

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No. **J240/03**

In the matter between :

NATIONAL EMPLOYER’S FORUM

Applicant

And

The Minister of Labour

1st Respondent

THE REGISTRAR OF LABOUR RELATIONS

2nd Respondent

THE DEPARTMENT OF LABOUR

3rd Respondent

JUDGMENT

PATTERSON AJ

Introduction

[1] The Applicant, an employer’s organisation duly registered in terms of Section 96 of the Labour Relations Act 66 of 1995, as amended (“the LRA”) seeks a final order declaring that the Second Respondent’s (“the Registrar’s”) conduct in publishing a notification in the Government Gazette in terms of Section 106(2B)

cancelling the registration of the Applicant as an employer's organisation in terms of Section 106(2A) of the LRA be reviewed and set aside. The Applicant further seeks an interdict against the Registrar and the Third Respondent ("the Department") from in any way seeking or effecting the de-registration of the National Employer's Forum ("NEF"), which is the Applicant in this matter, as a registered employer's organisation until such time as the NEF has an opportunity to state its case before the Registrar. Finally, an order is also sought against the Minister of Labour ("the Minister"), the Registrar and the Department to remove all references to the NEF from any publication made by such Respondents as to employer's organisations that are not "genuine" and which the Respondents seek to be deregistered, including any references to the NEF on the website of the Department. An Order is sought by the Applicant for costs, jointly and severally, the one paying, the other to be absolved against the Respondents in the event that the Application is opposed.

[2] The above Application was issued by the Registrar of the Labour Court on 30 January 2003. Service was affected on 30 January 2003 and the Application was set down for hearing by the Applicants as a matter of urgency on 31 January 2003 at 14h00. The Application was heard before Pammenter AJ on 31 January 2003 when a *rule nisi* was issued calling upon the Respondents to show cause on Wednesday, 5 February 2003 why an Order should not be made for an interdict materially in the terms mentioned above. The material terms of the *rule nisi* (excluding the declaration and the costs order) operated as an interim order pending the return date of the application.

[3] The Application was brought on grounds of urgency. The Application is no longer urgent for reasons which will become apparent from the Judgment.

Background

[4] Chapter VI of the LRA provides for the registration and regulation of both Trade Unions and Employer Organisations. Section 95 of the LRA provides for certain requirements for the registration of Trade Unions or Employer Organisations of an administrative and constitutional nature. Section 96 of the LRA prescribes the process for registration which requires that the Registrar be satisfied that the Applicant Trade Union or Employer's Organisation meet such requirements for registration. Section 97 of the LRA provides that a Certificate of Registration (LRA Form 6.3 in respect of a Trade Union and LRA Form 6.4 in respect of an Employer's Organisation) is sufficient proof of registration and that such Trade Union or Employer's Organisation is a Body Corporate. Whilst registration is not a *sine qua non* for the separate juristic personality of either a Trade Union or Employer Organisation, it is clearly of fundamental importance.

[5] The construction of the LRA is such that registered Trade Unions and Employee Organisations are afforded numerous rights in terms of the LRA. For example, Organisational Rights in respect of representative registered Trade Unions are conferred in terms of Sections 12 to 16 of the LRA; the ability to enter into binding and enforceable Collective Agreements (Section 23 of the LRA), Agency Shop Agreements (Section 25), Close Shop Agreements (Section 26), the ability to establish Bargaining Councils and to negotiate at such Bargaining Councils (Sections 27 – 34), the establishment of Statutory Councils (Section 40), the ability to pursue disputes regarding demarcation between sectors and areas (Section 62), the right to engage in strikes and recourse to a lockout (Sections 64 – 77), the right to refer and appear on behalf of members at Conciliation and Arbitration proceedings before the CCMA in terms of Section 133 – 150 of the LRA and at the Labour Court (Section 161 of the LRA). Whilst it is true that trade unions or employer's organisations may exist independently of registration in terms of the LRA, the viability and efficacy of such an organisation will be severely limited should it either not be able to gain or retain registration for any reason.

[6] Section 98 of the LRA requires both registered Trade Unions and registered employers organisations to keep books and records of income, expenditure, assets and liabilities and within 6 months after the end of each financial year prepare financial statements. Every registered trade union and every registered employers organisation must arrange for an annual audit of its books which must be conducted in accordance with generally accepted auditing standards and the auditor must provide a report. Section 99 of the LRA imposes a duty to keep records. Section 100 requires such registered trade union or registered employer's organisation to provide certain information to the Registrar by 31 March of each year relating to its membership, the auditors report, financial statements, the names and work addresses of office bearers and an address for service of documentation.

[7] Prior to the 1 August 2002 the department, for a variety of reasons which are not strictly relevant for the purposes of this judgement, found it particularly difficult to fulfil its supervisory functions and more particularly to ensure that registered trade unions and registered employer organisations comply with both their statutory duties and to ensure

that such organisations were *bona fide* trade unions or employer organisations established for the purposes of fulfilling functions in terms of the LRA.

[8] Pursuant to the enactment of the Labour Relations Act 66 of 1995 (which replaced the Labour Relations Act 28 of 1956) the proliferation of trade unions and employer organisations occurred. The structure of the legislation was such that labour consultants and to a lesser extent practising attorneys and advocates were effectively denied the right of representation. This resulted in a number of unscrupulous individuals establishing what are in effect bogus trade unions and employer organisations for the purposes of making profit and gaining representation under the auspices of a registered trade union and/or registered employer organisation to which they were not entitled. Such registered unions and employer organisations are in effect a sham and are an attempt to circumvent provisions of the LRA. They are in *fraudem legis*.

[9] Whilst the Labour Relations Amendment Act removed certain restrictions on the right of appearance both in respect of Labour Consultants and Legal Practitioners (subject to the passing of new rules by the CCMA) the enforcement procedures in respect of registered trade unions have been strengthened. The provisions assist the Registrar in identifying and weeding out registered trade unions and registered employer organisations which are not complying with their obligations in terms of the LRA and/or are not genuine.

[10] It is clear from the provisions of Section 109 of the LRA that the Registrar fulfils an important regulatory and custodial function in terms of the LRA and is accordingly responsible for protecting members of the public against some of the serious consequences which they may suffer when dealing with unscrupulous trade unions and employer organisations which either do not comply with the provisions of the LRA and/or are not genuine organisations but, in fact, profit making enterprises.

[11] Section 106(2) of the LRA, which is the subject matter of this application, provides as follows:

“(2) When the *registrar* receives a notice from the Labour Court in terms of subsection (1), the *registrar* must cancel the registration of the *trade union* or *employers’ organisation* by removing its name from the appropriate register.

(2A) The *registrar* may cancel the registration of a *trade union* or *employers’ organisation* by removing its name from the

appropriate register if the *registrar*-

- (a) is satisfied that the *trade union* or *employers' organisation* is not, or has ceased to function as, a genuine *trade union* or *employers' organisation*, as the case may be; or
- (b) has issued a written notice requiring the *trade union* or *employers' organisation* to comply with sections 98, 99 and 100 within a period of 60 days of the notice and the *trade union* or *employers' organisation* has, despite the notice, not complied with those sections.

[Sub-s. (2A) inserted by s. 21 of Act 12/2002]

(2B) The *registrar* may not act in terms of subsection (2A) unless the *registrar* has published a notice in the Government Gazette at least 60 days prior to such action -

- (a) giving notice of the *registrar*'s intention to cancel the registration of the *trade union* or *employers' organisation*; and
- (b) inviting the *trade union* or *employers' organisation* or any other interested parties to make written representations as

to why the registration should not be cancelled.

[Sub-s. (2B) inserted by s. 21 of Act 12/2002]

- (3) When a *trade union's* or *employers' organisation's* registration is cancelled, all the rights it enjoyed as a result of being registered will end.

[12] Pursuant to the changes implemented by the Labour Relations Amendment Act 12 of 2002 the department vigorously embarked on a process to identify and deregister organisations that either are considered not to be “genuine” or have failed to comply with the provisions of the act.

The National Employers' Forum (“the NEF”)

- [13] The NEF was registered as an employer's organisation in terms of Section 96(7) (a) of the LRA on the 2nd December 1996. It alleges that it has 1 500 members on a nation wide basis and which allegedly employs some 300 000 employees. It is a registered member to the Entertainment Industry Bargaining Council and has applied for membership to the Bargaining Council for the Restaurant and Catering Trade and the Bargaining Council for the Motor Industry.

[14] In December 1997 the NEF contracted out its administration and support functions to a company known as Labournet Management Services (LMS). LMS ultimately became Labournet Holdings (Pty) Ltd and a service agreement was entered into between the NEF and Labournet in terms of which Labournet was responsible and was contracted to conduct the administration, management and services of NEF.

[15] The activities of Labournet and by implication NEF, who were closely identified at that stage, first came to the attention of this Court in a matter between Labournet Holdings (Pty) Ltd and Peter McDermott (in an unreported judgment of Landman J under

case number J2793/02). Landman J, having reviewed in some detail the relationship between Labournet and NEF concluded that Labournet had no business to protect and refused to enforce certain restraints which Labournet sought to enforce against the Respondents. Landman J was of the view that the business of Labournet and NEF was in fraus legem in that Labournet sought to utilise an employer's organisation such as the NEF to give it an unlawful and unfair advantage relating to representation in the labour law consulting industry. The Court accordingly concluded that it was not in the public interest that such a restraint should be protected. Although the issue of the restraint had been resolved between the parties, Landman J, having been advised by the parties that it was not necessary to deliver a judgment because the matter had pursuant to argument become settled, nevertheless delivered a judgment on 23 October 2002. In such judgment the Court was highly critical of both Labournet and NEF. The views of the court were summed up as follows:

“31. The business model used by LNH requires of its employees, such as the respondent, to misrepresent their capacities. They purport to be officials of an employer's organisation when they appear before the CCMA, councils and the Labour Court. The NEF deceives the Registrar of labour relations in regard to its true nature. The public at large is encouraged to think that they are dealing with the NEF, and employer's organisation, when, in fact they are dealing with LNH or one of its subsidiaries. This is not a legitimate interest that is worthy of protection. It is against the public policy to carry on this sort of business. It would also, in my opinion, be against public policy to enforce a restraint and protect such a business. At the same time it would be inappropriate to encourage Mr McDermott or any other employee to engage in similar activities. In so far as I have any discretion, considerations of public policy, have waived me to exercise my discretion against granting relief to

the LNH.”

[16] Landman J thereafter discharged the rule granted against the Respondents and ordered costs, including costs of two counsel, against Labournet. In addition he directed the Registrar to furnish a copy of the judgement to the Judge President of the Labour Court, the director of the CCMA and the Registrar of labour relations.

[17] The Applicant has subsequently criticised the decision of Landman J on the grounds that it was unnecessary to deliver judgment in that the matter had been settled between the parties and that both parties had advised Landman J that it was not necessary to hand down judgement in the matter. In addition the Applicant complains that the NEF was not a party to the proceedings. The Applicant subsequently launched an application to intervene as a party to such proceedings in order, as I understand it, to have an opportunity to present further facts before this court. Such application has been postponed *sine die*. In my view that the Applicant’s criticism of the decision of Landman J to deliver a judgment relating to the evidently parasitic relationship that existed between Labournet and the NEF at that time and to provide such reasons to the Registrar of this court, the director of the CCMA and the Registrar of labour relations and its decision to provide reasons for his judgment is unfounded. It is quite clearly the duty of this court to uphold the integrity and efficacy of the LRA and it appears to me that the referral of Landman J’s judgment and his findings to the Judge President, director of the CCMA and the Registrar, was both proper and necessary in all the circumstances.

[18] Pursuant to the hearing of the Labournet matter on 24 July 2002 and the implementation of the amendments to the LRA which came into force and effect on 1 August 2002 and prior to Landman J’s decision which was handed down on 23 October 2002, the NEF notified its members on 7 August 2002 of a general meeting to be held on Friday, 30 August 2002. The NEF, by its own admission, arranged such meeting to permit itself “to once again take control of its own activities and affairs, and sever the relationship and control of Labournet”. The Annual General Meeting was eventually held on 9 September 2002 and it is the NEF’s contention that thereafter it “in effect severed its relationship with Labournet and took control of its own affairs”.

[19] It is not appropriate for this Court at this stage to express any opinion on the merits of such matter. The relief sought by the NEF arises out of an allegation that it has not been treated lawfully and fairly by the Registrar in publishing its name in terms of Section 106(2B) of the LRA and in giving it 60 days notice of the Registrar’s intention to cancel its registration on the grounds that it is not a genuine employer’s organisation and/

or has not complied with the provisions of Sections 98, 99 and 100 of the LRA. An interdict sought against the listing of the NEF and to prevent the Respondents' pursuing further action against the NEF until the Respondents have accorded the NEF the right to fair and lawful administrative justice (in particular *audi alteram partem*) is distinct from any complaint relating to a final decision to deregister the NEF by the Registrar. It would appear that any decision made by the Registrar ultimately to cancel the registration of the NEF may be challenged and that this Court may be required to consider an appeal on the merits of such decision in terms of the provisions of Section 111 of the LRA. Accordingly I express no view at this stage on whether the NEF has, pursuant to its general meeting on 9 September 2003, satisfactorily addressed the concerns raised by Landman J and evidently shared by the Registrar. Such a decision is not necessary for the purposes of the judgment in this matter.

The Applicant's Submissions

[20] Mr Cassim strongly argued that the proper interpretation of Section 106 of the LRA was that the NEF was entitled to *audi alteram partem* prior to the Applicant publishing a notice in the Government Gazette giving the Applicant 60 days notice of the Registrar's intention to cancel the registration of the NEF and inviting the NEF or any other interested third parties to make written representations as to why such registration should not be cancelled. The right to fair administrative action is a fundamental tenant of the common law and enshrined in the Constitution. Accordingly administrative decisions must be reasonable and justified by the reasons underpinning them, failing which they fall to be set aside, even if they are made in good faith.

See Mafongosi & Others vs United Democratic Movement & Others (Transkei High Court) 2002(23) ILJ 2179.

[21] Mr Cassim also referred the Court to the decision of Acting Provincial Commissioner Corrective Services & Others v Matheyese (1) 2002 (23) ILJ2192

in support of his argument that citizens such as the Applicant must be treated fairly and their rights respected in that any right taken away be done fairly and in a reasonable manner. Accordingly it was submitted by the Applicant, that before a decision is made in terms of Section 106(2A), such decision must be fair and reasonable, ie the affected party be afforded a proper opportunity to present its case and be properly heard before adverse decisions affecting its viability are taken and adopted.

[22] Mr Cassim argued that publication of the NEF as contemplated in Section 106(2B) of the LRA, which is the subject matter of this Application, has the effect of damning the Applicant to all concerned. In addition, it was argued by the Applicant that not only must the Applicant receive *audi alteram partem* in respect of the decision to publish a notice in the Government Gazette in terms of Section 106(2B), but that the *audi alteram partem* provided to the Applicant must be sufficient so that the Registrar is at that stage in a position, irrespective of the subsequent written submissions made by the Applicant in terms of Section 106(2B), to determine whether the registration of the NEF should be cancelled in terms of Section 106(2A). The purpose of Section 106(2B), so it was argued, is to give third parties (eg. the Applicant's members) a right to make representations.

The Respondents' Submissions

[23] Mr Maserumule argued on behalf of the Respondents that Section 106(2B) does not provide the Applicant with a right to *audi alteram partem* prior to publication and that the Applicant's rights to make representations is afforded to the Applicant later in terms of the provisions of Section 106(2B)(b) together with the right of third parties. Mr Maserumule argued further that the Applicant nevertheless had been given adequate *audi alteram partem* in that correspondence had ensued between the Applicant and the Respondents relating to both the Applicant's failure to submit financial statements as well as why the Applicant had ceased to function as a genuine employer's organisation. Mr Maserumule argued that the Registrar was both entitled and indeed obliged to publish a notice regarding the Applicant's non-compliance with its statutory obligations. Mr Maserumule said that even if the Registrar decided to cancel the registration of the Applicant ultimately in terms of the provisions of Section 106(2A), Section 111 of the LRA provided an appeal to this Court from the Registrar's decision which could be considered on the merits. It argued that the matter was neither urgent nor was there any basis in law for *audi alteram partem* to be applied prior to publication of a notice of the Registrar's intention to cancel the registration of an employee's organisation, and to invite that Employer's Organisation to submit representations in terms of Section 106(2B). In any event, so it was argued on behalf of the Applicant, adequate *audi alteram partem* had been afforded to the

Applicant prior to the notification in terms of Section 106(2B) although this was not required.

Audi Alteram Partem

[24] The actions taken by the Registrar in terms of Section 106 of the LRA are administrative actions which must be taken in accordance with the statutory requirements and the common law. The Rules of natural justice require a minimum standard of justice and fairness in the exercise of a discretion by the Registrar in terms of Section 106. Mr Cassim is undoubtedly correct in his submission on behalf of the Applicant that the issuing of a 60 day notice inviting the Applicant to make representations in terms of Section 106(2B) may have a prejudicial effect on the NEF. The mere fact that the provisions of Section 106(2B) statutorily permit the Applicant and other third parties to make representations prior to the Registrar exercising its discretion to cancel the registration of an Employer Organisation or Trade Union in terms of Section 106(2A) does not mean that the Registrar can act either unfairly or unreasonably and in breach of the basic requirements of *audi alteram partem*. Fair administrative justice depends on the circumstances of each case. Section 3(2)(a) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("POJA") is clear. The degree of *audi alteram partem* required for the Registrar to publish a notice in terms of the provisions of Section 106(2B) calling upon the NEF to submit together with other interested parties written representations within 60 days why

its registration should not be cancelled may differ from the degree of *audi alteram partem* required in terms of the provisions of Section 106(2A) where the Registrar considers such representations and determines that such registration should be cancelled. Normally *audi alteram partem* requires that party which may be prejudiced be given proper notice of the intended action and reasonable opportunity to make representations which must be considered by the official concerned. In addition a clear statement of the administrative action is required. The right to a personal appearance and/or legal representation, whilst perhaps desirable, does not necessarily follow. It seems clear that to give any satisfactory meaning and effect to the provisions of Section 106(2B) and uphold the efficacy of the LRA that an attenuated form of *audi alteram partem* must be applied in respect of Section 106(2B) of the LRA, failing which the LRA would be unworkable and the ability of the Registrar to deal with such matters would be severely hampered.

[25] In my view the Applicant has been afforded *audi alteram partem* in the following respects :

- on 12 November 2002 the Applicant received a letter from the Registrar of the Department of Labour drawing its attention to the provisions of Section 106(2A) of the LRA to the fact that according to the Registrar's records the NEF had failed to comply with the requirements of the Act in respect of Sections 100(a) – membership statement, 100(b) – financial statements and 100(d) – names and work addresses of office bearers. It

was drawn to the NEF's attention that should they persist with the failure to comply with the requirements by 31 October their name would be published in the Government Gazette in accordance with Section 106(2B) of the LRA.

- Although the Applicant alleges in its papers that it complied, the Applicant manifestly did not insofar as it did not provide financial statements for five years preceding in accordance with the requirements of the Act.

- On 12 November 2002, the NEF forwarded a letter to the Registrar of the Department of Labour purporting to comply with the provisions of Section 100(a) as at 31 December 2001. Section 100(a) requires that :

“by 31 March each year, a statement, certified by the secretary that it accords with its records, showing the number of members as at 31 December of the previous year and any other related details that may be required by the *registrar*,”

It is quite apparent from the above that this did not constitute compliance. In addition the Applicant referred to their Service Agreement with Labournet which had undoubtedly come to the attention of the Registrar arising from the Judgment of Landman J.

- On 14 November 2002 a lengthy memorandum was forwarded by the General Secretary of the NEF to the Registrar of the Department of Labour entitled “Representation as to compliance by National Employer's Forum with the provisions of Section 98, 99 and 100 of the Labour

Relations Act in the light of the Judgment of 23 October 2002 of the Labour Court in the matter of Labournet vs Peter McDermot and Another under Case No. J2793/02”. The Applicant thereafter alleges that he sought to meet with Mr Slabbert of the Department of Labour but without success.

- On 27 January 2003 the Registrar of the Department of Labour indicated his intention in terms of Sections 106(2B) to publish a notice in the Government Gazette that on the basis of the documentation before him, the NEF :

- o is no longer functional in terms of its Constitution;
- o has not complied with the provisions of Sections 98, 99 and 100 of the Act [Section 106(2A)(b)]; and
- o has ceased to function as a genuine organisation as envisaged by Section 106(2A)(a) of the LRA.

The Applicant was invited to make written representations within 60 days of the date of the notice as to why the registration should not be cancelled.

- In addition to the above, the Applicant’s name was placed on a web list operated by the Department of Labour entitled “List of Bogus Employer Organisations”. I shall refer to this later in this judgment.

[26] Mr Slabbert, the Registrar of Labour Relations, states under Oath that the NEF has failed to comply with his request to provide the financial information requested. Mr Slabbert states that the Applicant has only submitted financial statements for the period January 2001 to December 2001 and that the Applicant was registered in December 1996. The Applicant has not submitted financial statements for the period February 1997 up to and including February 2002. In addition the financial statements submitted do not comply with the provisions of Section 100(a). Mr Slabbert also states that he has formed a view that the NEF is not a genuine employer's organisation and that he only formed such view after considering the Applicant's representations. In forming such a view he acted *bona fide* and considered "inter alia, the Applicant's Service Agreement with Labournet, the minutes of its Annual General Meeting of 9 September 2002, the financial statements and the representations that the Applicant has made" were taken into account. Mr Slabbert says that he considered such representations and all of the above factors led him to the *prima facie* conclusion that the Applicant was not genuine. Mr Slabbert's Affidavit cannot be seriously challenged.

[27] In the premises, I am satisfied on a broad conspectus that the Applicant has complied with the dictates of fairness and reasonableness required by *audi alteram partem* required in terms of Section 106(2B) of the LRA. I reiterate that in accordance with POJA what may be required will vary in accordance with the circumstances of each case. Accordingly and without deciding such matter what may suffice for Section 106(2B) may not be adequate for Section 106(2A).

Costs

[28] Section 162(1) of the LRA provides that the Labour Court “may make an order for the payment of costs according to the requirements of the law and fairness”. The law requires that costs follow results. Fairness in this matter dictates that this Court makes no Order as to costs for *inter alia* the following reasons :

- Section 106(2B) provides that the Registrar publish a notice in the Government Gazette giving the Employer Organisation and/or any other interested parties 60 days to make representations as to why the registration should not be cancelled.
- Notwithstanding the clear provisions of Section 106(2B), the Department of Labour placed a notice on its website which referred to the NEF as a “Bogus Employer Organisation”. This web page was posted at a time when no final decision has been made or could be made by the Registrar. The distinctions between the Minister, the Registrar and the Department are, for the purposes of this Application, academic. They have displayed a common intention and purpose in this matter and it would be difficult, if not impossible, to separate their roles and culpability.
- Pammenter AJ issued a *rule nisi* on 31 January 2003 ordering that no reference be made to the Applicant on the web site of the third Respondent”.
- The Respondents dismally failed to comply with such *rule nisi*, which operated in the interim, notwithstanding the fact that the Applicant’s legal representatives were in Court.
- This Court expressed its displeasure that an Order of this Court should be ignored in such a cavalier fashion. This Court ultimately relies upon the State to give effect to its Orders, and such conduct must be viewed in a serious light.

In view of all of the above, there will be no Order as to costs.

[29] In the premises, I make the following Order :

- This Application is dismissed.
- There is no Order as to Costs.

SIGNED AND DATED AT BRAAMFONTEIN ON THIS 24TH DAY OF MARCH
2003.

BG PATTERSON

ACTING JUDGE OF the LABOUR COURT

Date of Hearing 5 and 6 February 2003

Date of Judgment 24 March 2003

For the Applicant Advocate N Cassim SC
Instructed by Attorneys Snyman van der Heever
Heyns

For the Respondent