

No. R. 1446

10 October 2003

LABOUR RELATIONS ACT, 1995 (ACT NO 66 OF 1995)**GUIDELINES ISSUED IN TERMS OF SECTION 95(8)**

I, MEMBATHISI MPHUMZI SHEPHERD MDLADLANA, Minister of Labour, hereby, under section 95(8) of the Labour Relations Act, 1995 (Act No. 66 of 1995), and after consulting NEDLAC, issue the guidelines in the Schedule hereto.

M M S MDLADLANA

MINISTER OF LABOUR

GUIDELINES ISSUED IN TERMS OF SECTION 95(8) OF THE LABOUR RELATIONS ACT, NO. 66 OF 1995

THE PURPOSE OF THIS DOCUMENT

Purpose

1. This document contains guidelines published by the Minister of Labour, in consultation with Nedlac, that are to be applied by the Registrar of Labour Relations in determining whether an applicant for registration in terms of the Labour Relations Act (LRA) is a genuine trade union or a genuine employers' organisation. In terms of section 95(7) of the Labour Relations Act, the Registrar may only register a trade union or an employers' organisation if the Registrar is satisfied that it is a genuine trade union or a genuine employers' organisation. In addition, in terms of section 106 (2A) of the LRA, the Registrar may cancel the registration of a trade union or an employers' organisation that is not, or has ceased to function as, a genuine trade union or employers' organisation, as the case may be.

Application

2. These guidelines deal separately with trade unions and employers' organisations.

Approach

3. In order to determine whether an organisation is genuine, it will be necessary for the Registrar to examine the actual operation of the organisation. In the case of an applicant, particular attention will have to be paid to the manner in which the organisation was established and formed. In the case of an existing organisation, attention will have to be paid to its actual activities and functioning. In evaluating whether a trade union or employer's organisation is genuine, the Registrar must take into account all relevant factors.

4. These guidelines are not concerned with evaluating whether the constitution of a trade union or employers' organisation complies with section 95(5) of the LRA.

TRADE UNIONS

The Definition of a Trade Union

5. The LRA defines a trade union as follows:

"An association of employees whose principal purpose is to regulate relations between *employees* and *employers*, including any *employers' organisations*."

6. Therefore, an organisation cannot be registered as a trade union or continue to operate as a registered trade union unless –

- (a) it is *in fact* an association of employees;
- (b) the *principal* purpose of the activities is to regulate relations between its members and their employers (or employers' organisations representing those employers).

It will therefore be necessary to raise and examine the actual process of forming a trade union, its composition and membership and the activities it undertakes on behalf of its members. These issues are examined in greater detail in this document.

Formation of a trade union

7. The process followed to form a trade union can give important indications as to whether an organisation is a genuine trade union.

Key aspects of the process that should be examined include –

- 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;
- the election of an executive committee or council of members and the election of office-bearers.

The crucial issue that must be addressed is whether the formation of a trade union involved employees associating with one another to establish an organisation to regulate relations with their employer(s).

Qualification for membership of a trade union

8. In terms of section 95(5)(b) of the LRA, the constitution of a trade union must prescribe the qualifications for membership. There is no requirement in the LRA that a trade union confine its membership to employees in a particular sector or sectors of the economy or a particular geographical region. However, the failure to place appropriate qualifications on membership may indicate, together with other factors, that the trade union is not a genuine trade union.

Membership of a trade union

9. The LRA does not create any membership threshold that trade unions must meet to register. Nevertheless, the size of the membership may

be an indication that a trade union is not a genuine trade union. It is legitimate for trade unions to restrict their membership to small groups of workers; for instance, the employees of one employer or within one bargaining unit or a small trade or profession. However, an extremely small membership in relation to the number of employees qualified to join, may indicate that the trade union is not a genuine trade union.

10. When evaluating the membership of a trade union, attention should be paid to its history. The fact that the membership of a trade union with a long history of representing its members' interests has declined to small numbers is not an indication in itself that it has ceased to be a genuine trade union.

11. The primary purpose of a trade union is to regulate relations between employees and employers (or employers' organisations). In particular, this includes the regulation of these relationships through collective bargaining. A trade union will only be able to seek organisational rights in terms of the LRA or demand collective bargaining where it recruits members from the employees of particular workplaces or bargaining units. The fact that a trade union has not sought to gain a critical mass of members in any particular workplace or bargaining unit that would allow it to gain organisational rights may be an indication that the trade union is not a genuine trade union.

12. In order to have a primary purpose of regulating relations between employees and employers (or employers' organisations) a trade union must recruit as members employees who are in employment. The fact that a significant proportion of a trade union's membership only become members after the termination of their employment is an indication, together with other factors, that the trade union is not a genuine trade union.

Activities of the trade union

13. A trade union may seek to regulate relations between its members and their employers and employers' organisations by –
- (a) seeking and/or obtaining organisational rights in terms of chapter 3 of the LRA;
 - (b) seeking and/or obtaining recognition from employers as the collective bargaining representative of its members;
 - (c) submitting and negotiating in respect of demands on behalf of their members for approved wages and working conditions.
14. Failure to engage in these activities does not in itself indicate that a trade union is not a genuine trade union. There may be reasons why a trade union had not succeeded in gaining organisational rights or

obtaining recognition. These may include difficulties in recruiting members and hostility from employers. However, the failure to seek to obtain organisational rights or recognition is a strong indication that the trade union is not a genuine trade union as these rights provide the basic platform for representing members' interests.

15. It is a legitimate function of a trade union to seek to resolve grievances on behalf of its members, including those who have been dismissed, and it can be expected that all genuine trade unions would undertake activities in this regard. However, the fact that a trade union's activities solely, or to a large extent, consist of referring disputes and cases on behalf of its members to the CCMA, the Labour Court or other courts, is an indication that a trade union is not a genuine trade union.

Independence from employers

16. A trade union may only be registered and continue to operate as a registered trade union if it is independent. In terms of section 95(2), a trade union is not independent if it is under the direct or indirect control of any employer or employers' organisation and is not free of interference or influence of any kind from any employer or employers' organisation. Factors that would indicate that a trade union is not independent are -

- (a) That any of the officials or office-bearers of a trade union are also officials or office-bearers of an employers' organisation;
- (b) That the trade union operates from the same premises or shares facilities with an employers' organisation;
- (c) an employer assisted with the formation of the trade union or that the trade union operates as a "sweetheart" union (i.e. a trade union that exists to further the interests of the employer or to undermine independent trade unions).

Association of employees

17. A trade union must be an association of employees. Indicators that a trade union is an association of employees are –

- (a) the establishment and effective functioning of branches;
- (b) the holding of regular meetings of members;
- (c) the election of shop stewards or other trade union representatives in workplaces;
- (d) the election of members as office-bearers.

Association not for gain

18. In terms of section 95(5)(a) of the LRA a trade union must state in its constitution that it is an association not for gain. The purpose of this requirement is to prevent trade unions from being used as vehicles for enriching individuals or as a cover for profit-making businesses. In evaluating whether a trade union is a genuine trade union, it is important to examine the actual financial operation of the trade union. Among the factors that may indicate that a trade union is operating in fact for the gain of certain individuals are the following :

- (a) Unrealistically high salaries and allowances are paid to the officials, office-bearers or employees of the trade union.
- (b) Interest-free or low interest loans are made to officials, office-bearers or employees, and those loans are not repaid.
- (c) Family members of office-bearers or officials are employed by the trade unions.
- (d) Income earned by the trade union is not used for the benefit of the organisation and its members but is paid out to officials, office-bearers or employees.

19. It must be borne in mind that it is not inappropriate for trade unions to pay competitive salaries to attract competent and qualified officials and employees. Likewise, there may be circumstances in which established trade unions may decide to provide loans on favourable terms to their officials, office-bearers or employees.

20. Usually the major source of revenue for trade unions is a subscription usually paid on a monthly basis. In general terms this will be a flat rate payment or a payment expressed as a percentage of the members' income. Trade unions may have other sources of income, such as investments.

21. The financial arrangements made with members of a trade union on behalf of whom litigation, particularly dismissal disputes, is instituted, is an indication of whether the trade union may not be a genuine trade union or may be operating as an association for gain. Where a trade union charges its purported members a substantial proportion of the settlement reached in disputes, this may be an indication that the trade union is not a genuine trade union. This does not mean that it is not appropriate for genuine trade unions to require members to make realistic contributions to the costs of bringing cases on their behalf. However, the fact that a member is required to pay a substantial percentage of the settlement to the union, would be a strong indication that the organisation is not a genuine trade union.

Federation affiliations

22. The fact that a trade union is affiliated to a federation of trade unions, the other members of which are genuine trade unions, is an indicator that the trade union is a genuine trade union.

EMPLOYERS' ORGANISATIONS**Definition of an employers' organisation**

23. The LRA defines an employers' organisation as follows:

"Any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between *employers and employees or trade unions*".

24. Therefore, an organisation cannot be registered as an employers' organisation or continue to operate as a registered employers' organisation unless –

- (a) the employers who are members of the organisation have in fact associated together;

- (b) the purposes for which they have associated together include regulating relations between employers and employees or trade unions.

25. It will therefore be necessary to examine the actual process of forming an employers' organisation as well as its composition and membership and the activities it undertakes on behalf of its members.

Formation of an employers' organisation

26. The process followed to form an employers' organisation can give important indications as to whether the employers who are members of the organisation have associated together. The key aspect of the process that should be examined include –

- the number and/or size of the founding members who attended the inaugural meeting to establish the employers' organisation;
- the means by which the constitution of the employers' organisation was drafted and adopted;
- the election of executive committee or council members and the election of office-bearers.

27. The crucial issue that must be addressed is whether the formation involved employers associating with one another to establish an employers' organisation.

Qualification for membership of an employers' organisation

28. In terms of section 95(5)(b) of the LRA, the constitution of an employers' organisation must set out the qualifications for admission to membership. There is no requirement in the LRA that an employers' organisation should confine its membership to employers in a particular sector or sectors of the economy or a particular geographical region. However the failure to place appropriate qualifications on membership may be an indication, together with other factors which are discussed below, that the employers' organisation is not a genuine employers' organisation. Where an employers' organisation has extremely wide qualifications for membership, it is appropriate to consider whether its members are in reality associating with each other for the purpose of regulating relations between themselves and their employees or the trade unions.

Membership of an employers' organisation

29. The LRA does not create any membership threshold that employers' organisations must meet to register. Nevertheless, the size of the membership (in terms of number of employers or number of employees

employed by them) may be an indication that the employers' organisation is not a genuine employers' organisation. It is legitimate for employers' organisations to restrict their membership to employers in small sectors of the economy.

Activities of an employers' organisation

30. The operation of an employers' organisation must involve employers associating with one another, *inter alia*, for the purpose of regulating relations between themselves and their employees or the trade unions to which the employees belong. This would be the case where the employer members meet together for the purposes of jointly engaging in collective bargaining with trade unions. The fact that the activities of the employers' organisation consist largely or solely of individual consultations between the employers who are members and officials of the employers' organisation, would be an indication that the employers' organisation is not a genuine employers' organisation.

Independence from trade unions

31. The fact that an employer's organisation is under the direct or indirect control of a trade union is an indication that it is not a genuine employers' organisation. Factors that would indicate that the employers' organisation is under the control of a trade union are -

- (a) that any of the officials or office-bearers of the employers' organisation are officials or office-bearers of a trade union;
- (b) that the employers' organisation operates from the same premises and shares facilities with a trade union.

Association not for gain

32. In terms of section 95(5)(a) of the LRA an employers' organisation must state in its constitution that it is an association not for gain. The purpose of this requirement is to prevent employers' organisations from being used as vehicles for enriching individuals or as a cover for profit-making in business. In evaluating whether an employers' organisation is a genuine employers' organisation, it is important to examine its actual financial operation. Among the factors that may indicate that an employers' organisation is in fact operating for the gain of individuals are the following:

- (a) Unrealistically high salaries or allowances are paid to the officials, office-bearers or employees of the employers' organisation.
- (b) Interest-free or low interest loans are made to officials, office-bearers or employees, and those loans are not repaid.

- (c) Family members of office-bearers or officials are employed by the employers' organisation.
 - (d) Income earned by the employers' organisation is not used for the benefit of the organisation and its members but is paid out to officials, office-bearers or employees.
33. It must be borne in mind that it is not inappropriate for employers' organisations to pay competitive salaries to competent and qualified officials and employees. Likewise, there may be circumstances in which established employers' organisations may decide to provide loans and favourable terms to their officials, office-bearers or employees.
34. Usually the major source of revenue for employers' organisations is likely to be a subscription paid on a regular basis. The financial arrangements made with members of an employers' organisation in respect of litigation, particularly dismissal disputes, may be an indicator whether the employers' organisation is in fact operating for the gain of certain individuals.

NOTICE ISSUED BY THE MINISTER OF LABOUR, AFTER CONSULTING NEDLAC, IN TERMS OF SECTION 33A(13) OF THE LABOUR RELATIONS ACT, NO. 66 OF 1995

- (1) An arbitrator conducting an arbitration in terms of section 33A of the Labour Relations Act, No. 66 of 1995 ("the Act") may impose a fine in terms of section 33A(8)(b) of the Act subject to the maximum fines set out in Tables One and Two of this item.
- (2) The maximum fine that may be imposed by an arbitrator in terms of section 33A(8)(b) of the Act –
- (a) for a failure to comply with a provision of a collective agreement not involving a failure to pay an amount of money, is the fine determined in terms of Table One;
- (b) involving a failure to pay an amount due in terms of a collective agreement, is the greater of the amounts determined in terms of Table One or Table Two.

Table One: Maximum permissible fine not involving an underpayment

No previous failure to comply	R100 per employee in respect of whom the failure to comply occurs
A previous failure to comply in respect of the same provision	R200 per employee in respect of whom the failure to comply occurs
A previous failure to comply within the previous 12 months or two previous failures to comply in respect of the same provision within three years	R300 per employee in respect of whom the failure to comply occurs
Three previous failures to comply in respect of the same provision within three years	R400 per employee in respect of whom the failure to comply occurs
Four previous failures to comply in respect of the same provision within three years	R500 per employee in respect of whom the failure to comply occurs.

Table Two: Maximum permissible fine involving an underpayment

No previous failure to comply	25% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within three years	50% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within a year, or two previous failures to comply in respect of the same provision within three years	75% of the amount due, including any interest owing on the amount at the date of the order

Three previous failures to comply in respect of the same provision within three years	100% of the amount due, including any interest owing on the amount at the date of the order
Four or more previous failures to comply in respect of the same provision within three years	200% of the amount due, including any interest owing on the amount at the date of the order