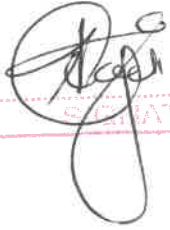


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- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO OTHER JUDGES: YES/NO.
 (3) REVISED.

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J 1375/2022

In the matter between:

SIMUNYE WORKERS FORUM

Applicant

and

REGISTRAR OF LABOUR RELATIONS

Respondent

Heard: 14 June 2023

Delivered: 21 June 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 21 June 2023.)

JUDGMENT

VAN NIEKERK, JIntroduction

- [1] The appellant was formed in 2015 and initially operated, by choice, as an unregistered trade union. At the end of 2020, the appellant revised its position

and resolved to apply for registration as a trade union in terms of section 95 of the Labour Relations Act (LRA). A constitution was adopted that the appellant believed would meet the requirements for registration and in September 2021, the application was duly submitted. That application was withdrawn after a number of queries raised by the respondent ('the registrar'). A fresh application was submitted to the registrar on 28 March 2022. On 22 June 2022, the registrar refused the application.

- [2] In these proceedings, the appellant appeals against that decision in terms of section 111(3) of the LRA, and seeks an order obliging the registrar to issue a certificate of registration in the appellant's name.

Material facts

- [3] The appellant describes itself as a 'modern' trade union, formed by workers in non-standard employment relationships. The appellant's history is recorded in a covering letter addressed to the registrar and submitted with the application for registration. The appellant has its roots in a community advice office, the Casual Workers Advice Office (CWAO) a non-profit, registered, independent community advice office. The catalyst for the appellant's formation were the amendments to the LRA (and specifically the amendments to section 198) that became effective on 1 January 2015, when statutory protections were extended to employees in non-standard forms of employment or, as the appellant describes them, precarious workers.

- [4] The appellant was formally constituted in February 2016, when a simple constitution was adopted. Between 2015 and 2020, while the appellant constituted a trade union for the purposes of the definition of that term in section 213 of the LRA, it preferred not to register as a trade union. The constitution that it adopted in 2016 reflects this stance, informed as it was by a mistrust of a trade union movement that the appellant's members considered to have failed them. In consequence, the 2016 constitution provides for a leadership that is not entrenched, but which remains flexible and responsive. Further, no membership fees were prescribed.

[5] As I have indicated, at the end of 2020, the stance against registration was revised. At a workshop held in December 2020, members voted in favour of the appellant seeking to register as a trade union. On 8 May 2021, the appellant called its first annual general meeting under a new constitution, which was adopted by the meeting. A standing committee was elected at the annual general meeting, a bank account opened in the name of the appellant, and the process of registration commenced. The registrar rejected the initial application submitted in September 2021 on various grounds. That application, as I have noted, was ultimately withdrawn. Further steps toward compliance were taken and changes to the constitution proposed. At its second annual general meeting, held on 26 February 2022, the appellant adopted the proposed constitutional amendments, and elected a standing committee for the ensuing 12-month period. A fresh application for registration (the application that forms the subject of these proceedings) was then submitted.

[6] The covering letter that accompanied the application for registration describes the appellant's activities. The appellant describes itself as an association of mainly precarious workers engaged in a wide range of activities, including engaging with employers to secure workers' rights, assisting its members in CCMA and bargaining council disputes, worker education, and participation in community struggles.

[7] The letter records that the application comprised three parts. The constitutional file enclosed the completed application form, the latest list of standing committee members together with identity documents and proof of employment or proof of the existence of a dispute, where the member concerned was no longer employed. Also included were selected extracts from the appellant's minute book reflecting the minutes of ordinary meetings. The minutes reflect that at each meeting, a different chairperson and a secretary, at least one of whom is a woman, is elected. Attendance registers from those meetings were included, as were selected minutes of meetings of the standing committee. In what is described as the membership file, the applicant recorded that under its 2016 constitution it had over 6600 members. In terms of that constitution members were not required to pay a membership fee. Since the adoption of its

new constitution in May 2021, the appellant's records showed that it had 1072 members in 41 companies who had completed the new membership application form; 282 of these members were fully paid up. Their names and workplaces were listed. Thirdly, the finance file included proof of the opening of the appellant's main bank account on 25 May 2021, and also a strike fund, opened on 14 October 2021. Details were included of the identities of the appellant's designated signatories. Further, copies of six months' bank statements from each account as well as copies of the appellant's financial records were provided. Finally, the appellant included a resolution by the management committee of the CWAO in terms of which the CWAO agreed to provide infrastructural support to the appellant, including the use of its office space without charge.

- [8] The appellant's constitution (commendably written in plain language) records that it has deliberately constituted itself to be completely different from the organisational model developed by the traditional South African trade union movement. The constitution further records the appellant's aim to keep decision-making power in the hands of those members affected by the decision in question, and to ensure that all work is done by members without remuneration, so as to remove any potential for personal financial interest. The principal purpose of the appellant is to regulate relations between its members and their employers. Membership is open to all employees listed in those sectors within the appellant organises, membership fees are fixed at R12.50 monthly or R150 annually, and provision is made for collections and donations to a special fund. Ordinary meetings are convened whenever necessary. Each meeting elects, for the next meeting, a chairperson (who chairs the meeting) and a secretary, who keeps brief minutes of the issues discussed at the meeting. The members who attend each meeting constitute a quorum for the purposes of that meeting, and may take decisions by majority vote. The constitution makes provision for an annual general meeting to be held each year, and for any special annual general meeting to be called by any ordinary meeting, if at least three quarters of the members present so resolve. The quorum for the annual general meeting is at least one representative from 35% of the active workplaces, an active workplace being one which has sent a

representative to at least one meeting in the 12 weeks prior to the annual general meeting. The annual general meeting may decide to amend the constitution, approve the appellant's audited financial statements, appoint the standing committee, set the membership fee and resolve to wind up the appellant.

[9] Clause 22 of the constitution specifically provides that the appellant is independent of trade unions, political parties, employers, the CWAO and the state. Clauses 23 to 30 of the constitution regulate the standing committee and organisational work. The constitution specifically records that the appellant does not employ officials, and that all organisational work is done by members. The appellant is served by a standing committee appointed by majority vote at the annual general meeting, to comprise no more than 10 and no fewer than three members so appointed, a majority of whom must be women. The standing committee is responsible for the day-to-day running of the appellant and may in writing, nominate any named member or volunteer as an office bearer for the purposes of the LRA, CCMA rules or the rules of any bargaining council. The members in the workplace may represent one or more workplace representatives at a meeting attended by at least half the members in that workplace. Each workplace representative is elected by majority vote at a meeting attended by at least half of the members in the workplace. Workplace representatives may represent any member in disciplinary proceedings if so requested, and may meet with management to discuss matters of mutual interest when mandated to do so.

[10] Clauses 37 and 38 of the constitution regulate the conduct of ballots prior to any strike. Clauses 39 to 43 regulate financial matters and require that the appellant operates a bank account in its own name, with two members of the standing committee as signatories to the account. The standing committee is to ensure that all statutory requirements are complied with, including those specified in sections 98 to 101 of the LRA. Membership fees paid to the appellant may only be used to advance to protect the socioeconomic interests of workers. Finally, the constitution provides that the appellant will not require or control any immovable property or financial instruments.

- [11] The application was accompanied by a list of members of the elected standing committee, together with the names of their employers (in the case of those who are employed), contact numbers and proof of identity. Also attached are minutes of selected ordinary meetings, and the annual general meeting of 26 February 2022.
- [12] The application was refused by the registrar on two primary grounds. The first is that the appellant's constitution did not meet the requirements of section 95, specifically section 95(5)(i) to (n). Secondly, the registrar did not consider the appellant to be a genuine trade union for the purposes of section 95(7). The more specific reasons for refusal are canvassed below.

Regulatory framework

- [13] The right to freedom of association is guaranteed by a number of international standards. It is also established as a fundamental right by section 23 of the Constitution, and finds legislative expression in chapter II of the LRA.
- [14] Article 2 of ILO Convention No. 87 provides that *'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization'*. This is the essence of the right to freedom of association. Article 3 of the Convention provides that workers' and employers' organisations *'shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes'*. The Article further provides that the public authorities *'shall refrain from any interference which would restrict this right or impede the lawful exercise thereof'*.
- [15] In a domestic context, the Constitution expressly recognises and gives context to the right to freedom of association in the workplace. Sections 23(2) and (4) read as follows:

- (2) Every worker has the right –
- (a) to form and join a trade union;

(b) to participate in the activities and programs of trade union; and

(c) to strike...

(4) Every trade union and every employers' organisation has the right –

(a) to determine its own administration, programs and activities;

(b) to organise; and

(c) to form and join a federation.

[16] Section 8 (a) of the LRA provides that subject to the provisions of Chapter VI, every trade union and every employers' organisation has the right to determine its own constitution and rules, and to hold elections for its office bearers, officials and representatives.

[17] The LRA provides for the registration of trade unions and employers' organisations. While registration is neither compulsory nor a *sine qua non* for separate juristic personality, the status of registration confers significant advantages under the LRA. The ILO's supervisory bodies have recognised that a system of registration of trade unions and employers' organisations is not incompatible with the terms of the Convention, provided that any regulations governing registration are applied in a manner consistent with their purpose and aimed to ensure the normal functioning of occupational organisations.

[18] Consistent with the limitation recognised by the ILO's supervisory bodies, Part A of Chapter VI of the LRA makes provision for the registration of trade unions and employers' organisations, and establishes the requirements for registration. Section 95 lists the requirements for registration. The section reads as follows:

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; 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, after 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...

[19] In 2018, the minister issued guidelines under section 95(8). The guidelines are not concerned with an evaluation of compliance with section 95; they are concerned with the evaluation of genuineness. The relevant clauses of the guidelines read as follows:

The Definition of a Trade Union (5-6)

5. The LRA defines a trade union as follows:

"An association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations."

6. Therefore, an organisation cannot be registered as a trade union or continue to operate as a registered trade union unless –

- (a) it is in fact an association of employees;
- (b) the principal purpose of the activities is to regulate relations between its members and their employers (or employers' organisations representing those employers).

It will therefore be necessary to raise and examine the actual process of forming a trade union, its composition and membership and the activities it undertakes on behalf of its members. These issues are examined in greater detail in this document.

Formation of a trade union (7)

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 employer(s).

Qualification for membership of a trade union (8)

8. In terms of section 95(5)(b) of the LRA, the constitution of a trade union must prescribe the qualifications for membership. There is no requirement in the LRA that a trade union confine its membership to employees in a particular sector or sectors of the economy or a particular geographical region. However, the failure to place appropriate qualifications on membership may indicate, together with other factors, that the trade union is not a genuine trade union.

Membership of a trade union (9-12)

9. The LRA does not create any membership threshold that trade unions must meet to register. Nevertheless, the size of the membership may be an indication that a trade union is not a genuine trade union. It is legitimate for trade unions to restrict their membership to small groups of workers; for instance, the employees of one employer or within one bargaining unit or a small trade or profession. However, an extremely small membership in relation to the number of employees qualified to join, may indicate that the trade union is not a genuine trade union.
10. When evaluating the membership of a trade union, attention should be paid to its history. The fact that the membership of a trade union with a long history of representing its members' interests has declined to small numbers is not an indication in itself that it has ceased to be a genuine trade union.
11. The primary purpose of a trade union is to regulate relations between employees and employers (or employers' organisations). In particular, this includes the regulation of these relationships through collective bargaining. A trade union will only be able to seek organisational rights in terms of the LRA or demand collective bargaining where it recruits members from the employees of particular workplaces or bargaining units. The fact that a trade union has not sought to gain a critical mass of members in any particular workplace or bargaining unit that would allow it to gain organisational rights may be an indication that the trade union is not a genuine trade union.

12. In order to have a primary purpose of regulating relations between employees and employers (or employers' organisations) a trade union must recruit as members' employees who are in employment. The fact that a significant proportion of a trade union's membership only become members after the termination of their employment is an indication, together with other factors, that the trade union is not a genuine trade union.

Activities of the trade union (13-15)

13. A trade union may seek to regulate relations between its members and their employers and employers' organisations by
 - (a) seeking and/or obtaining organisational rights in terms of chapter 3 of the LRA;
 - (b) seeking and /or obtaining recognition from employers as the collective bargaining representative of its members;
 - (c) submitting and negotiating in respect of demands on behalf of their members for approved wages and working conditions.
14. Failure to engage in these activities does not in itself indicate that a trade union is not a genuine trade union. There may be reasons why a trade union had not succeeded in gaining organisational rights or obtaining recognition. These may include difficulties in recruiting members and hostility from employers. However, the failure to seek to obtain organisational rights or recognition is a strong indication that the trade union is not a genuine trade union as these rights provide the basic platform for representing members' interests.
15. It is a legitimate function of a trade union to seek to resolve grievances on behalf of its members, including those who have been dismissed, and it can be expected that all genuine trade unions would undertake activities in this regard. However, the fact that a trade union's activities solely, or to a large extent, consist of referring disputes and cases on behalf of its members to the CCMA, the Labour Court or other courts, is an indication that a trade union is not a genuine trade union.

Independence from employers (16)

16. A trade union may only be registered and continue to operate as a registered trade union if it is independent. In terms of section 95(2), a trade union is not independent if it is under the direct or indirect control of any employer or employers' organisation and is not free of interference or influence of any kind from any employer or employers' organisation. Factors that would indicate that a trade union is not independent are –

- (a) That any of the officials or office-bearers of a trade union are also officials or office -bearers of an employers' organisation;
- (b) That the trade union operates from the same premises or shares facilities with an employers' organisation;
- (c) An employer assisted with the formation of the trade union or that the trade union operates as a "sweetheart" union (i.e. a trade union that exists to further the interests of the employer or to undermine independent trade unions).

Association of employees (17)

17. A trade union must be an association of employees. Indicators that a trade union is an association of employees are –

- (a) the establishment and effective functioning of branches;
- (b) the holding of regular meetings of members;
- (c) the election of shop stewards or other trade union representatives in workplaces;
- (d) the election of members as office -bearers

Association not for gain (18)

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.
19. It must be borne in mind that it is not inappropriate for trade unions to pay competitive salaries to attract competent and qualified officials and employees. Likewise, there may be circumstances in which established trade unions may decide to provide loans on favourable terms to their officials, office -bearers or employees.
20. Usually the major source of revenue for trade unions is a subscription usually paid on a monthly basis. In general terms this will be a flat rate payment or a payment expressed as a percentage of the members' income. Trade unions may have other sources of income, such as investments.
21. The financial arrangements made with members of a trade union on behalf of whom litigation, particularly dismissal disputes, is instituted, is an indication of whether the trade union may not be a genuine trade union or may be operating as an association for gain. Where a trade union charges its purported members a substantial proportion of the settlement reached in disputes, this may be an indication that the trade union is not a genuine trade union. This does not mean that it is not appropriate for genuine trade unions to require members to make realistic contributions to the costs of bringing cases on their

behalf. However, the fact that a member is required to pay a substantial percentage of the settlement to the union, would be a strong indication that the organisation is not a genuine trade union.

Federation affiliations (22)

22. The fact that a trade union is affiliated to a federation of trade unions, the other members of which are genuine trade unions, is an indicator that the trade union is a genuine trade union.'

[20] In summary, in broad terms, the sole requirements for the registration of a trade union are first, a name that does not closely resemble the name in shortened form of the name of another trade union such that it is likely to mislead or cause confusion; secondly, a constitution that meets the prescribed requirements; thirdly, an address in the Republic; fourthly, independence from employers; and finally, the requirement of genuineness. Genuineness is to be assessed against the guidelines issued by the minister. If the applicant union meets the requirements for registration, the registrar is obliged to register the applicant by entering its name in the appropriate register. Consistent with international standards (which recognise that the excessive use of discretionary powers may amount to a denial of the right to establish organisations without previous authorisation), the registrar has no discretion. If the requirements established by section 95 are met, the registrar is obliged to register the applicant.

Condonation

[21] The appellant has applied for condonation for the late filing of the record. The application was initially opposed, but that opposition was not pursued at the hearing. The delay is not excessive, and the reasons proffered for the late filing of the record are satisfactory. Condonation for the late filing of the record is accordingly granted.

The registrar's reasons

[22] As I have indicated, the registrar's reasons for refusing to register the appellant fall in two main categories – the appellant's constitution failed to comply with the requirements set out in section 95 and the appellant was not a genuine

trade union. The detailed reasons for refusal suggest an overlap between the categories. The registrar submits that the appellant failed to provide a copy of the minutes of the meeting at which the appellant was established, including a copy of the attendance register reflecting the names and numbers of the members that attended the inaugural meeting and particulars of their place of work. In particular, the registrar contends that the appellant failed to provide any proof to support this allegation and that this made it difficult for the registrar to examine and ascertain the manner in which the appellant was formed, as required by the guidelines. The registrar further submits that the appellant failed to provide evidence of how its constitution was drafted and adopted, and how its name was adopted. In this regard, the registrar avers that the appellant simply provided copies of the constitution with different dates, namely, 6 February 2016, 8 May 2021, and 26 February 2022. Further, failed to provide evidence of the election of the executive committee or council of members, the election of office bearers and trade union representatives. In support of this averment, the registrar's counsel made much of the fact that the constitution does not provide for the appointment of office bearers or officials. Further, it was contended on the registrar's behalf that the constitution of the appellant does not comply with the provisions of subsection (5)(i) to (n) of section 95, particularly in that the constitution does not make provision for the employment of officials, and permits any meeting to add to, recall or replace members of a standing committee by majority vote. Further, there is no provision for an appeal against any record or replacement. The registrar's counsel made specific reference to the application form, which on the face of it, was completed by persons using designations normally used for trade union office bearers. Given that the appellants and constitution did not provide for the employment of office bearers or officials; it was contended that this was a misrepresentation of the facts. Referring to clause 28 of the appellant's constitution, counsel noted that the standing committee may nominate any member or volunteer as an office bearer for the purposes of the LRA, and that the same constitution by the employment of office bearers. Similarly, persons nominated for the purposes of the completion of the application forms were nominated through a resolution allegedly taken in a meeting of 12 March 2022, ostensibly in contravention of the appellant's constitution. That resolution is not signed make no reference to

this nomination. In the circumstances, the appellant called into question the authenticity of the resolution, persons nominated as president and vice president are not members of the standing committee.

- [23] With regard to the independence requirement, counsel made much of the appellant's reliance for survival on the CWAO. The registrar submits that the appellant is dependent on the CWAO for office space, a postal address, a telephone line, education and training of its members, the development of organisational management systems and infrastructural support. In these circumstances, the registrar submits that it is inconceivable that the applicant would ever survive should the CWAO cease to exist.

The grounds for appeal

- [24] An appeal under section 111 (3) of the LRA is an appeal in the wide sense (see *Tickley & others v Johannes NO & others* 1963 (2) SA 588 (T); *Staff Association for the Motor & Related Industries v Motor 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.
- [25] The appellant submits that the registrar erred in concluding that the appellant is not a genuine trade union because it is not independent from the CWAO; that he erred in finding that the appellant cannot have a legitimate leadership on the basis that the appellant did not submit the *curriculum vitae* of office bearers reflecting their work history; that he erred in finding that the appellant is not a genuine trade union on the basis that it did not submit copies of the employment contracts of officials; that the registrar erred in concluding that the appellant had tried to mislead his office on the basis that some of its members only completed formal membership forms in 2022; that he erred in rejecting lists of the appellant's paid-up members as false on the basis that no membership fee was

agreed and that the amounts differ; and that the registrar erred in finding appellant's financial information demonstrates that the appellant is not a genuine trade union.

- [26] The appellant submits further that the registrar erred in concluding that the appellant had failed to comply with the requirements for registration and in particular, that he erred in finding that the appellant did not have an address in the Republic (on the basis that it does not have a lease agreement in respect of its premises) and that he erred in concluding that members of the appellant had not adopted its name, or its constitution.

Analysis

- [27] I deal first with the manner in which section 95 and the guidelines ought to be interpreted. South Africa has ratified Convention 87, with the consequence that section 95 must necessarily be interpreted and applied in a manner that best gives effect to its obligations in terms of the Convention. Further, and to the extent that the right to freedom of association in an employment context is regulated by section 23(2) and (4) of the Constitution, this court must adopt an interpretation that promotes the spirit, purport and objects of the Bill of Rights (see section 39(2) of the Constitution). Further, section 3 of the LRA requires the court to interpret its provisions to give effect to the LRA's primary objects, in compliance with the Constitution and in compliance with South Africa's public international law obligations.

- [28] This framework within which the LRA must be interpreted is one in which the right to freedom of association (which, as I have noted, is in essence the right to establish organisations in full freedom and without previous authorisation) is an essential value. Specifically, section 95 must be read and applied in a manner that promotes the spirit, purport and objects of the right to freedom of association, as must the guidelines published by the minister that concern the application of the genuineness requirement. Put another way, the right to freedom of association is to be interpreted generously. To the extent that the requirements for registration in section 95 limit that right, they are to be interpreted restrictively.

[29] The guidelines published under section 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 in 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.

[30] To the extent that the registrar refused to register the appellant on the basis that it failed to comply with section 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 employer's organisation) and the positive (the applicant must be free from any interference or influence of any kind from any employer or employer's 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 employer's organisation. There is no suggestion elsewhere the appellant is under the control of or influenced by any employer or employer's organisation. Simply on the basis of the test posited in section 95(2)(a) and (b), the appellant must thus be regarded as independent.

[31] In any event, and to the extent that the registrar regarding the appellant's relationship with the CWAO as impacting on the genuineness requirement, there is nothing untoward in a trade union obtaining services from working in collaboration with a community advice office. As Murphy J put it in *WUSA*:

Many trade unions in South Africa have been brought into existence at the instance of persons who are not employees, but who were social activists,

academics or politically motivated individuals. As many will recall, the Federation of South African Trade Unions (FOSATU), the predecessor of the country's biggest existing federation COSATU, is but one example.

[32] Nowhere in the LRA are trade unions barred from obtaining services from all working in collaboration with community advice offices. The nature of the appellant's relationship with the CWAO was fully explained in the covering letter to the application. When he refused to register the appellant on account of its relationship with the CWAO, the registrar took improper considerations into account and his decision was simply wrong.

[33] I turn next to the registrar's assertion that the appellant's constitution failed to comply with subsection (5)(i) to (n) of section 95. These paragraphs require an applicant trade union's constitution to:

- (i) establish the office of secretary and define its functions (subparagraph (i));
- (ii) provide for other office bearers, officials and trade union representatives and define their respective functions (subparagraph (j));
- (iii) prescribed procedure for nominating or electing office bearers and trade union representatives (subparagraph (k));
- (iv) describe a procedure for appointing, or nominating and electing, officials (subparagraph (l));
- (v) establish the circumstances and the manner in which office bearers, officials and trade union representatives may be removed from office (subparagraph (m));
- (vi) provide for appeals against removal from office of office bearers, officials and trade union representatives by prescribing a procedure for appeals and determining the body to which those appeals may be made (subparagraph (n)).

[34] I fail to appreciate how it can be said that the appellant's constitution fails to meet these requirements. Clause 15 of the constitution provides for the election of a secretary for each ordinary meeting. Clause 15 similarly provides for the election of a chairperson of each meeting and describes that person's functions. Clause 23 records that the appellant does not employ officials. To the extent that the registrar contends that section 95 (5)(j) requires an applicant union to provide for office bearers, officials and trade union representatives and to describe their functions, a proper interpretation of the sub paragraph and the words must 'provide for', construed in the context and with regard to the purpose of the Act and section 95 it means no more than that these are matters which must be addressed in the applicant union's constitution. To require that the constitution of an applicant specifically establish the offices of office bearers, officials and trade union representatives would present an unjustifiable inroad into the applicant's autonomy and establish an obstacle that may amount to a system of previous authorisation, contrary to the principles of Convention 87 and section 23 of the Constitution. The appellant's constitution addresses the fact that its organisational structure does not provide for office bearers, officials and trade union representatives as these offices are defined in section 213 of the LRA. The reasons for the appellant's election not to establish these offices in its constitution is fully explained, but in the constitution itself and the covering letter that accompanied the appellant's application. The same considerations apply to the requirement in section 95(5)(k) to (n), insofar as they relate to a procedure for the nomination, appointment and removal from office of the of persons appointed to the offices referred to in paragraph (j).

[35] Turning next to the registrar's objections to the form of the application and in particular, his objections to the signatories to the application and the designations of the signatories, what the registrar ignores is that the application for registration is a *pro forma* document, the content and form of which assume what has been referred to as the traditional structure of a trade union. The form thus requires the names, identity numbers and company addresses and contact numbers of a president or chairperson, a vice president or vice chairperson, a treasurer, additional members and also officials (union employees) in the form of a general secretary and a deputy general secretary. The appellant has made

clear that it has none of these posts in its organisational structure and that certain of its members were nominated, in a general meeting held on 12 March 2022, that particular persons be instructed and mandated to sign the application form in the capacities indicated by the form. So, for example, Mr Sydney Mkhonzo was mandated to complete and sign the form LRA 6.1 where the form requires the details of the president or chairperson of the applicant. It is disingenuous for the registrar to suggest that by completing the form in this manner the appellant was misleading his office. The appellant was doing no more than seeking to complete the application form, to the best of its ability and with complete transparency, in circumstances where its organisational structure did not reflect the assumptions made by the format of the application form.

[36] Insofar as the application of the guidelines is concerned, as I have indicated, the guidelines must necessarily be interpreted and applied having regard to their purpose. The guidelines establish indicators of genuineness, and are intended to assist the registrar when the determination of genuineness is made. The guidelines do not establish a checklist against which compliance must be assessed as a mechanical exercise, with the results to be read off the machine. Indeed, clause 3 of the guidelines specifically require the registrar to take into account all relevant factors, a requirement that necessarily suggests that each case ought to be assessed on its own merits, and that more or less weight will attach to particular indicators depending on the facts and circumstances of each application.

[37] Turning then to each of the guidelines and an assessment of their application in the present case, clauses 5 and 6 of the guidelines, there can be no doubt that the appellant is in fact an association of employees, whose principal purpose is to regulate relations between its members and their employers. I did not understand the registrar to contest this proposition. In regard to clause 7, which concerns the process followed to form a trade union, the appellant has given an explanation of the circumstances in which it was founded, the means by which its constitution was drafted and adopted, and the manner in which the standing committee was elected. As paragraph 7 specifically records, the crucial issue to 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 employers. This is precisely the purpose for which the appellant was formed. In regard to clause 8, the appellant's constitution specifies the qualification for membership, with specific reference made to the sectors defined in the annexure to the constitution. In regard to clauses 9 to 12, the appellant has provided details regarding its membership and there is no suggestion that the size of its membership in relation to the number of employees qualified to join the appellant, indicates that the appellant is not a genuine trade union. Clause 10 of the guidelines emphasises the history of the applicant in relation to an evaluation of its membership. The appellant has provided full details of its history and the basis on which it intends to extend its interests through the acquisition of organizational rights and the right to bargain collectively. For the purposes of clause 13 of the guidelines, these are legitimate activities and all indicative of a genuine trade union. The appellant's activities are not restricted solely, or even to a large extent, to the referral of disputes and representation of its members in the statutory dispute resolution structures. Finally, the appellant is manifestly independent from employers, an association of employees and an association not for gain. An overall assessment of the appellant's application for registration measured guidelines properly construed, points to the ineluctable conclusion that the appellant is a genuine trade union.

- [38] To the extent the registrar's concerns are motivated by the appellant's organisational structure, while it is correct that the structure is unique, that is not in itself a basis to reject the application. The emergence of trade unions that eschew traditional trade union structures is inevitable. Since the LRA was brought into operation in 1995, the labour market has changed radically. Workforces, once homogenous, have fragmented and segmented into core and marginal groups where new, less secure forms of work have emerged (see generally D Davis 'The Labour Relations Act; the Fundamental Assumptions swept asunder?' in Olivier, Smit and Kalula (eds) *Liber Amicorum: Manfred Weiss* at 95). New forms of worker organisation will inevitably emerge to meet these challenges and better serve the interests of the more vulnerable. The fact that the appellant has elected not to make provision on its constitution for the employment of officials or the election of shop stewards in the conventional

sense represent conscious choices by the appellant's members, informed by their prior experience regarding trade union governance. Their autonomy must be respected. The registrar is not a gatekeeper for traditional forms of trade union organisation, nor is it his function to question the wisdom of the appellant's choices.

[39] In summary: the appellant has a unique name, a compliant constitution, and an address in the Republic. It is also independent of any employer or employer's organisation. There is nothing untoward in the relationship between the appellant and the CWAO. The appellant is a genuine trade union. It is not a vehicle for enriching individuals nor is it a vehicle to the right of representation before statutory dispute resolution agencies and this court. The appellant thus meets the requirements for registration in terms of section 95, and the appeal succeeds.

Costs

[40] The appellant seeks the costs of the appeal. Section 162 confers a broad discretion on the court to make orders for costs according to the requirements of the law and fairness. The appellant has been obliged to incur costs in perusing the appeal, and there is no reason why it should not be entitled to those costs, to the extent that an order for costs can indemnify it. Having said that, I am inclined to disallow the costs of the two affidavits filed after the filing of the notice of appeal but prior to the hearing of the appeal. The affidavits seek to place information before the court to clarify the relationship between the appellant and the CWAO and to provide a potted history of the appellant. Neither affidavit was necessary. All of the material averments had been canvassed in the application and in particular, in the covering letter in support of the application. The affidavits and annexures extend to some 125 pages and added an unnecessary burden to an already lengthy record. Counsel for the registrar sought to have the affidavits struck out as irrelevant. While I do not intend to grant such an order, the requirements of fairness dictate that the preparation of the affidavits and their service and filing should be excluded from the ambit of the costs order that I propose to grant.

I make the following order:

1. The appeal is upheld.
2. The respondent's decision to refuse to register the appellant is set aside.
3. The respondent is ordered to register the appellant as a trade union in terms of section 96 of the Labour Relations Act and to issue a certificate of registration in the appellant's name, within 14 days of the date of this order.
4. The respondent is ordered to pay the cost of the application, but for the costs related to the affidavits filed on 9 March 2023.



André van Niekerk
Judge of the Labour Court of South Africa

Appearances:

For the applicant: M Bishop
Instructed by: Legal Resources Centre
For the respondent: EB Ndebele
Instructed by: State attorney