

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1732/10

In the matter between:

COMMERCIAL MINING AND ALLIED WORKERS UNION

Appellant

and

REGISTRAR OF LABOUR RELATIONS

Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an appeal by the appellant, the Commercial Mining and Allied Workers Union after the respondent, the Registrar of Labour Relations (the Registrar) had refused to register it as a trade union. The appellant had applied to be registered in terms of section 96 of the Labour Relations Act 66 of 1995 (the LRA). The registrar had found that it was not a genuine trade union as envisaged in the LRA and refused to register it.
2. The appeal is brought in terms of section 111(3) of the LRA. The appellant contends that it has met with the requirements of the LRA.

Background facts

3. The appellant stated in its founding affidavit that on 5 June 2010, at Johannesburg, a meeting was convened by the workers who experience common problems and

challenges at the workplaces throughout South Africa. The aim of the meeting was to consider the possibility of forming a trade union to attend to and address the common needs and problems of the workers. The meeting deliberated on the issues forming part of the agenda and ultimately adopted a constitution and the name of the appellant. The office bearers of the appellant were elected by ninety workers who attended the meeting. The elected executive were tasked with the registration of the appellant to ensure the optimal benefit to members arising out of the registration with the Registrar. The current membership of the appellant stands at 201.

4. On 30 June 2010 the general secretary of the appellant in pursuance of the mandate of the workers, completed and submitted to the Registrar an application form for the registration of the appellant. The application is dated 5 June 2010. It submitted three copies of the constitution, the minutes of the meeting of 5 June 2010, identity document, copies of the office bearers of the appellant and attendance register. The minutes of the meeting read as follows:

**“Minutes of the meeting
held on the 5th June 2010”**

Present

See the attendance register attached hereto

Agenda

- 1. Opening and Welcome*
- 2. Purpose of the meeting*
 - (2.1) Adaptation of the name*
 - (2.2) Adaptation of the constitution*
 - (2.3) Appointment of office bearers/officials*
- 3. Way forward*
- 4. Closure*

Opening and welcome

Cde Samuel Khosa opened and chaired the meeting and thanked everybody present for attending.

Purpose of the Meeting

Cde Samuel Khosa informed workers about formation of a trade union and the requirements as stipulated in section 95 of the Labour Relations Act.

Adaptation of a name

The name of a trade union was adopted to Commercial Mining and Allied Workers Union (COMAMWU)

Adaptation of the constitution

The constitution was summarized and adopted by the meeting.

Appointment of the office bearers/officials

Appointment of president it was agreed that it will be Andries Boshamane with work address as follows:

709 Rubenstein Moreleta Park working for Brinant Security.

Appointment of Deputy President was agreed that: it will be Vhuhanani Ronald Nemafohoni with work address as follows:

1 Tugela Crescent Lenasia working for Dynamic Engenering Rebuilders.

Treasurer: it was agreed that it will be Solomon Sibulelo Twalo with work address as follows:

6 Roper Street Eloff Ext working for Riverside Distribution

Appointment of Deputy Treasury: it was agreed that it will be Sibongile Jostina Shongwe with work address as follows:

46 Robynweg Klerksoord Akasia working for Rethas Kitchens

Samuel Gezani Khosa was appointed as a General Secretary

Lorraine Mogamisi was appointed as a Deputy Secretary.

Secretary and Deputy were assigned to ensure that the registration is been done within the period of 3 months

CLOSURE”

5. The Registrar responded in a letter dated 5 July 2010 as follows:

“Your application for registration of a trade union dated the 5th June 2010 has reference.

1. *The Registrar, in considering applications for registration, does so in terms of Section 95 and 96 of the Act. In addition to the above the Registrar must take into consideration the guidelines published in terms of Section 95(8) of the Act.*
2. *The application and the accompanying information submitted do not meet the requirements for registration and you are herewith afforded an opportunity in terms of section 96(4) of the Act to prove that the applicant complies with the Act and that it is a genuine trade union.*
3. *In considering a new application for registration, the Registrar must take into account other factors such as the formation of the applicant, activities of the applicant and membership of the applicant.*
4. *In order to enable this office to determine whether the application complies with the Act and is a genuine organization, the following information should be submitted for consideration within 30 days of the date of this letter.*
 - 4.1 *A list of the officials and office bearers of the applicant union, their contract details, work contact details and addresses.*
 - 4.2 *Copies of employment contracts of the officials of the appellant organization.*
 - 4.3 *Information on relevant work experience and qualifications of all officials and office bearers which will be beneficial to the positions they hold in the organization.*
 - 4.4 *Proof of paid-up membership of the last 3 months and the sectors in which the members belong.*
 - 4.5 *Banking account of the applicant organization (bank statement).*
 - 4.6 *A copy of the signed lease contract of the applicant organization's office(s).*
6. *The appellant responded in a letter dated 23 July 2010 as follows:*
 - “1. *Your cognisance of the provisions of sections 95 and 96 of the Act as well as your taking into consideration the guidelines published under section 95(8) of the Act is greatly appreciated.*
 - 1.1 *In terms of section 95(1) a trade union may apply to the registrar for registration if it satisfies the provisions of the provisions of paragraphs (a), (b), (c) and (d):*

- (a) *it has adopted a name, Commercial Mining and Allied Workers Union shortened COMAWU, that meets the requirements of subsection (4), that is, the name or shortened form of the name that does not closely resembles the name or shortened form of the name of another trade union and is unlikely to mislead or cause confusion. We submit that the adopted name or shortened form thereof does not resemble that of any other trade union and is unlikely to mislead or cause confusion.*
 - (b) *it has adopted a constitution which in our opinion satisfies the requirements set out in subsections (5) and (6). A copy thereof was handed in on 30 June 2010.*
 - (c) *it has an address in the Republic. The above stated postal address is in the Republic and the physical address in the Republic will be furnished once a registration certificate has been obtained as the prospective landlord is willing and prepared to lease his property to the trade union upon production of a registration certificate.*
 - (d) *this trade union is independent in that it is not under direct or indirect control of any employer or employers' organisation and is free of any interference or influence of any kind from any employer or employers' organisation.*
2. *The trade union was formed at the inaugural meeting attended, on 5 June 2010, by 90 founding members who associated with one another to establish this union to regulate their relations with their employers. It is at this meeting where the name and the constitution were adopted and office-bearers appointed. The membership presently stands at 201.*
 3. *Membership is restricted to employees in the commercial activities, mining and related and related industries - see clause 6 of the constitution.*
 4. *The activities of the applicant are to regulate relations between the members/employees and their employers and/or employers organisations including the regulation of these relationships through collective bargaining. It is evident from the attendance register that the applicant seeks to recruit members from particular workplace to entrench its organisational rights or collective bargaining.*
 5. *The following is the applicant's response to paragraph 4 of your above stated correspondence:*

5.1 POSITION NAME & CONTACT WORK ADDRESS

DETAILS

*President Andries Boshomane Brinant Security
Tel: 073 999 1264 709 Rubenstein Moreleta Park*

*Deputy President Vhulahani Ronald Dynamic Engineering
Nemaophononi 1 Tugela Crescent Lenasia
Tel: 076 268 1953*

*Treasurer Solomon Sibulelo Riverside Distributor
Twalo 6 Roper Street Eloff Extension
Tel: 076 058 4041*

*Deputy Treasurer Sibongile Jostina Rethas Kitchens
Shongwe 46 Robynweg Klerkoord
Tel: 074 210 9505*

*General Secretary Samuel Gezani COMAWU
Khosa P O Box 7909 Johannesburg
Tel: 071 345 2290*

*Deputy Secretary Lorraine Mogamisi COMAWU
Tel: 078 341 3517 P O Box 7909 Johannesburg*

- 5.2 *The two employees/officials of the applicant union are volunteers. Their contracts are attached hereto.*
- 5.3 *Copies of their cv's and educational certificates are attached hereto.*
- 5.4 *Because the applicant union does not have a bank account it is not able to collect membership fees for fear of unavailable safekeeping measures. The requested sectors are set out in clause 6 at pages 3 and 4 of the constitution.*
- 5.5 *A bank account could not be opened because the bank's prerequisite for opening an account is a certificate showing that the union has been registered. A copy of the bank's letter is attached hereto.*
- 5.6 *The landlord requires a copy of the registration certificate to enable him to sign the lease contract.*
- 5.7 *Because the applicant union does not have a certificate it is unable to invoke the provisions of section 21 to access the stop order facilities and/or workplace or appoint shop stewards.*

It is the applicant union respectful submission that your requirements as per paragraphs 4.2, 4.4, 4.5 and 4.6 of your communication put the applicant

union in an invidious position in that it seems to be a case of which the chicken and the egg came first”.

7. The appellant was informed in a letter dated 17 August 2010 that its application was refused. The letter reads as follows:

“I refer to your application for registration of a trade union.

On 5 July 2010 you were, in terms of section 96(2) of the Act, requested to provide the Registrar with further information in support of your application. From the information that was submitted the members are not paying membership fees in terms of the union constitution. This case doubt as to whether there is any employee that can claim to be a member of the union. An applicant trade union must be functioning as a trade union before applying for registration.

As a result thereof, the applicant union does not qualify for registration. Consequently your application is refused with effect from 17 August 2010”.

8. After the appellant had written to the Minister on 9 September 2010, the Registrar responded in a letter dated 23 September 2010 as follows:

“I refer to your letter dated 9 September 2010 addressed to the Minister requesting his intervention. I will elaborate on the reasons for the refusal of your application as was provided to you in my letter dated 17 August 2010.

When considering an application for registration, I make my decision based on the registration requirements as well as the guidelines issued by the Minister in 2002 to determine whether an applicant for registration is a genuine trade union.

A trade union as per definition of the Act means “An association of employees whose principal purpose is to regulate relations between employees and employers including employers’ organisation”. I am not convinced by the operations and activities of the applicant that the union members were associating together as required by the Act.

According to Guidelines, the process followed to form a trade union can give important indications as to whether or not an organization is a genuine trade union. In an attempt to prove that employees came together to form the trade union, minutes of a meeting dated 5 June 2010 were submitted by the applicant union. A copy of an attendance register submitted did not indicate in respect of which meeting it was for and no contact details were provided to enable this Office to verify if the individuals mentioned in the minutes did indeed attend the meeting. The minutes were poorly crafted and no clear resolution or discussion was captured. It is the view of this

Office that the minutes were not a reliable source to confirm that members associated together to form the applicant union. From the minutes it is confirmed that “Cde Samuel Khosa informed workers about formation of the trade union” which is an indication that certain individuals decided on the formation of the applicant union and not the members themselves.

The fact that the names and details of office bearers was the only information that could be submitted leads this Office to believe that it was only these individuals that established the organisation.

The applicant union claimed to have 201 members as per the LRA Form 6.1. The applicant in its letter dated 23 July 2010 confirmed that none of the “members” were paying membership fees and that there was no bank account. A letter from the First National Bank confirmed that the applicant union did not have a bank account.

The constitution indicated that membership fee is R42.00. Despite the provisions of the constitution that the members shall pay membership fees, none of the members paid any membership fees as required by the constitution. Furthermore, the union failed to prove in any way that workers were members of the applicant union by for instance submitting completed membership forms to show their commitment to the membership of the applicant union. Despite this being a requirement of the constitution.

This was a clear indication that the applicant union had no members and existed in name only. The Act requires that any trade union may apply to the Registrar for registration if it complies with certain requirements. In my view the applicant is not functioning as a trade union. The applicant must at least show that it is in some way functioning in terms of its constitution, before registration can be considered.

The applicant failed to submit a copy of a lease agreement as was requested to prove that it had an address in the republic. It failed despite this office’s request to submit a copy of the lease agreement.

Based on the above, the registration of the applicant union was therefore refused.”

9. After the Registrar had refused or register the appellant, the appellant brought this appeal against the Registrar’s decision.

The appellant’s contentions

10. The appellant contended that it has satisfied the requirements of section 95(1) and(2)

of the LRA. It has also responded to the requirements of the Registrar in full taking into account the provisions of section 95(8) of the LRA. The Registrar's concern was whether the appellant was a genuine trade union. It stated that of all the requirements stated by the Registrar, it was only unable to provide the information or documentation beyond its control. It was unable to open a bank account as the bank requires proof of registration as a trade union by way of a certificate of registration. It was unable to provide a copy of the lease agreement for its offices as the landlord wanted a copy of the certificate of registration as a trade union. Proof of paid - up membership for the last 3 months could not be submitted as the appellant could not invoke the provisions of section 21 of the Act as it is not recognized by employers' organisations due to non registration. The rights of the appellant are seriously curtailed if non existence at all. It cannot take the risk of collecting money without any bank account. It cannot comply with the requirements as they were beyond its reach.

11. The appellant contended further that it is independent as required by section 95(2) of the LRA. In his refusal to register the appellant, the Registrar relied on the provisions of sections 95(7) and (8) which provides that the Registrar must not register a trade union or employer's organization unless the Registrar is satisfied that the applicant is a genuine trade union employer's organization. The further requirement which is the reason for non registration of the appellant is the fact that according to the Registrar, the appellant must be functioning as a trade union before applying for registration. It is further the Registrar's view that since the appellant does not have members contributing membership fees in terms of its constitution,

there is a doubt regarding the membership of the appellant. The appellant contended that it was unable to comply or satisfy the above condition as it does not enjoy organizational rights enjoyed by registered trade union. It is thus not recognized by employers' organization alternatively a certificate of registration is required to allow for employers to deduct membership fees. In terms of section 23(2) of the Constitution of the Republic of South Africa, every worker has the right to form and join and to participate in its activities and programs. This right so it was contended has been frustrated by the Registrar without just cause. The appellant has complied with all the requirements for the registration of a trade union and therefore the Registrar must register the appellant accordingly. It has met the requirements regarding its name, constitution, independence and its reason for its formation are not contested by the Registrar.

Analysis of the facts and arguments raised

12. Chapter VI of the LRA deals with trade unions and employers' organisations. Sections 95 to 106 deals with the registration and regulation of trade unions and employers' organisations. A trade union may apply to the registrar for registration if it meets the criteria set out in section 95(1)(a) - (d) of the LRA. It provides as follows:

"1. Any trade union may apply to the Registrar for registraion 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 subsection*

(5) and (6);

(c) *It has an address in the Republic; and*

(d) *It is independent”.*

13. The registrar must in terms of section 95(7) of the LRA refuse to register any trade union unless he is satisfied that it is a genuine trade union. In terms of section 213 of the LRA trade union means “an association of employees whose principal purpose is to regulate relations between employees and employer”. The LRA provides no definition of the term ‘genuine’, but such meaning can be gleaned from the guidelines issued in terms of section 95(8) in GNR146 in Government Gazette 25515 of October 2003. The registrar’s powers under section 95(7) of the LRA should be construed as including a reference to the mischief which the 2002 amendment sought to address. The following appears in *WUSA v Crouse NO & Another* [2005] 11 BLLR 1156 (LC) at paragraph 27:

“Moreover, the registrar’s powers under section 95(7) should be construed as including a reference to the mischief which the 2002 amendment sought to address. It is well known that the amendments effected to sections 95 and 106 of the LRA in respect of registration and deregistration of trade unions and employers organisations on the grounds of genuineness sought to deal with a clearly defined mischief which was set out in the explanatory memorandum to the Bill in the following terms:

‘Since the enactment of the 1995 Labour Relations Act there has been a significant increase in the number of trade unions and employers organizations. A significant number of these are no more than disguised labour consultants that have registered for the sole purpose of gaining appearance rights at the CCMA and Labour Court. It has also come to the attention of the department that a number of these trade unions adopt coercive practices that are indicative of the fact that they are not genuine trade unions:

(a)

(b) if the trade union acts on behalf of a 'member' in a claim, excessive or disproportionate, the full amount of any payment received is not paid over to the member and often a service fee is charged.

(c)

There are also strong indications that some financial and insurance brokers have become active in the establishment and 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 the 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' organisations undermine effective dispute resolution. These organizations 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 section 95 are intended to discourage the formation and registration of trade unions and employers' organizations 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 organizations which are not. The Minister will have the power to issue guidelines concerning whether or not a trade union or employers' organizations 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 Organization has expressed the view that this is in keeping with its standards concerning the promotion of collective bargaining and freedom of association."

14. The Minister of Labour has in terms of section 96(8) of the LRA, in consultation with NEDLAC by notice in the Government Gazette published guidelines to be applied by the Registrar in determining whether an applicant is a genuine trade union or a genuine employer's organisation. The Minister has published guidelines in

GNR1446 in GG 25515 on 10 October 2003. Clause 1 of the guidelines sets out there purpose which is as follows:

“This document contains guidelines published by the Minister of Labour, in consultation with NEDLAC, that are to be applied 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’ organization. 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 a genuine employers’ organization. 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’ organization that is not, or has ceased to function as, a genuine trade union or employers’ organization, as the case may be”.

Clause 7 of the guidelines for the registration of trade unions provide that the process followed to form a trade union can give important indications whether an organisation is a genuine trade union. Amongst others, key aspects of the process include the number of founding members who attended the inaugural meetings to establish the trade union and who completed signed registers indicating their names and place of work, the means by which the constitution of the trade union was drafted and adopted and the election of an executive committee or council of members and the election of office bearers. They are guidelines and remains that.

15. The appellant applied to be registered as a trade union on 30 June 2010 with the Registrar which application was dated 5 June 2010. Upon receipt of the application, the Registrar considered the application and was not satisfied that the appellant met the requirements for the registration. It sent the appellant on 5 July 2010 a written notice and informed it that it had 30 days from the date of the notice to furnish the Registrar with additional information, amongst others, a list of the officials and office bearers of the applicant union, their contact details, work contact details and addresses, copies of employment contracts of the officials of the applicant’s

organisation, proof of paid up membership of the last three months and sectors in which the members belong, banking account details of the applicant, and the address of the applicant in South Africa.

16. The appellant responded with a letter dated 23 July 2010. It is stated in paragraph 2 of the letter that the trade union was formed at the inaugural meeting attended on 5 June 2010 by 90 founding members who associated with one another to establish the union to regulate their relations with their employers. It was at that meeting where the name and constitution were adopted and the office-bearers appointed. The membership presently stood at 201. It has clearly failed to provide the Registrar with a list of the officials and office bearers contact details, work contract details and addresses. No bank account had been opened and no office address has been furnished.
17. It is also clear from the aforesaid letter that the appellant did not meet before 5 June 2010 and that the constitution was adopted on 5 June 2010. The constitution must have been drafted before the meeting by the deponent of the founding affidavit, Samuel Khosa who is not an employee. Only employees are required for purposes of the formation of a trade union. Samuel Khosa described himself in his founding affidavit as "I am an adult male elected as the general secretary of the Appellant And I am furthermore duly authorized to depose to this affidavit in Terms of the resolution attached hereto as **Annexure "A".**" Since the deponent is not an employee himself, the meeting alone could not have been convened by the workers since a trade union is

formed by an association of employees.

18. The appellant in its founding affidavit has provided its address as P O Box 7909 Johannesburg 2000. In paragraph 2 of the founding affidavit it is stated that “the appellant is Commercial Mining and Allied Workers’ Union (COMAWU), a voluntary association of workers, which is constituted as such in terms of its constitution with its as P O Box 7909, Johannesburg 2000.” The appellant has stated that a meeting was convened on 5 June 2010 by workers who had experienced common problems and challenges at the workplace throughout the Republic of South Africa. The aim was to consider the possibility of forming a trade union to attend to and address the common needs and problems of workers. It is clear from the above that as at 5 June 2010 the applicant was not a trade union when it applied for registration. It has defined itself as a voluntarily association of workers. It also does not have a physical address or office address as contemplated in section 95 of the LRA. Only an existing trade union can apply for registration in terms of section 95 of the LRA.
19. It is not clear from the minutes how the officials were elected. The constitution was adopted without elections. There is no indication that there was any voting or election of office bearers. It is not stated from the minutes of the said meeting who made the resolution and how the resolution was arrived at to adopt the constitution. The minutes have not been signed by either office bearers or the members themselves. The attendance register does not state what it was for and even if it was accepted.

There are no details of the attendees and employment contact details on the register. There are no contact details and employment contract details to establish indeed that they are employees. As stated above Samuel Khosa who claimed that he chaired the meeting was not a worker. It is strange that he would arranged for the formation of the trade union when he himself is not an employee. A trade union should be formed by workers but he was the role player in this case and is not a worker. The appellant has stated that the current membership was 201 but nowhere in the papers is the membership base recorded and none of the employment details of the members has been provided.

20. The appellant has admitted that it did not comply with the requirements of the LRA for lack of an address in South Africa. It does not have an office where it operates from and this is also a basis for the registrar not to address it. First National Bank has requested that the appellant furnish a certificate and this is proof that it does not have a bank account which means that it has not been operating as a trade union. It is not true that the appellant will not be able to open a bank account without proof of registration. Any voluntary association can open a bank account.
21. The appellant has stated that it cannot take the risk of collecting money without any bank account and that it could not comply with the respondent's requirements as they were beyond its reach. It is clear from the contents that there is no membership and subscription fees and this is an indication that it is not a trade union.

22. The appellant's application for registration was refused because it is not a trade union and that it does not comply with section 95 of the LRA in that it does not have an office or address to operate from. The appellant has admitted in its founding papers that it has failed to comply with some of the requirements. Since it has failed to meet those requirements, it follows that the appeal stands to be dismissed.

23. I do not believe that this is a matter where costs should follow the result.

24. In the circumstances I make the following order:

24.1 The appeal is dismissed.

24.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPELLANT : S RATIME - UNION OFFICIAL

FOR RESPONDENT : AM PHETU INSTRUCTED BY STATE ATTORNEY

DATE OF HEARING: 5 AUGUST 2011

DATE OF JUDGMENT : 13 AUGUST 2011