REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J1611/10

In the matter between:

CONSOLIDATED ASSOCIATION OF EMPLOYERS

OF SOUTHERN AFRICA REGION **Applicant**

and

REGISTRAR OF LABOUR RELATIONS **Respondent**

Heard: 22 February 2012

Delivered: 29 February 2012

Summary: Appeal-cancelation of registration of the employer's organisation. Appeal upheld.

JUDGMENT

MOLAHLEHI J

Introduction

1] This is an appeal against the decision of the Registrar of in terms of section 111 (3) of the Labour Relations Act 66 of 1995 (the LRA). The appeal arises from the dissatisfaction of the Appellant ("Caesar") with the decision of the Registrar to deregister it as an employer's organisation. The Registrar cancelled the registration of the appellant because in his view the organisation was no longer operating as an employer's organisation but for gain.

Background Facts

2] It is common cause that until it's deregistration the Appellant was registered as an employer's organisation in terms of Section 96 (7) of the LRA. Its deregistration was set in motion by the letter dated 13 July 2004, in which the Registrar required it to furnish the following information: the income statement, financial statement for the period ending December 1999, income statement, names of all elected or approved executive committee members since 2001, minutes of general meetings, copies of attendance register of members who attended all meetings, copy of lease agreement, proof of all paid up memberships since 2001, etc.

3] On 20 July 2007, the Registrar addressed a letter to the Appellant informing it that he intends publishing a notice within seven days thereafter in the Government Gazette in terms of section 106 (2)(b) of the LRA. In that letter the Registrar stated the reasons for the publication in the Government Gazette as follows:

“In view of the documentation before me, I am of the opinion that the organisation is for gain of individuals and therefore is no longer functioning as a genuine employers’ organisation as envisaged in the Act.”

4] In response to the above mentioned letter the Appellant launched an urgent application seeking to interdict and restrain the Registrar from proceeding with his intention to place the notice in the Government Gazette. The urgent application did not proceed further as the parties concluded a settlement agreement in terms of which it was agreed that the Registrar would furnish the Appellant with documents upon which his decision was based.

5] On 20 August 2007, the Registrar addressed a letter to the Appellant in which he attached a list of the documents relied on in arriving at the decision to publish his intention to cancel the Appellant’s registration in the Government Gazette. The Appellant was unhappy with the information provided by the Registrar and says it is for this reason that it was not able to fully address the concerns and the issues raised by the Registrar.

6] The Appellant submitted its representations to the Registrar on 7 September 2007 in the form of a memorandum. In the memorandum the Appellant sought to answer to each of the concerns and or allegations upon which the Registrar based his decision.

7] On 20 March 2009, the Registrar addressed a letter to Appellant concerning the response to the issues he had raised. The said letter reads as follows:

“Kindly take note that despite the representations made in terms of the Court Order and requested for intervention from the ILO, I am still of the opinion that the organization is an organization for gain and thus not a genuine employer’s organization as envisaged by the Act.

Kindly take note that in terms of section 106 (2B), the attached notice will be published in the Government Gazette on 29 May 2009.

As indicated in the notice, you are invited to make written representations within 60 days of the date of the notice as to why the registration should not be cancelled, failing which the name of the organization will be removed from the register of the employer's organizations.

Yours faithfully ."

8] The Appellant made further submissions subsequent to the publication of the notice of intention to cancel by the Registrar in the Government Gazette. The registration of Appellant as an employer's organisation was subsequently cancelled on 13 November 2009.

9] It should be noted that although the LRA does not require reasons for the intention to cancel registration to be provided by the Registrar, in this instance reasons were provided in the letter dated 30 July 2007. In that letter the Registrar indicated that his intention to cancel the registration of the appellant was not based on the provisions of Section 98, 99 and 100 of the LRA, but rather on the guidelines published by the Minister in terms of Section 95 (8) of the LRA.

10] The Registrar based his reasons for the cancellation of the Appellant on essentially the following grounds:

a. The relationship the Appellant had with COFESA.

b. Failure to comply with clause 7(1) (a) of the constitution of the Appellant in that instead electing it appointed certain of its officials.

c. The diverse sectors of the economy from which the Appellant drew its members was suggestive of profit motive.

d. The chairperson of the Appellant was not an employer.

11] In brief and broadly speaking the response of the Appellant to the Registrar's concerns were as follows:

a. The relationship with COFESA was not denied but contended that it was not for any ulterior motive of profit making or serving as a retainer for purposes of representation at the CCMA.

b. The membership of COFESA was taken in accordance with the provisions of the constitution.

c. That the Appellant and COFESA are separate legal entities, each with clearly designed structures and functions. Each has its own books of accounts and records of income and expenditure which are kept in accordance with the standards of generally accepted accounting practice.

12] The appellant further says that:

"4.1.6 Caesar and Cofesa furthermore have easy distinguishable structures and functions. It is obvious that some functions may overlap due to the association of the two organisations; however care is taken that duties, responsibilities and functions are kept separate as far as practicality possible."

<u>Legal powers of the Registrar</u>

13] It is trite that the Registrar has powers to deregister a registered employer's organization in terms of section 106 of the LRA. The Registrar may deregister an employer's organization on the grounds of failure to comply with the provisions of sections 98, 99 and 100 of the LRA. The Registrar has further powers to deregister an employer's organization in terms of the guidelines promulgated by the Minister in terms of section 95 (8) of the LRA. In dealing with the purpose of deregistration the guidelines provides:

"In addition, in terms of section 106(2A) of the LRA, 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."

14] In terms of clause 24 of the guidelines an employer's organization loses its rights and benefit of remaining a registered organization under the LRA when the employers who are members stop associating as such and when they stop associating for the purposes regulating the relationship between employers and trade unions.

15] In determining whether or not an employer's organization satisfy the requirements of clause 24, it is necessary in terms of clause 25 of the guidelines to examine the actual process of forming an organization as well as its composition and membership including the activities it undertakes on behalf of its members.

16] In determining whether an employer's organisation satisfies the requirements of associating for the purpose of regulating the relationship between its members and the trade unions the following factors are in terms of the guidelines to be taken into account:

"• the number and/or size of the founding members who attended the inaugural meeting to establish the employers' organisation;the means by which the constitution of the employers' organisation was drafted and adopted;

• the election of executive committee or council members and the election of office-bearers."

17] It is important to note that whilst section 95(5)(b) of the LRA does not require an employer's organization to set out the qualifications for admission as a member of the employer's organization, the guidelines under clause 28 provides as follows:

"However the failure to place appropriate qualifications on membership may be an indication, <u>together with other factors</u> which are discussed below, that the employers' organisation is not a genuine employers' organisation. Where an employers' organisation has extremely wide qualifications for membership, it is appropriate to consider whether its members are in reality associating with each other for the purpose of regulating relations between themselves and their employees or the trade unions."

18] It is apparent from the reading of clause 28 that failure to provide for qualification of membership on its own does not automatically constitute a basis for the conclusion that the organization is not operating as envisage by the LRA. There are other factors to be taken into account which includes in particular the question of whether the organization is operating for gain.

19] In order to ensure that employers' organization do not operate as organizations for gain, section 95(5) of the LRA requires that an employer's organisation must state in its constitution that it is an association not for gain. In determining whether an employer's organization is operating as an organisation for gain, the Registrar is required to examine the organisation's actual financial operation. The factors to consider in determining whether an employer's organization is operating for gain of the individuals are the following:

"(a) Unrealistically high salaries or allowances are paid to the officials, office-bearers or employees of the employers' organisation.

(b) Interest free or low interest loans are made to officials, office-bearers or employees, and those loans are not repaid.

(c) Family members of office-bearers or officials are employed by the employers' organisation.

(d) 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.

20] The other indicator that an employer's organization is operating for gain of individuals may be the arrangements made with members to pay fees in respect of litigation in particular in cases involving dismissal disputes.

<u>Evaluation</u>

21] The approach to adopt in appeals of this nature is set out in *Staff Association for the*

Motor Related Industries v Motor Industry Staff & Another,[1] wherein it was held that the appeal envisaged in section 111 of the LRA is wide, involving a complete rehearing with adjudication on merits with or without additional evidence or information. In other words the powers of the court in considering the appeal is not limited to reviewing the decision of the Registrar.

22] In the present matter the reasons provided by the Registrar has to be assessed in the context of what was stated in the government gazette indicating the intention to deregister the Appellant. In a sense the notice of the intention to deregister an organization by the Registrar serves almost as a "charge sheet" against the affected organization. Thus the evaluation of the reasons to deregister an organization must be weighed against the background of what was stated in the notice. As indicated earlier the Registrar indicated that he intended to cancel the registration of Appellant as it no longer operated as a genuine employer's organization but rather as an organization for gain.

23] In the present instance there is no legal issue as concerning compliance with the requirement that the Appellant had to provide in its constitution that it is an organization not for gain. In arriving at the conclusion that Appellant was not a genuine employer's organization but operated for gain, the Registrar relied on the provisions of the guidelines promulgated in terms of section 95 (8) of the LRA and not in terms of section 98, 99 and 100 of the LRA.

24] It is undisputed that the Registrar has powers in terms of the provisions of the guidelines to deregister either a trade union or an employer's organization that falls foul of the law. In such instances the Registrar in exercising his discretion in terms of the guidelines, can deregister such an organization particular where he is of the view that it no longer operates as a genuine employer's organization.

25] In the present instance the Registrar found that the Appellant was not a genuine employer's organization but one for gain because of its relationship with COFESA. As indicated earlier in this judgment the Appellant does not dispute that it does have a

1 (1999) 20 ILJ 2552 (LAC).

relationship with COFESA but contends that the relationship is not for ulterior motives but a relationship fundamentally based on the right to freely associate.

26] 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 the problem which the Registrar has with the relationship is based on suspicion based particularly on the history of COFESA.

27] The Registrar says that by its nature the relationship between the Appellant and COFESA is based on a "retainer" in terms of which the Appellant's members appear on a fee at the CCMA in the dispute process. The Appellant does not deny that members who require assistance at the CCMA are charged a fee by agreement because its R20.00 (twenty rand) membership fee per annum is insufficient to cover all its running costs.

28] The only evidence which the Registrar relied on in relation to the issue of the relationship between the two organizations which suggest some profit making motive, is the arbitration award wherein some individual appeared before the CCMA Commissioner and claimed to be representing both COFESA and the Appellant. In my view the finding of the Commissioner in that award remained his or her opinion and could not be properly regarded as being definitive of the nature relationship between the two organizations. In a sense, in my view, at best the Registrar should have regarded the contents of the arbitration awards as nothing but an allegation that required further investigation on his part. The issue which the arbitrator was confronted with during the arbitration proceedings was not to determine whether the relationship between the two organizations was for the purposes of making a profit.

29] The evidence before the Registrar was therefore insufficient to conclude that the relationship between the two organizations was such that it can on the basis of the arbitration award make the Appellant not a genuine employer's organization. The same applies to the report of the audit of Tsedo Commercial Investigator (Pty) Ltd. In regard to that report the Registrar over looked the fact that it is stated amongst others in the report under the heading; “Restriction and Limitation”, that:_

18. “We were not required to and did not 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. Consequently, we do not express any audits.

19. The scope of our work was limited to a review and analysis of documentation and information made available to us and specific enquiries undertaken to pursue our mandate. <u>We have not have verified the authenticity of validity of the documentation made available to us.</u> (my underlining)

    20. We have included information that we obtained verbally, in this report. <u>We cannot verify that this information is credible or truthful. (my underlining)</u>

    21. We have referred to various legal provisions in this report. As we are not a legal practice, we refer you to your legal representative to make any legal interpretations with respect to our findings.

    22. Any recommendations made in this report should only be acted upon after consultation with your legal advisors. We have not discussed the contents of the report with the subject of the investigation.”

30] Similarly, failure to comply with the provisions of clause 7 (1) of the Appellant’s constitution does not seem to constitute a proper basis upon which it could be concluded that the organization was operating for a gain. The same applies to the issue of membership of the Appellant. The Registrar says that the Appellant is an organization for gain because it has failed to place appropriate qualifications on its membership. It seems to me, more is required than a simple accusation that an organization is profit driven simply because of failure to state qualification for its membership in its constitution.

31] As concerning the question of leadership of the Appellant the Registrar relied on the allegation that Mr Moody was not an employer. Besides it being raised late in the process of deregistration of the Appellant, it is not clear in what way can it be said that it is indicative of the fact that the Appellant is disguised as an organization for gain. There is no evidence indicating as to how much Mr Moody was earning. There is also no evidence as to whether the position he occupied was intended as a disguised to benefit someone else.

32] Turning to the issue of the financial statements of the Appellant it is apparent that the organization recorded a nominal profit over the period between 1998 and 2008. The nominal profit made over that period averages at R173 .12 per month. The question that arises is whether this nominal profit can be regarded as a "gain."

33] The LRA does not define the word "gain." I agree with counsel for the Appellant that the literal meaning of the word "gain" involves something more than a mere receipt of payment. I have not been able to find any authority in labour matters dealing with the concept "not for gain." The cases dealing with organisations "not for gain" under the old Companies Act of 1973 provide some inside into the concept. The concept received attention in the Supreme Court of Appeal (the SCA) in the matter of *Cunninghame v First Ready Development 249*.[2] In dealing with the concept, "not for gain," the Court in that case quoted with approval what was said by Nienaber JA in *Mitchell's Plain Town Centre Merchants Association v McCleod,*[3] where it was observed that:

"Gain" in the context in which it appears in ss 30(1) and 31 means a commercial or material benefit or advantage . . . in contradistinction to the kind of benefit or result which a charitable, benevolent, humanitarian, . . . or sporting organisation, for instance, seeks to achieve. The sections [ie 30(1) and 31] are concerned with commercial enterprises

2 2010 (5) SA 325 (SCA).

3 [1996] ZASCA 67; 1996 (4) SA 159 (A) at 169.

and "gain" must be given a corresponding meaning.'

The SCA further quoted with approval what was said in *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd*,[4] where in dealing with the same issue the Court had the following to say:

'Now, if you come to the meaning of the word "gain", it means acquisition. It has no other meaning that I am aware of. Gain is something obtained or acquired. . . . I take the words as referring to a company which is formed to acquire something, or in which the individual members are to acquire something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain something . . . It seems to me that the Act broadly means this: all commercial undertakings shall be registered. It distinguishes . . . between commercial undertakings on the one hand . . . and what we may call literary or charitable associations on the other hand, in which persons associate, not with a view to obtaining a personal advantage, but for the purpose of promoting literature, science, art, charity or something of that kind.'

34] I understand the above authorities, to be saying that the making of a "gain" is not necessarily a contravention of the object, "not for gain" as envisaged in the law. It seems that what is determinative of the nature of the object "not for gain" is the manner in which the "gain" is utilised or distributed. In other words the object would be defeated or undermined if the "gain" is 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 for 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.

35] In the present instance except for the finding that the Appellant made a profit there is no indication as to why that constituted contravention of the law. There is no evidence as to how the profit was distributed or used.

36] In light of the above, I am of the view that Applicant's appeal stands succeed. I see no reason both in law and fairness why costs should not follow the results.

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4 1938 CPD 199.

Order

37] In the premises the following order is made:

1. The appeal is upheld.

2. The decision of the Registrar to deregister the Appellant has no basis in law, is wrong and accordingly stands to be set aside.

3. The Registrar is ordered to reinstate the registration of the Appellant as an employer's organisation.

4. The Registrar is to pay the costs on the Appellant.

Molahlehi J

Judge of the Labour Court

EARANCESf

APPLICANT:

Appearances:

For the Applicant: Mr. Dirk Coetzee Instructed by: Dirk Coetzee Attorneys

For the RESPONDENTS: Mr. Coetzee Instructed by: State Attorney