

SOUTH AFRICA / JUDGMENT

Registrar of Labour Relations and Another v Justice for All Workers of South Africa (JA36/2024) [2024] ZALAC 64; [2025] 2 BLLR 169 (LAC); (2025) 46 ILJ 351 (LAC) (29 November 2024)

[2024] ZALAC 64

COURT

Labour Appeal Court

BEFORE

Savage ADJP, Sutherland JA, Govindjee AJA

CASE / FILE NUMBER

JA36/2024

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THE

LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case

no: JA 36/2024

In

the matter between:

REGISTRAR

OF LABOUR RELATIONS

First

Appellant

THE

DEPARTMENT OF EMPLOYMENT LABOUR

Second

Appellant

and

JUSTICE

FOR ALL WORKERS OF SOUTH AFRICA

Respondent

Heard:

20 November 2024

Delivered:

29 November 2024

Coram: Savage ADJP, Sutherland JA et Govindjee AJA
THE ORDER
[1] The appeal is dismissed.
[2] The order of the Labour Court is confirmed.
[3] The Appellants shall bear the respondent's costs in the appeal.

JUDGMENT

SUTHERLAND AJA,

Introduction

- [1] This case is about a decision by the Labour Court to approve the respondent, Justice for All workers of South Africa (JAWSA), as having satisfied the statutory requirements for registration as a trade union. The decision of the Labour Court was the outcome of an appeal against the refusal of the appellant, the Registrar of Labour Relations (the Registrar), to register JAWSA. The Registrar now appeals to this court against that order.
- [2] The Constitution prescribes several norms which regulate South African society. Among them are certain express rights to be free to act in specific ways. Section 23(2) provides that 'every worker has the right to form and join a trade union'. The point of a trade union is to represent workers' interests in competition with employers' interests. Thus, to facilitate that activity, section 23(5) expressly provides that trade unions are entitled to bargain collectively. In addition, that right, rooted in section 23(5), is furthermore, to be 'regulated' by legislation. That legislation is the Labour Relations Act 66 of 1995 (LRA).
- [3] A trade union is defined in section 213 of the LRA as: 'An association of employees whose principal purpose is to regulate relations between employees and employers.' Chapter VI of the LRA sets out a regime for registered trade unions. A trade union may (not must) register. The consequences of registration are that certain statutory privileges are then available to the registered trade union in exchange for subordinating themselves to the regulatory prescripts of chapter VI, administered by the Registrar.
- [4] Section 95 and 96 of the LRA prescribe the requirements and procedure for registrability. The critical requirement relevant to this controversy is that provided in section 95(7):
'The registrar must not register a trade union ...unless the registrar is satisfied that the applicant is a genuine trade union.'
- [5] To amplify this injunction the Minister of Labour has, pursuant to section 95(8), issued:
'... guidelines to be applied by the registrar in determining whether an applicant is a genuine trade union...'

The dispute over the ‘genuineness’ of the union

[6] The reason given by the Registrar for not registering JAWSA is that, in the opinion of the Registrar, JAWSA is not a genuine trade union. The rationale for this opinion was the subject matter of the appeal to the Labour Court in terms of section 111 (3).[1]

[7] These are the issues that fall to be addressed in the appeal before this court:

7.1. What is the test for overturning a decision of the Labour Court which has made a decision in a section 111(3) appeal from the Registrar?

7.2. What grounds, if any, are demonstrated to justify an interference with the Labour Court decision in this case?

[8] The use of the term ‘appeal’ in section 111(3) requires elucidation. The Labour Court does not sit ‘on appeal’ over the Registrar’s decision in the usual sense of that term. The ‘appeal hearing’ conducted by the Labour Court is an appeal in the wide or loose sense, the latter term often employed to describe the character of the process of a court when hearing ‘appeals’ from administrative bodies. In such a process, an aggrieved person may exercise a second opportunity to make out a case in a re-hearing. The Labour Court may receive evidence not presented to the Registrar, and, in no way, is the Labour Court required to show deference to the views of the Registrar. The Labour Court proceedings are, therefore, to facilitate the exercise of a judicial discretion on the question of the genuineness of the ‘trade union standing’ of an applicant organisation. Such a decision is self-evidently a qualitative decision and if taken properly, the Labour Court would have appreciated the nature of its function, applied its mind to the LRA, the guidelines and all the facts adduced before it.[2] Moreover, When the Labour Court’s section 111(3) ‘appeal Judgment’ is itself on appeal the attributes of the appeal in the loose sense, logically, persist for the purpose of the assessment that the court of appeal is called upon to make.[3]

[9] It would be tedious and is indeed unnecessary to regurgitate the traverse in detail of the evidence and contentions addressed in the judgment of the Labour Court. There is no basis advanced which indicates a failure to address the aspects of the exercise, as mentioned above. The principal arguments advanced on behalf of the Registrar are, in reality, an expression of a difference of opinion about the appropriate inferences to draw from common cause facts.

[10] The main criticisms by the Registrar of JAWSA that are ventilated relate to: (1) the dominant role played by Boshielo, a political activist, (2) a debate about which of two dates should be taken as the date of foundation of the union and what occurred on those occasions, (3) the apparent lack of direct involvement in the constitution-making process by most of the claimed membership and (4) the rudimentary financial controls over the bank account.

[11] There is no adverse inference to be drawn from the fact that Boshielo, who was not an employee and was rather, so it is alleged, a political party activist, being the initiator of the Union. There is nothing in law that inhibits a person who is not an ‘employee’ identifying

with the working classes and taking a leading role in promoting their collective power. Prima facie, Boshielo does seem to be the dominant personality and holds office as General Secretary and is in control of the apparatus of the union. This per se is a neutral factor. As pointed out in *Simunye* by Van Niekerk J, help from an external source is not per se inappropriate.[4] Similarly, electing a supposed outsider to a leading role is not proscribed and neither is it a negative factor per se.

- [12] In the process of the formation of the union two meetings of significance occurred. Both are minuted. The first was on 1 August
2020. The minute records that the workers called Kgakantsho (Boshielo) to seek his assistance with their labour issues. Those present resolved to form an 'interim' structure with Boshielo as general secretary. A committee was elected. Boshielo undertook to get a lawyer to draft a constitution. On 11 March 2023 a so-called 'launch meeting' was held where the Constitution was adopted. The CCMA was invited but did not send a representative. An attorney presented the draft of the constitution, and the text was read and put to the meeting clause by clause. A fortnight later the application for registration was lodged. The Registrar takes a view that the August 2020 meeting is the founding moment and lays heavy emphasis on the informal nature of those events. The Labour Court addressed this aspect and took a different view; ie that the various meetings should be holistically assessed as regard the process of formation. The opinions of the Registrar and the Labour Court differ. There is no reason to disturb the Labour Court qualitative assessment that the events offer no basis for an adverse inference as regards the attribute of genuineness.[5]
- [13] A particular concern of the Registrar is the small number of members in attendance at these meetings. On the facts it is plain the numbers were small. But, objectively, neither singly nor collectively does this factor weigh so heavily as thought by the registrar. The Labour court in its holistic assessment took the view that it offered no adverse inference that might be drawn. We agree.
- [14] The financial circumstances of JAWSA suggest that it is not well endowed. The Registrar's scepticism was piqued by the apparent delay in opening a bank account on 11 March 2022, long after the initial meeting of 1 August 2020. The bank account does however have three signatories. Bank statements were submitted for scrutiny from which the Registrar has expressed suspicion about cash withdrawals using an ATM card. Non-cash expenditure was recorded as being on petrol and food. These attributes indeed do not impress the observer. Nonetheless what reasonable inferences could be drawn? JAWSA offers the explanation that cash was needed for taxi transport. The other disbursements are consistent with transport being a regular feature on the demand on funds. The Registrar suggests that as Boshielo has no car, thus, how could petrol be bought, but this is specious as it is quite common to pay for assisted transport by paying for the fuel. The Registrar is not to be criticised for a close examination of these aspects, but a more robust perspective is required. Paradoxically, a fledgling union awash with money and sophisticated administration ought to look odd and the probabilities of an undisclosed sponsor should warrant deeper investigation. Here, the

general impression is of an impoverished organisation striving to get onto its feet.

[15] It was pressed on this court that the Labour Court should have followed the decision by Steenkamp J in *African Labour Civil Rights Union v Registrar of Labour Relations*.^[6] In that case the registration was refused in circumstances which it was argued are similar. The contention is misplaced. In the determination of whether or not a union is 'genuine,' the critical exercise is intensely fact-specific. The comparison, on the facts, of one case with another, albeit there are features of similarity, is not a sure or safe guide to the appropriate evaluation in either example.

[16] Absent from the assessment of JAWSA's application is the fact that it had existed for some three years prior to its attempt to register and had engaged in typical trade union activities, an irrefutable circumstance of no little significance.

Conclusions

[17] In our view, the decision of the Labour Court is not susceptible to criticism

[18] The appeal must therefore be dismissed.

[19] Costs were ordered a quo. It would be appropriate to do so on appeal too.

[20] Accordingly, the order as set out above is made.

Sutherland AJA (with whom Savage ADJP and Govindjee AJA concur)

APPEARANCES:

FOR THE APPELLANT Adv N Phambuka INSTRUCTED BY The State Attorney Pretoria FOR THE THIRD RESPONDENT M Tooka INSTRUCTED BY Mokoena Tooka Attorneys Inc

[1] 111 Appeals from registrar's decision

- (1) Within 30 days of the written notice of a decision of the registrar, any person who is aggrieved by the decision may demand in writing that the registrar provide written reasons for the decision.
- (2) The registrar must give the applicant written reasons for the decision within 30 days of receiving a demand in terms of subsection (1).
- (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.
- (4) 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.
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 - (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.
- [2] See *Simunye Workers Forum v Registrar of Labour Relations* (2022) 44 ILJ 2021 (LC) per Van Niekerk J (as he then was) at esp: [24] An appeal under s 111(3) of the LRA is an appeal in the wide sense (see *Tikly & others v Johannes NO & others* 1963
- (2) SA 588 (T); *Staff Association for the Motor & Related Industries v Motor Industry Staff Association & another* (1999) 20 ILJ 2552 (LAC); *Workers Union of SA v Crouse NO & another* (2005) 26 ILJ 1723 (LC); *Municipal & Allied Trade Union of SA v Crouse NO & others* (2015) 36 ILJ 3122 (LC)). In consequence, the court is empowered to consider the correctness of the registrar's decision, with or without additional

evidence or information, and may take into account reasons, objections and facts not placed before the registrar at the time

when the decision to refuse registration was made. And see also at: [29] The guidelines published under s 95(8), as the title suggests, are not peremptory. They are intended to assist the registrar in making a determination of genuineness and ought not be applied, as the registrar appears to consider, as a check list of mandatory

requirements. The purpose of the guidelines was made clear in the explanatory memorandum that accompanied the 2002 amendment to the LRA. The mischief intended to be addressed was coercive practices on behalf of disguised labour consultancies registered for the sole purpose of gaining rights of appearance in the CCMA and this court, and the activities of financial and insurance brokers forming trade unions or becoming active in their affairs for the purpose of marketing financial or insurance products. The guidelines must necessarily be interpreted with this purpose in mind.

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- [3] See: *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* 2015 (5) SA 245 (CC), at esp paras [82] to [92] where the distinction between a true discretion and a loose discretion is addressed. In particular: '[86] ... where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense - 'mean[s] no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision'

- [87] This court has, on many occasions, accepted and applied the principles enunciated in *Knox* and *Media Workers Association*. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to

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- [4] See at para: [30] To the extent that the registrar refused to register the appellant on the basis that it failed to comply with s 95(2) (the independence

requirement), the primary objection was that the appellant was heavily dependent on the CWAO, particularly in regard to its infrastructural needs. It should be recalled that the subsection defines independence both in the negative (the applicant must not be under the direct or indirect control of any employer or employers' organisation) and the positive (the applicant must be free from any interference or influence of any kind from any employer or employers' organisation). The registrar was required to apply the independence criterion so defined. Had he done so, he would have concluded that the CWAO is manifestly not an employer or an employers' organisation. There is no suggestion elsewhere that the appellant is under the control of or influenced by any employer or employers' organisation. Simply on the basis of the test posited in s 95(2)(a) and (b), the appellant must thus be regarded as independent.

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[5] See Judgment a quo at esp para [49]; reported in SAFLII [[2024] ZALCJHB 87 (27 February 2024).

[6]

[2018] ZALCJHB 370 (LC) at para 2[5]

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