



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: J851/20

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA**

Appellant

and

THE REGISTRAR OF LABOUR RELATIONS

First Respondent

**THE DEPARTMENT OF EMPLOYMENT
AND LABOUR**

Second Respondent

Heard: 17 September 2020 (Due to Covid 19 lockdown, this matter was heard *via* video conferencing and the parties agreed to such an arrangement).

Delivered: 23 September 2020 (This judgment was handed down electronically by emailing a copy of this judgment to the parties. The 23rd September 2020 shall be deemed to be a delivery date).

Summary: Section 111 of the LRA appeal of the registrar's decision. Exercise of public power – jurisdictional facts – absence of which power not exercisable in law. Interpretation of section 101 of the Labour Relations Act. A trade union seeking to amend its existing constitution has to satisfy the registrar that its constitution in the amended form complies with the provisions of section 95 of

the LRA. The registrar has no powers to register an amended constitution that does not comply with the provisions of section 95 of the LRA. The appellant's amended constitution did not comply with the provisions of section 95 (5) (p) and (q) of the LRA. Held: (1) Appeal is dismissed. (2) Applicant to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This case is the ripple effect of the Constitutional Court decision of *National Union of Metalworkers Union of South Africa v Lufil Packaging (Isithebe) and others*¹. The repercussions of the judgment drove the appellant before me to some action to amend its constitution. Perhaps it was about time that the appellant had to dust off some cobwebs from its constitution which was last amended in 2009. Before me is an appeal brought in terms of section 111 of the Labour Relations Act² (LRA) seeking to appeal a decision of the registrar of employment and labour relations which was taken on 13 August 2020.

[2] The appellant lodged this appeal on 21 August 2020. On 1 September 2020, the appellant approached this Court seeking an order that the appeal be heard on an urgent basis. My sister Prinsloo J issued an order directing the registrar of this Court to enrol the appeal on 17 September 2020 in the urgent Court. The appeal came before me for consideration.

Background facts

[3] Had this Court not limited the scope of this matter, this judgment would have been longer as the parties quibbled over other extraneous issues. The single

¹ [2020] 7 BLLR 645 (CC).

² No. 66 of 1995, as amended.

and critically important issue in this matter is whether the registrar of employment and labour relations was obliged to act within the contemplation of section 101 (3) of the LRA. On 26 March 2020, the Constitutional Court handed down a judgment in the *Lufil* matter. After studying the judgment, the appellant decided to call a special central committee meeting to consider an amendment to its constitution. The appellant considered options of holding a national congress to discuss issues relating to an amendment of its constitution. Owing to issues related to Covid-19 restrictions and financial constraints the idea of holding a national congress was jettisoned.

- [4] On 12 June 2020 the General Secretary of the appellant wrote a letter to the registrar of employment and labour relations calling on him to exercise his powers in section 101 (3) of the LRA. Various correspondences were exchanged between the registrar and the appellant. It is, for the purposes of this judgment, not necessary to set out the laborious exercise the parties engaged in. Ultimately on 13 August 2020 the registrar took a decision refusing to certify the amendment for various reasons but chiefly that the appellant's constitution did not comply with the provisions of section 95 (5) (p) and (q) of the LRA in as far as the secret ballot provisions are concerned. The parties quibbled around the veracity and legality of the decision taken by the registrar. Ultimately, the appellant lodged the present appeal.

Grounds of Appeal

- [5] On 21 August 2020, the appellant filed a lengthy notice of appeal which effectively recited the facts leading to the impugned decision. The thrust of the appeal is that the registrar acted unlawfully by refusing to exercise his powers in terms of the LRA. In the appellant's view it has met the legal requirements set out in section 101 and as a result the registrar was bound to certify the amendments to its constitution. The appeal is opposed by the registrar and the department.

Evaluation

- [6] The nerve central to this appeal is the correct interpretation of section 101 of the LRA. There is no dispute between the parties that the current constitution of the appellant does not comply with the provisions of section 95 (5) (p) and (q) of the LRA. The sections make reference to a secret ballot to be held before a calling of a strike action and protection against disciplinary steps against members. It is so that the Labour Relations Amendment Act³ (LRAA) provided for transitional provisions empowering the registrar to assist as it were registered trade unions to comply with the new provisions. In this case, the registrar did not initiate a process contemplated in section 19 of the LRAA.
- [7] The present appeal is a sequel of the quest to invoke the powers in section 101 (3) of the LRA. During argument, the parties were intent to address the Court on the provisions of section 19 of the LRAA. After extensive debate with the appellant's counsel it turned out that it is unnecessary to consider the provisions of section 19 of the LRAA. Section 101 provides as follows:

'101. Changing constitution or name of registered trade unions or employers' organisations

- (1) A registered trade union...may resolve to change or replace its constitution.
- (2) The registered trade union...must send the registrar a copy of the resolution and a certificate signed by its secretary stating that the resolution complies with its constitution.
- (3) The registrar must –
 - (a) Register the changed or new constitution if it meets the requirements for registration;
 - (b) Send the registered trade union...a copy of the resolution endorsed by the registrar certifying that the change or replacement has been registered.
- (4)...
- (5)...
- (6)...
- (7)...

³ No. 8 of 2018.

(8)...'

[8] It is clear from the above section that the statutory functions of the registrar are (a) to register a changed or new constitution and (b) to endorse the resolution of the trade union concerned and (c) to certify the change or replacement. These statutory powers can be exercised by the registrar once certain jurisdictional facts are present. Those are if the constitution in question, which is to be changed or replaced meets the requirements for registration. The principle of legality commands that a public official cannot exercise powers he or she does not have. The dictionary meaning of the word "if" is on the condition that. Therefore, in terms of the above provisions the registrar may exercise the statutory functions spelled out above on condition that the constitution involved meets the requirements of registration. If the constitution does not meet the registration requirements then the registrar cannot exercise statutory powers over it.

[9] The appellant's counsel submitted that when the section refers to the requirements of registration it refers to (a) copy of the resolution and (b) the signed certificate within the contemplation of subsection 101 (2) of the LRA. This cannot be so for two principal reasons. Firstly subsection (2) says nothing about registration and secondly the legislature could have expressly stated that if the requirements set out in subsection (2) above are met. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴, the Supreme Court of Appeal had aptly stated the following:

'Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appear; the apparent purpose to which it is

⁴ [2012] 2 All SA 262 (SCA).

directed and the material known to those responsible for its production'. [My underlining and emphasis']

- [10] In order to establish the meaning of the phrase *registration requirements* this Court must give the phrase its grammatical meaning in the light of the LRA as a whole. Elsewhere in the Act, the legislature provided the following:

'Chapter VI

TRADE UNIONS AND EMPLOYERS' ORGANISATIONS

PART A – REGISTRATION AND REGULATION OF TRADE UNIONS AND EMPLOYERS' ORGANISATIONS

95. **Requirements for registration of trade unions or employer's organisation**

- (1) Any trade union may apply for registration if –
- (a)...
 - (b) It has adopted a constitution that meets the requirements of subsections (5) and (6).
 - (c)...
 - (d)...
- (5) The constitution of any trade union...that intends to register must –'

- [11] Regard being had to the above provisions there is no doubt in my mind that when the legislature employed the phrase "*requirements for registration*" it must have been referring to the provisions of section 95. A submission that the provisions of section 95 applies only to new unions and not registered trade unions like the appellant is without merit and unpersuasive. At all material times a registered trade union must keep a constitution that is compliant. It is a legal requirement for registration that a trade union must adopt a constitution that complies with the provisions of section 95 (5) and (6). During the section 101 process, what a trade union is entitled to do, if it is a registered one is to (a) change or (b) replace its constitution. If it does either of the two in order to continue to retain its registered status it must ensure that the constitution in its changed or replaced form is one that complies with section 95 (5) and (6).

[12] Therefore, the clear legal position is that if a constitution does not meet the requirements of section 95 the registrar is not empowered to register it and certify it. The jurisdictional facts that must exist before exercising the statutory functions is that there must be a complaint constitution⁵. Since there was no compliant constitution the decision by the registrar in refusing to exercise his statutory functions set out above is not unlawful and thus not appealable. In short, the registrar did not err in refusing to register and certify the amended constitution of the appellant. Accordingly, the appeal must fail.

The issue of costs

[13] The remaining issue is that of costs. When it comes to costs, this Court retains a very wide discretion. Ordinarily a view was held and endorsed by the Constitutional Court in two of its judgments⁶ that in this Court the general rule of costs following the results is not applicable. However recently the Constitutional Court in its latest judgment seem to have changed tune⁷. The parties in this matter do not share a special relationship like employer and employee or bargaining relationship. They stand in the same position as ordinary litigants in a civil matter. A cost order would not ruin any special relationship. That being the case there is no reason why costs should not follow the result. Accordingly, a cost order is warranted. This is not a case where the losing party was seeking to vindicate its constitutionally guaranteed right. The intentions of pursuing this litigation are clearly financial more than vindicating collective bargaining rights. It is not a secret that the life blood of a trade union is the subscription from members. The more the subscriptions the more financially viable a trade union remains. In an affidavit in support of an urgent hearing of this appeal, the General Secretary of the appellant Mr Irvin Jim testified as follows:

⁵ See: *Afgri Operations Ltd v Macgregor NO & others* (2013) 34 ILJ 2847 (LC) at paras 8-14. This judgment was cited with approval by the Constitutional Court in *Lufil*.

⁶ *Zungu v Premier of the Province of KZN and others* [2018] 4 BLLR 323 (CC) and *Long v South African Breweries (Pty) Ltd* (2019) 40 ILJ 965 (CC).

⁷ See: *AMCU and Others v Ngululu Bulk Carriers (Pty) Ltd (In liquidation) and Others* 2020 (7) BCLR 779 (CC).

'23. If the appeal is not urgently determined the Union will suffer grave organizational and structural prejudice. Approximately 80 000 workers who have been recruited by the Union in the past two years fall outside its current registered scope...Following *Lufil* decision, the Union has received numerous letters terminating organizational rights.


[14] It is not too difficult to observe that this appeal is more about the financial survival of the appellant than any of the guaranteed constitutional rights. The rights to bargain collectively are secondary in this regard. All the appellant must do to ensure its financial survival is to simply comply with the applicable legislation and desist from lodging meritless appeals. Had the appellant complied, this appeal would have been obviated. Thus, in fairness it will be unfair to mulct the respondents who defend themselves using taxpayers' coffers with the costs of this appeal.

[15] In conclusion, for all the above reasons the appeal must fail with costs as the registrar did not err.

[16] In the results, the following order is made:

Order

1. The appeal is dismissed.
2. The appellant to pay the costs, such costs to include the employment of two counsel.



G. N. Moshwana
Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Advocate Hardy
Instructed by: Cheadle Thompson and Haysom, Braamfontein.

For the Respondents Advocate J Nalane SC with him Advocate N Mayet
Instructed by: State Attorney, Pretoria.

LABOUR COURT