



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

JUDGMENT

Reportable/Not Reportable

Case no: J2686/07

In the matter between:

RETAIL AND ALLIED WORKERS UNION (RAWU) **Applicant (Appellant)**

and

THE REGISTRAR OF LABOUR RELATIONS

DEPARTMENT OF LABOUR **First Respondent**

THE MINISTER OF LABOUR **Second Respondent**

Heard: **8 December 2011**

Date of judgment: **12 March 2012**

Summary:

JUDGMENT

MOKOENA, AJ:

Introduction

1. This matter came before me as an appeal initiated by the Applicant pursuant to the provisions of section 111 of the Labour Relations Act (“LRA”).
2. The Applicant is a registered trade union which was subsequently deregistered by the First Respondent as envisaged in section 106 of the LRA. It was as a result of the cancellation of registration of the Applicant by the First Respondent that the Applicant initiated an appeal as envisaged in section 111 of the LRA.

Brief synopsis of material facts relevant to the judgment

3. On 22 October 1999, the Applicant was registered as a trade union. It would appear that from the time when the Applicant was registered as a trade union in 1999 until 2005 (a period of approximately 5 years), the Applicant did not foul and/or transgressed any of the provisions of the LRA, to the knowledge of the Respondents.
4. On or about September/October 2005, the First Respondent despatched a notice in terms of section 106(2B) of the LRA to the Applicant wherein, *inter alia*, it was recorded that:-

- ‘(1) The Applicant was no longer functioning as a genuine organisation or in terms of its constitution as envisaged in section 106(2A)(a) of the LRA.
- 2) The trade union is not independent as it is under the direct control of a labour consultant for self enrichment.
- 3) Individuals who initiated the trade union are still running the organisation for gain.
- 4) They are running the organisation as a business and are charging

fees like consultants.’

5. According to the Applicant, it received the aforesaid notice on 1 September 2005. There is a dispute between the parties as to whether or not subsequent to the First Respondent having despatched the notice in terms of section 106(2B) of the LRA, the Applicant did furnish its objections and/or representations as provided for in the notice.
6. The Applicant contends that it submitted its representations dated 2 September 2005 by hand delivering same to the offices of the First Respondent wherein it clearly denied and challenged the allegations advanced by the First Respondent in the aforesaid notice.
7. According to the First Respondent, after having despatched a letter dated 28 August 2005 and the notice of September 2005, the Applicant despite being afforded an opportunity to make representations and/or to advance objections, the Applicant failed to do so and as a result, the notice of intention to cancel the registration of the Applicant was published on 7 October 2005.
8. As a result of the events which ensued subsequent to the aforesaid notice being despatched, including the urgent application and these appeal proceedings, the dispute has resolved itself and nothing turns on it as I am required to adopt a wider approach to this appeal by having regard to all the facts alluded to by the parties in the record of these proceedings.
9. Based on the documents and information placed before me, the question which I have to resolve and determine whether the First Respondent was correct in cancelling the registration of the Applicant and arriving at a conclusion that the Applicant has ceased to operate as a genuine union as envisaged in the provisions of the LRA.
10. On or about August 2005, the First Respondent published a notice of intention to cancel the registration of the Applicant and provided the following reasons

upon which the cancellation was premised:-

11. that the Applicant has ceased to function as a genuine organisation as envisaged by section 106(2A) of the LRA;
 12. that the Applicant has ceased to function in terms of its constitution;
 13. that the Applicant is operating for personal gain of certain individuals;
 14. that the Applicant is not independent as it is under the direct control of a labour consultant and family members for self enrichment;
 15. that the Applicant did not comply with the legal requirements in terms of section 100(a) of the LRA (section 106(2A)(b)).
16. The aforesaid notice invited the Applicant and/or any other interested party to advance representations to the First Respondent as to why the Applicant should not be deregistered. This notice afforded such parties a period of 60 (sixty) days upon which to make those representations. On a proper computation of 60 (sixty) days, this period was to lapse on 7 December 2005. However, there was an intervening event which obviously affected the running and/or lapsing of the period, of which I deal with, more fully, below.
17. Prior to the lapsing of the aforesaid period, the Applicant on 7 September 2005 brought an urgent application wherein it sought an interim order interdicting the Respondents from effecting and/or taking any further steps to deregister the Applicant. The Applicant successfully obtained an interim order. However, on the return date, the final order was denied on the basis that the Applicant has launched its application prematurely as there was no final decision to deregister it and that it was nonetheless afforded a period of 60 (sixty) days upon which to make representations which were to be considered by the First Respondent prior to arriving at a final decision to deregister and/or cancelling the registration of the Applicant.

18. On 4 October 2005, the Applicant received a further notice despatched by the First Respondent dated 30 September 2005 wherein the First Respondent notified the Applicant of the intention to cancel its registration as envisaged in section 106(2B) of the LRA. The aforesaid notice was to be published in the Government Gazette of 7 October 2005. The notice afforded the Applicant and/or any other interested party to make representations within 60 (sixty) days and to indicate as to why the cancellation of the registration of the Applicant should not be effected.
19. The aforesaid notice, *inter alia*, provided as follows:-
- '(1) The Applicant was no longer functioning as a genuine union or in terms of its constitution as envisaged by section 106(2A)(a) of the LRA.
 - 2) The Applicant is not independent as it is under the direct control of a labour consultant for self enrichment.
 - 3) Individuals who initiated the trade union are still running the organisation for gain.
 - 4) They are running the organisation as a business and are charging fees like consultants.'
20. There appear to be a further dispute between the parties pertaining to whether or not subsequent to the First Respondent having despatched the notice dated 30 September 2005, whether the Applicant did make representations and/or filed any objections prior to the expiry of 60 (sixty) days. Whether or not the Applicant did, in fact, make such representation is a factor not decisive to this appeal in terms of section 111.
21. As mentioned above, in determining this dispute between the parties I am entitled to have regard to all the papers and record as filed by the parties and arrive at my own independent conclusion as to whether, based on this information (the record), the Respondents (in particular the First Respondent),

was correct in arriving at a decision that the Applicant was not conducting itself as a genuine union. In this regard, I will, for the purpose of my judgement, consider and have regard to the representations and/or objections which were filed by the Applicant and contained in the record of the section 111 appeal.

22. It was also advanced during oral argument by the representatives of the parties, that I should adopt a wider approach to this appeal and have regard to all the documents before me in arriving at my judgement. This approach, is indeed correct and sound in law. I deal more fully with this aspect below, under the heading “applicable legal principles”.
23. Subsequent to this notice dated 30 September 2005 being despatched to the Applicant and representations made by the Applicant in response to the aforesaid notice, a period of approximately 2 (two) years lapsed without the First Respondent taking any further steps as envisaged in section 106 of the LRA. The First Respondent only despatched a further notice dated 23 November 2007. This was a notice in terms of section 106(2A) of the LRA giving the Applicant notice that its registration as a trade union has been cancelled.
24. This notice, *inter alia*, provided that:-
 - ‘(1) The name of the organisation was published in the Government Gazette of the 7th October 2005 in terms of section 106(2B). The union did not file representations as requested by the notice. I am of the opinion that the organisation is not a genuine trade union as envisaged by the Act.
 - (2) You are hereby therefore notified that the registration of Retail & Allied Workers Union (RAWU) LR2/6/2/816 is hereby cancelled with effect from 23 November 2007 and its name is removed from the register of trade union. A notice to this effect will be published in the Government Gazette on 30 November 2007.
 - (3) Kindly return the original certificate of registration that was issued on the

organisation within 14 (fourteen) days of the date of this letter.'

25. It would appear that this notice dated 23 November 2007 was premised on the facts and grounds as detailed in a notice which was despatched on 30 September 2005 and to be published in the Government Gazette of 7 October 2005 as envisaged in section 106(2B). I deal more fully with this aspect, below.
26. On 26 November 2007, the Applicant initiated an urgent application to stay the First Respondent's deregistration of the Applicant pending the finalisation of the appeal envisaged in section 111 of the LRA. The order was granted on 28 November 2007. In terms of the order as per Pillay J, it was ordered that:-
 - '(1) The First Respondent was to supply the Applicant with reasons within 30 (thirty) days of the date of the decision to deregister the Applicant which is 23 November 2007.
 - (2) Upon the Respondents furnishing reasons and the Applicant lodging an appeal in terms of section 111 of the Labour Relations Act, the deregistration of the Applicant will be suspended pending the finalisation of the appeal proceedings.'
27. In compliance with the court order, the First Respondent despatched its reasons upon which its decision to cancel the registration of the Applicant was premised, dated 19 December 2007. The First Respondent furnished four main reasons which were couched as follows:-
 28. the trade union has ceased to function in terms of its constitution.
 29. the trade union ceased to function as a genuine organisation and it is operating for personal gain of certain individuals.
 30. the trade union is not independent as it is under the direct control of a labour consultant.

31. the organisation does not comply with the legal requirements in terms of section 100(a) of the Act.
32. It must be added that the reasons advanced by the First Respondent pursuant to the Court order made by Pillay J, were detailed in nature with relevant facts being disclosed to the Applicant. However, these details and facts were not furnished to the Applicant prior to the First Respondent invoking the section 106 (2A) process. The notices were premised on the conclusions arrived at by the First Respondent and/or an opinion formulated by the First Respondent without the facts supporting such opinion and/or conclusions being disclosed in any details.
33. On 7 March 2008, the Applicant delivered its notice of appeal as envisaged in section 111 of the LRA. On the basis of the facts and events which occurred and alluded to above, including the order as per Pillay, J, the dispute pertaining to whether written objections were advanced or not simply does not arise as the parties seems to have accepted the directions made by Pillay, J, in her order referred to above. The issues were then comprehensively canvassed by the parties through the process and events leading to the section 111 appeal (this appeal) and the record filed in these proceedings.
34. It is therefore on these bases that I am enjoined to have regard to the entire record of these proceedings, the events leading to this appeal and assess all the relevant information placed before me in order to arrive at my decision as to whether the First Respondent was correct in deregistering the Applicant.

Applicable legal principles

35. The First Respondent is appointed in terms of the provisions of section 108 of the LRA. Section 108 provides that:-
 - '(1) The Minister must designate an officer of the Department of Labour as the registrar of labour relations to perform the functions conferred on the

registrar by or in terms of this Act.

- (2) (a) The Minister may designate any number of officers in the Department as deputy registrars of labour relations to assist the registrar to perform the functions of registrar in terms of this Act.
- (b) A deputy registrar may exercise any of the functions of the registrar that have been generally or specifically delegated to the deputy.
- (3) The deputy registrar of labour relations or if there is more than one, the most senior of them, will act as registrar whenever—
 - (a) the registrar is absent from the Republic or from duty, or for any reason is temporarily unable to perform the functions of registrar; or
 - (b) the office of registrar is vacant.'

36. The First Respondent conducted his functions as envisaged in section 109 of the LRA. Section 109 of the LRA provides as follows:-

- '(1) The registrar must keep—
 - (a) a register of registered trade unions;
 - (b) a register of registered employers' organisations;
 - (c) a register of federations of trade unions containing the names of the federations whose constitutions have been submitted to the registrar;
 - (d) a register of federations of employers' organisations containing the names of the federations whose constitutions have been submitted to the registrar; and

- (e) a register of councils.
 - (2) Within 30 days of making an entry in, or deletion from, a register, the registrar must give notice of that entry or deletion in the Government Gazette.
 - (3) The registrar, on good cause shown, may extend or condone late compliance with any of the time periods established in this Chapter, except the period within which a person may note an appeal against a decision of the registrar.
 - (4) The registrar must perform all the other functions conferred on the registrar by or in terms of this Act.'
37. A union such as the Applicant is registered as contemplated in section 95 of the LRA. Upon registration there are peremptory obligations which a union has to comply with as a registered union. For instance, a union has to comply with the provisions of sections 98, 99 and 100 of the LRA.
38. Section 98 relates to the keeping of books and records of the union's income, expenditure, assets and liabilities to the standards of generally accepted accounting practices. Section 98 provides that:-
- '(1) Every registered trade union and every registered employers' organisation must, to the standards of generally accepted accounting practice, principles and procedures—
 - (a) keep books and records of its income, expenditure, assets and liabilities; and
 - (b) within six months after the end of each financial year, prepare financial statements, including at least—
 - (i) a statement of income and expenditure for the previous financial year; and

- (ii) a balance sheet showing its assets, liabilities and financial position as at the end of the previous financial year.
- (2) Every registered trade union and every registered employers' organisation must arrange for an annual audit of its books and records of account and its financial statements by an auditor who must—
 - (a) conduct the audit in accordance with generally accepted auditing standards; and
 - (b) report in writing to the trade union or employers' organisation and in that report—
 - (i) express an opinion as to whether or not the trade union or employers' organisation has complied with those provisions of its constitution relating to financial matters; and
 - (ii) if the trade union is a party to an agency shop agreement referred to in section 25 or a closed shop agreement referred to in [section 26](#) express an opinion as to whether or not the trade union has complied with the provisions of those sections.
- (3) Every registered trade union and every registered employers' organisation must—
 - (a) make the financial statements and the auditor's report available to its members for inspection; and
 - (b) submit those statements and the auditor's report to a meeting or meetings of its members or their representatives as provided for in its constitution.
- (4) Every registered trade union and every registered employers'

organisation must preserve each of its books of account, supporting vouchers, records of subscriptions or levies paid by its members, income and expenditure statements, balance sheets, and auditor's reports, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate.'

39. In addition, section 99 of the LRA obliges a union to keep a list of its members, the minutes of its meetings, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate and the ballot papers for a period of three years from the date of every ballot.
40. While on the other hand, section 100 of the LRA obliges a union to provide certain information, specified therein, to the First Respondent. Section 100 provides as follows:-

'Every registered trade union and every registered employers' organisation must provide to the registrar—

- (a) by 31 March each year, a statement, certified by the secretary that it accords with its records, showing the number of members as at 31 December of the previous year and any other related details that may be required by the registrar;
- (b) within 30 days of receipt of its auditor's report, a certified copy of that report and of the financial statements;
- (c) within 30 days of receipt of a written request by the registrar, an explanation of anything relating to the statement of membership, the auditor's report or the financial statements;
- (d) within 30 days of any appointment or election of its national office-bearers, the names and work addresses of those office-bearers, even if their appointment or election did not result in any changes to its office-bearers; and

- (e) 30 days before a new address for service of documents will take effect, notice of that change of address.'

41. Relevant to these proceedings is also the provisions of section 106 of the Act which provides as follows:-

- '(1) The registrar of the Labour Court must notify the registrar if the Court—
 - (a) in terms of [section 103](#) or [104](#) has ordered a registered trade union or a registered employers' organisation to be wound up; or
 - (b) in terms of [section 105](#) has declared that a registered trade union is not independent.
- (2) When the registrar receives a notice from the Labour Court in terms of subsection (1), the registrar must cancel the registration of the trade union or employers' organisation by removing its name from the appropriate register.
- (2A) The registrar may cancel the registration of a trade union or employers' organisation by removing its name from the appropriate register if the registrar—
 - (a) is satisfied that the trade union or employers' organisation is not, or has ceased to function as, a genuine trade union or employers' organisation, as the case may be; or
 - (b) 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.
- (2B) 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—

- (a) giving notice of the registrar's intention to cancel the registration of the trade union or employers' organisation; and
- (b) inviting the trade union or employers' organisation or any other interested parties to make written representations as to why the registration should not be cancelled.

- (3) When a trade union's or employers' organisation's registration is cancelled, all the rights it enjoyed as a result of being registered will end.'

42. The abovementioned sections ought to be read with the provisions of section 111 of the LRA upon which these appeal proceedings are premised and which provides as follows:-

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

(2) The registrar must give the applicant written reasons for the decision within 30 days of receiving a demand in terms of subsection (1).

(3) Any person who is aggrieved by a decision of the registrar may appeal to the Labour Court against that decision, within 60 days of—

- (a) the date of the registrar's decision; or

- (b) if written reasons for the decision are demanded, the date of those reasons.

(4) The Labour Court, on good cause shown, may extend the period within which a person may note an appeal against a decision of the registrar.'

Applying the legal principles to the facts

The court's approach to the section 111 proceedings

43. In *Motor Industry Staff Association v Registrar of Labour Relations and Another*,¹ it was noted that:-

'[A]n appeal and not any form of review is contemplated in [section 111\(3\)](#) of the Act. In my view, such an appeal would then mean a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong.'

44. In *National Union of Textile Workers v Textile Workers Industrial Union SA and Others*,² the then Appellant Division held that:-

'[T]o interpret 'appeal' as restricted to 'review' . . . is to give the word a meaning which is not its ordinary meaning'.³

45. In *NEWU v Mtshali*,⁴ Ngwenya AJ found that:-

'the appeal envisaged in terms of [section 111](#) of the Act is sui generis. Firstly because it is an appeal from an administrative decision and not a review. Secondly because there is no record. The record is only generated for the first time on appeal . . . The issue to be decided by the court on appeal is whether the registrar's decision was correct or not. The enquiry is not that he exercised his discretion honestly and properly.'

46. The effect, it was held in *Edgars Stores (Pty) Ltd v Director, CCMA and Others*,⁵ is that the court must deal with a matter on its merits whereas in the case of judicial review "decisions can be described as tolerable even though they may be wrong".

1 [1998] 10 BLLR 1027 (LC) at para 10.

2 1988 (1) SA 925 (A) at 937G–938A.

3 *Id* at para 9.

4 [2000] 3 BLLR 337 (LC) at 341–342.

5 [1998] 1 BLLR 34 (LC) at 41, See also *Meyer v Iscor Pension Fund* [2003] 5 BLLR 439 (SCA) at para 8

Was the First Respondent correct in arriving at his decision to deregister the Applicant

47. Having analysed the applicable legal principles, above, it is important to properly locate the First Respondent's conduct and powers derived from the enabling Act to deregister the Applicant as a trade union.
48. The First Respondent derives his powers from the Labour Relations Act and exercises his discretionary powers through the permissive statutory language conferred upon him in section 106 signalled by the use of words "may" in the empowering provisions.
49. In *Dawood v Minister of Home Affairs*⁶ the Constitutional Court held that "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner."
50. As mentioned above and in line with the authorities already referred to above, the First Respondent when exercising his discretion in terms of the enabling Act (LRA) discharges and/or exercises an administrative action which has to pass the muster test as envisaged in section 33 of the Constitution read with the provisions of PAJA.
51. When exercising his discretion as such, the First Respondent's conduct constitutes an administrative action. An administrative action is described as one that implements or gives effect to a policy, a piece of legislation or an adjudicative decision.⁷
52. Even though the First Respondent's conduct has to be tested in terms of the administrative law principles (as it constitutes an administrative action) one should not lose sight of the fact that this matter involves a *sui-generis* appeal as envisaged in section 111 of the LRA. The approach or the test in other words it is hybrid in nature.

⁶ 2000 (3) SA 936 (CC) at para 53.

⁷ Cora Hoexter "Administrative Law in South Africa", 2007, pg 53, para c.

53. In *Tikly and Others v Johannes NO and Others*,⁸ Trollip J drew a distinction between two types of appeal. Appeal in the wide sense, or wide appeal, refers to a complete rehearing and determination on the merits of a case, with or without additional evidence or information. This means that the appeal body is not confined to the record of the body *a quo*. In an ordinary appeal, on the other hand, the hearing on the merits is limited to the evidence on which the decision was originally given, and thus restricted to the record of the authority *a quo*.
54. In the *National Employer's Forum v Minister of Labour and Others*,⁹ it was held that:-

'The degree of *audi alteram partem* required for the Registrar to publish a notice in terms of the provisions of section 106(2B) . . . may differ from the degree of *audi alteram partem* required in terms of the provisions of section 106(2A) . . . Normally *audi alteram partem* requires that [a] party which may be prejudiced be given proper notice of the intended action and reasonable opportunity to make representations which must be considered by the official concerned. In addition, a clear statement of the administrative action is required. The right to a personal appearance and/or legal representation, whilst perhaps desirable, does not necessarily follow. It seems clear that to give any satisfactory meaning and effect to the provisions of section 106(2B) and uphold the efficacy of the LRA that an attenuated form of *audi alteram partem* must be applied in respect of section 106(2B) of the LRA, failing which the LRA would be unworkable and the ability of the Registrar to deal with such matters would be severely hampered.'

55. The LRA clearly outlines and prescribes a process which the First Respondent ought to undertake when contemplating exercising his discretionary powers in terms of section 106. Prior to deregistering the Applicant and/or any other trade union for that matter, the First Respondent must give a notice of his intention to

8 1963 (2) SA 588 (T) at 590F – 591A, See also *Nichol v Registrar of Pension Funds* [2006] 1 All SA 589 (SCA) at paras 21 and 22.

9 [2003] 5 BLLR 460 (LC) at para 25, See also Section 3(2)(b) of PAJA. As found by the Constitutional Court in *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 101 'decision makers who are entrusted with the authority to make administrative decisions by any statute are ... required to do so in any manner that is consistent with PAJA.'

cancel the registration of the trade union and importantly must invite the trade union to make written representations as to why the registration should not be cancelled.

56. This therefore means that the First Respondent cannot deregister any trade union without having invited that union to make representations. Such representations are not simply made as a mere requirement to satisfy and/or justify the process, but such representations must indeed be considered by the First Respondent prior to exercising his discretion as envisaged in section 106(2A). Meaning that, the First Respondent must apply his mind to the representations advanced pursuant to the provisions of section 106(2B) prior to making his decision as contemplated in section 106(2A).
57. In this matter, Mr Mokhare (appearing on behalf of the First Respondent), eloquently and in the most lucid argument contended on behalf of the First Respondent that the First Respondent did not receive any representations made by the Applicant despite notice being despatched to the Applicant to make such representations.
58. As indicated above, on the other hand, the Applicant persisted with its contentions that it did provide and furnish the First Respondent with the aforesaid representations. During the oral argument advanced on behalf of the Applicant, I was referred to the written representations which the Applicant persists that it had despatched to the First Respondent.
59. At the heart of this dispute of fact is a consistent denial on the part of the First Respondent that he did not receive the representations which the Applicant persists that it had delivered to him. This therefore means that, on the First Respondent's own version, when exercising his discretion as contemplated in section 106(2A), did so, without having had regard to the representations made by the Applicant as he persists that same were not furnished to him.
60. However, what is more revealing is the fact that this matter has a lengthy

history which involved two urgent applications, of which I was also invited by the parties to have sight of same, in adopting a wider appeal approach, when determining the dispute between the parties. From the record of this appeal, it is evident that the representations which the First Respondent has consistently denied having received were indeed either filed by the Applicant as annexures to the aforesaid urgent applications and/or were brought to the attention of the First Respondent through the filing of processes leading to this appeal.

61. In *Tseleng v Chairman, Unemployment Insurance Board, and Another*,¹⁰ Heher J (as he was then), held that:

‘It is ... administratively unfair to fail to draw to the attention of an applicant that a board relies on a particular policy and by such failure to deprive the applicant of the opportunity of making submission as to why he should be treated as one who qualifies in terms of that policy.’

62. In other words, the First Respondent instead of applying his mind to the representations which were made by the Applicant and which subsequently came to his attention either during the urgent applications and/or during the filing of processes in this appeal decided to proceed exercising his discretion in terms of section 106(2A) without giving effect to the provisions of section 106(2B) by having regard to and considering those representations.
63. What appears to be also inconsistent with what is expected from the First Respondent when exercising his discretion in terms of section 106 is the fact that after having despatched the initial notice in 2005 a period of two years lapsed prior to the First Respondent invoking his powers in terms of section 106. Two years after the First Respondent has despatched the 106(2B) notice, the First Respondent relying on the same notice and grounds purported to exercise his discretion in terms of section 106 without even verifying whether the grounds and/or reasons upon which he sought to invoke his powers in terms of section 106 were still in existence and/or cured either by the efflux of

¹⁰ 1995 (3) SA 162 (T) at 178J – 179A.

time and/or the Applicant's repentance from the aforesaid conduct and/or any other intervening factors.

64. In *W G Davey (Pty) Ltd v National Union of Metalworkers of SA*,¹¹ the Supreme Court of Appeal (even though this matter dealt with dismissal, the principle enunciated therein is sound in law and to some extent relevant to this matter), held that it was unfair for a company to dismiss employees in instances whereby there was subsequent developments relevant to its decision which it failed to take into account and simply closed its mind to those developments.
65. Equally so, there is no reason why the First Respondent after becoming aware of the representations made by the Applicant, to consider same and apply his mind to them in exercising its discretion envisaged in section 106(2A). I have not come across any report by the First Respondent to the effect that he had considered the representations made by the Applicant and/or has applied his mind to same when arriving at the decision to deregister the Applicant.
66. In dealing with the principle of legality, the Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others*,¹² held that the principle of legality is an aspect of the rule of law in that a body exercising public power had to act within the powers lawfully conferred on it. In *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa*,¹³ the Constitutional Court held that:-

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for

11 (1999) 20 ILJ 217 (SCA).

12 1999 (1) SA 374 (CC) at para 59.

13 2000 (2) SA 674 (CC) at para 85.

such action.’

67. It cannot be said that the decision of the First Respondent in deregistering the Applicant was rationally related to the purpose for which the power was given when in fact he failed to apply his mind to the representations made by the Applicant prior to invoking his powers in terms of section 106(2A).
68. Lawful administrative action means in essence that administrative actions and decisions must be duly authorised by law and that any statutory requirements or preconditions that attach to the exercise of the power must be complied with. In *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd and Another*,¹⁴ the Appellant Division (as it was then), when dealing with the failure to apply the mind of an administrator, held that:-

‘[T]he decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the [administrator] misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones ...’
69. In this matter, the First Respondent has failed to take into account the representations made by the Applicant and thereby failed to apply his mind to the representations advanced on behalf of the Applicant. These representations were relevant considerations which he had to take into account in exercising his discretion in terms of section 106.
70. In addition, pursuant to the directions by Pillay J, the First Respondent was to supply the Applicant with reasons of the decision to deregister it. Upon the Respondents furnishing reasons, the Applicant was to launch an appeal in terms of section 111.
71. In compliance with the above order, the First Respondent despatched its reasons which were broadly couched and/or categorised into four main

¹⁴ 1988 (3) SA 132 (A) at 152C-D.

reasons, as follows:-

72. the trade union has ceased to function in terms of its constitution.
73. the trade union ceased to function as a genuine organisation and it is operating for personal gain of certain individuals.
74. the trade union is not independent as it is under the direct control of a labour consultant.
75. the organisation does not comply with the legal requirements in terms of section 100(a) of the Act.
76. It must be reiterated that the reasons advanced by the First Respondent were detailed in nature and disclosing some of the relevant facts upon which the decision to cancel the registration of the Applicant is premised. However, these details and supporting information or documents were not furnished to the Applicant prior to the First Respondent invoking section 106(2A). This therefore denied the Applicant a crucial procedural right to meaningfully deal with those allegations. In turn the conduct of the First Respondent rendered the provisions of section 106(2B) meaningless.
77. The Applicant, in its appeal in terms of section 111, dealt with the aforesaid reasons as follows:-

'The trade union ceased to function in terms of its constitution

25.3 The First Respondent was wrong in his opinion that the union has ceased to function in terms of its constitution. That the Secretary of the union acted outside the ambit of the constitution by assisting non-members under the auspices of the union RAWU. He further acted unconstitutionally by charging the non-member R500 deposit for his service. At the conclusion of the he insisted that an amount of R20, 000 be paid to him from the arbitration award against the employer besides

the trade union membership fees that he in the meantime insisted that members should also pay. The union in the representations it made to the Department admitted to this conduct. The Constitution of the Union stipulates in clause 8.1 that the Union membership fee shall not be less than R20.00 or more than R40.00 per month. This clearly contravenes the provisions of the union's constitution.

- 25.3.1 With regard to the First Respondent's opinion and/or allegations against the Applicant's Secretary as above, the Secretary and/or the Applicant disputes and deny the said allegation. Not only the allegation are now disputed, on its written representation hereto, the said allegations were challenged and denied.

The First Respondent was further made aware that in terms of clause 17.5 - 17.6.8 of the Applicant's (union) constitution, any office bearer, official, member and/or employee including the General Secretary who commits and/or purported to had committed misconduct, is subjected for disciplinary measures accordingly.

The First Respondent was therefore requested by the Applicant's elected National Office Bearers to substantiate its allegations (furnish and/or provide full particulars of all or any documentation and information of whatever nature upon which his opinion was based) to enable the Applicant to investigate. Not only would the Applicant investigate, but also to take appropriate corrective steps including but not limited to disciplinary measures and properly respond. However, to date the First Respondent failed to comply and/or to respond thereto.

- 25.3.2 With regard to the allegation that the above conduct were admitted to by the union in its representations it made to the Department;

- (i) The Applicant finds it interesting to learn that the First Respondent appears to admit that it received the Applicant's representation hereto, despite alleging on its notice of cancellation dated 23 November 2007 that the Applicant failed to submit its representation as requested.

- (ii) It is further submitted that on its representation it made, the First Respondent was informed that the benefit of the union are enjoyed and/or entitled to Applicants members in good standing only. That none of its members were charged consultation fee and or made to pay as alleged.

The First Respondent was further informed that as the Act allows registered trade unions and employers organizations to act on behalf of its members who affiliated after the dispute arose, the Applicant's resolution hereto was that if a member who affiliated after a dispute arose request the Applicant to act on his/her behalf for the said dispute that took place before the membership, the said member would be requested to meet disbursement costs thereto as per decision of the executive in that the said member cannot be expected to enjoy benefits of which he/she was not part thereof.

25.3.3 With regard to the First Respondent's new allegation that clause 22 of the Applicant constitution places an obligation on the union to submit to the Department its audited financial statements, its membership figures per sector and the unions name and addresses of its office-bearers annually. That for 2005 and 2006 the union have still not submitted its financial statements in terms of the above constitutional obligations and is therefore operating unconstitutional.

The Applicant find it strange for the First Respondent to include new allegation (unrelated issues not part of notice dated 30 September 2005). However, it is should be noted that on 30 September 2005 'the date of the said notice that led to cancellation, audited financial report for 2005/2006 and 2006/2007 were not yet due. Further, the First Respondent should be aware that when a trade union fails to comply in terms of Section 98; 99 and/or 100 of the LRA, a notice in terms of Section 106(2A)(b) should follow. It is submitted that to date, the Applicant did not receive any notice hereto from the First Respondent.

25.3.4 With regard to further new allegation relating to Applicant's previous

financial year report. The Honourable Court is referred to paragraph 25.7 below that incorporates these allegation.

The trade union is not independent as it is under the direct control of labour consultant

25.4 The First Respondent was wrong in his opinion that the union is not independent as it is under the direct control of Mr. Khoza who is operating as consultant and abusing his position in the union. He claims to be employed by the union as the General Secretary since inception, and on other hand he is using the union certificate to represent his clients at the CCMA for his own personal gain. The fact that he represents non-members and charge them 50% settlement amount is clearly the activities of the consultant or attorneys. Those activities are in contrast with the provisions of the constitution of the union as adopted and it also circumvents the provision of the Act.

The allegation is disputed and denied. It is submitted that the organization is under the control of its National Office Bearers in terms of its constitution. That Mr. Khoza is employed as the General Secretary of the Applicant in terms of the said constitution, registered as such like further Applicant's employees including but not limited with the UIF and carries function in terms of the said constitution. The First Respondent is further called upon to furnish and provide full particulars of all or any documentation and information of whatever nature upon which the alleged opinion is based to enable the Applicant and/or Mr. Khoza to take appropriate steps.

NB. The Applicant's constitution 'is annexed hereto as annexure "A11"

The trade union is not a genuine trade union and is being used for personal gain of certain individuals

25.5 The First Respondent was wrong in his opinion that that the Secretary of the union is using the union to enrich himself and insisted that an amount of R20,000 be paid into his private ABSA account as part of the

arbitration award made by the CCMA an indication that Mr. Khoza is using the union to his own benefit.

The allegation is denied and disputed by the Secretary hereto. The First Respondent is further called upon to furnish and provide full particulars of all or any documentation and information of whatever nature upon which his opinion was based to enable the Applicant and/or Mr. Khoza to take appropriate steps hereto.

- 25.6 The First Respondent was wrong in his opinion that the Applicant is not a genuine trade union and is being used for personal gain of certain individuals.

It is submitted that at the time the First Respondent is aware that not only did the Applicant had substantial membership at the following workplaces: Superand Superspar; Queenswood Superspar; Cherrylane Kwik Spar; Select Bakeries; Med Clinic; Shoprite Checkers; Nedbank; Standard Bank; Kwela fleet; Sky Golf in One; Mr. Clean amongst others.

Not only was the First Respondent aware that the Applicant had substantial membership at the above workplaces, the First Respondent was further aware that there were pending collective agreements on organizational rights disputes between the Applicant and below companies before the CCMA and the Labour Court involving about 300 members.

RAWU v SHOPRITE CHECKERS	GA39474/02
RAWU v MENLO SUPERSPAR	GA123537
RAWU v DOORNPOORTSPAR	GAPT8490-05
RAWU v SHOPRITE CHECKERS	GA39474/02

RAWU v GLADIATOURS SECURITY	(GA4501-03)
RAWU v MORELETA SUPERSPAR	

RAWU v BACHELLORS ROAD TOURS

Labour Court

RAWU v MENLO SUPERSPAR JR492/03

RAWU v BACHELLORS ROAD TOURS JR822/03

RAWU v GLADIATOURS SECURITY

See annexed "A9"

The above submission is proof enough that the Applicant is a genuine trade union not for personal gain as alleged by at the interest of its members as it would not had taken the organizational matters thus far and/or engage and/or negotiate benefits and annual salary increment amongst others

The trade union failed to comply with legal requirements in terms of section 100(a) of the Act.

25.7 The First Respondent was wrong in his opinion that the Applicant failed to comply in terms of section 100(a) of the Act. That even after submitting written representation, the Applicant failed to comply in terms of section 98, 99, and 100 of the Act. That the Applicant failed to submit financial statements for the year 2005 and 2006 despite numerous reminder letter mailed to the union. That as far as the previous financial years (2000 to 2004) are concerned the auditors reports also did not comply with section 98(2)(b) of the Act, in that it did not express an opinion as to whether the union have complied with those provisions of the constitution relating to financial matters. Judging from the qualification by the auditor it appears that the union will also not be able to comply with the act.

The Applicant find it further strange for the First Respondent's sudden unjustified new allegation hereto. The fact remains the First Respondent was provided with audited financial report for the said 2000 to 2004 period. Since then to date, the Applicant was never called upon to provide any explanation hereto and/or receive any correspondence from the First Respondent hereto.

It is clear that the First Respondent sudden allegations suggest that the First Respondent is constructing, smear campaigning and/ or witch-hunt to tarnish the Applicant's reputation for unknown reasons.

A copy of copy of 2004/2005 audited report which is self explanatory is attached hereto for perusal.

See annexed "A10"

- 25.8 The First Respondent was wrong in his opinion that despite numerous reminder letter mailed to the union hereto (compliance), the Applicant failed to comply.

It is submitted that not a single notice or correspondence received from the First Respondent which the Applicant failed to respond. Therefore, the First Respondent is called upon to provide proof hereof.

- 25.9 The Applicant further submit that it was surprised at one of current arbitration hearing to learn from Shoprite regional manager one Mr Oosthuisen that Shoprite is the one which lodged a complaint to the First Respondent. The said confession was not strange for Shoprite to had alleged hereto in that about 90% of disputes between Shoprite and the Applicant both at the CCMA and Labour Court including Labour Appeal Court were in favour of the Applicant. The latest was the Labour Appeal Court judgment handed down on 21 December 2007 between RAWU obo Maake under case number JA 03/05.

In conclusion

26. For the above submissions, it is submitted that the First Respondent's opinion that the trade union has ceased to function in terms its constitution, it is no longer a genuine trade union and its registration is cancelled is wrong, baseless, irrational and unjustifiable."

78. The abovementioned grounds of appeal, on closer scrutiny and proper analysis

mirrors the objections and/or representations which the Applicant contends that it had advanced to the First Respondent of which representations were not considered by the First Respondent even after same coming to its attention during the urgent applications and/or even subsequently.

79. The principle of *audi alteram partem* apparent from a proper construction of section 106(2B) viewed within the context of administrative action, dictates that a union should be furnished with comprehensive information or allegations upon which the First Respondent intends exercising his discretion to cancel the registration as envisaged in 106(2A), such information should not be furnished piece meal in vague and broad terms after the decision to cancel has already been taken.

80. In the case of *Chief Constable of the North Wales Police v Evans*,¹⁵ the court held that:

‘Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.’

81. Even though this decision dealt with judicial review, however, it is indeed informative pertaining to a fair procedure or process to be followed prior to a decision, which may adversely affect another person could be taken into account.

82. This judgment does not in any way suggest that there are no genuine reasons for the First Respondent to belief or to form an opinion that the Applicant has ceased to operate as a genuine union as contemplated in the provisions of the LRA. Such reason might indeed exist but the First Respondent has failed to exercise his discretion properly and as envisaged or expected from him in terms of section 106. In other words the First Respondent was wrong to conclude that

¹⁵ [1982] 3 All ER 141 (HL) at 154d.

the Applicant has ceased to operate as a genuine union and thereby cancelling its registration without having considered the Applicant's representations and applying his mind to same.

83. All the facts, allegations or concerns ought to be made known and disclosed to the Applicant in order for the Applicant to be able to meaningfully react on them through representations which the Applicant may choose to make, if it deems necessary to do so. This approach will indeed give meaning and effect to the provisions of section 106(2B). Failure to do so will indeed make section 106(2B) to have no meaning as the First Respondent may proceed to exercise his discretion in terms of section 106(2A) without having observed or adhered to requirements in section 106(2B).
84. The proper approach to section 106 requires that all facts negative or positive must be disclosed to a union not on vague basis but with the necessary detailed information and where necessary with the supporting documents. The union will then react to such allegations by means of representation if it chooses to do so. After having received this representation, the First Respondent must consider same and apply his mind to those representations. Should the union fail to make this representation within the allowed time period afforded to it, only then can the First Respondent exercise his discretion in terms of section 106(2A). It may be that even after the First Respondent having considered and applied his mind to the representation made by the union, he is still of the opinion that the union has ceased to operate as a genuine union for the reasons already advanced by him. He can then still be entitled to invoke the provisions of section 106(2A) and formulate his conclusions as such.¹⁶
85. In addition to what I had found above and based on all the documents and information placed before me, including the grounds of appeal and the representations made by the Applicant, I summarise my findings below and come to the conclusions that the First Respondent's decision to deregister the

¹⁶ *National Entitled Workers Union v Ministry of Labour and Others* (2011) 32 ILJ 1372 (LC); *National Entitled Workers Union v Ministry of Labour and Others* (LAC) (JA 84/2010) as per Davis JA.

Applicant was wrong on the following basis:-

86. The First Respondent failed to take into account and to properly consider the representations advanced on behalf of the Applicant. These representations ought to have been taken into account prior to the First Respondent exercising his discretion in terms of section 106(2A).
87. It was unreasonable for the First Respondent to delay the exercise of his discretion for a period of two years. Furthermore, without verifying the facts and/or the conduct initially complained about pertaining to the operations of the Applicant, the First Respondent proceeded to exercise his discretion in terms of section 106(2A) without explaining its delay and providing a justification as to why it was relying on a notice which was issued two years ago. Within the aforesaid two years delay, the First Respondent created an impression that it was satisfied in the manner in which the Applicant was conducting its affairs, as the Applicant was led to operate within that two year period without any interference and/or intervention by the First Respondent. Such a conduct, is indeed, unreasonable and cannot be justified within the context of a fair and just administrative action and/or the exercise of the First Respondent's powers in terms of section 106.
88. The grounds upon which this appeal is premised, as advanced by the Applicant, are persuasive as the First Respondent, *inter alia*:-
 89. premised its justification to deregister the Applicant on the grounds which were infact not properly ventilated for the Applicant to deal with;
 90. were added subsequent to the decision already been taken to deregister the Applicant;
 91. not existing at the time when the decision to deregister was made (i.e for instance the expectation to submit the audited statements which were

infact not due at the time); and

92. were vaguely and broadly couched without the Applicant being furnished with the supporting documents to deal with same.
93. The First Respondent failed to act consistent with what is expected from him in exercising his discretion and/or powers in terms of section 106, in that, despite the representations which came to the attention of the Applicant (whether before or after the urgent applications), the First Respondent was adamant to exercise his discretion in terms of section 106(2A) without giving any due weight to the aforesaid representations.
94. The letters from the attorneys Perrott Van Niekerk Woodhouse Matyolo and the affidavit from a member of the public complaining about the conduct of the Applicant and/or its President (Mr Khoza) were not furnished to the Applicant prior to the First Respondent exercising his discretion in terms of section 106(2A). This information ought to have been furnished to the Applicant in order for the Applicant to be able to make meaningful representations, if any, and/or if it chose to do so, in terms of the provisions of section 106(2B).
95. My findings above are strengthened by the decision of *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*,¹⁷ where it was held that:-

‘This is partly because process-related scrutiny can never blind itself to the substantive merits of the outcome. Indeed, under PAJA the merits to some extent always intrude, since the court must examine the connection between the decision and the reasons the decision-maker gives for it, and determine whether the connection is rational. That task can never be performed without taking some account of the substantive merits of the decision.’

96. In the premises, I make the following order:-

¹⁷ 2007 (1) SA 576 (SCA) at para 31.

97. The section 111 appeal is upheld.
98. The decision made by the First Respondent pursuant to section 106 in cancelling the registration of the Applicant is set aside.
99. The First Respondent is ordered to pay the costs of the section 111 appeal.

MOKOENA AJ

Acting Judge of the Labour Court

Appearances

For the Applicant: Mr Khoza

Instructed by: Retail and Allied Workers Union

For the Respondents: Adv W.R. Mokhari SC

Instructed by: State Attorney, Johannesburg

