

SOUTH AFRICA / JUDGMENT

African Labour Civil Rights Union v Registrar of Labour Relations (J 1605/17) [2018] ZALCJHB 370 (9 November 2018) [2018] ZALCJHB 370

COURT

Labour Court Johannesburg

BEFORE

Steenkamp

CASE / FILE NUMBER

J 1605/17

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Of interest to other judges

case no: J 1605/17

In the matter between:

AFRICAN LABOUR CIVIL RIGHTS UNION (ALCRU) Appellant and REGISTRAR OF LABOUR
RELATIONS Respondent

Heard: 23 October 2018

Delivered: 9 November 2018

Summary: Appeal against Registrar's refusal to register trade union –

LRA ss 95-96 and 111.

STEENKAMP J

Introduction

[1] This is an appeal in terms of s 111(3)(b) of the LRA.[1]

- [2] The Registrar of Labour Relations refused to register the appellant, ALCRU, as a trade union following its application in terms of ss 95 and 96 of the Act. The union appeals in terms of s 111(3)(b).

Background facts

- [3] The union applied to be registered on 7 February 2017. The Registrar requested additional information. On 16 February 2017 his office sent the union a letter that is worth quoting in full:

“Your application for registration of a trade union received on 7 February 2017 refers.

1. The Registrar, in considering applications for registration, does so in terms of registration requirements of sections 95 and 96 of the Act. In addition to the above the Registrar must take into consideration the guidelines published in terms of section 95 (8) of the Act.
2. The applicant is hereby informed in terms of section 96 (4) of the Act that the accompanying information submitted with the application

do not meet the requirements for registration in terms of section 96

- (4) of the Act and you are here with afforded an opportunity in terms of section 96 (2) read with (4) of the Act to prove that the applicant complies with the Act and that it is a genuine trade union.
3. In considering a new application for registration the Registrar must take into account other factors such as the formation of the applicant, and of the applicant [sic].
4. In order to enable this office to determine whether the application complies with the Act and is a genuine organisation, the following information should be submitted for consideration:

4.1 The minutes and signed attendance register when the union was established and where the constitution was adopted. Also submit

minutes of any other meetings held and signed attendance registers;

4.2 List of names and work addresses of all office bearers and officials, indicate clearly who officials are and who are office bearers and contact details of companies they work for;

4.3 Submit details of the previous involvement of the office bearers in other labour organisations;

4.4 Submit proof that all office bearers are paying their membership fees;

4.5 Submit proof of employment of office bearers in the form of salary payslips;

4.6 Submit all the expenditure and income documents as well as copies of proof of expenditure already incurred (include also the commission and travel allowances);

4.7 Submit application forms that have been completed by the members who have joined the applicant trade union which should include the identity numbers of the employees;

4.8 Submit proof of paid-up membership for the last 3 months and indicate the sectors members are employed.

4.9 Submit a copy of the signed lease contract of the applicant organisation's office(s).

4.10 It must be borne in mind that if the new constitution is compiled, another meeting should be held to adopt the constitution as indicated in 4.1 above.

The union is also requested to replace chapter 19 (ballots) with the attached ballot clause.

The union is also requested to provide clarity on the following concerns raised by this office:

Why should associate and retired members be entitled to benefits as they are no longer employees?

Borrowing of money in chapter 20 (71) "credit and debt", did the union receive any approval from FSB to borrow money on credit, please submit the proof.

Chapter 3 clause 11(1.1)(a) contradicts chapter 3 clause 13(2-3). How can an unemployed person remain a member of the union. [sic]. Your constitution says the member remain [sic] in good standing when subscription fees are not more than 3 months in arrears.

It is also noted that the numbering of clauses is incorrect, please rectify, attached find your constitution reflecting changes on the numbering.

It should however be brought to your attention that this office, when considering an application for registration takes a decision based firstly on the actual statutory registration requirements in terms of section 95 of the Act and secondly on the provisions of the guidelines 95 (8) of the Guidelines.

In terms of section 95(7) of the Act "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".

In terms of section 95 (8) of the Act, the Minister has issued Guidelines in consultation with NEDLAC, which were published in the

Government Gazette on 10 October 2003 and are to be applied by the Registrar in determining whether an applicant for registration is a genuine employers' organisation [sic].

You are hereby in terms of section 96 (4) given written notice that the application does not meet the requirements for registration and you are given 30 days from the date of this letter to meet those requirements.

Your cooperation will be appreciated.

Yours faithfully

REGISTRAR OF LABOUR RELATIONS”

[4] In response, the union submitted the following documents:

4.1 A document with the heading: “30 April 2016 MINUTES OF A MEETING HELD AT MBT (BAPSFONTEIN)”.

4.2 A document headed MEETING FOR DRIVERS and dated 30 April 2016.

4.3 A list of 20 names of people who attended a meeting at MBT petroleum on 30 April 2016.

4.4 A document headed 01 MAY 2016 MINUTES OF A MEETING HELD AT HONEY LOTUS

4.5 A document headed MEETING FOR DRIVERS and dated 1 May 2016.

4.6 A list of some 31 names of people who attended a meeting at Honey Lotus on 1 May 2016.

4.7 A document headed PROPOSAL FOR A MEETING – READING AND ADOPTION OF CONSTITUTION with the date 15 May 2016 and the venue 64 Allandale Park, Midrand.

4.8 Minutes of a meeting held at Midrand (undated).

4.9 A list of 35 names of people attending a “union meeting” at MBT Petroleum on 15 May 2016.

4.10 A document headed BACKGROUND OF THE FORMATION OF THE TRADE UNION MOVEMENT containing the following annotation:

“BELOW IS THE FIRST SITTING:-

DATE: 7th May 2016

TIME: 10h00

VENUE: Block 64 Allandale Park, Midrand.”

4.11 Some 85 signed application forms for ALCRU membership.

[5] The minutes of the meeting of 30 April 2016 reflects the following under the heading, “Establishment and registration of a trade union”:

“During the meeting workers discussed that due to their working conditions, exploitation and unfair labour practices they are encountering at the workplace. [sic]. The workers voice that when they try to challenge and engage their employees individually when they [sic] having problems in the workplace; they are always being victimised by their employers. Workers said they are not allowed to exercise their rights the workers felt that the voices are not being heard by the employers and I always being exploited by the employers because they are unorganised; then they decided that they need to so that their voices can are heard [sic] by their employers and that their challenges can be addressed in a structured manner.

After all that was said during the meeting: the workers agreed that they need to have two names from the workers that will form the interim structure to assist Mr P Khubeka in making sure that the meetings that will deal with the establishment are coordinated.”

[6] The minutes reflect that the workers identified Messrs Peter Moopeloa and Alfred Mnono “to make sure that the establishment and registration of the union is coordinated to all the employees.”

[7] The minutes of the next meeting “for drivers” at Honey Lotus on 1 May 2016 contain verbatim the same passage under the heading, “Establishment and registration of a trade union”. The only difference in the minutes appears to be that a further two names are added “to make sure that the establishment and registration of the union is coordinated to all the employees”, namely Messrs Isaac Motha and Sphamandla Jiyane.

[8] It appears that a meeting was then held on 7 May 2016 in Midrand, attended by five people, viz Messrs Kubheka, Motha, Jiyane, Mnono and Moopeloa. They agreed on the name of the union (ALCRU). The minutes then reflect:

“A proposal was made that the union need a constitution to be registered, as well as members who will join the union and pay the

monthly subscriptions. The challenge was how the members can join the union which is not registered. Finally it was agreed that the constitution should be drafted.”

[9] The final set of minutes appears to be that of Midrand, apparently on 15 May 2016. At that meeting “the constitution was read by the General Secretary, before the workers” – apparently the 35 workers present who signed what appears to be an attendance register. The constitution was adopted and “the NEC signed a document of resolution to open the bank account to any registered bank in South Africa.” It was also suggested that the union should be registered as soon as possible.

[10] After the union’s application for registration in February 2017, the Department of Labour submitted a report on the verification

of the application for registration to the Registrar on 29 March 2017.

[11] The report referred to the full set of minutes outlined above. It noted that only 20 people attended the meeting of 30 April

2016. The report states that “the executive committee elected themselves” and that “there is no clear indication on how the constitution was drafted as there are duplicates of minutes”. It concluded that there was no proper adoption of the constitution; that members did not participate in the drafting and adoption of the constitution; and that there was no proper formation of the trade union.

- [12] The report also states that the union does not have any current activities. It claims to have 171 signed copies of application forms and it submitted a typed list of 109 people purported to be paid up members. But when an official of the Department randomly contacted some of those individuals, some denied having any knowledge of the union (ALCRU) and others claimed to belong to AMCU (the Association of Mineworkers and Construction Union). The report expressed doubt that the union has members in good standing.
- [13] The report further states that, although the union had submitted a bank statement in the name of the union reflecting a balance of R5,36 (five Rand and thirty six cents), it was established that the union was using an ATM card to withdraw cash from the bank. That cast some serious doubt about the financial control over the union's finances. It concluded that the union does not have proper control of expenditure.
- [14] With regard to the premises of the union, the report had regard to a copy of the lease agreement entered into between the union and Jeany Enterprises (Pty) Ltd for the months of December 2016 and January
2017. However, it was also established on verification that the union had moved to a different location.

[15] In conclusion, it was recommended that the application for registration be refused.

The Registrar's decision

[16] The Registrar wrote to the union on 8 May 2017 and said:

"Your application for registration of a trade union dated received [sic] on 7 February 2017 [sic].

You are hereby notified that your application was perused and found not acceptable for approval and is turned down on the following grounds:

- There was no proper formation of the trade union;
- Union do [sic] not have members; and
- No financial accountability could be traced in the minutes of the meeting.

This is therefore not a genuine trade union as envisaged in the Act.

Consequently you are advised that the application is refused with effect from 8 May 2017."

[17] On 15 May 2017 the union requested reasons for the refusal. The Registrar responded on 14 June 2017. He referred to the Guidelines

issued by the Minister in terms of s 95(8) in consultation with NEDLAC. He elaborated on the following criteria contained in the

Guidelines:

17.1 Formation of a trade union: The Registrar referred to key aspects, including the number of: the means by which the constitution of the trade union was drafted and adopted; and the election of an executive committee. He noted that only 20 individuals attended the inaugural meeting on 30 April 2016; that an interim committee appears to have already been in place before 30 April 2016 and that it was not clear how the interim committee was nominated; that the appointment of the interim committee had no basis in the union's own constitution; and that, effectively, no leadership was elected. He also noted that the minutes of the meeting of 1 May 2016 and the agenda were the same as the one for 30 April 2016, apart from 2 individuals being added to the interim committee; and that 35 individuals signed the attendance register for the meeting 15 May

2016. The attendance register for 7 May 2016 indicates that only members of the interim committee were present during that meeting. All of these statements are an indication that the meeting of 7 May 2016 was not a meeting of employees associating together with the purpose of regulating relations between employers and employees. The registrar concluded that the fact that individuals behind the establishment of the trade union failed to involve members in the whole process is a clear indication that the process of establishing union was flawed. There was no proper formation of the trade union as required by the Guidelines.

17.2 Membership of the trade union: The union claimed to have 121 members, of which 72 were reflected as paid-up members. It submitted 171 signed copies of application forms for membership. The application forms reflect membership fees to be "R60 or R90, whichever is the greater" while the constitution submitted by the union provides for a monthly subscription fee not exceeding 1,5% of the member's basic salary. When the case official randomly contacted individuals that appear on the application forms, some denied having any knowledge of ALCRU and others claimed to belong to AMCU. That created doubt that the union has members in good standing.

17.3 Association not for gain: The Registrar noted that the union was using an ATM card to withdraw money, which casts some serious doubts about financial control by the union. The president of the union also confirmed during verification that he had the ATM card. "The availability of the ATM card indicates that the money can be withdrawn by anybody, anytime and anywhere. This is unacceptable as it clearly indicates that the applicant union does not have proper financial control and accountability."

[18] The Registrar concluded that it is evident that the union does not have proper control of expenditure and cannot be regarded as a genuine trade union as envisaged by the Act. He concluded that there was no proper formation of a trade union; the union does not have members; and there was no financial accountability. He concluded that it was not a genuine trade union as envisaged by the Act and therefore the application for registration was refused.

Grounds of appeal

[19] The applicant union has raised four grounds of appeal:

19.1 The Registrar erred in concluding that there was no proper formation of a trade union;

19.2 the Registrar erred and misdirected himself in the minutes of the meeting on 15 May 2016;

19.3 the Registrar erred in concluding that the union does not have members; and

19.4 the Registrar erred in concluding that the union does not prove financial accountability in the minutes of its meetings.

Evaluation

[20] I shall consider each of the grounds of appeal in turn. At the outset, it must be borne in mind that this is a proper appeal in terms of s 111 of the Act and not a review. This Court must decide whether section of the registrar was correct, and not merely whether he acted reasonably.[2]

Formation of the trade union

[21] The Guidelines provide the following guidelines in clause 7:

“The process followed to form trade union can give important indications as to whether an organisation is a genuine trade union. Key aspects of the process that should be examined include –

- the number of founding members who attended the inaugural meeting(s) to establish the trade union and who completed signed registers indicating their names and place of work;
- the means by which the constitution of the trade union was drafted and adopted;
- the election of an executive committee or council of members and the election of office bearers.

The crucial issue that must be addressed is whether the formation of a trade union involved employees associating with one another to establish an organisation to regulate relations with their employees.”

[22] The registrar considered the fact that only 20 members (or workers) attended the meeting of 30 April 2016. And only the five members of the “interim structure” attended the inaugural meeting of 7 May 2016.

[23] Mr Serage submitted that it is clear from the minutes of the 30th April meeting “that the individuals who met were employed by MBT (one company) and they agreed to form a trade union.” But that is far from clear. The Registrar correctly took into account that only 20 workers attended that meeting and that, apart from deciding that they needed to organise themselves in the form of a trade union, the only agreement reached was that to workers were identified to “form the interim structure to assist Mr P Khubeka”.

- [24] The registrar correctly found that the election of an executive committee was not done in accordance with the union's own constitution. And although the constitution was adopted on 15 May 2016, it appears to have been drafted by the five members present at the meeting of 7 May 2016 without any involvement of the members.
- [25] Having considered the evidence before the Registrar, I agree with his view that the applicant union has not established that it was formed with the aim of operating as a genuine trade union. Although the small number of employees allegedly involved in its formation cannot be viewed as a simple numbers game – for example, it is conceivable that a trade union with 20 members can have a significant impact in a small workplace with, say, 30 employees – it is remarkable that ALCRU claims more than 171 members when only 20 people attended the first meeting. The way in which the constitution was drafted and adopted also points to minimal involvement by the membership. And, as the verification report pointed out, the “interim committee” appears to comprise a self-appointed president and four other individuals who were appointed by a small group of workers at two subsequent meetings.

The meeting of 15 May 2016

- [26] The union raises as a ground of appeal that the Registrar did not consider that, at the meeting of 15 May 2016, the union's constitution was “adopted and signed”; that it resolved to open a bank account; and to have the union registered.
- [27] That meeting was attended by 35 individuals. The minutes reflect that they did “adopt” the constitution, although they were not involved in its drafting. And it was not signed, contrary to Mr Serage's submission: the minutes only reflect that “the way forward was that the President and the General Secretary are mandated to sign it and disclose it when opening the bank account, furthermore it should be submitted when the union is registered [sic] to the registrar.”
- [28] It is so that the “NEC” signed a “document of resolution” to open a bank account. But the Registrar pointed out that no NEC was properly appointed; and there was no proper financial control over the use of the bank account, to the extent that Mr Khubheka (or anyone else) could simply withdraw cash from an ATM. That consideration by the Registrar is not open to appeal.

Membership

- [29] The verification team found that some of those who purported to have signed application forms for ALCRU did not even know about the union, and others claimed to be members of AMCU. Mr Serage did not place any evidence to the contrary before the Registrar or this Court. I agree with the Registrar that that cast serious doubt upon the claimed membership of the union. His consideration of that factor cannot, in my view, be overturned on appeal.

Financial accountability

[30] The Registrar noted that the union is using an ATM card to withdraw money from its bank account which casts serious doubts upon its financial control. And the ATM card makes it possible that “money can be withdrawn by anybody, anytime and anywhere”.

[31] The Registrar correctly found that the union does not have proper control of expenditure. The refusal to register the union on that additional ground is not open to appeal.

Conclusion

[32] I agree with the decision of the Registrar. On the documents submitted by the union, he correctly found that it is not a genuine

trade union and refused to register it. In my view, it is the correct decision.

[33] In law and fairness, I do not believe that the union should be held liable for costs. The formation of trade unions should not be discouraged and I do not believe the appeal was frivolous.

Order

The appeal is dismissed.

Steenkamp J

APPEARANCES APPELLANT: T M Serage (attorney). RESPONDENT: M Rantho Instructed by the state attorney.

[1] Labour Relations Act 66 of 1995.

[2] IMATU v MATUSA (2017) 38 ILJ 1283 (LAC); MATUSA v Crouse N.O. (2015) 36 ILJ 3122 (LC).

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