IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Reportable

Case No: JA 93/2010

In the matter between:

NATIONAL ENTITLED WORKERS UNION (NEWU)	First Appellant
DLONGOLO EPHRAIM AND OTHERS	Second Appellant
and	
DIRECTOR OF THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	First Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Second Respondent
COMMISSIONER DAVE WILSON	Third Respondent
DUNLOP BELTING PRODUCTS (PTY) LTD	Fourth Respondent
CEPPWAWU OBO ITS MEMBERS	Fifth Respondent
LUNGISANI KUNENE AND OTHERS	Sixth and Further Respondents

Date of hearing : 5 May 2011

Date of judgment : 30 May 2011

JUDGMENT

DAVIS JA:

Introduction

[1] First Appellant ('NEWU') was deregistered as a trade union by the Registrar of Labour Relations ('the Registrar') in terms of section 106 of the Labour Relations Act 66 of 1995 ('LRA') on 31 October 2006.

[2] On 17 November 2006, NEWU sought to appeal this decision in the Labour Court. On 22 November 2006, Broster AJ granted NEWU a stay of the deregistration decision, pending the outcome of the appeal. The relevant portion of this order read:

> "As a result of the Applicant having filed its appeal in terms of section 111 of the Labour Relations Act, execution of deregistration of the Applicant ~~of~~ is suspended pending the outcome of appeal."

[3] On 25 November 2010, Francis J dismissed NEWU's appeal against the deregistration decision. On 26 November 2010, NEWU applied for and was granted leave to appeal against this decision. NEWU did not seek an order suspending the execution of the Registrar's decision, pending its appeal to this court nor did it seek an order to stay or suspend the enforcement of the order of the Labour Court, pending the determination of the appeal by this court.

[4] On 6 December 2010, third respondent ruled that NEWU was not entitled to represent its members in proceedings before second respondent as it had been deregistered and the stay granted by Broster AJ only applied until the outcome of the appeal in terms of section 111of the LRA, which appeal had, as stated, been dismissed by Francis J.

[5] NEWU then approached the court *a quo* on an urgent basis seeking to review and set aside the decision of third respondent on the basis that:

1. The order of Broster AJ continued as a result of NEWU's appeal against the decision of Francis J.
2. The appeal to this court had the effect that the judgment and order could not be carried out and hence no effect could be given to it.

Accordingly, NEWU contended that it remained a registered trade union and was entitled to represent its members in proceedings before the second respondent or the Labour Court.

[6] On 21 December 2010, Bhoola AJ, sitting in the court *a quo*, dismissed this application with costs, on the basis that the order of Broster AJ only had effect until such time as the appeal brought against the Registrar's decision, in terms of section 111, had been disposed of by the Labour Court. This had occurred upon judgment being handed down by Francis J on 25 November 2010. Further the Learned Judge

held that there was no automatic suspension of the Registrar's decision, pending an appeal to this court from the order of Francis J.

[7] It is against this decision that appellant, with leave of the court *a quo*, approaches this court on appeal.

Appellant's case

[8] Mr Mphahlani, who appeared on behalf of appellant, based his argument on one point, namely that the court *a quo* had erred in holding that, in the absence of an express provision in the LRA, to the effect that an appeal automatically suspends the order of the court *a quo*, the execution of the order of Francis J was not by law automatically suspended, once NEWU had applied for leave to appeal to this court. In other words, as the operation of the common law rule had not been expressly excluded by the LRA, the execution of the decision of the Registrar, pending the outcome of the appeal, had to be suspended.

[9] In support of this submission, Mr Mphahlani referred to four separate decisions of the Labour Court, which, in his view, had application to the present dispute. In *Cisco Printing CC and Another v Sinclair*,[1] Maserumule AJ held that, given the similar status of the High Court and the Labour Court and the applicable

[1] (1999) 20 ILJ 338 (LC) at para 17

provisions of the common law, an order of the Labour Court is suspended once an application for leave to appeal has been made or an appeal noted.

[10] In *Julies v County Fair Foods (Pty) Ltd,*[2] Landman J held that a decision of the Labour Court is automatically suspended by virtue of the noting of an appeal to this court. The Learned Judge held that "the purpose of the rule is to prevent irreparable harm to the appellant."

[11] In *NUM v Goldfields Security Ltd,*[3] Landman J was again confronted with the same problem. The Learned Judge held that, as the decision in *Cisco supra* was not *"*clearly wrong… I am consequently bound to follow it*"*.[4] The Learned Judge went on to say "[o]n the contrary, I am of the view that it gives an expression to considerations of justice underlying the legal effect of the noting of appeal."

[12] This approach was confirmed in *Ralebipi and Others v The University of the North,*[5] in which Revelas J found that Rule 49(11) of the then Supreme Court Rules was applicable to a dispute before the Labour Court and accordingly the operation of an order was suspended, pending a decision in respect of the application for leave to appeal.

[2] (1999) 20 ILJ 368 (LC) at para 6.,
[3] [1999] 4 BLLR 376 (LC)
[4] Id at at para 5
[5] (2002) 23 ILJ 1888 (LC) at paras 17-19

[13] In *Christo Bothma Finansiële Dienste v Havenga and Another*,[6] Francis J was required to consider whether the filing of a petition for leave to appeal with the Judge President of the Labour Court suspended the enforcement of an order which had been issued by the Labour Court. Referring to Rule 11(3) of the Rules of the Labour Court to the effect that, if the situation for which the rules does not provide arises in proceedings or contemplated proceedings, the Labour Court may adopt any procedure it deems appropriate in the circumstances, Francis J held that Rule 49(11) of the High Court Rules should thus be adopted by the court.[7] Accordingly, he held that the filing of a petition to the Judge President of the Labour Court stayed the enforcement of an order pending the outcome of the petition.

Evaluation

[14] All of these cases concerned dismissal disputes in which court orders were in issue and thus deal with considerations distinct from the present case. The present case deals with an administrative decision of the registrar. The only case which deals with the same set of facts, and which is relied upon by second respondent is that of *CCMA v Registrar of Labour Relations and Others*,[8] where Molahlehi J concluded that an application for a stay, pending an appeal would be considered by the court and granted, if the appellant could show that it suffered prejudice and that it had prospects of success on appeal. The Learned Judge held that the prejudice that a union would

[6] (2010) 31 ILJ 93 (LC),
[7] Id at para 17.
[8] Case no. J 984/10 handed down on 27 July 2010 at paras 36–37 (as yet unreported).

suffer as a result of a deregistration pending an appeal had to be "weighed against the public interest to protecting the interest of union members, in particular that of ensuring that funds contributed are utilised for the purpose of benefiting the union members. This simple accountability principle is founded on the notion that the union occupies a position of trust concerning the management of the funds contributed by members. In short, the provisions of section 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 interests."

[15] This decision notwithstanding, Mr Mphahalani submitted that the correct approach to a dispute of this nature was to follow the various decisions of the Labour Court which had incorporated the provisions of Rule 49(11) which, in turn, encapsulated the common law position. He further referred to the judgment in *Max v Independent Democrats and Others,*[9] where the court held that the noting of an appeal suspends a decision taken by an administrative agency. In Mr Mphahalani's view, this is what had occurred in the present case by virtue of the Registrar's decision to deregister NEWU.

[16] The applicable common law rule is that the execution of a judgment is automatically suspended upon the noting of an appeal with the result that, pending the

[9] 2006 (3) SA 112 (C)

appeal, the order cannot be carried out and no effect can be given thereto. This common law rule can be excluded by statute. For example section 8(3) (b) of the Road Transportation Act[10] provides that an act, instruction or a decision of a local transportation board is not automatically suspended by the noting of an appeal. The National Transportation Commission is given the power to grant or refuse, at its direction, an application for suspension. The purpose of this rule is to prevent irreparable damage being done to an appellant by the execution of an order which may later be set aside on appeal.[11]

[17] There is no provision either in the Rules of the Labour Court or of this court that specifically renders rule 49(11) of the Uniform Rules of the High Court applicable to a dispute such as the present one. As already noted, Rule 11(3) of the Labour Court Rules provides that "if a situation for which these rules does not provide arises in proceedings or contemplated proceedings the court may adopt any procedure that it considers expedient in the circumstances."

[18] The question therefore arises as to whether the Labour Court can adopt a procedure which it considers appropriate when an appeal is lodged against a failed appeal of a deregistration decision (i.e. a decision made by an administrative functionary within the contemplation of the LRA). Notwithstanding the decision in

[10] 74 of 1977.
[11] See *Reid and Another v Godart and Another* 1938 AD 511 at 513; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545.

Max supra, the common law rule does not appear to have been automatically applied to appeals from administrative decisions. As Baxter Administrative Law notes:

> "The common law principle can constitute no more than a presumption in the case of administrative decisions, and this presumption may well be negative by the implication of the statute."[12] (footnote omitted)

In *Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd*,[13] the court prevented the implementation of an administrative decision by the express grant of an interim interdict, suspending the implementation of the decision, pending an application for review. The court so decided after a careful consideration of whether the applicant had made out a case for apprehension of irreparable harm. The court found that the balance of convenience favoured appellant and no ordinary remedy was available. Hence it granted an interdict, which would strictly have been unnecessary, if the application for review to the High Court automatically suspended the administrative decision.

[19] In *Max,* although the court appeared to accept that the common law rule applied to administrative decisions, it went on to examine the practical implications of such a suspension. In that case, the dispute turned on the expulsion of an applicant from a political party whom he represented in the Western Cape Provincial Parliament. Had the administrative decision to expel him not been suspended

[12] (Juta & Co Ltd, 1984) at 381.
[13] 1993 (1) SA 853 (C).

pending an appeal, another representative of the political party would have been sworn in as a member of the provincial legislature in the place of the applicant. The court concluded:

> "Assuming that applicant's appeal is then successful, there would be no constitutional basis by which to remove Mr Hendricks and permit applicant to regain his seat. In short, the entire issue would be rendered chaotic in the sense that applicant would have no right to return as a member of the provincial legislature, notwithstanding that an appeal body had decided that disciplinary action taken against him including expulsion was not valid."[14]

[20] There is room to suggest that *Max's* case, at best for appellant, seems to provide equivocal authority for the submission that the common law rule automatically applies though it is clear from the facts of that case that the court there was mindful of the irreparable harm to Max even if he was eventually successful in the matter. It is for these reasons that it is necessary, as Baxter has observed , to return to an examination of the implications of the applicable statute to determine whether the common law principle is applicable to the present dispute. For this reason, the cases dealing with dismissals are not strictly relevant to the present dispute relating to the decision of the registration and it is thus unnecessary to determine whether they were correctly decided.

[14] Above n 9 at 121 H – J

[21] The present dispute involves the deregistration of a trade union. The relevant statutory provisions are important for the determination of this case. Section 106 of the LRA deals with the cancellation of the registration of trade unions or employers organizations. In terms of s 106(2A) of the LRA, 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 orginisation … is not, or has ceased to function as a genuine trade union.

[22] Some understanding of what was intended by the legislation can be gleaned from the Explanatory Memorandum to the Labour Relations Amendment Bill 2000 (Government Gazette 27 July 2000) in which it was stated at para 19.4 that a "number of trade unions adopt coercive practices that are indicative of the fact that they are not genuine trade unions including, coercing members to sign agreements which entitled the union to all benefits due to a member by the employer upon death of a member, if the trade union acts on behalf of "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 and further, unions require up to six months notice of resignation from members and levy heavy resignation fees on members." In other words, this section was designed to ensure that organisations which purport to be trade unions but act, not on behalf of members, but on behalf of those who have set up the union should be deregistered, lest they enjoy all of the benefits of a registered

trade union, which benefits then only accrue to those who have created the union, as opposed to any of the employees whom the union claims to represent.

[23] The purpose of section 106 of the LRA is thus to protect employees, many of whom are poor, from being exploited by an organisation which claims to represent them but which is set up almost exclusively for the financial benefit of a few people who purport to be the office bearers of such a "union". The implications for the present dispute may be illustrated thus: Assume that the Registrar exercises a discretion in terms of section 106 of the LRA and deregisters the 'union', on the basis that he finds that it is not genuine and is ultimately no more than a mechanism to extract profits from a group of vulnerable workers. It would manifestly be in this "union's" interest to lodge an appeal so that the decision to deregister could be suspended and its exploitative conduct could continue. Where the common law rule to apply, the decision of the Registrar to deregister this 'union' would be suspended, pending the exhaustion of appeals whether to the Labour Court or further, to the Labour Appeal Court and, with some measure of legal innovation, to the Supreme Court of Appeal and finally to the Constitutional Court. By the time these appeals had been exhausted and ultimately the decision of the Registrar confirmed, a further lengthy period of exploitation of employees would have taken place. The prejudice to employees, whom the section seeks to protect, would thus be immense.

[24] Viewed accordingly, a suspension of a deregistration decision, pending an appeal, should be dealt with by way of a careful consideration of the relevant factors, which would allow for a just and equitable determination, including the potential for irreparable harm or prejudice to either of the affected parties and the public interest, that is of protecting the interests of members and ensuring that monies which have been paid to the union are utilised for the purpose of benefiting members. The enquiry would clearly give effect to the purpose of section 106 of the LRA, namely the protection of vulnerable employees from abuse of the trust that had been placed in the 'union' by unscrupulous officials whose involvement in the 'union' is for no other reason than to advance their own selfish financial interests. By engaging in this enquiry a court would be able to determine whether an application for leave to appeal should suspend the decision. It will be able to arrive at a conclusion, after a careful consideration of the compelling interests, including any prejudice which may be caused to the union as a result of its suspension by the Registrar. Further, the court could take account of the prospects of success on appeal and determine whether the appeal which had been lodged is frivolous or vexatious; that is whether the appeal has been prosecuted with a *bona fide* intention of reversing the judgment or for an ulterior purpose, such as to continue the exploitation of vulnerable workers.

[25] In my view, the adoption of a test to determine whether the deregistration decision is suspended pending an appeal, falls manifestly within the clear purpose of section 106. It follows therefore that Rule 11(3) and (4) of the Labour Court Rules

and similar provisions in the Labour Appeal Court Rules empower the Labour Court or this court to adopt the necessary procedure to achieve the purpose of the section.

[26] The sole basis of the appeal by NEWU was predicated on the submission that there was an automatic suspension of the deregistration decision. No arguments were raised which engaged with the test proposed in this judgment; that is relating to the merits of the Registrars' decision, and hence prospects of success nor with competing versions of prejudice. Given that NEWU's submission stands to be rejected for the reasons set out in this judgment, there is no basis by which to set aside the order of Bhoola J.

[27] Accordingly, the appeal is dismissed with costs.

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DAVIS JA

Mlambo JP and Mocumie AJA concurring with the judgment of Davis JA.

Appearances:

For the appellant:	J.S Mphahlani
Instructed by:	M.M Baloyi Attorneys
For the respondents:	K. Savage
Instructed by:	Bowman Gilfillan Inc