



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JA123/2014

In the matter between:-

METSIMAHOLO LOCAL MUNICIPALITY Appellant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION First Respondent

THE PERSONS MENTIONED IN ANNEXURE "A" Second Respondent

Heard: 12 November 2015

Delivered: 11 May 2016

Summary: Employees embarking on strike in relation to issues which had already been mediated – employer obtaining interim order interdicting strike – Labour Court, on the return date, discharging interim order – Appeal – strike notice defective due to vagueness of the commencement of the strike – strike notice a procedural requirement. Strike unlawful for lack of proper notice – Labour Court erring in not confirming the rule *nisi*. Appeal upheld – Labour Court's judgment substituted with an order to the effect that the rule *nisi* is confirmed.

JUDGMENT

CJ MUSI JA

- [1] This is an appeal, with the leave of the court *a quo*, against the judgment of the Labour Court (Sono AJ) wherein it discharged a rule *nisi* with no order as to costs.
- [2] The respondents referred two disputes to the South African Local Government Bargaining Council (the Bargaining Council). The first dispute related to the appellant's alleged refusal to implement resolutions of the Local Labour Forum (LLF) with regard to salary disparities and the group scheme. The second dispute related to the interpretation and application of a collective agreement. Both disputes could not be resolved and the Bargaining Council issued certificates of non-resolution in respect of both disputes on 17 March 2014.¹
- [3] The parties agreed to endeavour to resolve their disputes through mediation. Commissioner Mohlala was appointed by the parties to mediate the disputes between them. Mohlala facilitated the process and issued a report on 23 March 2014. In terms of the report, agreement was reached in respect of all issues in dispute. The report concludes as follows:
- 'At the conclusion of the mediation session it was agreed that SAMWU will not exercise its right to strike or the municipality its recourse to lock out in the event of non-fulfilment of any part of this agreement. Further mediation session(s) shall be convened to attempt to break any deadlock arising before or after 30 June 2014 on any of the issues for which the parties have agreed on a process to resolve (sic).

¹ The respective certificates of outcome were issued under case number FSD021410 and FS021411.

This agreement, therefore, suspends the right of SAMWU to embark on a strike action on the issues covered under this agreement and the municipality's recourse to lock-out only until 30 June 2014.'

- [4] The issues covered under the agreement were the pay disparity, group scheme and the interpretation of the collective agreement. On 13 June 2014, while the appellant thought that the issues were resolved through the mediation process, the first respondent (SAMWU) served a strike notice on the appellant. The said strike notice reads as follows:

'Notice to engage in an industrial action (sic)

The matter cited above bear's reference (sic):

This communiqué serves to notify you that SAMWU will be embarking in an industrial action as from 17 June 2014 (sic). Take note that employer have been notified about this action in the last paragraph of the letter sent to the office of the Executive Mayor dated 22 May 2014 (sic). This action is informed amongst others by failure by the employer to implement what was agreed upon in the private mediation that was held on the 19 – 20 March 2014 (sic)...

- [5] In the letter of 22 May 2014, SAMWU complained about the failure by the appellant to implement the LLF's resolutions, the unfair dismissal of Mr Makua and 91 other employees, the unilateral change of the recruitment and selection policy, health and safety issues, insurance and funeral scheme pay-out, misuse of council funds, outsourcing of municipal services, failure to appoint employees after interviews were conducted, the disregard for arbitration awards and the unnecessary review applications. The letter ends as follows:

'We therefore seek your urgent political intervention on the above said matters as we have no choice but to revoke the mediation agreement and use our certificates that allows us to go on strike (sic). Probably an urgent meeting with you and your committee might possibly assist in this regard, as 30 May will be our final date in meeting you. (sic)'

[6] The respondents commenced with the industrial action on 17 June 2014. The appellant issued an ultimatum wherein it pointed out that the strike was unprotected and requested all the striking employees to report to their immediate supervisors. The first respondent's offices (Provincial and National) were also informed about the unlawfulness of the industrial action. Meetings were held between the appellant and shop stewards of SAMWU in order to attempt to resolve the dispute to no avail. The strike continued and the appellant approached the Labour Court, on an urgent basis, for an interdict.

[7] The urgent application served before Tlhotlhemaje AJ. On 27 June 2014, after the respondents had filed an answering affidavit and the matter fully argued before him, he issued a rule *nisi* returnable on 9 October 2014 to the effect that the strike was unlawful and unprotected. The respondents were also interdicted from promoting, inciting or instigating or participating in the unlawful strike. They were further, *inter alia*, interdicted against assault and damaging of property.

[8] Tlhotlhemaje AJ further ordered that:

'Unless and until the respondents comply with the provisions of section 64 and 65 of the Act, any further strike embarked upon by them will constitute a strike that is prohibited in terms of the said sections.'

[9] On 6 October 2014, the respondents filed a supplementary affidavit wherein they essentially set out what transpired after the rule *nisi* was issued. On 9 October 2014, the matter was before Sono AJ and the appellant objected to the supplementary affidavit being received as evidence because it was irrelevant. Sono AJ found that the supplementary affidavit raised crucial issues which were, in her view, determinative of the matter. She put it thus:

'As already stated, the affidavit raised crucial issues which may be dispositive of the matter. It is for this reason that the applicant (appellant) should have filed a response. The applicant however elected not to do so but to approach the court with an argument that the contents of the affidavit are irrelevant. I do not agree with this contention. These issues relate to the question whether the applicant has a clear right to the relief sought. Put differently, the

supplementary affidavit deals with the question whether good cause has been shown as to whether or not the strike action should be interdicted.'

[10] I have serious doubt as to whether the approach followed by the court *a quo* and its reasons for admitting the supplementary affidavit are correct. I say this because the respondents filed an answering affidavit and it was in that affidavit that they were supposed to show that the rule *nisi* ought not to be granted because, *inter alia*, the appellant had not shown that it had a *prima facie* or clear right. The supplementary affidavit dealt with facts that occurred after the rule *nisi* was granted. The appellant's attitude in the court *a quo* and in this Court was that even if the contents of the supplementary affidavit were considered as relevant evidence, the rule *nisi* should still have been confirmed. I will adjudicate this matter on the assumption that the supplementary affidavit was admissible.

[11] In the supplementary affidavit, the respondents testified that they adhered to the rule *nisi* from 30 June 2014 (which was the first working day after 27 June 2014) to 9 July 2014.

[12] On 1 July 2014, they gave notice to the appellant that they would commence with industrial action from 10 July 2014. The notice reads as follows:

'Notice to engage in an Industrial Action (sic).

The matter cited above bear's reference (sic). This communiqué serves to notify you that SAMWU will be embarking in an industrial action at any point from 10 July 2014 onwards (sic). Hope you will find the above in order.'

[13] On 2 July 2014, the appellant wrote to all its employees informing them that it had come to its attention that some of its employees were participating in unlawful industrial action in the form of a go-slow. The employees were informed that such industrial action was unlawful and in breach of the court order of 27 June 2014.

[14] On 4 July 2014, the appellant wrote a final notice to all SAMWU's members who were still embarking on unlawful industrial action, and requested them to return to work and resume their duties. They were also warned that from 7

July 2014, the appellant would start to issue all employees who were still engaged in or continuing with the unlawful strike, with dismissal notices.

- [15] SAMWU requested to meet with its members on 7 July 2014 but denied that its members were participating in an unlawful strike. Permission was granted and SAMWU met with its members who persisted with their denial.
- [16] On 10 July 2014, SAMWU's members commenced with strike action in accordance with the notice of 1 July 2014.
- [17] The court *a quo* found that the strike notice of 1 July 2014 was in compliance with the rule *nisi* and section 64(1)(d) of the Labour Relations Act 66 of 1995. The court *a quo* further found that the industrial action which commenced on 17 June 2014 came to an end and there was therefore no strike to interdict. According to the court *a quo*, the strike which commenced on 10 July 2014 was a new strike and not the subject matter of the rule *nisi*. The rule *nisi* could therefore not be confirmed.
- [18] The court *a quo* found that the strike notice of 1 July 2014 cured the defect in the strike notice of 13 June 2014, therefore the respondents could lawfully engage in industrial action, because there was no court order against the strike which commenced on 10 July 2014. The appellant submitted, in the court *a quo*, that the disputes that formed the subject matter of the strike that commenced on 10 July 2014 were not referred for conciliation. The court *a quo* rejected that argument and inexplicably found that because two certificates of non-resolution were issued on 17 March 2014, therefore, the respondents could embark on a lawful strike.
- [19] The appellant raised numerous grounds of appeal. In its heads of argument, which were drafted by Mr Brassey, it confined itself to a single ground of appeal. It contended that the purported strike notice of 1 July 2014 was fatally defective in that it had not informed the appellant when the respondents would commence with the proposed strike. Mr Marcus who appeared, before us, on behalf of the appellant, however contended that the supplementary affidavit should not have been admitted in evidence and that the matter should have been adjudicated on the founding and answering affidavits only, because the

appellant did not file a replying affidavit. If it was necessary to decide this point, I would probably have decided it in Mr Marcus' favour, but based on the assumption alluded to above, I do not have to decide this point.

[20] The respondents defended the court *a quo*'s order and contended that the issue was moot because the respondents commenced with a new strike on 10 July 2014 and the lawfulness of the July strike is irrelevant to decide whether the rule should be confirmed. The fact of the matter being that the June strike had run its course. They also contended that the strike notice issued by the respondents was clear in that it notified the appellant that the strike would commence on 10 July 2014 or any date thereafter.

[21] Section 64 and 65 of the Labour Relations Act 66 of 1995 ("the Act") read as follows:

'64 Right to strike and recourse to lock-out

- (1) Every employee has the right to strike and every employer has recourse to lock-out if-
 - (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-
 - (i) a certificate stating that the dispute remains unresolved has been issued; or
 - (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-
 - (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-
 - (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

- (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
- (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
- (d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).

65 Limitations on right to strike or recourse to lock-out

- (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-
 - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
 - (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
 - (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law;
 - (d) that person is engaged in-
 - (i) an essential service; or
 - (ii) a maintenance service.¹²
- (2) (a) Despite section 65 (1) (c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.¹³

- (b) If the registered trade union has given notice of the proposed strike in terms of section 64 (1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.
- (3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out-
 - (a) if that person is bound by-
 - (i) any arbitration award or collective agreement that regulates the issue in dispute; or
 - (ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
 - (b) any determination made in terms of Chapter Eight of the Basic Conditions of Employment Act and that regulates the issue in dispute, during the first year of that determination.'

[22] Tlhotlhemaje AJ found that the respondents were obliged to give seven days' notice of their intention to strike as contemplated in section 64(1)(d) of the Act. The exceptions in section 64(3) of the Act do not find application in this case. Secondly, by virtue of non-compliance with the provisions of section 64(1)(d) of the Act, it follows that the strike action embarked upon by the respondents was unlawful and unprotected, and the question as to whether the issues in dispute were resolved or not became moot for the purposes of that application.

[23] I find it quite strange that Tlhotlhemaje AJ issued a rule *nisi* when it was clear that final relief ought to have been given. A rule *nisi* should only be granted as interim relief pending the institution of judicial proceedings or because the other side has not been given proper opportunity to challenge the allegations in the application for a rule *nisi*.

- [24] In this matter, the respondents filed an answering affidavit and all the issues were properly ventilated before Thlotlhemaje AJ. He should have granted final relief.
- [25] When the matter was before Sono AJ, it ought to have been clear that at the time that the rule *nisi* was granted, the appellant was entitled to final relief. Sono AJ should therefore have confirmed the rule *nisi* on the basis that the strike was unprotected for lack of a proper strike notice. The issues that occurred subsequent to the rule *nisi* being granted were therefore irrelevant for the determination of the fate of the rule *nisi*.
- [26] The supplementary affidavit clearly shows that the respondents still embarked on the unlawful strike even after the rule *nisi* was granted. The ultimatum issued by the appellant on 2 July 2014 and 4 July 2014 would otherwise not have been issued if normality was restored by the rule *nisi*.
- [27] Did the notice of 1 July 2014 cure the defect in the notice of 13 June 2014? A strike notice is a procedural requirement for the exercise of the right to strike.² In *Equity Aviation Services (Pty) Ltd v SATAWU and Others*, it was said that:

‘The purpose of the strike notice is elaborated on by Helen Ready and Clive Thompson in their chapter on strikes and lock-outs in Clive Thompson and Paul Benjamin *South African Labour Law* as four-fold. First, the notice tells the employer that words are about to escalate into deeds, which they term ‘settlement brinkmanship’. Second, it leads to more orderly industrial action: the employer is given the opportunity to regulate what is inherently volatile – to agree or impose picket rules, for example. Third, it allows for ‘damage limitation’. Strikes are intended to cause financial loss, but the notice can prevent unnecessary loss – where an employer works with perishable goods for example, it can take steps to protect them. And fourth, ‘health and safety considerations’, in some cases an orderly slowdown of production might prevent or reduce health and safety risks to everyone in the workplace and to public. I would add that the requirement of a strike notice has an additional

² See *Equity Aviation Services (Pty) Ltd v SATAWU and Others* [2012] 3 BLLR 245 (SCA) at para 26 (*Equity Aviation Services*).

purpose: to protect employees. If they issue a strike notice in proper terms they are protected under the Act: their conduct is lawful.’³

[28] In *Ceramic Industries Ltd t/a Betta Sanitaryware and Another v NCBWU and Others*⁴ it was said that:

‘The specific purpose of warning employers of a proposed strike may have at least two consequences for the employer. The employer may either decide to prevent the intended power play by giving in to the employee demands, or, may take other steps to protect the business when the strike starts. For the former the notice in the present case might suffice, ... for the latter however, the notice is deficient, because the employer does not know when, after 48 hours the proposed strike will commence.’⁵

[29] In *Ceramic Industries Ltd t/a Betta Sanitaryware*, the manner in which section 64(1)(b) should be approached was stated as follows:

‘The language and purpose of section 64(1)(b) require that a specific time for the commencement of the proposed strike be set out in the written notice. The legislature was anxious that attention be paid to the “*commencement*” of the strike. The use of an exact time expressed in hours as a minimum of the notice to be given seems to indicate that the longer period envisaged by the phrase “*at least*” should also be expressed in an exact manner. The manner in which the time of the commencement of strike is expressed may, however, differ depending on the nature of the employer’s business. Strikes can occur which involve the whole workforce and others which merely involve one or more shifts. In a shift system notice of the exact time of the proposed strike in respect of particular shifts may be necessary.’⁶

[30] The strike notice in this matter, in as far as it does not indicate when exactly or on which day the strike would commence, is defective. How can an employer be expected to take steps to prepare for the eventuality of a strike when it is notified that the strike would commence “at any point from 10 July 2014 onwards”. At any point from 10 July 2014 onwards means that the strike could

³ At para 15.

⁴ [1997] 6 BLLR 697 (LAC).

⁵ At page 702B-C.

⁶ At page 702D-F.

commence on any day from the 10th of July 2014. This notice could therefore not cure the first notice. The court *a quo*'s finding to the contrary is therefore wrong.

[31] The contention of the respondents that the whole matter is moot is without merit for the simple reason that there are unfair dismissal disputes pending, which dismissals were as a result of the strike action. The question whether the strike was protected or not would therefore feature prominently during those proceedings. There is no reason in law or fairness why a costs order should be made in this matter.

[32] I therefore make the following order:

- a) The appeal is upheld with no order as to costs.
- b) The order of the court *a quo* is set aside and replaced with the following:

The rule *nisi* is confirmed.

C J Musi JA

Tlaletsi DJP and Makgoka AJA concur in the judgment of C J Musi JA.

APPEARANCES:

FOR THE APPELLANT:

Adv. M H Marcus

Instructed by Lebea & Associates
Johannesburg

FOR THE FIRST RESPONDENT:

Adv. G L van der Westhuizen

Instructed by Maenetja Attorneys Pretoria

LABOUR APPEAL COURT