Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no.: J634/11

In the matter between:

CAPE AGRI EMPLOYERS ORGANIZATION Applicant

and

REGISTRAR OF LABOUR RELATIONS Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant sought urgent relief *inter alia* in the following terms :

> "2.That it be declared that the decision of the Respondent to cancel the registration of the Applicant as an employers' organization as published in notice 176 of 2011 in the Government Gazette of 1 April 2011 was suspended by the lodging of an appeal against that decision ;
>
> <u>Alternatively to paragraph 2 above :</u>
>
> 3.That the decision of the Respondent to cancel the registration of the applicant as an employers' organization as published in the Government Gazette of 1 April 2011 under notice 176 of 2011 be suspended pending the adjudication of the appeal".

[2] At the commencement of the hearing the applicant abandoned the declaratory relief sought.

Background facts

[3] The applicant was formally registered on 21 June 2000 in terms of a certificate of registration issued by the respondent under the Labour Relations Act, 66 of 1995 ("the Act"). Clause 2 of its constitution expressly provides that it is established as an organization not for gain. Clause 4 provides that its main objectives are: (a) to regulate and promote relations between its members and their employees and/or trade unions; and (b) to promote and protect the common interests of members with respect to their employees, including providing members with representation at the CCMA.

[4] The members of the applicant are farmers in the Western Cape. The applicant states that it is financially unable to employ more than one employee to render human resources and dispute resolution services to its members, and the average farmer cannot afford to employ someone in this capacity in a small enterprise. It therefore provided these services to its members by accrediting human resource practitioners ("labour consultants") to assist them with labour law and dispute resolution services, including representation at CCMA proceedings. It states "such service providers all joined the applicant as members and all HR services rendered by these practitioners to members were paid for by the member concerned".

[5] Following a complaint received by the respondent from a trade union about the conduct of these labour consultants in CCMA matters, and expressed by it in correspondence to the applicant in 2006, the applicant adopted a Code of Ethics to regulate their conduct and also set up an ethics committee to oversee their conduct. It advised the respondent of these developments. Thereafter in 2007 and 2008 correspondence ensued between the parties regarding a further complaint received regarding registration, as well as concerns raised by a CCMA Commissioner querying the membership of the labour consultants.

[6] The respondent advised the applicant in about January 2010 that it appeared that the applicant was used by labour consultants as a profit-making vehicle and that it was not an association not for gain. The applicant was informed of the

respondent's intention to publish a notice in terms of section 106(2B) of the Act notifying all interested parties of its intention to cancel the registration of the applicant. The applicant alleges that this was unexpected since it had for a period of two years been unaware that there were any further complaints lodged against it with the respondent. Subsequently a notice in terms of section 106(2B) was published in the Government Gazette of 5 February 2010, inviting objections for a period of sixty days. The notice stated that the applicant "is used by consultants as a vehicle for profit-making. This is an association for gain and therefore not a genuine employer's organization as envisaged in the Act".

[7] The applicant responded with submissions dated 16 March 2010, which were supported by some of its members. In these submissions it stated *inter alia* the conclusion reached by the respondent has no factual basis and that its objectives relate to legitimate collective bargaining and providing advice to members on labour relations issues.

[8] No further correspondence ensued between the parties and one year later, on 16 March 2011 the applicant's registration was cancelled. On 14 April 2011 the applicant lodged an appeal in terms of section 111(3) of the Act.

The applicable legal test

[9] In *Lowveld Allied and General Employers' Organisation v Minister of Labour & others* (2011) 32 *ILJ* 340 (LC) Basson J found that a deregistered employers' organisation or trade union has the right to approach this Court for an order suspending deregistration pending the appeal, but whether or not it is entitled to the order depends on the facts and whether or not the requirements for the grant of interim relief have been satisfied.

[10] It is trite that in order to obtain the relief sought the applicant has to show that:

a) it has a *prima facie* right to the relief ;,

b) there is a well grounded apprehension of irreparable harm should relief not be granted,

c) the balance of convenience favours the granting of relief ;and

d) there is no other satisfactory remedy.

Analysis

[11] Although urgency is in issue it was not seriously challenged and the matter proceeded on an urgent basis. Mr Stoop, appearing for the applicant, submitted that the applicant has a *prima facie* right to the relief sought since there are reasonable prospects of success on appeal. Relying on the judgment of Van Niekerk J in *United Peoples' Union of SA v Registrar of Labour Relations* (2010) 31 *ILJ* 198 (LC) he submitted that an assessment of the preliminary merits of the case was essential to the grant of interim relief and proceeded to address this. He submitted that the respondent erred in determining, on the basis of the role and functions of four labour consultants who were admitted as members of the applicant, that it was not a genuine employers' organisation but a profit-making enterprise. This decision fails to take into account that it has about 489 members who employ approximately 68 000 employees to which it provided a broad range of services; that it was involved in a broad spectrum of collective bargaining activities and satisfied the guidelines for a genuine employers' organisation provided for in section 95(8) of the Act. Moreover, labour consultant members are not paid by the applicant but the members to whom they provide services. They were not involved in the establishment of the applicant and it was a ruling issued by the CCMA that required them to become members.

[12] Mr Stoop submitted further that the respondent failed to apply his mind to the totality of circumstances in which the applicant operates. This is relevant to determining whether a party is a genuine employers' organisation as was held to be the case by Landman J in *Labournet Holdings (Pty) Ltd v McDermott & another* (2003) 24 *ILJ* 185, where he examined the relationship between a labour consultancy and the National Employers' Federation and found the two entities to be indistinguishable from one another. The decision to deregister cannot be justified in circumstances, such as the present matter, where it is only membership of four labour consultants that is the issue. However, as Ms Prinsloo submitted it is not the number but the principle that matters, as well as the role and power of the respondent to intervene. Mr Stoop submitted that the respondent erred on the facts; the decision itself is unfair in the circumstances since the labour consultants have

not taken over the applicant; it is not a case where the deregistration was a necessary step for financial due diligence (as in *United Peoples' Union of SA* supra where the union had failed to provide audited financial statements); and thus there is a reasonable possibility that the appeal will succeed.

[13] Ms Prinsloo, appearing for the respondent argued that the applicant does not have a *prima facie* right to the relief sought in view of the express provisions of section 106(3) of the Act. It moreover cannot rely exclusively on the prospects of success to establish a *prima facie* right. Section 106(3) unequivocally states that all the rights enjoyed by an organisation as a result of being registered will end when it is de-registered. This is peremptory. As a result of the applicant's deregistration it can no longer enjoy the rights that derive from registration and the Act contains no provision for suspending the operation of the deregistration pending the finalisation of an appeal against the decision.

[14] No factual averments are made by the applicant to support its submission that it has a *prima facie* right. It is therefore unclear on what legal or factual basis it alleges it is entitled to continue to operate notwithstanding deregistration in the circumstances contemplated in the Act. On its own version, the applicant alleges that 'service providers' rendering human resource services are not precluded by the applicant's constitution from becoming members. The respondent however cites this as one of the reasons for its de-registration. It states that the definition of member in clause 3.2 of the applicant's constitution is an 'employer' within the agricultural sector. The applicant relies on an extremely wide interpretation of 'services' provided to members, described by respondent's counsel as encompassing any service "from the fork in the ground to the fork in the mouth" and which thus includes labour consultants irrespective of whether they are primary or secondary employers in the field of agriculture. This will undoubtedly be fully ventilated on appeal and is not for this court to decide, although it implies that the prospects of success may not be as secure as the applicant submits.

[15] The respondent states further that in correspondence it raised with applicant the concern that the genuineness of the organization may be affected when a labour consultant acts independently as a member of the organization. In issuing certificates of membership to these consultants the applicant breached its own

constitution. The applicant was moreover aware, as far back as 2006, that there were serious concerns about the fact that it admitted labour consultants as members, clearly in contravention of its constitution and despite this the applicant failed to act in compliance with its constitution. It must now face the consequences of its conduct and cannot seek to preserve its registration having forced the respondent to determine the issue.

[16] The applicant's case is that its members will suffer irreparable harm should relief not be granted – they will be left without representation in their pending CCMA matters; many will cancel their membership resulting in severe financial prejudice to the applicant. In this regard it would appear that no averments have been made to this effect in the pleadings and this submission is therefore purely speculative. Moreover, the members are not without recourse since they could join other trade unions or could still obtain the assistance of the existing or other labour consultants in pending CCMA or Bargaining Council matters, or could be represented by their directors, partners, members, owners or legal representatives. In *Lowveld* (*supra* at [28]*)* Basson J (at para 28) pointed out that this is an unfortunate consequence of deregistration and one that was foreseen by the legislature and cannot constitute irreparable harm. I agree.

[17] The balance of convenience requires weighing the prejudice the applicant may suffer if its deregistration is not suspended against the public interest of protecting the interests of all members of trade unions and employer organisations and enforcing the provisions of the Act. Respondent's counsel submitted that the balance of convenience favours the applicant in that it will suffer irreparable harm arising from loss of membership and concomitant financial prejudice should interim relief not be granted. On the other hand the respondent took a year to reach a decision to deregister the applicant and would suffer no prejudice if its decision was suspended pending determination of the appeal. Applicant's counsel argued that from a public policy point of view an organization should not be entitled to continue to enjoy the rights and benefits of registration if it has flaunted the very statute from which those rights are derived. It is clear from section 106 that the intention of the legislature was to bring an end to the rights and privileges enjoyed by an employer's organisation or trade union in these circumstances, at least until the main matter was determined. The rationale is to protect the institutional framework of collective

bargaining as well as the members of employer organisations and trade unions. The relief sought by the applicant will have absurd results as it will defeat the very purpose of section 106 (3) and undermine the powers of the respondent and its role in enforcing the Act. This is contrary to the public interest and clearly outweighs the granting of relief to the applicant.

[18] On this point it was held by Lagrange J in *General Domestic and Professional Employers' Organization v Registrar of Labour Relations* (unreported case number J1072/2010) that the employers' organisation preserves the title because an appeal was lodged while the harm for the respondent is that it suffers a loss of efficacy if it cannot clamp down on organisations not functioning as genuine employer organisations. It would not be in the public interest and would undermine the very fabric of the Act for the applicant to continue operating in such circumstances.

[19] It is further untenable to submit that the applicant has no alternative remedy. Indeed it exercised such an alternative when it lodged the appeal. It can in any event seek to expedite the date of hearing.

[20] In my view even if the applicant has a *prima facie* right to relief based on some prospect of success, this is outweighed by the balance of convenience. It is in the public interest that the office of the respondent be permitted to exercise its powers conferred under the Act without undue interference by this Court. Moreover, the applicant has not established the existence of irreparable harm or lack of a suitable alternative remedy. Therefore, the applicant has not met the requirements for urgent interim relief and the application must fail. There is no reason why costs should not follow the cause.

Order

[21] In the premises, I make the following order:

The application is dismissed with costs.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing : 17 May 2011

Date of judgment: 20 May 2011

Appearance:

For the Applicant : Adv BC Stoop instructed by Coetzer & Partners

For the Respondent: Adv C Prinsloo instructed by the State Attorney