

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JA 41/21

In the matter between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA

BHEKABANTU MBATHA AND 32 OTHERS

and

VULCANIA REINFORCING COMPANY (PTY) LTD

SEAN GREVE

First Appellant

2nd to 32nd Appellants

First Respondent

Second respondent

Heard: 17 February 2022

Delivered: 22 March 2022

Coram: Coppin JA, Tokota et Phatudi AJJA

JUDGMENT

TOKOTA AJA

[1] The first respondent was a manufacturer of mesh wire for the construction and hardware industry. The first appellant is a registered trade union that was active at its workplace. During 2014, the first respondent attempted to discipline one of its employees, a shop steward, as a result of which its employees embarked on an unprotected strike. This culminated in the employees, who were involved in the strike, being dismissed. The dismissal was challenged in the Labour Court. The matter was set down for hearing on 21 August 2014. On that date, the parties concluded a settlement agreement, which was subsequently made an order of court (“consent order”).

[2] In terms of the consent order, the first respondent was ordered to take all reasonable steps to ensure that the dismissed employees were reinstated, albeit not

retrospectively, within the first respondent or an affiliated company. The first respondent did not reinstate all the dismissed employees.

[3] On 22 October 2018, the appellants launched an application in the Labour Court, on an *ex parte* basis, seeking an order calling upon the respondents to show cause why they should not be committed for contempt of Court for the failure to comply with the consent order. They were called upon to file affidavits explaining their conduct in this regard. On 26 March 2019, the Labour Court granted an order (per Coetzee AJ) and the respondents were called upon to show cause why such order could not be made final.

[4] The matter was argued on 30 October 2020 and judgment was delivered (per Prinsloo J) on 17 November 2020, dismissing the application with no order as to costs. The appellants now appeal against that order with leave of that Court.

[5] Paragraph 5 of the consent order, which triggered the application, reads as follows:

‘The respondent hereby further agrees and undertakes to reinstate, without retrospective effect, the individual applicants listed in annex B by offering those individuals available jobs within it or any affiliated company of the respondent with same or similar rates with effect from 1 September 2017.’

The appellants’ case in the Labour Court was that the respondents failed to comply with this paragraph.

[6] When the settlement agreement was signed Mr Jarrod De Lange represented the first respondent and signed the agreement on its behalf. On 8 January 2018, he addressed an email to the first appellant and informed it that the individual employees had not reported for duty and prevailed upon it to request them to report for duty urgently. On 9 March 2018, another email was sent to the first appellant requesting more time to look for suitable employment of the individuals. The first appellant replied to this letter stating that it never received the email of the 8th of

January 2018 and undertook to inform the employees to report the following day ie 10 January 2018.

[7] The respondents denied that they were guilty of contempt of Court, contending that they took all reasonable steps to place the individual employees in employment. They contended that the first respondent had undergone a winding down process with the result that it could no longer employ the second to 32nd appellants. However, they sought placements for them at an affiliated company, Vulcania Reinforcing Solutions (Pty) Ltd. Although this company also underwent restructuring and decreased the number of its employees, it was able to identify 8 positions in its workforce. Five individuals were employed by this company and the remaining three failed to respond to the offer.

[8] The Labour Court found that the appellants failed to make out a case for contempt of Court in their founding affidavit. It found that the appellants had failed to prove the requisites for civil contempt beyond a reasonable doubt. Accordingly, it dismissed the application.

[9] On the date of the hearing of this appeal, Mr Sithole, who appeared for the appellants, informed us from the bar that due to the fact that the first respondent has been liquidated the case against it has become moot. He indicated that for this reason he was proceeding with the case against it purely for purposes of seeking an order that the order by Prinsloo J be declared a nullity because at the time it was made, the first respondent was no longer in existence. He contended that the first respondent was liquidated on the 21st of August 2020. Consequently, so he argued, in October 2020 when the order was made there was no first respondent in existence.

[10] Mr Sithole informed us further that the appellants were withdrawing proceedings against the second respondent and that we should make no order as to costs. The basis upon which the withdrawal was made at the Court's door, so he contended, was because the appellants were unaware of the liquidation of the first respondent. On the other hand, Ms Swart, who appeared for the second respondent,

submitted that the appellants were aware of the liquidation process of the first respondent and this fact was also brought to the notice of the Court *a quo*.

[11] Section 16(2) (a) (i) of the Superior Court Act No.10 of 2013 provides “[w]hen 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.”

[12] The Constitutional Court once said: “It is by now axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue. The court has a discretion whether or not to hear a matter. The test is one of the interests of justice. A relevant consideration is whether the order that the court may make will have any practical effect either on the parties or on others. In the exercise of its discretion the court may decide to resolve an issue that is moot if to do so will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty”.¹In this matter no interests of justice will be served by deciding the merits of it. There are no novel issues which are likely to arise in future for the benefit of the public at large. The appeal against the first respondent has to be dismissed on this ground alone.

[13] The appellants were aware of the liquidation and the appointment of the liquidator of the first respondent. They failed to give notice to the liquidator of their intention to proceed with the appeal as required in terms of section 359(2)(a) of the Companies Act No. 61 of 1971. If notice is not so given the proceedings shall be considered abandoned unless the Court otherwise directs.²Furthermore, besides what we were told from the bar by Ms Swart, we do not have evidence that the liquidator is aware of these proceedings.

[14] As far as the second respondent is concerned, the appellants failed dismally to make out a case for contempt of Court against any of the respondents in their founding affidavit. The Court *a quo* was correct in its finding in this regard. Consequently, the appeal has no merit whatsoever.

¹*Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472(CC) (2008 (4) BCLR 442; [2007] ZACC 24) at para29.

² Section 359(2)(b).

[15] When we put it to Mr Sithole during debate that the appellants had made no case whatsoever for the contempt of Court in the founding affidavit he could not dispute it, although he was reluctant to expressly concede it.

[16] It is well established that in order to succeed in the application for committal for civil contempt, the applicant must prove the requisites of contempt beyond a reasonable doubt. The applicant must allege and prove that: (a) there was a Court order against the alleged contemnor; (b) such Court order was served or brought to the notice of the alleged contemnor; and (c) the alleged contemnor has not complied with the order.³

Once the above requisites have been proved, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt of Court would have been proved beyond reasonable doubt.⁴

[17] In motion proceedings, the affidavits constitute both the pleadings and the evidence. The respondent has the right to know what case it has to meet and to respond thereto. This must be set out clearly in the founding affidavit. The general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit.⁵ Although this is not an absolute rule, a Court may only allow new matter in a replying affidavit in exceptional cases. Where this has been allowed the respondent will be granted an opportunity to deal with the new matter.⁶ The appellants having failed to make out a case in their founding affidavit, this appeal was a still-born child. No amount of breath will bring life to it.

³*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) ([2006] ZASCA 52) at para 42.; *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327(CC) at para 37; *Matjhabeng Local Muni v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) ([2017] ZACC 35) at para 73.

⁴*Fakie id paras 41 – 42*; *A Phoko v Ekurhuleni City* 2015 (5) SA 600 (CC) (2015 (6) BCLR 711; [2015] ZACC 10) at para 36; *Uncedo Taxi Service Association v Maninjwa and Others* 1998 (3) SA 417 (E) (1998(2) SACR 166; 1998 (6) BCLR 683) (*Maninjwa*) at 425C – G and 428A – C.

⁵ *Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) at para.13; *Minister of Land Affairs and Agriculture v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) ([2007] ZASCA 153) at para 44.

⁶ *Shephard v Tuckers Land & Development Corporation (Pty) Ltd* (1) 1978 (1) SA 173 (W) 177G-178A; *Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) at para 13.

[18] In any event, the second respondent was not a party to the proceedings when the consent order was made. The procedure followed in this matter is no different from that which was followed in *Matjhabeng*⁷. The second respondent was called upon to file an affidavit explaining his non-compliance with the consent order and to face a contempt of Court order. He was never joined in the proceedings. Failure to join the second respondent in his personal capacity was fatal to the appellants' case against him.⁸ For this reason as well there was no way the appellants would have succeeded in their application for contempt of Court against the second respondent.

Condonation

[19] The appellants were directed to file their written submissions in the appeal on or before 6 August 2021. They filed them on 2 September 2021. On 3 September 2021, the appellants filed an affidavit in support of an application for condonation for the late filing of heads of argument. In that affidavit, they state, as the reason for the delay, that following the delivery of the notice of appeal they were advised that the first respondent was subject of voluntary liquidation. They state that on 22 July 2021, they received a letter from the first respondent's attorneys proposing that the proceedings be stayed and that the appellants should comply with the provisions of section 359 of the Companies Act No. 61 of 1973. They accepted the suggestion.

[21] They did nothing until the 6th of August 2021 when they came across the decision of this Court in *Groom v Daimler Fleet Management (Pty) Ltd* (JA39/20) [2020] ZALAC 66 (4 August 2020). They then concluded, after reading this case together with that of *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and others* (CCT 52/21) [2021] ZACC 18 (29 June 2021), that the provisions of section 359 were not applicable to civil contempt of Court. It is then that they decided to proceed with the matter and file heads of argument.

⁷*Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) ([2017] ZACC 35).

⁸*Matjhabeng* footnote 6 para.103,

[22] The explanation for failure to file the written submissions timeously is poor. There are no prospects of success on appeal. Condonation falls to be dismissed as well.

[23] The issue remaining is that of costs. The general rule that costs should follow the result is not applicable in labour matters. This Court in *Wentworth Dorkin*⁹ per Zondo JP (as he then was), held that “[t]he relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost orders are not made unless those requirements are met. Fairness dictates therefore that there will no order as to costs.

[25] In the result, the following order is issued:

1. The application for condonation for the late filing of heads of argument is dismissed;
2. The appeal is dismissed.
2. There is no order as to costs.

B R Tokota

Acting Judge of the Labour Appeal Court.

Coppin JA and Phatudi AJ concur in the judgment of Tokota AJA

APPEARANCES:

FOR THE APPELLANT:

Adv Sithole

Instructed by S Mabaso Inc Attorneys

⁹39; *MEC for Finance, Kwazulu-Natal, and another v Dorkin NO and Another* (2008) 29 ILJ 1707 (LAC) para 19. *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC) (2018) (6) BCLR 686; [2018] ZACC 1): at paras24-26; *Union for Police Security And Corrections Organisation v S A Custodial Management (Pty) Ltd and Others* (2021) 42 ILJ 2371 (CC) at para39.

FOR THE RESPONDENT

Adv S Swart

Instructed by LD Inc Attorneys