IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C222/2023

In the matter between:

UNIVERSITY AND ALLIED WORKERS UNION **Applicant**

and

THE REGISTRAR OF LABOUR RELATIONS **First Respondent**

THE DEPARTMENT OF EMPLOYMENT & LABOUR **Second Respondent**

Heard: **18 May 2023**
Delivered: **23 May 2023**

Summary: Application to stay the operation of the de-registration of a trade union pending the determination of a statutory appeal. The requirements of granting such an application considered and applied. The applicant met the requirements of an interim interdict, which equates the stay application.

Held: [1] The operation of the de-registration is stayed pending the outcome of the determination of the statutory appeal.

Held: [2] There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application brought in terms of section 158 (1) (*a*) (i) and (ii) of the Labour Relations Act, 1995 (LRA)[1]. The application is brought on an urgent basis. Initially, the application was enrolled on the 17th of May 2023. Both parties, appearing before me, indicated that they had agreed to postpone the application to the following week. After debating the pertinent issues with the parties, particularly with the legal representative of the respondents, this Court ordered an adjournment of the application to the 19th of May 2023 to enable the parties to exchange the necessary documents. This Court was loath to burden another judge with a re-read of the papers, which were already sizeable at the time, in the course of the already jam packed motion week that was to follow.

[2] Indeed, on the 19th of May 2023, this Court heard the application as an opposed one.

Background Facts

[3] The Registrar lamented in the present application the ubiquitousness of applications of this nature, which end up with the appeal process being abandoned. Such relinquishment creates an oddity, when the interim orders issued by this Court continue in perpetuity. This is a valid concern and in this matter, the order this Court shall be issuing in due course shall decisively deal with this real conundrum.

[4] The applicant, University and Allied Workers Union (AAWU) was a registered trade union in terms of the provisions of the LRA. It has been

[1] Act 66 of 1995 as amended

registered as such since 2016 and has been operational for a solid nine years' period. On or about 3 May 2023, the first respondent, the Registrar of Labour Relations (Registrar) exercised his statutory powers emanating from section 100 (2) of the LRA and de-registered AAWU.

[5] The hardships of AAWU took a center stage since November 2022. Since then, the Registrar raised a barrage of non-compliance issues against AAWU. It is unnecessary for the purposes of the present application to punctiliously narrate the quandaries that faced AAWU. It suffices to state that both AAWU and the Registrar locked horns until the fateful day of 3 May 2023, when the Registrar unleashed his statutory powers.

[6] Section 111 (3) of the LRA affords aggrieved persons like AAWU an automatic right to appeal a decision of the Registrar to the Labour Court within a period of sixty days of that aggrieving decision. On 9 May 2023, AAWU exercised its automatic right by launching the present application in two parts. Part A is an application to suspend or stay the de-registration decision. Part B seems to relate to an appeal[2].

[7] The appeal shall be heard by this Court in due course.

Evaluation

Is the application urgent?

[8] In opposing the present application, the Registrar contends that the application is not urgent at all. In deciding whether to hear a matter as one of urgency, a judge exercises a full judicious discretion. The exercise of the discretion involves consideration of two main questions, namely (a) is an urgent relief necessary; and (b) would an applicant obtain an adequate and substantial redress in due course or not. In this present

[2] This is not in compliance with rule 9 of the Labour Court Rules. Since AAWU is still within the sixty days' period, it would have been too technical for this Court to have non-suited AAWU for this reason. What counts for now is the perspicuous intention to exercise the automatic right guaranteed in section 111 (3) of the LRA.

application AAWU alleged and was not challenged that its membership of the Statutory Council of the Squid Industry is dependent on it being a registered trade union and it stands to lose that membership. At the bargaining council level, it represents the desires and wishes of its members and that representation shall terminate once its registration as a trade union ceases. To my mind these consequences brings to the fore the inherent need for an urgent relief.

[9] I pause to mention that, in my view, trade unions exist to facilitate two important constitutional rights; namely; (a) the right to collective bargaining (section 23 (5) of the Constitution of the Republic of South Africa, 1996); and; (b) the right to freedom of association (section 23 (2) (a) and (b) of the Constitution). In my view, Indirectly, the cancellation of registration of a trade union implicates the right to freedom of association of the members of the de-registered trade union. Impliedly, in order to foster their rights to collective bargaining, members of the de-registered trade union may be forced to join another trade union contrary to their right to join a trade union of their own choice.

[10] One of the stated purposes of the LRA is to promote orderly collective bargaining. Another purpose is to advance labour peace. To my mind these fundamental rights enjoins this Court to treat disputes involving trade unions with some degree of urgency[3].

[11] Once the bargaining power of AAWU is reduced and or impacted during the de-registration spell, it is lost forever, never to be recouped. Thus, there is no substantial redress in due course. By the time AAWU achieve success on appeal, that is when the *causa* that affects its continuation is removed, AAWU would have lost its membership of the Statutory Council of the Squid Industry. Such is, in my view, definitely an irreparable harm. The suggestion by the Registrar that AAWU may opt to re-register does not amount to an adequate and substantial remedy for the ostensibly wrong de-registration. The procedure of registration as outlined in sections 95 and 96 is toilsome. It still leaves AAWU in the vulnerable

[3] See *Tonyela and others v Numsa and others* (2022) 43 ILJ 1895 (LC) at para 10 and 11 and *Ntlokose v Numsa* and others (2022) 43 ILJ 2562 (LC).

hands, as it were, of the Registrar as contemplated in sections 96 (3) – (5) of the LRA. It may end up as a revolving door and a vicious circle in that AAWU may end with the same appeal that is pending before this Court to challenge the decision to refuse registration.

[12] For all the above reasons, this Court takes a view that the present application meets the requirements of rule 8 of the Labour Court rules. Accordingly, the present application commands and deserves space on the urgent roll.

The issue of authority to institute the application

[13] Upon being challenged that the General Secretary does not have the necessary authority to launch the present application, a document signed in January 2019 by the General Secretary was introduced in order to prove that authority. That notwithstanding, Mr. Petersen appearing for the respondents persisted with the preliminary point of lack of authority. At first he presented the argument under the rubric of *locus standi*. He submitted that the General Secretary does not have a *locus standi*. *Locus standi* is a standing in law to institute an action in law. A simple answer to that challenge is that the application is launched by AAWU and not the General Secretary. There is no basis in law to suggest that AAWU does not have the necessary *locus standi* to launch the present application.

[14] Upon realizing that the *locus standi* shoe is pinching, the case gravitated and located to one of authority and challenged the authenticity of the document of January 2019. In a nitpicking fashion, issues such as of the address on the letterhead of AAWU were raised. It is by now trite that authority to act is challengeable through a procedure outlined in Rule 7 of the Uniform Rules. Such procedure has not been invoked by the respondents. As such the point of authority or lack thereof is not properly before Court and ought to be rejected[4].

Merits of the application

[4] See *ANC Umvoti Council Caucus v Umvoti Municipality* 2010 (3) SA 31 (KZP) at para 13-39.

[15] An application to suspend and or stay, is effectively an application for an interim relief of interdict. The question that pronounces itself with sufficient vigour in the present application is what are the requirements to be satisfied in order to obtain the interim relief of a stay. The Registrar contends that AAWU failed to demonstrate that it will suffer prejudice if his decision is not suspended pending the appeal and that it has prospects of success. Based on that, as far as the Registrar is concerned, in order for AAWU to be successful, it must meet two requirements; *viz*; (a) prejudice; and (b) presence prospects of success on appeal. As it shall be demonstrated later in this judgment, those are not the requirements to be met for an application to stay.

[16] However, for the sake of posterity, this Court wishes to deliver a comment on the alleged first requirement of prejudice. Generally, a prejudice occurs when a harm or injury results or may result from some action. Sections 12-21 of the LRA outlines a number of benefits enjoyed by a registered trade union. Absent registration, a trade union would not derive any of the apparent benefits outlined in the sections. To be part of any bargaining council and or statutory council a trade union is required to be registered. Undoubtedly, loss of any of the benefits mentioned now, spells affliction for any trade union. Even though prejudice is not one of the requirements, this Court fervently take a view that AAWU shall axiomatically suffer affliction as a result of the de-registration. One of the known requirements of an interdict is that of irreparable harm or potential harm. If this is what the Registrar refers to as prejudice, AAWU expressly testified that as a result of its de-registration, it will lose its membership of a statutory council. During the time of the loss of membership, bargaining on matters affecting its members will continue unabated. Even during the period AAWU awaits re-registration, if the suggestion of re-registration serves as an alternative redress, the loss would still continue unabated. This is a prejudice that is of an irreparable nature. If, during its loss of membership occasioned by the de-registration, a collective agreement is concluded, which collective agreement adversely affects it and its members' interests, by the time the appeal is successfully prosecuted, that adverse collective agreement would have been concluded and

acquired legal force in terms of section 31 of the LRA. All of these possibilities inflict irreparable harm on AAWU and its members.

The requirements of a stay or suspension applications.

[17] The effect of a stay order is to prevent harm or potential harm[5]. A stay or suspension is effectively an interim interdict. The learned Tebbutt J dealing with a stay of execution in *Strime v Strime* (*Strime*)[6], as fortified by *Rood v Wallach*[7] and *Graham v Graham*[8] had the following to say:

> "Execution should therefore generally be allowed unless the applicant for a stay shows that real and substantial justice[9] requires that such a stay should be granted…
>
> Whether or not the applicant is likely to succeed in obtaining a cancellation or variation of the maintenance order is not for this Court to determine. It would also be unwise to express any view because of the pending maintenance court application."

[18] In transmutation in order to suit the present situation, this Court states that whether the pending appeal is likely to succeed or not is not a matter for this Court and it will indeed be unwise to express a view whilst the appeal pends. The issue is one of real and substantial justice as opposed to weak or good prospects. If real and substantial justice requires a stay same should be granted. A real and substantial justice is one where another party does not suffer an injustice. Tebbutt J in giving content and meaning to the concept of 'real and substantial justice' remarked as follows:

> "This may well be so, but it is a matter for the maintenance court to consider. The applicant may succeed in persuading the maintenance court that, despite the factors to which I have just referred, he was, in

[5] See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD)

[6] 1983 (4) SA 850 (C).

[7] 1904 TS 257 at 259.

[8] 1950 (1) SA 655 (T) at 658.

[9] See *Stoffberg NO v Capital Harvest (Pty) Ltd* (2130/2021) [2021] ZAWCHC 37 (2 March 2021) para [26] as to what *real and substantial justice* entails.

> fact, unable to pay the R800 for the month of April. Were he to do so, then clearly injustice would be done were I, at this stage, to order that there should be execution in order to satisfy that amount.
>
> It seems to me, therefore, that the applicant is entitled to a stay of the execution. I stress that this is merely a stay of execution and not a setting aside of the execution order…"[10]

[19] In *casu*, an injustice will follow if, in due course, AAWU succeeds in persuading a Court of appeal that the de-registration by the Registrar was not lawful. Such would imply that it ought to have continued to enjoy the benefits of registration. Not staying the de-registration would be tantamount to denial of the registration benefits. This denial is a real and substantial injustice.

[20] Ackermann J in *Le Roux v Yskor Landgoed (Edms) Bpk en Andere (Le Roux)*[11] gave *Strime* an *imprimatur*. The learned Ackermann J had the following to say:

> "Die ondersoek na "real and substantial justice" was alleen gerig op die kwessie van opskorting van die eksekusie."[12]

[21] In *Glaxco Wellcome (Pty) Ltd and others v Terblanche and others* (*Glaxco*)[13], the learned Davis JP, as he then was, had the following to say, when considering the test for granting suspension pending review:

> "However in taking this decision the court has a discretion to grant or refuse an application to suspend an order. As Traverso J said in *Santam Limited v Norman and another* 1996 (3) SA 502 (C) at 505F, it is a discretion which should be exercised judicially but generally speaking a court will grant a stay of execution where real and substantial justice requires a stay or where injustice would otherwise be done (See also *Strime v Strime*…)

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[10] *Strime* at page 855.

[11] 1984 (4) SA 252 (T).

[12] *Le Roux* page 260. Loosely translated: *The enquiry into 'real and substantial justice' was only directed to the question of suspension of execution.*

[13] Unreported case (04/CAC/Oct00) [2000] ZACAC 2 (4 December 2000)

> The position can be summarised thus: In exercising its discretion a court must, of necessity, enquire as to whether there is a *prima facie* case that an applicant's rights have been infringed. Further the court must locate where the balance of convenience lies…"

[22] Ultimately in this Court Waglay J, as he then was, in *Tony Gois t/a Shakespeare's Pub v Van Zyl and others* (*Tony Gois*)[14] confirmed that the enquiry in applications of these nature does not concern the merits of the underlying dispute. A solitude question is whether the *causa* is in dispute. The underlying *causa* in the present application is the de-registration right. The de-registration right is in dispute.

[23] More recently, this Court in *Denel SOC Ltd v Numsa obo Petersen and Another (Denel)*[15] rejected the reasoning of Acting Justice De Villiers in *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) and others*[16] and followed *Tony Gois*. In similar fashion as in *Denel*, this Court reverberates its views and conclude that presence of the prospects of success is not one of the requirements to be met by AAWU. It suffices that AAWU has impugned the *causa* – the de-registration of the trade union rights.

[24] As I conclude, in the exercise of my judicial discretion, I take a view that the de-registration must be stayed pending the outcome of the appeal lodged by AAWU.

The effect and duration of the order, the legitimate concerns of the Registrar.

[25] As poignantly raise by the Registrar, trade unions which achieve the order I am about to make, has the penchant of adopting a supine approach and dilatorily prosecute the appeal. It is by now settled law that an appeal in terms of section 111 (3) of the LRA is an appeal in a wide sense. It is a complete rehearing and adjudication of the merits with or

[14] [2003] 11 BLLR 1176 (LC).

[15] [2022] 10 BLLR 945 (LC).

[16] (Case 39170/2019) dated 24 February 2020.

without additional evidence or information[17]. This seem to suggest that a full blown trial is awaited in matters of this nature.

[26] However, rule 9 of the Labour Court Rules governs the procedure related to appeals to the Labour Court. In terms of rule 9 (5) the Registrar is obliged to provide a written record and reasons for the decision within 15 days of the delivery of the notice of appeal. Once that is done, the appellant is tasked with the duty to copy and certify the records and thereafter furnish each party with the copies of the necessary records. Thereafter parties to the appeal must provide written representations. Upon receipt of those, the registrar of the Labour Court must allocate a date for the hearing of the appeal (rule 9 (8) of the Labour Court Rules). The Registrar did not outline where the delay happens or happened in the cases he mentioned in the answering affidavit. It may well be that the Registrar may also complicit and is responsible for the spoke in the wheel. If the record is not filed within the prescribed 15 days, then the next step in the process may not happen.

[27] Nevertheless, in my view, an appeal of this nature must be treated the same way as a review is treated in this Court. For that reason, this Court propounds that the provisions of clause 11 of the Practice Manual applies *mutatis mutandis* to an appeal in terms of section 111 (3) of the LRA. As already stated matters involving trade unions commands urgency, and an appeal of this nature must be treated as an urgent application and must be prosecuted within a twelve months' period contemplated in clause 11.2.7 of the Practice Manual. Should it not be prosecuted within that time, the Appeal shall lapse. Similarly, if the appeal record is not served and filed within sixty (60) days of the registrar of this Court advising the appellant that an appeal record exists, the appeal shall be deemed withdrawn. Thus, should the appellant fail to serve and file the appeal record, the appeal so noted shall acquire a status of being deemed withdrawn. This is consistent with rule 5 (17) of the Labour Appeal Courts Rules.

[17] *SAMRI v MISA* (LAC) and others quoted *in Protectors Workers Union v Registrar of Labour Relations and others* (J1028/13) [2014] ZALCJHB 289 (30 July 2014).

[28] What this Courts propounds is congruent with the purposes outlined in section 1 of the LRA read with the introductory provisions of the Practice Manual. Since the rules of the Labour Court are silent on the effect of failure to file the appeal record as a step towards prosecution of a statutory appeal, this Court, in line with its powers in section 158 (1) (j) of the LRA, is entitled to attach conditions to a stay order. Until the rules are aligned, it shall remain the duty of each Court granting a stay in applications of this nature to attach conditions to the order of stay. I shall be doing that in this matter.

[29] Accordingly, for all the above reasons, the suspension shall be so ordered with conditions, given that this is an interim order and it cannot, in my view, by default masquerades as a final order with the effects mentioned by the Registrar in this matter.

Order

[12] In the results, I make the following order:

1. Pending the finalization of the appeal in terms of section 111 (3) of the LRA, the de-registration of AAWU effected on 3 May 2023 by the Registrar of Labour Relations is placed on hold, suspended and stayed.
2. The appellant, AAWU must file all the necessary documents within twelve months from the date of this order failing which, the appeal shall be regarded as having lapsed and dismissed. However, the appellant shall be entitled to have the appeal reinstated on *good cause* shown.

3. The appellant, AAWU must serve and file the appeal record within 60 days of the record being made available, failing which, the appeal shall be deemed withdrawn. However, the appellant shall be entitled to have the appeal reinstated on good cause shown.

4. In the event of a lapse and a deemed withdrawal as set out in paragraphs 2 and 3 above, the suspension ordered above

(paragraph 1) shall also lapse, with the consequence that AAWU shall remain de-registered.

5. There is no costs order.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr C T Ramabu of Ramabu Attorneys, Muizenburg.

For Respondents: Mr F Petersen

Instructed by: State Attorney, Cape Town.