

SOUTH AFRICA / JUDGMENT

**National Entitled Workers Union (NEWU) v
Commission
for Conciliation, Mediation and Arbitration and Others
(JR1002/05) [2010] ZALC 155; [2011] 2 BLLR 180 (LC) ;
(2011) 32 ILJ 374 (LC) (22 October 2010)
[2010] ZALC 155**

COURT
Labour Court

BEFORE
Molahlehi

CASE / FILE NUMBER
JR1002/05

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IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG
Reportable
CASE NO: JR1002/05

In the matter between: NATIONAL ENTITLED WORKERS
UNION (NEWU)
.....Applicant
and
COMMISSION FOR CONCILIATION
MEDIATION& ARBITRATION
.....1st
Respondent
C.N. MBHELE N.O.
.....2nd
Respondent
CINQPLAST PLASTOP (PTY) LTD
.....3rd
Respondent
MINISRTY: JUSTICE AND
CONSTITUTIONAL DEVELOPMET
REPUBLIC OF SOUTH AFRICA
.....4th
Respondent
THE MINISTER: JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

REPUBLIC OF SOUTH AFRICA
(HONOURABLE MINISTER
BRIDGETE MABANDLA)
.....5th
Respondent
MINISTRY: LABOUR
REPUBLIC OF SOUTH AFRICA
.....6th
Respondent
THE MINISTER OF LABOUR
MEMBATHISI MDLADLANA)
.....7th
Respondent

JUDGMENT

Molahlehi J

Introduction

This matter came before this court as a review application on the 14 August 2010. The review application which was initiated during May 2005 was preceded by other applications which resulted in a number of orders and judgments by various judges. When the matter came before this court in August 2010, the court issued a directive on requiring the parties to address it on the following

issues:

4.1 The locus standi of the Applicant and its President to pursue these proceedings against the de-registration process of the Applicant.

A proper interpretation of the order made by His Lordship, Broster, AJ, in the light of the subsequent decisions of this Honourable Court in the CCMA v The Registrar of Labour Relations (the judgment of His Lordship, Molahlehi, J on the legal effect of section 111 appeal of the LRA) and the judgment of Her Lordship, Basson, J in Unica Plastic Moulders CC v National Union of South African Workers, of which judgment concurred with the judgment in the CCMA matter.

The impact of the negative remarks made from time to time in the judgments of this Honourable Court and the Labour Appeal Court pertaining to the conduct of the Applicant and its President Mr Maluleke to be considered in determining whether it will be in the interest of justice not to afford the Applicant locus standi in this matter where it seeks organizational rights, pending the final determination of its appeal in terms of section 111 of the Labour Relations Act regarding its de-registration.”

The essence of the issue that arose when the review application was to be heard in August 2010 was whether NEWU had locus standing to represent itself and or its members in the light of its de-registration as a union by the Registrar of the Labour Relations

(the Registrar) in terms of s111 of the Labour Relations Act 66 of 1995 (the LRA). It is common cause that NEWU has been deregistered

as a union by the Registrar.

For the purposes of this judgment I do not intend dealing with the details relating to the de-registration of NEWU as those details are dealt with in the papers submitted by the parties. I intend focusing on the following issues:

1. The binding effect of the order made by Broster AJ in the matter of National Entitlement Workers Union and others under case number J2189/06;
2. The impact and implication of comments made about the official of NEWU, Mr Maluleke regarding his role and conduct that forms part of the reasons for the de-registration of NEWU.

It is common cause that NEWU initiated an urgent application under case number J2189/06, wherein it sought an order that the decision to de-register it as a trade union be stayed or suspended pending the outcome of the appeal launched in terms of s111 of the LRA. The relevant part of the order granted arising from that urgent application which seems to have been granted by consent, by Broster AJ reads as follows:

“As a result the Applicant having filed its appeal in terms of section 111 of the Labour Relations Act, execution of deregistration of the Applicant is suspended pending the outcome of the appeal.”

The submissions made by the parties in as far as the status of the order made by Broster AJ centered around the issue of stare decisis. NEWU argued that the order was subsequent to its issuance binding on all judges and that the court in *Stanley Jacobs v AG Aluminum and others* unreported case number J879/08, was wrong and that this court should not follow it.

The seventh respondent, the Minister of Labour (the Minister) on the other hand argued that the order granted by Broster AJ was in effect the consequences of a settlement agreement “premised on wrong legal principles which was made an order of Court.” The Minister further argued that the cases to follow which were binding on this court were those in *Stanley Jacobs* and the *CCMA v The Registrar of Labour Relations and others*, unreported case number J984/10. In *Stanley Jacobs* the court in arriving at the conclusion that NEWU and its officer, Mr Maluleke were not entitled to represent its members before the Labour Court pending the outcome of its appeal against the decision of the Registrar largely relied on the decision in the CCMA’s case. The court in that case further held that it was not bound by the order made by Broster AJ.

The legal consequences of deregistration of a trade union.

In the CCMA's, case referred to above, this court summarized the statutory framework relating to deregistration of trade union as follows:

"[15] 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."

- [16] 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.
- [17] 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 court went further at paragraphs [35] and [36] of that judgment to say the following:

"[35] 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."

- [36] 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."

For the purposes of this judgment the most important principle, if it was to be referred as that, is what is stated in paragraph

[37] of the CCMA's judgment where the court had the following to say:

"[37] 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 key principles of the CCMA's judgment are summarized by this court in *United Peoples Union of South Africa v The CCMA and others* unreported case number J894/10 at paragraph [19] as follows:

"1 In terms of the proper interpretation of the LRA, the lodging of an appeal against the decision of the Registrar made in terms of s111 of the LRA, does not automatically suspend the implementation of the decision of the Registrar."

2 A union wishing to have the decision of the Registrar suspended pending the outcome of the appeal against the decision of the Registrar made in terms of s106 of the LRA can approach the court to have the implementation of the decision suspended pending the outcome of the appeal. "

The other important principle from the CCMA's case, which has not been stated in so many words, is that the de-registration of a trade union does not dissolve that union as a voluntary association. This means a de-registered trade union is entitled to continue its existence in terms of the right to Freedom of Association. A de-registered trade union does however; lose certain rights accorded to it by virtue of registration in terms of the LRA. One of the rights which a de-registered trade union loses

due to de-registration is the right to represent its members before all the statutory dispute resolution bodies. In respect of the court, a de-registered trade union loses its right of appearance accorded to it in terms of s161 of the LRA, the relevant part reads as follows:

"In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented by-

- (a)
- (b)
- (c) any member, office-bearer or official of that party's registered trade union or registered employer's organization."

In my view, the principle enunciated in the CCMA's case which says that a de-registered trade union is entitled to approach the court to have the decision to de-register it stayed pending the outcome of the appeal against the decision of the Registrar, is in fact a remedy to a de-registered trade union in the same way as a litigant in any other matter where stay of execution

is stayed pending further litigation. In this respect the court has a wide discretion to grant or refuse stay of proceedings. In

granting the stay of proceedings that court is entitled to impose whatever conditions it deems fit in ordering the stay of those

proceedings. See *South Cape Cooperation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1997 (3) SA 534 (A). It has been held that the discretion to grant or refuse leave to stay execution is part and parcel of the inherent jurisdiction of the court to control its own judgment. In my view this principle applies also to the stay of execution of decisions made by other institutions of the LRA, in as far as the court has a supervisory role over them.

In *National Union Police Service v Commissioner of the National Police Service and others* (1999) 20 ILJ 2408 (LC), the court held that in exercising the discretion whether or not to grant a stay of the court should determine what is just and

equitable in the circumstances. The court in that case went further to say that in exercising that discretion the court should take into account the following factors:

“1. The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;

2. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
3. The prospects of success on appeal including more particularly the question as to whether the appeal is frivolous or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or harass the other party;
4. Where there is the potentiality of irreparable harm or prejudice to both applicant and respondent the balance of hardship or convenience, as the case may be.”

In my view, in cases concerning stay of execution of the decisions of the Registrar, in particular de-registering a trade union or employer’s organization further consideration should be given to the input that refusal to grant a stay has on Freedom of Association pending the outcome of the appeal. Of course this must be weighed against the public interest which was referred to in the case of the CCMA.

In practice the stay of execution of decisions in the Labour Court is a daily occurrence in particular in relation to the enforcement of arbitration awards. The application to stay the execution of the decision of the Registrar has recently become a common phenomenon. In the UPUSA matter this court in dealing with the consequences of an administration act in the middle of paragraph

[27] said the following:

“[27] It needs to be emphasized that the proper functioning of the machinery of the LRA would be considerably frustrated and rendered

ineffective if the decision of Registrar was not given effect or was to be ignored pending the outcome of the appeal. It cannot be denied that the possibility exist that the decision of the Registrar may once tested on appeal prove to be wrong. It should however be born in mind that our law accept that an unlawful administrative act is capable of producing legally valid consequences as long as the act is not set aside.”

The above principle, in my view applies to orders granted by the court. It is for this reason that I take a different approach to the one taken by my sister Basson J in Stanley Jacobs. It is important to note that the parties which were involved in the matter before Broster AJ are the same as those in the present and importantly the Minister of Labour. The argument that the order was granted on the basis of a negotiated settlement based on wrong principles is not sustainable. The fact of the matter is that an order of court which has took effect since November

2006. The Minister of Labour and any of the others parties have never deemed it necessary to appeal and have it set aside. It is therefore my view that an order issued by a court is final unless it is set aside by way of rescission or appeal.

I have stated earlier in this judgment that it has become a common phenomenon to have the execution of the Registrar’s decision stayed pending the outcome of the appeal in terms of s 111 of the LRA. Orders similar to the one granted by Broster AJ were granted by judges in the following matters: Agricultures Employer’s Organization v Registrar of Labour Relation case number J2391/05, dated 6 August 2008, Retail & Allied Workers Union (RAWU) v Registrar of Labour Relations case number J 2686/07 dated 27 November 2007, Togetherness Amalgamated Workers Union of SA v Registrar of Labour Relations case number J1502/08, RAWU obo Nqwelethana v Mashaba NO & Others case number JR 1777/06 dates 11 February 2010 and the Agricultural Employers Organization v Registrar of Labour Relations case number J239/05 dated 4th December 2005.

The impact of remarks made against Mr Maluleke, in relation to his right to present NEWU in court proceedings.

In as far as the above issue is concerned reference has to be made to the order made by Broster AJ. In exercising the discretion of suspending the decision of the Registrar the Learned Judge imposed no condition on such suspension. In other words the order had no provision that the suspension of the decision was made on condition that Mr Maluleke should not be allowed to appear for

and on behalf of NEWU pending the outcome of the appeal.

Summary of the reasons

NEWU has been deregistered by the Registrar of the Labour Relations in terms of s 106 of the LRA. NEWU applied and successfully obtained an order during 2006, from Broster AJ, staying the implementation of the decision of the Registrar pending the outcome of the appeal it launched in terms of s 111 of the LRA. The appeal is still pending.

In the absence of the reasons been given for the order by Broster AJ, it seems to me that the only reasonable conclusion to arrive at is that, the Learned Judge in making that order took into account factors relevant to the consideration of whether or not that

stay of proceedings should be granted. In other words the Learned Judge was satisfied that NEWU had made out a case for granting a stay of execution of the decision to de-register it by the Registrar. The order in its proper reading is very wide and did not limit itself to the matter which was before Broster AJ.

The order made by Broster AJ has never been set aside and therefore remains valid until ruled otherwise by a Superior Court.

In the premises the following order is made:

NEWU has the right to represent and appear on its own behalf and represent its members in terms of s 161 of the Labour Relations Act 66 of 1995, on the authority of the order which was made by the Labour Court under case number J 2189/06.

The official of NEWU, Mr Maluleke, and NEWU as a union has the right to appear in any case before this court and any other statutory dispute resolution to represent members and NEWU as a union before the court pending the outcome of the appeal.

The review application is postponed to a date to be arranged with the Registrar.

Date of Hearing : 13 August 2010

Date of Judgment : 22 October 2010

Appearances

For the Applicant : Union Official Mr Maluleke from NEWU

For the Respondent: Adv P.L. Mokoena

Instructed by : State Attorney

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