**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT BRAAMFONTEIN**

**Reportable**

**Case Number: J2457/05**
**Heard: 21 April 2006**
**Order: 21 April 2006**
**Reasons:5 May 2006**
**In the matter between**

**NATIONAL ENTITLED WORKERS UNION (NEWU)** **APPLICANT**

**and**

**THE MINISTER OF LABOUR** **1ST RESPONDENT**

**THE MINISTER OF LABOUR**

**(M.M.S MDLADLANA)** **2ND RESPONDENT**

**DEPARTMENT OF LABOUR** **3RD RESPONDENT**
**REGISTRAR OF LABOUR RELATIONS**

**(J.T CROUSE)** **4TH RESPONDENT**

**DEPUTY REGISTRAR OF LABOUR**

**RELATIONS** **5TH RESPONDENT**

## REASONS FOR JUDGMENT AND FURTHER ORDERS

Pillay D, J

1. The applicant is National Entitled Workers Union (NEWU). The first and second respondents are the Ministry and Minister of Labour respectively. The third to fifth respondents are respectively, the Department of Labour, the registrar and deputy registrar of labour.

2. On 15 December 2005 NEWU applied urgently for a *rule nisi* calling on the respondent to show cause why a notice published in the Government Gazette on 2 December 2005 headed "Cancellation if the Registration of a Trade Union" should not be declared *ultra vires*, misleading, vague, uncertain and therefore, invalid, and that it be stayed pending the determination of the matters under Case No: J2122/05. And further, to the extent that it remained the intention of the respondents to cancel the registration of NEWU, the Respondents should publish a notice that complies strictly with the provisions of section 106(2B) of the Labour Relations Act 66 of 1995 (LRA) by heading it "Notice of the registrar's intention to cancel the registration of the trade union… (NEWU)" and that the cancellation of NEWU be stayed pending the outcome in Case No: J2122/05.

3. The *rule nisi* was obtained on an urgent basis before an acting Judge and at a time when the Labour Court was in recess. Surprisingly, it was issued *ex parte*. Notice was given to the respondents by service on the state attorney, Johannesburg, by faxing only the Notice of Motion at 11h10 when the matter was enrolled for 12h00. There was predictably no appearance for the respondent. As it now transpires, it was by sheer accident that the state attorney found the fax at the machine when she was receiving other documents in another case. Furthermore, NEWU had been communicating about this matter with the respondents direct at their offices in Pretoria.[1] To serve only the Notice of Motion on the state attorney who has not been involved previously in this matter and to give such short notice is devious.

4. Mr Maluleke, the President of NEWU who appears for it in these proceedings, informed the court that he had drawn to the attention of

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the acting judge the manner in which NEWU had given notice to the respondents when obtaining the *rule nisi*. Whether this is true or not is not evident as there is no transcript of those proceedings. Nor has the learned acting judge given reasons for his order. However, no proof of service of even the Notice of Motion appears to have been given to the acting judge.

5. Proof of service of the Notice of Motion came to the attention of this court for the first time as an annexure to the registrar's affidavit.[2]

6. When the state attorney eventually caught up with NEWU members in court, the *rule* had already been issued. All that the NEWU members did in response to the protests about the improper notice to the respondent was to apologise.

7. Equally disturbing is the fact NEWU failed to disclose material facts when obtaining the *rule*. Mr Maluleke failed to disclose firstly, that on 1 September 2005, three and a half months before launching this application, the registrar had called for an explanation of NEWU's financial statements (discussed below) for the period 2002 to 2004. NEWU was warned then of the cancellation of registration of trade unions in terms of section 106(2A) if they ceased to be genuine.

8. NEWU replied on 29 September 2005 ambiguously offering to provide relevant and available information, but also complaining about the short time limit of 30 days in which it was required to do so. Thereafter NEWU launched into a protest against the alleged violation of its constitutional rights arising from the "threat" to cancel its registration. The rest of the response is seemingly a request for further particulars to the financial issues for which the registrar had sought an

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explanation, and responses to the registrar's alleged breaches of NEWU's rights to equality and fair treatment. NEWU concluded with a request for an extension 60 days after the registrar gave the information requested, to respond to the 1 September 2005 letter.

9. In his response of 8 October 2005 the registrar pointed out that some of the matters raised in NEWU's letter dated 29 September 2005 had nothing to do with proof of its genuiness. Nevertheless NEWU was given an extension until 31 October 2005 to supply the information.

10. NEWU did not respond.

11. On 25 November 2005 the registrar informed NEWU that he was satisfied that NEWU had ceased to be a genuine trade union because:

> ''The audited financial statements for 2002, 2003 and 2004 contain irregularities which have not been explained by the union despite being given an opportunity to do so.
> The union is operating for gain of individuals.
> The union is not functioning in terms of its constitution."

12. NEWU was informed that the registrar would give public notice in the Government Gazette of 2 December 2005 calling interested parties to make written representations as to why the registration of NEWU should not be cancelled.

13. If Mr Maluleke had disclosed these facts to the learned acting judge the application would have been dismissed forthwith because he would have failed to show that it was a matter of such urgency that relief was warranted without giving the respondents any opportunity to be heard.

14. Secondly, NEWU failed to disclose that the queries raised by the registrar were about:

    (a) the discrepancy between the compensation payments received from employers of R149 258, R447 886 and R129 566 and the shortfall in payouts to members of R71 948, R259 683 and R118, R6 244 respectively;
    (b) the expenditure of R31 378 and R12 142 for Lotto, the national lottery, for which the registrar required a motivation, the minutes of a meeting approving this expenditure, details of the members who attended the meeting and a reference to the provision in NEWU's constitution that authorised the transactions;
    (c) NEWU's unsecured loans to Mr Maluleke of R73 146, R167 534 and R241 169 for which the registrar required similar supporting information as in (b) above;
    (d) minutes of congresses and Executive Council meetings and a list of the office bearers and paid officials together with their contract details.

15. Thirdly, NEWU failed to disclose that it received qualified audits for the financial years ending 2002, 2003 and 2004. The qualification each year read as follows:

> "In common with similar organisation, it is not feasible for the union to institute accounting controls over cash collections prior to the initial entry of the collections in the accounting records. Accordingly, it was impracticable for us to extend our examination beyond the receipts actually recorded."

16. Fourthly, NEWU failed to disclose that it had not complied with section 100(d) of the LRA which requires it to give the registrar the names and

work addresses of its elected or appointed office bearers periodically. The last record of the section 100(d) information was supplied under cover of NEWU's letter dated 22 March 2001.[3]

17. Fifthly, NEWU failed to point out that Thandi Annie Molefe, whom its Executive Council had authorised to institute this application[4] was, according to her affidavits, an office bearer of NEWU[5]. In the footer of the letterhead of NEWU attached to the affidavits, Molefe is described as the Deputy President. According to the information supplied to the registrar in terms of section 100(d) on 22 March 2001[6] Molefe was listed as a union official holding the position of Additional Member (General Secretary). The affidavits filed on behalf of NEWU were typed by T Molefe.

18. By definition an office-bearer is not an official. An official is defined to include the secretary of a trade union. The obvious discrepancies between Molefe's affidavits and the annexures cast doubt on whether Molefe was properly elected or appointed. The authenticity of the resolution authorising the launching of this application is therefore in doubt. The identity of the members of the Executive Council who resolved to authorise Molefe to launch the application, the identity and capacity of the person signing the resolution, whether Molefe was party to the resolution and if so, in what capacity, are not disclosed by NEWU. One of the reasons for separating office bearers from officials is that office bearers, as elected representatives, are accountable to the membership for proper governance of trade unions. Officials are employees of trade unions accountable for their management. By allowing officials to also serve as office bearers NEWU has

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5 pages 10; 304
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compromised the governance of the Union.

19. Whether the Executive Council performs a genuine independent governance function on behalf of the membership is now in serious doubt. The dual role of Molefe was not disclosed at the first appearance. Nor has it been clarified in the replying affidavit. NEWU has failed to establish that Molefe has *locus standi* to launch this application. It is also not clear what oral submissions Mr Maluleke made to secure a *rule nisi*. As a matter of law and on the facts the *rule* cannot be confirmed for several further reasons.

20. NEWU has a statutory obligation to comply with provisions of the LRA, particularly those relating to its finances, in order to remain registered. It had to comply with those requirements without prompting from the respondents. Not only does it seem that NEWU has failed to comply voluntarily with its statutory obligations, it also fails to do so at the request of the registrar.

21. The registrar pointed out apparent flaws in NEWU's financial controls and invited it to clarify specific issues. His letters of 1 September 2005, 3 October 2005 and 25 November 2005 can leave no reasonable person in any doubt that they convey merely an *intention* to cancel the registration of NEWU. The wording of the notice is drawn from section 106(2) itself to which he made reference. Section 106 is headed "Cancellation of registration…". Under this heading it sets out the procedure for cancellation. That procedure prescribes that the registrar must give notice of his intention to cancel first. The section 106(2B) notice given to NEWU is not the first of its kind given to a trade union. Similar notices have been issued against other unions in the past as the law reports show. Mr Maluleke probably did not draw the attention of the learned acting judge to both section 106 and the case law as

was his obligation, especially as the application was brought urgently.

22. As all three letters invite responses from NEWU, it is quite disingenuous for it to suggest that it was being deregistered without a hearing. This is manifestly untrue from all three letters and the notice of 2 December 2005. The letter dated 25 November 2005 and the notice published on 2 December 2005 contain invitations to make representations before the registration of NEWU is cancelled. There is no ambiguity whatsoever to the notice dated 2 December 2005. NEWU could not have been in any doubt about the meaning and purpose of the notice. An employer R and P Marketing who employs NEWU members and who received only the heading and Government Gazette reference to the notice dated 2 December 2005, realised subsequently that it was merely notice of the registrar's intention to deregister NEWU.[7]

23. The registrar is entrusted with a statutory responsibility to oversee the administration and scrutinise the financial controls that trade unions are required to maintain in respect of the funds they hold. These are public funds for which trade unions are publicly accountable. As the registrar points out, his justification is to protect the members of trade unions who are most vulnerable to abuse of their subscriptions. The registrar should be left to do his job. The courts should be slow to interfere and certainly should avoid doing so without giving him a hearing. To prevent him from doing his job has the effect that public funds could be at risk.

24. NEWU had two remedies other than seeking urgent relief from the court. The first was to answer the valid queries raised by the registrar. That would have avoided its proposed deregistration altogether, if it

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succeeded in proving its genuineness. The second remedy was to appeal against the decision of the registrar if and when he decided to cancel its registration.

25. The registrars concerns about the apparent lack of authority for the Lotto payments, the unsecured loans and the short payment of compensation claims due to members are manifestly cause for grave concern. Lotto payments are not unusual for a trade union. However, trade unions are free to organise their administration and finances as they see fit in pursuance of their socio-economic interests. The registrar's concern is not about the fact that the Lotto payments were made and loans granted. His interest is in ensuring that the rules governing NEWU were followed as prescribed in the LRA, NEWU's constitution and the minutes of its congress and Executive Council meetings. Thus if NEWU's members, with full knowledge of all the facts and in compliance with its rules, consented to payments for Lotto and unsecured loans being granted to its President, that should be the end of the registrar's interest in the matter. Likewise with regard to the underpayments of compensation to members of NEWU. If the individual members in full knowledge released NEWU from paying the full amounts to them, then the registrar can have no further interest in the matter. Support for this view can be found in the guidelines from the International Labour Office (ILO) on the limits of interference in the administration of trade unions summarised in the following extracts from Freedom of Association Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the International Labour Office 4th (revised) edition:

> "416. Freedom of association implies the right of workers and employers to elect their representatives in full freedom and to organize their administration and

> activities without any interference by the public authorities.
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> 417. The fundamental idea of Article 3 of Convention No 87 is that workers and employers may decide for themselves the rules which should govern the administration of their organizations and the elections which are held therein.

…

426. The principles established in Article 3 of Convention No 87 do not prevent the control of the internal acts of a trade union if those internal acts violate legal provisions or rules. Nevertheless, it is important that control over the internal acts of a trade union and the power to take measures for its suspension or dissolution should be exercised by the judicial authorities, not only to guarantee an impartial and objective procedure and to ensure the right of defence (which normal judicial procedure alone can guarantee), but also to avoid the risk that measures taken by the administrative authorities may appear to be arbitrary.

427. There should be outside control only in exceptional cases, when there are serious circumstances justifying such action, since otherwise there would be a risk of limiting the right that workers' organizations have, by virtue of Article 3 of Convention No 87, to organize their administration and activities without interference by the public authorities which would restrict this right or impede its lawful exercise. The Committee has considered that a law which confers the power to intervene on an official of the judiciary, against whose decisions an appeal may be made to the Supreme Court, and which lays down that a request for intervention must be supported by a substantial number of those in the occupational category in question, does not violate these principles.

438. Provisions which give authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes for normal and lawful trade union purposes are incompatible with principles of freedom of association.

…

440. While the legislation in many countries requires that trade union accounts be audited, either by an auditor appointed by the trade union or, less frequently, appointed by the registrar of trade unions, it is generally accepted that such an auditor shall possess the required professional qualifications and be an independent person. A provision which reserves to the government the right to audit trade union funds is, therefore, not consistent with the generally accepted principle that trade unions should have the right to organize their administration and that the public authorities should refrain from any interference which would restrict this right or impede the lawful exercise therefore.

…

> 442. The Committee has observed that, in general, trade union organizations appear to agree that legislative provisions requiring, for instance, financial statements to be annually presented to the authorities in prescribed form and submissions of other data on

points which may not seem clear in the said statements, do not *per se* infringe trade union autonomy. Measures of supervision over the administration of trade unions may be useful if they are employed only to prevent abuses and to protect the members of the trade union themselves against mismanagement of their funds. However, it would seem that measures of this kind may, in certain cases, entail a danger of interference by the public authorities in the administration of trade unions and that this interference may be of such a nature as to restrict the rights of organizations or impede the lawful exercise thereof, contrary to Article 3 of Convention No. 87. It may be considered, however, to some extent, that a guarantee exists against such interference where the official appointed to exercise supervision enjoys some degree of independence of the administrative authorities and where that official is subject to the control of the judicial authorities.

444. As regards certain measures of administrative control over trade union assets, such as financial audits and investigations, the Committee has considered that these should be applied only in exceptional cases, when justified by grave circumstances (for instance, presumed irregularities in the annual statement or irregularities reported by members of the organization), in order to avoid any discrimination between one trade union and another and to preclude the danger of excessive intervention by the authorities which might hamper a union's exercise of the right to organize its administration freely, and also to avoid harmful and perhaps unjustified publicity or the disclosure of information which might be confidential."

26. In the circumstances NEWU has failed to establish that it has a clear right to the relief sought. It has also failed to demonstrate any prejudice that it might suffer if the interdict is refused. Greater prejudice may arise for its members if the interdict is granted.

27. The registrar has launched a counter application for an order staying the applications launched by NEWU under case No's J1758/05, J2122/05 and JR1002/05 pending the finalisation of the section 106 process. NEWU consents to the alternative order sought by the registrar namely for the consolidation of these matters (except JR1002/05) and their determination simultaneously at some future date.

28. The registrar has demonstrated that he has a valid concern about whether NEWU is a genuine trade union. NEWU has failed to comply with its statutory reporting obligations and to answer the queries raised by the registrar. The court is deeply disturbed by the devious manner in which NEWU secured the *rule* and its non-disclosure of material facts. Litigants in urgent applications have an ethical and legal obligation to make full disclosure in urgent applications.

29. The conduct of NEWU representatives leaves the court too in serious doubt as to whether it is a genuine trade and whether it is complying with all its statutory and constitutional obligations. Until that has been established, exposure to the risks of a trade union that is possibly not genuine should be minimised. I accordingly grant a stay of the proceedings under case No J1758/05, J2122/05 and JR1002/05.

30. In the absence of better information as to which individuals are responsible for this ill conceived application, the court is confined to making a punitive cost order against NEWU only. However, any

interested party who is able to identify the person(s) responsible for this application and to demonstrate that the costs should not be born by NEWU, may apply on the same papers, supplemented in so far as is necessary, for a variation of this costs order.

31. The rule is discharged with costs to be paid by NEWU on an attorney-client scale.

32. The counter application succeeds with costs to be paid by NEWU on a party and party scale.

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Pillay D, J