and employer's organisations that are not genuine, by introducing a requirement that they be genuine or bona fide and giving the registrar of labour relations the power to refuse to register organisations which are not. The Minister will have the power to issue guidelines concerning whether or not a trade union or employers' organisation is bona fide. Any refusal to register a trade union on these grounds will be subject to appeal to the Labour Court.

> The International Labour Organisation has expressed the view that this is in keeping with its standards concerning the promotion of collective bargaining and freedom of association.'

[28] The registrar must ensure that an entity such as a trade union or employers' organisation meets the requirements of the LRA and that it is a genuine trade union or employers' organisation. Once an employers' organisation, such as CAESAR is registered, section 98 of the LRA imposes obligations on it to maintain books and records of its income, expenditure, assets, liabilities, which records must be audited and be made available for inspection. In terms of section 99 of the LRA, duties are imposed on the employers' organisation to maintain a list of its members and copies of the minutes of the meetings that it holds. Section 100 of the LRA imposes a further obligation on CAESAR to provide, by 31 March of each year, a statement certified by its secretary that accords with its records and which shows the number of members at 31 December of the previous year, together with any other related details that may be required by the registrar. At the same time, the employers' organisation is obliged to submit an audited report and a certified copy of the financial statements to the registrar. In terms of section 100(c), the registrar may request in writing, within 30 days of receipt of the financial statements from the employers' organisation, an explanation of any matter that relates to the statement of membership, the auditor's report or the financial statements.

[29] In terms of section 106 of the LRA, the registrar may cancel the registration of a trade union or employers' organisation by removing its name from the appropriate register. In terms of Section 106(2A) of the LRA, the registrar may cancel the registration of a trade union or employers' organisation by removing its name from the appropriate register if the registrar is satisfied that the trade union or employers' organisation is not, or has ceased to function as, a genuine trade union or employers' organisation or, as the case may be; or has issued a written notice requiring the trade union or employers' organisation to comply with sections 98, 99 and 100 within a period of 60 days of the notice and the trade union or employers' organisation has, despite the notice, not complied with those sections. In terms of section 106(2B) of the LRA, the registrar may not act in terms of subsection (2A) unless the registrar

has published a notice in the Government Gazette at least 60 days prior to such action giving notice of the registrar's intention to cancel the registration of the trade union or employer's organisation; and inviting the trade union or employers' or any other interested parties to make written representations as to why the registration should not be cancelled.

[30] Section 106 of the LRA was promulgated in the public interest of protecting members of a trade union or employers' organisation, in particular ensuring that funds contributed by them are utilised for the purpose of benefitting such members. A trade union and employers' organisation occupies a position of trust concerning the management of funds contributed by members. Section 106 is protective in nature with the object of protecting members who pay their membership fees on a regular basis where it appears that officials are involved with no other reason but to advance their own selfish business interests.

[31] In determining whether a trade union or employers' organisation is a genuine trade union or employers' organisation, the Minister published certain guidelines in terms of section 95(8) of the LRA. Clause 1 of the guidelines provides as follows:

> 'This document contains guidelines published by the Minister of Labour, in consultation with NEDLAC, that are to be supplied by the Registrar of Labour Relations in determining whether an applicant for registration in terms of the Labour Relations Act is a genuine trade union or a genuine employers' organisation. In terms of section 95(7) of the Labour Relations Act, the Registrar may only register a trade union or an employers' organisation if the Registrar is satisfied that it is a genuine trade union or an employers' organisations. In addition in terms of section 106(2A) of the Labour Relations Act, the Registrar may cancel the registration of a trade union or an employers' organisation that is not, or has ceased to function as, a genuine trade union or employers' organisation, as the case may be.'

[32] Clause 3 of the guidelines provides as follows:

'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 to the actual activities and functioning. In evaluating whether a trade union or employer's [sic] organisation is genuine, the Registrar must take into account all relevant factors.'

[33] Clause 32 of the guidelines deals with the fact that an employers' organisation may not be an organisation for gain. The purpose of this requirement is to prevent employers' organisations from being used as vehicles to enriching individuals or as a cover for profitmaking in business. In evaluating whether an employers' organisation has a genuine financial operation, it is important to examine its actual financial operation. The factors which the registrar may take into consideration that may indicate that an employers' organisation is in fact operating for the gain of the individuals are that unrealistically high salaries or allowances are paid to the officials, office bearers or employees of the employers' organisation; interest free or low interest loans are made to officials, office bearers or employees, and those loans are not repaid; family members of office bearers or officials are employed by the employers' organisation and income earned by the employers' organisation is not used for the benefit of the organisation and its members, but is paid out to officials, office bearers or employees.

[34] Clause 34 provides as follows:

> 'Usually the major source of revenue for employers' organisation is likely to be a subscription paid out on a regular basis. The financial arrangements made with members of an employers' organisation in respect of litigation, particularly dismissal disputes, may be an indicator whether the employers' organisation is in fact operating for the gain of certain individuals.'

[35] In deciding whether a trade union or employers' organisation is genuine, the registrar must *inter alia* give particular attention to the manner in which the organisation was established and formed. In the case of an existing organisation, attention must be paid to its actual activities and functioning. In evaluating whether a trade union or employers' organisation is genuine, the registrar must take into account all relevant factors.

[36] The functions of the registrar are set out in section 109 of the LRA. This includes keeping a register of registered employers' organisations etc. He fulfils an important regulatory and custodial function in terms of the LRA and is responsible for protecting members of the public against some of the serious consequences which they may suffer when dealing with unscrupulous trade unions and employer's organisations which either do not comply with the provisions of the LRA and/or are not genuine organisations but, in fact, profitmaking enterprises. The registrar has a discretion when exercising his powers in terms of section 106(2)(a) of the LRA. He has wide powers and must still act within the confines of the law and give reasons for his decision. He must allow an applicant to make representations before making his decision. He does not have unfettered powers in terms of the LRA.

[37] The question to be determined in this matter is whether CAESAR was in fact a genuine employer's organisation or a profit making business and an association for gain.

[38] It is clear from the documents that were placed before the court *a quo* that the registrar acted on documents and information supplied by CAESAR. He therefore acted in terms of the powers afforded to him by the LRA. He examined all the documentation provided for by CAESAR in terms of sections 98 and 100 and found that CAESAR had ceased to be a genuine employers' organisation and that its registration should be cancelled. In the registrar's opinion, there were adequate reasons to justify his decision to cancel CAESAR's registration. There were five reasons for the cancellation of the registration of CAESAR. These were because of its relationship with COFESA; that it is a labour consulting business; its questionable leadership; that it is not functioning in terms of its constitution and collective bargaining.

[39] The registrar had in his first submission dated 20 July 2007 raised the nature of the relationship between CAESAR and COFESA. This was also raised in letters dated 26 and 30 July 2007, in a submission dated 13 November 2009 and a letter dated 3 December 2009. The registrar took into account the fact that COFESA was registered as a confederation on 6 November 1990 and that its true nature was unclear since section 80(1) of the LRA does not

provide for the registration of confederations, but only provides for the registration of federations. It is clear that in January 1996, COFESA resolved to form an employers' organisation with the name of CAESAR as an arm of COFESA to assist in its activities or representing it at negotiations and/or discussions and/or mediations and/or conciliations and/or arbitrations. In terms of the amended constitution of COFESA, the following was *inter alia* added:

> '3.11 Representation at negotiations/discussions/mediations/conciliation/ arbitrations, including councils/conciliation boards and other statutory and non-statutory forums;
>
> 3.12 That a section be formed to assist employers on all levels of negotiations and representation. That this section functions under the name "Consolidated Association of Employers of Southern Africa Region, CAESAR.'

[40] COFESA could not undertake the abovementioned functions because it was registered as a confederation on 6 November 1990 and not as an employers' organisation. Its true nature as an organisation is unclear since section 81 of the 1956 LRA, in terms of which it was registered, did not provide for registration of confederations but only for federations. From its inception, COFESA had mixed membership consisting of federations, associations as well as direct members/individual companies. The registrar claims that COFESA was not a federation as it claimed but in fact a consultant to an employer body charging clients rates for its services. It specifically found that CAESAR was used as an organ that was responsible for dispute resolution only. It said that the operations of the two organisations are so interlinked that it is difficult for anyone to separate the organisations from one another. CAESAR was being used as a tool to further the objectives of COFESA.

[41] The question is whether there is any substance or support for the registrar's contention that the operations of CAESAR and COFESA are so interlinked that it is difficult for anyone to separate the organisations from one another and that CAESAR was being used as a tool to further the objectives of COFESA. The answer to the question raised is an overwhelming yes.

[42] The following is stated in a joint newsletter of COFESA and CAESAR for 2002 and 2003:

> 'CONSOLIDATED ASSOCATION OF EMPLOYERS OF SOUTH AFRICA
>
> To enable COFESA's officials to assist employers in terms of Sec 200 of the LRA in conciliation procedures on the same level as the trade union organisation organises, CAESAR was registered at the Department of Labour on 11 February 1997 in terms of the new LRA 1995.
>
> Dual membership:
>
> In terms of a previous resolution of COFESA members, COFESA members now also have membership of CAESAR. An amount of R20.00 is paid over in respect of every member as membership fee. Our dispute resolution officials represent our members at the CCMA and at arbitration hearings in terms of their CAESAR certificates.'

[43] CAESAR and COFESA has made no attempt to hide the fact that they are one and the same thing and that CAESAR was established to focus on the professional level, while COFESA, provides other services like funeral cover and medical aid cover. This relationship was also provided for in clause 4.8 of the constitution of the organisation, which reads as follows:

> 'Employers who are paid-up members of the confederation of employers of Southern Africa shall for the purpose of this constitution be deemed to be subject to clause 5, be founder members.'

[44] From the list of services offered by COFESA there can be no doubt that there is a profit motive. For example the document at page 350 which is headed COFESA Consulting Service, sets out their professional services and fees. The standard consulting fees for a consultation is R375 per hour; Arbitration R440 per hour; Labour Court R495 per hour; Travelling time R165 per hour and Distance R2 per kilometre. On the other hand it is also clear from the facts that professional services are provided for by CAESAR on behalf of COFESA. This appears more clearly from the application for membership forms of CAESAR which is at page 688. The CAESAR membership fee is R20.00 per annum, however, the legal costs per month are set out to be

debited on a monthly basis and a member can chose the type of cover that it needs for example cover at R300 per month for R10 000 cover per annum. At page 689, the fees structure regarding services at the CCMA or Bargaining Council level is charged at special membership rates as set out in paragraph 2 of the service level agreement and membership conditions. They deal with the hourly rate, dispute resolutions, conciliations, arbitrations, labour court and labour appeal court matters, as well as travelling time and kilometres. Clause 3.6 provides that the member, by signing the agreement, agrees to pay on presentation of an invoice for representation at the CCMA, Bargaining Council or Labour Court at the rates set out in clause 2 of the agreement.

[45] The annual report of COFESA and CAESAR for 2002 and 2003 states the following under the heading:

> 'COFESA SERVICES EXTENDED TO FOCUS
>
> ON NEEDS OF EMPLOYERS:
>
> Retainer
>
> To help the cash flow of members, our advisors analyse the labour relations needs of a member and work out a monthly retainer to cover the cost of all consultancies, disciplinary hearings, appeal hearings, contracts and other labour issues. HR functions such as recruitment and selection form part of this service.
>
> Legal Cost Cover
>
> To avoid the enormous risks and legal costs in the event of unfair labour practices we provide Legal Cost Cover at a monthly premium. It covers legal costs in units of R10 000 per annum for disputes at the CCMA, Arbitrations or at the Labour Courts.'

[46] The inter-dependence of the two organisations can also be inferred from the following facts:

46.1 Tsedo filed a report for CAESAR on 13 July 2009 which report appears at pages 101 etc. It is stated in paragraphs 49 and 51 of the report that since the registration of CAESAR, COFESA supported CAESAR as CAESAR could not survive on a membership fee of merely R20.00 per annum. Further that many of the services rendered by COFESA are covered by membership fees. Where the services are at an additional cost, the members are invoiced by either COFESA or CAESAR. It is stated at paragraph 51 of the report that CAESAR is not an independent organisation since members do not decide on how payments should be made. It is stated that many of the services rendered by COFESA and by CAESAR are covered by membership fees. Where those services are at an additional cost, the members are invoiced by either COFESA or CAESAR.

46.2 In paragraph 56 of the Tsedo report, it is stated amongst others that employers require proper representation, the best they can afford because they run enormous risks due to complex labour legislation. Employers therefore need expert advice, which comes at a price. Tsedo also compares on the same page the organisational fee structure of CAESAR to that of other consultants like SEESA, another employer's organisations which was deregistered by the registrar on the basis that it was operating as a labour consultant. This is a clear indication that CAESAR is not a genuine organisation but a consultancy disguised as an employers' organisation.

46.3 The report also confirms that CAESAR was established as a vehicle for COFESA to continue its business of providing individual services to its members. COFESA charges consultation fees and other fees as per the tariff mentioned above and CAESAR then does the professional assignments for which fees are paid.

46.4 A jurisdictional ruling was granted by the CCMA on 25 September 2007 where it was found on the evidence and documentation before the commissioner that it was clear that COFESA was trying to use a CAESAR's certificate of registration to access the CCMA. COFESA was therefore denied access to represent members at the CCMA under the pretence of CAESAR. The commissioner also ruled that the

CCMA was to serve the ruling on the registrar for investigation into the activities of CAESAR and COFESA.

46.5 Documentation referring to Angus Slaghuis and H Wessels again confirms the inter-relationship between CAESAR and COFESA. The first is a certificate issued by COFESA stating that Angus Slaghuis is a paid up member in good standing of COFESA and CAESAR from 1 April 2007 to 31 March 2008. The second is a certificate by CAESAR stating that F H Wessels is a dispute resolution official of CAESAR from 1 January 2007 to 31 December 2007. It is signed by the secretary of CAESAR and by a director of COFESA. It contains the registration numbers of both organisations.

[47] The respondent's contentions are baseless. It is clear from the background facts that the appellant had engaged the respondent before it took its final decision to deregister it. The *audia altem partem* principle was adhered to when the appellant had engaged with the respondent. The documents that the registrar acted on were identified and the respondent knew what the allegation was against it and had made representations that were considered by the appellant and were correctly rejected. It is correct that the guidelines were promulgated on 10 October 2003. The respondent contended that before that there were no guidelines and that the registrar should have looked at their conduct after that. This implies that before that they were operating as a labour broker but once the guidelines were issued they ceased to act like they use to. The evidence that was placed before court was that the respondent's conduct continued. I have already in paragraph 46 set out what facts the registrar took into account in arriving at its decisions. These happened after October 2003.

[48] It is clear from the aforementioned facts that CAESAR is an organisation for gain and therefore not a genuine employers' organisation as envisaged in the LRA and the guidelines referred thereto. The registrar's finding and conclusion about the relationship between COFESA and CAESAR was correct. It is also clear from the evidence that was placed before the court *a quo* that members were also charged for the services that were provided to

them without any input from their side. Legal costs were included for representations at institutions such as the CCMA. Members are charged per hour for services offered by labour consultancies. This is clearly a labour consultancy organisation disguised as a registered employers' organisation. CAESAR is effectively a part of a consultancy business and is thus operating as an organisation for gain.

[49] I am satisfied that the court *a quo* erred when it found that the registrar had acted on mere suspicion. Sufficient evidence was placed before it that CAESAR is not a genuine employer's organisation and it should have dismissed the respondent's appeal.

[50] The appeal succeeds in the circumstances.

[51] It would be in accordance with the requirements of the law and fairness that costs should follow the result.

[52] In the circumstances, I make the following order:

52.1 The appeal is upheld with costs.

52.2 The decision of the court *a quo* is set aside and replaced with an order that registrar's decision to deregister the respondent is confirmed.

Francis AJA

Tlaletsi DJP and Mokgoatlheng AJA concur in the judgment of Francis AJA

APPEARANCES:

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|---|---|---|
| FOR THE APPELLANT | : | H Woudstra SC |
| | | Instructed by State Attorney |
| FOR THE RESPONDENT | : | D J Coetzee of Dirk Coetzee Attorneys |