



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA129/2021

In the matter between:

ECONOMIC FREEDOM FIGHTERS

Appellant

and

BRIGHTSTONE TRADING 3 CC T/A GORDON ROAD SPAR

First Respondent

PATRICIA BAFEDILE

Second Respondent

DORA BATSIJANG

Third Respondent

PRECIOUS

Fourth Respondent

OLIVIA BULANI

Fifth Respondent

IGNATIA MASHIFANE

Sixth Respondent

HAPPINESS NDAWONOLE

Seventh Respondent

SIBUSISO BONGA

Eighth Respondent

TSHOLOFELO MSINDO

Ninth Respondent

NELLY ZUMMA

Tenth Respondent

EMMA LOBAKENG

Eleventh Respondent

EUNICE SEBOLA

Twelfth Respondent

Heard: 23 February 2023

Delivered: 17 August 2023

Coram: Waglay JP, Savage et Gqamana AJJA

JUDGMENT

THE COURT

Introduction

- [1] This is an appeal, with the leave of this Court, against both a final order and costs order made by the Labour Court against the appellant, the Economic Freedom Fighters (“EFF”).
- [2] On 1 June 2021, the Labour Court granted a rule *nisi* interdicting and restraining “[the EFF] *and its members and all other persons acting on their instructions*”, and the second to fourteenth respondents (“the employees”) from engaging in unlawful action which disrupted the business operations of the first respondent, Brightstone Trading 3 CC t/a Gordon Road Spar (“Spar”) in Roodepoort.
- [3] The EFF opposed the interdict application, distancing itself from the protest action and the unlawful activities associated with it. It denied that Mr Sechaba Sono, a local EFF branch official who was not cited as a party to the application, had been authorised to act on the EFF’s behalf. On the return date, the Labour Court confirmed the rule *nisi*, making a costs order against the EFF in doing so.

Background

- [4] On 15 April 2021, the eleventh respondent, Ms Emma Lobakeng, was demoted from the position of floor manager to that of cashier. Almost a month later, on 12 May 2021, Mr Sono addressed a letter to Spar, on the letterhead

of the EFF local branch, in which he requested a meeting with management on 16 May 2021 to discuss the issues set out in his letter.

- [5] After Spar did not respond to the letter, on 16 May 2021 Mr Sono arrived at Spar's premises. He demanded the reinstatement of Ms Lobakeng into her previous position and threatened to shut down the store if the demand was not met. The demand was not met. Mr Sono and a number of protesters then forced the store's closure. Cashiers were shouted at, shoppers were threatened and all were instructed to leave the store. The entrance to the shopping centre was barricaded and the store was required to close for the day.
- [6] Two weeks later, on 29 May 2021, a similar incident occurred and the store was closed again. Consequently, Spar instructed its attorneys to address a letter to the EFF's Johannesburg James Sofasonke Mpanza Region (the region) demanding that the EFF and its members cease all illegal conduct and interference with its business operations. The letter was emailed to individuals cited as "Joseda", "Sasakhe" and Mr Mandla Ndzuta. In spite of the letter sent, the protest action intensified. This led to Spar approaching the Labour Court for an urgent interdict.

Labour Court

- [7] In confirming the rule *nisi*, the Labour Court found that –

‘...the enquiry is not whether the [EFF], through the provisions of its constitution or otherwise, conferred authority on Mr Sono and its members to protest at the applicant's premises. It is whether, on the probabilities of the pleaded facts this court can conclude that Mr Sono and the protesters created the appearance that they had the power to act on behalf of the [EFF].’¹

- [8] The EFF was found liable for Spar's costs on the basis of the doctrine of ostensible authority, on the basis that:

¹ Court *a quo* judgment at para 42.

'The [Spar] has succeeded in showing that it relied on a misrepresentations by Mr Sono and the protesters that they acted on behalf of the [EFF]. This is the end of the inquiry for ostensible authority. It is only open to the [EFF] to contend that the [Spar's] reliance was, on the probabilities, unreasonable or misguided. This it has failed to do.'²

Evaluation

[9] The primary issue for determination in this appeal is whether the doctrine of ostensible authority finds application on the facts of this matter or not. As was made clear by the Constitutional Court in *Makate v Vodacom*³ (*Makate*):

[45] Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority.

[46] The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others...

[47] A closer examination of the original statement on apparent authority by Lord Denning, quoted below, reveals that the presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its

² Ibid at para 58.

³ [2016] ZACC 13; 2016 (4) SA 121 (CC) at paras 46 – 47.

behalf. Nothing more is required. The means by which that appearance is represented need not be directed at any person. In other words the principal need not make the representation to the person claiming that the agent had apparent authority. The statement indicates the absence of the elements of estoppel. It does not mention prejudice at all...' [Own emphasis]

[10] It follows that ostensible authority is established if it can be shown that the conduct of the principal created an impression that the agent had the power to act on its behalf. It is therefore the conduct of the principal that must be examined in order to determine whether it created the appearance that the agent had the authority to bind the principal. The agent does not authorise herself or himself. Rather, authorisation flows from the principal's conduct.

[11] Subsequent to the decision in *Makate*, this Court in *Western Platinum Ltd v National Union of Mineworkers obo Mathulatsipi and Others*⁴ held that:

'[3] ... The true position is that ostensible or apparent authority cannot be founded upon a representation made by the agent alone. In order for the principal to be bound by virtue of an estoppel, the representation must be made by the principal itself...

[4] The conduct of the principal plays a crucial role in determining whether it had ratified its agent's action. This was much the case in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd & others* where the court held that ostensible authority flows from the appearances of authority created by the principal... Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that the appearance, the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on the principal.'

[12] The Labour Court in *Maye Serobe (Pty) Ltd v Labour Equity General Workers Union of South Africa obo Members and others*⁵, with reference to the

⁴ (2020) 41 ILJ 2617 (LAC) at paras 3 - 4.

decision of the Supreme Court of Appeal in *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd and others*,⁶ found that to hold a party liable on the basis of ostensible authority, there must be shown to have been (a) a representation by words or conduct; (b) made by the appellant and not merely by the agents that they had authority to act as they did; (c) in a form such that the appellant should reasonably have expected that outsiders would act on the strength of it; (d) with reliance placed by the respondents on such representation; (e) which reliance was reasonable; and (f) caused consequent prejudice to the respondents.

- [13] There is no dispute that the principal in the current context is the EFF as a voluntary association and national political party. With almost half a million members, the EFF's highest decision-making body in terms of its constitution is its Central Command Team (CCT). Neither individual members, nor members holding local branch or regional leadership positions, are entitled to act on behalf of the EFF without the necessary authorisation. There was no dispute that Mr Sono sent a letter to Spar on an EFF letterhead and that correspondence was thereafter exchanged between Spar's attorneys and the EFF region.
- [14] It was contended for Spar that the only reasonable impression that could be reached from this communication was that the protesters were acting on the instruction, or at least with the knowledge of the EFF, and as such that Spar had established the ostensible authority of the EFF sufficient to warrant the imposition of a costs order against the EFF.
- [15] For the doctrine of ostensible authority to find application, the Labour Court was required to find that the EFF, as a voluntary association, had created an appearance or representation by words or conduct that Mr Sono and/or his other EFF members involved in the protest action had authority to act as they did. There is no evidence of such appearance or representation having been made by the EFF, nor one that the EFF should reasonably have expected that

⁵ [2015] JOL 33143 (LC) at para 30.

⁶ [2012] 3 All SA 498 (SCA).

outsiders would act on the strength of and that would lead Spar reasonably to rely on such representation to its consequent prejudice. The fact that Spar wrote to the regional office of the EFF indicates that it was aware that higher authority within EFF structures may be called upon to intervene to halt the unlawful conduct of Mr Sono and the protestors. This gives credence to a finding that the EFF had not created an appearance or representation by words or conduct that Mr Sono and/or other protestors had the authority to act on behalf of the EFF as they did. In finding differently the Labour Court erred.

[16] It follows for these reasons that the appeal must succeed, that the final order issued against the EFF discharged and the costs order of the Labour Court made against the EFF set aside. The EFF would nevertheless be well advised to take appropriate steps to prevent future such unlawful conduct from arising.

[17] Insofar as the costs of this appeal are concerned, having regard to considerations of law and fairness, no costs order is warranted.

[18] In the result, the following order is made:

Order

1. The appeal is upheld with no order as to costs.
2. The order of the Labour Court is set aside in part and the order is substituted as follows:
 - “1. The rule *nisi* issued on 1 June 2021 is confirmed against the second to further respondents, but discharged against the first respondent.
 - 2 No order of costs is made.”

THE COURT

PER WAGLAY JP, SAVAGE AND GQAMANA AJJA

APPEARANCES:

For the Appellant: T Ramagale (together with Advocate F Sangoni)

Instructed by Ian Levitt Attorneys

For the Respondent: C Goosen (Together with Advocate N Nortjie)

Instructed by ML Schoeman Attorneys

LABOUR APPEAL COURT