



(1) Reportable: Yes
(2) Of interest to other Judges: Yes

Signature

19/01/2026
Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C644/2023

In the matter between:

**COMMUTER CONTRACT
EMPLOYERS' ASSOCIATION**

Appellant

and

**REGISTRAR OF LABOUR
RELATIONS**

Respondent

Heard: 21 January 2025

Delivered: 19 January 2026

Summary (Appeal against Registrar's refusal to register and employer organisation – Jurisprudence considered – Registrar ignoring crucial factors and collapsing issues of compliance with section 95(5) of the LRA, with the separate test to determine if the association is a genuine employers' organisation or trade union – appeal upheld)

JUDGMENT

LAGRANGE, J

Introduction

- [1] This is an appeal under s 111(3) of the Labour Relations Act, 66 of 1995 ('the LRA') against a decision by the Registrar of Labour Relations ('the registrar') on 9 October 2023 to refuse to register an employer's organisation ('COMCONEA'). This was COMCONEA's second application for registration.
- [2] In 2022, the Registrar had rejected the organisation's first registration application on the basis that it was not a genuine employer's organisation.
- [3] In the course of drafting the judgment, the court's attention was drawn to the fact that the Labour Appeal Court judgment in *Registrar of Labour Relations v Simunye Workers Forum*¹ had been handed down. At the time this appeal was argued, only the Labour Court decision had been published, and neither the court nor any of the parties were aware of the LAC decision. Accordingly, the parties were given an opportunity to file supplementary submissions in relation to anything arising from the LAC decision. Only COMCONEO made further submissions.

Background

Genesis of COMCONEA's registration application.

- [4] The application to register COMCONEA arose from very specific and somewhat unique circumstances, namely the conclusion of a settlement agreement between Golden Arrow Bus Services (Pty) Ltd ('GABS') and the union NUMSA on 10 February 2022.
- [5] The settlement agreement concluded a dispute over whether a strike NUMSA had called was protected or not and consequently whether GABS was entitled to interdict it. In March 2020, GABS had resigned its membership of the Commuter Bus Employers Organisation ('COBEO') that was a party to the South African Road Passenger Bargaining Council ('SARBAC'). Two of the other founder members of COMCONEA, Table Bay Rapid Transit (Pty) Ltd and

¹ (2025) 46 ILJ 1906 (LAC)

Sibanye Bus Services (Pty) Ltd were either members of COBEO or the South African Bus Employers' Association ('SABEA') and they also resigned from those associations when GABS left COBEO.

- [6] COMCONEA explained that the interests of GABS and its affiliated companies were at odds with those of the other employer members of COBEO and SABEA, who insisted that wage increases should be determined as a percentage of existing wages. According to COMCONEA, those companies all paid the minimum wage is determined at SARBAC. By contrast, the members of COMCONEA had historically paid wages in excess of the minimum bargaining council rates and, in consequence, when a percentage increase was awarded the absolute increase that they were liable for was always greater than the increases paid by their competitors. As a result, they could never reduce the premium wages they paid. As long as they remained members of the other two employer organisations, which favoured percentage increases, their divergent interest could not be advanced in collective bargaining in the council.
- [7] As a result of resigning their membership of the other employer organisations GABS and its affiliated companies were not even nominally represented in collective bargaining at SARBAC by virtue of belonging to an employer organisation which was party to the bargaining council. NUMSA, a union which has substantial number of members employed by COMCONEA's members, was unhappy with GABS exit from COBEO and demanded that GABS rejoin COBEO. In May 2021, NUMSA referred a dispute to conciliation, claiming it was a dispute over a refusal to bargain. When the dispute was not settled at conciliation, NUMSA issued a strike notice. Initially, this court interdicted the strike on an interim basis, having taken the view, it was unprotected. On the return day, the rule was discharged because the judge on that occasion took the view it was protected. GABS took that judgment on appeal, but before the matter was heard, the parties concluded the settlement agreement mentioned.
- [8] The pertinent part of the settlement agreement is that GABS undertook to 'cause' the formation of a new employer's organisation and to apply for its registration, within four months of the conclusion of the settlement agreement. It

also agreed to cause the newly registered association to apply for admission as an employer party to SARBAC within a month of being registered.

- [9] GABS, which employs about 2410 employees, then initiated the formation of COMCONEA by agreement with the other three businesses. TBART and Sibanye are both subsidiaries of GABS, employing 234 and 69 employees respectively. The N2 Express Joint Venture employs 80 employees and GABS holds a minority stake in that entity.

The Statutory Framework and s95(8) Guidelines

- [10] The application was made under Section 96(1) of the LRA. The following provisions were central to the Registrar refusing to register the association.

- [11] Section 95(3) reads:

‘(3) Any *employers’ organisation* may apply to the *registrar* for registration if-

- (a) it has adopted a name that meets the requirements of subsection (4);
- (b) it has adopted a constitution that meets the requirements of subsections (5) and (6), and
- (c) it has an address in the *Republic*.’

- [12] Section 95(7) states:

‘(7) The registrar must not register a trade union or an employers’ organisation unless the registrar is satisfied that the applicant is a genuine trade union or a genuine employers’ organisation.’

(emphasis added)

- [13] Section 95(8) reads:

‘The Minister, after consultation with NEDLAC, may by notice in the Government Gazette publish guidelines to be applied by the registrar in determining whether an applicant is a genuine trade union or a genuine employers’ organisation and guidelines for the system of voting as contemplated in subsection (9).’

(emphasis added)

[14] In accordance with S 95(8), guidelines were published in 2018². Paragraph 3 of the guidelines state:

'3. 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.'

[15] In the guidelines, the definition of an employer's organisation is set out in paragraph 23, and in paragraph 24, the guidelines state:

'24. Therefore, an organisation cannot be registered as an employers' organisation or continue to operate as a registered employers' organisation unless-

[a] the employers who are members of the organisation have in fact associated together;

[b] the purposes for which they have associated together include regulating relations between employers and employees or trade unions.

25. It will therefore be necessary to examine the actual process of forming an employers' organisation as well as its composition and membership and the activities it undertakes on behalf of its members.'

(emphasis added)

[16] In paragraph 26, the guideline goes on to look at the process of forming the organisation which 'can give important indications as to whether the employers who are members of the organisation have associated together' (emphasis added). It also prescribes that the aspects of the process that should be examined include the number and size of the founding members who attended

² No R 1395, gg 42121, 19 December 2018.

the inaugural meeting, the means by which the Constitution was drafted and the collection of office bearers.

[17] The concluding paragraph emphasizes what is of central importance when considering the formation of the organisation:

'27. The crucial issue that must be addressed is whether the formation involved employers associated with one another to establish employer's organisation.'

(emphasis added)

The Registrar's decision

[18] The registrar's decision to reject COMCONEA's second application for registration, was taken after COMCONEA had responded to various requests for information from the registrar. The registrar had requested further information to establish that the organisation was genuine and had complied with the LRA. After analysing the information, the Registrar concluded:

'4.1 Section 95(3) of the Act contains specific and express requirements for registration of an employer's organisation. The applicant failed to meet the registration requirements, which have been discussed above and referred to below hereunder:

4.1.1 The application does not comply with provisions of section 95(3)(a) of the Act as the applicant organisation failed to satisfy this office that members adopted the name of the applicant organisation in a properly constituted meeting of members for the formation an employers' organisation which should have taken place on the date reflected on LRA Form 6.2.

4.1.2 The applicant does not comply with provision of section 95(3)(b) of the Act as the applicant organisation failed to satisfy this office that members have adopted the constitution in a properly constituted meeting of members,

4.1.3 The applicant does not comply with provision of section 95(3)(c) of the Act as the applicant organisation failed to satisfy this office that it has address in the Republic.'

(emphasis added)

The registrar concluded that:

'It is the view of this office that the applicant failed to comply with the requirements of registration of the Act and could not be regarded as a genuine employers' organisation as envisaged by the Act' (*sic*)

(emphasis added)

[19] The underlying basis for registrar finding the organisation wanting under the various provisions of s 95 may be expressed briefly as follows:

19.1 S 95(3)(a): There were no minutes of the inaugural meeting of 8 June 2022 where the name of the organisation was supposedly adopted. A purported resolution and an attendance register, without minutes detailing the deliberations of members was insufficient proof of the name being adopted with the agreement of members. There were also no attendance registers for subsequent meetings.

19.2 S 95(3)(b): There are no minutes of the constitution being adopted or issues like membership fees, leadership elections or governance rules being discussed by ordinary members in any meeting. A resolution without minutes is insufficient. Minutes from meetings on 25 October 2022, 23 November 2022, 25 January 2023, 13 February 2023, 17 March 2023, and 9 June 2023 were submitted without signed attendance registers, despite repeated requests, which undermined their authenticity and suggested meetings were not properly constituted. Key office bearers are employees of GABS, not independent officials of the organisation. GABS was the driving force behind the application, given its links to subsidiaries (Sibanye, TBART) and the N2 Express JV, and the overlapping leadership roles.

19.3 S 95(3)(c): The organisation admitted that it used facilities of founding members instead of having its own address.

[20] Apart from concluding that the provisions of S 93(a),(b) and (c) had not been satisfied, the registrar also expressed views on other perceived deficiencies in the constitution, which she seemingly also believed indicated it was not a

genuine employers' organisation, though her failure to mention these in the concluding sections of her decision suggests she might not have regarded these as decisive issues when it came to approving registration. Nonetheless, the fact that she drew adverse inferences from them warrants their mention, as they are also indicative of her reasoning.

[21] In summary, the issues she flagged were the perceived undemocratic structure; the leadership was self-appointed and mainly comprised employees of the employer members; the membership arrangements and financial arrangements suggested it was controlled by the holding company of the other employers ('GABS') and had no operational independence. In particular, the absence of signed membership forms, unclear subscription fees, large deposits made by members, absence of proof of expenses, lease agreements or independent functioning. The registrar was not persuaded that affidavits proffered long after the inaugural meeting in lieu of minutes were 'credible', and the conflicting evidence about who was present at the inaugural meeting was also untrustworthy.

The grounds of appeal

[22] In its appeal the association seeks to rebut some of the factual findings of the registrar or dispute their relevance and to question the legal correctness of her approach.

Factual findings

[23] The association appeals against certain factual findings of registrar, namely that:

23.1 the resolution passed by the appellant's founding members on 8 June 2022, forming the appellant and adopting the appellant's constitution ("8 June 2022 founding resolution"), included an 'attendance register' and that this did not 'make sense';

23.2 the following could not be established:

23.2.1 the means by which the constitution of the appellant was drafted and adopted;

23.2.2 the election of an executive committee or council of members and election of office bearers; and

23.2.3 how the name and acronym of the applicant came about and how they were adopted;

23.3 that it was contradictory and confusing for Golden Arrow Bus Services (Pty) Ltd ("GABS") to be represented in the passing of the 8 June 2022 founding resolution by Mr ML Wilkin, a director of GABS, and for Sibanye Bus Services (Pty) Ltd ("Sibaoye") to be represented by Mr Dammert, when Mr Dammert was also an executive of GABS;

23.4 that it was not clear who decided what money was to be paid into the appellants' bank accounts (for subscription fees) because this was not discussed in the meetings of the appellant for which minutes were submitted, and

23.5 that the transactions pertaining to the appellant's bank account, invoices (to members) and the appellant's constitution reflect inconsistencies and that the appellant failed to prove that ordinary members agreed on the amounts to be paid to the appellant.

[24] These grounds of appeal are addressed in more detail below.

a) Formation –

[25] The Registrar contends that there is insufficient proof of a properly constituted inaugural meeting. No minutes or signed attendance register were provided for the meeting of 8 June 2022. Affidavits dated 31 July 2023 were rejected as non-contemporaneous. The Registrar concludes that COMCONEA failed to show that employers associated in a meeting to form the organisation and adopt its name and constitution.

[26] COMCONEA submits that the founding resolution dated 8 June 2022 was signed by authorised representatives of all founding members. It expressly allowed execution in counterparts and recorded the formation of the organisation, adoption of its name, and adoption of its constitution. Moreover, confirmatory affidavits by Messrs Dammert, Meyer, and other representatives of each of the founding employer members attested that formation discussions

occurred and that the resolution was passed by round-robin. Weekly group executive meetings, which were not typically minuted, discussed the formation. COMCONEA addresses this point directly in its submissions. It argues that there is nothing contradictory or improper about Mr. Dammert representing Sibanye Bus Services while also being an executive of Golden Arrow Bus Services (GABS). Sibanye is a subsidiary of GABS, and Mr. Dammert serves on the boards of both companies.

[27] COMCONEA explained that the founding resolution required one authorised signatory from each founding member. In this case Mr. M.L. Wilkin ('Wilkin'), the Financial Director of GABS, signed on behalf of GABS and Dammert signed on behalf of Sibanye in his capacity as a director of Sibanye. It submits that the 'confusion' on the part of the registrar had no bearing on the statutory requirements under section 95 of the LRA or the Guidelines.

b) Leadership election-

[28] The Registrar said there was no evidence of a democratic election contemporaneous with formation. Minutes later supplied lacked attendance registers, undermining credibility. She insisted that office-bearers must be elected by members at a properly constituted meeting.

[29] The office-bearers and officials consist of the President, John Dammert, Executive Members Toto Ntsohi (TBART) and Derick Meyer (N2 Express JV), and Secretary Karin de Jongh. COMCONEA provided identity documents, CVs, and letters of good standing from the Compensation Commissioner or SARS compliance PINs. The constitution allows election by consensus or, failing that, by a two-thirds majority vote. Affidavits confirmed the election of the President and Executive members.

c) Membership and paid-up status

[30] The Registrar demanded membership application forms, a list of paid-up members, and proof of three months' paid-up status. The Registrar concluded that COMCONEA failed to prove membership compliance under the Guidelines.

[31] COMCONEA argued that as founding members, GABS, TBART, Sibanye, and N2 Express JV, were all members at the time of application. Annual subscription invoices dated 29 September 2022 were calculated at R34 per employee, and bank statements reflect payments made on 12 October 2022. An invoice error for Sibanye was corrected by the actual paid amount reflected in the bank statement. Proof of deposit of membership fees were provided.

d) Banking activities

[32] The Registrar required explicit proof of authorisation for signatories and the opening of the account, such as resolutions or mandates. The Registrar found that the large balance with minimal expenditure indicates “compliance-only” banking, which was not indicative of genuine organisational activity.

[33] COMCONEA provided Nedbank confirmation of the existence of an account in its name and when it was opened, as well as bank statements showing incoming membership fees and a positive balance of R339,904.54 as at 3 July 2023. Special levy invoices dated 8 June 2023 were raised for legal fees. COMCONEA explained that pre-registration expenditure had been limited due to it being newly established and the fact that sectoral bargaining could only commence after registration and admission to SARPBAC.

Legal conclusions

[34] The association contests what it characterises as the following legal conclusions of the registrar. There are obviously areas of overlap between how to legal interpret certain facts and whether correct factual conclusions (some of which are mentioned above) were reached by the registrar.

[35] In relation to the registrar’s findings of flaws in the formation of the association, it disputes her findings that:

35.1 a founding resolution could not be a substitute for minutes of a meeting where members associated to form a genuine employers’ organisation;

35.2 a failure to submit minutes of the founding meeting meant non-compliance with the Minister’s Guidelines under section 95(8) of the LRA;

35.3 the absence in later meeting minutes of references to the formation, leadership election, adoption of the name and constitution, or to subscriptions, indicated a flawed formation process, and

35.4 the failure to prove members adopted the name in a properly constituted meeting was an breach of sections 95(3)(b) and (c).

a) Legal pre-requisites of formation and appointment of office bearers

[36] The Registrar insists that the absence of minutes for the 8 June 2022 meeting is fatal and argues that the Guidelines require proof that employers associated in a properly constituted meeting to form the organisation. Accordingly, a round-robin resolution cannot substitute for minutes of an inaugural meeting. He maintains that the affidavits purportedly confirming the event, were not reliable because they were submitted long after the event. and lacked the contemporaneity of minutes. COMCONEA did not comply with section 95(3)(a) and (b) because there is no evidence that members adopted the name and constitution in a properly constituted meeting, which is what the Guidelines contemplate. On the question of the legitimacy of the leadership, the Registrar likewise insists that COMCONEA had to provide evidence of a democratic election having taken place a meeting, evidenced by attendance registers and minutes.

[37] Clause 8.2 of the constitution provides for election of the President by consensus or, failing that, by a two-thirds majority vote. Affidavits confirmed the election of the President and appointment of Executive members. The executive members of the Executive Committee, which manages and controls the organisation in terms of clause 10.1 of the constitution, comprises the President and a representative of each of the other founding members. Only in the event the organisation has ordinary members is it necessary for the AGM to decide on who will represent those members on the EXCO. As the President was appointed by consensus, no vote needed to be taken. In any event, COMCONEA disputes that either section 95 or the guidelines require formal minutes to be provided.

Disputed findings having a bearing on the registrar's decision that COMCONEA is not a genuine employer's organisation

[38] Some of these criticisms overlap with points raised above.

[39] COMCONEA rejects registrar's finding that the absence of signed attendance registers for each meeting undermined the credibility of the minutes and the decisions recorded therein, because neither s 95 nor the guidelines stipulate such a requirement. Moreover, it had provided minutes of six Executive Committee meetings and supplemented them with sworn affidavits from attendees, confirming the meetings and the accuracy of the minutes. The registrar's insistence on signed attendance registers imposed unwarranted formal standards and was at odds with an interpretation of the statutory requirements which should have leaned in favour of supporting freedom of association rather than restricting it. The crucial issue is whether employers associated together to form and operate the organisation, for which there was ample evidence in the form of the resolution, minutes of meetings, and the affidavits

[40] COMCONEA disputed the validity of registrar's conclusion that the secretary of the association, Ms. de Jongh ('de Jongh'), could not also be an employee of GABS, one of the association's members. COMCONEA rejected the Registrar's suggestion that the secretary could not be part-time because the Labour Relations Act does not require an official of an employers' organisation to be employed full-time. It pointed out that section 213 of the LRA defines an "official" as someone employed as secretary or in any prescribed capacity, whether or not that person is employed in a full-time capacity. Accordingly, it was irrelevant that de Jongh, worked part-time and was seconded by GABS at no cost to COMCONEA.

[41] COMCONEA rejected the finding that the association lacked the legitimate leadership expected of a genuine employers' organisation, or that the relationship of other members to GABS showed that it was improperly behind the registration application. It acknowledged that GABS is a holding company of the other founding members but argued that this is neither improper nor prohibited by the LRA or the Guidelines. Irrespective of the corporate

relationship between them, each of the members had similar collective bargaining interests, making it logical for them to associate in an employers' organisation. Further, each founding member is a separate legal entity with its own board and fiduciary duties, and each resolved to join COMCONEA. In respect of registrar's questioning the 'legitimacy' of the leadership, the organisation points out that its leadership structure as set out in its constitution complied with the requirements of the LRA. It pointed out that in the Labour Court decision in *Simunye Workers Forum v Registrar of Labour Relations*³ the court held that autonomy in governance choices must be respected and that the registrar is not a gatekeeper for conventional organisational forms⁴.

[42] COMCONEA attacks the registrar's assumption that signed membership application forms were necessary to prove membership of the association. It argues that this is not a requirement of registration under s95 of the LRA and it provided ample evidence of its membership in the form of the founding resolution signed by authorised representatives of all founding members, confirmatory affidavits from those representatives, invoices for annual membership fees calculated per employee and bank statements showing payment of those fees by each founding member.

[43] In respect of the arbitrator's finding that clauses in the constitution limited eligibility for election as a president of the association to the founding members which indicated a lack of democratic governance, and therefore that it was not a genuine employers' organisation, COMCONEA, it submitted that neither section 95 of the LRA nor the guidelines prescribe the manner in which an employers' organisation must structure its leadership or eligibility criteria. The autonomy of members to design their governance arrangements is protected under the right to freedom of association, which the Labour Court had upheld in *Simunye*. This issue had no bearing on whether it was a genuine employers' organisation.

[44] The registrar had concluded that the association had not complied with Section 95(3)(c), which requires an association to have an address in the Republic. In

³ (2023) 44 ILJ 2021 (LC)

⁴ At paragraph 38.

support of this conclusion he points out the absence of a lease or dedicated premises and is not satisfied that it uses the address of the largest member GABS. COMCONEA argues that the registrar has imposed additional requirements not required by the LRA, and that the only purpose of having an address in the country is for purposes of being able to effect service of legal documents on it.

Legal Principles

[45] In this matter, the registrar refused to register COMCONEA both because of its alleged non-compliance with sub-sections 95(3)(a),(b) and (c) of the LRA and because, in his view, it did not amount to a genuine employers' organisation.

[46] The appeal against the registrar's decision is an appeal in the wide sense in which the aggrieved party has a second opportunity to make out their case in a re-hearing⁵.

[47] In relation to whether an applicant for registration has satisfied the requirements of registration, the most recent Labour Appeal Court judgment addressing that issue held that the requirements of section 95 must be met by a union wishing to register and the provisions thereof do not impose unjustifiable inroads into its autonomy nor present undue obstacles to registration⁶. Thus, the provisions of section 95 are mandatory requirements for a union or employer's organisation seeking registered status. However, the court also made it clear that in determining if compliance has been demonstrated it is crucial to bear in mind that compliance must be evaluated with reference to the purpose of the provision. At paragraph 36 of the judgment, the LAC reiterated the dictum of the Constitutional Court in *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others*⁷, viz:

“The central element is to link the question of compliance to the purpose of the provision. It has to be determined “whether what the

⁵ *Registrar of Labour Relations and Another v Justice for All Workers of South Africa* (2025) 46 ILJ 351 (LAC) at paragraph 8.

⁶ *Registrar of Labour Relations v Simunye Workers Forum* (2025) 46 ILJ 1906 (LAC) at paragraph 37.

⁷ (2022) 43 ILJ 1032 (CC) at para 71.

applicant did constitute compliance with the statutory provisions viewed in the light of their purpose"

(emphasis added)

It follows that any evaluation of whether an applicant has complied with a provision of section 95, must be informed by the reason for a particular requirement.

[48] In relation to the question whether a union or employer organisation is a 'genuine' one, the LAC stated, in the course of explaining the nature of an appeal against a decision of the registrar:

'The Labour Court proceedings are, therefore, to facilitate the exercise of a judicial discretion on the question of the genuineness of the 'trade union standing' of an applicant organisation. Such a decision is self-evidently a qualitative decision and if taken properly, the Labour Court would have appreciated the nature of its function, applied its mind to the LRA, the guidelines and all the facts adduced before it.'⁸

[49] It is important to note that in *Simunye* the LAC made it clear that it did not have to deal with the registrar's finding that SWF was not a genuine trade union, because it found that its constitution did not comply with the prescripts for registration in section 95(5)⁹. Nonetheless, it emphasised why section 95(7) had been introduced to the LRA, which requires the registrar to be satisfied that a trade union or employers' organisation is genuinely such an institution, namely, to prevent labour consultancies from registering as trade unions or employer organisations only to secure rights of representation in the CCMA¹⁰. Further it emphasised that, in the case of a union, paragraph 7 of the guidelines identified that the crucial issue to determine, was if it involved the association of employees in order to establish an organisation to regulate relations with their

⁸ See footnote 4 *supra*.

⁹ At paragraph 52.

¹⁰ At paragraph 24.

employers¹¹. By parity of reasoning, paragraph 27 of the guidelines which applies to employer organisations, also deserves emphasis¹².

[50] The LAC decision in *Simunye* also stressed that the courts have recognised that the right of freedom of association and the role played by employer organisations and unions make them associations ‘*worthy of protection not only from the state but also from external actors who may not share these goals*’¹³. Moreover, it highlighted provisions of the ILO’s Freedom of Association Convention no 87, which had to be considered when interpreting sections 23(2) and (4) of the Constitution, namely:

[3] Article 2 of the ILO’s Freedom of Association Convention, 87 states that:

‘Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.’

[4] Article 3 of the Convention provides that:

‘Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programme...’

And that:

‘The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.’

[5] Section 3 of the LRA requires a court to interpret the LRA’s provisions in a manner which gives effect to the Act’s primary

¹¹ At paragraph 25.

¹² Paragraph 27 of the guidelines reads:

‘The crucial issue that must be addressed is whether the formation involved employers associating with one another to establish an employer’s organisation.’

¹³ At paragraph 7, citing the Constitutional Court judgment in *National Union of Metalworkers of South Africa (NUMSA) v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus) (Pty) Ltd and Others* [2020] 7 BLLR 645 (CC).

objects, in compliance with the Constitution and in compliance with South Africa's public international law obligations. Freedom of association is given expression in section 8 of the LRA, which provides that every trade union and employers' organisation, subject to Chapter VI, has the right to determine its own constitution and rules and hold elections for its office-bearers, officials and representatives.'

[51] In relation to the regulatory framework which registered unions and employer organisations must comply, the LAC in *Simunye* reiterated what it had previously stated in the *JAWSA* judgment:

'[9] Registration as a trade union or employers' organisation, while not compulsory, provides both statutory protections and significant benefits, including the right to exercise workplace rights, bargain collectively and represent members in various fora, including at the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils. This, in exchange for a trade union or employers' organisation subordinating itself to the regulatory prescripts of Chapter VI, administered by the Registrar.'

(emphasis added)

[52] However, I do not believe the court intended to imply that this 'exchange' empowers the registrar to determine anything more than whether the requirements for registration in section 95 are met and whether the association is a genuine union or employer's organisation as defined in s 213 of the LRA. In determining if compliance is satisfactory, the registrar must bear in mind whether the purpose of a statutory requirement has been substantially achieved and, in deciding if the association is legitimate, the registrar's primary focus should be on whether it does fall within the definition of a union or employers' organisation. The registrar's powers do not extend to measuring compliance, or evaluating the true nature of the organisation, by comparison with the registrar's own conception of an ideal or typical organisational structure.

[53] Moreover, it must be remembered that an association's 'subordination' to the regulatory prescripts of Chapter VI as a condition of registration, must be interpreted in a way that least obtrudes on the freedom of the association to determine its own internal organisational arrangements and operations, in

keeping with the Article 3 of Convention 87 and in conformity with section 39(2) of the Constitution.¹⁴ Likewise, to the extent that the requirements of registration do limit the right to freedom of association, they cannot be construed in a manner that would be tantamount to applying the provisions of s 95 in a way that it would not satisfy the limitation test of section 36(1) of the Constitution¹⁵.

Evaluation

[54] Firstly, for I will address the contention that COMCONEA had not complied with the requirements of section 95(3) [a], [b] and [c] of the LRA. As mentioned, these are mandatory requirements. Secondly, the registrar's decision that the association was not a genuine employer's organisation will be considered.

Compliance with section 95(3) of the LRA

Compliance with s 95 [3] [a]

[55] The registrar's essential complaint is that he was not satisfied with the evidence provided by COMCONEA that it had adopted a name that met the requirements of subsection 95 [4]. The letter subsection nearly prohibits an organisation from adopting a name or abbreviated name which closely resembled that of another employer's organisation, and that might accordingly cause confusion.

¹⁴ '39(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

¹⁵ Section 36(1) states:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,' considering factors such as:

the nature of the right,

the importance of the purpose of the limitation,

the nature and extent of the limitation,

the relationship between the limitation and its purpose,

and whether there are less restrictive means to achieve that purpose'

- [56] It is true that there was no minutes of a meeting at which the founding members of COMCONEA agreed on the name of the Association. However, a resolution dated 8 June 2022 was adopted using a round robin procedure and was signed by representatives of each of the founder members, expressly confirming the establishment and name of the association as well as their status as founding members. The resolution expressly notes the collective bargaining form governing conditions of service of the employees is SARBAC and that they considered that sectoral collective agreements determining those conditions should establish a level playing field between competing employers insofar as wage levels are concerned.
- [57] The registrar fixated on the question of whether there was evidence of deliberations and discussions about arriving at the decision to form the organisation and about the choice of name and the adoption of the constitution. These considerations were important in leading to his decision that the formation process of the organisation was flawed. He rejected the resolution as evidence of compliance with s 95(3)(a) because it was merely a decision and without minutes showing how the decision was reached was not acceptable as proof of compliance.
- [58] The first and most obvious difficulty with the registrar's reasoning in this regard is that there is absolutely no basis for imposing a requirement that a joint decision by founding members of employer's organisation can only be validated by minutes of discussions preceding that decision. It is self-evident from the resolution that there was unanimous agreement amongst all the founding members to form COMCONEA and to adopt its name. To decide if s 95(3)(a) had been complied with all the registrar needed to determine was that the organisation had adopted a name which did not create the possibility of it being confused with another employer organisation. As such, the resolution signed by the founding members was more than adequate to establish this. The registrar erred in deciding that there was only one method of establishing whether the subsection had been complied with, and in doing so his application of the provision was unduly restrictive and did not promote freedom of association.

[59] It is also apparent that the registrar appeared to take a view that the guidelines were also to be used in determining if the mandatory requirements of section 95 were met. In so doing, the registrar erred in law because both section 95 [8] and paragraph 1 of the guidelines¹⁶ make it patently clear that they apply only in the determination of whether a union or employer's organisation is a genuine one. It seems that the arbitrator allowed his analysis of whether COMCONEA is a genuine employer's organisation to form part of his assessment as to whether section 95(3) was complied with, whereas the two inquiries are separate.

Compliance with s 95 [3] [b]

[60] On the question of whether COMCONEA had adopted a constitution meeting the requirements of sections 95 [5] and [6], the registrar adopted a similar approach in finding that it had not done so, namely that he was not satisfied that the Constitution was adopted in a properly constituted meeting of members. The absence of minutes in which deliberations on issues like governance rules and membership fees were discussed was evidence that it had never been adopted in a genuine meeting of the members. In passing I note that the registrar did not embark on an enquiry about whether the provisions of the constitution satisfied section 95(5) and (6) and has not contended these were not satisfied.

[61] The resolution of 8 June 2022 provided by COMCONEA included a provision that the Constitution was adopted by the founding members. As in the case of the adoption of its name, the organisation argues that the registrar impermissibly introduced formal requirements not provided for in section 95 nor even in the guidelines.

[62] The registrar's reasoning and conclusion regarding compliance with s 95 [3] [b] is flawed on the same grounds which applied to his reasoning under section 95(3)(a).

¹⁶ The relevant portion reads "**Purpose 1.** This document contains guidelines published by the Minister of Labour in consultation with Nedlac, that are to be applied by the Registrar of Labour Relations in determining whether an application for registration for in terms of the Labour Relations Act (LRA) is a genuine trade union for a genuine employer's organisation. In terms of section 95 [7] of the Labour Relations Act, the Registrar may only register a trade union or an employer's organisation if the Registrar is satisfied that it is a genuine trade union or genuine employers' organisation.'

Compliance with s 95 [3] [c]

[63] This provision merely requires that an employer's organisation 'has an address in the Republic. The registrar unnecessarily embellished this requirement by interpreting it to mean that it had to have an address of its own at premises owned or leased to it. He reasoned that because it used the same address as a founder member that it did not comply with the provision. COMCONEA correctly submitted that the logical purpose of providing an address of the organisation is for the purposes of service of documents, which is supported by section 97 [4] of the LRA which states that service at the address most recently provided to the registrar constitutes valid service.

[64] In conclusion, the registrar ought to have concluded that COMCONEA had met all the prerequisites of section 95(3).

Section 95(7) – Is COMCONEA a genuine employers' organisation?

[65] It is indicative of the registrar's conflation of the other requirements for registration under section 95 with the determination of genuineness that he did not separate his analysis of whether COMCONEA was a genuine organisation under section 95(7) from his determination of whether COMCONEA had complied with the section 95(3). For this reason there is some overlap between reasons he found it had not met requirements of section 95(3) and the reasons he doubted it was a genuine employer's organisation. Consequently, there is some degree of repetition in the issues considered, though the emphasis will be on their relevance to the determination of the genuine nature of COMCONEA as an employers' organisation.

The formation process

[66] As previously mentioned, the registrar found that COMCONEA failed to provide credible evidence of a proper inaugural meeting where employers associated together to form the organisation. Only a resolution dated 8 June 2022 was submitted, without minutes of the meeting. Subsequent meetings lacked signed attendance registers and were not credible.

[67] COMCONEA pointed out that such formalities are not pre-requisites for the formation of the association and ample proof of the founding resolution and adoption of the constitution was furnished. Moreover, affidavits were provided confirming the meetings held. Section 95(3)(b) stipulates what must be demonstrated in relation to the association's constitution and, once again, it is not essential to produce a minute of a meeting as proof of its adoption.

Address in South Africa

[68] This issue has already been canvassed above under the previous discussion of compliance under section 95(3)(c) and given that COMCONEA was compliant with that section, it should not have any bearing on the question of its genuine character.

Leadership Legitimacy

[69] The Registrar concluded that COMCONEA's leadership was dominated by individuals linked to Golden Arrow Bus Services (GABS), compromising independence. He noted, with disapproval that GABS in house legal advisor was being deployed as the secretary of COMCONEA, whereas she ought to have been its employee. These factors reinforce a theme running through the registrar's opposition to approving COMCONEA's registration is a barely disguised suggestion that COMCONEA is an artificial contrivance and not an employer's association in a genuine sense. Thus, for example, the registrar discerns the hidden hand of GABS behind the formation of COMCONEA, noting that most of the other members are its subsidiaries. In light of this he found the leadership of COMCONEA lacked legitimacy.

[70] It was neither unreasonable of the registrar to identify GABS as the driving force behind the establishment of COMCONEA, nor to believe it has influence over the other founding members who are its subsidiaries. However, the fact remains that each of the subsidiaries are corporate entities in their own right and are eligible to be individual members of COMCONEA, irrespective of whether they have corporate connections to GABS. They might have more common interests than if they were companies owned by a variety of different shareholders, but there is no reason why that commonality should prevent them

all belonging to the same employer's organisation, even if one employer might dominate any voting because membership voting rights of the founding members are pro-rated to the relevant staff complement they each employ. There is no statutory requirement that members of an employer's organisation should have the same voting rights.

[71] The issue which the registrar does not explain in raising this factor as an issue, is why he believes this tends to demonstrate that COMCONEA did not involve employers associating with one another to establish an employer's organisation.

Membership and finances

[72] The Registrar found no signed membership forms and noted large deposits from GABS and subsidiaries and concluded this was compliance-driven funding rather than representing genuine subscriptions.

[73] COMCONEA correctly notes that neither the LRA nor Guidelines require signed forms. Moreover, invoices for payment of membership fees were provided as well as bank statements and documents explaining how fees were determined. The fact that deposits far exceeded expenses at the stage it applied for registration was simply because the organisation was at an early stage of establishment and expenditure was limited. Proof of the existence of COMCONEA's bank account was provided.

[74] Quite apart from this, the founding resolution identified all the founding members and their representatives signed the resolution. Although the registrar seems to have acknowledged that membership fees were paid, he seems to have regarded proof of membership fee payments as an aspect of compliance despite this not being a requirement for registration. To the extent that he regarded it as relevant to the question whether it was a genuine organisation, his deduction that the deposits made appeared to be solely for the purpose of compliance is difficult to fathom. Proof of such membership fee payments for registration purposes is not required, so even on a hypothetical basis they could not have been made for compliance purposes. Even the guidelines do not identify this as an indicator of the genuine nature of the organisation. In any

event, there was no factual basis for the registrar to consider that the payments made was some kind of sham transaction.

Democratic Principles

- [75] The Registrar found that the constitution restricted eligibility for presidency to founding members, and this undermining democratic governance. COMCONEA contends that its constitution provides for election by consensus or two-thirds majority, consistent with democratic principles. Undoubtedly, any non-founder member would be at a permanent disadvantage if it had aspirations to attain the presidential office. The question is whether the registrar is entitled to demand a more open system of candidacy.
- [76] Section 95(5) of the LRA sets out what issues a union or employers' organisation must contain. While it is required to contain election procedures, meeting procedures and the like, the LRA does not impose any limitations on the minimum features such procedures must contain. Nowhere does it prescribe that the constitution may not contain any provisions which differentiate between classes of members. The only limitation is contained in section 95(6) which prohibits direct or indirect discrimination against anyone on grounds of sex or race. Neither does it prescribe that only one class of membership is permitted or require a constitution to measure up to a particular democratic model. This approach is consistent with a recognition that unions and employers' organisations are voluntary associations which enjoy a degree of autonomy in the manner they conduct their affairs.
- [77] The legislature might have decided to impose a requirement that constitutions could not have classes of members with different rights or that all structures had to satisfy certain egalitarian standards, but it did not. It does not lie within the discretion of the registrar to assume the role of the legislature in that regard by evaluating constitutions against his own yardstick of what they ought to contain. Moreover, he does not explain why the rules governing election of a president are indicative that COMCONEA is not a genuine employers' organisation.

Appointment of a secretary

- [78] The registrar found the appointment of De Jongh as the secretary of the applicant to be irregular.
- [79] Clause 13 of the constitution provides for the appointment of a secretary by the executive committee. The clause also sets out the duties the secretary must perform. De Jongh was employed by GABS as a legal advisor under a conventional contract of employment. In September 2022, COMCONEA, GABS and De Jongh concluded an agreement in terms of which she accepted appointment as the secretary of the organisation on a part-time basis and GABS agreed to make her available during her ordinary working time to perform the duties of a secretary. The agreement did not constitute a new employment contract and could be terminated by any party on notice, without affecting her employment with GABS.
- [80] The registrar was concerned that in terms of section 213 of the LRA, she could not qualify to perform the work of the secretary even on a part-time basis because she was not employed by COMCONEA. In terms of the definition of an official a secretary of an employers' organisation is deemed to be one.

“official” in relation to a trade union, employers' organisation, federation of trade unions or federation of employers' organisations means a person employed as the secretary, assistant secretary or organiser of a trade union, employers' organisation or federation, or in any other prescribed capacity, whether or not that person is employed in a full-time capacity. And, in relation to a council means a person employed by a council as secretary or in any other prescribed capacity, whether or not that person is employed in a full-time capacity;..

- [81] The LAC in *Simunye* did not accept that SWF's constitution provided for the office of a secretary as required by section 95(5)(i)¹⁷ of the LRA because it allowed for a different secretary to be appointed at each meeting and merely because that person had to keep record of the meeting in a minute book did not

¹⁷ The section (i) establish the office of secretary and define its functions;

meet the threshold of defining the functions of the office of a secretary¹⁸. In this instance, COMCONEA's constitution does make provision for the establishment of the office of a secretary and defines the functions. The question remains whether De Jongh is properly appointed as an official owing to her employment by GABS. Even though the parties have reached an agreement that should ensure she can fulfil the secretarial function on a part time basis, while remaining an employee of GABS, this arrangement would seem to amount to a form of a part-time secondment of De Jongh to perform duties for COMCONEA, while she remains employed by GABS. On the face of it this does not seem to satisfy the requirement of the definition of an official in section 213.

[82] Accordingly, the registrar might well be correct that her engagement on a part-time seconded basis does not mean she can be considered an official of the union. Even so, the clause in COMCONEA's constitution governing the secretarial office is concerned only with complying with section 95(5) in establishing the office of secretary. The question of compliance raised by the registrar relates not to the constitution itself, but whether De Jongh's appointment as secretary is compliant with the LRA. Clearly, this is an issue which needs to be resolved if problems are not to be encountered later as to whether she can properly perform the statutory functions of a secretary, but that does not have a direct bearing on whether the association can be registered because it is not a breach of section 95(5)(j) as such, nor does it seem to be relevant to whether the registrar was confronted with a *bona fide* employers' organisation. Whether De Jongh's appointment is in conformity with the LRA is a separate matter from whether COMCONEA's constitution has complied with s 95(5)(i).

[83] What is startling about the registrar's approach to determining the genuineness of the organisation, is that absolutely no attention was paid to the very reason why COMCONEA was formed in the first place. If that is considered, it is blindingly obvious that it originated precisely out a legal obligation (the settlement agreement) and the objective of being able to participate in SARBAC's collective bargaining forum. That objective is one of the very

¹⁸ At paragraph 39.

reasons why the LRA provides for the registration of employer organisations and answers the 'crucial issue' posed in paragraph 27 of the guidelines, namely whether the formation involved employers associated with one another to establish employer's organisation.

Conclusion

[84] In light of the reasoning above, I am satisfied that the registrar erred in his findings of fact and law and on a proper consideration of the issue he was required to determine, COMCONEA ought to have registered, even if he had legitimate concerns about whether the terms of the secretary's appointment were satisfactory.

[85] Accordingly, the registrar's decision to reject COMCONEA's registration application must be set aside and replaced with a decision that it must be registered. In passing, I must express concern at what appears to have been a very partial approach adopted by the registrar to the application, which was not warranted on the information provided in support of the application. Far from promoting collective bargaining by representative organisations, the decision obstructed progress being made to achieve that objective. To the extent that the registrar exercises a gatekeeping role in deciding to register unions and employer organisations, based on whether they are bona fide organisations the enquiry should be guided by the kind of mischief that the guidelines were intended to thwart, such as organisations established for profit, or to permit them to represent parties in the CCMA or in court.

Order

1. The appeal against the decision of the Respondent on 9 October 2023 not to register the Appellant as an employers' organisation under section 96 of the Labour Relations Act, 66 of 1995, is upheld.

2. Within 15 days of the date of this judgement, the Respondent must register the Appellant by entering the Appellant's name in the register of employers' organisations.
3. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

S Harrison from Edward Nathan
Sonnenbergs Inc.

For the Respondent:

S Tshungu

Instructed by:

State Attorney Cape Town