

SOUTH AFRICA / JUDGMENT

National Entitled Workers Union (NEWU) v Ministry of Labour and Others (JA 84/2010) [2011] ZALAC 31; (2012) 33 ILJ 2585 (LAC) (29 September 2011) [2011] ZALAC 31

COURT

Labour Appeal Court

BEFORE

Davis, Mlambo, Mocumie

CASE / FILE NUMBER

JA 84/2010

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD

AT JOHANNESBURG)

Case

No: JA 84/2010

In

the matter between:

NATIONAL

ENTITLED WORKERS

UNION

(NEWU) Appellant

And

THE

MINISTRY OF LABOUR First Respondent

THE

MINISTER OF LABOUR Second Respondent

DEPARTMENT

OF LABOUR Third Respondent

REGISTRAR

OF LABOUR RELATIONS Fourth Respondent

DEPUTY

REGISTRAR OF LABOUR RELATIONS Fifth Respondent

Date of hearing : 05 May 2011

Date of judgment : 29 September 2011

JUDGMENT

DAVIS JA:

Introduction

- [1] This is an appeal against the judgment and order of the court a quo by Francis J dismissing an appeal in terms of section 111(3) of the Labour Relations Act 66 of 1995 ('the LRA') against a decision of fourth respondent, the Registrar of Labour Relations (Registrar), to deregister appellant as from 31 October 2006.

Factual Background

- [2] Appellant was registered as a trade union on 14 January 1997. Consequently, it fell within the regulatory scope of the LRA. Once a union, such as appellant is registered, section 98 of the LRA imposes obligations on the union to maintain books and records of its income, expenditure, assets and liabilities, which records must be audited and be made available for inspection. Furthermore, in terms of section 99 of the LRA, duties are imposed on the union to maintain a list of its members and copies of the minutes of meetings that it holds.
- [3] Section 100 of the LRA imposes a further obligation on appellant to provide, by 31 March of each year, a statement certified by its secretary that accords with its records and which shows the number of members as at 31 December of the previous year, together with any other related details that may be required by the Registrar. At the same time, the union is obliged to submit an audited report and a certified copy of the financial statements to the Registrar.
- [4] In terms of section 100(c), the Registrar is empowered to request, in writing, within 30 days of receipt of the financial statements from appellant, an explanation of any matter which relates to the statement of membership, the auditors report or the financial statements.
- [5] The present dispute essentially turns on the consequences of this regulatory framework. The Registrar examined the documentation provided by the appellant in terms of sections 98 and 100. In brief, he found, on the basis of this examination, that the appellant was not or had ceased to be a genuine trade union and hence its registration should be cancelled. In the Registrar's opinion, there were adequate reasons to justify his decision to cancel appellant's registration.
- [6] An assessment of the justification of his decision requires recourse to the concerns which prompted the inquiry. The four key issues which generated queries from the Registrar together with appellant's response can be summarised thus:

Discrepancies between compensation received by the Appellant and amounts it paid out to members in 2002, 2003 and 2004 respectively. The compensation referred to herein relates to matters taken up by the Appellant on behalf of its members for example in the Labour Court. Appellant's audited financial statements for these years showed that in 2002, it received compensation of R 149 258 and paid out R 71 949. 00. In 2003, it received R 447 886 and paid out R 259 683, in 2004 it received R 129 566 and paid out R 118 624.

When asked to explain these discrepancies, the appellant claimed that the difference between the gross amounts received as compensation and the net amounts paid out to members consisted of lawful deductions which included:

- (i) Trade union subscriptions in arrears together with mora interest;
- (ii) Realistic contributions made by members to the costs of the appellant in launching or defending cases on behalf of members;

2. The playing of lotto in 2003 and

2004. The Registrar wrote to appellant and noted that the audited financial statements for these years reflected that amounts of R31 378 and R 12 142 were expended for playing lotto. The appellant was requested to furnish the Registrar's office with an explanation for this expenditure. In furnishing the requested explanation appellant contended that the playing of lotto constituted a bona fide attempt to secure funds and thus rescue appellant from its dire financial straits, and further that the playing of lotto was to

make a contribution to 'lotto's good causes'.

3. Unsecured loans. Appellant's audited financial statements showed that its president, Mr MD Maluleke, received unsecured loans in the following amounts: R 73 146 in 2002, R 167 534 in 2003 and R 241 169 in 2004. Appellant was requested to furnish the Registrar's office with minutes of the meeting at which these loans were approved and the contact details of each member present at the meeting, and, further, the terms of the particular provision of appellant's constitution, in terms of which the loans had been approved. Appellant replied that the loan transactions had been noted in audited reports and were approved and

authorised by the members on 15 April 2000, in terms of the resolution of the National Executive Committee passed on that date.

It said that to avoid prolixity, it had not annexed copies of the minutes and resolutions of the meeting where the loans had been

approved. It did, however state that the loans had been fully paid back by the end of each relevant financial year. It claimed further that proof of repayment of the loans by Mr Maluleke was evident in his pay slips for the relevant years. However appellant did not avail the payslips claiming that these were private and personal information.

4. The Registrar requested that it be provided with minutes of appellant's congress and executive council meetings for the past two years, attendance registers and updated list of office bearers and paid officials together with their names and contact details, minutes of the meeting at which they were elected, work addresses of the executive council and registered address of the union. The Registrar claimed that it requested this information in order to make a determination as to the genuineness of the union.
5. Appellant claimed that, in terms of clause 9(1)(b) of its constitution, the national congress had to be convened every calendar year. Appellant supplied dates during which the congress had been held. Appellant stated that to avoid prolixity it had not annexed copies of the meetings and resolutions of the congresses which had been held during 2003 and 2004 as at 1 September 2005 together with the attendance registers; 'which were clearly voluminous'.
6. It further provided dates for executive council meetings. Again, appellant replied that, to avoid prolixity, it had not annexed copies of the minutes and resolutions of the executive council meetings and the attendance registers which had been held for the past two years as at 1 September 2005, because they were "clearly voluminous". It also claimed that an updated list of office bearers, namely contact details, had been provided on 14 October 2003. Since that date, official correspondence generated by appellant had listed, on its letter heads, the names of its office bearers. Insofar as work addresses were concerned, the appellant stated that these had been provided on October 2003 and had not changed since that date.
- [7] Dissatisfied with these explanations, the Registrar made a decision to deregister the union. In justifying this decision, the Registrar states in paragraph 3.1 of its final report dated 31 October 2006:

"The union's audited financial statements of 2002...2003...and 2004... contained financial irregularities which could not be explained by the union despite being given the opportunity to do so.

The union is to operating for gain of the individuals.

The union is not or was ceased to operate as a genuine trade union as envisaged in the Act."

In dealing with the discrepancies relating to compensation, the Registrar concluded at para 3.2.1:

"It follows therefore that the discrepancies are made up of monies paid by members which are unconstitutional. If any deductions were made as suggested by the union it would have been reflected as such by the auditor. No such transactions or explanations are contained in the relevant statements. No proof from the union was submitted to substantiate the explanation given by them. It is highly unlikely that an auditor would not reflect money payable to members. The union is making profit out of its members."

- [8] Turning to the question of lotto payments, fourth respondent said at para 3.2.2:

“In this office’s letter of 1/9/05 the union was asked to provide proof of authorisation for such activities by submitting the minutes of the meeting whether it was approved. The union have made its stance clear on the matter they will not do anything to assist this office with the investigation and it is up to the Department to come to there offices to find the information that is required. Based on the unwillingness of the union to assist the Department the only conclusion that can be made is that the union did not have authorization by members to play Lotto. Without proof of authorisation by members the lotto playing remains irregular. The matter is of further concern due to the fact that Mr Maluleke is the kingpin around whom all the financial transactions revolve.”

- [9] In assessing the significance of unsecured loans in the amount of approximately R481 849.00 which were advanced to Mr Maluleke, the Registrar stated at para 3.2.7:

“The union was requested to furnish the Registrar with minutes of a meeting where the loans were approved and also contact details of each member present at the meeting (name, telephone number and work address). This was not done. It was also requested to indicate in terms of which provision of the constitution this was done.”

He went on to state:

“The Registrar had also requested the union to indicate if the loans in respect of Mr Maluleke have been paid back. The money paid back is said to be reflected in Mr Maluleke’s pay slips. The union has refused to provide the required proof and is suggesting that section 16(5)(d) of the LRA applies. The section reads ‘An employer is not required to disclose information.’ This is totally unrelated and this office fails to see how this can apply to a situation like this.”

- [10] On the basis of these conclusions, the Registrar decided to deregister the appellant, against which decision the appellant appealed to the court a quo, in terms of section 111 of the LRA, which provides that a person aggrieved by a decision of the Registrar can appeal to the court a quo within 60 days from the date of the Registrar’s decision or, if written reasons for the decision had been demanded, the date of those reasons.

The proceedings before the court a quo

- [11] The appellant lodged both a constitutional challenge to the applicable provisions of the LRA as well as an attack on the merits of the Registrar’s decision. It raised eight grounds to support its constitutional challenge. In essence, the challenge amounted to a contention that “the guilt or innocence of a registered union together with a sentence of deregistration is done by a registrar who is the accuser, investigator and prosecutor and not by a court which is the appropriate body to make such a decision.” I shall leave a consideration of these constitutional questions to later in the judgment. Suffice to say, they were dismissed by Francis J, primarily on the basis that the entire process of cancellation of registration in terms of section 106 of the LRA is neither arbitrary nor capricious and is buttressed by rational guidelines published in terms of section 95(8) of the LRA. Further, the process is placed under the supervision of a court in terms of an appeal which can be brought against a decision of the Registrar in terms of section 111 of the LRA.

[12] Turning to the merits of the Registrar's decision, Francis J found that the appellant was in financial dire straits and yet, notwithstanding this position, had authorised its president to play lotto, as a result of which R 43 520 was spent over a two year period between 2003 and 2004. Further, it had granted its president unsecured loans in the amount R471 839. 00 and, whatever loans had been provided by other members, these were "quite minuscule as compared with what was given to its president."

[13] Francis J also observed that during 2002 – 2004 appellant had obtained amounts of compensation for members from which it deducted significant amounts. It had thus retained R276 454.00 as compensation. The learned judge took cognizance of the fact that:

"In most of the cases appellant litigates in this Court, its president appears on its behalf or for its members. The appellant seldom uses attorneys in this Court save for in this appeal. The amount retained as compensation should have been much lower. If attorneys were used the amounts retained as compensation might have been justified. Appellant's president is the same person who was given unsecured loans and was authorised to use funds to play lotto."

[14] On the basis of all of this evidence Francis J held that the only conclusion that can be reached is that the appellant was operated by its president. For these reasons, the learned judge was satisfied that the Registrar had justifiably invoked the provisions of section 106 of the LRA, after having provided the appellant with more than sufficient opportunity to make representations. The decision to deregister the union stood to be upheld.

[15] With the leave of the court a quo, appellant approaches this court on appeal.

The case as brought on appeal

[16] As noted above, appellant raised a constitutional question with regard to the power of the Registrar to deregister a union.

[17] Although appellant did not press the constitutional challenge in oral argument before this court, it did not abandon its eight grounds of appeal which were the following:

1. There existed a purpose, motive of enacting section 106 read with section 95 of simply cancelling the registration of 'significant number of registered trade unions'. It is alleged that the discriminatory cancellation of registration of unions conflicts with section 9(1) of the Constitution.
2. Guilt and innocence and the deregistration sentence to be imposed to those found guilty of being not, or having ceased to function as genuine trade union is not done by the Labour Court but by the Registrar who is also an accuser, investigator and prosecutor.
3. Section 106 does not afford the Registrar with a discretion to impose a sentence short of cancellation of registration.
4. Fourth respondent is appointed and is under the ultimate control of the Minister of Labour. This violates the doctrine of legality or the rule of law.

5. The legal representatives and the legally recognised representatives are not equal before the law in the process of striking off under section 106. Unlike the striking off the roll of an attorney for example, the judiciary has no power to make a decision or order for the cancellation of the registration of a union.
6. The guidelines pursuant to section 95(8) contained material provisions that are not authorised by section 95(8) and are therefore unlawful.
7. The guidelines, lack legality, are ultra vires, vague and are not capable of being understood, overboard and fall to be struck down.
8. The means to achieve the goal of the guidelines are not reasonable. In particular, the present guidelines are manifestly overboard in furthering such purposes, and are thus unreasonable and unconstitutional.

[18] It is necessary to deal with these arguments, however skeletally they were articulated before this court.

[19] To recapitulate: in terms of section 106(2)(A) of the LRA, the Registrar may cancel the registration of the trade union or employees organisation by removing its name from the appropriate register, if:

“(a) satisfied that the trade union or employers’ organisation is not, or has ceased to function as a genuine trade union or employer’s

organisation as the case may be...’

In terms of subsection (2)(B) the Registrar may not act in terms of subsection (2)(A) ‘unless he or she has published a notice in the Government Gazette at least 60 days prior to such action giving notice of his or her intention to cancel the registration of a trade union or employers organisation and inviting trade union and employers organisation or any other interested parties to make written representations as to why the registration should not be cancelled.’

[20] The manner in which these provisions afford procedural and substantive protection to affected organisations is well illustrated in the present case.

[21] In his answering affidavit in these proceedings, the Registrar describes how on 1 September 2005 he dispatched a letter to appellant whereby he indicated his concerns pertaining to the irregularities in the financial statements and, further, that he requested clarification of these irregularities and the provision of further information. The Registrar contends that appellant failed to provide answers to the questions as set out in this letter or to explain the irregularities to which reference has been made.

[22] Accordingly, fourth respondent generated a further letter on 3 October 2005, in which inter alia he said the following:

“It is the duty of the office of the Registrar to protect the members of the public against some of the serious consequences which they might suffer when dealing with unscrupulous trade unions and employers’ organisations which either do not comply with the provision of the LRA and/or are not genuine organisations but, in fact, profit making enterprises. See National Employers Forum v Minister of Labour

(2003) 824 ILJ (LC) at (958H – 959C).

In my letter to you were referred to the provisions of section 106 but this office has not taken any steps in terms of those provisions.

Your response may or may not result in the provisions of section 106 being invoked.

The issue that we raised in the letter appears on the surface to be inconsistent with normal trade union activities, and it is for that reason that we would like to determine whether or not the union is a genuine trade union.

Some of the matters you refer to in your submissions having nothing to do with the genuineness of your opinion and are currently being dealt with. Other matters fall outside the jurisdiction of this office and I don’t have the powers to address it, as you suggested. It is not prudent for me to react to these allegations.”

[23] Appellant replied on 7 October

2005. In fourth respondent’s view, the appellant failed again to deal with the queries that he had raised. A further period of time was provided by fourth respondent which would enable the appellant to submit the necessary information as requested by 31 October 2005.

[24] Further correspondence was generated between the parties, culminating in a letter from the appellant on 1 November 2005, in which, in the view of the Registrar, it still refused to respond to the earlier requests contained in the letter of 1 September

2005. As a result, on 25 November 2005, the Registrar wrote to the secretary of appellant, drawing his attention to a notice which would be published in the Government Gazette on 2 December 2005, pursuant to section 106 (2)(B), in which all interested parties were invited to make written representation within 60 days of the notice as to why the registration of appellant should not be cancelled.

[25] In my view, there can be no doubt that fourth respondent followed the steps required of his office, prior to invoking the powers granted to him in terms of section 106 (2)(A). Further, these steps illustrated the extent of the procedural protections afforded to a party such as appellant to the Registrar to legitimate concerns pertaining to the “genuineness” of its existence as a union.

- [26] Once a decision had been taken by the Registrar then, in terms of section 111 of the LRA, a party aggrieved by the decision such as appellant cannot only demand written reasons for the decision, but may lodge an appeal with the Labour Court within 60 days of the date of the decision, or the date on which reasons were provided.
- [27] The LRA thus provides an aggrieved party, such as appellant with a right to make considered representations to fourth respondent prior to the latter's decision in terms of section 106(2A). A right is then afforded to the aggrieved party to be provided with written reasons for the justification for the decision which has been taken by fourth respondent. It then has a further right to appeal the decision to the Labour Court, which is obliged to consider the matter afresh.
- [28] In summary, I have set out both the conduct of the Registrar, pursuant to section 106, and the rights contained in section 111 in order to evaluate the essential claim made by appellant that the powers of the Registrar violate "the doctrine of legality or the rule of law." The action taken by the Registrar is administrative action. (See the definition of "administrative action" as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")). Within the present South African context, the Registrar's action stands to be evaluated in terms of PAJA. In *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others*,¹ Chaskalson CJ stated the following:
- "PAJA [is] required to cover the field and purports to do so. [Hence], a litigant cannot avoid the provisions of PAJA by going behind it in seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation."* (my emphasis)
- [29] In short, a litigant such as appellant, which seeks relief against a decision of the Registrar, should base its case on the provisions of PAJA. Nothing in appellant's argument provides a justification for a conclusion that the rights enshrined in PAJA, in essence the right to lawful and procedural fair administrative action, have been breached, either in terms of the provisions of sections 106 and 111 of the LRA or by the conduct of the Registrar. There was no suggestion that the provisions of PAJA failed to meet the requirements of section 33(1) of the Constitution or that these provisions of the LRA were incompatible with PAJA. Accordingly, there is no merit in any of the arguments which were raised by the appellant against the constitutional framework of section 106 read together with section 95 and section 111 of the LRA. They cannot be sustained even as a breach of PAJA, which is the proper manner in which a challenge should have been brought.
- [30] I therefore turn to the attack on the merits of the decision of the Registrar

- [31] As noted, the Registrar raised four separate queries against the conduct of appellant. These queries focused upon the concern as to whether the appellant was a genuine trade union or an organisation which was conducted for the specific benefit of its president and some other specific individuals as opposed to its overall membership. To test the justification of the Registrar's decision, I revert to the queries that he raised.
- [32] Invited to explain how a financially impoverished trade union could spend R43 500 on lotto over a period of two years, counsel for the appellant offered two reasons, namely that it was a fund raising exercise and that it illustrated appellant's commitment to the worthy causes sponsored by the national lotto. These are mutually destructive of each other. It is conceded that appellant was in dire financial straits. It could therefore not have been in a financial position to generously contribute to the social upliftment of society. Its funds were desperately needed for its own operational activities. In addition, to seek to justify the conduct of a president of a trade union in employing union funds to play lotto as being a fund raising exercise is truly to stretch the imagination of any reasonable decision maker. The only reasonable inference that can be drawn from this conduct was that the president was using trade union funds in order to attempt to personally profit through the playing of lotto.
- [33] Francis J also noted that it took more than three years after the request by the Registrar for appellant to provide him with the minutes of the meeting which had approved the lotto transaction. The examination of the minutes which were provided supports the conclusion reached by Francis J that:
- "They were not voluminous nor are the names and addresses and details of the members who attended this special meeting there. The only inference to be drawn is that no special meeting was held where the playing of lotto was authorised."*
- [34] I turn next to the question of the unsecured loans. Appellant's defense was that this loan was approved by members of appellant on 15 April 2000 in terms of a resolution of the national executive council passed on that day. Once more, the relevant copies of minutes and resolutions were not furnished together with the full details of members who had attended. Asked as to what legal power justified the provision of these unsecured loans made by a financially impoverished union to its president, reference was made by appellant to clause 10(5)(b) of appellant's constitution. The argument was raised that this included an implied power to make loans to members. This clause provides that the executive council shall, subject to the provision of the constitution, have the power to engage and dismiss except or otherwise provided in the constitution any employees of the trade union including a general secretary to fix their remuneration and to define their duties. There is no implied power to authorise unsecured loans. To the extent that appellant submits that the president paid back these loans, it failed to disclose his salary and pay slips to support its case.
- [35] Appellant submits that the court a quo is only required to decide whether the loans given to its president were authorised "nothing more, nothing less".

But this submission misses the key point. Whatever may finally had been paid back (which remains uncertain), a huge sum of money, R 481 000, was loaned in an unsecured fashion to the president of a trade union which, on its own admission, was in a parlous financial state.

[36] During a three year period, appellant retained R 276 454.00 in compensation for its efforts to obtain R 726 700 for its members. The financial statements provide no indication as to the reasons for this large retention. Take the 2002/3 financial statements, all that appears in the financial statements is a note that compensation was received from employers in the sum of R447 886 and compensation was paid to members amounting to R259 683. Given that in most cases, appellant did not litigate through attorneys, the extent of the retention appears excessive and calls for explanation beyond vague claims about repayment or subscriptions and interest. None of these claims find any description or explanation in the financial accounts.

[37] To summarise, the playing of lotto, the grant to the president of a massive unsecured loan, the excessive retention of a significant portion of moneys received on behalf of members, the completely inadequate response to the provision of minutes and attendance registers which, upon an examination, reveal a small and rather vague constituency of members support the only reasonable inference, that this was an organisation which was conducting its activities solely or mainly for the benefit of a few people and, in particular, its president.

[38] For these reasons therefore, the evidence clearly supports the conclusion that this was precisely the kind of organisation which the drafters of the LRA had in mind when it empowered the Registrar to examine its activities and to deregister it, so as to deny it the protections of the LRA, as its activities were not designed to promote the interests of its members but rather those of a few office bearers.

[39] For these reasons, the appeal is dismissed with costs.

DAVIS JA

Mlambo JP and Mocumie AJA concur in the judgment of Davis JA

Appearances

For the appellant : J S Mphahlani

Instructed by : Baloyi Attorneys

For the Respondents: Adv. P.L. Mokoena

Instructed by : State Attorney, Johannesburg

1 2006 (2) SA 311 (CC) at paras 95 – 97.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALAC/2011/31.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/national-entitled-workers-union-newu-v-ministry-of-labour-and-others-unknown-topic-alac-2011>

Prepared on 12 October 2026 · Esheria