

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J1577/23

In the matter between:

**DEPARTMENT OF PUBLIC WORKS
AND ROADS, NORTH-WEST**

Applicant

and

**NATIONAL UNION OF PUBLIC SERVICE
AND ALLIED WORKERS UNION**

Respondent

Heard: 8 February 2024

Delivered: 12 February 2024. This judgment was handed down electronically by emailing a copy to the parties. The 12 February 2024 is deemed to be the date of delivery of this judgment.

Summary: Application to interdict misconduct, return date. Application dismissed, no order as to costs.

JUDGMENT

DANIELS J

Introduction

[1] For ease of reference, the applicant is hereafter referred to as “the Department” and the respondent is referred to as “the Union”.

Material facts

[2] The Expanded Public Works Programme (hereafter the “EPWP”) is a government led nationwide initiative aimed at enabling and skilling large numbers of unemployed youth by drawing them into the workforce. All government entities are expected to engage in and support the EPWP by employing youth from indigent and local communities. The EPWP operated based on fixed term employment contracts, the specific duration of which depended on the approved budget and the nature of the project.

[3] The Department was granted approval to engage in the EPWP, in respect of its Iterele Roads Maintenance Programme. This envisaged road maintenance in all districts of the North-West Province, over a period of 36 months.

[4] The Department recruited a large number of individuals for the project, and it did so in two groups. The fixed term employment contracts for the first group were due to terminate at the end of July 2023 and those of the second group were at end at the August 2023.

[5] However, as the termination dates approached, several disputes arose between the Department and the employees. The applicant extended the termination dates to the end of October and November 2023, and established a task team to engage with the employees to resolve their disputes. Initially the employees were unrepresented in these discussions.

[6] During August 2023, the Union recruited some of the employees as its members and transmitted a memorandum of demands to the Premier of the North-West Province. The Department refused to engage with the Union, alleging that it did not have any members because none of its employees paid membership fees.

[7] Frustrated, the Union issued to the Department a notice of its intention to picket, on 12 October, at its offices. The primary demand made by the Union was permanent employment of all the employees engaged by the Department

through the EPWP. On 12 October, the picket occurred without hindrance from the Department.

[8] On 25 October 2023, the Department notified the first group of employees that their employment would terminate at the end of that month.

[9] On 1 and 2 November 2023, the gates at several different offices operated by the Department were locked, thus hindering work. The Department alleged that these activities were executed by members of the Union acting collectively but it failed to identify a single Union official or member who had engaged in the misconduct. It also produced no evidence that the Union was involved in planning the misconduct. Unsurprisingly, the Union denied that it was involved. The Union contended that the misconduct was committed by the local community who were angered by the Department's conduct.

[10] On 3 November 2023, the Department addressed a letter of demand to the Union, requiring it to desist from unlawful conduct. Unsurprisingly, the letter failed to elicit a positive response.

[11] On 7 November 2023, the Department launched an urgent application. The Department argued that the Union had no paid up members and could therefore not bargain on behalf of any employees, it alleged that the misconduct during October and early November 2023 was committed by members of the respondent acting collectively, and it alleged that the picket on 12 October was unlawful because it was not in support of a protected strike. It bears repeating. In its papers, the applicant clearly, and repeatedly, contended that there was no strike in which members of the respondent engaged.

[12] A rule nisi and interim order was issued on 10 November 2023. Prayers 2 and 3 of the interim order read as follows:

2. *An interim order is granted – in the following terms, pending the return date of 7 February 2024 where the respondent may show cause why a final order should not be granted in these terms:*

12.1 *NUPSAW is interdicted and restrained from disrupting the day-to-day functioning of the applicant by, inter alia, locking its gates across all its offices in the North-West Province,*

12.2 *The respondent is to immediately unlock all gates to the applicant's offices and sites and to vacate the applicant's premises,*

3. *Costs will be determined on the return date.*

[13] Although initially enrolled for 7 February, the matter came before me on 8 February, when the applicant sought to confirm the rule nisi. The respondent filed a supplementary affidavit shortly before the hearing and sought leave to have it admitted.

Legal Issues

[14] As the factual matrix reveals, there were several unusual features in this matter:

14.1 The employer contended that there was no unprotected strike. This was perhaps not surprising when one has regard to para 14.2 below.

14.2 The employer contended that the picket on 12 October 2023 was unlawful because it was not held in support of a protected strike.¹

14.3 By the time of the return date, the Union had no members in the employ of the Department. Its members' employment contracts expired at the end of October, or November 2023.

Did the misconduct in October and November 2023 constitute a "strike"?

[15] The word "strike" is defined in section 213 of the Labour Relations Act No. 66 of 1995 as amended (hereafter the "LRA") in the following terms:

"Strike means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed

¹ See section 69(1)(a) of the LRA

by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory.”

[16] The definition of strike was considered by the Labour Appeal Court in *TSI Holdings (Pty) Ltd & Others v National Union of Metalworkers of SA & Others*² which held as follows:

“[25] In their argument counsel for both parties referred either to the strike in support of a demand or to the purpose of the strike. To refer to the purpose of a strike or to a strike in support of a demand is inaccurate in our law. This is because in terms of the definition of a strike in s 213 of the Act a strike is not a refusal to work or an obstruction or retardation of work only but it is such refusal, obstruction or retardation when it is concerted and is resorted to for a purpose contained in the definition of the word 'strike' or, when regard is had to the definition of 'issue in dispute' in s 213, it can also be said that it is such conduct when it is in support of a demand. The definition of the phrase 'issue in dispute' in s 213 of the Act is: 'issue in dispute in relation to a strike or lock-out means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out'. The demand is linked up with the purpose - not of a strike - but of a concerted refusal to work, or the retardation or obstruction of work contemplated in the definition of the word 'strike'.

[26] In terms of the definition of the word 'strike' the purpose of a concerted refusal to work, retardation or obstruction of work can be to remedy a grievance, or to resolve a dispute in respect of any matter of mutual interest between employer and employee. Under the Labour Relations Act 28 of 1956) (the old Act) the definition of a strike did not include the purpose of remedying a grievance or resolving a dispute. The purpose provided for in the definition of the word 'strike' in s 1 of the old Act was the compulsion of the employer to agree to a demand or request or proposal made by employees in regard to

² (2006) 27 ILJ 1483 (LAC) at paras _____

terms and conditions of employment or in regard to a matter of mutual interest. This resulted in many cases where, if workers had refused to work or had engaged in a work stoppage without articulating any demand to the employer, their conduct was held not to constitute a strike. Accordingly, what the definition of the word 'strike' does is to acknowledge that, even in a situation where workers stop working or refuse to start work without articulating a demand or request or proposal to their employer, they have a grievance of one kind or another which they want their employer to remedy and their conduct constitutes a strike. Other concerted refusals to work or retardations or obstructions of work are those where disputes exist or a demand has been made to the employer but the employer has yet to respond thereto. A dispute will exist where a demand has been made on the employer and he has rejected it or where there is disagreement between the parties on a particular issue.

[27] A concerted refusal to work or a concerted retardation or obstruction of work which is resorted to for the purpose of resolving a dispute is the one where the union or employees have made a demand on the employer and the employer has either rejected such demand or has neglected to comply with it. The reference to a demand, a grievance or a dispute in relation to a strike or lock-out in the definition of the phrase 'issue in dispute' confirms the existence of three categories of strikes, namely, those which have a demand, those where there is no demand but there is a grievance and those in which there is a dispute. There can be no doubt that, where there is a concerted refusal to work or a concerted retardation or obstruction of work which is accompanied by a demand, such a demand is the issue in dispute.... “

[17] This authority clarifies, in general terms, that the conduct of employees will constitute a strike if it meets three requirements: it is concerted, it hinders or obstructs work, and it is for the purpose of resolving a grievance, demand or issue in dispute.

[18] In this matter, on the applicant's version, the conduct of its employees, during October and November 2023, met the definitional requirements of strike action. The conduct hindered or obstructed work, it was concerted, and it was

for the purpose of resolving a demand – that all the employees engaged on the EPWP be employed on indefinite term employment contracts. In the circumstances, there can be no question that the jurisdiction of this court was correctly engaged when the interim order was granted, given that the misconduct interdicted was in furtherance of an unprotected strike.³

Jurisdiction of the Court

[19] Whether this Court, correctly seized with jurisdiction when the matter is first heard, can be deprived of jurisdiction thereafter, by a shift in the factual matrix, is less clear.⁴ I believe the court retains its jurisdiction in such circumstances. Fortunately, the unique facts of this matter allow me to dispose of the matter on a clearer basis.

Requirements for final interdict

[20] The applicant must satisfy the requirements for a final interdict which, of course, are well embedded in our law.⁵ Importantly, for our purposes, to obtain a final interdict, there must be a continuing injury or a reasonable apprehension of future harm occurring.⁶

³ Section 68(1) of the LRA

⁴ The jurisdiction of the Labour Court does not extend to all matters arising from the employment relationship and, as a creature of statute, its jurisdiction is established by the four walls of the statute, or statutes, which grant it jurisdiction. The jurisdiction of the Labour Court is not governed by its broad powers under the LRA. It exercises its broad powers in relation to those matters under its jurisdiction. Of course, the jurisdiction of the court will be governed by the pleaded facts and law of each matter. For example, when a political party threatens the health and safety of employees in an otherwise unrelated business enterprise the court may well find that it has jurisdiction to interdict such conduct through section 157(2)(a) of the LRA, or through section 77(3) of the Basic Conditions of Employment Act, 1997. An employer must take reasonable steps to protect the health and safety of its employees. The employees, on the other hand, have a right to a reasonably safe working environment and to be free from all forms of violence. These rights and duties may find expression in the employment contract, statute, or the Bill of Rights.

⁵ The applicant must establish a clear right or, more accurately, a right clearly established on a balance of probabilities, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy. See CB Prest: *The Law and Practice of Interdicts* pp 42 – 48

⁶ See *Makhado Municipality v South African Municipal Workers Union & Others* (2006) 27 ILJ 1175 (LC) at para 6, and *Phillip Morris Inc & another v Marlboro Shirt Co SA Ltd & another* 1991 (2) SA 720 (A) 735B

[21] This principle has recently been confirmed in *UDM and another v Lebashe Investment Group (Pty) Ltd and others*⁷ where the Constitutional Court said: “An interdict is not a remedy for the past invasion of rights: it is concerned with the present and future. The past invasion should be addressed by an action for damages. An interdict is appropriate only when future injury is feared.”

[22] Here, the applicant cannot demonstrate that there is any possibility that the Union or its members are violating, or will violate, any of its rights in future. In these circumstances, the rule nisi falls to be discharged.

Costs of the application

[23] Both parties sought costs. In *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another*⁸ the court stated as follows: “The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The 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. In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes.” (Own emphasis)

[24] Both parties genuinely believed they were acting in defence of their rights. In these circumstances, there is nothing in law or fairness which requires

⁷ 2023 (1) SA 353 (CC) at para 48

⁸ [2008] 6 BLLR 540 (LAC) at para 19

that either of them be mulcted in costs. I therefore exercise my discretion by making no costs order.

Conclusion

[25] In the result, the rule nisi and interim order is discharged, with no order as to costs.

R Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Mokoatlo
Instructed by: State Attorney

For the Respondent: Ms. Cecilia Sithole
Instructed by: Sithole Attorneys