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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 78915/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 6 APRIL 2021

SIGNATURE: ....

ASSOCIATION OF MINE WORKERS AND CONSTRUCTION UNION — Applicant

And

THE MINISTER OF EMPLOYMENT AND LABOUR — Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This application concerns guidelines issued by the respondent, the Minister of Employment and Labour ("the Minister") in terms of the Labour Relations Act, 6 of 1995 ("the Act").

[2] The applicant, the Association of Mine Workers and Construction Union ("AMCU"), a registered trade union in terms of the LRA, seeks an order that the guidelines be reviewed and set aside in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") *alternatively* be declared inconsistent with the principle of legality enshrined in section 1(c) of the Constitution of the Republic of SA, 108 of 1996 and setting them aside.

THE GUIDELINES

[3] Section 95 of the Act provides for the registration of trade unions or employers' organisations.

[4] Section 95(8) provides that the Minister may issue guidelines and reads as follows:

> *"(8) The Minister, after 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 and guidelines for the system of voting as contemplated in subsection (9)."*

[5] On 9 December 2018 and in Government Notice 1397, *Government Gazette* No. 42121, the Minister issued the guidelines that forms the subject matter of this application. The guidelines pertain to *"the system of voting as contemplated in subsection (9)".*

[6] Section 95(9) of the Act reads as follows:

"(9) For the purpose of subsection (5), 'ballot' includes any system of voting by members that is recorded and in secret."

[7] Section 95(5)(p) and (q) pertains to a *"ballot"* and provides that:

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

(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;"

[8] Although section 95(5) refers to *"trade unions that intends to register"*, section 19 of the Labour Relations Amendment Act, 8 of 2018 which introduced the requirement of a secret ballot, provides as follows:

"19(1) The registrar must, within 180 days of the commencement of this Act, in respect of registered trade unions and employers' organisations that do not provide for a recorded and secret ballot in their constitutions —

(a) consult with the national office bearers of those unions or employers' organisations on the most appropriate means to amend the constitution to comply with section 95; and

(b) issue a directive to those unions and employers' organisations as to the period within which the amendment to their constitution is to be effected, in compliance with the procedures set out in the amended constitution.

(2) Until a registered trade union or employers' organisation complies with the directive made in terms of subsection (1)(b) and the requirements of section 95(5)(p)and(q)of the Act, the trade union or employer organisation, before engaging in a strike or lockout, must conduct a secret ballot of members."

[9] In the result, the guidelines that were published by the Minister on 9 December 2018 is applicable to AMCU.

ADMINISTRATIVE ACTION

[10] In order to rely on the provisions of PAJA, the guidelines issued by the Minister must fall within the definition of *"administrative action"* as defined in section 1 of PAJA, to wit:

"any decision taken...by-(a) an organ of state, when – (ii) exercising a public power or performing a public function in terms of legislation.....which adversely affects the rights of any person and which has a direct, external legal effect...."

[11] The Minster contends that the issuing of the guidelines does not fall within the definition of an administrative act as envisaged by PAJA.

[12] Mr Loxton SC, counsel for AMCU, with reference to *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College (PE)* 2001 (2) SA 1 CC, submitted that it does. In paragraph [18] of the judgment, the following is stated:

"It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road or rail transportation, or tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action."

[13] The Act provides in section 95(8) for the issuing of guidelines by the Minister. In the result, the Minister performed a public function in terms of legislation and the decision to issue the guidelines complies with the first requirement for the decision to fall within the ambit of an administrative action as defined by PAJA.

[14] Mr Maleka SC, counsel for the Minister, however, submitted that the decision does not comply with the second requirement in that the issuing of the guidelines does not adversely affect the rights of AMCU or any other trade union and does not have a direct, external legal effect.

[15] AMCU contends that the issuing of the guidelines adversely affects its right to administer its own affairs.

[16] In my view and will be more fully dealt with *infra*, the guidelines are peremptory and prescribe the manner in which a trade union should conduct a ballot of members before calling for a strike or lock-out. In this regard, the guidelines do have an adverse effect on AMCU's powers to regulate its own affairs.

[17] In the premises, I am satisfied that PAJA does apply to the relief claimed by AMCU.

Condonation

[18] In view of the aforesaid finding, it is necessary to consider the issue of condonation.

[19] Section 7(1) of PAJA provides that an application for review should be brought within 180 days after the day on which the applicant was informed of the administrative action or should reasonably have been expected to become aware of it.

[20] The guidelines were published on 19 December 2018 and this application was served on the Minister on 23 October 2019, some ten months later.

[21] AMCU contends that it only became aware of the effect of the guidelines on 20 August 2019 when it obtained an opinion from senior counsel. In the result, AMCU submits that the application was brought without unreasonable delay and within the 180 day period prescribed by section 7(1)(b) of PAJA.

[22] Insofar as the court finds that the application is out of time, AMCU seeks condonation in terms of section 9(1) of PAJA. In its founding affidavit, AMCU merely asserted that, in view of the impact of the guidelines, it is in the public interest and the interests of justice to grant condonation.

[23] No explanation was tendered for the delay in obtaining senior counsel's opinion.

[24] The deponent to the answering affidavit pointed out that AMCU did not provide any facts to explain the delay in bringing the application.

[25] In response and rather belatedly, AMCU in its replying affidavit explained in detail what transpired from November 2018 until the application was brought in October 2019.

[26] The reasons for the delay should have been set out in the founding affidavit and the belated effort to rectify its failure to do so does not avail AMCU.

[27] I am, however, of the view that the relief claimed herein is in the public interest, at least insofar as trade unions are concerned and in exercising my discretion condone the late filing of the application.

GROUNDS OF REVIEW AND SUBMISSIONS

[28] The first ground of review is based on the provisions of section 6(2)(a)(i) of PAJA which provides for the judicial review of an administrative action that was not authorised by the empowering section. In the event, that the decision falls outside the scope of the empowering provision the decision is *ultra vires* and stands to be reviewed and set aside.

Ultra vires

[29] Paragraph 1 of the guidelines states that the guidelines are published in terms of section 95(9) of the Act. The applicant contends that section 95(8) provides for the issuing of guidelines and that the Minister in issuing the guidelines in terms of section 95(9) of the Act acted *ultra vires.*

[30] Mr Maleka submitted that subsections (8) and (9) should be read together and that the reference in subsection (8) to subsection (9) makes it clear that as long as the Minister invokes subsection (8) in deciding to issue the guidelines, the guidelines may be issued in terms of subsection (9) of the Act.

[31] Mr Maleka, furthermore, asserted that the Minister's predecessor did invoke subsection (8) in issuing the guidelines and as a result the *ultra vires* point is misguided.

[32] The submission does not assist the Minister. Section 95(8) expressly empowers the Minister to issue guidelines *"for the system of voting as contemplated in subsection (9)".* Subsection (9) does not confer a similar power on the Minister.

[33] Mr Loxton with reference to *Minister of Education v Harris* 2001 (4) SA 1297 CC emphasised the legislative imperative to act within the powers granted by the enabling legislation.

[34] I agree.

[35] The further problem with the guidelines is to be found in paragraph 9. Although paragraph 9 states that the guidelines *"are indicative of the procedures that should be followed when conducting a secret ballot"*, the subparagraphs are couched in mandatory terms, namely:

[35.1] Paragraph 9.1: *"Reasonable notice must be given to members of a ballot...."*

[35.2] Paragraph 9.2: *"The notice must specify the time and place of the ballot."*

[35.3] Paragraph 9.3: *"The question that is the subject of the ballot must be clearly phrased, and must be consistent with the terms of the dispute referral.*

[35.4] Paragraph 9.4: *"Ballot papers must be prepared in accordance ...."*

[35.5] Paragraph 9.5: *"Ballots must not contain...."*

[35.6] Paragraph 9.6: *"A ballot must be conducted in terms of ....".*

[36] AMCU submits that the mandatory provisions in the Guidelines are not provided for in the empowering section, section 95(8), which provides that guidelines may be issued by the Minister for the system of voting contemplated in subsection 9 and is as a result *ultra vires*.

[37] Mr Maleka submitted that, although the word *"must"* is used in some of the subparagraphs, the introductory portion of paragraph 9 makes it clear that the guidelines are only *"indicative"* of the procedures that should be followed. In the

result, the word *"must"*, although normally associated with a mandatory provision, is not mandatory in the context of the guidelines as a whole.

[38] There is nothing ambiguous in the word *"must"* in the context of the guidelines as a whole. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at paragraph [25] the court explained the interpretation of a word in a statute as follows:

"Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the word used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and defined meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to language used."

[39] *In casu*, the word *"must"* does not have a different meaning other than the normal mandatory obligation it imposes on trade unions to comply with the prescripts contained in paragraphs 9.1 to 9.6.

[40] Section 95(8) does not empower the Minister to impose mandatory obligations on trade unions and to this end the paragraphs mentioned *supra* is also *ultra vires.*

[41] In view of the finding *supra*, I do not deem it necessary to consider the remainder of the grounds of review.

ORDER

[42] In the premises, I issue the following order:

1. Condonation is granted for the late filing of the application in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000.
2. The *Guidelines Issued in Terms of Section 95(9) of the Labour Relations Amendment Act 8 of 2018*, published in Government Notice 1397, *Government Gazette* No. 42121 dated 19 December 2018, is set aside.
3. The Respondent is ordered to pay the costs of the application, such costs to include the costs of two counsel.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

<u>DATE HEARD PER COVID19 DIRECTIVES:</u> 17 March 2021

(Virtual hearing.)

<u>DATE DELIVERED PER COVID19 DIRECTIVES:</u> 06 April 2021

<u>APPEARANCES</u>

Counsel for the Applicant:	Advocate C. Loxton SC and Advocate P.J. Daniell
Instructed by:	LDA Attorneys Incorporated
Counsel for the Respondent:	Advocate V. Maleka SC and Advocate S. Tilly
Instructed by:	The State Attorney Office