**IN THE LABOUR APPEALCOURT OF SOUTH AFRICA**

**(HELD AT JOHANNESBURG)**

**Case No. CA1/2006**

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| **JOHAN CROUSE N.O.** | **First Appellant** |
| **THE DEPARTMENT OF LABOUR** | **Second Appellant** |
| **and** | |
| **WORKERS UNION OF SOUTH AFRICA** | **Respondent** |

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**JUDGMENT:**

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**DAVIS JA:**

**Introduction**

[1] In 2002 certain workers employed at Atlantis Farge Plant in Atlantis, Western Cape, decided to form a new trade union because they considered the existing union, the National Union of Metal workers of South Africa (NUMSA), had not adequately served their interests, *inter alia,* because they had a lack of confidence in the local organizer and further because certain employees had complained about the dismissal of shop stewards, including Mr. D Braaf and Mr. D Willemse.

[2] In October 2003 some fourteen employees at the plant held a meeting which was chaired by an employee, Mr. R Muller. At this meeting, the establishment of a new trade union was discussed. Muller informed the meeting that he and a Mr. K

Booysen had visited Braaf and Willemse and inquired as to whether they were interested in forming a new union. The two men agreed to so participate. An interim committee was formed to deal with the process of union registration. Braaf and Willemse were appointed to that committee. They were the only executive committee members who were not employees of Atlantis Farge. It was then agreed that interested employees would meet on 18th October 2003 to elect drafters of the constitution of the proposed union.

[3] On 18 October 2003 the executive committee mandated Braaf and Willemse to do the necessary research in order to draft the constitution of the proposed union. They were also mandated to approach labour lawyers who would advise on the requirements for the establishment of the union. Braaf was elected as chairperson of the committee and Willemse as its secretary.

[4] On 25 October 2003 another meeting of the executive committee was held. At that meeting Willemse reported that he and Braaf had approached lawyers, who, unfortunately, had not had the necessary background in the registration of trade unions. He informed the meeting that he and Braaf would do the necessary research for a fee of R 5 000.00 (five thousand rand). This matter was deferred to the next meeting. At the next meeting on October 1, 2003, the chairperson asked those present to decide on the name of the proposed union and whether it should broaden its scope. A proposal was adopted that the union be called 'The Workers Union of South Africa' and that it should be multi-sectoral.

[5] On 18 March 2004 first appellant received an application by respondent for registration. On 1 April 2004 officials of second appellant visited respondent's offices to which respondent had moved the day before. Braaf informed these officials that the office would be occupied for some two months. A checklist was

then completed by these officials. From the completed checklist it appeared that respondent had been formed after Braaf and Willemse had been unfairly dismissed and that four members attended the inaugural meeting. The checklist also reflected that respondent had 3000 "potential members'. The checklist showed Braaf to be respondent's president and Willemse its secretary. The constitution had not yet been adopted and the union was not yet in operation. In short, it appeared that an application was made for registration before the union operationally existed.

[6] An amended registration form was submitted on 8 April 2004, after officials of second appellant had advised that the composition of the executive had to be altered.

[7] On 13 April 2004 a special general meeting was held. At that meeting a central committee was elected, a management committee was also elected and it was agreed that a banking account would be opened.

[8] On the same day, 13 April 2004, respondent's attorneys wrote to first appellant informing him that respondent had been advised not to collect monies from members and operate a bank account in that , if it did so , this would constitute a breach of the Labour Relations Act of 66 of 1995 ('the Act').

[9] On 3 June 2004 respondent's attorneys wrote to first appellant advising him that respondent was attempting to obtain stop orders and membership forms and requested him to finalize the registration of the union as soon as possible.

[10] On 13 July 2004 first appellant informed respondent that the application for registration had been refused on the grounds that the respondent was not a genuine organization as envisaged by the Act. The first appellant stated that respondent had not functioned in terms of its constitution and had been

established for personal financial gain.

[11] On 22 July 2004 respondent's attorney requested written reasons for the decision. These were set out in a letter generated by first appellant on 16 August 2004; to which I shall make detailed reference presently.

[12] On 15 October 2004 respondent lodged an appeal to the Labour Court in terms of s111 (3) of the Act against the decision of first appellant not to register the respondent. On 29 July 2005 Murphy AJ upheld the appeal and ordered the registration of respondent. It is against this decision that, with the leave of the court *a quo,* appellants comes on appeal before this Court.

**The applicable legislation**

[13] In order to analyse the merits of this appeal, it is necessary to set out the relevant provisions of the Act. Section 95 of the Act provides as follows:

**Requirements for registration of trade unions or employers' organisations**

(1) Any trade union may apply to the registrar for registration if-

(a) it has adopted a name that meets the requirements of subsection (4);

(b) it has adopted a constitution that meets the requirements of subsections (5) and (6);

(c) it has an address in the Republic; and

(d) it is independent.

(2) A trade union is independent if-

(a) it is not under the direct or indirect control of any employer or employers' organisation; and

(b) it is free of any interference or influence of any kind from any employer or employers' organisation.

(3) Any employers' organisation may apply to the registrar for registration if-

(a) it has adopted a name that meets the requirements of subsection(4);

(b) it has adopted a constitution that meets the requirements of

subsections (5) and (6), and

(c) it has an address in the Republic.

(4) Any trade union or employers' organisation that intends to register may not have a name or shortened form of the name that so closely resembles the name or shortened form of the name of another trade union or employers' organisation that it is likely to mislead or cause confusion.

(5) The constitution of any trade union or employers' organisation that intends to register must-

(a) state that the trade union or employers' organisation is an association not for gain;

(b) prescribe qualifications for, and admission to, membership;

(c) establish the circumstances in which a member will no longer be entitled to the benefits of membership;

(d) provide for the termination of membership;

(e) provide for appeals against loss of the benefits of membership or against termination of membership, prescribe a procedure for those appeals and determine the body to which those appeals may be made;

(f) provide for membership fees and the method for determining membership fees and other payments by members;

(g) prescribe rules for the convening and conducting of meetings of members and meetings of representatives of members, including the quorum required for, and the minutes to be kept of, those meetings;

(h) establish the manner in which decisions are to be made;

(i) establish the office of secretary and define its functions;

(j) provide for other office-bearers, officials and, in the case of a trade union, trade union representatives, and define their respective functions;

(k) prescribe a procedure for nominating or electing office-bearers and, in the case of a trade union, trade union representatives;

(l) prescribe a procedure for appointing, or nominating and electing, officials;

(m) establish the circumstances and manner in which office-bearers, officials and, in the case of a trade union, trade union representatives, may be removed from office;

(n) provide for appeals against removal from office of office-bearers, officials and, in the case of a trade union, trade union representatives, prescribe a procedure for those appeals and determine the body to which those appeals may be made;

(o) establish the circumstances and manner in which a ballot must be conducted;

(p) provide that the trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out;

(q) provide that members of the trade union or employers' organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if-

(i) no ballot was held about the strike or lock-out; or

(ii) a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out;

(r) provide for banking and investing its money;

(s) establish the purposes for which its money may be used;

(t) provide for acquiring and controlling property;

(u) determine a date for the end of its financial year;

(v) prescribe a procedure for changing its constitution; and

(w) prescribe a procedure by which it may resolve to wind up.

(6) The constitution of any trade union or employers' organisation which intends to register may not include any provision that discriminates directly or indirectly against any person on the grounds of race or sex.

(7) The registrar must not register a trade union or an employers' organisation unless the registrar is satisfied that the applicant is a genuine trade union or a genuine employers' organisation.

(8) 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 employers' organisation.

**The Relevant Factual Matrix**

[14] Within the context of this legal framework, it is now possible to turn to the key facts which gave rise to the present dispute. To recapitulate: (a) respondent lodged an application for registration on 18th March 2004; (b) on 1st April 2004 an inspection by officials of second appellant took place; (c)on 12 July 2006, first appellant refused to register respondent.

[15] A flurry of correspondence was then generated, not all of which is strictly relevant to this dispute. However, of particular relevance is the fact that on 13th July 2004, respondent's attorneys received a letter from first appellant stating that its application for registration had been refused with effect from 12 July 2004. That letter reads: "I acknowledge receipt of your letter …. dated 13 April 2004 and have to advised that the union's application for registration has been perused and found not acceptable for approval and I base my decision on the following grounds:

- The union is not a genuine organization as envisaged by the Act
- The union does not function in terms of its constitution
- The trade union was established for financial gain and to circumvent the provisions of the Act

Consequently you are advised that the application for registration is refused with effect from 12 July 2004."

[16] On 22nd July 2004 respondent's attorneys requested reasons for this decision, which were provided on 16th August 2004. The relevant portion of this letter

reads: "I refer to the facsimile letters dated 22 July 2004 and 4 August 2004 respectively and have to inform you that the decision of the Registrar is final and cannot be reconsidered. The only route to follow is provided for in section 111 of the Act ….

In arriving at the above decision, I relied on the guidelines issued by the Minister of Labour in terms of section 95 (8) of the Act and the following facts regarding the application:

- The trade union is not a genuine organization as envisaged by the Act

  Trade union as per definition of the Act means "An association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organization".

From the information at hand, the formation of the union and the subsequent operation thereof, did not involve employees associating together, but was initiated by the President Mr. Dalton Braaf, and the General Secretary, Mr. David Willemse, after they were dismissed from their respective employment. This means that unemployed persons established the union. Mr. Braaf claims to be self-employed and the conclusion was that the formation of the union did not involve "employees" as defined in section 213 of the Act. The democratic principles on which a union is based did not apply and it cannot be argued that worker established this union.

- The union was established for gain of individuals

  The argument above also applies to this point as it can only be argued that the motive behind the establishment of the union by the two individuals was for gain. A new application form with an amended executive committee that was later submitted to this Office, reflects Mr. Dalton Braaf who, in conjunction with Mr. David Willemse established the union, as the general secretary

whilst Mr. Willemse position is that of treasurer. This happened after it was pointed out to the officials of the union that the office bearers namely Mr. Braaf who is not an employee, could not in terms of the definition of "office bearer" qualify to be the President, he was then positioned as the General Secretary. This is unconstitutional and it was clearly done only to satisfy the registration requirements. Although this was clearly an attempt to remedy the composition of the executive committee by moving the names around, the executive committee is still not acceptable in light of the involvement of the people who established the organization.

- The organization is not functioning in terms of its constitution

  The organization is not functioning as yet and has only potential members who are willing to join the union after it is registered. Only the "steering committee" is active. The constitution that was submitted for approval does not make provision for a steering committee. The organization has to function according to its constitution even if its not registered and upon application for registration, must prove that it is operational in terms of the constitution.'

**Judgment of the court *a quo***

[17] It was against this decision of first appellant that the appeal to the court *a quo* was lodged. In his judgment, Murphy AJ examined section 95 through the prism of the guidelines issued in terms of section 95 (8) of the Act [Government Gazette 25515 of 10 October 2003]. The learned judge concluded that section 95 (7) of the Act read together with the guidelines gave first appellant a narrow discretion to refuse to register an unregistered trade union seeking registration. Accordingly, 'it makes sense to limit the determination to paying attention to the manner in which the organization was established and formed and without

having regard to the actual activities and functioning'. para 21 of the judgment.

[18] Murphy AJ proceeded to find that in terms of section 111 of the Act the appeal before him constituted an appeal in the wide sense. It could involve a complete rehearing and adjudication on the merits with or without additional evidence or information.

[19] Based on these premises and his examination of the reasons provided by first appellant in his letter of 16 August 2004, Murphy AJ concluded: 'I am persuaded that the registrar is mistaken in his interpretation and application to the facts before him of the guidelines issued in terms of section 95 of the LRA. Most particularly in that he clearly failed to take important relevant considerations into account and was influenced by irrelevant considerations. His finding that the appellant is not an association of employees by reason that certain of its promoters were unemployed is simply wrong. Likewise, his conclusion that the union was not operational in terms of its constitution and was established for the gain of two individuals is also incorrect and amounts to irrelevant consideration that improperly influenced his exercise of discretion'. para 31 of the judgment.

**The appeal to this court**

[20] On appeal, Ms. Rabkin-Naicker, who appeared on behalf of respondent, submitted that section 111 of the Act provided for an appeal in the wide sense to the Labour Court. Thus, it involved a complete rehearing and adjudication of the merits. She submitted that, the court *a quo* had correctly followed this approach and had made its own findings on the evidence placed before it. She submitted further that for these reasons there was no basis to upset the court *a quo's* order.

[21] In support of this submission, counsel for the respondent relied upon a judgment of this Court in Staff Association for Motor and Related Industries Motor

Industries Staff Association and another (1999) 20 ILJ 2552 (LAC). In that case, this Court examined s111 (3) of the Act. S113 (3) provides "any person who is aggrieved by a decision of the registrar may appeal to the Labour Court against that decision in 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."

[22] In both judgments which were delivered, by Ngcobo AJP and Conradie JA, emphasis was placed on the fact that the aggrieved person in that case was a third party, being a trade union which had objected to the registrar's decision to register another union. Accordingly, in both judgments it was held that a review of such a decision was not possible, because the third party had not been involved in the decision making process nor in the provision of information to the registrar prior to the decision to register the other trade union. The Court held that the matter had to be heard afresh, the court held that the word 'appeal', as it appears in s111 (3), had to be given a wide meaning.

[23] That case did not, in any way, examine the problem posed by the facts of the present case, namely whether an applicant trade union which was refused registration in terms of a discretionary act of the registrar pursuant to s95 (7) of the Act, is entitled to an appeal (in the wide sense) against the adverse decision of the registrar as opposed to a review of such a decision.

[24] Given the approach which I adopt, it is unnecessary for me to deal with this interpretive question. The key issue is whether an appeal against first appellant's 'decision' was competent. For section 111 (3) to be applicable, a final decision by the registrar has to made. The appeal, in terms of s111(3) of the Act, is

against this decision. In terms of s96 (4) of the Act, it is clear that, where the registrar acting in terms of his power under s 95, decides that he is not satisfied that the applicant union meets the requirements for registration, he is obliged to notify the applicant of this decision and must provide reasons for the decision. Further, he must provide a 30 day period in which the applicant union has an opportunity to meet the statutory requirements for registration.

[25] It is common cause that no such application of this provision took place in the present case. First appellant made his decision on 12th July 2004. Only after a letter from respondent's attorneys were reasons provided on 16 August 2004 by the first appellant. There was clear non compliance with the provisions of section 96 (4), in that no opportunity was provided to respondent to deal with the problems raised by first appellant in his letter of 16th August 2004.

[26] Though section 96 (4) (a) refers to "a written notice of the decision and the reasons for that decision", (my emphasis) it is clear, when this provision is read together with subsections (5) and (6), that the decision taken in terms of section 96 (4) (a), is but a provisional decision. The Act mandates first appellant to inform the applicant that it has 30 days from the date of the notice to meet the requirements which the first appellant has found not to have been met and the failure of which justified the initial decision. In terms of s96 (5), where an applicant such as respondent meets the requirements for registration in this 30 day period, first appellant is mandated to register the union.

[27] For this reason, no legally effective decision was taken by first appellant which was final and therefor could have been the subject of an appeal. Expressed differently, until there was compliance with the provisions sections 96(4), (5), (6),

no decision had been made which determined the rights or interests of respondent. This could have only taken place after due compliance with s 96(3), being the provision of reasons, an opportunity to respond and a decision taken pursuant to such response. As the Constitutional Court held in Fedsure Life Assurance Ltd v The Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) at para 59, the principle of legality is central to the rule of law. That means that a body exercising a power such as first appellant is required to act lawfully within the powers granted to it. In this case, a decision by first appellant could not have been lawfully made until there was due compliance with its provisions of section 96 of the Act.

**Conclusion**

[28] It follows from this analysis of the law that, when the matter came before the court *a quo,* the proper course was to find that no appeal could be prosecuted in terms of section 111 until a final decision had been made which could then be the subject of an appeal. Given the lack of compliance with the provisions of s96(3), in particular, the court *a quo* was required to refer the matter back to first appellant in order that a decision could be made pursuant to the provisions of the Act. With regard to costs, I am of the view that the requirements of the law and fairness dictate that there should be no order of costs both in this Court and in the Court a quo.

[29] For these reasons therefor the following order is made:

1. The appeal is upheld.
2. There is no order of costs on appeal.
3. The decision of the Labour Court of 29 July 2005 is set aside and replaced with the following order.

(a) The decision which first respondent took on 12th July 2004 in which he refused to register applicant in terms of Section 96 of the Act 66 of 1995 is set aside.

(b) The application for registration by applicant is referred back to first respondent in order for him to comply with the provisions of Section 96(3) of the Labour Relations Act 66 of 1995

(c) There is no order as to costs.

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**DAVIS JA**

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**I agree** **ZONDO JP**

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**I agree** **TLALETSI AJA**

**Date of Judgment: 19 May 2008**

**Appearances**

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| **For the Appellant** | **Advocate T Bruinders SC assisted by Adv. E. Tolmay** |
| **For the respondent** | **Advocate H Radkin-Naiker** |