IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG CASE NO: J2180/06

In the matter between:

NATIONAL ENTITLED WORKERS' UNION (NEWU)	Appellant
and	
THE MINISTRY OF LABOUR	1st Respondent
THE MINISTER OF LABOUR	2nd Respondent
DEPARTMENT OF LABOUR	3rd Respondent
REGISTRAR OF LABOUR RELATIONS (J T CROUSE)	4th Respondent
DEPUTY REGISTRAR OF LABOUR RELATIONS	5th Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an appeal by the appellant, the National Entitled Workers Union (NEWU) which was a registered trade union until its deregistration by the registrar of Labour Relations (the registrar) on 31 October 2006.

2. The registrar had found that the appellant was not operating or had ceased to operate as a genuine trade union as envisaged in the Labour Relations Act 66 of 1995 (the LRA). His conclusion was because the audited financial statements in 2002, 2003 and 2004 contain irregularities which have not been explained by the appellant despite being given an opportunity to do so that it was operating for gain of individuals and was not functioning in terms of its constitution.

3. The appeal is brought in terms of section 111(3) of the Labour Relations Act 66 of 1995 (the LRA). The first respondent in this appeal is the Ministry of Labour. The second respondent is the Minister of Labour. The third respondent is the Department of Labour. The fourth respondent is the registrar of Labour Relations and the fifth respondent is the deputy of labour relations. It is unclear why all of the respondents except the Minister of Labour and the registrar have been cited in this appeal since the appeal is against a decision taken by the registrar.

4. The appellant relies on the following grounds of appeal:

4.1 There is no basis on fact/evidence and law for the registrar's conclusions/findings that the appellant is allegedly not a genuine union as envisaged in the LRA, that it is allegedly run by individuals for gain, that it allegedly refused to submit documentation (proof) that the union is operating as a genuine trade union, that its audited financial statements for 2002, 2003 and 2004 allegedly contain financial irregularities which could allegedly not be explained by the union despite being given an alleged opportunity to do so, it is allegedly operating for an alleged gain of the alleged individuals and it is allegedly not, or has ceased to operate as a genuine trade union as envisaged in the LRA.

4.2 The registrar has overlooked or ignored the material evidence before him proving that the appellant is clearly a genuine trade union as envisaged by the LRA read with the guidelines for the registration of trade unions and employers' organisations issued in terms of section 95(8) of the LRA. The appellant is run

by its members, subject to its constitution and rules as amended. It is not run by individuals for gain. Its officials are duly appointed officials in terms of its constitution as amended. The office bearers are duly elected office bearers in terms of its constitution, as amended. The officials and office bearers obtain no other advantage or gain from their office than that to which they are in law entitled by way of unionists' remuneration (in the form of realistic salaries, allowances, staff loan facilities and other employee benefits duly approved by the appellant's members in terms of its constitution, as amended) as defined in section 213 of the LRA. It did not refuse to submit the documentary proof that it is operating as a genuine trade union. The registrar is fully aware that it has allowed him to inspect all the relevant voluminous documents/proof that it is operating as a genuine trade union. The registrar has elected not to inspect the said documents for reasons unknown.

4.3 In his decision, the registrar has ignored or overlooked the material written representations submitted to him and proving that the appellant's audited financial statements for 2002, 2003 and 2004 do not contain alleged financial irregularities and it has clearly explained all queries raised by the registrar in his original notices of cancellation of registration dated 1 September 2005 and 3 October 2005. The appellant is not operating for gain of individuals and is, or has not ceased to operate as a genuine trade union as envisaged in the LRA.

4.4 The registrar has arrived at his conclusion capriciously, or upon wrong principle, or has not brought his unbiased judgment to bear on the question or has not acted for substantial reasons. He has exercised his discretion capriciously, improperly, unfairly and unconstitutionally. The appellant did not commit any kind of act

which is prohibited by law or which is defined as a deregisterable offence. In this context there is no wrongful conduct or wrongdoing on the part of the appellant justifying its deregistration.

THE CHALLENGE TO THE CONSTITUTIONALITY OF SECTIONS 106 (2A), 106(2B) AND 111 OF THE LRA AND CLAUSES 18, 19, 20 AND 21 OF THE GUIDELINES ISSUED IN TERMS OF SECTION 95(8) OF THE LRA

5. This Court must in terms of the appellant's appeal and pre-hearing minutes agreement determine whether sections 106(2A) and (2B) and of 111 of the LRA as amended and clauses 18 to 21 of the guidelines issued in terms of section 95(8) of the LRA are unconstitutional and invalid in that they are inconsistent with the Constitution. The appellant seeks an order declaring these sections and guidelines to be inconsistent with the Constitution and thus invalid with retrospective effect from 2 August 2002. It seeks an order of constitutional invalidity to the Constitutional Court for confirmation. It seeks an order reinstating the registration of the appellant pending a decision of the Constitutional Court on the validity of sections 106(2A) and (2B) of the LRA and guidelines and a cost order.

6. During arguments in Court, the appellant's counsel did not make any submissions on this issue. The impression that I gained was that this issue was abandoned. Upon making further enquiries about this, this Court was informed that the appellant was persisting with this challenge. Since the challenge was raised in the appellant's founding papers, the heads of arguments and the pre-appeal hearing agreement, it is still an issue that must be dealt with. The appellant's failure to join the Minister of Justice and Constitutional Development as a party to the proceedings is not fatal since the responsible Minister for

labour matters has been cited.

7. The appellant relies on eight grounds of challenge to the constitutionality of these sections and guidelines.

7.1 The first challenge is that it is apparent from paragraphs 19 to 22 of the Explanatory Memorandum preceding the enactment of section 106(2A) and (2B) of the LRA, that the statements made by the Minister of Labour responsible for Labour legislation, the speeches of the multi-party negotiating members of NEDLAC, the gazetted notices of the registrar's intention to cancel registration and the registrar's gazetted notices of deletion in Government Gazettes for the period November 1996 to date, that the Government's purpose, motive, impact or effect of the enactment and application of section 106 (2A) and (2B) of the LRA read with the guidelines issued in terms of section 95(8) of the LRA, is mainly to cancel the registration of a significant number of registered trade unions and the registered employers' organisations registered after the enactment of the LRA. This purpose, motive, impact or effect is constitutionally invalid because it is inconsistent with sections 1(c), 9, 22 and 23 of the Constitution. Evidently the post-1995 enacted registered trade unions and registered employers' organisations are mainly the only ones deregistered: the pre-1995 LRA enactment registered trade unions and registered employers' organisations, whose conduct is equally reprehensible, is left undisturbed in their registered status, legal personality and corporate status. The only thing which sets the post-1995 LRA enactment registered trade unions and registered employers' organisations apart

from the remaining pre-1995 LRA enacted registered trade unions and registered employers' organisations is the fact that they are the victims of unfair discrimination. The imposition of the sentence of cancellation of registration under section 106 of the LRA is arbitrary and capricious and promotes selective enforcement or non-enforcement of section 106 and the Guidelines, amounting to unjustifiable distinctions between registered trade unions in similar circumstances. This discriminatory cancellation of registration not only conflicts with the equal protection and due process principles or ideals of the justice system, but also with section 9(1) of the Constitution which provides that: "Every person is equal before the law and has the right to equal protection and benefit of the law". There is clearly the arbitrariness inherent in the application of section 106 of the LRA and the guidelines in practice. It cannot be gainsaid that poverty, political beliefs or affiliations and chance play active roles in the outcome of deregistration cases and in the final decision which organisations should live (i.e. not be deregistered) which should die (i.e. be deregistered). One of the reasons why the respondents have knowingly refused, failed, neglected or delayed accusing, investigating, prosecuting, judging and deregistering the organisations registered before the 1995 LRA enactment despite overwhelming evidence against them showing that they have committed deregisterable offences is because the respondents have great belief and deep conviction that a significant number of the post-1995 LRA enacted registered unions (with no proven track record of having fought against 'white racism') are inherently and naturally not genuine and that the pre-1995 LRA enacted and registered unions (such as COSATU-affiliated trade unions allied to the ruling political party) which fought

the ‘white racism’ cannot do anything wrong. In this context these guidelines undermine the rule of law referred to in section 1(c) of the Constitution, and undermine the Constitutional rights to equality before the Law conferred by section 9(1)(c) of the Constitution. For this reason alone sections 106(2A) and (2B) of the LRA and the guidelines are inconsistent with the Constitution.

7.2 Under section 106 (2A) and (2B) of the LRA, the questions of guilt and innocence and the deregistration sentence to be imposed on those found guilty of being not, or having ceased to functions as, ‘genuine trade union or employers’ organisations’, is not decided by the Labour Court, but by the registrar who is also an accuser, investigator and prosecutor. The registrar is both the player and the referee possessing unlimited or blanket statutory powers to accuse, investigate, prosecute and deregister registered trade unions or registered employers’ organisations oppressively, vexatiously, unfairly, arbitrarily, capriciously or unconstitutionally. The Courts have disapproved of the combination in one person of the accuser, investigator, witness, prosecutor, judge and executor of judgment. The legislative exclusion of the judiciary from deciding whether or not to cancel the registration of the registered trade unions and registered employers’ organisations and the legislative concentration of deregistration powers on the hands of the registrar, are not consistent with the Constitution and section 426 of the ILO’s Freedom of Association of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the International Labour Office 4th (revised) edition. South Africa’s international obligations are important to the interpretation of the LRA.

7.3 In section 106 of the LRA, once the registrar 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, the registrar has no discretion to impose a sentence short of a cancellation of registration, the registrar has no discretion but to cancel the registration of the offender, with no due regard to the presence or absence of mitigating and/or aggravating factors, there are no alternative punishments available to the registrar, with dire consequences that the offender with no inborn criminal tendencies which have strayed into criminal activities and the habitual offender with criminal leanings which habitually commit offences and which may have offended more than one occasion, are all deregistered, regardless of whether the particular offence is too serious or is not too serious, and a deregistration penalty imposed even in cases not of extreme seriousness. Cancellation of registration means the death of the registered trade union or the registered employers' organisations. Unjust cancellation of registration of an innocent trade union is irremediable because there is no provision under section 106 of the LRA for re-registration of a deregistered trade union or a deregistered trade union or a deregistered employer's organisation even if the registrar can be satisfied by the clearest proof that the organisation has genuinely reformed, that a considerable time has lapsed since it was deregistered and that probability is that, if reinstated, it will conduct itself honestly and honourably in the future.

7.4 The registrar is appointed and is under the ultimate control of the Minister of Labour. It is public knowledge that the Minister of Labour is the one who actually cancels the registration of the trade unions and/or employers' organisation (or who actually gives orders to the registrar to do so). This violates

the doctrine of legality or the rule of law.

7.5 The legal representatives (i.e. attorneys and advocates) and the legally recognised lay representatives (i.e. the registered trade unions and the registered employers' organisations) are not equal before the law of the striking off, in that under section 106(2A) and (2B) of the LRA, the judiciary has no power to make a decision or an order for cancellation of registration of the legally recognised lay representatives, while, on the other hand, under section 22(1)(d) of the Attorneys Act No 53 of 1979, as amended and section 7(1)(d) of the Admission of Advocates Act 74 of 1976, as amended, only the High Court has the power to make the decision or the order for the suspension (from practice) or the removal of unfit and improper attorneys or advocates from the appropriate roll. This infringes the equality guarantee under section 9(1) of the Constitution and constitutes unfair discrimination against legally recognised lay representatives. The limitation of the legally recognised lay representatives' right to equality before the Law and the right of access to the Courts to decide whether their registration should be cancelled, is not reasonable, legitimate, justifiable and necessary. The attorneys, advocates and legally recognised lay representatives have the same right of appearance before the Labour Court and Labour Appeal Court. The level of responsibility of the legally recognised lay representatives appearing in Court is no different from that which the Court is entitled to expect from a legal practitioner. The legally recognised lay representatives are also expected by the Court to maintain some degree of order and court manner. The legally recognised lay representative is also having the duty to assist the Court in arriving at the truth of the matter, which requires a part to act honestly about their

dealings with Court.

7.6 Insofar as the Minister Labour has published guidelines issued in terms of section 95(8) of the LRA to be applied by the registrar in deciding whether a registered trade union or a registered employer's organisation is a genuine trade union or a genuine employer's organisation for the purpose of cancellation of its registration and to cancel its registration if found not to be genuine, such guidelines contain material provisions that are not authorised by section 95(8) of the LRA and are therefore unlawful to that extent. Section 95(8) of the LRA does not empower the Minister of Labour to publish guidelines to be applied by the registrar in determining whether a trade union or a registered employer's organisation is a genuine trade union or a genuine employer's organisation for the purpose of cancellation of its registration if found not to be genuine. Section 95(8) of the LRA only provides that the 'Minister, in consultation with NEDLAC, may by notice in the Government Gazette publish guidelines to be applied by the registrar in determining whether an applicant is a genuine trade union or a genuine employer's organisation. This only relates to an applicant for registration under section 95 of the LRA. This is confirmed by clause 19.8 of the guidelines which provide that the proposed amendments to section 95 are intended to discourage the formation and registration of trade unions and employers' organisations that are not genuine, by introducing a requirement that they be genuine or *bona fide* and giving the registrar of labour relations the power to refuse to register organisations which are not. The Minister of Labour will have the power to issue guidelines concerning whether or not the trade unions or employers' organisations are *bona fide*. Any refusal to register a trade union on these

grounds will be subject to appeal to the Labour Court.

7.7 The guidelines lack legality or are *ultra vires*, vague, not capable of being understood, overboard and fall to be struck down. The underlying problem that goes to the root of these guidelines is that the prohibition of the formation, registration and carrying on of a trade union or any employers' organisation as an association of gain, does not lie against in having as an object the carrying on of activities of a registered trade union or employers' organisation for the acquisition of gain, but lies against the making of a profit to the members and flies in the face of the well-established law saying that the prohibition lies not against the making of a profit (provided this profit is not distributed to the members) but in having as an object the carrying on of a business for the acquisition of gain. The attitude of the executive is to 'provide service to union members, but don't charge too much trade union subscriptions or levies. If you do, you are not genuine'. However, the State or the Government does not pay the difference to finance the services provided for less. The prohibited 'unrealistically high salaries and allowances' not to be 'paid to the officials, office-bearers or employees of the trade union', the prohibited 'low interest loans', not be 'made to officials, office-bearers or employees', the prohibited 'substantial proportion of the settlement reached in dispute' and the prohibited 'substantial percentage of the settlement to the union' are not defined and/or explained. While clause 21 of the guidelines correctly acknowledge 'that it is appropriate for genuine trade unions to require members to make realistic contributions to the costs of bringing cases on their behalf', such realistic

contributions are not defined and/or explained. 'A threshold of charges above which the union would be considered not to be a genuine trade union' and 'a tariff for realistic contributions to the costs of bringing cases', have not been prescribed and/or established. The type, limit, nature, extent or amount of the prohibited 'unrealistically high salaries and allowances' not to be 'paid to the officials, office-bearers or employees of the trade union', the prohibited 'low interest loans' not be 'made officials, office-bearers or employees', the prohibited 'substantial proportion of the settlement reached in disputes', the prohibited 'substantial percentage of the settlement to the union', and the permissible 'realistic contributions' that 'genuine trade unions' are entitled 'to require members to make ... to the costs of bringing cases on their behalf', are not transparent precisely because they are decided secretly and privately by the respondents at will.

7.8 The means to achieve the goal of the guidelines is not reasonable. On assumption that cancelling registration of the registered trade unions and registered employers' organisations (which are not 'a fit and proper person' to practice as registered trade unions or registered employers' organisation) is a legitimate objective, the present guidelines 'are manifestly overboard in furthering such purposes, and as such are unreasonable and unconstitutional. The guidelines are evidently unlawful, contradictory and vague. For example clauses 6 and 7 which purport to provide that trade unions cannot be brought into existence at the instance of persons who are not employees, is not inconsistent with the Labour Court judgement in 2005 (11) BLLR 1156 (LC) at paragraphs 25-26. Part of clause 8 of the guidelines which purports to provide 'the failure to place

appropriate qualifications on membership may indicate, with other factors, that the trade union is not a genuine trade union, is unlawful, vague and contradicts another part of clause 8 which provides that 'there is no requirement in the LRA that a trade union confine its membership to employees in a particular sector or sectors of the economy or a particular sector or sectors of the economy or a particular geographical region'. Part of clause 9 which purports to provide that the 'size of the membership may be an indication that a trade union is not a genuine trade union' and that 'an extremely small membership in relation to the number of employees qualified to join, may indicate that the trade union is not a genuine trade union', is unlawful, vague and contradicts another part of the clause 9 which provides that 'the LRA does not create any membership threshold that trade unions must meet to register', and that 'it is legitimate for trade unions to restrict their membership to small groups of workers; for instance, the employees of one employer or within one bargaining unit of a small trade or profession'. Clause 18 which purports to provide that a trade union is not a genuine trade union if 'unrealistic high salaries and allowance are paid to the officials, office-bearers or employees of the trade union' or if 'interest free or low interest loans are made to officials, office-bearers or employees, and those loans are not repaid' is vague and contradicts clause 19 of the guidelines which provides 'that it is not inappropriate for trade unions to pay competitive salaries to attract competent and qualified officials and employees' and that 'there may be circumstances in which established trade unions may decide to provide loans on favourable terms to their officials, office-bearers or employees'. Part of clause 21 which purports to provide that a trade union is not a genuine union if it

'charges its purported members a substantial proportion of the settlement reached in disputes', or if 'a member is required to pay a substantial percentage of the settlement to the union', is vague and contradicts part of the guideline which provides that it is 'appropriate for genuine trade unions to require members to make realistic contributions to the costs of bringing cases on their behalf.

8. The appellant is seeking in terms of section 172(1)(a) of the Constitution read with sections 157(1) and (2) and section 158(1)(a)(iv) of the LRA an order declaring that the provisions of sections 106 (2A) and (2B) and of 111 of the LRA as amended and clauses 18 to 21 of the guidelines issued in terms of section 95(8) of the LRA are unconstitutional and invalid in that they are inconsistent with the Constitution.

9. The Labour Court has in terms of section 157 of the LRA concurrent jurisdiction with the High Court in respect of an alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution, and arising from employment and from labour relations in respect of any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer.

10. Chapter VI of the LRA deals with trade unions and employers' organisations. Sections 95 to 106 deals with the registration and regulation of trade unions and employers' organisations. A trade union may apply to the registrar for registration if it meets the criteria set out in section 95(1)(a) - (d) of the LRA. The registrar must in terms of section 95(7) of the LRA refuse to register any trade union unless he is satisfied that it is

a genuine trade union. The LRA provides no definition of the term 'genuine', but such meaning can be gleaned from the guidelines issued in terms of section 95(8) in GNR146 in Government Gazette 25515 of October 2003. The registrar's powers under section 95(7) of the LRA should be construed as including a reference to the mischief which the 2002 amendment sought to address. The following appears in *WUSA v Crouse NO & Another* [2005] 11 BLLR 1156 (LC) at paragraph 27:

"Moreover, the registrar's powers under section 95(7) should be construed as including a reference to the mischief which the 2002 amendment sought to address. It is well known that the amendments effected to sections 95 and 106 of the LRA in respect of registration and deregistration of trade unions and employers organisations on the grounds of genuineness sought to deal with a clearly defined mischief which was set out in the explanatory memorandum to the Bill in the following terms:

'Since the enactment of the 1995 Labour Relations Act there has been a significant increase in the number of trade unions and employers organizations. A significant number of these are no more than disguised labour consultants that have registered for the sole purpose of gaining appearance rights at the CCMA and Labour Court.

It has also come to the attention of the department that a number of these trade unions adopt coercive practices that are indicative of the fact that they are not genuine trade unions:

(a) .....

(b) *if the trade union acts on behalf of a 'member' in a claim, excessive or disproportionate, the full amount of any payment received is not paid over to the member and often a service fee is charged.*

(c) .....

There are also strong indications that some financial and insurance brokers have become active in the establishment and affairs of trade unions and employers' organisations in order to market financial or insurance products. In one instance a magistrate's court ordered the transfer of the union's assets and all records (in effect the registration and management) to an insurance broker. This broker then attempted to continue by cloaking its activities under the banner of a union. The status quo was

partially restored but only after a lengthy, resource-absorbing and time-consuming process.

The operation of certain labour consultancies that have registered as employers' organisations undermine effective dispute resolution. These organizations tend to recruit their members from small businesses that are inexperienced in respect of labour relations matters. Once gullible employers have joined, they are frequently faced with exorbitant fees.

This creates a negative impression of the Labour Relations Act and its dispute resolution institutions and undermines the efforts of genuine organisations participating in collective bargaining structures to recruit such employers. This in turn negatively impacts on the participation by certain employers, including small employers in bargaining councils.

The proposed amendments to section 95 are intended to discourage the formation and registration of trade unions and employers' organizations that are not genuine, by introducing a requirement that they be genuine or bona fide and giving the registrar of labour relations the power to refuse to register organizations which are not. The Minister will have the power to issue guidelines concerning whether or not a trade union or employers' organizations is bona fide. Any refusal to register a trade union on these grounds will be subject to appeal to the Labour Court.

The International Labour Organization has expressed the view that this is in keeping with its standards concerning the promotion of collective bargaining and freedom of association."

11. The Minister of Labour has in terms of section 96(8) of the LRA, in consultation with NEDLAC by notice in the Government Gazette published guidelines to be applied by the registrar in determining whether an applicant is a genuine trade union or a genuine employer's organisation. These were published in GNR942 in Government Gazette 23611 of 25 July 2002. They are guidelines and remains that. Clause 1 of the guidelines sets out their purpose which is as follows:

"This document contains guidelines published by the Minister of Labour, in consultation with NEDLAC, that are to be applied by the registrar of Labour Relations in determining whether an applicant for registration in terms of the Labour Relations Act is a genuine trade union or a genuine employers' organization. In terms of section 95(7) of the Labour Relations Act, the registrar may only register a trade union or an employers' organisation if the registrar is satisfied that it is a genuine trade union or a genuine employers' organization. In addition in terms of section 106(2A) of the Labour Relations Act, the registrar may cancel the registration of a trade union or an employers' organization that is not, or has ceased to function as, a genuine trade union or employers' organization, as the case may be".

12. Clause 3 of the guidelines provide as follows:

"In order to determine whether an organization is genuine, it will be necessary for the registrar to examine the actual operation of the organization. In the case of an applicant, particular attention will have to be paid to the manner in which the organization was established and formed. In the case of an existing organization, attention will have to be paid to the actual activities and functioning. In evaluating whether a trade union or employers' organization is genuine, the registrar must take into account all relevant factors."

13. Sections 102 and 103 of the LRA deals with the winding-up of trade unions or employers' organisations on its own accord and because of insolvency. Such applications must be heard by the Labour Court. In terms of section 105 of the LRA, a registered trade union may apply to the Labour Court for an order declaring that another trade union is not independent and if the Labour Court is satisfied that it is not independent may make such a declaratory order.

14. Section 106 of the LRA deals with the cancellation or registration of trade unions or employers' organisations. There is a duty on the registrar of the Labour Court to notify

the registrar if the Court has in terms of section 103 ordered a registered trade union or a registered employer's organisation to be wound up or in terms of section 104 declared that a registered trade union is not independent. Once the registrar has received a notice from the Labour Court it must in terms of section 102(2) of the LRA cancel the registration of a trade union or employers' organisation by removing its name from the appropriate register. A registered trade union that is no longer independent may only be declared to be no longer independent in terms of a court order. A registered trade union may also be wound up by bringing an application to this Court or because of an act of insolvency.

15. The registrar is granted the power to deregister a trade union that is no longer genuine. Before doing so he must follow the provisions of section 106 (2A) and (2B) of the LRA which provide as follows:

(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.

(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."

16. This Court can wind up a registered trade union and/or grant an order that it has ceased to be an independent trade union. Where it is no longer a genuine trade union, the registrar is empowered to deregister the said trade union and no court order is needed. The registrar has a discretion to cancel the registration of a trade union or employers' organisation by removing its name from the appropriate register. This can only happen if the registrar is satisfied that the trade union or employer's organisation is not or has ceased to be a genuine trade union or employer's organisation. Where the registrar has issued a notice requiring the trade union or employers' organisation to comply with sections 98, 99 and 101 of the LRA 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, he may cancel the registration of the said trade union or employers' organisation. The registrar must before removing the name of the trade union or employers' organisation from the appropriate register publish a notice in the Government Gazette at least 60 days prior to such action, give notice of his intention to cancel the registration of the trade union or employers' organisation and invite the trade union or employers' organisation or any other interested parties to make written representations about why the registration should not be cancelled. The trade union could persuade the registrar that it is a genuine trade union and if it fails to do so, and after the notice was published request written reasons for the registrar's decision and thereafter lodge an appeal.

17. An aggrieved person may within 30 days of the written notice of a decision of the registrar, demand in writing that the registrar provide written reasons for the decision. The registrar must give the applicant written reasons for the decision within 30 days of receiving the demand. Any person who is aggrieved by a decision of the registrar may appeal to this Court against that decision, within 60 days from the date of the registrar's decision or if written reasons for the decision are demanded, the date of those reasons.

18. After a trade union or employer's organisation's registration is cancelled, it no longer enjoys the rights afforded to it in terms of the LRA but it continues to exist. Nothing prevents the said trade union to again apply to be registered if it can show that it is a genuine trade union.

19. It is clear from the facts of this matter that the appellant was requested by the registrar to give an explanation about certain issues contained in the auditor's report. After much delay the appellant gave some explanation. It is also clear that the registrar notified the appellant in writing that he had formed the view that it was no longer a genuine trade union and it was allowed to make representations. The appellant was thereafter notified that the registrar was going to publish a notice in the Government Gazette and was called to make written representations why its registration should not be cancelled. Those representations were made and the registrar decided to proceed with the cancellation. The appellant demanded written reasons for the registrar's decision which reasons were provided.

20. It is clear that the LRA sets out what steps must be followed in registration of trade

unions. It also sets out an elaborate procedure that must be followed before a trade union can be deregistered. There are safeguards in place. Once that procedure has been followed, an aggrieved person or trade union can lodge an appeal to this Court in terms of section 111 of the LRA. The registrar is obliged to afford the appellant the right to be heard before making his decision. He is also obliged to give the appellant written reasons for the decision that he has taken. It is clear from the facts of this case that the appellant was given an opportunity to be heard before a decision was taken against it. I do not understand how the provisions of sections 106(2A) and 2(B) and 111 of the LRA are inconsistent with the Constitution.

21. It was contended by the appellant that the registrar is both a prosecutor, judge and executioner. I agree that the registrar seems to have wide powers in terms of the LRA. The registrar must still act within the confines of the law and give reasons for his decision. He must allow an applicant to make representations before making his decision. He does not have unfettered powers in terms of the LRA. In terms of the LRA, the registrar makes that decision. He does not have to consult the Minister of Labour about that decision. In some instances he has no discretion at all. Once an applicant complies with the LRA, the registrar must register the trade union.

22. The appellant had referred to the provisions of the Attorneys Act and the Admission of Advocates Act and contended that attorneys and advocates can only be removed by an order of Court. What the appellant has failed to take into account is that attorneys and advocates must apply to the High Court to be admitted and they can only be struck off by an order of the High

> Court. The trade unions do not apply to the Labour Court to be registered. They apply to the registrar. For deregistration for not complying with sections 98 to 101 of the LRA or where they have ceased to be a genuine trade union, the registrar may cancel their registration.
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> There are only two instances where this Court can grant and order for

deregistration of a trade union where it is not an independent trade union or where it has been wound up.

23. The appellant contended that the registrar is discriminating against trade unions and employers' organisations established after 1995 since they were not involved in the fight against 'white racism'. Further that the registrar has not taken any steps to deregister trade unions established before 1995. It gave a number of examples where the registrar has not taken any steps against pre 1995 unions. The fact that the registrar has not taken any steps against those unions is not a basis to challenge the constitutionality of the provisions of the LRA and it does not follow that the provisions of section 106(2A) and (2B) are unconstitutional. There are several remedies available to a party who believes that the registrar is not performing his tasks and duties as required in terms of the LRA. It is for purposes of this judgment not necessary to state what those remedies are. It must be borne in mind that the registrar is a creature of statute. He must act within the confines of the LRA. He does not have any power in terms of the LRA to suspend the cancellation of a trade union or to impose certain fines. He can depending on what section of the LRA a trade union has breached, call upon the trade union to remedy that within a specific period. The fact that his powers are limited does not mean that his

failure to impose a fine renders the provisions of the said section as inconsistent with the Constitution.

24. This Court can take judicial notice of a number of bogus trade unions and employers organisations that have sprung up post 1995. Many such officials have attempted to appear in Court to represent both employees and employers. Some such organisations are known to recruit employees of registered trade unions who were informed by the said trade unions that they will not represent them in Court because they do not have any prospects of success in their cases. The said employees' hopes will be raised and will then be shattered when they lose their cases in Court.

25. The guidelines issued by the Minister of Labour in consultation with NEDLAC remain that namely guidelines. These are examples of indications. They are not a closed lists of factors that a registrar may take into account in determining whether a trade union is a genuine trade union. They apply also to trade unions formed before or after 1995. This much is clear from clause 3 referred to in paragraph 12 above.

26. There is no evidence that the imposition of the sentence of cancellation of registration under section 106 of the LRA was arbitrary and capricious and promoted selective enforcement or non-enforcement of sections 106 and the guidelines amounted to an unjustifiable distinction between registered trade unions in similar circumstances. There was no arbitrariness inherent in the application of section 106 of the LRA and the guidelines in practice. The guidelines are not unreasonable. They do not lack legality and are not vague and not incapable of being understood and are not overboard that it

should be struck down.

27. I conclude that the provisions of sections 106(2A) and (2B) and 111 of the LRA and the guidelines are consistent with the Constitution.

THE APPEAL BROUGHT IN TERMS OF SECTION 111 OF THE LRA

28. It is not necessary to deal with the history of this matter and all the court applications filed by the appellant including the Labour Appeal Court judgment. Those Courts have dealt with the issues raised in those applications. Since this Court is dealing with an appeal filed in terms of section 111(3) of the LRA, it will confine the judgment to the appeal. The registrar has served and filed an appeal record which contains all the relevant correspondences between the parties. The appeal record includes the registrar's letter dated 1 September 2005 requesting the appellant to explain certain issues. It includes the appellant's representations made on 6 May 2006, the registrar's letter advising the appellant of the cancellation, and the reasons for the decision made by the registrar.

29. The appeal is brought in terms of section 111(3) of LRA. Before the registrar may decide to cancel the registration of a trade union or employer's organisation he must comply with the provisions of section 106(2A) and (2B) of the LRA. It is clear from the facts placed before this Court that the registrar has complied with the provisions of section 106(2)(A) and (B) of the LRA. Section 111 of the LRA provides as follows:

> *"(1) Within 30 days of the written notice of a decision of the registrar, any person who is aggrieved by the decision may demand in writing that the registrar provide written reasons for the decision.*

(2) The registrar must give the applicant written reasons for the decision within 30 days of receiving a demand in terms of subsection (1).

(3) Any person who is aggrieved by a decision of the registrar may appeal to the Labour Court against that decision, within 60 days of -

(a) the date of the registrar's decision; or

(b) if written reasons for the decision are demanded, the date of those reasons.

(4) The Labour Court, on good cause shown, may extend the period within which a person may note an appeal against a decision of the registrar."

30. The appellant's registration was cancelled by the registrar for four reasons. These are:

30.1 The discrepancies between compensation received and amounts paid out from employers in 2002, 2003 and 2004 as reflected in the audited financial statements;

30.2 Playing of lotto in 2003 and 2004;

30.3 Unsecured loans made to M D Maluleke in 2002, 2003 and 2004 and

30.4 Other proof of genuineness of the union.

31. The Court will now proceed to deal with each reason given by the registrar. In doing so the Court will only deal with the relevant correspondence and the representations made about this.

Discrepancy on compensation received and amounts paid out:

32. It is common cause that the appellant's audited financial statements show that the appellant in 2002 received compensation of R149 258 and paid out R71 949.00. In 2003 it received R447 886 and paid out R259 683. In 2004 it received R129 566 and paid out

R118 624. The registrar requested the appellant to explain the discrepancies between the amounts received and amounts paid out.

33. The explanation provided by the appellant is that there are no discrepancies between the amounts received and the amounts paid out. The amounts received constitute gross amounts received and the amounts paid out constitute net amounts paid out, after lawful deductions. It said that the differences between the gross amounts received and net amounts paid out mainly consisted of the following lawful deductions made by the appellant from gross amounts received:

33.1 the trade union subscriptions in arrears (at the time the net amounts were paid out), with the amounts of *mora* interest thereon,

33.2 realistic contributions (made by members) to the costs of appellant bringing or defending cases on its members' behalf, as, *inter alia*, sanctioned or authorized by clause 19 of the guidelines issued in terms of Section 95(8) of the LRA published in the Government Regulation No. 7410 Volume 445 Pretoria 25 June 2002 No. 23611 at page 226-241, which provides that it is "appropriate for genuine trade unions to require members to make realistic contributions to the costs of bringing cases on their behalf".

34. It is clear from the explanation tendered by the appellant that it states that the amounts paid out were net. Deductions were made from the gross amounts for subscriptions that were in arrears and with realistic contributions to the costs of the appellant on its members behalf which was sanctioned by the guidelines issued in terms of section 95(8) of the LRA. The members made realistic contributions to the costs of bringing cases on

its members behalf which is in accordance with the guidelines.

35. Section 95(5)(a) of the LRA requires a trade union to state in its constitution that it is an association not for gain. Clause 18 of the guidelines state that "the purpose of the requirement that the union must state in its constitution that it is an association not for gain is to prevent trade unions from being used as vehicles for enriching individuals or as a cover for profit-making businesses. In evaluating whether a trade union is a genuine trade union, it is important to examine the actual financial operation of the trade union. Among the factors that may indicate that a trade union is operating in fact for gain of certain individuals are the following: unrealistically high salaries and allowances are paid to the officials, office-bearers or employees of the trade union; interest free or low interest loans are made to officials, office-bearers or employees, and those loans are not repaid; family members of office-bearers or officials are employed by the trade unions and income earned by the trade union is not used for the benefit of the organisation and its members but is paid out to officials, office-bearers or employees".

36. Clause 21 of the guidelines provide as follows:

"The financial arrangements made with members of a trade union on behalf of whom litigation, particularly dismissal disputes, is instituted, is an indication of whether the trade union may not be a genuine trade union or may be operating as an association of gain. Where a trade union charges its purported members a substantial proportion of the settlement reached in disputes this may be an indication that the trade union is not a genuine trade union. This does not mean that it is not appropiate for genuine trade unions to require members to make realistic contributions to the costs of bringing cases on their behalf. However, the fact that a member is required to pay a substantial percentage of the settlement to the union, would be a strong indication that the

organisation is not a genuine trade union.

37. It is clear from the explanation tendered to the registrar by the appellant that no reference is made that not all of the amounts were paid out during that year because some members had not collected the compensation during that year. The explanation tendered in Court was an after thought. I accept that the guidelines allow genuine trade unions to require its members to make realistic contributions towards the trade union costs. The question that arises is what is a realistic contribution. Mr Mphahlani who appeared for the appellant could not inform this Court what is realistic. He conceded that it must be determined objectively. Can it be said that the retention of more than 50% or 45% of the compensation is a realistic contribution? It is a well established fact that some attorneys reach contingency fees arrangements with their clients. The amount varies between 10% and 25%. It is clear that in 2002 the appellant retained more than 50% of the compensation received. In 2003 it retained about 45% of the compensation received and in 2004 about 10%. There was clearly a discrepancy in the amounts received and payments made to the members. The amount retained cannot be regarded as a realistic contribution towards the appellant's costs. It far exceeds what attorneys would charge in terms of contingency fees.

38. The appellant is established in terms of its own constitution. It can only act if it is authorised to do so in terms of its constitution. The explanation tendered is that the difference is made out of arrear subscriptions, *mora* interest and realistic contributions made by members whose matters are being defended by the union. The appellant's constitution does not provide for *mora* interest on arrear subscriptions. It also does not

provide for contributions to be made by members whose matters are being defended by the union. The discrepancies are made up of monies paid by members which are unconstitutional. If any deductions were made as suggested by the appellant, it would have been reflected as such by the auditor. No such transactions or explanations are contained in the relevant financial statements. It is highly unlikely that an auditor would not reflect money payable to members as such. The appellant has placed before this Court some documents reflecting what the arrear subscriptions was. Those amounts are minuscule. They do not make any dent on the compensation retained.

39. It was contended by appellant's counsel that clause 8(2) of the appellant's constitution deals with the issue of costs. Clause 8(1) deals with the membership fee that is payable to the union. Clause 8(2) provides that in addition to the membership fee a member shall also be liable for the payment in the same manner of such other fees as may be prescribed in terms of the rules governing any fund established in terms of clause 3(h). It was contended that clause 8(2) permits the union to charge its members fees. I do not agree. Clause 8(2) refers specifically to clause 3(h). 3(h) deals with the objects of a trade union which is *inter alia* to establish and administer funds for the benefit of its members and their dependants. The two clauses envisage in my view was for a medical aid fund or pension fund etc. and has nothing to do with legal costs.

40. The only conclusion that this Court can come to is that the appellant is making a profit out of its members. No proof from the appellant was submitted to prove the explanation given by it. The obvious route to follow was for the appellant to provide or at least attempt to provide some proof that vulnerable members are not exploited by union

officials.

The issue of playing lotto

41. The registrar wrote to the appellant pointing out that the audited financial statements for 2003 and 2004 reflected that amounts of R31 378 and R12 142 respectively were used for playing lotto. The appellant was requested to furnish the registrar's office with the motivation behind this, the minutes where the approval was given for those transactions, the contact details of the names, telephone numbers and addresses of each member present at that meeting and to indicate in terms of which provision of the constitution this was done.

42. The appellant gave a lengthy explanation about the playing of lotto. Two reasons were given for playing lotto. The first is that it was one of the appellant's *bona fide* attempts to secure funds and to rescue it out of its financial dire straits and/or to pursue its socio-economic interests. It said that it was a matter between the appellant and its members. It gave examples about its attempts to raise funds from different donors/funders which were all unsuccessful. It had applied to the Minister of Labour, the South African Labour Development Trust and the Gauteng Provincial Government. The second reason for playing lotto was to make contributions and/or donations to lotto's good causes. By playing lotto the appellant also contributed or donated towards lotto's good causes as envisaged in the Lotteries Act No. 57 of 1997, as amended. The appellant stated that both the LRA and its registered constitution do not prohibit it from using its money for purposes of playing lotto since it was in the best interest of the appellant and its members and which is consistent with the objects or any other matter specifically provided for in

its constitution. It said that had it won the lotto jackpot or any substantial amount, the registrar might in all probabilities have congratulated it for having won such prizes to promote and serve the best interests of its members.

43. The appellant stated that as the auditor's reports indicate, there was no attempt to conceal the matter. There was full disclosure of playing lotto. It had suppressed and concealed nothing. The appellant's members had agreed to the use of its money to play lotto for the abovementioned lawful purposes. The lotto transactions were approved and/or authorized by the members of the appellant on 1 January 2001 in terms of their resolution of the special congress of NEWU passed on 20 January 2001 at 21 Loveday Street, Johannesburg but to avoid prolixity did not annex copies of the said minutes and the last known contact details (names, telephone numbers and work addresses) of each member present at the aforesaid meeting, which are clearly voluminous. It said that if so required, those were available for inspection in their registered address by prior written arrangements with the appellant. The lotto is the national lottery game authorized under the Lotteries Act, 1997 in terms of which both the individuals (e.g. unionists, etc.) and the syndicates (e.g. trade unions, etc.) have the legal right to play lotto. The appellant said that using the said amounts to play lotto was done in terms of clauses 3(c), 3(j) and (10m) of its constitution and this might be in the interests of the appellant and its members.

44. The appellant was requested to furnish the registrar's office with the motivation behind the playing of lotto. It had to provide the registrar with the minutes where the approval was given for those transactions and with the contact details of the names, telephone

numbers and addresses of each member present at that meeting and to indicate in terms of which provision of the constitution this was done. Two reasons were given by the appellant for playing lotto was fund raising and to make contributions and/or donations to lotto's good causes. The reasons given by the appellant are fantastic. It had spent R63 520.00 over a two year period when it was in dire financial straits. Lotto is a game of chance and the possibility of catching the jackpot is about one in 13 million. It simply does not make sense that the appellant would have authorised its president to used its funds to play lotto. There are no records of any winnings made when lotto was played. The appellant has not given the registrar the minutes where the approval was given for those transaction because it was to avoid prolixity. It has also failed to give the registrar the names, telephone numbers and addresses of each member who were present because it was voluminous. To do so three years after the request was made, raises a number of questions and more particularly that the minutes are not genuine. The minutes that were subsequently provided are not voluminous nor are the names and addresses and details of the members who attended the special meeting. The only inference to be drawn is that no special meeting was held where the playing of lotto was authorised.

45. The appellant stated that the playing of lotto is authorised by clauses 3(c), 3(j) and 10(m) of its constitution. I have considered the said clauses. They do not deal with fund raising and does not assist the appellant at all.

The unsecured loans

46. The audited financial statements of the appellant show that M.D. Maluleke received the following unsecured loans: R73 146 (2002); R167 534 (2003) and R241 169 (2004). The

appellant was requested to furnish the registrar's office with minutes of a meeting where these loans were approved and the contact details of each member present at the meeting (names, telephone numbers and work addresses) and in terms of which provision of the constitution this was done. It also required the appellant to indicate if any of the loans were paid back and if any amount was paid back to provide proof of such payment. If none was paid back to provide him with an undertaking that the money would be paid back.

47. The appellant stated that as the auditor's reports indicate, there was no secrecy and there was no attempt to conceal the matter. There was full disclosure of the said loans. Its members agreed to the appellant making loans to its unionists. The loan transactions were approved and/or authorised by the members of the appellant on 15 April 2000 in terms of their resolution of the national executive council of NEWU passed on 15 April 2000. It said that to avoid prolixity, it has not annexed copies of the minutes and resolution of the aforesaid meeting where union staff loans (including, but not limited to, loans received by M. D. Maluleke) and the last known and available contact details of the names, telephone numbers and work addresses of each member present at the said meeting, which were clearly voluminous. It said that if so required, these were available for inspection at their registered address which was shown in the registrar's system, by prior written arrangements with the appellant. It said that the main purpose found in the statute or in the registered constitution of the appellant was to regulate relations between employees and employers, including any employers' organization and express powers are given in the appellant's constitution to appoint and remunerate the appellant's unionists.

48. The appellant stated that its power to appoint and remunerate its unionists in terms of clause 10(5)(b) of its constitution includes an implied power to make loans to its unionists. However, even it its constitution was silent about making loans to the unionists, it was quite clear law that all such acts are reasonable necessary for effectuating that purpose and exercising such powers and accordingly, all such acts are *intra vires*. They are even without express mention within the union's powers. The making of loans to its unionists is reasonably incidental or consequential upon the appointment, remuneration and retainment of its unionists. The powers or authority of the appellant is not limited by its constitution or rules to make personal loans to its unionists. Its constitution does not prohibit it from making loans to its unionists. The appellant's history reveals that it makes, to the standards of generally accepted loaning practice, principles and procedures, staff loans to its staff members. Union loans are not only granted to M.D. Maluleke, but to other unionists.

49. The appellant stated further that the loans of other unionists for the 2002/2003/2004 financial years were fully paid back on or before the end of each relevant financial year. It is for this reason alone that the auditor's reports and/or the union's audited financial statements for the 2002/2003/2004 financial years do not indicate that such unionists received unsecured loans because at the time of auditing such loans were already fully paid. The loans are paid back in the form of monthly deductions of the amount of loans from the borrower's monthly salary and/or, the monthly repayment thereof. It said that proofs of payment of the amounts of loans received by M.D. Maluleke and paid back are set out *inter alia* in his pay slips for 2002/2003/2004 which, in terms of Section 16 (5)(d) of the LRA, is private personal information relating to M.D. Maluleke. The amounts of

loans received by M.D. Maluleke have been paid back fully by means of deductions of such loans from his salaries. An undertaking that the outstanding loan moneys would be paid back is set out in his loan applications which contain borrowers undertaking to repay any loan so made to him or her. His approved loan applications and pay slips for 2002/2003/2004 are voluminous and confidential. These are available for inspection by the registrar at the appellant's registered address which is in the registar's system by prior written arrangement with the appellant.

50. The appellant was required to provide the registrar with five things. This was the minutes of a meeting where these loans were approved; the contact details of each member present at the meeting with his name, telephone number and work address; to indicate in terms of which provision of the constitution this was done; to indicate if any of the loans were paid back and if so to provide proof of such payment and if none was paid back to provide an undertaking that the money would be paid back. The appellant did not at the time give the registrar the minutes of the meeting where the loans were approved and the contact details of the persons present at the meeting. It said that the loans given to M.D. Maluleke were paid back but did not provide any proof save that the pay slips indicted that they were paid back but refused to furnish those on the basis that they were confidential in terms of section 16(5)(d) of the LRA. It said that the minutes were available for inspection but were too voluminous to provide to the registrar. It further said that the loans were authorised in terms of clause 10(5)(b) of its constitution.

51. Clause 10(5)(b) of the appellant's constitution provides that the executive council shall subject to the provisions of the constitution have the power to engage and dismiss, except

where otherwise provided in the constitution, any employees of the trade union, including a general secretary, to fix their remuneration and to define their duties. The aforesaid clause clearly does not authorise the granting of loans to unionists including M.D. Maluleke. As a result of clause 18(b) of the guidelines, the power to remunerate officials or employees of the union cannot include an implied power to make loans to such officials and employees. The making of unauthorised loans to officials, office bearers or employees of a union is not something expected from a genuine trade union.

52. The appellant's reliance on section 16(5)(d) of the LRA is clearly misguided. The section provides that an employer is not required to disclose information. According to the appellant the information sought was private personal information relating to M.D. Maluleke. This is totally unrelated and does not apply to the present situation. The appellant has disclosed examples of loan advances to some of the unionists. It has failed to provide the loan agreements advances to M.D. Maluleke on some spurious basis. It has also failed to disclose his salary and pay slips to support its case. The granting of loans was simply not authorised in terms of its constitution.

The genuineness of the union

53. The registrar requested that it be provided with the following in order for him to determine the genuineness of the appellant: the minutes of congresses and executive council meetings for the past two years and attendance registers thereof; an updated list of office bearers and paid officials of the union with names and contact details (telephone numbers and work addresses); the minutes of a meeting where these were elected; work addresses in respect of the whole executive council and the registered address of the

union. The registrar stated further that according to the financial statements the union's address is Unit 5, 1st Floor, 299 Pendoring Avenue, Blackheath Extension 6, 2195 and he had another address for it in his system. It requested the appellant to indicate what the official address of the appellant was.

54. The appellant stated that clause 9(1)(b) of its constitution provides that the national congress shall be convened once every calendar year: provided that the executive council may decide to convene the national congress for a particular year within a six-month period after that year. It said that the congresses for the past two years as at 1 September 2005 were duly held on 11 December 2003, 11 September 2004, 2 October 2004, 23 October 2004, 13 November 2004, 29 January 2005, 16 July 2005 and 20 August 2005. It said that to avoid prolixity, it has not annexed copies of the minutes and resolutions of the congresses of the appellant held on the aforesaid past two years as at 1 September 2009 and attendance registers thereof, which were clearly voluminous. However, if so required, these were available for inspection at its registered address which is shown in the registrar's system), by prior written arrangements with the appellant. It said that the additional minutes and attendance registers of congresses for the period since 1 September 2005 to date were also available for inspection, if so required. It said that clause 9(2)(a) of its constitution provides that the executive council shall ordinarily meet at least once every three (3) months on a date to be fixed by the president. The executive council meetings as at 1 September 2005 were duly held on 13 January 2003, 31 January 2003, 30 July 2003, 3 October 2003, 6 October 2003, 22 November 2003, 24 January 2004, 29 February 2004, 27 March 2004, 24 April 2004, 29 May 2004, 24 July 2004, 28

August 2004, 18 September 2004, 4 December 2004, 19 February 2005, 26 March 2005, 28 May 2005, 25 June 2005, 23 July 2005, 8 October 2005 and 27 August 2005. It said that to avoid prolixity, it has not annexed copies of the minutes and resolutions of the executive council meetings of the appellant and the attendance registers thereof duly held for the said past two years as at 1 September 2005, which are clearly voluminous. However, if so required, these were available for inspection at their registered address which was shown in the registrar's system, by prior written arrangements with the appellant. It said that an updated list of office-bearers with names and contact details (telephone numbers and work addresses), and the minutes of a meeting where these were elected, were duly given to the registrar on 14 October 2003 in terms of Section 100(d) of the LRA. It said that since 14 October 2003 to date their written correspondences to it contain the names of the office-bearers of the appellant evidently listed in its letterheads, of which fact the registrar was fully aware. The work addresses in respect of the whole executive council were also given to him on 14 October 2003 in terms of Section 100(d) of the LRA. Since 14 October 2003 to date, the given work addresses in respect of the whole executive council never changed and are still the same. It said that in terms of clauses 10(4)(b) and 11(2) of the appellant's constitution, the paid officials of the union are not elected. On the contrary they were appointed. In this context there were no minutes of a meeting where these were elected.

55. The appellant stated that the address (i.e. Unit 5, 1st floor, 29 Pendoring Avenue, Blackheath Extension 6, 2195) shown in its financial statements as its registered office is merely the address of its duly appointed auditors of record as required by sections 215(2), 276(3), 276(4) and 325(1) of the Companies Act No. 61 of 1973 as amended to

which all communications and notices regarding audits of this trade may be addressed by the members of this trade union and at which all queries from members of this trade union regarding this trade union's audits may be served. This was a *bona fide* act. However, to the extent that, according to the registrar, it was a deregistrable offence to show an address of a union's duly appointed auditors of record in its financial statements as its registered address, it said that it should be pardoned and the future address of the appellant's duly appointed auditors of record will no longer be shown as its "registered address".

56. The appellant said that it was clearly self-explanatory from the reading/perusal of the reported cases, the unreported cases, the media and the press, and the records in the appellant's possession and/or control such, for instance, as voluminous collective agreements on organizational rights and voluminous collective agreements on wage increases, provision of employee benefits and other terms and conditions of employment and/or any other matter of mutual interest concluded by the appellant and employers of the members of the appellant that since date of its registration which is 14 January 1997 to date. The primary purpose of the appellant is to regulate relations between employees and employers (or employers' organizations), and in particular, this includes the regulation of these relationships through collective bargaining. The appellant seeks organizational rights in terms of the LRA or demands collective bargaining where it recruits members from the employees of particular workplaces or bargaining units. It gained a critical mass of

> members in so many particular workplaces or bargaining units that allow it to gain and retain organizational rights. It recruits as members employees who are in employment, to have a primary purpose of regulating relations between employees and employers (or employers' organizations). It regulates relations between its members and their employers and employers' organizations by seeking and/or obtaining organizational rights in terms of chapter 3 of the LRA; seeking and/or obtaining recognition from employers as the collective bargaining representative of its members; engaging in collective bargaining with employers, and submitting and negotiating in respect of demands on behalf of its members for approved wages and working conditions.

57. It is not in dispute that the appellant has entered into various collective agreements with employers on behalf of its members. It is also not in dispute that the appellant represents some of its members in the different forums including this Court. Some part of the appellant indicates that it is a genuine trade union. The appellant has given a valid explanation about the discrepancy about its registered address. The registrar had requested the appellant to furnish him with copies of the minutes, updated lists of office bearers, work addresses of the executive council and the registered address of the union. The appellant stated that such meetings were held but did not furnish the registrar with the information because it wanted to avoid prolixity. The appellant was requested to submit information around its structure. It furnished the registrar with a list of national office bearers indicating that its president and deputy president are employed by the union. Four additional members are also employees of the union. This is contrary to

clause 10(1) of its constitution which provides that the president and vice president must be members of the union. Section 213 of the LRA defines an 'office-bearer' as a person who holds office in a trade union and who is not an official of the union, whereas an official is a person employed by a trade union. The fact that the president, vice president and some members of the executive are not members of the trade union is an indication that it is not an association of employees.

Conclusion

58. The applicant was in dire financial straits which according to it prompted it to pass a resolution authorising it to apply for funds. After its efforts were unsuccessful, it authorised its president to play lotto, firstly, to raise funds and secondly, to contribute to the good causes of lotto. It spent R63 529.00 on lotto over a two year period being 2003-2004. During 2002-2004 it granted its president unsecured loans of R471 839.00. It has submitted loan documents given to its other members. The amounts reflected in it are quite minuscule if compared with what was given to its president. The appellant has failed to disclose what its president is earning. It relied on section 16(2)(d) of the LRA which is clearly misguided. It has failed to disclose what the terms of the loans were. If one takes into account the amounts lent to him, the only conclusion that one can reach is that he is earning a high salary. I do not understand the secrecy around his salary. During 2002-2004 the appellant retained R276 454.00 as compensation. This Court can take judicial notice that in most of the cases that the appellant litigates in this Court, its president appears on its behalf or for its members. The appellant seldom uses attorneys in this Court save for in this appeal. The amount retained as compensation should have been much lower. If attorneys were used the amounts retained as compensation might

have been justified. The appellant's president is the same person who was given unsecured loans and was authorised to use funds to play lotto.

59. The only conclusion that can be reached is that the appellant is operated by its president. He was playing lotto with the union's funds. He was given unsecured loans when the union was in dire financial straits. The other members were given loans which were far less than what the president was given. There is a major discrepancy between the compensation received and payments made to the members. The appellant is operating for gain of individuals. It has ceased to operate as a genuine trade union as envisaged in the Act. The appellant is one for gain and is used a vehicle to enrich its president and is a cover for a profit making business.

60. I have considered the reasons given by the registrar for deregistering the appellant. The registrar has considered the representations made by the appellant. I am satisfied that the registrar when he invoked the provisions of section 106 of the LRA provided the appellant with more than sufficient opportunity to make representations. This is evident from the annexures contained in these proceedings. The conduct of the registrar constitutes a fair and lawful administrative action which was based on a transparent and fair process. It is not in the interest of justice that the appellant should be allowed to operate in instances where it does not comply with the LRA and where it is evident that it benefits individuals such as its president. The members of the public must be protected from such an entity. The registrar's decision to invoke section 106 of the LRA was indeed not capricious and/or motivated by any ulterior purpose.

61. The appeal stands to be dismissed.

62. There is no reason why costs should not follow the result.

63. In the circumstances I make the following order:

63.1 The appeal is dismissed with costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : MPHAHLANI INSTRUCTED BY BALOYI ATTORNEYS

FOR RESPONDENTS : D MOKOENA INSTRUCTED BY STATE ATTORNEY

DATE OF HEARING: 21 OCTOBER 2010

DATE OF JUDGMENT : 25 NOVEMBER 2010