THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

JUDGMENT

Reportable

CASE NO: J 1973/19

In the matter between:

GERHARD VOSLOO *N.O*

(Administrator of the South African Medical Association Trade Union) **First Applicant**

THE SOUTH AFRICAN MEDICAL ASSOCIATION TRADE UNION (under administration) **Second Applicant**

and

THE SOUTH AFRICAN MEDICAL ASSOCIATION NPC **First Respondent**

REGISTRAR OF LABOUR RELATIONS **Second Respondent**

Heard: 13 May 2020 (via Zoom)

Judgment delivered: The judgment was handed down electronically by circulation to the parties' legal representatives and the registrar by email on 18 May 2020 at 12h00.

(by email)

JUDGMENT

VAN NIEKERK J

Introduction

[1] On 10 October 2019, this court granted an order placing the second applicant (the union) under administration in terms of s 103A (1)(a) of the Labour Relations Act (LRA). On 27 February 2020, the court granted an order appointing the first applicant as the administrator. That order incorporates the administrator's terms of reference, which include the authority to take immediate control of the affairs of the union with a view to exercising his powers to conserve the affairs and business of the union.

[2] In these proceedings, the administrator seeks an order directing the first respondent (SAMA) to provide him with all necessary information and assistance to enable him to perform his duties as administrator and other ancillary relief. In essence, he seeks an order to enforce his statutory rights and obligation to take charge of the union's affairs.

Urgency

[3] The present proceedings were brought on an urgent basis. The applicant submits that the application is urgent because SAMA is actively engaging with its members to persuade them to cancel their membership of the union, that the bargaining council of which the union is a member has put it on terms to submit audited membership figures or face termination of its membership of the PSCBC, and because union members require their interest to be represented and advanced during the Covid-19 pandemic. It is not clear to me from the papers that the union has the necessary organisational infrastructure to achieve the

latter. However, the prospect of forfeiting its membership of the bargaining council (membership figures were to have been submitted by no later than 30 April 2020) and the consequences of that loss, is a relevant consideration. What weighs particularly heavily with me is the fact that should the union be required to obtain a hearing in the normal course, the purpose of the order placing it in administration would be frustrated, if not undermined. For these reasons, I am satisfied that the applicants have made out a case for urgency.

<u>The Registrar of Labour Relations</u>

[4] The Registrar of Labour Relations does not oppose the application, and has delivered an explanatory affidavit both to explain the circumstances surrounding the registration of the union as an independent trade union, and the purpose of the deductions of the union's membership fees through the PERSAL stop order facility. The court is indebted to the registrar for the explanatory affidavit.

<u>Material facts</u>

[5] SAMA is a non-profit company registered in terms of the Companies Act. It was established in the late 1920s, to represent the interest of medical doctors and the medical profession generally. The first respondent is not a trade union. SAMA established the union in 1996, initially known as the Medical Association of South Africa Trade Union. The union was registered in terms of what was then the newly-enacted Labour Relations Act (LRA) so as 'to create a trade union to complement the existing services and benefits provided by SAMA NPC to its members'. SAMA's memorandum of incorporation includes as a main objective of the organisation seeking and obtaining organisational rights in terms of the LRA, planning recognition from employers as a collective bargaining representative, representing and assisting members in both the private and public sectors in disputes before the statutory bodies such as the CCMA, bargaining councils and this court and providing legal assistance to members in connection with these matters. SAMA provides these services through the vehicle of the union.

[6] Subsequent to its establishment, the union was granted various organisational rights. It is a member of the bargaining councils the Public Sector Coordinating Bargaining Council and the Public Health and Social Development Sectoral Bargaining Council. In this capacity, it enjoys organisational rights that extend to access, check-off, the election of trade union representatives, leave for trade union activities and the disclosure of information (see ss12 to 16 of the LRA). In respect of doctors employed in the public sector, the union has been afforded stop order facilities on the PERSAL payroll system. The National Treasury confirmed on 22 August 2002 in a letter addressed to SAMA that the stop order facilities had been allocated for the deduction of trade union subscriptions.

[7] In 2013, the union adopted a new constitution and changed its name to the present. That constitution provides, amongst other things, that all registered medical practitioners are eligible for membership, on application, and that the national congress or the national executive committee of the union has the power to determine the rate of the subscriptions payable by members of the union. In regard to financial administration, the constitution provides that the union's funds shall be generated by subscriptions, levies donations, interest or any other legitimate source. The constitution further provides for broad accountability in respect of finances at both national and a provincial level.

[8] As I have indicated, the second respondent, the Registrar of Labour Relations, submitted an explanatory affidavit in which he records that the union's constitution, adopted in March 2013, was registered on 18 April 2013. Further, he explains that the union was thus registered as an independent trade union in terms of s 97 (1) of the LRA, with a certificate of registration being sufficient proof that the union is a body corporate. The union was registered on the basis that it was a genuine trade union for the purposes of s 97 (7) of the LRA and that it was independent in the sense of being free from any direct or indirect control from an employers' organisation (or any entity for that matter), and any interference or influence from such entities. According to the registrar, the union has submitted

an audited list of members in compliance with s 100 of the LRA except for the years 2017 and 2019.

[9] Despite the existence of the union as a registered trade union and a body corporate, SAMA records that it has historically treated the union as one of its divisions, a vehicle through which SAMA could represent its salaried members in the forums established by the LRA, and part of what it describes as its ‘bouquet of services to members’. SAMA’s relationship with the union is described in the answering affidavit deposed to by Dr. Nhlapho, SAMA’s acting general manager. He records that the first meeting of the union’s national executive committee was held in October 2013, when a Dr. Phalane was elected general secretary. He was not an independent trade unionist; rather, he was employed by SAMA on a fixed term contract which expired in October 2016, after which she relinquished the office of general secretary. Phalane was not replaced and the union had no other office bearers. SAMA avers that at this point, the union was dysfunctional. None of the national office bearers elected in 2013 remained in office after 2016 and in September 2016, SAMA’s Board of Directors resolved to disestablish the union’s structure and replace it with what is referred to as the interim employed doctors’ committee. Thereafter, SAMA established a trade union task team to investigate the position and re-establish the union, and to ensure compliance with the requirements established by the LRA. For various reasons, the work of the task team was impeded and as recently as August 2019, the convener of the task team reported that no province had concluded an elective process and that no provincial executive committees had been established. In short, it would appear that the inability to re-establish national and provincial union structures led ultimately to the application during September 2019 when the union was placed under administration.

[10] Central to the present dispute is the relationship between SAMA and the union. SAMA avers that at no time did it intend to establish a trade union that is a separate juristic entity. The reason for registering the union was simply to enable SAMA to provide services to its members. Even after the registration of the

union, members of SAMA did not discretely pay subscription fees to belong to the union. The entire monthly membership subscription payment received from employed and non-salaried members of SAMA was budgeted and allocated to the provision of services to SAMA's members. In particular, SAMA avers that services were made available to every employed doctor who was a member of SAMA but denies that this had the effect that any member became a member of the trade union, or that a monthly trade union subscription fee was recovered from any member. Further, SAMA states that no separate list of union members was kept - membership of SAMA entitled an employed doctor to be represented by SAMA, and no separate trade union operated or indeed, existed.

[11] After the union was placed in administration, SAMA has continued to deduct what it refers to as monthly membership subscription payments. There were a number of meetings during March 2020 between SAMA and the administrator where SAMA avers that it was explained to him that there was no membership of the union and that the union had no structures. In SAMA's view, it remains the administrator's function to determine which of SAMA's members wish to be union members and it was for him to create the formal structures of the trade union and to see to the election of office bearers. After the meetings, the administrator insisted that the monthly membership subscription payments of all employed doctors be paid over to him, in his representative capacity. SAMA avers that the administrator 'could not or would not understand that the monthly membership subscription payments were the subscription fee paid to SAMA by its members, whether they are in private practice or whether they are employed'.

[12] The differences between the administrator and SAMA led ultimately to a communiqué issued by SAMA to its members in which it advised them of the problems experienced with the intended separation of SAMA and the union. It also informed employed doctors of the intention to migrate their debit orders from PERSAL to personal debit orders. It would appear that this communiqué had the consequence of the letter of demand, addressed by the administrator to SAMA. In that demand, certain information in respect of the membership of the union

was required. In the interim, the administrator approached the chief director: health sector bargaining, with a demand that the banking account for the payment of monthly membership subscriptions deducted from PERSAL be changed from SAMA to the union. On 20 April 2020, the chief director addressed a letter to the director: PERSAL with a request that the administrator's demand be executed. SAMA's attorneys addressed a letter to the director: PERSAL to demand that the instruction from the Department of Health be ignored. This demand was refused, and proceedings were instituted in the High Court to interdict and restrain the National Treasury from heeding to the Department of Health's instruction. That application has been set down for hearing in the High Court on 19 May 2020.

[13] In short, SAMA takes the view that the union was always an integral part of its own organisation, and established solely for the purpose of providing services to those of its members who are employed, as opposed to those members in practice for their own account. The union never existed as a discreet legal entity, certainly since 2016 it has had no separate structures, and no separate list of union members was ever maintained, and in reality, there are no union members. The deductions effected through the PERSAL system are in respect of SAMA membership fees; they are not trade union membership subscriptions. On this basis, the information sought by the administrator is simply not in the position of SAMA, and there is no basis for the interdictory and other relief sought by administrator.

[14] Counsel for SAMA submitted that the union had failed to make out a case for the relief sought in its founding affidavit and that in any event, on the basis of the principles that regulate the determination of factual disputes in motion proceedings, the court was obliged to find in favour of SAMA. (See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A), as restated in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).)

<u>Analysis</u>

[15] Whatever factual disputes may exist between the parties (primary among these is whether as a matter of fact there is a discrete union, whether the union has members and whether the subscriptions deducted from employed doctors are in respect of union subscriptions), SAMA cannot dispute the existence of the union as a legal entity, that the union is and remains a registered trade union in terms of s 96 of the LRA, that the union is a member of two bargaining councils and party to collective agreements concluded in those councils, and that as a registered trade union, it enjoys (and continues to enjoy) organisational rights, including the right to deduction of trade union subscriptions or levies in terms of s 13 of the LRA. It is also not in dispute that SAMA is not a trade union, let alone a trade union registered under the LRA, and that it enjoys none of the rights that accrue to registered trade unions under the Act.

[16] What is also not in dispute are the administrator's terms of reference, an integral part of the order issued by Lagrange J on 27 February 2020. The terms of reference are cast widely and extend to such powers as are necessary to give effect to the order including the authority to take immediate control of, in place of any union office bearers, the management of the affairs of the union together with all assets and interests relating to its business, the power to control the funds and finances of the union, to take control of cash, cash investment shares and other securities, to commission the preparation of the union's audited financial statements, to submit the audited financial statements to the registrar of labour relations and to investigate any financial irregularities relating to the assets or the affairs of the union and when necessary, to recommend that action be taken against any person guilty of misconduct or a crime. It should be recalled that in essence, the non-interdictory relief sought by the administrator seeks to enforce the rights and obligations accorded the administrator by virtue of the order, and to enable him to take charge of the affairs of the union and administer it in terms of his appointment.

[17] Section 103A of the LRA, which regulates the appointment of an administrator of a trade union that is placed under administration, has as its primary objective the regaining of a trade union's viability and the fulfilment of the purpose for which the union was established (see *Solidarity v Metal & Engineering Industries Bargaining Council & others* (2017) 38 *ILJ* 2109 (LC)). As Myburgh AJ noted in *Public Servants Association of South Africa and another v Minister of Labour and another* [2016] 1 BLLR 68 (LC):

> [7] in essence, the appointment of an administrator may be compared to the appointment of a business rescue practitioner in the case of an ailing company. It is a mechanism that can be resorted to before a trade union or employer's organisation is deregistered and wound up, and attempts to avoid this in the interests of all concerned.

[18] Certain legal consequences flow from the undisputed factual matrix, the terms of Lagrange J's order and the statutory provisions referred to above. Firstly, in terms of s 97 of the LRA, registration has the effect that the trade union concerned is a body corporate. Further, in terms of s 98, the union is required to comply with the standards of generally accepted accounting practice, principles and procedures, keep books and records of income expenditure, assets and liabilities and prepare financial statements. Further, the union is obliged in law to arrange for an annual audit of its books and records of account and its financial statements. A certified copy of the financial statements and the auditor's report are required to be made available to union members for inspection, and provided to the registrar within 30 days of receipt of the auditor's report. Section 99 requires a union to keep records of the list of its members, the attendance register, minutes and any other prescribed record of its meetings, and ballot papers or any documentary or electronic record of any ballot. The statutory reporting obligations established by s 100 are extensive. In addition to the submission of the auditor's report and a certified copy of the financial statements, a registered trade union is required to submit the list of members as at 31 December of the previous year, and the names and work addresses of office bearers.

[19] Secondly, s 13 regulates the exercise of the statutory right to check-off or the deduction of trade union subscriptions and levies from remuneration. This right may be enjoyed by any employee who is a member of a representative trade union and who authorises the employer in writing to deduct subscriptions or levies payable to the union from the employee's remuneration. An employee may revoke an authorisation given in terms of the section by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice. With each monthly remittance, the employer is obliged to give the representative trade union a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance, with details of the amounts deducted and remitted.

[20] It follows from these provisions, which served to guarantee the rights of freedom of association and confer statutory benefits on employees who are members of representative and registered trade unions, that it is not open to a professional body, such as SAMA, to ignore or circumvent all of these statutory requirements simply for reasons of internal administrative and managerial convenience. Some of the services offered by SAMA are reserved for trade unions as they are defined in s 213 of the LRA. A 'trade union' is defined to mean '*an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations*'. The LRA clearly did not intend trade unions to be used as vehicles for other ends, or to be a single bloom in what SAMA terms 'a bouquet of services' offered to its members. The trade union is a body that is statutorily recognised, which exists independently and with freedom from interference and with all of the statutory protections that flow from the fundamental rights established by s 23 (4) of the Constitution. Significantly, this right includes the rights of a trade union to determine its own administration, programs and activities, and to organise. These fundamental rights find legislative expression in the LRA.

[21] In law therefore, regardless of the fact that SAMA has historically regarded and managed the union as one of its business divisions and despite its denial that any trade union exists or that any single one of its members is a member of the union, the union exists, in law, as an entity independent of SAMA the fact that it may not have been managed in that fashion is neither here nor there. While there is clearly a significant overlap between SAMA's membership and that of the union, for statutory purposes, at least some of SAMA's members are members of the union.

[22] Of some significance for present purposes is the fact that the union obtained organisational rights by agreement with the state, with the result that several thousand doctors employed by the state currently pay trade union subscriptions via the PERSAL payroll system. It is not open to SAMA to contend, as it does in these proceedings, that subscriptions deducted from their remuneration of those of its members employed in the public sector are membership fees due to SAMA paid through the convenient vehicle of the statutory right to check-off. Section 13 makes clear that deductions in these circumstances made solely for the benefit of a trade union, after authorisation by employees who are trade union members. SAMA thus cannot deny the existence of information in its possession in which is recorded the names of those doctors employed in the public sector from whom trade union subscriptions have been deducted, and from whom they continue to be deducted.

[23] In summary: the fact that SAMA has managed the union as one of its business divisions does not detract from the fact that in law, the union is a discrete, independent statutory body, subject to regulation by the LRA and accountable to its members and the registrar. To the extent that SAMA denies that the subscriptions deducted from the remuneration of those of its members who are employed by the state accrue to the union, the statutory basis on which the deductions are made and remitted is such that only the union is the proper beneficiary of those funds. Those of SAMA's members who have been and remain party to authorisations to effect deductions from the PERSAL payroll

system are union members, since only union members may grant such authorisations to a registered trade union. They remain bound by those authorisations until the authorisations are validly terminated.

[24] The administrator has been mandated by this court to unscramble an egg of significant proportions. The order does not require this court to undertake that task – this is for the administrator to accomplish. But this court is empowered to give effect to its orders, and to provide the administrator with the necessary means to give effect to his mandate. On its own version, SAMA has been the *de facto* manager of the union since the union's inception. It is not open to SAMA to hide behind the organizational structures that it has created to refuse to assist the administrator, who is obliged in law to take control of the union's management and affairs. The scope of the administrator's terms of reference as defined by the order granted on 27 February 2020, entitle him to all necessary information and assistance from SAMA in the execution of his mandate. This would include all information in SAMA's possession regarding those of its members employed in the public sector who are members of the union, and from whom statutory deductions in respect of trade union subscriptions or levies have been made in terms of s 13 of the LRA. Further, the administrator is entitled to all documents relating to the registration of the union that may be in SAMA's possession, including the original certificate of registration and a certified copy of the union's constitution, and all financial records and returns referred to in ss 99 and 100 of the LRA. Given that the stop order deductions in place in respect of doctors employed in the public sector deductions made in terms of s 13 of the LRA and solely for the benefit of the union, the union is entitled to a declaratory order to that effect, as well as a declaratory order to the effect that all employees in respect of whom such stop orders were and are being made, are union members, at least for as long as they have not terminated their membership of the union.

[25] To the extent that the administrator seeks further orders declaring that all cancellations of membership of the union for the period 27 February 2020 to date

which did not comply with the provisions of s 13 (3) of the LRA are invalid and of no consequence, I am unable to ascertain on the papers before me whether such cancellations have indeed been effected, and whether any cancellations so effected comply with s 13 (3) of the LRA. It will be recalled that in terms of that subsection, three months' written notice must be given by the employee to the employer and the trade union concerned. Whether terms of any cancellation failed to comply with this provision, it is of course open to the employer and the union concerned to reject the notice of cancellation. To the extent that the administrator sought interdictory relief, including an order that SAMA is precluded from holding itself out to be a registered trade union in terms of the LRA, seeking or obtaining organisational rights, seeking or obtaining recognition from employers as a collective bargaining representative, soliciting members of the union or taking steps to encourage them to cancel existing union membership stop order facilities, Mr. Fourie SC, who appeared for the applicants, abandoned this prayer and I need not consider whether the administrator is entitled to an order in these terms. However, as I have noted above, it is not in dispute that SAMA is not a trade union as defined, nor is it registered in terms of the LRA. This fact alone places restraints on the activities of SAMA, at least to the extent that it seeks now to hold itself out as a trade union and offer its members the benefits that accrue to a registered trade union.

Costs

[26] Finally, in terms of s 160 of the LRA, this court has a broad discretion to make orders for costs in accordance with the requirements of the law and fairness. The applicants contend that SAMA has acted fraudulently and that a punitive costs order is warranted. On the papers before me, I am unable to make a finding of fraud. That does not excuse the conduct of SAMA, which was obliged to assist the administrator and offer him its fullest cooperation. Despite a promising start, the administrator has met with obstruction and obfuscation. None of the usual conventions that apply to disputes between individual employees and their employers, or between trade unions and employers are applicable in the present

instance. The applicants have substantially succeeded in obtaining the relief that they seek in the interests of the law and fairness are best served by an order that costs follow the result.

I make the following order:

1. The first respondent is directed, within five days of the date of this order, to provide the applicant with the following:
    1.1 all information in its possession regarding the members of the second applicant, including but not limited to those employed in the public sector and whose union subscriptions are deducted via the PERSAL payroll system;
    1.2 all necessary assistance in providing the above information, and ensuring that same is accessible and complete;
    1.3 all records in its possession relating to disputes and grievances instituted, pending or received by the second applicant;
    1.4 the second applicant's original certificate of registration;
    1.5 a certified copy of the second applicant's constitution;
    1.6 all of the second applicant's financial records in its possession submitted to the Registrar of Labour Relations in terms of s 100 of the Labour Relations Act, including:
        1.6.1 audited financial statements;
        1.6.2 management accounts;
        1.6.3 bank statements;
        1.6.4 records of investment;
        1.6.5 assets;
        1.6.6 income statements;
        1.6.7 details of all monies appropriated by the first respondent in respect of the costs of shared

services provided by the first respondent to the second applicant.

2. It is declared that all amounts deducted in favour of the second applicant on the PERSAL payroll system pursuant to the right to the deduction of trade union subscriptions and levies in terms of 13 of the Labour Relations Act, were remitted in terms of s 13 (3) to and for the account of the second applicant.

3. It is declared that in the absence of any proof to the contrary, all SAMA members in respect of whom such stop order deductions were and continue to be made through the PERSAL payroll system, are and remain members of the second applicant.

4. The first respondent is to pay the applicants' costs of the proceedings, such costs to include the costs of two counsel where so employed.

André van Niekerk

Judge of the Labour Court

APPEARANCES

For the applicants: Adv. G Fourie SC, with him Adv. D Groenewald, instructed by Serfontein Viljoen & Swart

For the First Respondent: Adv. TP Krüger SC, instructed by Wellman Bloem

For the Second Respondent: Adv. S Shaba SC, with him Adv. S Tshauke, instructed by the state attorney