

SOUTH AFRICA / JUDGMENT

Democratic Municipal and Allied Workers Union of South Africa (DEMAWUSA) v Registrar of Labour Relations (J119/2020) [2020] ZALCJHB 61; [2020] 7 BLLR 681 (LC); 2020) 41 (ILJ) 1968 (LC) (10 March 2020) [2020] ZALCJHB 61

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

J119/2020

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The Labour Court of South Africa,

(held at JOHANNESBURG)

Of interest to other judges

case No: J119/2020

In the matter between:

Democratic Municipal And Allied Workers Union of South Africa (DEMAWUSA) Applicant and
Registrar of Labour Relations Respondent

Heard: 28 February 2020

Delivered: 10 March 2020

Summary: (Urgent – interim relief - application to suspend de-registration of union pending
outcome of appeal against de-registration)

judgment

LAGRANGE J

Introduction

- [1] This is an urgent application for interim relief to reinstate the registration of the applicant union ('DEMAWUSA') or to suspend the cancellation of its registration as published in a notice of 31 January 2020, pending the determination of the union's appeal against its de-registration. The registrar of Labour Relations ('the registrar') opposes the application.

Background

[2] On 22 January 2016, DEMAUSA acquired the status of a registered trade union in terms of s 96 of the Labour Relations Act 66 of 1995. It is an affiliate of the South African Federation of Trade Unions ('SAFTU'). DEMAUSA claims to currently have 12000 signed up members, many of whom are temporary workers awaiting the determination of their status as permanent employees. It is not disputed that at the time of DEMAUSA's de-registration about 3000 members were paying their union subscriptions via deductions from their salaries.

[3] On 30 August 2019, DEMAUSA was interdicted from embarking on a strike against Johannesburg Metropolitan Bus Services ('Metrobus'),

in respect of certain demands unless it conducted a secret ballot of members in terms of section 19 of the Labour Relations Amendment Act, 8 of 2018 19(2).[1] Section 19 of the Amendment Act states:

"19.

(1) The registrar must, within 180 days of the commencement of this Act, in respect of registered trade unions and employers' organisations that do not provide for a recorded and secret ballot in their constitutions—

(a) consult with the national office bearers of those unions or employers' organisations on the most appropriate means to amend the constitution to comply with section 95; and

(b) issue a directive to those unions and employers' organisations as to the period within which the amendment to their constitution is to be effected, in compliance with the procedures set out in the amended constitution.

(2) Until a registered trade union or employers' organisation complies with the directive made in terms of subsection (1)(b) and the requirements of section 95(5)(p) and

(q) of the Act, the trade union or employer organisation, before engaging in a strike in or lockout, must conduct a secret ballot of members."

[4] The union claims to have conducted the secret ballot on 4 September 2019 pursuant to the Court order and Metrobus raised no objections to the conduct of the ballot, though it did apply for leave to appeal against the judgment handed down on 30 August on other grounds

relating to the legitimacy of certain strike demands. Leave to appeal was granted on 20 September 2019.[2] The Court also declined to stay the effect of its order pending the outcome of the appeal. The appeal appears not to have been pursued by Metrobus.

- [5] The strike ultimately began on 16 September 2019 and by 23 September, the strikers had returned to work.

The path to de-registration

On 17 September 2019, the day after a strike began, the registrar promptly began inquiring about the authenticity of the ballot in very detailed terms, going so far as to request proof of the secret ballot. The registrar sent a letter via email to the union, asking it to confirm within 4 days if the LRA had been complied with by holding a secret ballot before embarking on the strike action. Counsel for the registrar could not say if such an inquiry is now standard practice of the office of the registrar.

- [6] On 26 November 2019, the registrar sent the general secretary a letter notifying the union that he was intending to cancel the registration after issuing a notice in terms of section 106 [2B]. The reason for the proposed cancellation was that the registrar:

“...was of the opinion that that the union is not operating as envisaged by the Act, and base it on the following:

- the union had failed to comply with the provisions of section 99 and 100 of the LRA and
- the union had failed to comply with guidelines for balloting regarding members having a secret ballot before embarking on strike action.”

The letter further stated “As indicated in the notice, you are invited to make representations within 60 days of the date of the notice as to why the registration of the organisation should not be cancelled, failing which the name of the organisation will be removed from the Register of Trade Unions.”

- [7] S 106(2A) and (2B) provides that:

(2A) The registrar may cancel the registration of a trade union or employers’ organisation by removing its name from the appropriate register if the registrar –

- (a) is satisfied that the trade union or employers’ organisation is not, or has ceased to function as, a genuine trade union or employers’ organisation, as the case may be; or
- (b) has issued a written notice requiring the trade union or employers’ organisation to comply with sections 98, 99 and 100 within a period of 60 days of the notice and the trade union or employers’ organisation has, despite the notice, not complied with those sections.

(2B) 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 –

- (a) giving notice of the registrar’s intention to cancel the registration of the trade union or employers’ organisation; and

- (b) inviting the trade union or employers' organisation or any other interested parties to make written representations as to why the registration should not be cancelled.

(emphasis added)

- [8] The registrar maintained that the union had been obliged to provide the registrar with proof of the ballots in terms of section 99 [c] and 100 [f] of the LRA and had failed to do so despite explicit request to provide them and after drawing the union's attention to these provisions. Sections 99 and 100 state:

99. Duty to keep records.

In addition to the records required by section 98, every registered trade union and every registered employers' organisation must keep-

- (a) a list of its members;
 - (b) the attendance register, minutes or any other prescribed record of its meetings, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate; and
 - (c) the ballot papers or any documentary or electronic record of the ballot for a period of three years from the date of every ballot.
100. Duty to provide information to registrar. Every registered trade union and every registered employers' organisation must provide to the registrar-
- (a) by 31 March each year, a statement, certified by the secretary that it accords with its records, showing the number of members as at 31 December of the previous year and any other related details that may be required by the registrar;
 - (b) within 30 days of receipt of its auditor's report, a certified copy of that report and of the financial statements;
 - (c) within 30 days of receipt of a written request by the registrar, an explanation of anything relating to the statement of membership, the auditor's report or the financial statements;
 - (d) within 30 days of any appointment or election of its national office-bearers, the names and work addresses of those office-bearers, even if their appointment or election did not result in any changes to its office-bearers; and
 - (e) 30 days before a new address for service of documents will take effect, notice of that change of address, and
 - (f)

the records referred to in section 99.

(emphasis added)

[9] The notice issued under section 106(2)(b) was published the following day on 27 November 2019 and the union had 60 days to make representations why its registration should not be cancelled. The union failed to make representations in terms of the notice. The union claims it never received a copy of the gazetted notice. Prior to this notice being issued the deputy general secretary of the union, Mr Aaron Sekulane, wrote to the registrar on 3 October 2019 confirming that the secret balloting requirements had

been complied with. On 8 October the registrar demanded the union provide proof of this. On 31 October the union queried why it was necessary to provide proof of the ballot and what proof was required. The registrar referred the union to section 100 (f) and 99(c) of the LRA by way of clarification.

[10] However, by 15 November 2019 Sekulane had resigned and had not been in the union office from 15 November to 1 December 2019. There appears to have been an administrative gap between then and 17 January 2020 when a former unionist was able to take up appointment and to assist with head office administration.

[11] The president of the union claims that he became aware of the deregistration notice which was published on 31 January 2020 on account of it being circulated on social media in early February. The union convened a meeting with the registrar on 10 February 2020, which the union claims was cordial and at which it was agreed with the registrar that the union would provide information concerning the ballot, while the union would seek urgent relief in the Labour Court and the parties would commit themselves to a healthy relationship. The registrar admits the meeting taking place but denies any agreement was reached and the meeting does not form part of the recorded deliberations of the registrar's office. On 18 February, DEMAUSA confirmed it was going to launch this application. On 19 February the union submitted a report on the ballots and advised the registrar that it had lodged the sealed ballot box at the offices of the union's attorney who would make them available for inspection or arrange for them to be inspected at the registrar's

office. The registrar's attitude was that the report did not comply with the original request for proof of the ballot and, in any event, a decision had been taken.

[12] This application was filed on 21 February

2020. On 27 February, the union filed its application for leave to appeal against the deregistration at this court.

Evaluation

[13] DEMAUSA contends the application is urgent, that it will suffer irreparable harm if interim relief is not granted, it has no suitable alternative remedy and the balance of convenience favours it. It claims it has a prima facie right to relief and a reasonable prospect of success on appeal.

- [14] The registrar argues that; the LRA prohibits interim relief being granted pending an appeal against a decision to deregister a union, the urgency is self-created, and that the balance of convenience does not favour it. As to the harm the union will suffer, financial harm is insufficient and it can obtain suitable alternative relief if it is successful on appeal.

Existence of a prima facie right

- [15] The union argues that it has good prospects of success on appeal and that having filed an application for leave to appeal, it has a prima facie right to have the decision suspended pending the outcome of the appeal. Its contention that it has a good prospect of success on

appeal is based inter alia on an argument that the de-registration of the union as a remedial measure is not commensurate with the alleged infringement of sections 99(c) and 100(f) in respect of a single strike ballot and that the registrar incorrectly interpreted the 'guidelines' on balloting as statutory prescripts and, in principle, was not entitled to rely on alleged non-compliance with those as a reason for de-registering the union.

- [16] The registrar argues firstly that since the amendment of s111 of the LRA by s 17 of Act 6 of 2014, the legislature made it clear that the effect of de-registration could not be suspended by virtue of an appeal being lodged. Moreover, the union was plainly in breach of the requirements of s 99(c) and 100(f) of the LRA and the registrar was clearly entitled to de-register the union after due notice was given and the union had failed to comply with the provision of the information requested despite being plainly

instructed to do so. The registrar further argues that "the guidelines are an expression of the statutory requirement regarding

secret ballots" and DEMAWUSA ought to have complied with them.

- [17] In 2014, the following subsection was added to s 111 of the LRA:

- (5) An appeal in terms of this section against a decision by the registrar in terms of section 106 does not suspend the operation of the registrar's decision.

- [18] The registrar argued that this amendment indicated the clear intention of the legislature that the de-registration of a union or employers' organisation could not be suspended by the lodging of an appeal against the decision. Prior to this there had been number of matters before the Court where it had been argued by de-registered bodies that their de-registered status had been suspended because they had lodged appeals against de-registration and the ordinary consequences of filing an application for leave to appeal or of a pending appeal against a court judgment applied equally when appeals were lodged against a de-registration decision.[3] The alternative interpretation of the amendment is preferable in my view; that the amendment merely confirmed what judgments of this Court had already said. However, s 111(5) is not a bar for a party to approach the Court for interim relief to suspend the operation of a de-registration decision. The section means that it is now clear, the suspension must be justified and it does not apply automatically. On the face of it, the de-

registration of the union on account of an alleged failure to comply with balloting provisions on one occasion and non-provision of information connected therewith despite express requests from the registrar to furnish it, does seem a somewhat drastic step to have taken and it is arguable that the guidelines on balloting were not intended to be binding pre-requisites for the acceptable conduct of a secret ballot, failing compliance with which it would not qualify as such. It also appears that even if the union had not complied timeously with the request to provide proof of the ballot, there is good reason to believe it is able to rectify such defect based on the belated representations made.

- [19] Accordingly, I am satisfied that the union is not barred by s 111(5) from applying for interim relief pending an appeal against its de-registration and has an arguable case on appeal.

Irreparable harm and balance of convenience.

- [20] The registrar rightly argues that financial harm is generally insufficient ground for arguing irreparable harm. However, it is not

the financial harm as such which the union is seeking to prevent, but to minimise the damage de-registration can do to its organisational

capacity to continue functioning as a union. The effect of de-registration was recognised in *Commission for Conciliation, Mediation & Arbitration v Registrar of Labour Relations & others*[4]:

“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.”[5]

- [21] In other cases of applications for suspending the effect of de-registration such as the one above, there were weighty countervailing considerations which affected the balance of convenience, such as the need to protect union members from maladministration of union finances or from office bearers or officials using the resources of the union for their own personal interests. In this case, there are no union members complaining of ballot rigging or any evidence that it would not be in the interests of DEMAWUSA members to allow the union to continue to operate as effectively as it might be able to pending the outcome of the appeal. The basis for de-registration in this instance does not rest on general maladministration of union finances or chronically dysfunctional organisational structures arising from a failure to elect office bearers or the like. The registrar’s own interest in ensuring compliance with the LRA will not be jeopardised if interim relief is granted and the de-registration decision is ultimately upheld. On the other hand, given the union’s dependence on a relatively small number of stop-orders to continue to function in the interim, the value of any ultimate success it might obtain on appeal, will be worth little if it is not granted the interim relief it seeks.

Urgency

- [22] The union argues that the matter is urgent by virtue of its income from stop orders having been curtailed and the loss of income threatens its ability to conduct its activities. The registrar retorts that financial need is insufficient ground for urgent relief. I have dealt above with the real significance of financial constraint on organisational capacity.
- [23] The registrar also argues that the urgency is self-induced because the union did nothing during the period that was granted it in terms of the notice to make representations why it should not be de-registered. This argument carries more weight, but I am also mindful of the fact that an administrative vacuum developed in the union during the crucial period when the letter of 26 November

2019 should have been addressed, and it does not appear to be for lack of bona fides in the DEMAWUSA's dealings with the registrar that caused it not to address the threat of de-registration timeously.

- [24] In the circumstances, I am satisfied DEMAWUSA should be afforded the interim relief it seeks. There is no reason not to make a cost order either.

Order

- [1] The application is dealt with as one of urgency and non-compliance with the Rules of the Labour Court dealing with time periods and service is condoned.
- [2] The decision of the Respondent, the Registrar of Labour Relations, to cancel the registration of the Applicant, the Democratic Municipal and Allied Workers Union, with effect from 30 January 2020 in terms of s 109(2) read with s 106(2A) of the Labour Relations Act, 66 of 1995, is suspended pending the outcome of the applicant's leave to appeal against the decision.
- [3] The Respondent must pay the Applicants' costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:

A Roskam of Haffegge Roskam Savage Attorneys

For the Respondent:

O Mooki, SC and M Rantho instructed by the State Attorney

- [1] Johannesburg Metropolitan Bus Services (SOC) Ltd v Demawusa & others (J 1799/19) dated 30 August 2019.

- [2] Johannesburg Metropolitan Bus Services (SOC) Ltd v Demawusa & others (J 1799/19) dated 20/09/2019.
- [3] E.g See Cape Agri Employers' Organization v Registrar of Labour Relations (2011) 32 ILJ 2952 (LC); Lowveld Allied & General Employers' Organization v Minister of Labour & others (2011) 32 ILJ 340 (LC); General Domestic & Professional Employers' Organisation v Registrar of Labour Relations (2011) 32 ILJ 316 (LC); United People's Union of SA v Registrar of Labour Relations (2010) 31 ILJ 198 (LC), and United Peoples Union of South Africa ("UPUSA") v Commission for Conciliation, Mediation and Arbitration and Others (J984/10)
- [2010] ZALC 150 (21 October 2010)
- [4] (2010) 31 ILJ 2886 (LC) at 2895
- [5] At 2895

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