



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C879/2015

Not Reportable

In the matter between:

**PROFESSIONAL ALLIED & TRANSPORT UNION**

**Applicant**

and

**REGISTRAR OF LABOUR RELATIONS**

**Respondent**

Heard: **March 24 2016**

Delivered: **27 July 2016**

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**JUDGMENT**

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RABKIN-NAICKER, J

[1] This is an appeal in terms of section 111(3) of the LRA against the decision of the respondent (the Registrar) to refuse to register the applicant (the union) as a trade union in terms of section 96 of the LRA. Both parties have filed written submissions before court.

[2] The reasons for the refusal to register the union are set out in a report by the Registrar dated 13 July 2015. It summarises the basis for the refusal of registration as the following:

“- There was no formation of a trade union

- The Applicant does not have members

- This is an association for gain of certain individuals

This is therefore not a genuine trade union as envisaged in the Act.”

[3] The LRA defines a trade union as ‘an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ association. In order to enjoy the rights of a registered trade union, a trade union must meet the requirements as set out in Section 95, the contents of which bear recording:

“95 Requirements for registration of trade unions or employers’ organisations

(1) Any trade union may apply to the registrar for registration if-

- (a) it has adopted a name that meets the requirements of subsection (4);
- (b) it has adopted a constitution that meets the requirements of subsections (5) and (6);
- (c) it has an address in the Republic; and
- (d) it is independent.

(2) A trade union is independent if-

- (a) it is not under the direct or indirect control of any employer or employers’ organisation; and

- (b) it is free of any interference or influence of any kind from any employer or employers' organisation.

(3) Any employers' organisation may apply to the registrar for registration if-

- (a) it has adopted a name that meets the requirements of subsection (4);
- (b) it has adopted a constitution that meets the requirements of subsections (5) and (6), and
- (c) it has an address in the Republic.

(4) Any trade union or employers' organisation that intends to register may not have a name or shortened form of the name that so closely resembles the name or shortened form of the name of another trade union or employers' organisation that it is likely to mislead or cause confusion.

(5) The constitution of any trade union or employers' organisation that intends to register must-

- (a) state that the trade union or employers' organisation is an association not for gain;
- (b) prescribe qualifications for, and admission to, membership;
- (c) establish the circumstances in which a member will no longer be entitled to the benefits of membership;
- (d) provide for the termination of membership;
- (e) provide for appeals against loss of the benefits of membership or against termination of membership, prescribe a procedure for those appeals and determine the body to which those appeals may be made;
- (f) provide for membership fees and the method for determining membership fees and other payments by members;
- (g) prescribe rules for the convening and conducting of meetings of members and meetings of representatives of members, including the quorum required for, and the minutes to be kept of, those meetings;
- (h) establish the manner in which decisions are to be made;
- (i) establish the office of secretary and define its functions;
- (j) provide for other office-bearers, officials and, in the case of a trade union, trade union representatives, and define their respective functions;
- (k) prescribe a procedure for nominating or electing office-bearers and, in the case of a trade union, trade union representatives;
- (l) prescribe a procedure for appointing, or nominating and electing, officials;
- (m) establish the circumstances and manner in which office-bearers, officials and, in the case of a trade union, trade union representatives, may be removed from office;

- (n) provide for appeals against removal from office of office-bearers, officials and, in the case of a trade union, trade union representatives, prescribe a procedure for those appeals and determine the body to which those appeals may be made;
- (o) establish the circumstances and manner in which a ballot must be conducted;
- (p) provide that the trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out;
- (q) provide that members of the trade union or employers' organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if-
  - (i) no ballot was held about the strike or lock-out; or
  - (ii) a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out;
- (r) provide for banking and investing its money;
- (s) establish the purposes for which its money may be used;
- (t) provide for acquiring and controlling property;
- (u) determine a date for the end of its financial year;
- (v) prescribe a procedure for changing its constitution; and
- (w) prescribe a procedure by which it may resolve to wind up.

(6) The constitution of any trade union or employers' organisation which intends to register may not include any provision that discriminates directly or indirectly against any person on the grounds of race or sex.

(7) The registrar must not register a trade union or an employers' organisation unless the registrar is satisfied that the applicant is a genuine trade union or a genuine employers' organisation.

(8) The Minister, in consultation with NEDLAC, may by notice in the Government Gazette publish guidelines to be applied by the registrar in determining whether an applicant is a genuine trade union or a genuine employers' organisation."

[4] It is thus mandatory for the Registrar to refuse registration if he is not satisfied that the applicant union is 'genuine'. The Guidelines do not define the meaning of "genuine" but as was submitted by Mr Bosch for the union, essentially the guidelines suggest that the approach to be adopted by the Registrar is to examine the actual operation of the union. Moreover he must ascertain the process by which the union was formed, its composition, membership and the activities it undertakes.

[5] The grounds of appeal by the union are set out as follows in the Notice of Appeal:

“4. The Respondent erred in concluding that no trade union was formed. In particular, but without derogating from the generality of the foregoing:

4.1 The Respondent failed to appreciate that he was not required to determine whether a trade union was formed, but rather whether the Appellant should be permitted to register as a trade union.

4.2 In any event, the Respondent ignored the definition of ‘trade union’ in the LRA when determining whether a trade union was formed in the current matter;

4.3 The Respondent applied factors relevant to determining whether a trade union is genuine for the purposes of s97(7) of the LRA when determining whether a trade union was formed in this case;

4.4 The Respondent had no factual basis on which to determine that no trade union was formed. In particular, the Respondent erred in concluding that the meeting on 9 December 2014 was incapable of adopting, or failed to adopt, a constitution.

5. The respondent erred in concluding that the Appellant had no members. In particular, but without derogating from the generality of the foregoing:

5.1 The Respondent failed to appreciate that he was not required to determine whether the Appellant had members, but rather whether it should be permitted to register as a trade union;

5.2 In any event, the Respondent ignored the relevant evidence submitted by the Appellant regarding its membership base;

5.3 The Respondent relied on factors which were irrelevant or incapable of sustaining a conclusion that the Appellant had no members.

6. The Respondent erred in concluding that the Appellant is an association for gain of certain individuals. In particular, but without derogating from the generality of the foregoing:

6.1 There was no factual basis on which to conclude that the Appellant is an organisation for the gain of certain individuals;

6.2 In reaching this conclusion the Respondent failed to appreciate that none of the factors to which he referred was apparent from the evidence before him;

6.3 The Respondent applied wrong legal principles in concluding that office-bearers are not entitled to receive salaries or allowances from a trade union.”

[7] The documents before me comprise three parts:

7.1 The record filed by the Registrar (the Record)

7.2 Further documentation filed by the union (the union’s bundle)

7.3 A supplementary bundle filed by the Registrar (the Registrar’s supplementary bundle).

[8] The Registrar’s reasons for his decision contain the following pertinent paragraphs:

**“Formation of a Trade Union**

.....The applicant submitted minutes of an “inaugural congress” meeting allegedly held at Motango in Pretoria on 9 December 2014. From the start we learn that “delegates” had to introduce themselves. For a new union starting from scratch, it is confusing to speak about a “Congress” with “delegates”. The question will be who are the delegates, who do they represent and who elected them? This was not a meeting of members.

The attendees purported to deal with the adoption of constitution as follow: “Comrade L Mba adopted constitution and seconded by S Nkomo”. Further on we learn that “the constitution adopted by S. Mathulachipe and seconded by Mafifi” As we can see from the Guidelines<sup>1</sup> above, the constitution must be adopted by members. The applicant did not submit an attendance register despite request. From the discussions in the meeting we deduce that the so called inaugural congress was attended by a clique of only 7 people some of whom were members of a union called Professional Transport and Allied Workers Union (PTAWU) Mr L. Tshifhesi was suspended by PTAWU for engaging in a conduct of establishing another trade union. Five of the people who attended this meeting were still office bearers of Professional Transport and Allied Workers Union....

The above mentioned people then nominated themselves into positions. There was no adoption of constitution and election of office bearers by members.

We conclude there was no formation of trade union.

### **Membership**

As per LRA form 6.1 the applicant claims to have 456 members. The applicant submitted several copies of application forms for membership from Fidelity Security Services. This is the only company in which the applicant claims to have members. The bank statements reflecting payments by Fidelity Security Services into the account of the applicant was submitted. Also received by this office are pay slips from two employees reflecting double deductions for both Professional Transport and Allied Union of South Africa (PTAWU) and Applicant. The pay slips relate a period covered by the bank statement (April 2015).

This office has documentary evidence that the membership of applicant and this union is the subject of a dispute that has been taken to the Labour Court. The dispute in court relates to unlawful deduction of subscriptions by Fidelity Security

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<sup>1</sup> i.e. Minister’s Guidelines

Services in favour of Applicant. The Registrar of Labour Relations has been cited as Third Respondent in the matter.

Although we accept that there is no law against dual trade union membership, we cannot accept that the Applicant has members at Fidelity Security Services because of the dispute. We also take cognisance that the Applicant claims to have members only at Fidelity Security Services. There is a stop order facility in favour of the Applicant although Applicant is not a registered trade union. We further note that huge sums of money are deposited by Fidelity Services and after each deposit of a large sum of money there is a withdrawal of almost the same amount deposited. It is a concern in this office why the sums of money are deposited and withdrawn immediately from the account.

As stated above the conclusion is since there is an unresolved dispute around the members at Fidelity Security Services, we cannot accept that the Applicant has members due to the uncertainty.

#### **Association for gain of certain individuals**

.....The fact that Elliot L Tshifhesi who is serving as President and Nomaswazi Nkosi serving as Treasurer received unexplained amounts of R2000.00 and R1500.00 respectively is an indication that this is an organisation for gain of certain individuals. The practice where office bearers draw money or unexplained allowances from the union is an indication that it is an association for gain of certain individuals. Office bearers are employees in the scope of the union and members of the trade union. They are not officials. They are not entitled to receive salaries or any unexplained allowances from the union.

In the circumstances we arrive at a conclusion that this is an association for gain of certain individuals.”

- [9] I note that subsequent to the Registrar conveying his decision refusing registration, the union furnished the Registrar with further documentation. This included an attendance register for the inaugural meeting which was held on 9

December 2014. It also made available various minutes and attendances registers, not available to the Registrar before the decision was made.

[10] The further minutes and attendance registers contained in the union's bundle which appear to pre-date the inaugural meeting of the union include three in which there are discrepancies:

10.1 An attendance register dated the 25 April 2014 in respect of a meeting held in Cape Town on 19 April 2014;

10.2 An attendance register dated 13 October 2014 in respect of a meeting held in Port Elizabeth on 12 October 2014; and

10.3 Three attendance registers dated 25 October 2014 in respect of a meeting held in Robertville on 22 October 2014.

[11] Mr Bosch quite correctly informed the court that he could not take the problem of these inconsistencies further in submission. The submission made on behalf of the Registrar was that where an attendance register is not taken on the same day that a meeting is held the Registrar does not consider it to be sufficient proof of the attendance at the meeting.

### Evaluation

[12] This is an appeal in the wide sense. It is a complete rehearing of and fresh determination on the merits of the matter. The court can consider the matter afresh and make any appropriate order it deems justified by the facts.<sup>2</sup> As referred to above, the court has additional evidence before it, not before the Registrar when he took his decision.

[13] It was submitted on behalf of the union that the Registrar was incorrect in his statement that 'no trade union' was formed, given the definition of trade union in the LRA referred to above. As a point of semantics this may well be correct.

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<sup>2</sup> Staff Association for the Motor & Related Industries v Motor Industry Staff Association & another (1999) 20 ILJ 2552 (LAC) at paragraph 12;

What the Registrar actually considers is whether there is a trade union ripe for registration before him.

[14] The union argues that the fact that only delegates and not all 456 members were at the inaugural meeting cannot be taken as an indication that the union is not a 'genuine' union. The register of the inaugural meeting in the documents before me provided subsequent to the Registrar's decision is headed "09 December 2014 Attendance register for Fidelity employees" and has 12 names and signatures on it. There is no indication of the status of those present at the meeting in relation to the regions of the union. There is no indication in the minutes of this meeting or the register that the persons nominated into office bearer positions are mandated by any collective of the union's members. However, read with the minutes provided of the meetings held in different regions, some of the names on the register are of persons nominated to represent members at the inaugural meeting.

[15] The Ministerial Guidelines promulgated in terms of section 95(8) of the LRA provide as follows in as far as the formation of a trade union is concerned:

"Formation of a trade union

7. The process followed to form a trade union can give important indications as to whether an organisation is a genuine trade union. Key aspects of the process that should be examined include -

- the number of founding members who attended the inaugural meeting(s) to establish the trade union and who completed signed registers indicating their names and place of work;
- the means by which the constitution of the trade union was drafted and adopted;
- the election of an executive committee or council of members and the election of office-bearers.

The crucial issue that must be addressed is whether the formation of a trade union involved employees associating with one another to establish an organisation to regulate relations with their employees)."

- [16] The union refers to only one inaugural meeting in its submissions before court and submits that those attending the meeting were delegates. It further states that the minutes of regional meetings indicate that members in various areas appointed representatives to attend and to adopt.
- [17] From the above, it is my view that given the record before me which contains additional evidence than that serving before the Registrar, it cannot be said that the inaugural meeting did not consist of delegates representing the membership. There are in the region of 456 members of the union who work for an employer with branches all over the country. The finding that there are no members of the union is incorrect.
- [18] The Registrar was also influenced in his assessment of the formation of the union by the fact that certain of the representatives at the regional meeting were office bearers of another union (PTAWU). His report refers to these persons as a 'clique'. Reference is also made to an unresolved dispute around the members at Fidelity Security Services, which the report states means that 'we cannot accept that the Applicant has members due to the uncertainty'. The papers in the dispute referred to, are contained in the record before me under case number J791/15. A look at the answering papers in the urgent application reflect that it arose regarding a dispute over two R40 deductions from the wages of an employee in respect of PATU who was not a member of the union, but of PATAWU. The monies were refunded.
- [19] As referred to above, the Registrar also records in his reasons for the decision not to register the union that he believes that the union is an association for gain of certain individuals in particular that: "The practice where office bearers draw money or unexplained allowances from the union is an indication that that is an association for gain of certain individuals. Office bearers are employees in the scope of

the union and members of the trade union. They are not officials. They are not entitled to receive salaries or any unexplained allowances from the union.”

[20] It is submitted on behalf of the union in relation to the issue of payments made to office bearers, that: “...the respondent applied wrong legal principles in concluding that office-bearers are not entitled to receive salaries or allowances from a trade union. The guidelines themselves envisage that office bearers might be paid salaries.”

[21] The Ministerial guidelines provide in relevant part that:

“Association not for gain

18. In terms of section 95(5)(a) of the LRA a trade union must state in its constitution that it is an association not for gain. The purpose of this requirement is to prevent trade unions from being used as vehicles for enriching individuals or as a cover for profit-making businesses. In evaluating whether a trade union is a genuine trade union, it is important to examine the actual financial operation of the trade union. Among the factors that may indicate that a trade union is operating in fact for the gain of certain individuals are the following

(a) Unrealistically high salaries and allowances are paid to the officials, office-bearers or employees of the trade union.

(b) Interest-free or low interest loans are made to officials, office-bearers or employees, and those loans are not repaid.

(c) Family members of office-bearers or officials are employed by the trade unions.

(d) Income earned by the trade union is not used for the benefit of the organisation and its members but is paid out to officials, office-bearers or employees.” (emphasis mine)

[21] In my view the union is incorrect in submitting that the Guidelines envisage office bearers may be paid salaries, although not unrealistically high. The Guidelines must be read with the provisions of the LRA which distinguishes between employees of a union and its office-bearers. Section 213 provides that:

“ 'office-bearer' means a person who holds office in a trade union, employers' organisation, federation of trade unions, federation of employers' organisations or council and who is not an official; (my emphasis)

'official', in relation to a trade union, employers' organisation, federation of trade unions or federation of employers' organisations means a person employed as the secretary, assistant secretary or organiser of a trade union, employers' organisation or federation, or in any other prescribed capacity, whether or not that person is employed in a full-time capacity. And, in relation to a council means a person employed by a council as secretary or in any other prescribed capacity, whether or not that person is employed in a full-time capacity;”

[22] In terms of the Guidelines, the actual financial operation of the union must be considered by the Registrar. The union provided the Registrar with bank statements covering a period of five months. The union also on request provided him with an accounting of its expenditure. However, almost half the items listed did not have supporting vouchers. The financial documentation contained in the record before me (i.e. filed for the purposes of the court hearing) contains additional items of expenditure than provided to the Registrar for the same period. In addition I note that the union has submitted that the Court should consider the report from a registered auditor in making its decision.

[23] While there is a report from a registered auditor, the auditor did not perform an audit or review as indicated by him, but a report solely on the following:

- “1. We examined the membership records for the period ending March 2015 (3<sup>rd</sup> month) and compare with the bank statement amount reflected in total. This included a review of the bank statements for 3 month transactions ended 31 March 2015.
2. We examined the constitution document and confirm that PATU has a constitution in place.

3. We confirmed the office bearers listed in the constitution in place by inspecting a copy of their Identity documents.”

[24] In as far as the first issue was concerned, the auditor’s finding was that:

“The records total contributions of R40 for their total members less commission; the total amount was reflected in the bank statement as received. For the 3 months January, February and March 2015, the bank statements reflected amounts received from members.”

[25] The auditor’s report states that the procedures it performed “do not constitute an audit or a review made in accordance with International Standards on Auditing or International Standards on Review Engagements, we therefore do not express any assurance on the procedures performed above”.

[26] The report does not in my view, given its limitations, assuage concerns regarding the financial operations of the union.

[27] In **Registrar of Labour Relations v Consolidated Association of Employers of SA Region**<sup>3</sup> the LAC was concerned with the deregistration of an employers’ organization by the Registrar and stated that:

[27] The registrar is a creature of statute. He derives his powers from the LRA and the guidelines promulgated in terms of the LRA. During the period 1996 to 2002, the function of the registrar was restricted to determining whether a trade union or employers’ organisation had adopted a name that met the requirements of the LRA and certain other requirements. If those requirements were met, the registrar was obliged to register the trade union or employers’ organisation. Certain amendments to the LRA came into force in 2002 and the registrar was then given the additional authority in terms of s 95(7) of the LRA not to register any trade union or employers’ organisation unless he was satisfied that the applicant was a genuine trade union or employers’ organisation. In the explanatory memorandum to the bill the following was stated:

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<sup>3</sup> (2015) 36 ILJ 182 (LAC)

'There are also strong indications that some financial and insurance brokers have become active in the establishment and the affairs of trade unions and employers' organisations in order to market financial or insurance products. In one instance a Magistrate's Court ordered the transfer of a union's assets and all records (in effect the registration and management) to an insurance broker. This broker then attempted to continue by cloaking its activities under the banner of a union. The status quo was partially restored but only after a lengthy, resource-absorbing and time-consuming process.....

The proposed amendments to s 95 are intended to discourage the formation and registration of trade unions and employer's organisations that are not genuine, by introducing a requirement that they be genuine or bona fide and giving the registrar of labour relations the power to refuse to register organisations which are not. The Minister will have the power to issue guidelines concerning whether or not a trade union or employers' organisation is bona fide. Any refusal to register a trade union on these grounds will be subject to appeal to the Labour Court.

The International Labour Organisation has expressed the view that this is in keeping with its standards concerning the promotion of collective bargaining and freedom of association.'

[28] Assessing whether an organisation is genuine or authentic, even with the assistance of the Ministerial Guidelines is a difficult task for the Registrar. I must decide on the record before me whether the Registrar's decision stands to be confirmed. I am of the view that it should be for inter alia, the following reasons:

- 28.1 There are discrepancies in certain of the documentation provided by the union which point to materials being drafted after the fact. In particular I refer to the attendance registers and minutes provided;
- 28.2 The minutes of the inaugural meeting of the union are lacking in particularity and while persons were mandated to attend, these

representatives appear to have nominated each other into office-bearer positions;

28.3 While there are clearly members of the union who work at Fidelity Services nationally and whose wages are subject to a subscription deduction in favour of the union, with the blessing of the employer, the union has not set out any detailed submissions as to what the members of the union are undertaking to regulate relations between themselves and the employer;

28.4 The financial operation of the union, on the information provided by it both before and subsequent to the decision of the Registrar, and the random undocumented payments made to office-bearers discernible in the short period covered by the information provided, does not reflect that the union is at this stage bona fide operating in the interests of its members.

[29] I agree with the respondent's submissions that the financial information before me is inadequate and reflects the absence of basic checks and balances in the union's accounting system. The trade union in my view is not ripe for registration in that it has been unable to present the evidence to establish it is bona fide or genuine and fit for purpose to be registered under the LRA. In the result I make the following order:

Order

1. The decision of the Respondent to refuse to register PAWU is upheld.
2. There is no order as to costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: C.S. Bosch instructed by Malcom Lyons & Brivic Inc

Respondent: T Sarkas instructed by State Attorney

Labour Court