



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J744/24

In the matter between:

THE REGISTRAR OF LABOUR RELATIONS

Applicant

and

**PUBLIC SERVANTS ASSOCIATION OF
SOUTH AFRICA ("PSA")**

Respondent

Heard: 19 March 2025

Delivered: 24 June 2025 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 24 June 2025.)

JUDGMENT

PHEHANE, J

Introduction

[1] The applicant is the Registrar of Labour Relations (the Registrar) appointed in terms of section 108 of the Labour Relations Act¹ (LRA). The statutory role of the Registrar is to *inter alia*, oversee the workings and functions of employer organisations and trade unions, which includes ensuring that the rights of the members are not infringed and to ensure that their fiduciary duties to their members are not breached. Section 108 of the LRA provides that the Registrar is impartial and independent, subject only to the Constitution of the Republic of South Africa, 1996, (the Constitution) and the law and must exercise his powers and perform his functions without fear, favour or prejudice. In addition, no person or organ of state may interfere with the functions or duties of the Registrar.

[2] The respondent, the Public Servants Association of South Africa (PSA) is a trade union registered as such in terms of section 96 of the LRA.

[3] The applicant brings this application in terms of the provisions of section 103A of the LRA to place the PSA under administration.²

[4] The application is opposed by the PSA essentially, on the premise that the real relief that is sought by the Registrar, is that the PSA reports to him, on what it has done to implement the recommendations of a forensic report by Fundudzi Forensic Services (Pty) Ltd (Fundudzi) into allegations of fraud and corruption in the PSA, failing which, the PSA is to be placed under administration in order that the administrator can establish what has been done and report his findings to this Court. The PSA submits that this relief, to report on what the PSA has done in respect of the forensic recommendations, firstly, is not prayed for in the notice of motion and secondly, the relief sought does not justify placing it under administration.

Condonation

¹ Act 66 of 1995, as amended.

² See: notice of motion.

[5] The Registrar seeks condonation for the late filing of his replying affidavit. Condonation is unopposed. I have considered the condonation application and find that good cause is shown for the late filing of the replying affidavit.

Background

[6] During August 2023, the Registrar received an affidavit from a whistleblower whose identity is now known, namely Nomabandla Corah Silinyana (Ms Silinyana), an expelled member of the PSA Board of Directors, together with a comprehensive report by Fundudzi (the forensic report) dated August 2020 which documented serious allegations of corruption, fraud, nepotism, unlawful overspending, procurement and financial mismanagement in respect of the PSA.

[7] In a letter dated 13 September 2023,³ the Registrar requested the PSA to respond to the allegations in the affidavit relating to improprieties and maladministration by the PSA and in respect of the recommendations contained in the forensic report to refer matters to the Directorate of Special Investigations. In his letter, the Registrar informed the PSA that owing to the seriousness of the allegations in the affidavit and forensic report, that he would not hesitate to invoke the provisions of section 106 of the LRA to cancel the registration of a non genuine trade union, alternatively, the PSA could be placed under administration in terms of the provisions of section 103A of the LRA.

[8] In an undated letter of response,⁴ the PSA took umbrage with the Registrar's letter and stated that the tone of the Registrar's letter suggested that the Registrar had made a foregone conclusion that the allegations in the affidavit and forensic report were confirmed and such a conclusion had an effect of tainting his impartiality. The PSA also took issue with the forensic report commissioned by it being provided to the Registrar by Ms Silinyana and queried whether Ms Silinyana or the Registrar had obtained the prior permission of Fundudzi to disseminate the report as was required. The PSA responded to the allegations as contained in the affidavit. The Registrar does not complain about the PSA's response to the allegations contained

³ Bundle pp 389 to 390.

⁴ Bundle pp 391 to 412.

in Ms Silinyana's affidavit. He states that the PSA provided a comprehensive response in this regard.⁵ Therefore it is not necessary to deal with those allegations and the PSA's responses thereto, save the allegation that she made that the PSA's current leadership after unlawfully ousting its general manager, has been mismanaging the finances of the trade union, operating for the gain of friends to the detriment of its members' interests and there has been a total collapse of corporate governance. In response to this allegation, the PSA stated that these are unsubstantiated allegations of a disgruntled individual, whose Board membership expired and who was removed as a trade union office bearer. The PSA further avers that Ms Silinyana was a Board member when the allegations of impropriety she complains of arose but she did not at that stage, report these incidents which she had the fiduciary duty to do, and only raised them after she was no longer a member of the PSA. The PSA denies any misgovernance and financial mismanagement. The PSA avers that it has submitted annual audited financial statements which addresses matters of corporate governance to the Registrar in terms of the provisions of section 100 (b) of the LRA over the period in question and received an unqualified audit report - this has been the position for several years.

[9] As far as the PSA is concerned, the Registrar's letter of 13 September 2023 required it to report on whether the allegations of fraud and corruption had been reported to the Directorate of Special Investigations. In its letter of response, the PSA informed the Registrar that it had implemented the recommendation by registering a criminal case at the South African Police Service under case number 123/08/2020 and denied that it is not implementing the recommendations.

[10] The Registrar was dissatisfied with the latter response as he required the PSA to provide him with its responses to the recommendations in the forensic report in circumstances where he did not expressly request it to do so.⁶ More specifically, the Registrar states that he expected an update from the PSA on the status of the criminal case.

⁵ Founding affidavit at para 72 on p 22.

⁶ Founding affidavit at para 62 on pp 19 to 20.

[11] The Registrar thus avers that the PSA's response was inadequate, that the PSA made baseless allegations that he is biased and refuses to co-operate as it has failed to report to the Registrar as to whether it has implemented the recommendations in the forensic report. The Registrar requires a response from the PSA and the annexures to the forensic report, in order to assess whether the PSA failed to disclose the improprieties in its annual financial statements submitted to the Registrar. The Registrar contends that in terms of his statutory duties and functions, he is obliged to act upon all complaints that come to his attention as the overseer of the activities of trade unions and employer organizations alike.

[12] In the premises, the Registrar dispatched a second letter to the PSA dated 19 March 2024 clarifying his position that he is duty bound by the LRA to act upon complaints of impropriety. Where there exist *prima facie* findings of misconduct, misgovernance and malfeasance and when these allegations are proven, they justify a trade union being wound up or placed under administration for reasons that it is not a *bona fide* trade union acting in the interest of its members. The Registrar granted the PSA the last opportunity to advise him what it has done in respect of the recommendations of the forensic report, failing which he is entitled to conclude that the PSA's refusal to comply with his request is due to it not implementing the recommendations of the forensic report and thus not operating as a *bona fide* trade union. Therefore, he is entitled to approach this Court for relief to place the PSA under administration. The Registrar contends that this application could have been avoided had the PSA cooperated with his request to provide a meaningful response to his inquiries.

Opposition

[13] The PSA raises several issues in opposing this relief. First, an application to strike out the forensic report and all references to the forensic report for a host of reasons.

[14] Second, should the striking out application not succeed, the PSA opposes the main relief on the basis that the Registrar has not satisfied the jurisdictional requirements in section 103A of the LRA to place the PSA under administration.

[15] Third, the PSA contends the forensic report is not properly before the Court, in that the Registrar simply attaches the forensic report to his founding affidavit without reference to specific paragraphs in the report.

[16] I deal with the PSA's contentions in turn.

Application to strike out

[17] The PSA launched an application in terms of Rule 41 of the Rules of this Court, read with Uniform Rule of Court 6(15),⁷ to strike out specified paragraphs of the founding affidavit and the forensic report. The PSA submits that the grounds for striking out are that the aforesaid:

- 17.1 contains evidence illegally and/or improperly obtained;
- 17.2 contains personal information obtained in contravention of the Protection of Personal Information Act⁸ (POPIA);
- 17.3 constitutes inadmissible hearsay evidence;
- 17.4 constitutes inadmissible opinion evidence.

The forensic report was illegally obtained

[18] The PSA contends the forensic report is not properly before the Court as no prior permission was obtained from Fundudzi to utilize the report, which is confidential and concerns the internal affairs of the PSA.⁹ Ms Silinyana gained knowledge of the report as a member of the PSA Board and was not granted permission to disclose its content. Therefore, Ms Silinyana providing the Registrar with the forensic report in such circumstances means that the report is unlawfully possessed by the Registrar. The Registrar took no steps to follow proper processes to obtain a copy of the forensic report, such as an Anton Piller procedure or an application to compel the disclosure of the forensic report. In the premises, in

⁷ Bundle pp 677 to 693.

⁸ Act 4 of 2013.

⁹ The PSA no longer persists with its defence that the forensic report is privileged.

accordance with the maxim *ex turpi causa non oritur*, this Court should exercise its discretion not to consider unlawfully obtained evidence.

Use of the forensic report violates POPIA

[19] The forensic report contains personal information of approximately 140 natural persons and 74 juristic persons. Ms Silinyana and the Registrar have improperly accessed and are in possession of personal information of the data subjects. As the Registrar has divulged personal information of data subjects without their consent, the PSA will suffer prejudice if the Court admits into evidence the forensic report obtained in contravention of POPIA.

The forensic report constitutes inadmissible hearsay evidence

[20] In addition to the Registrar failing to obtain the prior permission of Fundudzi to utilize the report, the Registrar has also failed to obtain affidavits from the interviewees in the report who furnished Fundudzi with information. Therefore, the report constitutes inadmissible hearsay evidence.

The forensic report constitutes inadmissible opinion evidence

[21] The PSA contends that the conclusions and recommendations contained in the forensic report constitute opinions expressed by the authors thereof. The Registrar has failed to comply with the procedural requirements to introduce and rely on such opinion evidence. In the circumstances, the forensic report constitutes inadmissible opinion evidence.

[22] In view of the afore-going, the PSA contends that it will be prejudiced if this Court were to consider the forensic report in circumstances where it is improperly before the Court and the report constitutes inadmissible evidence.

[23] The PSA refers to the report as “expunged”. It is presumptuous in holding the view that its application to strike out will succeed. It has not responded to the allegations in the founding affidavit and submits that it will seek leave to file a

supplementary answering affidavit to deal with these paragraphs in the founding affidavit if the striking out application is not granted. The notice of motion in the striking out application does not seek leave to file a supplementary affidavit if the said application fails.

Opposition to the main application

[24] In the event that the striking out application does not succeed, the PSA has made submissions before this Court opposing the relief sought by the Registrar in the main application essentially, on the basis that the Registrar is not entitled to the relief he seeks, as he has failed to satisfy the jurisdictional requirements to place it under administration as contemplated in section 103A(1)(a) read with section 103A(2) of the LRA. The PSA contends that the Registrar has not placed evidence before this Court to satisfy this Court that it is just and equitable to place the PSA under administration for materially failing to perform its functions or that there is serious mismanagement of the finances of the PSA with the consequence that the PSA is not a genuine trade union.

[25] The PSA contends that it has an unqualified audit report over the past recent years. It is not financially distressed, which, in terms of the decisions in *Public Servants Association of SA and Another v Minister of Labour and Another*¹⁰ (*PSA v Minister of Labour*) and *Solidarity v Metal and Engineering Industries Bargaining Council and Others*¹¹ (*Solidarity*) the Registrar must demonstrate that it is in financial distress in order to succeed in obtaining relief to place the PSA under administration.

[26] In *PSA v Minister of Labour*,¹² the Court stated as follows:

‘... Section 103A was introduced into the LRA by way of the 2014 amendments, which came into operation on 1 January 2015. Subsection (1) provides that this court may order the appointment of a person to administer a trade union or employers’ organisation if: the court is satisfied that it is just and equitable to do so; and either the trade union/ employers’ organisation

¹⁰ (2016) 37 ILJ 185 (LC) at paras 6 to 7. Upheld on appeal in *Minister of Labour and Another v Public Servants Association of SA and Another* (2017) 38 ILJ 1075 (LAC).

¹¹ (2017) 38 ILJ 2109 (LC) at paras 40 to 42.

¹² *Id* fn 10 at para 6.

has resolved to be placed under administration and applied to court to give effect to the resolution, or the registrar has applied to court to appoint an administrator. Without limiting the generality of circumstances under which it will be just and equitable for the court to place a trade union under administration, subsection (2) provides that it may be just and equitable to grant such an order if the trade union materially fails to perform its functions or there is serious mismanagement of the finances of the trade union.

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 employers' organisation is deregistered and wound up and attempts to avoid this is in the interests of all concerned.'

[27] In *Solidarity*, this Court referred to business rescue proceedings under the Companies Act¹³ as an avenue to rescue an entity in financial distress before liquidation proceedings and likewise, compared business rescue proceedings to proceedings in terms of section 103A of the LRA.

[28] Therefore, the submission by the PSA is that in order to succeed in an application in terms of section 103A of the LRA, the Registrar is required to place evidence before this Court to show that the PSA is an ailing trade union, in financial distress and in need of rescue to be put back on track.¹⁴

[29] The PSA submits that the Registrar's powers in section 109 of the LRA are not unfettered¹⁵ and it would be a sad day for this Court to place it under administration for failing to respond to the Registrar's high handed request that the PSA informs him what it has done with recommendations in a report that is not only outdated and no longer relevant,¹⁶ but is incomplete, without annexures and unlawfully obtained.

Forensic report is not properly before the Court

¹³ Act 71 of 2008.

¹⁴ PSA's heads of argument at paras 13, and 16 to 18.

¹⁵ PSA's heads of argument at para 9 and the authorities cited in the corresponding footnote therein.

¹⁶ Answering affidavit at para 168 on p 468.

[30] The PSA contends that other than quoting the final recommendations in the report and averring that the content of the report should be read as if specifically traversed in his founding affidavit, the Registrar does not make reference to any specific paragraphs in the forensic report. The PSA contends that this approach does not pass muster and relies on the decision in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*,¹⁷ which stated thus:

‘Regard being had to the function of affidavits it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practise would be destroyed. A party would not know what case must be met. See *Lipschitz and Schwarz NNO v Markowitz* 1976 (3) SA 772 (W) at 775H and *Port Nolloth Municipality v Xahalisa and Others: Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111B – C’.

[31] The PSA accordingly submits that the failure by the Registrar to specifically refer to portions of the forensic report on which it relies is fatal to its application, more so in circumstances where the Registrar pleads that he does not seek to rely on the veracity of anything contained in the forensic report, that he has no knowledge of the content of the report, that it is not important for this Court to peruse the entire report, and is not possessed with the annexures to the report. In the premises, the PSA contends that the Registrar has failed to set out a proper factual and legal basis for the relief it seeks, and has failed to place evidence before this Court to place the PSA under administration.

Legal Framework

¹⁷ 1999 (2) SA 279 (T) at 324 F-G.

[32] Section 213 of the LRA defines a trade union to mean “*an association of employees whose principle purpose is to regulate relations between employees and employers, including any employers’ organizations*”.

[33] In *Vosloo NO and Another v SA Medical Association NPC and Another*¹⁸ (*Vosloo*) this Court, per Van Niekerk J (as he then was), stated after considering the definition of a trade union in section 213 of the LRA that the LRA did not intend for trade unions to be used as a vehicle for other means. The Court considered that subscriptions are deducted from employees’ salaries with their written authorization as members of a trade union, that the LRA requires proper accounting and financial records to be kept, audited financial statements to be provided to the Registrar as well as a record of the number of members. The Court concluded that all these statutory reporting obligations guaranteed the right to freedom of association and confer statutory benefits on employees who are members. Further, as recognized statutory bodies, trade unions enjoy the fundamental rights in section 23(4) of the Constitution to determine their own administration, programmes and activities.¹⁹

[34] Section 108 of the LRA makes provision for the appointment of the Registrar to perform the functions conferred on the Registrar in terms of the LRA.

[35] The functions of the Registrar are set out in section 109 of the LRA.

[36] The list of functions in section 109 are not exhaustive. To this end, section 109(4) of the LRA provides that the Registrar must perform “*all other functions conferred on the registrar by or in terms of [the LRA]*”.

[37] These other functions are regulatory and contained in Chapter VI of the LRA, which include registering and cancelling the registration of trade unions and employers’ organizations, receiving information and records mentioned in section 98 of the LRA, launching an application to wind-up a trade union or employers’

¹⁸ (2020) 41 ILJ 2482 (LC)

¹⁹ *Vosloo* (fn 19) at paras 18 to 20.

organization and to place a trade union or employers' organization under administration.²⁰

[38] Therefore the Registrar has statutory regulatory and custodial functions as confirmed in *Registrar of Labour Relations v Sono NO and Others*²¹ (Sono), where this Court per Prinsloo J stated as follows in relation to these functions of the Registrar, quoting with approval from the cases of *Registrar of Labour Relations v Consolidated Association of Employers of SA Region*²² and *National Entitled Workers Union v Ministry of Labour and others*:²³

'[30] In *Registrar of Labour Relations v Consolidated Association of Employers of SA Region*, the LAC considered the functions of the Registrar and confirmed that "the registrar is a creature of statute. He derives his powers from the LRA and the guidelines promulgated in terms of the LRA". It further held that:

"The functions of the registrar are set out in s 109 of the LRA. This includes keeping a register of registered employers' organisations etc. He fulfils an important regulatory and custodial function in terms of the LRA and is responsible for protecting members of the public against some of the serious consequences which they may suffer when dealing with unscrupulous trade unions and employers' organisations which either do not comply with the provisions of the LRA and/or are not genuine organisations but, in fact, profit making enterprises. The registrar has a discretion when exercising his powers in terms of s 106(2A) of the LRA. He has wide powers and must still act within the confines of the law and give reasons for his decision. He must allow an applicant to make representations before making his decision. He does not have unfettered powers in terms of the LRA."

[31] In discussing the limitations and restrictions of the Registrar's powers, the court in *National Entitled Workers Union v Ministry of Labour and others* held as follows:

²⁰ See: *Minister of Labour and another v Public Servants Association of SA and another* (Id fn 10) at paras 81 and 83.

²¹ [2024] JOL 66314 (LC) at para 30 to 32.

²² (2015) 36 ILJ 182 (LAC) at para 27.

²³ (2011) 32 ILJ 1372 (LC) at para 23.

"It must be borne in mind that the registrar is a creature of statute. He must act within the confines of the LRA. He does not have any power in terms of the LRA to suspend the cancellation of a trade union or to impose certain fines. He can, depending on what section of the LRA a trade union has breached, call upon the trade union to remedy that within a specific period. . ."

[32] It is clear from the authorities that the Registrar is a creature of statute, that he does not have unfettered powers, but must act within the confines of the powers given to him in terms of the LRA. The Registrar fulfils an important regulatory and custodial function.'

(Own emphasis).

[39] Therefore, the functions of the Registrar are to oversee that trade unions and employers' organization are genuine organizations. The Registrar must not register a trade union or employers' organization unless he is satisfied that it is a genuine trade union or employers' organization (section 95(7)). The Registrar may cancel the registration of a trade union or employers' organization if he is satisfied that it ceases to be a genuine trade union or employers' organization (section 106(2A)). The Registrar may apply to this Court to wind up a trade union or employers' organization (section 103). The Registrar may apply to this Court to place a trade union or employers' organization under administration (section 103A). As stated in *Sono*, the functions of the Registrar are not unfettered and he is to exercise his powers and functions within the confines of the provisions of the LRA.²⁴

[40] In terms of section 95(8) of the LRA, the Minister, after consultation with NEDLAC, may publish guidelines in the Government Gazette to be applied by the Registrar in determining whether or not a trade union or employers' organization is genuine. These guidelines were published on 12 December 2018 (Guidelines). Clause 4 of the Guidelines provides what the Registrar must consider whether a trade union or employers' organization is genuine and provides thus:

²⁴ *Sono* (Id fn 23) at para 32.

'In order to determine whether an organisation is genuine, it will be necessary for the Registrar to examine the actual operation of the organisation. In the case of an applicant, particular attention will have to be paid to the manner in which the organisation was established and formed. In the case of an existing organisation, attention will have to be paid to its actual activities and functioning. In evaluating whether a trade union or employer's organisation is genuine, the Registrar must take into account all relevant factors.'

[41] Section 103A of the LRA provides:

'(1) The Labour Court may order that a suitable person, who may be a Commissioner, be appointed to administer a *trade union or employers' organisation* on such conditions as the Court may determine if the—

(a) Court is satisfied that it is just and equitable to do so; and

(b) *trade union or employers' organisation* has resolved that an administrator be appointed and has applied to the Court for an order to give effect to that resolution; or

(c) registrar has applied to the Court to appoint an administrator.

(2) Without limiting the generality of subsection (1) (a), it may be just and equitable to make an order in terms of subsection (1) if—

(a) the *trade union or employers' organisation* fails materially to perform its functions; or

(b) there is serious mismanagement of the finances of the *trade union or employers' organisation*.

(3) If there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection (1), the Court must consider their interests before deciding whether or not to grant the order.'

(Own emphasis).

[42] In determining whether it is just and equitable to place a trade union or employers' organization under administration, the relevant factors that may be taken into consideration by the Court are whether the trade union is failing materially to perform its functions or whether there is serious mismanagement of its finances; in addition, the interests of persons who may be affected by the order who are not

represented before the Court. Such persons in my view, are employers of trade union members and any party that had dealings with the trade union in its activities, programmes and administration.

[43] Placing a trade union under administration has been interpreted by this Court and the Labour Appeal Court as being akin to a business rescue application or process in terms of the provisions of the Companies Act, which has the objective of placing a trade union that is in financial distress on the road to a healthy recovery as the last step before a winding-up application.²⁵

Evaluation

Application to strike out

[44] The report is a forensic investigation report that was commissioned by the PSA following disclosures by whistleblowers in terms of the provisions of the Protected Disclosures Act²⁶ relating to allegations of fraud and corruption within the PSA.

[45] I have considered the PSA's several grounds to strike out. That application is dismissed for the reason essentially, that the forensic report is relevant to the determination of this application, and to exclude it would not be in the interest of justice.²⁷

²⁵ See: fn 10 *supra*. See also: Vosloo (Id fn 19) at para 17 where this Court stated as follows: '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 and 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.'" (Own emphasis).

²⁶ Act 26 of 2000.

²⁷ See: *Jajbhay v Cassim* 1939 AD 537 where the Appellate Division set out the scope and operation of the maxim *ex turpi causa non oritur actio* and held that the maxim is concerned with the prohibition of the enforcement of immoral or illegal contracts. The maxim is often used within the context of contractual or restitution claims and not within the context of arguing the admissibility of evidence. See also: *Minister of Police v Underwriters at Lloyds of Londo* (1212/19) [2021] ZASCA 72 (8 June 2021). Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 provides factors that this

[46] The PSA had the opportunity to oppose the application on the merits and its defence is that the Registrar has failed to satisfy this Court that it is just and equitable to place it under administration. For this reason, it was not necessary to postpone the application for the PSA to reply to the allegations in the founding affidavit specifically in relation to the forensic report.

Is the forensic report improperly before the Court?

[47] The contention that the Registrar failed to place the forensic report properly before the Court in that it failed to make specific reference to the portions of the report that it relies on is without merit. The Registrar has in his founding affidavit, quoted the recommendations of the forensic report that he relies on and submits that the PSA has refused to inform him of what it has done in respect of these recommendations. These recommendations are essentially that disciplinary proceedings be instituted against specified individuals who are alleged to have committed acts of fraud and corruption within the PSA.

Merits of the main application

[48] The PSA contends, on the basis of *PSA v Minister of Labour and Solidarity* that the Registrar is required to prove that it is in financial distress in order to succeed in its prayer for an order in terms of section 103A of the LRA. The Registrar contends that a trade union being in financial distress is not a precursor to the granting of an order in terms of section 103A.

[49] Section 39 of the Constitution provides that when interpreting legislation, the Court must promote the spirit, purport and objects of the Bill of Rights.

Court may take into account in determining whether it is in the interests of justice to admit hearsay evidence. Section 6(1)(e) of POPIA which excludes the application of POPIA where the processing of information is conducted in relation to the judicial functions of a court. Opinion evidence is admissible when it is rendered by an expert. The PSA does not dispute that it commissioned a report by forensic auditors, which it avers that it actioned its recommendations. See: *FEDICS Group (Pty) Ltd and another v Matus and others; FEDICS Group (Pty) Ltd and another v Murphy and others* [1997] 4 All SA 14 (C), which held that a Court has the discretion to admit evidence illegally obtained and is more inclined to exercise this discretion in favour of a litigant who seeks to introduce evidence comprising of documents or information that would or should eventually have obtained through lawful means.

[50] Section 23 of the Constitution embodied in the Bill of Rights provides that everyone has the right to fair labour practices. It provides for the rights of workers to join trade unions and employers to join employers' organizations and the right of trade unions and employers' organizations to determine their own activities, programmes and administration and therefore, to be independent.

[51] The LRA confers statutory regulatory and custodial powers and functions on the Registrar, to be exercised within the confines of the LRA. The position of the Registrar is a public position which has an impact on the rights of a large number of workers and on the public.²⁸

[52] Therefore, in interpreting section 103A(1) and (2) of the LRA one needs to give effect to the spirit, purport and objects of the Bill of Rights. In determining whether it is just and equitable to place a trade union under administration, the enquiry is not limited to a circumstance where a trade union is in financial distress. To do so will be limiting the generality of section 103A(1), which subsection (2) warns against doing. The Court in *PSA v Minister of Labour* and its approach followed in *Solidarity* does not confine the enquiry of determining whether it is just and equitable to place a trade union under administration to circumstances where a trade union is in distress. These authorities liken a process of placing a trade union under administration to a business rescue process. This is in keeping with the provisions in section 103A(2) that set out what is to be considered is whether there is serious mismanagement of the finances of the trade union or whether the trade union is failing materially to perform its functions.

[53] There may be a number of factors which prevent a trade union from performing its functions, such as factions within the leadership, a factor which amongst others, such as the trade union being controlled by family members and being an association for gain which this Court found justified the placing of a trade union under administration.²⁹ Where a trade union that is no longer genuine, is a

²⁸ *Minister of Labour Relations and Another v Public Servants Association of South Africa and Another* (id fn 10) at para 67.

²⁹ *Registrar of Labour Relations v Iqubelaphambili Trade Union and Others* (Id fn 36).

profit making enterprise where individuals appoint friends and relatives as service providers and acquire assets for their own benefit, it is just and equitable in such circumstances to place it under administration to regain the fulfilment for which it was established,³⁰ and to protect members of the public from dealing with trade unions that are no longer genuine but are profit making enterprises.³¹

[54] Therefore, the Court is not restricted to the circumstances provided in section 103A(2) in determining whether it is just and equitable to place a trade union or employer's organization as the case may be, under administration.

[55] To further elaborate on this point this Court in *Chemical Energy Paper Printing Wood and Allied Workers Union and others v Mashanda NO and others*³², per Snyman AJ, described the power the Labour Court has in appointing (or refusing to appoint) an administrator as a “*very broad and general power*”. This power, based on the wording of section 103A(2) is not limited to the two instances as set out in subsections (2)(i) and (ii), but rather, these serve as instances which can result in the grant of an order for the appointment of an administrator.

[56] The Court's wide discretion is demonstrated in *Registrar of Labour Relations v Inqubelaphambili Trade Union and Others*³³ wherein this Court granted an application to place the trade union under administration due to internal conflict and strife between factions within the union which resulted in the union being unable to convene a national congress for three consecutive years, impacting the election of executive committee members. Thus, the union was unable to comply with its constitution and with the LRA.

[57] Similarly, in *Registrar of Labour Relations v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union*³⁴, this Court was called to grant an order appointing an administrator as the union had failed to submit its audited financial statements to the Register for a period of four years and thus failed to fulfil its

³⁰ Vosloo, *supra* fn 19.

³¹ Sono, *supra* fn 23.

³² (2023) 44 ILJ 520 (LC) at fn 24.

³³ (J614/20) [2020] ZALCJHB 130 (13 August 2020).

³⁴ Unreported decision. Case no: J2896/18. Delivered 4 June 2020.

obligation to do so in terms of the LRA and the union's own constitution. The Court found that it was just and equitable that the application be granted given the union's lengthy delays in meeting its obligations.

[58] What is required of the Registrar to prove in its application in terms of section 103A to satisfy the Court that it is just and equitable to place a trade union under administration?

[59] The PSA contends that the Registrar is required to place evidence before this Court that there exists a factual basis to place the trade union under administration. Put differently, the PSA contends that the Registrar has failed to put up any allegations let alone evidence that the PSA is not a genuine trade union.³⁵ In the circumstances where the Registrar states that he has no knowledge of the content of the forensic report, that it is not important for this Court to peruse the entire forensic report, that he does not seek to rely on the veracity of anything contained in the forensic report, that he has no idea whether the allegations of misconduct, malfeasance and mismanagement are true or not, there is no evidence to satisfy the Court that it is just and equitable to place the PSA under administration.³⁶ I agree.

[60] When consideration is had to an order in terms of section 103A being akin to (not restricted to) business rescue proceedings, in *Mintails South Africa (Pty) Ltd v Mintails Mining SA (Pty) Ltd and Others (Bekker and others as Intervening Parties)*³⁷ (*Mintails*) the Court had occasion to consider the provisions of section 131(4) of the Companies Act which provides:

(4) ... the court may—

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that—

(i) the company is financially distressed;

³⁵ PSA's heads of argument at para 76 and 77.

³⁶ See: PSA's heads of argument at paras 33, 35 to 37 and the references to the pleadings in the corresponding footnotes on pp 12 to 13.

³⁷ [2021] JOL 52560 (GJ) at para 30.

- (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
- (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company.'

[61] In relation to the definition of rescuing a company in financial distress as defined in section 128 of the Companies Act, the Court stated that the objective of business rescue proceedings is to put the financially distressed company back on track in terms of its finances, *or* for the shareholders to get a higher return on their investment than they would receive if the company was wound up. Therefore, the Court continued, an applicant must place a factual foundation for the existence of a reasonable prospect that the company can be saved or shareholders can get a higher return on investment.³⁸

[62] The Court went on to say that what is required to satisfy the Court that it is just and equitable to place a company under business rescue is a cogent evidential foundation to support the existence of a reasonable prospect that the desired objective can be achieved that must be placed before the Court.

[63] Therefore, in the context of section 103A of LRA, to satisfy the Court that it is just and equitable to place a trade union under administration, an applicant must place a cogent evidential foundation before the Court to support the existence of a reasonable prospect that under administration, the trade union will regain the fulfilment of the purpose for which it was established - put differently, it will return to being a genuine trade union.

[64] In view of the foregoing, it follows that more than *prima facie* evidence is required. The applicant bears the onus to prove on a balance of probabilities, that there is serious mismanagement of the finances of the union, or the union is failing materially to perform its functions, and that the union has ceased being a genuine trade union.

³⁸ *Mintails supra* at para 30.

[65] In *casu*, the Registrar has not placed cogent evidence before this Court to show that the PSA is not a genuine trade union, that there is serious mismanagement of its affairs or that the PSA is failing materially to perform its functions.

[66] The Registrar avers that all he requires to know, is what the PSA has done about the recommendations in the forensic report and he required an update on the criminal case. As the PSA has not provided him with this information and update, he contends that he entitled to place the PSA under administration in order for the appointed administrator to establish what has occurred with the recommendations and to report this to the Registrar; and if the recommendations were not followed up, the administrator is to do so. The Registrar submits that this application could have been avoided if the PSA simply provided him with adequate, meaningful responses.³⁹

[67] The PSA has denied that it is not implementing the recommendations in the forensic report.⁴⁰ It is not necessary for the PSA to spell out chapter and verse, what it has done with the recommendations, as this concerns the internal affairs of an independent trade union. The unqualified audited annual financial statements of the PSA have been submitted in terms of section 100 of the LRA and no irregular expenditure appears. The Registrar's suspicion that the financial statements are inaccurate based on a report that on his own version he has no knowledge of, is incomplete and the veracity upon which he does not rely, does not lay a concrete factual foundation that there is serious financial mismanagement in the PSA.

[68] The forensic report lists the names of individuals who are alleged to have misconducted themselves. As stated above, the PSA does not deny implementing the recommendations of the forensic report. This relates to the internal affairs of the PSA. To permit the Registrar to place the PSA under administration in circumstances where it has not satisfied the Court by placing cogent evidence that the PSA is not a genuine trade union, will set a dangerous precedent. The PSA has responded to the

³⁹ Registrar's heads of argument at para 13 and 14.

⁴⁰ Annexure R5, at para 110 on p 407. See also: answering affidavit at para 124 on p 461.

Registrar's enquiries. Being dissatisfied with the responses on the basis that they are inadequate, in my view, does not justify placing the PSA under administration.

Costs

[69] It is now well established that in this Court, costs do not ordinarily follow the result. In the premises, no order for the payment of costs is made.

[70] In view of the foregoing, the following order is made:

Order

1. Condonation is granted for the late filing of the replying affidavit.
2. The application to strike out is dismissed.
3. The application in terms of section 103A of the Labour Relations Act 66 of 1995 as amended, is dismissed.
4. There is no order as to costs.

M.T.M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Adv Leon Halgryn SC and Adv Noxolo Kekana
Instructed by:	The State Attorney, Pretoria
For the respondent:	Adv LM Malan SC
Instructed by:	Bowman Gilfillan Inc.