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IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

**Reportable
Case no: DA31/22**

In the matter between:

CCI SOUTH AFRICA (PTY) LTD

Appellant

And

**AFRICAN NATIONAL CONGRESS YOUTH LEAGUE
Respondent**

First

AFRICAN NATIONAL CONGRESS

Second Respondent

SBUSISO KHUMALO

Third Respondent

SANELE MBAMBO

Fourth Respondent

XOLO MAGUTSHWA

Fifth Respondent

Heard: 14 September 2023

Delivered: 06 March 2024

Coram: Waglay JP, Mlambo JA et Malindi AJA

Summary: Mootness – Section 16 of the Labour Relations Act – Discretion to grant leave to appeal if matter is moot – Requirements to be considered –

Practicality of order – Importance and complexity of issue – Ripeness of the arguments – Presence of conflicting judgments – Weight of factors depends on facts of each case – Held: No requirements met, appeal dismissed

Jurisdiction – Protest – Whether Regulation of Gatherings Act or Labour Relations Act applies – Labour Relations Act exclusively governs labour disputes – Involvement of political party not permitted in labour relations except in advisory capacity – Regulation of Gatherings Act and not Labour Relations Act applies to protest action that does not involve employees and a union – Held: Employee's and trade union not involved in protest action, Labour Court lacks jurisdiction

JUDGMENT

MLAMBO JA

Introduction

[1] This is an appeal brought by CCI South Africa (Pty) Ltd (Appellant) with the leave of the Court *a quo*. The Appellant seeks an order setting aside the whole Judgment and order of the Labour Court and replacing it with one declaring that the Court *a quo* had jurisdiction to hear the matter because the Respondents'¹ conduct was either a strike or protest action, or conduct in furtherance of such.

[2] The appeal is not opposed by the Respondents who did not participate in the proceedings.

Parties

¹ All references to "the Respondents" refer to all but the Second Respondent who was not involved in the facts of this case but merely cited as the parent body of the First Respondent.

- [3] The Appellant is CCI South Africa (Pty) Ltd, a company duly incorporated in terms of the company laws of South Africa, with registration number [...] H[...] Street, U[...].
- [4] The First Respondent is the African National Congress Youth League (ANCYL), the youth league of the Second Respondent. The Second Respondent is the African National Congress (ANC), a duly registered political party. The Third and Fourth Respondents' are Sbusiso Khumalo and Sanele Mbambo, Regional Congress Preparatory Committee Convenors in the eThekweni region of the ANCYL. The Fifth Respondent is Xolo Magutshwa a Regional Congress Preparatory Committee Organiser in the eThekweni region of the ANCYL.

Factual background

- [5] On 15 February 2022, the Appellant obtained an interim interdict from the Labour Court against the Second to Fifth Respondents. In terms of the interdict, these Respondents were interdicted from interfering with the Appellant's business (first interdict). In the preceding period, the Appellant had seen a leaflet bearing the ANCYL's logo which called for a shutdown of the Appellant as well as a list of demands relating to various employment issues. Subsequently, one of the Appellant's staff members showed the Appellant's management a WhatsApp voice note allegedly from the Respondents, also relating to the proposed shutdown of the Appellant, and with a repeat of the same demands. This was also the case on Facebook, where the Appellant's attorney found posts made by the Third Respondent, where there was a leaflet with the same demands and a call for a shutdown of the Appellant.
- [6] In view of the first interdict, the proposed march to the Appellant did not occur. However, a similar scenario played out in the time following the first interdict and the launching of the second interdict application, which is the subject of the current appeal.

- [7] On 23 February 2022, it was brought to the attention of the Appellant's management that there was a new proposed march to its premises. This time the march would start at Cornubia Circle and end at the Appellant's premises. The next day, the Appellant found out that the eThekweni Municipality had granted the Second Respondent permission for the march, in line with the Regulation of Gatherings Act² (RGA). However, it also found out that the Municipality was misled by the Second Respondent who misrepresented themselves as the "*ANC Youth League and Workers Union*", and that was who permission for the march was given.
- [8] In this instance as well, there were posters, flyers and Facebook posts circulated about the march with a list of demands and a call for the general public to join on 25 February 2022. In addition, there was a newspaper article about the march in which the Fifth Respondent was quoted repeating the same demands. All of this caused the Appellant to launch the second interdict application under the same case number.

In the Labour Court

- [9] The matter came before Allen-Yaman AJ as an urgent application, which was heard on the same day as the proposed march. The Respondents were represented but did not file an answering affidavit due to the short time period granted to them.
- [10] The Appellant argued that the Respondents had circumvented the first interdict application by misrepresenting themselves as a union and merely marching outside of the area mentioned in that interdict. The crux of the Appellant's submissions was that the Second Respondent was not a registered union and therefore could not participate in labour matters, other than in an advisory capacity. They said the Second to Fifth Respondents' conduct was a strike or protest action, or conduct in furtherance of a strike or protest action, which had the

² Act 205 of 1993, as amended.

purpose of obstruction or retardation of work at the Appellant's premises. As the ANCYL was not a union, this conduct would be in breach of the Labour Relations Act³ (LRA).

[11] The Respondents did not challenge the Appellant's facts but raised the issue of jurisdiction. They argued that the Labour Court did not have jurisdiction over the matter, as they were protesting in terms of section 17 and not section 23 of the Constitution.⁴ The Appellant said that this was not the case as the Respondents had clearly linked the march to labour relations, and had even misrepresented themselves as a trade union when applying for permission to march. They repeated that the effect of the march would be the obstruction or retardation of work at their premises, so this was in their view, conduct within the definition of strike or protest action, or conduct in furtherance of a strike or protest action.

[12] The Judge in the Court *a quo* found in favour of the Respondents and concluded that she did not have jurisdiction to hear the matter. Having firstly set out the provisions of the LRA relating to strikes and protest action, she found that the march was neither a strike, protest action nor conduct in furtherance of either. The reason for this was that the Appellant's employees did not stop working, so there was no refusal to, obstruction or retardation of work.

[13] The Court also found that there was no evidence before it showing a contravention of the LRA, because even if the protest was in relation to labour matters concerning the Appellant, the Respondents were, in its view, marching in terms of section 17 of the Constitution, in line with the RGA.

³ Act 66 of 1995, as amended.

⁴ Section 17 of the Constitution of the Republic of South Africa, 1996 provides as follows:

“17. Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”

Section 23 in relevant part provides that:

“(2) Every worker has the right—

...

(c) to strike.”

[14] As to the cases relied on by the Appellant, the Court *a quo* found all of them distinguishable on the facts presented by the Appellant. With the exception of *Vodacom (Pty) Ltd and others v National Association of South African Workers and another*⁵ (*Vodacom*), she found that because there was no conduct in furtherance of a strike or protest action – because its employees continued working – the Appellant could not rely on those cases. As to the *Vodacom* case, she found that the Appellant did not plead a violation of their property rights, so that case too did not find application in the matter. For all these reasons, she concluded that the Labour Court lacked jurisdiction to hear the matter.

Issues in the appeal

[15] There are three main issues to be decided on appeal. The first relates to an interpretation of the relevant provisions of the LRA, and whether the Respondents' conduct fell within the definitions of "strike" and "protest action". The second relates to the jurisdiction of the Labour Court regarding a strike or protest action that does not involve a registered trade union, but a political party. The third relates to mootness. The appropriate starting point will be the question of mootness because if the matter is moot, there will be no need to consider the remaining two issues, unless we exercise our discretion to hear the appeal on the basis that it would be in the interests of justice to do so.

Mootness

[16] Section 16 of the Superior Courts Act⁶ sets out the procedure on appeal to this Court. As to mootness, in section 16(2)(a)(i) it provides:

‘16. Appeals generally

(1) Subject to section 15 (1), the Constitution and any other law –

⁵ [2019] ZALCJHB 49; (2019) 40 ILJ 1882 (LC) (*Vodacom*).

⁶ Act 10 of 2013, as amended.

...

(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.’

[17] It is settled law that Courts do not provide advisory opinions and that matters that are moot will ordinarily not be considered. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,⁷ the Constitutional Court explained mootness as follows:

‘A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.’⁸

[18] There is, however, an exception to this rule. Where it would be in the interests of justice for the matter to be heard, a Court may exercise its discretion to hear a matter that is moot. The Constitutional Court explained the exception in *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others*⁹ (*Normandien*):

‘[46] It is clear from the factual circumstances that this matter is moot. However, this is not the end of the inquiry. The central question for consideration is: whether it is in the interests of justice to grant leave to appeal, notwithstanding the mootness. A consideration of this Court’s approach to mootness is necessary at this juncture...

[47] Mootness is when a matter “no longer presents an existing or live controversy”. The doctrine is based on the notion that judicial resources

⁷ [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39.

⁸ Id at para 21 fn 18. This case was followed by this court in *Potgietersrust Platinum Limited (Mokgalakwena Section) v Ditsela and Others* [2015] ZALAC 29 at para 9 fn 5; *City of Cape Town v South African Municipal Workers Union obo Abrahams and Others* [2012] ZALAC 30; (2012) 33 ILJ 1393 (LAC) at para 11; and *Multichoice Africa (Pty) Ltd v Broadcasting, Electronic Media and Allied Workers Union* [2011] ZALAC 18; [2012] 2 BLLR 158 (LAC); (2012) 33 ILJ 177 (LAC) at para 16.

⁹ [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (*Normandien*).

ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are “abstract, academic or hypothetical”.

[48] This Court has held that it is axiomatic that “mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require”. This Court “has discretionary power to entertain even admittedly moot issues”.

[49] Where there are two conflicting judgments by different Courts, especially where an appeal court’s outcome has binding implications for future matters, it weighs in favour of entertaining a moot matter.

[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:

- (a) whether any order which it may make will have some practical effect either on the parties or on others;
- (b) the nature and extent of the practical effect that any possible order might have;
- (c) the importance of the issue;
- (d) the complexity of the issue;
- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving the disputes between different courts.’¹⁰ [Footnotes omitted]

[19] The weight to be attached to each factor depends on the facts of each matter and one factor can outweigh all others. In *Association of Mineworkers and Construction Union and Others v AngloGold Ashanti Limited t/a AngloGold Ashanti and others*,¹¹ this court dismissed an application to consider a moot matter on the ground that

¹⁰ Id at paras 46 - 50.

¹¹ [2020] ZALAC 45; (2020) 41 ILJ 2763 (LAC).

*“there [was] no significant point of law which flows from [the] appeal that requires determination by this Court in circumstances where there is no longer a live dispute between the parties”.*¹² The appellants in that matter wanted the court to interpret a provision of the LRA which this Court and the Labour Court had already ‘considered ... in carefully written judgments’.¹³

Appellant’s submissions on mootness and analysis

[20] The Appellant accepts that the matter is moot but it sought to persuade us that it would be in the interests of justice for this Court to hear the appeal despite it being moot. It argued that in the first interdict, the Court was in agreement with it that the Respondents’ conduct was unlawful, and that the second interdict judgment is in conflict with this. It submitted that the judgement in the second interdict would allow political parties to circumvent the laws limiting their involvement in labour matters. The argument was that these parties would simply deny that they are involved in strike or protest action on the basis that they are protesting under section 17 and not 23 of the Constitution. The Appellant also argued that this Court’s decision will have binding implications for future matters. Lastly, on mootness, it argued that not only did the Labour Court grant leave to appeal, but it did so as a result of a “compelling need” for this Court to pronounce on the merits.

[21] It appears prudent to consider the Appellant’s arguments to determine if the interests of justice compel us to hear the appeal. It is well settled that the involvement of a political party in labour matters is limited to an advisory one only, because they are not trade unions. In *Langplaas Boerdery CC and Others v Matshini and Others*¹⁴ (*Langplaas Boerdery*), one of the cases relied on by the Appellant, the Labour Court ordered a political party to pay the costs of an application for an interdict for their involvement in an unprotected strike. It reasoned as follows:

¹² Id at para at 24.

¹³ Id at para 18.

¹⁴ [2020] ZALCJHB 246; [2021] 4 BLLR 427 (LC); (2021) 42 ILJ 1210 (LC).

[17] I accept from the founding affidavit that the unprotected strike action was accompanied by unlawful and violent conduct, which was exacerbated by the involvement of other role players, including members of the surrounding communities and the [political party] in particular. Inasmuch as the Employees were appreciative of the [political party's] role in highlighting their concerns, it is my view that it had ultimately entered into a labour dispute, when it clearly had no business to do so.

[18] Being a political party, and to the extent that the [political party] was of the view that it needed to assist the farmworkers, its role, in the light of the Employees being not unionised, ought to have been limited to an advisory one. This could have included referring the Employees to the DOEL, or (given the nature of the other grievances raised i.e. allegations of racism, and being compelled to attend church services) to the relevant Chapter 9 Institutions such as the South African Human Rights Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

[19] By however entering the arena, and actively participating in and/or instigating the strike and the accompanying violent conduct, the [political party] made itself party to a labour dispute which it had no business with. By further advising the applicants through their attorneys of record that it would defend this application and further seek a punitive costs order against the applicants, the [political party] became party to this litigation, when it should have had a limited advisory role in the dispute between the Employees and the applicants...'¹⁵

[22] There were similar outcomes in the other cases relied upon by the Appellant. In *Calgan Lounge (Pty) Ltd v National Union of Furniture and Allied Workers Union of*

¹⁵ Id at paras 17-19.

South Africa (NUFAWSA) and others,¹⁶ the employees in that case had joined the protest action instigated by the political party, that is not the case in this matter. In both *Langplaas Boerdery*¹⁷ and *Brightstone Trading 3 Closed Corporation t/a Gordon Road Spar v Economic Freedom Fighters and Others*¹⁸ (*Brightstone*), interdicts were granted after the employees in those cases approached a political party, which then intervened on their behalf. The political party was found to be instrumental in instigating strike action that was joined by the employees. This too was not the case in the current matter. In any event, reliance on the *Brightstone* case is further misplaced because an appeal by the political party was recently upheld by this court in *Economic Freedom Fighters v Brightstone Trading 3 CC t/a Gordon Road Spar and others*.¹⁹ It was found that the political party had not authorised the conduct of its members (through actual or ostensible authority), so the interdict of the Labour Court did not apply to them and was set aside.

[23] Returning to the question of whether the LRA or the RGA are applicable to this matter, the *Court a quo* in the second interdict referred to *Go Touch Down Resort-Season CC and another v Farm Rural Informal Dwellers Association and another*.²⁰ In that matter, the High Court was faced with a situation where it was accepted that the respondent was not a trade union and that there was no labour relationship between the parties. The question before it was whether it could grant an interdict in terms of the RGA or if the matter should have been taken to the Labour Court to be dealt with in terms of the LRA.²¹ It concluded that because there “[was] no strike or lockout and no conduct in furthering a strike or lockout” the High Court and not the Labour Courts had jurisdiction because the latter only deal with issues that arise from the application of the LRA.²²

[24] The Supreme Court of Appeal made this position clear in another case relied on by the *Court a quo* – *National Union of Metalworkers of South Africa and others v*

¹⁶ [2018] ZALCJHB 334; (2019) 40 ILJ 342 (LC); [2019] 4 BLLR 393 (LC).

¹⁷ *Langplaas Boerdery* above n 15 para 9.

¹⁸ [2021] ZALCJHB 122; (2021) 42 ILJ 1953 (LC); [2021] 9 BLLR 913 (LC) (*Brightstone*).

¹⁹ [2023] ZALAC 21; [2023] 11 BLLR 1148 (LAC).

²⁰ [2022] ZAGPPHC 50.

²¹ *Id* at para 12.

²² *Id* at para 16.

Dunlop Mixing and Technical Services (Pty) Ltd and others.²³ That Court held that a claim for damages arising from a registered trade union's picket in terms of section 69 of the LRA, which was in furtherance of strike action, cannot be made in terms of the RGA, but must be made in terms of the LRA.²⁴ It relied on the decision of the Constitutional Court in *Gcaba v Minister for Safety and Security and Others*,²⁵ where it said:

‘Therefore, a wide range of rights and the respective areas of law in which they apply are explicitly recognised in the Constitution. Different kinds of relationships between citizens and the State and citizens amongst each other are dealt with in different provisions. The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality, just administrative action (PAJA) and labour relations (LRA). Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system. This was emphasised in *Chirwa* by both Skweyiya J and Ngcobo J. If litigants are at liberty to relegate the finely tuned dispute-resolution structures created by the LRA, a dual system of law could fester in cases of dismissal of employees.’²⁶ [Footnotes omitted and emphasis added]

[25] Therefore, it is settled that if protest action falls within the ambit of the LRA, the Labour Courts have jurisdiction, while if it does not, the RGA applies and the High Courts would have jurisdiction. The Appellant would have been within its rights to seek an interdict whether the protest action was in contravention of the LRA or the RGA. What is important is the forum in which they sought that interdict. The essence of the cases considered in the preceding paragraphs is clear – if the dispute does not revolve around an employer, employees and their union, the LRA does not apply.

²³ [2020] ZASCA 161; [2021] 3 BLLR 221 (SCA); (2021) 42 ILJ 475 (SCA); 2021 (4) SA 144 (SCA) (*Dunlop*).

²⁴ *Id* at paras 29-46.

²⁵ [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC).

²⁶ *Dunlop* above n 23 at paras 29 - 30.

[26] Applying these principles to this case, it is difficult to see how a conclusion that the LRA applies in this matter can be reached. This is a situation where the Appellant had no labour relationship with the Respondents, the march was sanctioned by the Municipality in terms of the RGA (whether under false pretences or not) and none of its employees approached a political party for help nor did they agree to, obstruct or retard the productivity of their work. The fact that the reason for the protest was almost exclusively about labour issues at the Appellant does not automatically make it into a matter governed by the LRA. Any person, in terms of section 17 of the Constitution can protest about perceived violations of labour rights, so long as it is done lawfully in terms of the RGA. Where it is employees and their union doing so, they must do so in terms of the LRA, if it is other members of the public like political parties – to the exclusion of employees, they can do so in terms of the RGA.

[27] Even the judgment in *ADT Security (Pty) Ltd v National Security And Unqualified Workers Union and Others*,²⁷ which appears to confirm the Appellant's position, does not come to its rescue. In that case, the Labour Court held that a protest in terms of the RGA was not a circumvention of the provisions of the LRA, and this court overturned it on appeal, holding that it was. The respondent, a trade union, sought organisational rights but the appellant refused to grant them. They then planned and gained approval for a march in terms of the RGA, where they would demand them from the appellant, which it then argued was a contravention of the LRA because the march was clearly about a matter regulated by the LRA. The reason this Court overturned the Labour Court was because the LRA is specialised legislation which trumps any other laws regulating the same areas of labour relations. As a result, because organisational rights are governed by the LRA, any disputes relating to them should be resolved by the mechanisms created by it.

[28] What is different in this matter is that as much as the reasons for the protest action by the current Respondents were those falling almost exclusively under the LRA,

²⁷ [2012] ZALAC 52; [2014] 11 BLLR 1096 (LAC); (2015) 36 ILJ 152 (LAC).

there was neither the involvement of a trade union nor participation in a strike by its employees. The appeal is thus liable to be dismissed for being moot on this ground. The law is clear on the jurisdiction of the Labour Court and High Courts regarding protest action taken in terms of the LRA and the RGA.

[29] It is clear from the jurisprudence traversed that the Court a quo was correct in ruling that it lacked jurisdiction to entertain the matter. The law on this aspect is well settled and clearly, it is not in the interests of justice, for this Court to deal with this appeal. None of the circumstances mentioned in *Normandien*²⁸ are present in this matter.

Conclusion

[30] The Appellant raised three grounds of appeal and they have all been rejected by this Court. As the matter was not opposed, there is no rationale in making an order on costs.

[31] In the circumstances, I make the following order:

Order

1. The appeal is dismissed.

Mlambo JA

Waglay JP and Malindi AJA concur.

APPEARANCES:

²⁸ *Normandien* n 9 above.

For the Appellant: Indhrasen Pillay SC
Instructed by: Garlicke & Bousfield

For the Respondent: No appearance