



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J 1947/10

In the matter between:

**NATIONAL EMPLOYERS' UNITED
OF SOUTH AFRICA ('NEUSA')**

Applicant

and

**REGISTRAR OF LABOUR
RELATIONS**

Respondent

Heard: 1 June 2012

Delivered: 27 June 2012

JUDGMENT

BHOOLA J

Introduction

- 1] This is an appeal in terms of section 111(3) of the Labour Relations Act, 66 of 1995 ("the Act"), in which the applicant seeks the following relief :

- 1.1 *Declaring as unlawful and invalid the respondent's refusal on or about 26 May 2010 of the registration of the appellant in terms of section 96 of the Act ;*
- 1.2 *Ordering the respondent to register the appellant in the register as an employer's organisation in terms of section 96 of the Act;*
- 1.3 *Ordering the respondent to issue a certificate of registration in the appellant's name.*

Background facts

- 2] The applicant applied for registration as an employers' organisation on 1 July 2009 ("the first application"), attaching a copy of its constitution. In a letter dated 8 July 2009 the respondent advised that the application and accompanying documents did not meet the requirements for registration and that the applicant was being afforded an opportunity in terms of section 96(4) of the Act to prove that it was a genuine employers' organisation and complied with the Act. The letter requested that the following information should be submitted within 30 days :

1. The minutes of the meeting where the employers' organisation was established, the register with signatures and contact details of the members who attended the inaugural meeting. In this regard also provide me with a list of the officials and office bearers of the employers' organisation, their contact details, physical and business addresses and ID numbers.

2. A membership list indicating paid-up membership for the last 3 months and the sectors in which they operate.

3. A copy of the lease contract of the employers' organisation offices.

4. Banking account details of the employers' organisation (bank statements for 3 months).

Failure to submit the relevant information could result in the application being refused.

On receipt of the information and if the additional information shows that the applicant is genuine and complied with the registration requirements, an appointment will be made with you to verify the correctness of the information and to determine whether the organisation is operating as a genuine employers' organisation.

- 3] The Applicant again applied for registration as an employer's organisation on 14 December 2009 ("the second application"). In a letter dated 17 December 2009 the respondent requested the following further information from the applicant:

In order to enable this office to determine whether the application complies with the Act and [the applicant] is a genuine organisation, the following information should be submitted for consideration within 30 days of the date of this letter.

The minutes of the meeting where the employers' organisation was established, the register with signatures and contact details of the members who attended the inaugural meeting. In this regard, also provide me with a list of the officials and office bearers of the employers' organisation, their contact details, physical addresses and ID numbers.

A membership list indicating the paid-up membership for the last 3 months and the sectors in which they operate.

A copy of the lease contract of the employers' organisation offices.

Banking account details of the employers' organisation (bank statements for 3 months)

Failure to submit the relevant information could result in the application being refused.

On receipt of the information and if the additional information shows that the applicant is genuine and has complied with the registration requirements, an appointment will be made with you to verify the correctness of the information in order to determine whether the organisation is operating as a genuine employers' organisation.

4] In response to the respondent's request for additional information the applicant provided the following information under cover of its letter dated on 7 January 2010:

- 4.1 Minutes of the meeting at which the applicant was founded. These are the minutes of an AGM held on 13 December 2009 which reflect that the meeting was opened by Matlala who indicated the purpose of the gathering and "also mentioned that the new Employer's organization has to be formed". The minutes reflect that the interim constitution was presented and amended and election of office bearers was conducted. Messrs Matlala and Grobler were elected as chairperson and general secretary of the applicant respectively. The chairperson's address to the meeting reflects that it is "looking forward to defend all members in terms of our organization constitution and the Labour Laws of our country" and that they sought "fair treatment for Employers at all forums and to defend this to the best of our ability".
- 4.2 A list of office bearers and officials which includes Messrs Matlala (Chairperson), Grobler (General Secretary) and Jardim (Treasurer) as elected office bearers (in the same positions as reflected in the first application).
- 4.3 An attendance register of the meeting on 13 December 2009 (from which some of the addresses are illegible or incomplete).
- 4.4 A list of members (which does not contain addresses and is not identical to the aforementioned attendance register).
- 4.5 A statement of account for the period October, November and December 2009 from which it appears that the applicant received membership fees. The statement of account was submitted in response to the respondent's request that bank statements for three months should be submitted.
- 4.6 Copies of receipts of payments from which it appears that the applicant received membership fees.

- 5] The chairperson of the applicant, Matlala, alleges that on 17 August 2010 he was provided with a copy of a letter dated 26 May 2010 which informed the applicant that its application for registration had been turned down for the following reasons:

The organisation is not a genuine employers' organisation as envisaged in the Act; and

The individual established the employers' organisation to circumvent the provisions of the Act;

Consequently your application is refused from 26-5-10.

- 6] The applicant was not satisfied with the decision and Matlala addressed a letter to the respondent on 18 August 2010 to this effect and proposed a meeting between the parties.. The respondent replied on the same day indicating that it could not reverse the decision taken and the applicant had recourse to section 111 of the Act if it was dissatisfied with the decision.
- 7] Thereafter the respondent complied with a request for reasons for its decision on 14 September 2010. The essence of the reasons were that the organisation is not a genuine employers' organisation. In this regard the respondent explained that it is required to base its decision on the registration requirements in the Act as well as the guidelines issued by the Minister in 2002 to determine whether an applicant is a genuine employers' organisation. Following reiteration of the definition of an employers' organisation the respondent states as follows :

"The applicant employers' organisation was established by labour consultants Mr Ben Matlala (Chairperson) who is the owner of Mpotoka Dithamaga (MM labour) and Mr Kobus Grobler (General Secretary) the owner EEE Professional Services established the applicant employers' organisation. Mpotoka Dithamaga (MM labour) labour consultancy specialises in human resource services and labour relations. Mr Ben Matlala's (Chairperson) idea came as a result of him helping his clients with hosts of issues especially human resources and labour related matters. Mr Matlala through his labour consultancy has been assisting his clients with their labour dispute cases. Mr Kobus Grobler's (General Secretary) labour

consultancy (EEE Professional Services) specialises in training.

From the above it is clear that the main purpose of the application is for the individuals to use the organisation for their own financial gain and to further their businesses. The organisation is clearly going to be used by individuals including its principles for the financial benefit and for the purpose of gaining representations under the auspices of a registered employers' organisation.

The organisation is a profit making enterprise and not a genuine employers' organisation as envisaged by the Act. The individuals that established the organisation did it for personal gain. It is to be used as a vehicle to represent clients at dispute resolution institutions such as the CCMA. The organisation will be used to give it an unlawful advantage and unfair advantage in the labour relations environment which is not in the public interest.

An employers' organisation should be used in the interest of its members to pursue its objectives collectively. It should not be used to enrich individuals and be exploited to give individuals the right of appearance to labour forums such as the CCMA. See National Employers' Forum v Minister of Labour (2003). The reason behind the establishment of the applicant organisation is to enable Attorneys and labour consultants to get access to the CCMA. If the organisation is registered, it will only benefit Attorneys and labour consultants, which according to the judge is a sham.

An application of this kind, namely one designed for and motivated by a desire to circumvent some of the provisions of the Act, is ultimately driven by the self interests of the attorneys and labour consultants for personal gain. Under these circumstances such an application would not be genuine, but a stratagem which cannot be countenanced because to do so would mean that the Registrar would act contrary to the objectives of the Act. Such an applicant would not be a genuine organisation but in truth a business of consultants striving for personal gain.

It is this Office's contention that the status of this employers' organisation cannot be remedied to be deemed an employers' organisation as envisaged by the Act. I am therefore of the view that the application was, inter alia, lodged to circumvent the provisions of the Act and the application for registration was, as a result, refused."

Merits of the appeal

- 8] The applicant relies on the following grounds of appeal :
- 8.1 the respondent was mistaken in its interpretation and application of the guidelines in terms of section 95 of the Act ;.
 - 8.2 the respondent has failed to take important relevant considerations into account and was influenced by irrelevant considerations; and.
 - 8.3 the respondent's finding that the individual established an employers' organisation to circumvent the provisions of the Act amounts to irrelevant considerations and is clearly wrong.
- 9] Mr Mosebo, appearing for the applicant, submitted that the documentary evidence reveals that it was formed by a group of employers at a general meeting exercising their right to freedom of association; only two employers tendered their apologies for non-attendance, a draft interim constitution was presented and amended, and the executive and office bearers were elected. The fact that Matlala facilitated the formation and establishment of the organisation does not render it not a genuine employers' organisation. The applicant had therefore complied with all the requirements for registration and the respondent was obliged to register it. This is the import of section 96(3)(b). Given the nature of an appeal he submitted, this court was simply required to determine whether the respondent was right or wrong in refusing to register the applicant. In this regard the applicant relies on *Crouse NO & Another v WUSA* ¹ as well as the interpretation of this court's duties under section 111 (3) in *Motor Industry Staff Association v Registrar of Labour Relations & Another*. ²
- [13] Ms Baloyi, for the respondent, submitted that the *Motor Industry Staff Association* decision relied upon by the applicant was overturned by the Labour Appeal Court in *Staff Association for the Motor & Related Industries v Motor Industry Staff Association & Another*.³ The Labour Appeal Court made it clear that an appeal of this nature is an appeal in the

1 (2008) 10 BLLR 919 (LAC)

2 1998 (19) ILJ 1520 (LC)

3 1999 (20) ILJ 2552 (LAC)

wide sense and is therefore not limited to a determination of whether the respondent erred in making its decision. Instead, the LAC held that the applicant must show that it has met the requirements for registration. In the words of Ngcobo AJP (as he then was):⁴

The appeal contemplated in section 111(3) is an appeal in the wide sense of a complete rehearing and adjudication on the merits with or without additional evidence or information.”

- 10] Ms Baloyi therefore submitted that on all the evidence before this court the applicant has patently failed to show that it has passed the definition hurdle to show that it is a genuine employers’ organisation, let alone that it has met the requirements for registration. Section 213 of the Act defines an employers’ organisation as “any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions”. In this regard, she submitted, the guidelines issued in terms of section 95(8) of the Act in item 26 require the respondent to consider *inter alia* the process of formation of the organisation, including the number and/or size of the founding members who attended the inaugural meeting to establish the organisation; the means by which the constitution was drafted and adopted; the election of executive committee or council members and the election of office-bearers. The crucial issue that the guidelines require, she submitted, is consideration of whether the formation “involved employers associating with one another to establish an employers’ organisation” as defined in section 213. The respondent clearly applied his mind to these requirements based on the detailed investigation reports provided to him, and has given full reasons for his conclusion that the requirements for a genuine employers’ organisation were not met.
- 11] Ms Baloyi submitted that it was significant that the applicant failed to disclose to this court, when it filed the second application for registration (dated 13 December 2009 i.e. the day after the so-called inaugural meeting) that an application for registration had been lodged on 9

⁴ At para [26].

February 2009. Therefore, at the time the applicant alleges an inaugural meeting was held to form an association, it had already been formed months previously. This renders it improbable that the members met for the purposes of forming the organisation on 12 December 2009. The applicant has not disclosed this fact to the court either in their pleadings or heads of argument, despite the reference to the first application in the respondent's bundle and heads. It is apparent from the first application that the constitution was signed on 9 February 2009 and it is therefore improbable and incorrect that the organisation was formed on 13 December 2009 as is alleged. On this ground alone, Ms Baloyi submitted, the appeal falls to be dismissed.

- [14] Ms Baloyi however relied on further facts which establish the improbability of the organisation being formed in December 2009 – *inter alia* that correspondence with the respondent in regard to the office bearers and officials reflects the treasurer as Manny Jardim. However his name does not appear on the list of members who attended the inaugural meeting and at which he would have been elected treasurer, nor do the minutes of the AGM (which reflects that it was held on 13 December 2009) reflect his attendance or his election. This would imply either that it is incorrect that he was elected treasurer or that the supporting documents provided to the respondent were incorrect. The AGM minutes moreover do not state that the constitution was adopted, merely that the interim constitution was amended. In fact minutes of the inaugural meeting are not provided and it is apparent from the AGM minutes that this is not the first meeting of a new organisation. Another relevant fact is that the lease agreement provided to the respondent reflects that the lease (the signatory to which is Ben Matlala on behalf of the applicant), was entered into on 10 September 2009, three months prior to the date when the applicant alleges the organisation was formed. Based on these factors, the applicant's contention that it was formed in December 2009 is not correct and it cannot therefore be considered to be a genuine employers' organisation. Moreover, proper financial statements are not forthcoming nor are banking statements as requested by the respondent. Ms Baloyi submitted therefore that even if the applicant had submitted all the information

required for registration it would still have to overcome the definition hurdle in terms of section 213 and has not succeeded in doing so.

[15] In reply Mr Mosebo conceded that insofar as information is still outstanding the applicant should be given a further opportunity to comply. He was asked by the court whether the relief sought was being amended and he indicated that he was proposing an alternative but persisted with the relief sought in the notice of motion. He submitted that the respondent was misdirected in that there was firstly no requirement that the AGM minutes should reflect the names of all the office bearers elected and the fact that the minutes do not reflect this does not imply that they were not elected. Secondly, in regard to the constitution he submitted that the same constitution was provided in February and has not been amended, and the fact that it may have been signed in February does not mean it was adopted at that stage. He does not deal with the fact that the minutes do not appear to reflect an inaugural meeting or that the constitution was in fact adopted. Lastly he submitted that the first application has no bearing on the appeal and should be ignored. No further evidence or documentation was provided by the applicant in support of its assertions, and the concession implies that this application may itself be premature and therefore and vexatious. Moreover the failure to disclose the first application is in my mind not insignificant and would imply a measure of duplicity on the part of the applicant, which would cast doubt on the nature of the enterprise.

[16] I am in agreement with the submissions made by Ms Baloyi that on the facts and evidence before this court, and in particular given the concession in reply, the applicant does not meet the definition of an employers' organisation nor can it be said to have met the requirements for registration even if it were to pass this hurdle. No substantive legal or factual submissions were made in support of any of the grounds of appeal, and it is evident from the process as well as the reasons provided by the respondent that a considered decision was made based on the facts and the respondent cannot be said to have erred, acted capriciously or misdirected himself in so doing. In the premises, the decision of the

respondent is upheld but no order for costs is made since the respondent does not seek costs.

Order

12] In the premises, I make the following order :

The application is dismissed. No order as to costs.

Bhoola J

Judge of the Labour Court of South Africa

APPLICANT: Mr P Mosebo, Maserumule Inc

RESPONDENT: Ms S Baloyi (with her Ms L Madima)

Instructed by the State Attorney, Johannesburg