**IN THE LABOUR COURT OF SOUTH AFRICA**

**(HELD AT JOHANNESBURG)**

**Case number: J 2431 / 09**

In the matter between:

**LOWVELD ALLIED AND GENERAL EMPLOYERS' ORGANIZATION ("LAGEO")** **Applicant**

and

**THE MINISTER OF LABOUR** **1st Respondent**

**THE DEPARTMENT OF LABOUR** **2nd Respondent**

**REGISTRAR OF LABOUR RELATIONS** **3rd Respondent**

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**JUDGMENT**

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## INTRODUCTION

[1] This was an urgent application in terms of which the applicant (Lowveld Allied and General Employers' Organization) sought the following urgent relief:

1. That, pending the final determination of this application and/or the appeal in terms of section 111 of the Labour Relations Act 66 of 1995 ("the LRA"):

1.1 The applicant be permitted to enjoy the full benefit of rights and privileges enjoyed by a registered employers' organization in terms of the LRA;

1.2 That the cancellation of the registration of the applicant be suspended with effect from 28 October 2009 (the date of the decision taken by the 3rd respondent);

2 That the respondents be interdicted from:

2.1 Publishing on the website operated by the 2nd & 3rd respondents the fact that the applicant had been deregistered; and

2.2 Preventing the applicant from enjoying the full benefits of a registered employers' organization in terms of the LRA.

3. Costs of suit in the event of opposition only.

[2] On 22 September 2010 this Court dismissed the application with costs. Here are the full reasons for my order.

[3] The application was opposed by the 1st respondent (the Minister of Labour); the 2nd respondent (the Department of Labour) and the 3rd respondent (the Registrar of Labour Relations). I will refer to the three respondents collectively as "the respondents". The opposing affidavit was deposed to by Mr. Crouse who is the Registrar of Labour Relations employed by the 2nd Respondent. I will refer to Mr. Crouse as "the Registrar" where applicable.

[4] The respondents raised three issues: Firstly, the matter is not urgent; secondly the relief sought by the applicant is not competent and appropriate and thirdly the applicant has not made out a case for the relief it seeks.

**The relevant facts**[1]

[1] As far as the chronology of material facts is concerned I have quoted liberally from the applicant's heads of argument in light of the fact that most of the facts were not in dispute. Where necessary, I will point out where the parties differ on the facts.

[5] The applicant was a registered employers' organization in terms of the LRA since 1 February 1999 and has currently 165 registered members. On or about 24 December 2008 a manager in the office of the Registrar made a submission (hereinafter referred to as "the first submission") to the Registrar in terms whereof it was recommended that the Registrar publish an intention to cancel the applicant's registration in the *Government Gazette* in terms of section 106(2B) of the LRA. In this first submission (dated 24 December 2008) the author (Mr Blom) sets out in some detail why he is of the view that the registration of the applicant should be cancelled. In brief it is submitted that the applicant has ceased to operate as a genuine employers' organization. Blom then proceeds to set out in a ten page document the facts upon which he relies in support of this contention. In brief it is stated that the applicant is in reality practicing a labour consultancy and that the labour consultancy camouflages itself as an employers' organization merely in order to continue with their businesses. On 24 April 2009 the Registrar approved the recommendation that the applicant be deregistered.

[6] On 4 May 2009 the applicant wrote a letter to the Registrar requesting copies of the documents which have been collected by the Registrar's office during the latter's investigation and which related to the intended cancellation of the applicant.

[7] On 8 May 2009 the Registrar published a notice of his intention to cancel the applicant's registration in the Government Gazette. In this Gazette the applicant is

notified of the intention of the Registrar to cancel the registration of the applicant. On 9 June 2009 the Registrar sent a response to the applicant.

[8] On 6 August 2009 the applicant presented submissions to the Registrar as to why the registration of the applicant should not be cancelled. On 9 October 2009 the Registrar sent a letter to the applicant advising it that he was still of the opinion that the employers organization is not a genuine employers' organization and that its registration will be cancelled with effect from 28 October 2009.

[9] On 10 November 2009 the applicant was advised that the cancellation of its registration was published on 28 October 2009. The applicant dispatched a letter to the Registrar requesting him to furnish in terms of section 111(1) of the LRA his reasons for the decision to cancel the registration of the applicant. On 11 November 2009 the applicant lodged an appeal against the cancellation of its registration in terms of section 111(3) of the LRA.

[10] On 14 December 2009, the Registrar sent a letter to the applicant furnishing his reasons for the decision to cancel the applicant's registration.

[11] On 13 November 2009 pursuant to the publication of the cancellation of its registration and the lodging of an appeal against the cancellation of the registration, a certain Mr. Raymond Dibden (a Senior Commissioner of the CCMA ("Dibden")) sent an e-mail to Ms. Bone (the applicant's legal officer - "Bone") confirming to her that the appeal *"suspends the administrative action of deregistration"* and that *"this should be sufficient to allow the representation to continue until such time as the matter has been adjudicated by the labour court".*

[12] On 1 December 2009 Dibden confirmed by e-mail to Bone that the applicant's rights to represent its members at the CCMA had been restored.

[13] On 28 July 2010 Ms. Eleanor Hambidge ("Hambidge") of the CCMA advised Bone by e-mail of the decision by Molahlehi, J in *CCMA v Registrar of Labour Relations & Others* (J984/10: 27 July 2010 referred to hereinafter as "UPUSA"). In that decision Molahlehi, j held that the decision of the Registrar to deregister is *not* suspended pending the outcome of the appeal in terms of section 111(3) of the LRA.[2] A few days later the Court in *UNICA Plastic Moulders CC v National Union of South African Workers* (J1072/2010: 3 August 2010 – hereinafter referred to as "*UNICA"*) handed down a decision in which it agreed with the decision of Molahlehi, J.

[14] On 30 July 2010 Dibden, in light of these recent decisions, advised Bone that the applicant will have to apply to the Labour Court for an order suspending the cancellation of the registration. A resolution was passed on 2 August 2010 that

[2] *"[35] The objects of s106 read with s111 (3) of the LRA must also be understood in the context that the legislature having created an environment and a frame work for the guaranteed and enjoyment of the Freedom of Association in form of trade unions, also sought to ensure that certain minimum duties of transparency and accountability are imposed on the trade unions. The need for accountability arises from the fact that trade unions, as public entities, depends largely on financial contributions from the workers who are members of the public. It cannot be denied that the decision of the Registrar to de-register a trade union has serious consequence on that union as an entity and its members. As an entity the decision of the Registrar, is likely to have a profound impact on its structures and its operations including the right to represent its members in various dispute resolution processes. It further cannot be denied that there exists a possibility that the Registrar in arriving at the decision to de-register a trade union may be based on an incorrect interpretation of facts before him or her or other invalid reasons which may ultimately result in the decision being overturned on appeal.*

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

the Applicant associate with CTL Management Forum ("CTL") and that all paid-up members of the applicant became paid-up members of CTL. CTL is an employers' organization whose registration had also been cancelled, but who had obtained an order from the Labour Court on 30 October 2007 suspending such cancellation pending an appeal against such cancellation. According to the Registrar although CTL has been de-registered in 2006 it has done nothing to pursue or finalise its appeal.

[15] On 2 August 2010 UPUSA lodged an appeal against the UPUSA judgment. On 3 August 2010 the applicant received a letter from Bowman Gilfillan, acting on behalf of the CCMA (in the UPUSA – matter (*supra*), confirming that the CCMA accepted the legal position as set out in the UPUSA judgment and does not agree that the application for leave to appeal has the effect of suspending the judgment appealed against. On the same day, the applicant sent a further letter to Bowman Gilfillan in an attempt to persuade the CCMA that at common law, the noting of an appeal suspends the operation of the order in question. No reply was received to this letter.

[16] The applicant was allowed to operate in terms of the association with CTL until 17 August 2010 when Bone was told to leave a process before the CCMA in Sabie. On 20 August 2010 Bone sent a letter to the CCMA, confirming the association with CTL. On 23 August 2010 Mr. Van Zuydam of the CCMA ("Van Zuydam") stated in an e-mail that *"the CCMA records show that LAGEO was deregistered on 28 October 2009 which prohibits that employers' organizations from representing its members at the CCMA…".*

[17] Van Zuydam also stated in a further e-mail that in the light of the recent judgments of the Labour Court *"…an official practice note will be issued that no representation will be allowed in the CCMA by deregistered unions or employers organizations notwithstanding an appeal having been lodged"*.

[18] Upon receipt of the e-mails from Van Zuydam, Bone contacted the State Attorney on 25 August 2010 and requested whether an agreement could be reached that the implementation of the deregistration of the applicant could be stayed, pending the outcome of the appeal. On 1 September the State Attorney advised Bone that such agreement could not be reached. The urgent application was filed on 2 September 2010 to be heard on 16 September 2010.

**Urgency**

[19] The respondent disputed the urgency of the application and argued that the applicant had been aware of the deregistration since 10 November 2009. The applicant submitted that, after it had lodged an appeal against the cancellation of its registration, it continued to represent its members before the CCMA and was allowed to do so. There was, therefore no need to launch this application. It was only on 28 July 2010 that it was made aware of the fact that Molahlehi, J handed down the UPUSA judgment in terms of which it was held *"… that the general common law rule practice that an appeal stays the enforcement [of] a judgment pending the outcome of an appeal does not apply to decisions made by the Registrar in terms of s 106 of the LRA*". As already indicated, the applicant then formed an association with CTL in terms whereof the applicant's paid-up members became paid-up members of CTL and continued with this arrangement

until 23 August 2010 when Van Zuydam of the CCMA informed the applicant that in light of the recent judgments of the Labour Court, deregistered organizations would not be allowed to represent their members notwithstanding an appeal having been lodged. When the applicant was unable to reach an agreement with the State Attorney the applicant filed the urgent application.

[20] I am in agreement with the submission on behalf of the applicant that the matter is urgent in light of the fact that the need for the urgent relief only arose after the UPUSA judgment was handed down on 27 July 2020 and more specifically on 17 August 2010 when the applicant was not allowed to represent one of its members at the CCMA. I am also satisfied that the applicant took reasonable steps and acted with appropriate urgency to bring this matter before the Court. In light of these facts I am persuaded that the matter is urgent.

**The relief sought**

[21] The respondent argued that the relief sought by the applicant is not competent and that, although the applicant seeks an interim interdict pending the finalization of the appeal lodged in terms of section 111(3) of the LRA, the interdict will have final relief. It was further submitted on behalf of the respondent that the effect of an order suspending the operation of the deregistration of the applicant will have final effect in that the applicant will be able to proceed with all its operations as if it is a properly registered organisation despite the fact that it has been deregistered in terms of the provisions of section 106 of the LRA. It was further argued that should the deregistration be suspended pending the appeal, there would be no incentive for the applicant to pursue and finalise the appeal. Lastly it was argued

that it is clear from the wording of section 106(3) of the LRA that it was the intention of the legislature to bring an end to the rights and privileges enjoyed by an employers' organisation pending the outcome of the appeal.

[22] I am not persuaded by this argument. The relief sought in the Notice of Motion is both competent and appropriate. See in this regard the *UPUSA*-judgment where the Court held as follows:

> *"[37] If assuming that the decision of the Registrar is patently wrong and is based on incorrect facts, then the union is not without a remedy. The remedy available to the union is to approach the court for an order suspending the decision pending appeal. Of course one of the things that the union would have to show in approaching the court on this basis would be to show that it will suffer prejudice if the decision is not suspended pending the appeal and that it has prospects of success on appeal. "*

[23] It also appears from the papers that the applicant is intending to pursue the appeal and that it has in fact lodged an appeal. Lastly, I am also not in agreement with the argument that the relief sought will have the effect of a final order. The interim relief will always be limited by the outcome of the appeal. If the appeal is withdrawn or lapses for whatever reason, the cancellation of the registration will become final. In the event I am of the view that the relief is competent. Whether or not the applicant is entitled to the relief depends, however, on other considerations.

**The requirements for interim relief**

[24] A party seeking an interim interdict must establish the following:[3]

(i) it has a *prima facie* right;

(ii) that the balance of convenience favours the applicant;

(iii) that it has a well grounded apprehension that it will suffer irreparable harm if the *interim* relief is not granted;

(iv) that it has no alternative remedy that will afford adequate protection.

These requirements should not be considered separately or in isolation but in conjunction with one another in order to determine whether or not this Court should exercise its discretion in favour of the applicant.[4]

[25] An organisation whose registration has been cancelled by the Registrar, has a right in terms of section 111(3) of the LRA to lodge an appeal against the Registrar's decision to the Labour Court. The lodging of the appeal does not, however, suspend the decision of the Registrar to de-register. Both the decisions in *UPUSA* and *UNICA* altered the common law position by holding that the common law position does not apply to appeals in terms of section 111(3) of the LRA against the cancellation of the registration of an organisation in terms of section 106(2A) of the LRA. The result of these decisions is that an appeal does not automatically suspend the operation of the decision to deregister. The aforementioned courts came to this conclusion in light of the fact that it is clear from the wording of section 106(3) that it was the intention of the legislature to

[3] *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691 B – E.
[4] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383D – F.

bring to an end the rights and privileges enjoyed by an employers' organisation that has been de-registered even pending the outcome of the appeal.[5]

[26] Nothing however, prevents an employers' organisation (and a trade union) from approaching the Court for an order suspending the decision of the Registrar (to de-register) pending the outcome of an appeal against the decision to de-register. The Court pertinently pointed out that the remedy available to an organization which believes that the Registrar's decision is patently wrong, is to approach the court for an order suspending the decision pending appeal. The applicant needs to show that The Court stated that such an applicant needs to show:

(i) That it will suffer prejudice if the decision is not suspended pending the appeal, and

(ii) That it has prospects of success on appeal.

[27] A de-registered employers' organisation or trade union therefore has the right to approach the Labour Court for an order suspending the decision to appeal. Whether or not the Court will grant the interim order depends on the facts and on whether or not the applicant has satisfied the requisites for an interim interdict. I will return to the facts which gave rise to the de-registration hereinbelow . See also the discussion in paragrapf [35] *et seq*.

[28] The applicant also argued that it will suffer prejudice as its members will be left without guidance and assistance in various matters such as matters at the CCMA or at the Labour Court. Only a registered employers' organisation or trade union

[5] See in this regard the UNICA judgment where the Court held as follows: *"It would therefore appears from the aforegoing that the principle is that, unless the relevant statute provides otherwise, the lodging of an appeal suspends the effect of the (administrative) decision pending the outcome of the appeal.."*

may represent (through its officials) its members in proceedings at the CCMA (see Rule 25(1)(b)(3) of the Rules of the CCMA), bargaining councils and the Labour and Labour Appeal Court (see section 161 of the LRA).

[29] It is so that the applicant's members may be without representation by the applicant at the CCMA and bargaining councils. However, as was pointed out by the Court in *UPUSA,* this is an unfortunate consequence of having been deregistered. This is, however, a consequence that the legislature has foreseen when it formulated the consequences of deregistration as follows. Section 106(3) of the LRA reads as follows:

> *"When a trade union's or employers' organisation's registration is cancelled, all the rights it enjoyed as a result of being registered* ***will end****."*[6]

[30] Moreover, the members of the applicant are not left without recourse and they are free to approach another employers' organisation or even a legal representative for assistance. As already pointed out, the fact that the applicant will no longer be able to exercise its rights in terms of the LRA is the very consequence of being de-registered and does not, in my view, constitute irreparable harm (see also the next paragraph).

[31] The applicant also submitted that the balance of convenience favours the applicant. In this regard it was argued that the applicant has demonstrated strong prospects of success on appeal, which have been left unchallenged by the respondents. It was further argued that the prejudice that the applicant will suffer if the *interim* relief is not granted by far outweighs the prejudice that the

[6] My emphasis.

respondents will suffer if the *interim* relief is granted. It was specifically argued that the protection of the public interest is almost of no significance whatsoever where the Registrar's decision to cancel the applicant's registration is based on the fact that the Registrar is of the view that the applicant was not operating as a genuine employers' organization. This is not a case where the applicant is suspected of financial impropriety. In this regard it was argued that the present matter is to be distinguished from the facts in the *UPUSA*-judgment and *UNICA*-judgment where the Court stressed the need to protect the union's members against financial impropriety. In light of the fact that no such a need exist in respect of the applicant, it was argued that the Court should find that the balance of convenience favours the applicant.

[32] The respondent, however, argued that the Registrar has the responsibility to protect the general interest of the members of a trade union or employers' organisation and argued that the mere fact that this particular employers' organisation is not accused of financial impropriety does not diminish the public interest nor the duty of the Registrar to protect the general interest of the public and the members of the employers' organisation.

[33] I am in agreement with the submissions advanced by the respondent. Firstly, the Registrar must ensure that an employers' organisation do not abuse the rights and privileges afforded to it in terms of the LRA. Secondly, an employers' organisation occupies a position of trust and it is the responsibility of the Registrar to ensure that there is compliance with this position in light of the requirements set out in the LRA. In this regard the Court in *UNICA* held as follows:

*"[21] …… As already indicated, I am of the view that the statute is clear that the intention of the legislature was to bring to an end the rights and privileges enjoyed by a trade union in terms of certain provisions of the LRA pending the outcome of the appeal. There is also a further and important public policy consideration as to why the rights of a trade union should come to an end when it is de-registered by the Registrar (pending the appeal). A trade union is in a position of trust vis à vis its members and as such is entrusted with ensuring that the employee is treated fairly by his or her employer in the workplace. A registered trade union is further allowed to represent its member at the CCMA, the Bargaining Council and the Labour Court and is as such in a similar position as an attorney or counsel. From a public policy point of view a trade union should not be able to enjoy the rights afforded to a registered trade union if it has flaunted the very act from which these rights are being derived. "*

[34] In the present case the applicant was deregistered because the Registrar was of the view that it was not operating as a genuine employers' organization. This in my view, if this is indeed the case, is serious as this defies the whole purpose of an employers' organisation namely to protect and advance the interests of their members. Section 106 of the LRA has been enacted to protect members from an abuse of their trust. An employers' organisation who has, according to the Registrar, ceased to operate as a genuine employers' organisation, is abusing the trust of its members and should not be allowed to operate.

[35] According to the applicant it has good prospects of success in the appeal particularly in light of the fact that the decision to deregister was taken after a very limited opportunity

was provided to the applicant to state its case. Put differently, the applicant argued that it was denied the necessary *audi alternam* partem before a decision was taken.

[36] Crouse (the Registrar) denies that there was no adherence to the *audi alteram partem* rule. He also denies that he was biased when taking his decision. Crouse points out that he had raised concerns with the applicant in respect of its (the applicant's) compliance with several legal requirements as far back as 23 July 2007. In this letter Crouse raised various concerns about membership fees; minutes of annual general meetings, the list of office bearers and officials and the family involvement of certain individuals. On 24 April 2009 it was decided to give the applicant notice of the intention to deregister. This was done after the first submission dated 24 December 2008 was received. In terms of this submission the applicant has ceased to function in terms of its constitution; the applicant is functioning for the personal gain of individuals; the applicant has ceased to function as a genuine organisation as envisaged by section 106(2A)(a) of the LRA and labour consultants are involved in the running of the applicant.

[37] A notice of intention to cancel was published in the Government Gazette of 8 May 2009 (Notice 420 of 2009). In terms of this Notice the applicant was afforded an opportunity to make written representations as to why the registration should not be cancelled. The applicant submitted detailed written representations dealing with each and every point raised by the Registrar in the Notice. This document is dated 6 August 2009 and was received by Crouse on 12 August 2009. According to Crouse he duly considered the representations made by the applicant and remained of the opinion that the applicant was not a genuine employers' organisation. The applicant was then informed that it would be deregistered as from 28 October 2009. According to Crouse the applicant had

a sufficient opportunity to respond to the Notice of Intention to deregister and accordingly submitted that the *audi alteram partem* rule was adhered to.

[38] I have perused the documents (including the submission that was filed with the Registrar and the response received from the applicant pursuant to the Notice of the intention to de-register) and am of the view that the applicant has not established that it has a *prima facie* right to the relief sought in its Notice of Motion. As pointed out by the Court in *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688, the question is not whether or not the applicant, on the facts set out by it together with any facts set out by the respondent which the applicant cannot dispute and having regard to the inherent probabilities, "*could on those facts obtain final relief at the trial*". The question is whether or not the applicant "*should*" obtain final relief at the trial. Although the applicant disputes that the *audit alteram partem* has been denied, it appears from its own submissions to the Registrar in response to the Notice that the *audit alteram partem* rule was in fact adhered to. In order to succeed the applicant must show that it has a *prima facie* right which may only be open to "*some doubt*". In the present case serious doubt is cast upon the averment of the applicant that it was not granted the *audi alteram partem*. I am therefore of the view that, in light of the aforegoing, it cannot be concluded that the applicant should obtain final relief when the appeal is heard.

[39] The applicant lastly submitted that it has no alternative remedy other than to approach this court for the relief it seeks. This is disputed by the respondent who argued that the applicant has an alternative remedy and that is to pursue the appeal.

[40] The requirement of no other satisfactory remedy is normally in the context of an application for interim relief considered together with the requirement of "irreparable harm": If the applicant will suffer irreparable harm the requirement of no alternative remedy will be satisfied. I have already indicated that I am not persuaded that the applicant (and more particularly its members) will suffer irreparable harm if the relief is not granted.

**Conclusion**

[41] On the facts of this particular case and having considered the requisites for an interim interdict, I am not persuaded that the applicant is entitled to the relief sought. It is, in my view, not in the public's interest to allow the present applicant to operate in circumstances where the Registrar is of the view that the applicant was not operating as a genuine employers' organization and in circumstances where it appears that the Registrar has arrived at this conclusion after having afforded the applicant the *audi alteram partem*. In the event the application is dismissed. I can find no reason why costs should not follow the result.

**AC BASSON, J**

**Date of application**: 16 September 2010.

**Date of order**: 22 September 2010

**Date of judgment**: 22 October 2010

**For the applicant:** Adv Riaan Venter.

**For the respondents:** Adv C Prinsloo. Instructed by the State Attorney, Pretoria.