



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR936-10

In the matter between:

MAGEU NUMBER ONE (PTY) LTD

Applicant

and

UPUSA OBO MEMBERS

1st Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

2nd Respondent

COMMISSIONER L M S MELLO N.O

3rd Respondent

Date heard: 31 January 2012

Date of reasons: 27 December 2012

Summary: Cost order- costs against a non-party to the proceedings. Union official continuing to represent the employees even after deregistration, conduct improper and visited costs order against the individual.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] On 31 January 2012, this court made an order reviewing and setting aside the arbitration award which had been made under case number GATW 130 848-09. The court, however, reserve judgement in relation to the costs which had been prayed for against, Mr Luthuli in his personal capacity.
- [2] It has regrettably taken a very long time to make this judgment which was due to the fact that after the order was made the file was not diarised for judgment, but erroneously filed away.
- [3] The review application had been filed on behalf of the employees by the UPUSA whose general secretary at the time was Mr Luthuli. UPUSA was deregistered as a trade union during 02 October 2009.
- [4] The applicant cancelled the organisational rights of UPUSA after its deregistration by the Registrar of the Labour Relations. UPUSA referred a dispute to the CCMA to challenge the decision of the applicant, cancelling its organisational rights. The Commissioner ruled that pending the outcome the appeal before the Labour Court in terms of section 111 of the Labour Relations Act (the LRA), UPUSA retained its organisational rights with the applicant. In other words the Commissioner found that the appeal which UPUSA had filed with the Labour Court stayed the implementation of the decision of the Registrar pending the outcome of that appeal.

Grounds for review

- [5] The applicant challenged the decision of the Commissioner on the grounds that the Commissioner committed a gross irregularity in that he made a material finding which a reasonable decision maker could not have reached. The applicant further contended that the Commissioner made a material mistake of law in finding that the lodging of an appeal suspended the effect of the deregistration of UPUSA.

Evaluation

- [6] The law regarding the status of the decision of the Registrar concerning cancellation of the registration of a trade union was considered by this court in

*CCMA v Registrar of Labour Relations and others*¹. In that case the court found that the decision of the Registrar concerning the cancellation of registration of a trade union is not suspended by an appeal to the Labour Court in terms of section 111 of the LRA².

- [7] It is trite law that a material error in law made by the Commissioner is a ground for reviewing the arbitration award.³ In light of the decision in *CCMA v Registrar*, the decision of the Commissioner that the appeal which UPUSA had filed with the Labour Court, suspended the effect of the decision of the Registrar from coming into effect pending the outcome of the appeal, is patently wrong in law and accordingly makes the decision reviewable.
- [8] It was on the basis of the above reasons that the Commissioner's arbitration award was reviewed.

The issue of costs against Mr Luthuli

- [9] The applicant complained that even after the cancellation of the registration of UPUSA, Mr Luthuli continued to act as a representative of the union in the review application. In this regard the applicant list the following incidence where Mr Luthuli acted as a representative of UPUSA whilst knowing that the union had been deregistered:
- a. He appeared and argue this matter on 25th of March 2010.
 - b. On 19 December he filed a notice with the Labour Court withdrawing the review application in this matter.

¹(2010) 11 BLLR 1151 (LC).

²Section 111 of the LRA reads: ***Appeals from registrar's decision***

- (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.*

³See Maneche & Others (2007) JOL 20281.

[10] It has been accepted that the Labour Court has in terms of section 162 of the LRA,⁴ the same powers, as those of the High Court under common law⁵ of being able to make costs orders against non-parties who have supported the litigation or have some other connection to the matter. The Labour Court derives the powers to make costs orders against non-parties in terms of section 162 of the LRA which reads as follows:

“(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account –

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties –

(i) in proceeding with or defending the matter before court;

(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.”

[11] The parties envisaged in section 162(3) of the LRA would in general include those parties envisaged in section 161 of the LRA which reads as follows:

“In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by a legal practitioner, a co-employee or by a member, an office-bearer or official of that party’s trade union or employers’ organisation and, if the party is a juristic person, by a director or an employee.”

⁴Skhosana & others v Sasol Synthetic Fuels [2000] 1 BLLR 101 (LC), Maluleke & others v Johnson Tiles (Pty) Ltd (2008) 11 BLLR 1065 (LC) and *Moloi & another v Euijen & another* (1999) 20 ILJ 2829 (LAC).

⁵*Francarmen Delicatessen (Pty) Ltd v Gulmini & another* 1982 (2) SA 485 (W).

- [12] It follows from the above that Mr Luthuli appeared and argued the matter for and on behalf of UPUSA on 25 March 2010, knowing that UPUSA was deregistered and therefore what he did was improper. The same applies to the notice of withdrawal which Mr Luthuli filed with the court on 19 December 2011, wherein he indicated that the matter was withdrawn in terms of Rule 11 of the Labour court rules, because UPUSA was deregistered.
- [13] The conduct of Mr Luthuli must be understood in the context where this court as indicated earlier had ruled in, *CCMA v Registrar of Labour Relations and others*, that the appeal launched by UPUSA against its deregistration did not suspend the decision of Registrar cancelling its registration.
- [14] Although he did not file any answering papers in response to the application for costs against him, Mr Luthuli, addressed the letter dated 27 January 2012 to the applicant's attorney of record and stated the following:

"Your letter dated 26/01/2012 directed to Mr Luthuli refers.

1. I put on record that you have no rights to challenge Mr Luthuli as a result that he was employed by the union UPUSA before.
2. The union is no longer exists due to deregistration.
3. I warn you, in case you demand cost to Mr Luthuli in person that will be denied and challenged as Mr Luthuli no longer employed by the deregistered trade union UPUSA.
4. . . .
5. . . .
6. . . .
7. I warn you that any action you might take against Mr Luthuli in person will be defended and denied and seek a costs against him personal and your company for demanding course on the wrong and innocent person.
8. Noted that Mr Luthuli has rights to sue you if you persist with your thread and denied action.

Therefore Mr Luthuli's rights remains strictly reserved."

- [15] At the hearing of this matter Mr Luthuli argued that he was not liable for costs because he dealt with the matter in his capacity as the representative of UPUSA.

[16] I have already indicated that the conduct of Mr Luthuli in the manner he continued to be involved in this matter after the deregistration of the trade union was improper. I therefore find that Mr Luthuli, should in terms of the provisions of section 162 (3) of the LRA be held personally liable for the costs.

Order

[17] In the circumstances, Mr Luthuli is ordered to pay the costs of these proceedings, jointly severally with UPUSA, on the attorney and client scale, the one paying the other to be absolved.

Molahlehi J

Judge of the labour Court Of South Africa

APPEARANCES:

FOR THE APPLICANT: Dewey De Souza Attorneys

FOR THE RESPONDENT: Mr Elvis Luthuli of UPUSA (The union)