

SOUTH AFRICA / JUDGMENT

Unica Plastic Moulders CC v National Union of South African Workers (J1072/2010) [2010] ZALC 116; (2011) 32 ILJ 443 (LC) (3 August 2010) [2010] ZALC 116

COURT
Labour Court

BEFORE
AC Basson

CASE / FILE NUMBER
J1072/2010

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IN THE LABOUR COURT OF

SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

CASE NO: J1072/2010

In the matter between : UNICA PLASTIC MOULDERS
 CC APPLICANT
 V
 NATIONAL UNION OF SOUTH
 AFRICAN WORKERS RESPONDENT

JUDGMENT

AC BASSON, J

This is an urgent application in terms of which the applicant (UNICA Plastic Moulders CC) applies for an order to interdict and restrain the respondent (“NUSAW”) from “interfering with the Applicant’s business, and its employees”. The applicant also seeks an order interdicting and restraining the respondent from approaching or being within 50 meters of the applicant’s premises and from recruiting and writing letters to the applicant.

It also appears from the papers that NUSAW has referred a dispute about organizational rights to the CCMA in terms of section 22 of the Labour Relations Act 66 of 1995 (hereinafter referred to as “the LRA”). Section 11 of the LRA clearly states that only a registered trade union that is sufficiently¹ representative of employees employed by the employer in the workplace, may apply and enjoy the organizational rights provided

for in Part A (sections 11 – 22) of the LRA.

It appears that this urgent application was prompted by the fact that it came to the applicant’s attention that NUSAW has been de-registered by the Registrar of Labour Relations and that the Registrar has removed NUSAW from the register of trade unions as published in Government Gazette No 30074 of 20 July 2007 (Notice 893 of 2007). It is common cause that an appeal has been lodged to this Court against the Registrar’s decision to de-register NUSAW.

In a letter dated 19 May 2010 the applicant wrote to the respondent that NUSAW does not have any “bargaining powers” because it has been de-registered. In this letter it is also stated that the respondent is not entitled to exercise any organizational rights in light of the fact that it was de-registered.

On 21 May 2010 the respondent responded to this letter and recorded the following:

“You are advised that once Appeal is lodged the Registrar’s decision is put aside until Labour Court rule otherwise (sic).”

Also attached to the respondent’s papers is a letter from the CCMA (Pretoria) dated 4 August 2009 in terms of which NUSAW is advised that, pending the finalization of the appeal, NUSAW is entitled to represent its members at the CCMA.

In deciding this application, the following must be considered:

Firstly, the status of a trade union that has been de-registered by the Registrar of Labour in terms of the relevant provisions of the LRA. I will refer to those provisions hereunder.

(ii) Secondly, if it is held by this Court that a de-registered trade union’s rights are suspended pending the outcome of an appeal against the decision of the Registrar to de-register, does that mean that a trade union has no rights vis à vis its members? It appears to be the case of the applicant in the present application that a de-registered trade union does not have the right to even recruit members or write letter to an employer.

Brief exposition of the law

Section 8 of the LRA states that every employer's organization and every trade union have certain rights in terms of the LRA. These rights include the right, subject to the provisions contained in Chapter VI of the LRA, to determine their own constitutions and rules and to hold elections for its office-bearers, officials and representatives. Chapter VI of the LRA (sections 95 –

- 111) contains detailed prescriptive provisions that must be complied with if a trade union or an employer organization wishes to apply for registration in terms of the LRA. (For purposes of this brief judgment I will only refer to trade unions with the understanding that the provisions contained in Chapter VI of the LRA equally apply to employer's organizations except where the context provides otherwise.)

Trade unions apply for registration in order to be able to claim as of right various rights provided for by the LRA but reserved solely for registered trade unions. As such only a registered trade union can claim and enforce (in terms of section 22 of the LRA) certain organizational rights provided for in sections 11 – 21 of the LRA. Only a registered trade union(s) and a registered employer's organization(s) may establish a bargaining council as contemplated by Part C of the LRA (sections 27 – 34). Only registered trade unions can seek the establishment of a workplace forum as contemplated in Chapter V of

the LRA (sections 78 – 94) and only registered trade unions can conclude collective agreements as contemplated by sections 23 – 26 of the LRA. Of particular importance is the fact that only a registered trade union may represent (through its officials) its members in proceedings at the CCMA (see Rule 25(1)(b)(3) of the Rules of the CCMA), bargaining councils and the Labour and Labour Appeal Court (see section 161 of the LRA).

Nothing in the LRA, however, prevents an unregistered or de-registered trade union from recruiting members or from representing its members at disciplinary hearings (provided that union officials are allowed to represent employees at a disciplinary hearing). Nothing also prevents an unregistered or de-registered trade union from approaching an employer demanding that the employer bargains with it over wages. Nothing in the LRA also prohibits an unregistered trade union (and its members) from participating in a protected strike.

Consequently, in so far as the applicant in the present application is seeking an order against NUSAW (as a de-registered or unregistered union) interdicting it from recruiting members amongst the staff of the applicant, the order should be refused as the LRA clearly allows even unregistered unions from operating in the workplace. What unregistered or de-registered unions cannot claim are those rights specifically afforded to registered unions only.

In terms of section 95 of the LRA a trade union may apply to the Registrar for registration and in doing so it must be able to satisfy the Registrar that it, inter alia, has adopted a constitution that meets the requirements of subsection

- (5) and (6) of section 95. Section 95(5) provides that the trade union must be an association not for gain. The constitution must provide for banking and investing its money and must establish the purpose for which its money may be used. The Registrar will only register a trade union if it is satisfied that the trade union meets all the requirements for registration. Section 97 of the LRA provides for the effect of registration of a trade union.

Section 98 of the LRA is particularly important and requires that accounting records must be kept and that audits must be done annually. In terms of this section every registered trade union must adhere to generally accepted accounting practices, principles and procedures. In terms of section 100,2 every trade union is also required to provide the registrar, inter alia, with a statement certified by the secretary that it accords with its records.

It is clear from a reading of the LRA that the Registrar of Labour Relations is assigned an important function which is to ensure that trade unions comply with the obligations prescribed by the LRA. Should the Registrar be of the view that the union has failed to adhere to its statutory obligations in terms of the LRA, the Registrar is able to take appropriate steps to rectify any non-adherence to these obligations.³ In terms of section 106 of the LRA, the Registrar also has a discretion to cancel the registration of a trade union by removing

its name from the appropriate register. Section 106(2A) and (2B) provides as follows:

“(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.”

A party who is aggrieved by a decision of the Registrar to de-register a trade union and to remove its name of the Registrar, may appeal against the decision within 30 days of the written notice of the decision of the Registrar. The Registrar must then provide the applicant with written reasons for the decision within 30 days of receiving a demand in terms of subsection (1) of section 111. Any person who is then dissatisfied with the written reasons for the decision may appeal to the Labour Court against that decision within 60 days of the date of the Registrar's decision or if written reasons for the decision are demanded, the date of those reasons.

The importance of the Registrar in ensuring compliance with the statutory accounting and accountability standards as set out in the LRA becomes even more apparent when regard is had to two recent matters that came before this Court, both of which concerned de-registered trade unions.⁴ In both of these judgments the learned judges referred to the shocking extent to which some trade unions have failed to comply

with the prescribed accounting procedures and standards prescribed by the LRA. In *National Entitled Workers Union v Ministry of Labour & Others*

(2010) 31 ILJ 574 (LAC), Wagley, DJP sets out in fair detail the degree to which NEWU has failed to comply with the required statutory accounting

standards. In that matter the Registrar of Labour de-registered NEWU after it discovered various and serious incidences of financial

mismanagement. These include the granting of unsecured loans in excess of R 400 000.00 to Mr. Maluleke without furnishing any

information in respect of whether the loans were paid back or when the loans will be paid back. The Registrar was also of the view that NEWU is operating for the gain of certain individuals. The appeal in that matter is still pending. The Registrar of Labour Relations also de-registered the United Peoples Union of South Africa ("UPUSA") after it detected similar acts of serious financial and accounting mismanagement. The Registrar similarly found that UPUSA had ceased to function in terms of its constitution and that it did not comply with section 98, 99 and 100 of the LRA. The Registrar also found that UPUSA had ceased to operate as a genuine trade union. See in this regard: *United People's Union of South Africa v Registrar of Labour Relations* (Case no J 2178/09). An appeal is also pending against the decision of the Registrar of Labour in the latter case.

What is the effect of an appeal against a decision of the Registrar to de-register?

I am of the view that the noting of an appeal does not suspend the effect of the decision of the Registrar to de-register pending the appeal in terms of section 111(3) of the LRA. I have come to this decision on the following basis. Firstly, section 106(3) of the LRA unequivocally states that all the rights

enjoyed by a trade union as a result of being de-registered will end. This section is, in my view, clear in its intention namely that the (de-registered) trade union will no longer be able to exercise or claim the rights reserved for registered trade unions only. These rights include the right to organizational rights in terms of the LRA and also the right to appear in this Court and at the CCMA and Bargaining Councils. Although section 106(3) does not expressly state that a decision of the Registrar is not suspended (pending the appeal), I am of the view that it is implied having regard to the following: Section 106(3) of the LRA must be read against the transitional provisions contained in Schedule 7 of the LRA which provides as follows:

"Cancellation in terms of sub-item (6) takes effect –

- (a) if the trade union or the employer's organization has failed, within the time contemplated in section 111(3), to appeal to the Labour Court against the cancellation, when that period expires; or
- (b) if the trade union or the employer's organization has lodged an appeal, when the decision of the registrar has been confirmed by the Labour Court."

Section 106(3) of the LRA now provides as follows:

"When a trade union's or employer's organisation's registration is cancelled, all the rights it enjoyed as a result of being registered will end."⁵

I am further of the view that this view does not conflict with the academic authority which clearly states that the question of whether or not an administrative decision is suspended pending the outcome of an appeal depends on the relevant statute itself. Lawrence Baxter Administrative Law⁶ discusses the question whether or not an administrative decision which is challenged whether by way of a review or an appeal, has interim effect. IBaxter⁷ is of the view that, in the case of private disputes, the effect at common law of noting an appeal is to suspend the operation of the decision appealed against. However, where an appeal is noted against a decision taken in terms of statutory powers, whether or not the decision appealed against is suspended, is dependent upon the enabling statute. The common law principle constitutes no more than a presumption in the case of an administrative decision which presumption may be negated by the statute itself.⁸

A similar view is held by JR De Ville *Judicial Review: Procedure and Remedies*. The learned author writes that where an appeal is allowed against an administrative decision (such as in the present case), the decision appealed against will be suspended and will therefore only take effect (i) once the period for the appeal has expired and the person affected did not lodge an appeal or (ii) the decision has been confirmed on appeal. De Ville, however, also points out that the decision will not be suspended if the statute in question provides otherwise.

It would therefore appear from the foregoing that the principle is that, unless the relevant statute provides otherwise, the lodging of an appeal suspends the effect of the (administrative) decision pending the outcome of the appeal. As already indicated, I am of the view that the statute is clear that the intention of the legislature was to bring to an end the rights and privileges enjoyed by a trade union in terms of certain provisions of the LRA pending the outcome of the appeal. There is also a further and important public policy consideration as to why the rights of a trade union should come to an end when it is de-registered by the Registrar (pending the appeal). A trade union is in a position of trust vis à vis its members and as such is entrusted with ensuring that the employee is treated fairly by his or her employer in the workplace. A registered trade union is further allowed to represent its member at the CCMA, the Bargaining Council and the Labour Court and is as such in a similar position as an attorney or counsel. From a public policy point of view a trade union should not be able to enjoy the rights afforded to a registered trade union if it has flaunted the very act from which these rights are being derived.

In preparing this judgment I also had the benefit of reading my learned brother's decision in *CCMA v Registrar of Labour Relations & Others* (Case No: J984/10) dated 27 July 2010. Molahlehi, J came to a similar decision namely that the decision of the Registrar to deregister is not suspended pending the outcome of the appeal in terms of section 111(3) of the LRA. I am, in particular, in agreement with his assessment of what the objects of the LRA are in respect of trade unions:

"[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. "

I am in agreement with the above sentiments. There is no doubt that trade unions play an important role in the workplace and in that sense fulfill an important social responsibility towards employees who in most instances have no other recourse than the trade union who will then be entrusted to ensure that he or she is treated fairly by his or her employer. Where the union is registered, the union has the further right of representing the employee at the CCMA, Bargaining Council and the Labour Court. Commissioners, Arbitrators and Judges expect of union representatives to diligently and honestly serve the interest of their members. They have, after all, been granted the privilege and right to be able to represent their members by virtue of them having complied with the statutory provisions of the LRA. I am therefore in agreement with my learned brother Molahlehi, J that a trade union should not be able to represent these vulnerable workers if their conduct have been found to be unscrupulous by the Registrar of Labour and especially where the Registrar of Labour finds that the union is no longer operating as a genuine trade union but is being used to advance the selfish business interests of individuals. See further *CCMA v Registrar of Labour Relations* (supra):

“[38] 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. “

The fact that a trade union will no longer be able to exercise organisational rights in terms of the LRA is an unfortunately consequence. However, the union only has itself to blame. See in this regard *United People's Union of South Africa v Registrar of Labour Relations* (Case no J 2178/09):

“[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 organisational 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 utilised 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' organisation, 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.”

The present matter

Turning to the present matter. Although the grounds for urgency set out in the founding affidavit are rather flimsy, I have nonetheless decided to deal with the matter on an urgent basis. As far as the merits of the application are concerned, I am of the view that the application should fail. I have already alluded to the fact that a union may still, despite having been de-registered, represent its members albeit not before the CCMA, Bargaining Council or the Labour Court. An unregistered trade union is also not barred from recruiting members nor is it barred from negotiating on behalf of its members. I can also find no basis as to why NUSAW should be interdicted and restrained from approaching or being within 50 meters of the applicant's premises. An unregistered trade union may, however, not claim, as a matter of right any of the organizational rights provided for in the LRA. There is a dispute about organizational rights currently pending before the CCMA. As a result of its unregistered status (which is not suspended pending the outcome of the appeal against the decision to de-register) NUSAW do not have the right to represent its members at the CCMA despite a letter from the Senior Convening Commissioner of the CCMA (Pretoria) allowing it to do so. This is also the view of my learned

brother Molahlehi, J (supra). The application therefore falls to be dismissed. I can find no reason why costs should not follow the result.

In the event the following order is made:

“The application is dismissed with costs.”

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DATE OF APPLICATION: 23 JULY 2010

DATE OF JUDGMENT: 3 AUGUST 2010

FOR THE APPLICANT:

Mr. Madoda Khumalo of Kganare Attorneys

FOR THE RESPONDENT:

Mr. Matsobane Ramalatso of

Matsobane Ramalatso Attorneys

1 In certain instances it is required that the union must be a majority union. See, for example, section 14 and 16 of the LRA.

2 “(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.”

2 “(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.”

3 See Part C of the LRA sections 108 – 110.

4 The LAC in *National Entitled Workers Union v Ministry of Labour & Others*

(2010) 31 ILJ 574 (LAC) stated as follows: “[7] The registrar is an important functionary in terms of the LRA and is tasked, inter alia, with ensuring due compliance by registered trade unions the obligations imposed upon them by the LRA. The registrar is defined in the LRA as 'the registrar of labour relations' and is the fourth respondent in this appeal.”

5 My emphasis.

6 Baxter at page 360.

7 Baxter page 380 – 381.

8 Ibid at 381: “The common –law principle can constitute no more than a presumption in the case of administrative decision, and this presumption may well be negated by the implications of the statute.”

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