



THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case no: PA 04/2023

In the matter between:

CEPPWAWU

First Appellant

THUSILE NJAPA MASHANDA

Second Appellant

and

SAKHIWO ZAKO

First Respondent

MZWANDILE MPOFU

Second Respondent

Heard: 25 September 2024

Delivered: 26 September 2024

Coram: Van Niekerk JA, Nkutha-Nkontwana JA & Jolwana AJA

JUDGMENT

VAN NIEKERK, JA

[1] On 4 June 2020, the Labour Court appointed the second appellant as the administrator of the first appellant (the union). In terms of the order, the second appellant was authorised to take immediate control of and in the place of the

union's president, deputy general secretary, national office bearers committee and the national executive committee, to manage the affairs of the union, together with all assets and interests relating to the union's business and affairs.

[2] During July 2021, the second appellant, in her capacity as administrator, embarked on a restructuring exercise in terms of s 189A of the Labour Relations Act (LRA). On 21 July 2021, the first respondent referred the matter to the CCMA for facilitation in terms of s 189A(3). During the course of the facilitation, the respondents filed an urgent application in terms of 189A(13), seeking an order to the effect that the second appellant consult the union's national executive committee prior to implementing the restructuring exercise, declaring that she had acted *ultra vires* her powers as administrator, and that the process was fundamentally flawed and a *fait accompli*.

[3] On 8 September 2021, the Labour Court issued an order in terms of which the second appellant was ordered to comply with paragraph 3.9 of the order granted by the Labour Court on 4 June 2020, and 'to comply with a fair procedure'. Paragraph 3.9 of the order issued on 4 June 2020 concerns, among other things, the second appellant's authorisation to convene meetings of the union's national executive committee, on notice given within the time periods prescribed by the Constitution, and to consider any motions for the removal or reinstatement of a national office-bearer.

[4] This is an appeal against the order issued by the Labour Court on 8 September 2021, and also against the order granted on 12 November 2021 when the Labour Court refused an application for the late filing of an application for leave to appeal, with costs.

[5] I deal first with the appeal against the order refusing leave to appeal. The founding affidavit filed in support of that application discloses that the delay was not excessive, and the explanation for the delay reasonable. The Labour Court refused the application primarily on lack of reasonable prospects of success. That notwithstanding, on 15 February 2023, the Labour Court delivered a written judgment in which it found that the appellants had established

reasonable prospects of success in the main application and granted leave to appeal, with costs to be costs in the appeal. The reason for this *volte-face* is not apparent from the papers, but it would seem from the terms of the order that the Labour Court itself considered the order issued on 12 November 2021 to have been incorrectly granted. There is nothing before us to gainsay that conclusion. The issue remains live on account of the order for costs granted against the appellants. Given the Labour Court's subsequent ruling in which leave to appeal was granted on the basis of reasonable prospects of success, there was no basis, in the application for condonation, for the costs order made against the appellants. The appeal, insofar as it is directed against the order issued on 12 November 2021, thus stands to succeed.

[6] In relation to the merits, during the hearing, despite having submitted heads of argument opposing the appeal on substantive grounds, both respondents elected to withdraw their opposition. The appeal thus stands to be considered on an unopposed basis.

[7] The appellants' primary contention is that the judgment under appeal is a nullity for want of jurisdiction. In particular, the appellants note that the urgent application that served before the Labour Court was brought in terms of s 189A(13) of the LRA, primarily directed at declaring the s 189A process initiated by the second appellant to be unfair. The issue before the court was thus whether there had been compliance with a fair procedure, as contemplated by s 189 of the LRA. This Court has made clear, and indeed the Constitutional Court has confirmed,¹ that the purpose of s 189A(13) is to enable the Labour Court to intervene in any restructuring or retrenchment exercise where there is a failure by the employer to comply with the requirements of fair procedure, and to issue orders to ensure such compliance. To the extent then that the application before the Labour Court concerned matters that fell outside of the statutory facilitation process and in particular, the requirements of fair procedure established by the LRA, the appellants submit that these could not properly be brought before or considered by the Labour Court.

¹ *Solidarity obo members v Barloworld Equipment Southern Africa & others* (2022) 43 ILJ 1757 (CC).

[8] The notice of motion filed in the application brought by the respondents sought an order directing the appellants to withdraw the s189A notice dated 13 August 2021, and declaring the process initiated by the second appellant to be unfair. The founding affidavit discloses that the basis on which the assertion of unfairness was made rests entirely on the provisions of the union's constitution, read with the Labour Court's order dated 4 June 2020. In particular, the first respondent in these proceedings, who was the deponent to the founding affidavit, contended that the second appellant had exceeded the powers extended to her in terms of the union's constitution, read with the order. This averment was upheld by the Labour Court, which granted the order sought on the basis that the second appellant's powers were not unlimited, and that she was not vested with powers entrusted in terms of the union's constitution to the union's national executive committee. The Labour Court made specific reference to clause 42(2) of the union's constitution, which provides that the national executive committee exercises all executive functions of the union within the national sphere of its operations and has the general authority, amongst other things, to *'...determine the creation, maintenance and termination of employment posts for the effective running of the union and higher union employees through national office bearers and to determine employment terms and conditions for employees and officials of the union...'*. In particular, the Labour Court found that the second appellant had failed to convene, on notice, a meeting of the national executive committee in accordance with the time periods established by the constitution, and granted the order that it did on that basis.

[9] A proper analysis of the notice of motion and founding affidavit discloses that the substance of the claim that served before the Labour Court was an alleged failure by the second appellant to comply with the union's constitution. This, of course, is a matter regulated by s 158(1)(e) of the LRA, where the Labour Court is empowered to determine a dispute between a union and one or more members regarding any alleged non-compliance with the union's constitution. There were no averments before the Labour Court to establish a case of unfair procedure, certainly not in relation to the elements of fair

procedure listed in s 189(2) and (3) of the LRA. What was alleged were breaches of the union's constitution, read with the 4 June 2020 order, and a lack of authority on the part of the second appellant to initiate a facilitation process. The issue is thus not one of a lack of jurisdiction so much as a failure by the respondents to have made out a case in the founding affidavit for the relief that they sought. In the absence of a proper factual foundation establishing the appellants' failure to comply with a fair procedure, the application ought to have been dismissed. In these circumstances, there is no need to consider the appellants' further grounds for appeal.

[10] Although, as I have indicated, opposition to the appeal was withdrawn during the course of the hearing, the respondents had raised in the heads of argument the issue of mootness. While a lot of water has passed under the proverbial bridge since the granting of the order that is the subject of this appeal, I am satisfied that the appellants have established that the dispute between the parties remains live, at least in the sense that the judgment under appeal formed the basis of subsequent contempt proceedings and may be relevant to future proceedings concerning the alleged unfair dismissal of the respondents.

[11] In the result, the appeal stands to succeed.

[12] Insofar as costs are concerned, the appellant sought an order for costs against the respondents, who in turn submitted that the requirements of the law and fairness dictated that each party be responsible for its own costs. I agree with the latter submission – the costs regime that applies in the Labour Court and in this Court is one in which the court is ordinarily reluctant to make an adverse order for costs against dismissed employees who pursue grievances against their erstwhile employers in good faith. There is no reason why the present case should be treated any differently. Each party ought therefore to bear its own costs, including the costs of 4 September 2024 when the appeal was stood down to enable the respondents to obtain the record and file heads of argument.

[13] I make the following order:

1. The appeal succeeds and the orders of the Labour Court granted on 8 September 2021 and 12 November 2021 respectively, are set aside.
2. The order granted on 8 September 2021 is substituted by the following:
'The application is dismissed'.
3. The order granted on 12 November 2021 is substituted by the following:
'The application for condonation is granted'.
4. There is no order as to costs.

A van Niekerk JA

Judge of the Labour Appeal Court

Nkuta-Nkotwana JA *et* Jolwana AJA concur

Appearances:

For the Applicant:

S Bismilla

Instructed by:

KMNS Attorneys

For the Respondents:

Self