DELETE WHICHEVER IS NOT APPLICABLE

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

14/08/2023
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 1375/2022

In the matter between:

Decided in Chambers

REGISTRAR OF LABOUR RELATIONS Applicant

and

SIMUNYE WORKERS FORUM Respondent

Delivered: 14 August 2023

(This ruling was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the ruling is delivered is deemed to be 14 August 2023.)

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK, J

[1] The applicant (the registrar) seeks leave to appeal against the whole of the judgment delivered by this court on 21 June 2023. In its judgment, the court upheld

an appeal filed by the respondent in these proceedings (the union) against a decision by the registrar to refuse to register the union in terms of section 96 of the LRA.

[2] The test to be applied is that referred to in section 17 of the Superior Courts Act, 10 of 2013. Section 17(1) provides:

> Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
>
> (a) (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
>
> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
>
> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[3] The use of the word "would" in section 17 (1)(a)(i) has been held to be indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion (see *Daantjie Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* (75/2008) [2015] ZALCC 7 (28 July 2015).

[4] The applicant raises a number of grounds for appeal, most of which relate to the '*reasonable prospect of success*' requirement and one of which raises the '*other compelling reason*' requirement. I deal first with the latter. The registrar contends that the court's finding that the requirements for registration established by section 95 are to be interpreted restrictively to the extent that they may limit the right to freedom of association raises issues of public importance and constitutes an important question of law. As such, the registrar submits that this finding amounts to a compelling reason why the appeal should be heard. There is no merit in this

contention. The court's conclusion is no more than a restatement of the law. In *Municipal and Allied Workers union of SA v Crouse NO* (2015) 36 *ILJ* 3122 (LC), Murphy AJ held that the right to freedom of association must be interpreted generously and that the requirements of registration, in so far as they restrict that right, should be interpreted restrictively. There is no justification for an appeal in circumstances where the court restates and applies well-established principles.

[5] The registrar's first ground of appeal is related to the contention that some other compelling interest warrants the granting of leave. The registrar contends that the court erred by relying on the right to freedom of association, as it finds expression in section 8, to interpret section 95. There is similarly no merit in this submission. First, it is trite that statutes must be interpreted harmoniously, so that provisions are not mutually destructive. It is equally trite that in terms of section 233 of the Constitution, the court is mandated to prefer any reasonable interpretation of legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law. In its judgment, the court made specific reference to Article 3 of ILO Convention 87 (which South Africa has ratified). While the union submitted that its constitutional rights under sections 18 and 23 of the Constitution should be directly applied, this was not necessary since, as the court observed, section 8 gives expression to the constitutional rights concerned, and are capable of direct application in disputes such as the present. I do not understand the registrar to dispute in these proceedings that the court is bound to interpret and apply the rights established in section 8 in a manner that better promotes the spirit, purport and objects of a fundamental right, or that international labour law, as it applies to the right of freedom of association and its exercise, should be ignored.

[6] The registrar only identifies a single aspect in which the union's constitution does not comply with section 95, being that it does not establish the office of secretary. The union's constitution does establish the office of secretary, and defines its functions. To the extent that the registrar contends that the secretary refers to an office of the secretary general who must manage the administration of a trade

union, there is no basis for that interpretation in section 95(5)(i). That provision specifically permits the union to determine the functions of a secretary. In the present instance, the union's constitution specifies that the administration of the union is managed by the standing committee, subject to the overall direction and control of the meetings. It is entitled to make that choice.

[7] To the extent that the registrar contends that the use of the words 'provide for' in section 95 requires a trade union's constitution to establish the offices in question, this is not an approach supported by the text. Section 95(5) uses the words 'provide for' in instances where the clear meaning is 'to make provision for'. Where the section requires a union to 'establish' an office or process, it says so. For example, paragraph (h) requires the constitution to establish the manner in which decisions are to be made. To interpret 'provide for' to mean 'establish' (as the registrar contends), ignores the fact that the legislature chose to use different terms. In any event, the union's constitution establishes both 'office bearers' and 'trade union representatives'. The fact that it does not employ officials because it prefers members to perform that work is not a disqualification for registration; nowhere in section 95 is that interpretation reflected. To the extent that the registrar relies on *NUMSA v Lufil Packaging (Isithebe) and others* (2020) 41 *ILJ* 1846 (CC), that case was concerned with compliance by a union with its own constitution, not the content of a union's constitution. That judgment illustrates further why the registrar was wrong not to register the union in the present instance. The union's constitution promotes the values on which the registrar relies, in the form of greater accountability, transparency and democracy. This is precisely what the union's constitution seeks to achieve by establishing its flat, non-hierarchical structure.

[8] To the extent that the registrar relies on the registration application form (Form LRA 6.1) to determine whether the union complied with the LRA, the application form does not set the requirements for registration. These are established by section 95(5), and must be interpreted and applied without reference to the form. There is nothing improper in the union mandating name members to sign the form in the circumstances in which they did. They had been authorized to do so and to

the extent that the form seeks to impose designations not required by the LRA, it is not to refuse an application for registration on that basis.

[9] Finally, to the extent that the registrar submits that the LRA treats all unions equally and that there is no provision made or distinction drawn between traditional and new unions in the labour market, the registrar is correct that the LRA treats all unions equally. But the registrar is wrong in assuming that it necessarily follows that unions who do not adopt organisational structures which replicate those of unions currently registered must not be registered until there is a legislative amendment. The issue is whether the union's constitution meets the requirements of section 65. If it does, it is entitled to be registered, whether it's organisational structure reflects that of a traditional union or not. The reality is that the registrar has imposed a range of requirements that do not appear in section 95, or elsewhere in the LRA.

[10] In short, none of the grounds of appeal have any prospects of success, nor is there any other compelling reason to grant leave to appeal. The application for leave to appeal thus stands to be dismissed. Finally, there is no reason not to deny the union the costs it has incurred in opposing the application.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge of the Labour Court of South Africa