IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CASE NO: J984/10

In the matter between:

UNITED PEOPLES' UNION	
OF SOUTH AFRICA ("UPUSA")	Applicant
AND	
THE CCMA	1st Respondent
THE REGISTRAR OF THE LABOUR	
RELATIONS	2nd Respondent
HARMONY GOLD MINING COMPANY	3rd Respond

JUDGMENT

Molahlehi J

Introduction

1] This is an application for leave to appeal against the judgment of this court which was made on the 27th July 2010 under case number J984/10. In terms of that judgment the court held that the appeal against the decision of the Registrar of Labour Relation (the Registrar) cancelling the registration of the applicant UPUSA did not suspend the decision from taking effect.

2] The leave to appeal was not opposed, the first and third respondent having withdrawn their opposition and having undertaken to abide by the decision of this court.

3] NEWU's application to be joined as a party at this late stage of the proceedings was dismissed because it had not shown that it had a direct and material interest in the outcome of the matter.

The legal principles governing leave to appeal

4] In terms of s166 of the Labour Relations Act 66 of 1995 (the LRA), an appeal from the decision of the Labour Court to the Labour Appeal Court rests with the Labour Court.

5] It is trite that the test for determining whether or not to grant leave to appeal requires a judge to answer the question whether or not there is a reasonable prospect that another court may come to a different conclusion to the one reached by him or her.

The background facts

6] The background facts of this matter are set out in the earlier judgment made by this court. It is not necessary to repeat the same in any details in the present matter. It should however suffice to say that this matter came before this court because of the deregistration of the applicant by the Registrar. The Commission for Conciliation, Mediation and Arbitration (the CCMA) sought a declaratory order that the appeal launched by UPUSA with the court ought to stay the implementation of the decision to deregister it pending the outcome of that appeal.

The grounds for leave to appeal

7] I do not intend to deal with each and every aspect of the grounds for leave to appeal raised by the applicant. This does not however detract nor have any impact on the conclusion reached at the end of this judgment. I do however, seek to deal with those grounds of leave to appeal which I belief are key to the central issue which the court a quo had to deal with. The grounds for leave to appeal are set out in the applicant's founding affidavit in the following terms:

> "*22 This finding by the Court a quo, is with respect fundamentally wrong in a number of respects, in that it clearly presupposes:-*
>
> *22.1 that the Registrar is always right when he cancels a trade*

union's registration, (a pending appeal in terms of section 111(3) of the LRA nonetheless);

22.2. that such a trade union is always wrong, (a pending appeal of section 111(3) of the LRA nonetheless), in that "...it had failed to obey the law...", which allowed it its rights and benefits as a registered trade union in the first place; and

22.3. that this is the legal position until a Court has upheld an appeal by such a trade union, in terms of section 111(3) of the LRA, when the status quo ante will, somehow, be restored.[15]

23. This finding by the Court a quo, was fundamental to the conclusion ultimately arrived at by the Court a quo, i.e. that — the lodging of an appeal in terms of section 111(3) does not suspend the operation of the deregistration of a trade union and there exists a very real and reasonable possibility that the Labour Appeal Court may find that this approach was fundamentally wrong."

8] UPUSA contended that the common law principle that an appeal suspends a judgment of a lower court applies to the decision of the Registrar to deregister a union because that principle has not been expressly excluded by the LRA. UPUSA relied on a number authorities including academics in support of its contention. It is on the basis of this contention that UPSA argued that there is a reasonable possibility that Labour Appeal Court may find that the Court *a quo* erred in finding that an appeal in terms of section 111(3) of the LRA does not suspend the Registrar's decision to deregister UPUSA, by reason of the fact that its constitutional right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33 of the Constitution of the Republic of South Africa, No 108 of 1996 is thereby infringed.

9] It was further contended on behalf of UPUSA that the Labour Apeal

Court, may also well disagree with the finding by the Court a quo that:

> *"The prejudice that a union will suffer as a result of de-registration and enforcing such, even pending appeal, should be weighed against the public interest of protecting the interest of union members in particular that of ensuring that funds contributed are utilized for the purpose of benefiting union members"*

10] The other basis upon which the applicant seeks leave to appeal is that the issue at hand concerns the question of interpretation and in particular the applicability of s23 and 33 of the Constitution.

11] It was further contended that there is a need for clarity as to the interpretation of s111 read with s106 of the LRA. In support of this contention reliance was placed on the Constitutional Court decision of *Equity Aviation Service (Pty) Ltd v Service Commission for Mediation Conciliation and Arbitration & Other (2008) 29 ILJ 2507 (CC)*.

The judgment of the court a quo

12] There seem to be no dispute that the real issue which was before the court a quo was whether the appeal lodged by UPUSA against the decision of the Registrar to deregister it in terms of s106 read with s111 of the LRA suspends the coming into effect of that decision.

13] The reading of the judgment of the court a quo reveals very clearly, in my view, that the court in arriving at the decision that the launching of the appeal does not suspend the implementation of the decision of the Registrar is based on the purposive interpretation of the relevant provisions of the LRA. In this respect the Constitutional Court in *Equity Aviation (supra)at paragraph [34]* had the following to say:

> *"[34] Ordinarily, the primary rule in interpreting legislation is to determine the meaning of the words used in the relevant statute according to their natural, ordinary or primary*

meaning and also in the light of their context, including the subject-matter of the statute and its apparent scope and purpose. The provisions of the LRA must be purposively construed to give effect to the right protected by s 23(1) of the Constitution that is enjoyed by both employers and employees. (Footnotes not included)"

14] In my view UPUSA has incorrectly read the judgment when it says that the court in arriving at the conclusion as it did was influenced by the decision of Van Niekerk J, involving the urgent application which UPUSA had launched which is reported in *United Peoples Union of SA v Registrar Labour (2010) 31 ILJ 198 (LC).* Reference to that case was made in the context of setting out the background facts of this matter.

15] It is apparent from the reading of the judgment that the issue before the *a quo* court, as indicated earlier revolved around the interpretation of the LRA. In this respect the court found that any interpretation which was to be given other the one it gave to the provisions of s111 of the LRA would lead to absurd results which would defeat the very objective of the LRA in as far as the regulation of the internal affairs of unions were concerned. This court has also not made a determination s to the validity or otherwise of the decision of the Registrar.

16] In arriving at the conclusion that an appeal against the decision of the Registrar does not suspend its implementation the court a quo compared the provisions of the transitional measures in the LRA, their purpose and contrasted that with the purpose of s106(3) of the LRA. The court found that the two provisions in the LRA were different because they sought to achieve different objectives. The court further in this respect found that reading the intention of the legislation in as far the consequences of filing an appeal in terms of s111 of the LRA with reference to the transitional measures would lead to an absurd results which could never intended by the legislature. The court went

further to say the following:

> *"In any case the legislature was aware of the consequence which was provided for under the transitional measures. If the legislature wished to have the provisions of the transitional measures read into s 106 in the event of an appeal then it would have been states such.*

17] After placing the object of s106 of the LRA within the context of Freedom of Association and the rights acquired by a trade union in registering in terms of the provisions of the LRA, the court had the following to say:

> *[32] The objects of s106 read with s111 (3) of the LRA must also be understood in the context that the legislature having created an environment and a frame work for the guaranteed and enjoyment of the Freedom of Association in form of trade unions, also sought to ensure that certain minimum duties of transparency and accountability are imposed on the trade unions. The need for accountability arises from the fact that trade unions, as public entities, depends largely on financial contributions from the workers who are members of the public. It cannot be denied that the decision of the Registrar to de-register a trade union has serious consequence on that union as an entity and its members. As an entity the decision of the Registrar, is likely to have a profound impact on its structures and its operations including the right to represent its members in various dispute resolution processes. It further cannot be denied that there exists a possibility that the Registrar in arriving at the decision to de-register a trade union may be based on an incorrect interpretation of facts before him or her or other invalid reasons which may ultimately result in the*

decision being overturned on appeal.

[33] The prejudice that a union may suffer as a result of de-registration and enforcing such, even pending appeal, should be weighed against the public interest of protecting the interest of union members in particular that of ensuring that funds contributed are utilized for the purpose of benefiting union members. This simple accountability principle is founded on the notion that a union occupies a position of trust as concerning the management of the funds contributed by members. In short the provisions of s 106 of the LRA are protective in nature, intended to protect the vulnerable workers from abuse of their trust by unscrupulous union officials whose involvement in a union may be for no other reason but to advance their selfish business interest.

[34] If assuming that the decision of the Registrar is patently wrong and is based on incorrect facts, then the union is not without a remedy. The remedy available to the union is to approach the court for an order suspending the decision pending appeal. Of course one of the things that the union would have to show in approaching the court on this basis would be to show that it will suffer prejudice if the decision is not suspended pending the appeal and that it has prospects of success on appeal.

[35] The prejudice argument would probably have supported the interpretation of the CCMA had one of the consequences of de-registration been to render the continued operation of such a union illegal. In our law the existence and operation of unions is not based on registration but as indicated earlier on the principle of respect and guarantee of Freedom of Association. Thus a de-registered union can continue operating even after the de-registration. The consequence of de-registration is simply that the rights and benefits given to the union by the very law, which it had failed to obey, is taken away.

[36] In summary the declerator which the CCMA sought in terms of this application stands to fail. It is therefore my view, firstly that the general common law rule practice that an appeal stays the enforcement a judgment pending the outcome of an appeal does not apply to decisions made by the Registrar in terms of s 106 of the LRA."

18] The two key principles that emerges from that judgment are the following:

1 In terms of the proper interpretation of the LRA, the lodging of an appeal against the decision of the Registrar made in terms of s111 of the LRA, does not automatically suspend the implementation of the decision of the Registrar.

2 A union wishing to have the decision of the Registrar suspended pending the outcome of the appeal against the decision of the Registrar made in terms of s106 of the LRA can approach the court to have the implementation of the decision suspended pending the out of the appeal.

Evaluation

19] In the first instance, I do not agree with the applicant that there are deferent approaches between the approach adopted by this court and the one by the High Court. The High court authorities which the applicant relied on in this case are cases where the statute expressly provides for the suspension of an administrative decision pending the outcome of the appeal. The issue in this matter concerned the interpretation of the LRA. I found no judgment nor did the applicant refer me to any judgment of the High court that made a decision regarding the provisions of s106 read with s111 of the LRA. The decision that is illustrative of the approach that the High Court have adopted can be found in the case of *Van Royen v Minister of Minerals and Energy 2010 (1) SA 104 (C)*, wherein the court had to deal with

the issue of compensation for expropriation of mineral rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002. The plaintiff in that matter filed claim against the decision of the Director –General for holding that the plaintiff did not have a valid claim. Following the decision of the Director-General the plaintiff had in terms of Regulation 82A(5) of the Mineral and Petroleum the right to appeal to the Minister. Section 96 of the Mineral and Petroleum provides:

> **"96. Internal appeal process and access to courts.—**
>
> 1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to—
>
> (*a*) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or
>
> (*b*) the Minister, if it is an administrative decision by the Director-General or the designated agency.
>
> (2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

20] The court in *Van Royen (supra)* in the middle of paragraph 20 of that judgment held that:

> *"An appeal does not suspend the decision. No person may apply to court for a review of an administrative decision until that person has exhausted his or her remedies in terms of section 96(1). Section 96(4) specifically makes sections 6, 7(1) and 8 of PAJA applicable to court proceedings in terms of the section.*

The gist of the argument is that administrative decisions, having been made, cannot be ignored and remain valid until set aside, bearing in mind that an unlawful administrative act produces legally valid consequences for so long as it is not set aside."

21] I also do not agree with the interpretation given to the case of *Equity* Aviation by the applicant. There is nothing in that judgment that says leave to appeal should automatically be grant whenever a court deals with an interpretation of legislation. Of course the fact that the court was dealing with an interpretation of legislation is a factor to consider in assessing the prospect of another court arriving at a decision deferent to its decision. In applying that test, I am not persuaded that another court may simply on the basis of the fact that this matter involved interpretation of the LRA arrive at a deferent conclusion to the one reached by this court.

22] In my view, there is no reasonable prospect that the Labour Appeal Court may arrive at a conclusion different to the one reached by this court in that judgment. My view in this regard is strengthen by the case of *National Police Service Union v The National Commissioner of the National Police Service and Others (1999) 20 ILJ 2408 (LC).*

23] Although in *National Police Union,* the court was dealing with the provisions of clause 6(7) of the South African Police Regulations R1489 of 1995, the principle enunciated therein is apposite the present matter. Having obtained leave to appeal from the Labour Court the union in that matter sought to have the decision of the Commissioner of Police which deregistered it from National Negotiating Forum of the SA Police Services, suspended pending the outcome of the appeal from the Labour Appeal Court. The decision to deregister the union arose from the fact that it had lost the threshold requirements for representivity in the forum.

24] In *National Police Service Union the court* refused to stay the decision

to deregister the union pending the outcome of the appeal which was to be heard by the Labour Appeal Court. It should be noted that in that case the union sought to have the decision to deregister it suspended after it obtained leave to appeal from the Labour Court to the Labour Appeal Court. In the present instance the stay, based on the common law principle is sought pending the outcome of the appeal by the Labour Court in terms of s111 of the LRA.

25] Marcus AJ, in refusing to grant the stay of execution of the decision to deregister the union in *National Police Service Union,* had the following to say:

> *"[18] In my view, the same approach governs the present application. The union's argument* (which was that leave to appeal suspended the decision to deregister it) *would lead to absurd consequences. It would entail that where, for example, a court of review declines to set aside a refusal to grant a liquor licence, the noting of an appeal would have the effect of awarding that licence."*

26] It needs to be emphasized that the proper functioning of the machinery of the LRA would be considerably frustrated and rendered ineffective if the decision of Registrar was not given effect or was to be ignored pending the outcome of the appeal. It cannot be denied that the possibility exist that the decision of the Registrar may once tested on appeal prove to be wrong. It should however be born in mind that our law accepts that an unlawful administrative act is capable of producing legally valid consequences as long as the act is not set aside. In the present instance the decision of the Registrar will remain valid until set aside. In the earlier judgement I accepted that there will be some prejudice suffered by a deregistered union. However, that prejudice is outweighed by the accountability and protective considerations set out in the LRA. I also stated that if there are good prospect on appeal the union could avoid such prejudice by approaching the court and seek

an order to have the decision stayed pending the outcome of the appeal. I am also of the view, noting that matters of this nature concerns Freedom Association that a union or employer's organization should be entitled to approach the court for a directive to have the hearing of the appeal expedited.

27] As indicated earlier in this judgment, I am thus not convinced that there are reasonable prospects that another court may come to a different conclusion to the one reached by this court when it held that the appeal launched by UPUSA did not suspend the decision by the Registrar to deregister it from taking effect.

28] In the premises the applicant's application for leave to appeal to the Labour Appeal Court is refused.

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Molahlehi J
Judge of the Labour Court
Date of the hearing: 11 September 2010
Date of the judgment: 21st October 2010

Appearances:
For the applicant: MM Baloyi of Baloyi Attorneys
Matter unopposed.