

Trade union liable for neglecting to prosecute members' claims

 By [Johan Botes](#)

16 Oct 2013

The Constitutional Court held (on 9 October 2013) that a trade union cannot avoid liability for its neglect to prosecute claims by its members merely because the union has a constitutional right to determine its own administration.



Image courtesy of cooldesign /
FreeDigitalPhotos.net

In determining its own administration - in accordance with section 23(4)(a) of the Constitution - the union does not have the right to withdraw its representation of its members with impunity; it still had to act in a manner that does not cause prejudice to its members. The judgement in *FAWU v Ngcobo NO and Mkhize* (CCT 50/12; [2013] ZACC 36) represents a victory for members against negligent conduct by their trade union representatives.

In 2002, the Food and Allied Workers Union (FAWU) agreed to represent two employees of Nestle South Africa (Pty) Ltd who claimed that they were unfairly dismissed. FAWU duly referred a dispute, alleging unfair dismissal of their two members, to the Commission for Conciliation, Mediation and Arbitration (CCMA). When the dispute could not be resolved at conciliation, the CCMA issued a certificate confirming this. FAWU was then entitled to refer the dispute for adjudication to the Labour Court within 90 days of the certificate being issued. It advised the two members that it would do so. However, the union did not refer the dispute.

Case lacked merit

The 90-day period lapsed. Although the union could still refer the claim to the Labour Court and apply for condonation for the late filing, it did nothing of that sort. Instead, after the members took legal advice from a university law clinic, the union assigned the case to another official. He advised them that they have to apply for condonation, but then failed to do so. Instead, he re-initiated proceedings at the CCMA. The CCMA dismissed this attempt.

The trade union's attorney then furnished it with a legal opinion advising that the case lacked merit and that the union risked an adverse cost order if it were to proceed. FAWU relied on this to advise the two members that it would not proceed with its claim in the Labour Court. Almost two years had lapsed already since the two members were dismissed by their employer.

The two members obtained legal advice. Their attorneys demanded that FAWU refer the dispute to the Labour Court and apply for condonation. The union did not respond to the demand. The attorneys issued summons on behalf of their clients.

The High Court awarded the two members consolation payment (solatium) of 12 months' remuneration as being just and equitable. The court held that the union had an obligation to prevent prejudice to its members where it agreed to assist them.

FAWU appealed the judgment. The SCA, in a split decision, held in favour of the two members. It held that the union agreed to assist the members under a contract of mandate. As such, it was obliged to perform its functions faithfully, honestly, and with care and diligence. FAWU's failure to, firstly, refer the dispute and, having failed to do so, then to apply for condonation, was in breach of its duty to act honestly or diligently.

In proceedings before the Constitutional Court, FAWU argued that it enjoyed special protection under the Constitution and LRA.

The argument went as follows:

- The Constitution allows a trade union to determine its own administration (section 23(4)(a));
- The LRA allows the union to act in its own interest, on behalf of any of its members or in the interest of any of its members (section 200(1));
- The union's own constitution permitted it to provide legal assistance to members ... where it deems it in the interest of the union to do so (clause 5.110);
- Where it is not in the union's interest to represent members, the union's contractual liability (to the members it undertook to represent is) is limited.

The Constitutional Court unanimously rejected this argument. It held that the union could not pursue its own interests, with impunity, when it has caused injury to members by failing to represent them properly. The union's own constitution suggested that the union will take responsibility for the negligent action of those acting on its behalf. The court stated that, even if the trade union was permitted to withdraw from a matter where it agreed to represent its members, it was still obliged to take such a decision in good faith and inform the members timeously. It was obliged to act in good faith and could only withdraw if the members could fulfil the mandate previously given to the trade union.

The judgement is an important reminder of the responsibility shouldered by trade unions in representing its members. The union attracts liability for its actions where it agrees to act on behalf of its members and then fail to carry out that mandate diligently and in good faith.

It is likely that we will see an increase in the number of claims brought against trade unions by disgruntled members. Trade unions should guard against negligent conduct by its officials or office bearers. It may be forced to obtain indemnity insurance against such claims by members, as suggested in the proceedings in the High Court. Ultimately, whether the trade unions self-insure or transfer the risk to an insurer, the judgement sends a clear signal that members need not put up with negligent conduct of its labour representatives. If this result in greater care applied to the management of labour disputes by trade unions, everybody stands to gain. The diligent prosecution of claims before the CCMA or Labour Court can only lower the employee relations climate from its current heightened temperature.

ABOUT JOHAN BOTES

Johan Botes is Head of the Employment Practice for Baker McKenzie in Johannesburg. He has a Master's Degree in Labour Law, and regularly appears in the CCMA, Bargaining

Councils, Labour Court and High Court. Contact Johan: Tel: +27 (0) 11 911 4400, mobile: +27 (0) 82 418 0157, switchboard: +27 (0) 11 911 4300, fax: +27 (0) 11 784 2855
Johan.Botes@bakermckenzie.com

- #BizTrends2024: Adapting to change and the growing call for DEI - 18 Jan 2024
- Claiming constructive dismissal - take advice from your wingman - 21 Sep 2023
- Too sick to work, but well enough to march? Not so fast... - 26 Jul 2023
- #BizTrends2023: Quitting quiet quitting - balancing the needs of employers and employees - 23 Jan 2023
- Confidentiality clauses - whistles can't be blown if employer consent is required - 2 Jun 2022

[View my profile and articles...](#)

For more, visit: <https://www.bizcommunity.com>