

SOUTH AFRICA / JUDGMENT

Commission for Conciliation, Mediation and Arbitration v Registrar of the labour Relations and Others (J984/10) [2010] ZALC 110; [2010] 11 BLLR 1151 (LC) ; (2010) 31 ILJ 2886 (LC) (27 July 2010) [2010] ZALC 110

COURT
Labour Court

BEFORE
Molahlehi

CASE / FILE NUMBER
J984/10

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IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN CAPE
TOWN
REPORTABLE
CASE NO: J984/10

In the matter between:

COMMISSION FOR CONCILIATION
MEDIATION& ARBITRATION
APPLICANT
and
THE REGISTRAR OF THE LABOUR
RELATIONS 1st
Respondent
UNITED POEPLS UNION OF
SOUTH AFRICA 2nd
Respondent
HARMONY GOLD MINING
COMPANY LIMITED
3rd
Respondent

JUDGMENT

Molahlehi J

Introduction

The applicant (the CCMA) is seeking an order suspending the bringing into effect the cancellation of the registration of the second respondent (UPUSA) as a trade union by the first respondent (the Registrar) pending the outcome the appeal.

The Registrar took the decision to de-register UPUSA in terms of s106 (2A) of the Labour Relations Act 66 of 1995 (the LRA). The appeal is lodged in terms of s111 (3) of the same legislation.

The third respondent brought an application to be joined as interested party in these proceedings. The joinder application was granted regard being had to both the interest expressed in the application and the fact that the other parties did not oppose it.

In the course of preparing this judgment the opinion which had been prepared for the CCMA by its attorneys of record was erroneously emailed to me. The parties were notified about this issue and agreed that the opinion be circulated and that the court should proceed with its finalization of the judgment. No response was however received from UPUSA's attorneys. I proceeded to finalize a judgment despite this, because what is contained in the opinion is no different to the heads of arguments of the CCMA.

The parties

The CCMA is a public dispute resolution body established in terms of the LRA. The Registrar is an officer appointed and designated by the Minister of Labour to perform the function of the registrar of labour relations in terms of s108 of the LRA. UPUSA is a trade union whose rights to perform its function and exercise its rights under the LRA has been put in issue because of its de-registration by the Registrar. Harmony Gold Mining is a company registered in the terms of the company laws of the country and is involved in this matter because of the dispute that has arisen between it and UPUSA concerning organizational rights. The dispute between the two parties arose because Harmony Gold Mining contends that UPUSA no longer have organizational rights because of its de-registration by the Registrar.

Background facts

UPUSA was de-registered as a trade union by the Registrar on 2nd October 2009. The de-registration occurred after the Registrar had called on UPUSA to show cause why it should not be de-registered.

Thereafter UPUSA brought an urgent interdict against the Registrar when it received notice of the intention publish the cancellation.

The Registrar's reasons for the cancelation of the registration of UPUSA are set out in the judgment of Van Niekerk J in the urgent application which is reported in *United People's Union of SA v Registrar of Labour Relations* (2010) 31 ILJ 198 (LC). The reasons are:

UPUSA had ceased to function in terms of its constitution;

UPUSA had not complied with section 98, 99 and 100 of the LRA; and

UPUSA had ceased to operate as a genuine trade union.

UPUSA responded to the invitation to make representation as was contained in the Registrar's notice and contended that it should not have been de-registered because of reasons stated in that representation. There is some dispute as to whether the Registrar did receive UPUSA's representation. Be that as it may, the court in the same matter in considering the urgent interdict found that UPUSA did not in its presentation, attached to the court papers, address the issues raised by the Registrar and further that there were two qualified audits on the financial statements of UPUSA.

UPUSA's urgent application was dismissed for reasons, which are not necessarily relevant for the purpose of this

judgment.

However, what is important is the observation made by the Learned Judge at paragraph [10] of his judgment wherein he states the following:

[10] Mr. Lengane, who appeared for UPUSA, made much of the consequences that a refusal to grant interim relief would visit on UPUSA. Indeed, those consequences have already manifested themselves in the form of the withdrawal of recognition and organizational rights by a number of employers following on the Registrar's decision. This may be so, but UPUSA has only itself to blame. Trade unions are public institutions, not private businesses. The act of registration confers many benefits on those trade unions that seek to be registered. But these benefits come at the price of submission to the reporting requirements established by section 100 of the LRA, all of the requirements that are intended to provide a guarantee to union members that their membership subscriptions have been utilized to further their interests. A failure by a registered trade union to comply with section 100 and to keep books of account and records to the standard required by section 98 undermines this statutory guarantee. Ultimately, it is the Registrar who is the underwriter of this warranty, and like all underwriters, the Registrar must protect the general interest at the expense of the particular when this is necessary. The Registrar is accountable to the public as a whole should a registered trade union (or employers' organization, for that matter) fail to implement the required financial and administrative controls, and a degree of due diligence by the Registrar in enforcing the relevant requirements of the Act is therefore necessary.

On 20th October 2010 UPUSA lodged its notice of appeal in terms of s 111 of the LRA, which appeal is apparently still pending before the Labour Court.

The case of the CCMA is that subsequent to launching the appeal UPUSA and other stakeholders addressed correspondence to it regarding the status of UPUSA in representing employees in various dispute resolution processes conducted by the CCMA since its de-registration. In one of the

letters to the CCMA, UPUSA indicated that its view is that it continued to enjoy the rights it had before de-registration and will continue to represent its members in the CCMA processes until such time that its appeal against the decision of the Registrar is finalized.

It seems that the CCMA accepted the position taken by UPUSA that pending the appeal it was entitled to all the rights and benefits it enjoyed before cancellation of its registration. It was because of this that the CCMA sent a memo to its commissioners advising that UPUSA will continue to enjoy the right of representation in the various processes pending the outcome of the appeal launched in terms of s111(3) of the LRA.

The case of the CCMA is further stated in the founding affidavit as follows:

8.20 Following receipt of this letter (letter from the Registrar complaining about the position taken by the CCMA) the CCMA sought external legal advice. This advice confirmed the CCMA's view that the effect of the trade union's appeal was to suspend the effect of the decision to cancel registration of the trade union; that the urgent application brought by UPUSA had,

however, been misconceived; and that the decision of the Labour Court in those proceedings did not deal directly with the legal position as it was understood by the CCMA.

8.21 The records in possession of the CCMA show that UPUSA has referred some 194 disputes to the CCMA over the past 7 months - between October 2009 and April

2010. There are currently some 85 formal processes pending to which UPUSA is a party.

8.22 Despite the view of the CCMA on the status of UPUS pending the appeal against its de-registration, differences of opinion continue to bedevil these processes. This has a significant and detrimental impact on the CCMA and its operations. In summary and from the information that is fed back to me in my capacity as the National Senior Commissioner for dispute resolution:

Employer parties continue to take issue, on almost every occasion, with the standing of UPUSA and to dispute its right to represent members in proceedings before the CCMA. This frequently results in interlocutory applications being argued, delays in the conduct of matters, and clogging of the CCMA's dispute resolution systems.

Different commissioners have taken different views on the issue. Despite the CCMA's guidance to its commissioners on the issue, some commissioners genuinely believe that the approach is incorrect and deny UPUSA the right to represent members in proceedings before them.

The Registrar and other representatives of the Department of Labour continue to believe that the CCMA is undermining the role and functions of the Registrar in relation to the de-registration of trade unions, and that it is acting in breach of the provisions of the LRA either commissioners allow UPUSA to represent its members in processes or refuse to allow this, dissatisfied parties have threatened to bring or have brought review applications on this ground, or on other grounds related to UPUSA's standing as a trade union..”

The other part of the CCMA’s case can be found at paragraph 9 (nine) of the founding affidavit where it is stated as follows:

“9.3 The applicant is currently faced with a large number of existing disputes involving UPUSA, one of the trade unions whose registration has recently been cancelled by a decision of the Registrar, but which has lodged an appeal to the Labour Court against that decision. UPUSA is not the only trade union in this, or a similar, position. The National Entitled Workers Union has also been informed by the Registrar that it is to be deregistered, and the union is in the process of appealing that decision. The same question is likely to arise on a regular basis in the future with similar consequences for the dispute resolution system.

The divergent views as to the correct legal position frustrate and undermine the primary objects of the LRA, which include the promotion of orderly collective bargaining and the effective resolution of labour disputes. Where it has no clarity as to the correct legal position, the applicant is unable to comply with its role of providing simple and effective procedures to resolve disputes.

The confusion that results in a large number of processes in the CCMA also has a negative impact on the CCMA's ability to deal with disputes fairly, quickly, and with the minimum of legal formalities.

There is a real risk that decisions of commissioners on this issue, which are made on an almost daily basis, will produce review applications and the proliferation of collateral litigation both in the CCMA and in this Honourable Court.

If the declaratory relief sought in this application is granted, this Honourable Court would avoid these consequences and this would assist the CCMA to further the objectives of the LRA in relation to dispute resolution.

The sooner the declaratory relief is obtained; the sooner there will be clarity and consistency on the correct approach to be followed. The result will be that the law will develop in a coherent manner and there will be compliance with the purposes of the LRA.

In these circumstances, I submit that the matter is sufficiently urgent to be heard in the timeframes set in the notice of application, and respectfully request this Honourable Court to condone non-compliance with the Labour Court Rules or the ordinary procedures regarding the scheduling of matters.”

The statutory frame work for registration and deregistration

The requirements for registration of trade unions are dealt with in terms of the provisions of s95 of the LRA. And once registered a trade union derives certain rights and benefits from its status as a registered union. A registered trade union that is sufficiently representative of the workers in the workplace is entitled to certain organizational rights such as access to the workplace, the payment of union dues, appointment of union representative and the right to represent its members in the labour relation process that may take place at the workplace including those at the CCMA.

However, in order to retain that status there are certain obligations which the LRA imposes on the union. In this respect the union is obliged in terms of s99 of the LRA to maintain a list of its members, minutes of meetings and ballot papers for specified period.

If a trade union is de-registered it will lose the rights and benefits referred to above, including more importantly for the purposes of this judgment the right to represent members in the CCMA proceedings.

The de-registration of a trade union may take place in terms of s106 (2A) and (2B) of the LRA. Section 106 of the LRA reads as follows:

"(2A) The registrar may cancel the registration of a trade union or employers' organization by removing its name from the appropriate register if the registrar -

is satisfied that the trade union or employers' organization is not, or has ceased to function as, a genuine trade union or employers' organization, as the case may be; or

has issued a written notice requiring the trade union or employers' organization to comply with sections 98, 99 and 100 within a period of 60 days of the notice and the trade union or employers' organization has, despite the notice, not complied with those sections.

2(B) The registrar may not act in terms of subsection (2A) unless the registrar has published a notice in the Government Gazette at least 60 days prior to such action-

giving notice of the registrar's intention to cancel the registration of the trade union or employers' organization; and

inviting the trade union or employers' organization or any other interested parties to make written representations as to why the registration should not be cancelled."

On the other hand the right to appeal against the decision of the Registrar to cancel registration of the Trade Union is provided for in s 111 of the LRA. Section 111 (3) reads as follows:

"3 Any person who is aggrieved by a decision of the registrar may appeal to the Labour Court against that decision, within 60 days of-

- (a) the date of the registrar's decision; or
- (b) if written reasons for the decision are demanded, the date of those

reasons.

The Labour Court, on good cause shown, may extend the period within which a person may note an appeal against a decision of the registrar.”

The CCMA argued that unless the statute provides otherwise where there is a right of appeal against an administrative decision, such a decision will be automatically

suspended pending the finalisation of the appeal. The argument is based on the view expressed by De Ville; “Judicial Review of Administration Act in South Africa” at page 334 and a number of cases which were relied upon by the CCMA. Because of the view taken on the approach to be adopted in this matter I do not deem it necessary to canvas those views in this judgment. The same applies to the Road Traffic and Revenue Tax cases relied upon by the CCMA and UPUSA. It was further argued that unless the relevant statute provided otherwise, the lodging of an appeal suspends the effect of the decision pending the outcome of the appeal.

The CCMA based its argument also on the analogy between the effects of an appeal on a judgment of a court of law. In my view the rule governing the consequences of appeal in a judgment of a court is trite. The rule which is accepted in general practice is that an appeal stays the enforcement or execution of a judgment or an order of a court.

In line with the view of the CCMA, it was argued on behalf of UPUSA that the rule applicable to the suspension of judgments of the court when an appeal has been noted should also apply. It was argued in this respect that the fact that the legislature was silent about the consequences of an appeal against the decision of the Registrars does not exclude the operation of the common law rule that automatically suspend the decision of a judgment pending the outcome of an appeal.

I agree with Mr Cassim for the Registrar that Baxter & De Ville in the view they express about this matters of this nature makes a lose and general point. Their views are based largely on the cases that deal with the situation where the statute expressly provides for suspension pending the outcome of the appeal.

In my view this matter turns around the interpretation of the LRA in relation to the consequences of de-registration followed by an appeal.

Mr Todd for the CCMA in seeking to persuade me to accept the interpretation of s111 (3) to mean that an appeal suspends the decision under s106 of the LRA, made reference to the provisions of item 5 of Schedule 7 to the LRA.

Item 5 of schedule 7 of the LRA deals with transitional arrangements relating to trade unions which were in existence immediately prior to the commencement of the LRA.

Items 5(1) of Schedule 7 provides for transitional measures to deal with both unions which were registered and those not before the 1995 LRA came into operation. Unions which were operational before the LRA came into operation were all deemed to be registered. The Registrar was accordingly in terms of item 5(2) and

- (3) of the Schedule obliged to enter all those unions in the register. The Registrar further had powers in terms of the item to direct that a union to comply with the provisions of s95 of the LRA. Failure to comply could result in such a union receiving notice from the Registrar indicating that cancellation of its registration was being considered. The union would then be given 30 (thirty) days to comply.

The Registrar could cancel the registration of a trade union that failed to rectify a defect in its constitution after it had been given the opportunity to do so. A union whose registration was cancelled under the transitional measures could appeal against the decision of the Registrar to the Labour Court in terms of s111

- (3) of the LRA.

The decision to cancel the registration of a union would under the transitional measures take place only if the affected union has failed to lodge its appeal within the period envisaged in s111(3) of the LRA. Where the union has filed an appeal against the decision of the Registrar the decision to de-register would only take effect when the decision is confirmed by the Labour Court. This means that the decision of the Registrar to de-register a trade union during the transitional period was suspended pending the outcome of the Labour Court appeal.

Both the LRA and the Labour Court Rules are silent as to the effect of an appeal lodged in terms of section 111(3) of the LRA. I have already indicated earlier that in my view the issue in this matter turns around the intention of the legislature in as far as s 106 read with s 111 of the LRA is concerned.

Turning to the interpretation of the provisions of s111 (3) post the transitional period it was argued for the CCMA that the legislative intention was informed by what happened during the transitional period. It was submitted that the fact that the legislature left out the provisions of the effect of an appeal as was envisaged in the transitional period meant that the legislature intended the consequences of those provisions to remain in place in a sense and should be read into the provisions of s 106 when read with s 111 (3) of the LRA. I do not agree with this approach.

The purpose of the transitional measures was to regularize registration of trade unions and to bring all of them under one regulatory system. The purpose and the objects of s106 (3) of the LRA is thus different. It would therefore lead to absurd consequences to infer the intention of the legislation by reading into the provisions of s111

- (3) of the LRA the provisions of measures whose objectives were to address the transition from an old Act into a new one. This interpretation would not only lead to absurd consequences but would also defeat the purpose and the objective which the legislature sought to achieve in giving the powers to the Registrar under the provisions of s106 of the LRA. In any case the

legislature was aware of the consequence which was provided for under the transitional measures. If the legislature wished to have the provisions of the transitional measures read into s 106 in the event of an appeal then it would have been states such.

The object of s106 must be understood within the context of Freedom of Association and the consequent rights, benefits and duties that flow from exercising of that freedom in the form of forming, joining and participating in trade union activities.

As soon as it is registered a trade union acquires certain rights and benefits which are guaranteed by the LRA.

The objects of s106 read with s111

- (3) of the LRA must also be understood in the context that the legislature having created an environment and a frame work for the guaranteed and enjoyment of the Freedom of Association in form of trade unions, also sought to ensure that certain minimum duties of transparency and accountability are imposed on the trade unions. The need for accountability arises from the fact that trade unions, as public entities, depends largely on financial contributions from the workers who are members of the public. It cannot be denied that the decision of the Registrar to de-register a trade union has serious consequence on that union as an entity and its members. As an entity the decision of the Registrar, is likely to have a profound impact on its structures and its operations including the right to represent its members in various dispute resolution processes. It further cannot be denied that there exists a possibility that the Registrar in arriving at the decision to de-register a trade union may be based on an incorrect interpretation of facts before him or her or other invalid reasons which may ultimately result in the decision being overturned on appeal.

The prejudice that a union may suffer as a result of de-registration and enforcing such, even pending appeal, should be weighed against the public interest of protecting the interest of union members in particular that of ensuring that funds contributed are utilized for the purpose of benefiting union members. This simple accountability principle is founded on the notion that a union occupies a position of trust as concerning the management of the funds contributed by members. In short the provisions of s 106 of the LRA are protective in nature, intended to protect the vulnerable workers from abuse of their trust by unscrupulous union officials

whose involvement in a union may be for no other reason but to advance their selfish business interest.

If assuming that the decision of the Registrar is patently wrong and is based on incorrect facts, then the union is not without a remedy. The remedy available to the union is to approach the court for an order suspending the decision pending appeal. Of course one of the things that the union would have to show in approaching the court on this basis would be to show that it will suffer prejudice if the decision is not suspended pending the appeal and that it has prospects of success on appeal.

The prejudice argument would probably have supported the interpretation of the CCMA had one of the consequences of de-registration been to render the continued operation of such a union illegal. In our law the existence and operation of unions is not based on registration but as indicated earlier on the principle of respect and guarantee of Freedom of Association. Thus a de-registered union can continue operating even after the de-registration. The consequence of de-registration is simply that the rights and benefits given to the union by the very law, which it had failed to obey, is taken away.

In summary the declarator which the CCMA sought in terms of this application stands to fail. It is therefore my view, firstly that the general common law rule practice that an appeal stays the enforcement a judgment pending the outcome of an appeal does not apply to decisions made by the Registrar in terms of s 106 of the LRA.

In the premises, I make the following order:

1. It is declared that the appeal against the decision of the first respondent cancelling the registration of the second respondent does not suspend that decision.
2. There is no order as to costs.

Date of Hearing : 16 July 2010

Date of Judgment : 27 July 2010

Appearances

For the Applicant : Mr C Todd

Instructed by : Bowman Gilfillan Inc

For the Respondent: Adv N Cassim SC & Adv M Baloyi

Instructed by : The State Attorney

For the third respondent: Mr J Olivier of Brink Cohen Le Roux

2

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