



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

LAC Case No: JA43/2019

In the matter between:

ASSOCIATION OF MINEWORKERS AND

CONSTRUCTION UNION

First Appellant

EMPLOYEES LISTED IN ANNEXURE "A"

TO THE NOTICE OF MOTION (JA20/19)

Second Appellant

EMPLOYEES LISTED IN ANNEXURE "A"

TO THE NOTICE OF MOTION (JA24/19)

Third Appellant

INDIVIDUALS LISTED IN ANNEXURE "A"

TO THE NOTICE OF MOTION (JA30/19)

Fourth Appellant

THE PERSONS WHOSE NAMES APPEAR

ON ANNEXURE "A1" TO THE NOTICE OF

MOTION (JA31/19)

Fifth Appellant

EMPLOYEES LISTED IN ANNEXURE "A"

TO THE NOTICE OF MOTION (JA32/19)

Sixth Appellant

EMPLOYEES LISTED IN ANNEXURE "A"

TO THE NOTICE OF MOTION (JA38/19)

Seventh Appellant

EMPLOYEES LISTED IN ANNEXURE “A”

TO THE NOTICE OF MOTION (J439/19)

Eight Appellant

EMPLOYEES LISTED IN ANNEXURE “A”

TO THE NOTICE OF MOTION (J440/19)

Ninth Appellant

MEMBERS OF AMCU EMPLOYED BY

THE APPLICANT (J442/19)

Tenth Appellant

MEMBERS OF AMCU EMPLOYED BY

THE APPLICANT (J444/19)

Eleventh Appellant

and

ANGLOGOLD ASHANTI LIMITED t/a

ANGLOGOLD ASHANTI

First Respondent

LONMIN PLATINUM COMPRISING

WESTERN PLATINUM LIMITED AND

EASTERN PLATINUM LIMITED t/a LONMIN

Second Respondent

RUSTENBURG PLATINUM MINES LIMITED

t/a RUSTENBURG PLATINUM

Third Respondent

HARMONY GOLD MINING COMPANY

LIMITED t/a HARMONY GOLD

Fourth Respondent

VILLAGE MAIN REEF (PTY) LTD, TAU

LEKOA (PTY) LTD AND KOPANONG (PTY) LTD

t/a VILLIAGE MAIN REEF

Fifth Respondent

NORTHAM PLATINUM LIMITED t/a

NORTHAM PLATINUM

Sixth Respondent

MARULA PLATINUM (PTY) LTD t/a

MARULA PLATINUM (PTY) LTD

Seventh Respondent

IMPALA PLATINUM LIMITED t/a

IMPALA PLATINUM

Eight Respondent

GLENCORE OPERATIONS SA (PTY) LTD

Ninth Respondent

BUSHVELD VAMETCO ALLOYS (PTY) LTD

Tenth Respondent

Heard: 20 August 2020

Delivered: 01 September 2020

Summary: *Appeal—To Labour Appeal Court---Mootness---S16(2)(a)(i) of Superior Courts Act 10 of 2013---Principles applicable---When appeal court will consider appeal despite mootness---Interpretation of s 66(2)---Court will not entertain an appeal with regard to settled point of law. Appeal dismissed with costs.*

Practice and procedure— Mootness---16(2)(a)(i) of Superior Courts Act 10 of 2013---- Principles applicable---When appeal court will consider appeal despite mootness--- Interpretation of s 66(2)---Court will not entertain an appeal with regard to settled point of law. **Coram: Davis JA, Coppin JA and Kathree-Setiloane AJA**

JUDGMENT

DAVIS JA

Introduction

- [1] When should a court hear an appeal in relation to a matter which the parties to the dispute have agreed has been rendered moot? Section 16(2)(a) of the Superior Courts Act 10 of 2013 provides the statutory answer:
- (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;
 - (ii) Save under exceptional circumstances, the question when a decision would have no practical effect or result is to be determined without reference to any consideration of costs.
- [2] It is common cause that the dispute between the parties has long been resolved. Hence a decision of this Court will no longer have any practical effect. Thus the only question which arises for determination is whether there are exceptional circumstances which dictate that this Court should entertain the merits of the appeal.

Factual matrix

- [2] Following a series of disputes on 19 November 2018, the first appellant issued Sibanye Gold Limited t/a Sibanye Still Water (Sibanye) with a 48-hour strike notice. Its members then commenced with a protected strike in terms of the strike notice on 21 November 2018. This primary strike continued until April 2019.
- [3] On 22 February 2019, first appellant issued a notice of secondary strike action to the first, second, fourth, fifth, sixth, seventh and eight respondents; on 21 February 2019, it issued a secondary strike notice to the ninth and tenth respondents. All of the respondents are party to the Mineral Council South Africa (the Mineral Council). The strike notices indicated that the

secondary strike would be in support of the protected strike at Sibanye and related to a dispute over wages and other conditions of employment. On the basis of these notices, the secondary strike was to commence on 28 February 2019 and continue for the full duration of the primary strike. Subsequent thereto, the first appellant clarified the position, namely that the strike was to continue for a period of seven days from 28 February 2019 to 7 March 2019.

- [4] Following these notices, the nine respondents all launched separate urgent applications seeking to interdict appellants from initiating such strike action at their respective operations and to declare the proposed secondary strike to be unprotected.
- [5] On 15 March 2019, Prinsloo J, sitting in the Court *a quo*, after a carefully considered judgment ordered that the secondary strike in respect of all of the respondents be declared to be an unprotected strike. There was no order as to costs. Although the application for leave to appeal was dismissed with costs on 27 April 2019, the first appellant was successful in its petition to this Court which granted leave to appeal on 20 August 2019.
- [6] Notwithstanding that the primary strike at Sibanye Gold was settled on 17 April 2019 which in itself put paid to the secondary strike, appellants have persisted with their appeal against the orders granted by the court *a quo*.
- [7] The appellants thus have approached this Court, notwithstanding that there is no live dispute between the parties on the basis that exceptional circumstances, as provided for in s16 (2)(a)(ii) of the Superior Court Act, exist so that this Court should consider the judgment and order of the court *a quo* in order to declare that the nature and extent of the secondary strike was reasonable. In essence, the appellants contend that the judgment, if it stands, sets out law that will have clear consequences on the future manner in which secondary strikes may lawfully be conducted.

- [8] It is for this reason that it is now necessary to consider whether exceptional circumstances as set out in s 16 (2) (a) of the Superior Courts Act do exist which would justify the consideration of the merits of this appeal.

Appellants' arguments

- [9] Mr Boda, who appeared together with Ms Collet, submitted that there were significant reasons for this Court exercising a discretion to hear this appeal. In the first place, he contended that the dispute regarding secondary strikes turned on the correct interpretation of s 66 (2) of the Labour Relations Act 66 of 1995 (LRA) and, in particular, the question as to whether, for the purposes of this section, the court should group together a collection of secondary employers to assess their combined effect of the secondary strike upon the primary employer.
- [10] The Court *a quo* held that the factual enquiry enjoined by s 66 (2)(c) of the LRA concerned the weighing up of two fundamental factors, namely the reasonableness of the nature and extent of the secondary strike which meant examining the effect of the strike on a secondary employer together with the effect of the nature and extent of the secondary strike on the business of the primary employer. For this reason, Prinsloo J held:

'This factual enquiry does not permit the grouping together of a collection of secondary employers in a specific industry and assessing what the combined effect of a broader industry the secondary strike would have on the primary employer. Such an approach will ignore a critical question namely; the effect the secondary strike may have on the business of the primary employer in relation to the secondary employer, which calls for consideration of the facts and an assessment of factors relevant to each secondary employer. To do differently would deprive each single secondary employer of the protection afforded to them by s 66 (2)(c) of the LRA.'

[11] Mr Boda submitted that this court was required to make a determination as to whether the enquiry was restricted to a balancing of the effect on a single secondary employer (as opposed to a group of secondary employers). In turn, the effect of the secondary strike upon the primary employer went to the heart of the constitutional right to strike and the reach of the right to engage in secondary strike action.

[12] Mr Boda also submitted that the court *a quo* had, in the formulation of the correct test, incorrectly overemphasised the harm caused to the second employer. In this connection, the court *a quo* had held:

‘Although it was held in SALGA 1 that the disruptions of services and economic loss are not factors that rank highly when considering the legitimacy of industrial action and that those are rather inevitable consequence which underpins the purpose of strike action in a democratic society, I am of the view that the economic loss to be suffered by the secondary employers should be considered with due regard to the industry within which the strike is to happen and it is a factor that should be ranked highly when considering the proportionality of the impact of the secondary strike on the business of the secondary employers...’

[13] Mr Boda submitted that in this passage of the judgment, the court had incorrectly interpreted the test as contained in s 66 (2)(c). In his view, this section directed attention to the possible as opposed to the probable or definite direct or indirect effects that the secondary strike may have on the business of the primary employer. In addition, Mr Boda submitted that this factor should be given far greater consideration in the proportionality inquiry as compared to the harm caused to the secondary employer.

[14] In summary, appellants’ case was that this case raised a unique set of facts which called into question the evaluation of a secondary strike which was targeted against a range of secondary employers. These facts called for a definitive answer from this Court which would bring clarity to a critical aspect

of strike action, namely the secondary strike which was targeted against a multiplicity of secondary employers.

- [15] In *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* 2013 (3) SA 315 (SCA) at para 5 Wallis JA provided guidance as to the test to be followed with regard to hearing an appeal of this kind:

‘The disclosure of the report means that any judgment or order by this court will have no practical effect or result as between the parties. In the circumstances this court may dismiss the appeal on that ground alone. The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose.’

- [16] This Court can obtain further guidance with regard to when it should exercise its discretion from its judgment in *Sun International Ltd v SA Commercial Catering & Allied Workers Union* (2017) 38 ILJ 1799 (LAC). Following a strike, the appellant, in that case, had persisted with a lockout and the employment of replacement labour. As a result of an application, the Labour Court granted an interdict against the appellant from continuing to use replacement labour after the strike had ended. An appeal was lodged against this decision but by this time the wage dispute had been settled.

- [17] In *Sun International*, appellant’s counsel argued that the appeal, notwithstanding that the dispute had been settled, raised a discreet legal issue being the interpretation of s 76(1)(b) of the LRA. He buttressed his argument with the further submission that the interpretation of the section held considerable importance for the labour community at large. In rejecting

this argument and thereby finding that there was no basis to entertain the merits of the appeal, the court said the following at paras 20-21:

‘The dispute no longer live between the parties and therefore does not deserve the attention of this court. When a live dispute triggers the application of s 76 (1) (b) of the LRA, the Labour Court and/or this court will doubtless deal with the application of the section through the prism of the factual matrix confronted at the time.

The appellant has in effect asked for an advisory opinion as to future conduct. The appellant does not represent the broader labour law community nor did any other party seek to join as an amicus in order to provide further information or argument to this court. There was a dispute between two parties and that matter has been resolved. It is not a case which should be heard by this court because it falls within the doctrine of mootness as I have outlined it. There is therefore no basis by which to decide the interpretation question relating to s 76 (1) (b) of the LRA.’

Evaluation of appellants’ argument

[18] The first argument raised by Mr Boda concerned the interpretation of s 66 (2) of the LRA and the extent to which a judgment of this court is required in order to bring clarity to the position as to whether the evaluation of a secondary strike concerns each single employer or should take account of a combination of employers. The problem with this submission is that both the Labour Court and this Court have considered this particular section in carefully written judgments.

[19] In *SALGA v SAMWU* [2008] 1 BLLR 66 (LC) at para 12 Van Niekerk J considered this section and the test which is required as a result by way of a reading of the text thereof, The learned judge held at para 16::

‘In short, whether or not a secondary strike is protected is determined by weighing up two factors – the reasonableness of the nature and extent of the secondary strike (this is an enquiry into the effect of the strike on the

secondary employer and will require consideration, *inter alia*, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer and the sector in which it occurs) and, secondly, the effect of the secondary strike on the business of the primary employer, which is, in essence, an enquiry into the extent of the pressure that is placed on the primary employer.' (my emphasis)

- [20] In *SA Local Government Association v SA Municipal Workers Union* [2011] 7 BLLR 649 (LAC); (2011) 32 ILJ 1886 at paras 9-10 Waglay JA (as he then was) confirmed this approach:

'In these proceedings, quite properly, neither the appellant nor the union contest the proposition that s 66 (2) (c) of the Act, imports a proportionality test. What is required to be determined, as the court *a quo* correctly observed, is the reasonableness of the nature and extent of the secondary strike (which inevitably involves an enquiry into the effect of the strike on the secondary employer) in relation to the effect on the business of the primary employer (which inevitably involves an enquiry into the extent of the pressure placed on the primary employer).

Under the head of proportionality, the court must weigh the effect of the secondary strike on the secondary employer and the effect of the nature and extent of the secondary strike on the business of the primary employer.' (my emphasis)

- [21] Whilst the facts of the *SALGA* case were different to that which applied in the present dispute, this Court, in confirming the judgment of Van Niekerk J, clearly established a test that the mandated enquiry has to focus on the individual secondary employer. There is, therefore, no reason to entertain an appeal with regard to a point of law which has already been settled by this Court. In the event that some adaptation to this form of interpretation is required by way of a set of facts presented in a live dispute, that obviously

would be the correct course, in that a live factual matrix would be the time to test the correctness of the dicta to which I have made reference.

- [22] Turning to the second leg of appellants' argument, the core of the submission is that in the judgment of Van Niekerk J in *SALGA* the disruption of services and economic loss were not factors that ranked highly when considering the legitimacy of this form of industrial action. The approach actually adopted by Van Niekerk J was somewhat different to that which formed the basis of the submission:

'Whether or not a secondary strike is protected is determined by weighing up two factors – the reasonableness, nature and extent of the secondary strike (this was an enquiry into the effect of the strike on the secondary employer and will require consideration, inter alia, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strikes impact on the secondary employer and the sector in which it occurs) and secondly the effect of the secondary strike on the business of the primary employer which is in essence an inquiry into the extent of the pressure that has placed on the primary employer.' (para 16)

- [23] There can be little doubt that in this paragraph the learned judge clearly placed emphasis upon economic consequences of a secondary strike for the secondary employer. The weight to be accorded to this set of factors in the balancing exercise is a factual determination which will vary from case to case. The jurisprudence clearly mandates a proportionality assessment in which a court is enjoined to weigh the reasonableness, nature and extent of the secondary strike against the effect of the secondary strike on the business of the primary employer. This establishes that the economic consequences for the secondary employer must be taken into account. It follows that no further judgment of this court is required to set out the nature of the proportionality enquiry. Manifestly, there may be different factual applications of this enquiry. The evaluation of the outcome thereof will

depend upon a live dispute which would then require the attention of the Labour Court and, if necessary, this Court.

[24] In summary, there is no significant point of law which flows from this appeal that requires determination by this Court in circumstances where there is no longer a live dispute between the parties. Indeed, the facts of this case are even more adverse to the appellants than were the facts of the case in *Sun International*, given the two *SALGA* judgments which deal with the relevant section of the LRA.

[25] There is, therefore, no reason to alter the approach which was taken by this Court in *Sun International supra*, with respect to whether exceptional circumstances existed to justify hearing an appeal where there is no longer a live dispute.

[26] The same result must apply in this case. For this reason, the appeal is dismissed with costs, including the cost of two counsel.

Davis JA

Coppin JA and Kathree-Setiloane concur.

APPEARANCES:

FOR THE APPELLANTS:
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FOR THE FIRST, THIRD, FOURTH, SIXTH,

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