



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA115/2023

In the matter between:

REGISTRAR OF LABOUR RELATIONS

Appellant

and

SIMUNYE WORKERS FORUM

Respondent

Heard: 21 November 2024
(final submissions 26 November 2024)

Delivered: 26 May 2025

Coram: Savage ADJP, Nkutha-Nkontwana JA and Mooki AJA

Summary: Appeal against decision of Labour Court to uphold appeal under section 111(3) of the Labour Relations Act, 1995 against the refusal of the Registrar of Labour Relations to register trade union – purpose of registration to safeguard members rights and interests and ensure accountability – section 95(5) requirements not met – appeal upheld with no order of costs.

JUDGMENT

SAVAGE, ADJP

Introduction

- [1] This appeal, with the leave of the Labour Court, is against the judgment and order of that Court¹ which upheld the respondent's appeal, wherein Simunye Workers Forum (SWF) sought, under section 111(3) of the Labour Relations Act² (LRA), to appeal and set aside the decision of the appellant, the Registrar of Labour Relations (Registrar), to refuse to register SWF as a trade union. The Labour Court ordered that the Registrar register SWF as a trade union in terms of section 96, and to issue it with a certificate of registration within 14 days of the date of the order, with the Registrar to pay the costs of the appeal, save for those related to affidavits filed on 9 March 2023.

Constitutional and legislative framework

- [2] Every worker has the constitutional right in terms of section 23(2) to form, join and participate in the activities of a trade union³ and every trade union and employer's organisation has the right '*to determine its own administration, programmes and activities*'.⁴ The International Labour Organisation (ILO) conventions and recommendations are an important source of international law to be considered in the interpretation of section 23 of the Constitution of the Republic of South Africa, 1996.⁵
- [3] Article 2 of the ILO's Freedom of Association Convention, 87⁶ states that:

¹ Reported as *Simunye Workers Forum v Registrar of Labour Relations* (2023) 44 ILJ 2021 (LC).

² Act 66 of 1995, as amended.

³ Section 23(2) of the Constitution reads:

'(2) Every worker has the right –
 (a) to form and join a trade union;
 (b) to participate in the activities and programmes of trade union; and
 (c) to strike...'

⁴ Section 23(4) states:

'(4) Every trade union and every employers' organisation has the right –
 (a) to determine its own administration, programs and activities;
 (b) to organise; and
 (c) to form and join a federation.'

⁵ *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) (*Bader Bop*) at para 28. See also *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) at para 25.

⁶ C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) ratified by South Africa.

‘Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.’

[4] Article 3 of the Convention provides that:

‘Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programme...’

And that:

‘The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.’

[5] Section 3 of the LRA requires a court to interpret the LRA’s provisions in a manner which gives effect to the Act’s primary objects, in compliance with the Constitution and in compliance with South Africa’s public international law obligations.⁷ Freedom of association is given expression in section 8 of the LRA, which provides that every trade union and employers’ organisation, subject to Chapter IV, has the right to determine its own constitution and rules and hold elections for its office-bearers, officials and representatives.⁸

[6] The Constitutional Court has emphasised the importance of the right to freedom of association, which applies equally to the workplace,⁹ recognising it as a positive right which enables individuals to organise collectively around issues of concern, including to ‘*contest and ameliorate the structure of social power within its midst*’.¹⁰ A trade union, as an association of employees whose principal purpose is to regulate relations between employees and employers,¹¹ reflects such a collective organisation.

⁷ Section 3.

⁸ Section 8.

⁹ *National Union of Metalworkers of South Africa v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus) (Pty) Ltd and Others (Lufil)* [2020] 7 BLLR 645 (CC) at para 32.

¹⁰ *Ibid* at para 33.

¹¹ Defined as such in section 213 of the LRA.

- [7] Our courts have recognised that the role and power of such associations make them ‘worthy of protection not only from the state but also from external actors who may not share these goals’.¹² In *National Union of Metalworkers of South Africa (NUMSA) v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus) (Pty) Ltd and Others*¹³ (*Lufil*), the Constitutional Court quoted Woolman on the danger of the ‘capture’ of associations:

‘[C]apture justifies the ability of associations to control their associations through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership and dismissal policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current *raison d’être* of the association matters to the extant members of the association, the association must possess the ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, and for similar reasons, an association’s very existence could be at risk. Individuals, other groups or a state inimical to the values of a given association could use ease of entrance into and the exercise of voice in an association to put that same organisation out of business.’¹⁴

- [8] The importance of a trade union constitution, as with other voluntary organisations, is that it constitutes the agreement entered into by its members.¹⁵ Its constitution not only determines the nature and scope of the association’s existence and activities but also prescribes and demarcates the powers of the association and its office-bearers.¹⁶

¹² *Ibid.*

¹³ *Supra.*

¹⁴ Woolman “Freedom of Association” in Woolman et al (eds) *Constitutional Law of South Africa Service* 6 (2014) at 44-2-3.

¹⁵ *Turner v Jockey Club of SA* 1974 (3) SA 633 (A) at 644G – 645C.

¹⁶ *Saunders v Johannesburg Stock Exchange* 1914 WLD 112 at 117; *Ex parte United Party Club* 1930 WLD 277; *Medupe and Others v African National Congress and Others* [2025] ZASCA 22 at para 24 -25.

[9] Registration as a trade union or employers' organisation, while not compulsory, provides both statutory protections and significant benefits, including the right to exercise workplace rights, bargain collectively and represent members in various fora, including at the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils. This, in exchange for a trade union or employers' organisation subordinating itself to the regulatory prescripts of Chapter VI, administered by the Registrar.¹⁷

[10] Section 95(1) of the LRA permits any trade union to 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.'¹⁸

[11] A trade union is considered independent, in terms of section 95(2), 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.'

[12] Subsection 95(5) details the issues that must be reflected in the constitution of a trade union or employers' organisation that seeks to register, with section 95(7), providing that the Registrar '*must not*' register a trade union or employer's organisation unless satisfied that it is genuine, having regard to the Guidelines published by the Minister in terms of section 95(8).

[13] In issue in this appeal is whether the Labour Court erred in finding that the Registrar had erred in finding that SWF's constitution did not comply with

¹⁷ *Registrar of Labour Relations and Another v Justice for All Workers of SA* (2025) 46 ILJ 351 (LAC) (JAWSA) at para 3.

¹⁸ A similar provision is found in section 95(3) in relation to employers' organisations.

section 95(5), that the union did not meet the requirements for genuineness and that it was not independent.

- [14] The appeal to the Labour Court under section 111(3) is one in the wide or loose sense. This meant that, as with similar appeals against the decisions of administrative bodies, SWF was entitled to exercise a second opportunity before the Labour Court to make out a case in a rehearing.¹⁹ The Labour Court was entitled to receive evidence not presented to the Registrar and was not required to show deference to the views of the Registrar. This appeal, as was noted in *Registrar of Labour Relations and Another v Justice for All Workers of South Africa*²⁰ (JAWSA), is similarly one in the wide or loose sense for the purpose of the assessment that this Court is called upon to make.²¹

Relevant background

- [15] SWF describes itself as a 'modern' trade union, not constituted in the same manner as more traditional South African trade unions, but formed by workers in non-standard, often precarious employment. Its roots are to be found in the Casual Workers' Advice Office (CWAO), a non-profit, registered, independent community advice office. The catalyst for SWF's formation were amendments to the LRA, specifically to section 198, which took effect on 1 January 2015, and extended statutory protections to employees in non-standard forms of employment.
- [16] Following its formation in 2015, in February 2016, SWF adopted a simple constitution and functioned as an unregistered trade union as defined in section 213 of the LRA.²² In 2020, it resolved to apply for registration in terms of section 95 of the LRA. It adopted a constitution for this purpose in 2021, which was

¹⁹ JAWSA supra at para 8.

²⁰ Ibid.

²¹ See JAWSA at para 8, fn 3 in which reference is made to *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* 2015 (5) SA 245 (CC) at paras 82 to 92 and the distinction between a true discretion and a loose discretion. In particular:

[86] ... where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense –

“mean[s] no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision”.

²² Section 213 defines a 'trade union' as 'an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations'.

amended on 26 February 2022. On 22 June 2022, the Registrar refused to register SWF as a trade union on the basis that SWF's application did not comply with the requirements for registration set out in section 95(5) of the LRA, that it did not constitute a genuine trade union and was not independent of the CWAO.

[17] The 2022 SWF constitution records its name²³ and provides that:

‘...

15. Each Meeting elects a Chairperson (who chairs the meeting) and a Secretary (who keeps brief notes of the issues discussed at the meeting) to preside at the next Meeting. Where a Chairperson/Secretary were not elected, or are not present at a Meeting, the Meeting must elect a Chairperson and/or Secretary. A meeting that does not elect a woman Member as Chairperson or Secretary is unconstitutional.
16. Except for the matters reserved for the Annual General meeting, the Members present at each Meeting constitute a quorum for purposes of that Meeting, and may take decisions by majority vote.
17. The Secretary records every decision in the Simunye Workers Forum Minute Book.’

[18] Clause 21 provides that at only the annual general meeting, which in terms of clause 18 is to be held annually in July, if possible, can *inter alia* decide to amend the constitution; approve SWF's audited financial statements; appoint the standing committee, subject to clause 29; set the annual membership fee and wind up SWF. Clause 22 provides that SWF is ‘*independent of trade unions, political parties, employers, the CWAO and the state*’.

²³ Section 95(1) of the LRA provides that:

‘Any trade union may apply to the registrar for registration if –

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

Section 95(4) provides that:

‘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.’

- [19] SWF does not, in terms of clause 23, employ officials, with it recorded that all organisational work is done by its members. Clause 24 states that SWF is:

‘[S]erved by a Standing Committee appointed by majority vote at the AGM, which serves until the following AGM (subject to clause 29) under the ultimate direction and control of the Meetings.’

- [20] The standing committee, in terms of clause 25, consists of:

‘[N]o more than ten and no fewer than three members appointed by the AGM, a majority of whom must be women Members.’

- [21] Clause 26 provides that the standing committee is responsible for overseeing the day-to-day running of the SWF, including providing secretarial support to the elected chairperson and secretary of each meeting, assigning two of its members to be signatories to the SWF bank account and administering that account, banking membership fees and managing special funds. Clause 27 permits the standing committee to co-opt any person with special skills to assist it in fulfilling its functions, provided that such persons assist on a voluntary basis and are not remunerated. In terms of clause 29, ‘*(a)ny Meeting may add to, recall or replace Members of the Standing Committee by majority vote*’. Clause 30 provides that:

‘Because Members of the Standing Committee have no material interest in the office, which is purely an office of service, no provision is made for an appeal against recall or replacement.’

- [22] No officials are employed by SWF, and any member or volunteer may be nominated as an office bearer for the purposes of the LRA, CCMA Rules or the rules of any bargaining council. The standing committee is to ensure that all statutory requirements are complied with, including those specified in sections 98 to 101 of the LRA. Membership fees may only be used to advance and protect the socio-economic interests of workers, and SWF is neither to acquire nor control any immovable property or financial instruments.

Section 95(5) requirements

[23] Section 95(5) requires that the constitution of any trade union (or employers' organisation) that intends to register must:

- '(a) ...
- ...
- (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...'

Section 95(8) Guidelines

[24] In 2002, the LRA was amended to include in section 95(7) that the Registrar '*must not*' register a trade union or employer's organisation unless satisfied that it is genuine, with the Minister permitted under section 95(8) to publish guidelines to be applied by the Registrar in determining whether such an applicant is a genuine trade union or employers' organisation. The amendment was aimed chiefly at preventing labour consultancies from registering as trade unions or employer organisations only to secure rights of representation in the

CCMA. The Guidelines issued by the Minister in terms of Section 95(8)²⁴ (Guidelines) are concerned with the genuineness requirement and make it clear that they are *'not concerned with evaluating whether the constitution of a trade union or employers' organisation complies with section 95(5) of the LRA'*.²⁵

- [25] The Guidelines require that the Registrar *'take into account all relevant factors'* in determining whether a trade union or employers' organisation is genuine.²⁶ In terms of paragraph 6, a trade union *'cannot be registered'* unless it is in fact an association of employees with the principal purpose of its activities being to regulate relations between its members and their employers. This requires that the *'actual process of forming a trade union, its composition and membership and the activities it undertakes on behalf of its members'* be examined. Paragraph 7 suggests that the process followed to form a trade union *'can give important indications as to whether [it] is a genuine trade union'*. The determination of whether a trade union is genuine includes, the *'crucial issue'* of *'whether the formation of a trade union involved employees associating with one another to establish an organisation to regulate relations with their employer(s)'*, considering the number of founding members who attended the inaugural meeting(s) to establish the trade union and who completed signed registers indicating their names and place of work, the means by which the constitution of the trade union was drafted and adopted and the election of executive committee or council members and the election of office-bearers. Paragraph 8 notes that *'the failure to place appropriate qualifications on membership may indicate, together with other factors, that the trade union is not a genuine trade union'*.

- [26] Other factors require consideration by the Registrar of the size of the membership²⁷ and the history of a trade union,²⁸ whether it has sought to gain a critical mass of members in particular workplaces or bargaining units that would allow it to gain organisational rights,²⁹ whether it recruits members who

²⁴ GNR 1446 of 10 October 2003. The 2003 guidelines were subsequently withdrawn, and in 2018, new guidelines were promulgated in GNR 1395 of 19 December 2018.

²⁵ Ibid at para 4.

²⁶ At para 3.

²⁷ At para 9.

²⁸ At para 10.

²⁹ At para 11.

are in employment³⁰ and has sought organisational rights, recognition from employers or submitted negotiated demands³¹ or sought to resolve grievances on behalf of its members.³² In addition, regard must be had to whether the trade union is independent from '*direct or indirect control of any employer or employers' organisation*',³³ and is an association of employees not for gain. Indicators of the latter include whether the trade union has functioning branches, holds regular meetings of members, elects shop stewards and other trade union representatives in workplaces, elects office-bearers,³⁴ pays unrealistically high salaries or makes low or no interest loans to officials or their family members, uses income earned for the benefit of officials, office-bearers or employees and not members, or charges members for litigating on their behalf.³⁵

Decision of the Registrar

[27] The Registrar refused to register SWF as a trade union, finding that its constitution did not comply with the requirements for registration set out in section 95(1)(a), (b) and (c), nor with the requirements of section 95(5)(i) to (n) of the LRA and that it could not be determined if it was a genuine trade union as required by section 95(7) and the Guidelines. The Registrar was not satisfied that SWF's members had adopted its name and constitution, that SWF had shown that it had an address in South Africa, nor that it was an independent and genuine trade union. In addition, the Registrar took issue with the union's failure to put up a copy of the minutes and attendance register of the meeting at which it was established, which register reflected the names and numbers of the members who had attended the inaugural meeting, as well as particulars of their place of work. No evidence was found to have been provided to show how SWF drafted and adopted its constitution, adopted its name, or how the executive committee or council of members, office bearers and trade union representatives were elected. Issue was also taken with the authenticity of the

³⁰ At para 12.

³¹ At para 13.

³² At para 15.

³³ At para 16.

³⁴ At para 17.

³⁵ At paras 18 and 21.

resolution, and the nomination of the president and vice president of SWF when they were not members of the standing committee. In addition, the Registrar expressed concern that SWF was dependent for its survival on the CWAOW, and that it was unable to survive without the support of the CWAOW for office space, a postal address, a telephone line, education and training of its members, the development of organisational management systems and infrastructural support.

[28] SWF's constitution was also found not to make provision for the employment of officials or office bearers; with any meeting entitled to add to, recall or replace members of a standing committee by majority vote, and with no provision for an appeal against any recall or replacement decision taken. The designations normally used for trade union office bearers on the application forms were not applied and those nominated to complete the application form seeking registration were not shown to have been nominated by resolution taken in a meeting of 12 March 2022, when this was ostensibly in contravention of the respondent's constitution in that it is not signed and makes no reference to such nomination.

[29] The Registrar stated that:

'It is the conclusion of this office to regard the applicant SWF as CWAOW a registered non-profit donor funded independent community advice office with registration number (NPO-093-222). Furthermore, it is impossible for this office to separate CWAOW from SWF. SWF cannot be regarded to be independent from CWAOW as one would expect in a genuine trade union as envisaged in the LRA. On this basis alone the applicant trade union cannot be regarded as a genuine trade union as envisaged in the LRA to qualify for registration as a trade union as required by section 95(7) of the LRA.'

[30] The registration of SWF as a trade union was therefore refused on 22 June 2022 on the grounds that it had failed to meet the requirements for registration in terms of the Act and was not a genuine trade union.

Judgment of the Labour Court

[31] Aggrieved with the Registrar's refusal to register it, SWF appealed to the Labour Court in terms of section 111(3) of the LRA. The Court set aside the Registrar's decision of refusal, finding that SWF was independent, met the requirements of genuineness despite its unique organisational structure, and found that to the extent required, SWF had complied with the provisions of section 95(5)(i) to (n). The decision of the Registrar was therefore set aside, and the Registrar was ordered to register SWF as a trade union within 14 days of the date of the Labour Court's order. The Registrar was ordered to pay the cost of the appeal, save for the costs related to two lengthy and unnecessary affidavits filed on 9 March 2023.

Discussion

[32] The right to freedom of association is to be interpreted generously, recognising the importance of fundamental rights and ensuring their protection as fully as possible,³⁶ in a manner which promotes the spirit, purport and objects of the Bill of Rights.³⁷ The words used in the statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity, with statutory provisions always to be interpreted purposively, properly contextualised, construed consistently with the Constitution, and where reasonably possible, interpreted to preserve their constitutional validity.³⁸ Any limitation of rights is to accord with the provisions of section 39(2).³⁹

[33] The Registrar's appeal turns on the Labour Court's interpretation and application of section 95(5) and its conclusion that SWF is a genuine trade union independent from CWAO.

³⁶ See: *Bader Bop supra*.

³⁷ See: section 39(2) of the Constitution. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at para 45.

³⁸ *Cool Ideas 1186 CC v Hubbard and Another* 2014 (8) BCLR 869 (*Cool Ideas*) at para 28 with reference *inter alia* to *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) at para 37; *S v Zuma and Others* 1995 (2) SA 642 (CC) at paras 13 -14; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* 2014 (3) BCLR 265 (CC) at paras 84 - 86; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para 5; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) at para 24; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para 39; and *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 664E-H.

³⁹ *Bader Bop supra*.

Compliance with section 95(5)

[34] Section 95(5) requires that the constitution of a trade union that intends to register ‘*must inter alia* (i) establish the office of secretary and define its functions⁴⁰, and (ii) provide for other office-bearers, officials and trade union representatives, defining their respective functions⁴¹. In addition, section 95(5)(k) requires a procedure to be prescribed for nominating or electing office-bearers and trade union representatives and, in section 95(5)(l), for appointing, or nominating and electing officials. Section 95(5)(m) requires that 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 be established, with section 95(5)(n) requiring that the constitution provide for appeals against the removal from office of office-bearers, officials and trade union representative and prescribe a procedure for those appeals and determine the body to which those appeals may be made.

[35] SWF contends that its structure, as reflected in its constitution, is intentionally flat and non-hierarchical. It relies on the ILO’s Compilation of Decisions of the Committee on Freedom of Association⁴² as the basis of its right to determine freely its structure and composition, as matters for workers to decide. It argues that legislative provisions which regulate the details of the internal functioning of workers’ organisations –

‘...pose a serious risk of interference by the public authorities. Where such provisions are deemed necessary by the public authorities, they should simply establish an overall framework in which the greatest possible autonomy is left to the organizations in their functioning and administration. Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing democratic functioning of organizations.’

[36] The Registrar, on the other hand, considers the provisions of section 95 to be peremptory. In *National Education Health and Allied Workers Union v Minister*

⁴⁰ Section 95(5)(i).

⁴¹ Section 95(5)(j).

⁴² ILO Convention 87.

of *Public Service and Administration and Others*⁴³, it was noted that a label such as peremptory or directory, mandatory or directory is not necessarily determinative of whether a failure to comply with its provisions inevitably results in nullity. All statutes must be construed consistently with the Constitution⁴⁴ and

‘... (i)n deciding whether there has been compliance with the statutory injunction, what is important is the object sought to be achieved by the injunction and whether this object has indeed been achieved.⁴⁵ The central element is to link the question of compliance to the purpose of the provision. It has to be determined “whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose”.⁴⁶

[37] Having regard to the requirements set out in section 95, it is not clear that these create an unjustifiable inroad into SWF’s autonomy or present undue obstacles to registration. It establishes a framework for registration to ensure accountability, transparency, and democracy in trade unions’ internal processes and procedures.⁴⁷ This serves to protect members, the organisation itself and the external parties with whom it relates. Where a trade union elects not to register, it is not obliged to comply with the provisions of the section.

[38] Clause 15 of SWF’s constitution provides for the election of a secretary and a chairperson for each ordinary meeting, with the secretary required, in clause 17, to record every decision taken at the meeting in the SWF Minute Book. In issue is whether these provisions establish an ‘*office of secretary*’ and define its functions. In issue is whether an office of secretary can be said to have been established where a different secretary may be elected at each meeting and

⁴³ *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others; South African Democratic Teachers Union and Others v Department of Public Service and Administration and Others; Public Servants Association and Others v Minister of Public Service and Administration and Others; National Union of Public Service and Allied Workers Union v Minister of Public Service and Administration and Others* (2022) 43 ILJ 1032 (CC) (NEHAWU) at para 71.

⁴⁴ *Cool Ideas* supra at para 28. See: NEHAWU at para 72.

⁴⁵ See: *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 643G.

⁴⁶ *African Christian Democratic Party v Electoral Commission & others* 2006 (3) SA 305 (CC). See also *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 30.

⁴⁷ See: *Lufil* supra at para 64.

whether the requirement that its functions are defined is met by noting that the secretary records decisions in a minute book.

[39] In attributing meaning to the words used in the statute, regard is to be had to the context, the language used and the apparent purpose to which it is directed. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors, with a sensible meaning to be preferred.⁴⁸ By requiring the establishment of an office of secretary, the apparent purpose of the provision, considered in the context of registration requirements, appears to be to ensure appropriate administrative controls are in place to ensure order and accountability and transparency in the operation and functioning of a trade union. Allowing a different secretary to be appointed at each meeting is not the creation of an office. It amounts to the *ad hoc* appointment of a different secretary at each meeting, and tasking such a person with recording decisions in a minute book does not reach the threshold of defining the functions of the office. The fact that the standing committee is required, by clause 26, to provide secretarial support to the elected chairperson and secretary of each meeting, reiterates that such functions are not vested in an office of secretary but in a committee of members elected. From this, it is apparent that the constitution does not comply with the requirement of section 95(5)(i).

[40] The Registrar disputes that there has been compliance with section 95(5)(j) in that the constitution has failed '*to provide for other office-bearers, officials and trade union representatives*' or '*define their respective functions*'. Section 213 of the LRA defines an official as –

‘a person employed as the secretary, assistant secretary or organiser of a trade union... or in any other prescribed capacity, whether or not that person is employed in a full-time capacity...’

[41] Apart from the *ad hoc* appointment of a secretary and chairperson at a meeting, the constitution makes no provision for the appointment of a person to be

⁴⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) at para 18.

employed in such capacity or in any other capacity which falls within the definition of an official.

[42] An office-bearer is defined as –

‘a person who holds office... and who is not an official...’.

[43] SWF’s constitution does not provide for office-bearers, officials and trade union representatives, as defined in section 213 of the LRA, nor does it provide for their functions. Clause 23 states that SWF does not employ officials, with all organisational work done by members. In terms of clause 24, the union is served by a standing committee appointed at its annual general meeting, which is under the ultimate direction of ‘the meetings’. Clause 26 provides that the standing committee is responsible for overseeing the day-to-day running of the SWF, including providing secretarial support to the elected chairperson and secretary of each meeting, assigning two of its members to be signatories to the SWF bank account and administering that account, banking membership fees and managing special funds. Clause 27 permits the standing committee to co-opt any person with special skills to assist it in fulfilling its functions, provided that such persons assist on a voluntary basis and are not remunerated.

[44] The Labour Court found that the reason that no officials were appointed was explained in the constitution and the covering letter that accompanied SWF’s application; and that to interpret the words ‘provide for’ to mean ‘establish’, as the Registrar contends, ignores the fact that the legislature chose to use different terms and that a proper interpretation of the provision, considered in context and with regard to the purpose of the Act and section 95, means no more than that these are matters which must be addressed in SWF’s constitution. The Court suggested that a different interpretation would present an unjustifiable inroad into SWF’s autonomy and establish an unwarranted obstacle to registration. The same considerations were found to apply to the requirement in section 95(5)(k) to (n), insofar as they relate to a procedure for the nomination, appointment and removal from office of the persons appointed to the offices referred to in paragraph (j).

- [45] The difficulty with this finding is that even if not established, no provision is made in the constitution for other office-bearers or officials. In fact, the constitution expressly disavows the need for such positions, with clause 23 providing that SWF does not employ officials and that all organisational work is done by members, with it possible to co-opt any person with special skills to fulfil functions required, provided such persons are not remunerated.
- [46] In these circumstances, it would amount to an unduly expansive interpretation of section 95(5)(j) to find that the constitution makes the provision for the subsection when it has expressly and intentionally does not do so. Given as much, it follows that the constitution has not prescribed a procedure for nominating or electing office-bearers as required by section 95(5)(k), or for appointing, or nominating and electing officials in terms of section 95(5)(l). Clauses 31 to 36 of the SWF constitution provide for trade union representatives, defined as 'a member of a trade union who [are] elected to represent employees in a workplace', who work in a workplace and may be elected as one or more workplace representatives at a meeting attended by at least half of the members of that workplace.
- [47] However, the constitution provides that any meeting may add to, recall or replace members of the standing committee by majority vote in terms of clause 29, with clause 30 making it clear that no appeal against recall or replacement is provided since members of the standing committee have no material interest in the office, which is purely an office of service. The result is that on no construction can the constitution be interpreted to have established 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, as required by section 95(5)(m), or provide for appeals against their removal in the manner set out in section 95(5)(n).
- [48] While the express intent of the SWF constitution, as set out in its preamble is '*to keep decision-making power in the hands of those Members affected by the decision in question*', with all work done by members and no person remunerated for any work done, it fails to comply with the requirements for registration set out in section 95(5).

Genuine and independent?

[49] The LRA was amended in 2002 to introduce subsections 95(7) and (8), which require the Registrar to determine whether a trade union (or employers' organisation) seeking registration is genuine. The notion of independence in section 95(2) is concerned with whether a trade union is '(a) ... *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*'. While the Registrar in refusing SWF registration took the view that it was dependent on the CWAPO, particularly in regard to its infrastructural needs, there is no dispute that the CWAPO is not an employer or an employer's organisation for purposes of section 95(2) and there is no suggestion that SWF is under the control of or influenced by any employer or employer's organisation.

[50] In *Vosloo NO and Another v SA Medical Association NPC and Another*,⁴⁹ it was found that a trade union must not only be free from control by employers or employers' organisations, but it must be independent in the sense of being free from direct or indirect control of any entity and any interference or influence. Our courts have recognised that many South African trade unions grew out of advice offices, or were brought into existence in collaboration with social activists, academics or politically motivated individuals.⁵⁰ While independence is narrowly defined in section 95(2), this Court accepts that it is unlikely that an organisation that is under the direct or indirect control of another entity will be found to meet the requirements for registration as a genuine trade union or employers' organisation.

[51] In determining whether a trade union or employers' organisation is genuine, the Registrar '*must take into account all relevant factors*' set out in the Guidelines in order to determine whether such organisation is genuine.⁵¹ The Guidelines are not peremptory but are, as their name suggests, guidelines. They detail some of the issues the Registrar will consider in having regard to whether a

⁴⁹ (2020) 41 ILJ 2482 (LC) at para 8.

⁵⁰ *Workers Union of SA v Crouse NO & another* (2005) 26 ILJ 1723 (LC) at para 36.

⁵¹ Para 3.

trade union or employers' organisation is genuine. As such, they do not override the requirements of section 95(5) LRA and are not a checklist, with genuineness to be considered in light of the mischief which it was apparent from the explanatory memorandum to the amendment was sought to be prevented, namely that unions or employer organisations are not registered when these are disguised labour consultancies which seek to gain rights of appearance at the CCMA.

[52] Given the finding that the SWF constitution does not comply with the prescripts for registration set out in section 95(5), the appeal must succeed, and the orders of the Labour Court set aside. It is premature to consider whether SWF meets the threshold for genuineness or independence, and it is unnecessary to determine whether it failed to provide the required information or sought to mislead the Registrar in its application. It would not be appropriate for this Court to determine such issues on a piecemeal basis. SWF must be permitted to revisit and amend its constitution so as to ensure that its members are properly and adequately protected and represented and that it reflects a due regard for the principles of accountability and transparency. This will limit disputes in the future and provide appropriate legal protections for workers who are already recognised as vulnerable. Thereafter, the union may apply again to the Registrar for registration.

[53] Having regard to considerations of law and fairness, we are not persuaded that a costs order is warranted in this matter. SWF has as its members the most vulnerable of workers, whereas the Registrar performs a regulatory function in terms of the LRA, resourced by the State. There is no reason to saddle SWF with costs, more so given the nature of the issues which required consideration in this matter.

[54] In the result, the following order is made:

Order

1. The appeal is upheld with no order as to costs.
2. The orders of the Labour Court are set aside.

SAVAGE ADJP

Nkutha-Nkontwana JA and Mooki AJA concur.

APPEARANCES:

FOR THE APPELLANT: M S Mphahlele SC and EB Ndebele
Instructed by the State Attorney

FOR RESPONDENT: M Bishop SC and S Harvey
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