

## NOTES / AANTEKENINGE

### The Establishment and Registration of Trade Unions Different From Traditional Union Structures

#### 1 Introduction

Internationally, various instruments protect the right to freedom of association. Domestically, in South Africa, it is protected by the Constitution of the Republic of South Africa, 1996 (Constitution) (s 23(2)) and the Labour Relations Act 66 of 1995 (LRA). This right, amongst others, includes employees' right to establish and join trade unions. Trade unions in South Africa are regulated under the LRA. A trade union is a voluntary association that may exist and function without being registered. However, it is beneficial for trade unions to register with the Department of Employment and Labour (*SANAWU v Maluti Crushers* [1997] 7 BLLR 955 (CCMA)). Benefits for registration include the acquisition of a legal personality separate from members (s 97 of the LRA), organisational rights (s 12–16 of the LRA), the conclusion of collective agreements enforceable under the LRA (s 23 of the LRA), membership of bargaining councils (s 27 of the LRA), the establishment of workplace forums (s 80 of the LRA), and authorisation of pickets (s 69(1) of the LRA). Moreover, section 213 of the LRA defines a trade union as “an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations.” It is evident from this definition that a trade union should be an association of employees with the main purpose of regulating relations between employees and employers. Through trade unions, employees with common concerns combine to maintain and advance industrial and other interests (Landman “Statutory Inroads into a Trade Union's Right of Disassociation” 1997 18(1) *ILJ* 13–15 13).

The LRA provides for the registration of trade unions under section 95. This section outlines the requirements for registering trade unions, including the content that the constitution of a trade union should cover. Moreover, its subsection (7) states that the registrar must not register a trade union unless he is satisfied that it is a genuine trade union while subsection (8) states that the Minister may, in consultation with the National Economic Development and Labour Council, by notice in a Government Gazette, publish guidelines to be applied by the registrar in this regard (GN R1446 in GG 25515 of 2003-10-10) (Guidelines)). If satisfied, the registrar must register the applicant trade union, however, if not satisfied, the registrar must send the applicant a written notice of the decision and the reasons, giving the applicant 30 days

to comply with the requirements; failure which, the registrar must refuse to register the applicant (s 96(3) and (4) of the LRA). In the recent case of *Simunye Workers Forum v The Registrar of Labour Relations* ((2023) 44 ILJ 2021 (LC)) (*Simunye v The Registrar*), the registrar refused to register the applicant amongst others because of the way it was established, due to its non-compliance with provisions of section 95 of the LRA, and because it was not a genuine trade union. As a result, the union appealed the registrar's decision. In view thereof, the discussion considers the facts of the case, the registrar's grounds to reject the application for registration, the finding of the court, and the legal framework for the establishment and registration of trade unions in South Africa.

## 2 Facts of the case

The appellant (Simunye) was established in 2015 but operated as an unregistered trade union for some time. It decided to register as a trade union in terms of the LRA at the end of 2020. The application was submitted in September 2021; however, it was withdrawn after several queries were received from the registrar. Another application for registration was submitted on 28 March 2022 (par 1). Unfortunately, the registrar rejected the application on 22 June 2022. Thereafter, Simunye decided to appeal against the decision in terms of section 111(3) of the LRA and sought an order that the registrar issue a certificate of registration in its name (par 2). Simunye presented itself as a "modern trade union," formed by workers in non-standard employment relationships. Simunye further described itself in a covering letter as an association of mainly vulnerable workers involved in a wide range of activities, including engaging with employers to secure workers' rights, assisting members in the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining council disputes, worker education, and participation in community struggles (par 6). Its basis was a community advice office called the Casual Workers Advice Office (CWAO), a registered, non-profit and independent community advice office (par 3). The management committee of the CWAO passed a resolution stating that the centre agreed to provide infrastructural support to the union, including the use of office space at no cost (par 7). Simunye was officially constituted in February 2016, and a constitution was adopted, which provided for flexible and responsive leadership (par 4). The first annual general meeting was convened on 8 May 2021, where a new constitution was adopted. A standing committee was also elected, which was responsible for the day-to-day running of the union, and a bank account was opened in the name of the union (par 5). There were minutes of meetings indicating that a different chairperson and a secretary were elected at each meeting. Simunye indicated that it had 1072 members in 41 companies, of which 282 were fully paid. It was stated in the constitution that the union was deliberately constituted to be completely different from the organisational model developed by the traditional South African trade union movement. It further stated that the union did not employ officials, as members carried out organisational work, and that it aimed to keep decision-making power in the hands of members. Membership fees were fixed at R12.50 per month or R150 annually (par 8). Clause 22 of Simunye's constitution stated that the union was independent of trade unions, political parties, employers, the

CWAO, and the state. It was also stated that the union would not require or control any immovable property or financial instruments (par 10).

The registrar refused the application because Simunye's constitution did not meet the requirements of section 95(5)(i) to (n) of the LRA and was not considered a genuine trade union for purposes of section 95(7) of the LRA (par 12). Among other things, the registrar argued that Simunye failed to provide a copy of the minutes of the meeting where it was established, including a copy of the attendance register and evidence of the election of committees and office-bearers. Further, it failed to provide evidence of how its constitution was drafted and adopted, and how its name was adopted; it did not have an address in the Republic, and there was a misrepresentation of facts on the application form. The reliance of Simunye on CWAO was also questioned (par 22). Simunye contended that the registrar erred in his above conclusions.

### **3 Findings of the court**

The court first dealt with the interpretation of section 95 of the LRA and the Guidelines to determine the genuineness of Simunye as a trade union. It stated that section 95 of the LRA should be interpreted in a way that best gave effect to South Africa's obligations in terms of the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 (Convention 87). The court adopted an interpretation that promoted the spirit, purport, and objects of the Bill of Rights, in particular, the right to freedom of association, which gave effect to the LRA's primary objects in compliance with the Constitution and international law obligations (par 27). It stated that to the extent that the requirements for registration limit the right to freedom of association, they should be interpreted restrictively. The court found that the Guidelines should not be interpreted as a checklist of mandatory requirements, as they were intended to address coercive practices on behalf of disguised labour consultancies registered for the purpose of gaining the right to appear before the CCMA and the Labour Court (par 29). Regarding the issue of independence, the court stated that this requirement had to do with employers and employers' organisations, that CWAO was neither an employer nor an employers' organisation, and that there was nothing wrong with a union working with a community advice centre (par 30–32).

Regarding Simunye's constitution, the court found that clause 15 provided for the election of the secretary and the chairperson for each meeting and their functions. Further, clause 23 stated that the union did not employ officials, and that section 95(5)(j) of the LRA means no more than that matters mentioned therein must be addressed in the constitution. Additionally, requiring the constitution to specifically establish the offices of office-bearers, officials, and trade union representatives would be an unjustifiable intrusion into the union's autonomy, contrary to the principles of Convention 87 and section 23 of the Constitution. The same applied to the provisions in section 95(5)(k)–(n), which deal with the procedure for the nomination, appointment, and removal from office of those appointed in terms of par (j) of the section (par 34). It also found that Simunye did not

mislead the registrar in the manner in which a *pro forma* document for registration was completed (par 35).

Regarding items 5 and 6 of the Guidelines, the court found that there could be no doubt that Simunye was an association of employees whose principal purpose was to regulate relations between its members and employers (par 37). In relation to item 7 of the Guidelines, the court found that Simunye explained how it was established and how its constitution was adopted. Concerning item 8 of the Guidelines, the court found that the constitution provided for the qualifications of membership and the sectors in which the union recruited members. It was further found in relation to items 9–12 of the Guidelines that Simunye provided details regarding its membership, which did not suggest that the union was not genuine. Furthermore, regarding item 10 of the Guidelines, the court found that the union provided its history and the basis on which it intended to extend its interests. In relation to item 13 of the Guidelines, it was found that Simunye's activities were not restricted to the referral of disputes and representation of its members in the statutory dispute resolution structures. Regarding the independence of Simunye, the court found that the union was independent, not an association for gain, and that it was a genuine trade union (par 38). It noted that while Simunye's organisational structure was unique, that was not in itself a basis to reject the application as the rising of unions different to traditional union structures was unavoidable, given the growth of non-standard employment relationships (in this regard, the court referred to Davis "The Labour Relations Act: The Fundamental Assumptions Swept Asunder?" in Olivier, Smit and Kalula (eds) *Liber Amicorum: Manfred Weiss* 95). The court then remarked that it was not the registrar's role to be a gatekeeper for traditional forms of trade union organisations, nor his function to question the union's choices (par 38). The appeal was upheld, the registrar's decision was set aside, and he was ordered to register Simunye as a trade union.

#### **4 The establishment and registration of trade unions**

##### *4 1 The international position regarding the establishment and registration of trade unions*

The right to freedom of association is the basis for the establishment of trade unions. Internationally, amongst others the right to freedom of association is protected through the Universal Declaration of Human Rights, 1948 (UDHR), which provides in its article 20 that everyone has the right to freedom of peaceful assembly and association; the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), which directly provides in its article 8 that State Parties to the ICESCR must ensure the right of everyone to form trade unions and join trade unions of their choice subject to rules of the organisation concerned and that no restriction should be placed on this right, other than those prescribed by law and which are necessary in a democratic society and the International Covenant on Civil and Political Rights, 1966 (ICCPR), which specifically provides in article 22

that everyone shall have the right to freedom of association with others, which includes the right to form and join trade unions for the protection of their interests.

The right to freedom of association is also protected by the International Labour Organization (ILO), an international organisation that brings together governments, employers, and workers to set labour standards and develop policies and programmes. It is devoted to promoting social justice and internationally recognised human and labour rights. Among other things, it recognises the importance of the right to freedom of association for workers in the Preamble to the Constitution of 1919. The ILO Declaration of Philadelphia, 1944, also supports the principle of freedom of association. Furthermore, Convention 87 and the Right to Organise and Collective Bargaining Convention 98 of 1949 (Convention 98) both protect the right to freedom of association. In line with the ICESCR, article 2 of Convention 87 states that “workers” and employers without distinction shall have the right to establish and subject only to the rules of the organisation concerned to join organisations of their choice without previous authorisation. Article 3 provides that there should be no interference by public authorities that restricts or impedes workers from exercising the right to freedom of association. Workers shall have the right to draw up their constitutions and rules, to elect their representatives in freedom, and to organise their administration and activities. Article 11 of Convention 87 provides that each member of the ILO undertakes to take all necessary and appropriate measures to ensure that workers and employers may freely exercise the right to organise. Convention 98 prohibits parties’ interference with each other, and article 2(2) defines “employer interference” with a trade union as follows:

“[A]cts which are designed to promote the establishment of workers’ organisations under the domination of employers’ organisations ... or to support workers’ organisations by financial or other means, with the object of placing such organisations under the control of employers or employers’ organisations ...”

Trade unions should, therefore, be established independently by workers. The provision of office space and other facilities for trade union representatives in the workplace would not necessarily amount to undue influence, as it may fall under organisational rights. Additionally, article 3 of Convention 98 states that machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise.

It is evident from the above discussion that international instruments protect the right to freedom of association and the establishment of trade unions by workers; however, no mention is made of the registration of trade unions, which implies that registration is not an obligation and therefore that trade unions may function even though they are not registered. Nevertheless, the ILO has recognised that the registration of trade unions is not incompatible with the terms of its Conventions (*Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* 5ed (2006) 294).

## 4 2 *The constitutional position regarding the establishment and registration of trade unions*

Section 18 of the Constitution provides for the right to freedom of association in general terms, while section 23, in line with the ICESCR, the ICCPR, and ILO Conventions 87 and 98, provides for this right in the employment context (see also *Cronje v United Cricket Board of South Africa* 2001 ILJ 2577 (T)). Section 23(2) of the Constitution specifically provides as follows:

“Every worker has the right–

- (a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union; and
- (c) to strike.”

Like ILO Conventions 87 and 98, the Constitution uses the word “worker” instead of “employee”. The word “worker” implies that the above right should not only be limited to common-law employees. It, therefore, covers all workers, including members of the armed forces (*South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC)). However, section 36 of the Constitution allows for the limitation of the rights contained in the Bill of Rights in terms of law of general application, on condition that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom; hence, the LRA limits the right to freedom of association in some respects. Section 23(4) of the Constitution states as follows:

“Every trade union ... has the right–

- (a) to determine its own administration, programmes, and activities;
- (b) to organise; and
- (c) to form and join a federation.”

This right is afforded to “every” trade union and not just registered trade unions. It is apparent from the above discussion that the Constitution directly protects the right to freedom of association and the establishment of trade unions by workers; however, it does not differentiate between registered and unregistered trade unions. This once more shows that workers are free to establish trade unions; however, the registration of trade unions is not compulsory.

## 4 3 *The LRA’s position regarding the establishment and registration of trade unions*

The LRA gives effect to the rights contained in section 23 of the Constitution and to obligations incurred by South Africa as a member of the ILO. Section 4(1) of the LRA states that every employee has the right to participate in forming a trade union (see *Oil Chemical and General Workers Union v Total SA (Pty) Ltd* (1999) 20 ILJ 2176 (CCMA)). Section 8 of the LRA provides that every trade union has the right to determine its constitution and hold elections for its office-bearers, officials, and representatives. The word “every” implies that even unregistered trade unions have this right. As stated previously, the LRA defines a “trade union” in section 213. Based on this

definition, the LRA limits the right to freedom of association, as only “employees” and not all “workers” can establish and join trade unions (*National Entitled Workers Union (NEWU) v Mtshali* (2000) 21 ILJ 1166 (LC) (*NEWU v Mtshali*); *Midland Chamber of Industries Staff Committee v Midland Chamber of Industries* [1995] 5 BLLR 74 (IC) 77E–H; *Nomabunga v Daily Dispatch* [1997] 11 BLLR 1519 (CCMA); *National Manufactured Fibres Employers Association v Bikwani* (1999) ILJ 2637 (LC)). Unemployed persons and independent contractors may, therefore, not form or join trade unions (Grogan *Collective Labour Law* (2019) 45).

As per the definition, a trade union’s main purpose should be to regulate relations between employees and employers; however, trade unions may pursue other objectives other than those which have to do with the regulation of relations between employers and employees, such as administering retirement and other schemes or funds (Grogan *Collective Labour Law* 38). Unlike the above-discussed international instruments, the ILO conventions, and the Constitution, the LRA directly provides for the registration of trade unions and sets requirements for registration. The purpose of registration, according to the Wiehahn Commission Report, is to protect the interests of trade union members and, more specifically, to safeguard their funds (Wiehahn The Complete Wiehahn Report (Lex Patria 1982 par 4.34.18 485)). Registration promotes the observance of democratic principles in the internal operation and governance of trade unions and ensures the proper financial control over funds in line with public policy (Explanatory Memorandum to the Labour Relations Draft Bill of 1995 (1995) 16 ILJ 278 324). According to Landman (see Landman “The Registration of Trade Unions – The Divide Narrows” 1997 18 ILJ 1183 1188) the registration of trade unions is encouraged because it permits the state and employers to know with whom they are dealing, to have access to the constitution of the trade union as a public document, to contribute towards the maintenance of the principles of democracy in the union, to secure protection of union members, also as regards the financial circumstances of the union and to enable the society to measure the progress and development of trade unions.

Section 95(1) of the LRA states that any trade union may apply to the registrar for registration, if it has adopted a name that meets the requirements of subsection (4) (see also *MISA v Registrar of Labour Relations* [1998] 10 BLLR 1027 (LC); *Independent Municipal and Allied Trade Union (IMATU) v Municipal and Allied Trade Union of South Africa (MATUSA)* (2017) 38 ILJ 1283 (LAC); Manamela “The Interpretation and Application of Section 95(4) of the Labour Relations Act 66 of 1995” 2005 17(3) SA Merc LJ 348), it has adopted a constitution that meets the requirements of subsections (5) and (6); it has an address in the Republic and it is independent. Subsection (2) states that a trade union is independent if it is not under the direct or indirect control of any employer or employers’ organisation and is free of any interference or influence of any kind from any employer or employers’ organisation. Section 95(5) of the LRA provides for 24 aspects that should be included in the trade union’s constitution. These include qualifications for membership, termination of membership, election, and appointment of office-bearers, officials, and trade union representatives. 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." It defines an "office-bearer" as "a person who holds office in a trade union ... and who is not an official." It further defines a trade union representative as "a member of a trade union who is elected to represent employees in a workplace."

The process of registration itself is fairly straightforward, however, section 95(7) of the LRA, states that the registrar must not register a trade union unless he is satisfied that it is a "genuine" trade union (see also *Municipal and Allied Trade Union of South Africa (MATUSA) v Crouse* NO [2015] 11 BLLR 1172 (LC) par 25; Manamela "The Role of the Registrar in the Registration of Trade Unions" 2006 18(4) *SA Merc LJ* 518 519). The word "satisfied" in the section has been interpreted to mean no more than that the registrar must determine whether the requirements for registration have been met, without exercising any discretion (see in this regard *Staff Association for the Motor & Related Industries v Motor Industry Staff Association* (1999) 20 *ILJ* 2552 (LAC) 2558D; *NEWU v Mtshali supra*; Manamela 2006 *SA Merc LJ* 519). Although the LRA provides for the registration of trade unions, it is still not compulsory for trade unions to register with the Department of Employment and Labour. Nevertheless, as previously stated, preference is given to registered trade unions, as they acquire special benefits under the LRA.

In view of provisions of section 95(7) and (8) of the LRA, which refer to the "genuineness" of a trade union, the Labour Relations Amendment Act (12 of 2002) introduced "Guidelines" to assist the registrar in their determination of the genuineness of a trade union. The meaning of the word "genuine" is to be found in the Guidelines themselves (*Workers' Union of South Africa (WUSA) v Crouse* (2005) 26 *ILJ* 1723 1730J (*WUSA v Crouse*)). In terms of item 3 of the Guidelines, the registrar must assess the actual operation of the trade union to determine whether it is genuine or not, and attention should be given to the manner in which it was established, taking into consideration relevant factors. Items 5 and 6 of the Guidelines state that the union must meet the definition of trade union as provided in section 213 of the LRA regarding its membership and functions. Even in cases where the purpose stated in the constitution matches the one in the definition of a trade union, the registrar must still consider the Guidelines for determining the genuineness of a trade union. Regard is therefore not only to form but also substance (*National Union of Metal Workers of South Africa (NUMSA) v Bader Bop (Pty) Ltd* [2003] 2 BLLR 103 (CC) par 52; *Aucamp v South African Revenue Services* [2014] 2 BLLR 152 (LC) par 18–20).

According to item 7 of the Guidelines, factors to be considered in relation to the formation of a trade union include the number of members, the way the constitution was adopted, and the election of the executive committee and office-bearers. Item 8 of the Guidelines requires that the constitution of a trade union should provide for qualifications of membership (see also *National Union of Metal Workers of South Africa (NUMSA) v Lufil Packaging (Isithebe)* [2020] 7 BLLR 645 (CC); *NEWU v Mtshali supra*). Items 10, 11, 13, and 14 of the Guidelines require that the history of the trade union and involvement in collective bargaining, including efforts to acquire

organisational rights, should also be considered. In terms of items 12 and 15 of the Guidelines, the union must recruit members who are already employees, and its activities should not solely consist of referring disputes and cases on behalf of its members to the CCMA, the Labour Court, and other courts. Item 16 of the Guidelines states that a trade union should be completely independent from direct or indirect control of any employer or employers' organisation, while item 17 states that a trade union must be an association of employees that establishes effective branches, holds regular meetings of members, elects shop stewards or other trade union representatives, and office-bearers. According to item 18 of the Guidelines, it must be stated in the constitution of a trade union that the organisation is not for gain, to avoid a situation where the trade union is used to enrich individuals, and item 20 of the Guidelines indicates that the union's source of revenue should mainly be monthly subscriptions paid by its members.

Although the Guidelines may be of assistance to the registrar who must assess the genuineness of the applicant trade union, they are, to a greater extent, a repetition of what the LRA already provides for in terms of the definition of a trade union and the provisions in section 95 of the LRA.

## 5 Analysis and discussion

The finding of the court is now analysed against international standards, the Constitution, the LRA, and the Guidelines, in view of the facts in *Simunye v The Registrar*. In doing so, the analysis determines whether the applicant was indeed established as a trade union as defined by section 213 of the LRA; whether the union complied with the requirements for registration as prescribed by section 95(1) of the LRA, and whether it was a "genuine" trade union in terms of the Guidelines. With regard to the interpretation of section 95 of the LRA and the Guidelines, the court was correct in stating that they should be interpreted in such a way that the interpretation gives effect to South Africa's obligations in terms of Convention 87 and that the court must adopt an interpretation which promotes the spirit, purport, and objects of the Bill of Rights. The Constitution is the supreme law of the Republic, and law or conduct inconsistent with it is invalid (s 2 of the Constitution). When interpreting the Bill of Rights, a court, tribunal, or forum must, amongst other things, consider international law (s 39(1)(b) of the Constitution). The court stated that the Guidelines should not be interpreted as a checklist of mandatory requirements, against which compliance must be assessed; rather, each case should be determined on its merits (*Vidar Rubber Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration (CCMA)* [1998] 6 BLLR 634 (LC)). As stated above, Convention 87 confirms workers' rights to establish and join workers' organisations of their choice (art 2) and that workers' right to freedom of association should not be impeded (art 3). This is supported by section 23 of the Constitution, which protects workers' right to form and join workers' organisations.

The first determination is in relation to the definition of trade union (s 213 of the LRA), which, as previously stated, requires that a trade union should be an association of employees whose main purpose is to regulate relations between employees and employers. Items 5 and 6 of the Guidelines also emphasise the importance of an organisation complying with the definition,

failure of which it would not qualify as a trade union under the LRA. Section 213 of the LRA also provides a definition of “employee”. Part (a) of this definition states that an employee is “any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive any remuneration” and in terms of Part (b) “any other person who in any manner assists in carrying on or conducting the business of an employer” qualifies as an employee. A trade union may not, in its constitution, provide for membership of applicants for employment, as they do not fall under the definition of employee as provided in section 213 of the LRA (*Nomabunga v Daily Dispatch supra*). In *Kylie v Commission for Conciliation, Mediation and Arbitration (CCMA)* ([2010] 7 BLLR 705 (LAC) par 58), it was stated that sex workers are entitled to form and join trade unions but not be involved in activities that further the commission of a criminal offence. Simunye depicted itself as a “modern trade union” which was formed by workers in non-standard employment relationships. “Non-standard employment” is a term used for types of employment arrangements that do not conform to standard employment. These include temporary employees who are provided to a client by temporary employment services (TES or labour brokers); fixed-term employees and part-time employees (Grogan *Workplace Law* (2017) 17; McGregor, Dekker (eds), Budeli-Nemakonde, Germishuys-Burchell, Manamela ME, Manamela TE, Tshoose *Labour Law Rules!* (2021) 38). Owing to their vulnerability, the Labour Relations Amendment Act (6 of 2014) introduced increased protection to non-standard employees and enhanced trade union organisational rights to facilitate their organisation or collective bargaining coverage (s 21(8)(b) and 32(5A) of the LRA as amended). Workers in non-standard employment are therefore regarded as employees who can form and join trade unions (*NEWU v Mtshali supra*; *Midland Chamber of Industries Staff Committee v Midland Chamber of Industries supra* 77E–H). It must be acknowledged that worldwide, there are trends towards non-standard employment and individualisation of employment relations (Theron “Employment is not What it Used to Be” 2003 24 *Industrial Law Journal* 1247 1271). Trade unions should, therefore, not be left behind in terms of how they accommodate such employees.

Items 3 and 7 of the Guidelines further underscore the crucial issue of a trade union being formed by employees associating with one another, considering factors such as the number of founding members at the inaugural meeting, the adoption of the constitution, and the election of committee members. It must be noted that these items are less onerous for applicants for registration compared to existing organisations (Manamela 2006 *SA Merc LJ* 522; *WUSA v Crouse supra*). Simunye provided an explanation of how it was formed, how its constitution was adopted, and the election of committee members. In view thereof, it is submitted that Simunye qualified as an association of employees. With regard to the principal function of a trade union as per the definition of trade union, Du Toit *et al* state that synonyms of the word “regulate” include “co-ordinate” or “organise” whereas the word “relations” refers to “the employment relationship or the relationship between a trade union and one or more employers” (Du Toit, Godfrey, Cooper, Cohen, Conradie, Giles, Gaibie, Fergus *Labour Relations Law: A Comprehensive Guide* (2023) 252). Items

13–15 of the Guidelines mention various factors that can be considered when evaluating the activities of a trade union, including obtaining organisational rights, seeking recognition from employers, and resolving grievances on behalf of members. It must be stated that Simunye was involved in a wide range of activities, including engaging with employers to secure workers' rights and assisting members in the CCMA and bargaining council disputes. Based on this, it is submitted that Simunye's activities and functions are related to the regulation of the relationship between employees and employers, hence, in line with the definition of a trade union. The court, therefore, found that indeed, Simunye was an association of employees, with the main purpose of regulating relations between its members and employers.

The second determination is whether Simunye complied with the four key requirements that applicants for registration should meet in terms of section 95(1)(a)–(d) of the LRA. The first requirement is that the applicant should have adopted a name that meets the requirements of subsection (4) (s 95(1)(a) of the LRA). Although the registrar argued that the union did not provide evidence of how its name was adopted, the applicant had a name, which was "Simunye Workers Forum". It must be indicated that the focus in the section appears to be on whether the name adopted by the trade union meets the requirements of subsection (4) and not necessarily on how the name itself was adopted. The issue of whether the name of "Simunye Workers Forum" met the requirements of subsection (4) or not was not in dispute in *Simunye v The Registrar* and will not be canvassed further in this discussion. The second requirement is that the union must have adopted a constitution which meets provisions of section 95(5) and (6) of the LRA (s 95(1)(b) of the LRA). Again, here, it seems the focus should be on whether or not the union's constitution meets the provisions of the LRA and not necessarily on how it was adopted. Amongst others the constitution of a trade union which applies for registration must state that the union is an organisation not for gain (s 95(5)(a) of the LRA); provide for qualifications of membership (s 95(5)(b) of the LRA; see also items 8–12 of the Guidelines; *Van Wyk & Taylor v Dando & Van Wyk Print (Pty) Ltd* [1997] 7 BLLR 906 (LC)); membership fees (s 95(5)(f) of the LRA; *TGWU v Multi Bus Service CC* (1995) ILJ 213 (IC)); rules for convening and conducting meetings (s 95(5)(g) of the LRA); the manner in which decisions are to be made (s 95(5)(h) of the LRA); the establishment of the office of the secretary (s 95(5)(i) of the LRA); office-bearers, officials and trade union representatives and their functions (s 95(5)(j) of the LRA); procedure for their nomination and election (s 95(5)(k) and (l) of the LRA); circumstances under which they may be removed from office and appeals against removals (s 95(5)(m) and (n) of the LRA). Simunye stated that all union work was to be done by members without remuneration in order to remove any potential for personal financial interest. It was, however, not stated anywhere in the constitution that the organisation was not for gain. It is submitted that this should have been clearly stated in the union's constitution. Clause 8 of Simunye's Constitution provided for qualifications of membership and specified the sectors in which the union recruited members. In *NUMSA v Lufil Packaging (Isithebe)* (*supra* par 64), it was stated that trade unions should operate and organise within their constitutions, as allowing them to

go outside their constitutions would go against constitutional values such as accountability, transparency, and openness. It was further stated that unions are entitled to the powers conferred upon them by their constitutions, implying that admitting members outside the scope specified in the union's constitution is invalid. Simunye's constitution set the membership fees at R12.50 per month, provided rules for convening ordinary meetings and annual general meetings, and stipulated quorums for meetings, as well as the manner in which decisions were to be made. It must be noted that one of the registrar's grounds for the refusal of the registration of the applicant was that its constitution did not meet the requirements of section 95(5)(i) to (n) of the LRA. Simunye's 2016 constitution, amongst others, provided for a flexible leadership structure, with a different chairperson and secretary at each meeting. A standing committee was also elected, which was responsible for the day-to-day running of the union. The court correctly held that clause 15 of the constitution provided for the election of the chairperson and secretary and their functions at each meeting. Further, clause 23 of the constitution stated that Simunye did not employ officials, as organisational work was done by members, without payment. The court also correctly stated that what section 95(5)(j), (k), (m) and (n) require is that matters relating to the section should be addressed in the constitution and therefore requiring more than that would be contrary to Convention 87 and section 23 of the Constitution and will amount to an inroad in the union's self-governance. This will also contravene section 8 of the LRA, which enables trade unions to regulate their own affairs. These subsections to section 95(5) of the LRA require that provision be made for matters mentioned therein without prescribing how it is supposed to be done. Although not formulated as is usually done by other traditional trade unions using the proforma constitution, provisions of Simunye's constitution provided for matters stipulated in section 95(5) of the LRA. It must be noted that the registrar raised no issue in relation to section 95(6) of the LRA, which prohibits discrimination on the grounds of race and sex. As per the court's remarks, Simunye's organisational structure was unique, but that was not a basis for rejecting its application. The court was correct in stating that the registrar's role is not to be a gatekeeper for traditional forms of trade union organisations, nor to question the union's choices. Even though Simunye's constitution generally complied with the provisions of section 95(5) of the Constitution, it is important for trade unions to ensure that their constitutions cover all provisions of the section in clear and unambiguous terms to avoid their applications being rejected. The third requirement is whether Simunye had an address in the Republic as required by section 95(1)(c) of the LRA. Indeed, Simunye used the office space of CWAO and a postal address. Therefore, the court correctly found that Simunye had an address in the Republic, even though it did not have a lease agreement with CWAO. The fourth requirement is whether Simunye was independent as required by section 95(1)(d) of the LRA (see also item 16 of the Guidelines). The registrar refused to register Simunye because it was heavily dependent on CWAO with regard to its infrastructural needs. Concerning this, the management of CWAO took a resolution which stated that CWAO agreed to provide infrastructure to Simunye, which would include the use of office space. Simunye also stated in clause 22 of its constitution that it is independent of trade unions, political parties, employers, CWAO itself, and

the state. Furthermore, there was no evidence to show that CWAO interfered in the operations of Simunye. The court correctly found that the requirement of independence had to do with employers and employers' organisations and that CWAO was neither of the two, as it was a community advice office. Section 95(2) of the LRA clearly states that the union is independent if it is not under the direct or indirect control of any employer or employers' organisation and if it is free of any interference or influence of any kind from any employer or employers' organisation.

Section 96 of the LRA requires that a trade union may apply for registration by submitting a prescribed form that has been properly completed, a copy of its constitution, and any other information that may assist the registrar in determining whether it meets the requirements or not. The registrar may require further information, and in cases where he is not satisfied that the applicant meets the registration requirements, he must inform the applicant that it has 30 days to do so in terms of section 96(4) of the LRA. In *Simunye v The Registrar*, Simunye submitted an application form; however, it was argued on behalf of the registrar that the form misrepresented the facts, as on its face, it was completed by office-bearers, whereas the union's constitution did not provide for officials and office-bearers. It must be admitted that the manner in which the form was completed was a bit confusing; nevertheless, this was appropriately informed by Simunye's constitution. It is submitted that, although Simunye's approach and manner of addressing different requirements of section 95 of the LRA were distinctive, as explained in the covering letter, it generally met the requirements for the establishment and registration of trade unions.

The third and last determination is whether Simunye was a genuine trade union. In view of the above analysis, including the consideration of the Guidelines, there was nothing untoward that could raise suspicions that Simunye was not a genuine trade union as required by sections 95(7) and (8) of the LRA. It is, therefore, concluded that the court was correct in finding that Simunye was a genuine trade union.

## **6 Conclusion**

It is evident from both international instruments and the Constitution that all workers have the right to freedom of association and, therefore, the right to establish and join trade unions of their choice. However, neither of them directly requires trade unions to be registered in order to function as such. The LRA gives effect to the right to freedom of association and limits it only to employees. Employees, in general, therefore have the right to establish and join trade unions. The LRA further provides for the registration of trade unions; however, it does not make this compulsory. The process of applying for registration is not complicated; however, the registrar must satisfy himself that the applicant is indeed a trade union, that it complies with the provisions of section 95 of the LRA, and that it is a genuine trade union, before registering it. The registrar's factual determination is largely based on the information provided by the applicant (see Du Toit *Labour Relations Law: A Comprehensive Guide* (2015) 273). In doing so, the registrar must also consider the Guidelines for determining the genuineness of a trade union in order to avoid registering counterfeit trade unions meant to circumvent

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provisions of the LRA. This, nonetheless, does not give the registrar powers to go beyond what the LRA requires, as that may, in certain cases, create a platform for him to limit employees' right to establish and register trade unions. Given the changes taking place in the nature of employment, some flexibility should be allowed in the establishment and registration of trade unions; however, this should be done within the confines of the LRA. It must be emphasised that South Africa is not immune to worldwide trends towards non-standard employment and individualisation of employment relations, which all have an impact on the establishment and functioning of trade unions (Theron 2003 *Industrial Law Journal* 1271).

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