

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JS 113/2010

Reportable

In the matter between;

**CHEMICAL, ENERGY, PAPER, PRINTING,
WOOD AND ALLIED WORKERS UNION**

First Applicant

BADYE, ISAAC & 293 OTHERS

2ND and Further Applicants

and

EXPRESS PAYROLL CC

Respondent

JUDGMENT

CAWE AJ:

Introduction

- [1] This is an interlocutory by the Respondent, a labour broker, seeking an order preventing Cheadle Thompson of Hayson Inc, a firm of attorneys, from acting on behalf of the second and further Applicants until they have furnished proof of their own, or First Applicant's authority to act on behalf of second and further Applicants in the main matter, i.e. the alleged automatically unfair dismissal of the second and further Applicants.

Factual Background

- [2] The Respondent is a labour broker providing the services of workers to Glass Decorations CC, the client.
- [3] The main dispute between the parties and which gave rise, subsequently, to the instant application before the Court, is the dismissal of the second and further Applicants by the Respondent on allegations that they committed acts of misconduct during what Respondent termed “an unprotected strike.
- [4] There is no formal recognition agreement between the union and the company but the company has granted some organisational rights to the union, including the recognition of its shop stewards.
- [5] The parties were engaged in negotiations regarding wages and conditions of service. The last meeting that the parties held was on the 22 June 2009. The said negotiations deadlocked. The Applicant Union then referred a wage dispute to the CCMA for conciliation.
- [6] The CCMA set the wage dispute down for conciliation on 14 August. Both parties attended the conciliation meeting. The company was represented by Mr Van Rooyen, Mr Van Graan and its legal representative, Mr Gary Ryan Rose. The union and its members were represented by Makhaza and the union’s shop stewards.

- [7] The dispute was not resolved. The Commissioner issued a certificate of non resolution authorizing the second and further Applicants to strike.
- [8] In its statement of claim the Union states that on the 15 August 2009 it addressed a letter to the company that its members would embark on a protected strike with effect from 6 am on 18 August. The Respondent sent the Union picketing rules. According to the Union, these were drafted by the Company without consultation with the Union
- [9] It is the Applicant's version that on 20 August, and when the workers were on strike, the company addressed a "notice to all members to attend disciplinary enquiry" on 25 August.
- [10] It is the Applicant's further version that the disciplinary hearing on 25 August proceeded in the absence of the affected workers, or CEPPWAWU, which had requested a postponement of the hearing. One of the union's shop stewards attended the hearing to ensure that it was postponed. The company gave him a bundle of documents and successfully attempted to persuade him to represent the affected workers. The hearing was conducted for 205 workers who had been charged with various acts of misconduct (including participation in unprotected strike action). All of those workers were found guilty of participating in an unprotected strike by the external chairperson. Many of them were dismissed for alleged misconduct.

- [11] The Applicant Union then referred an automatically unfair dismissal dispute, on behalf of the dismissed workers, to the Labour Court. The reasons for contending that the dismissal was automatically unfair have been set out in detail in the Applicant's statement of claim. As I do not have to decide on that issue I will not deal with them in the present judgment.
- [12] When the first Applicant gave notice of the application to the Respondent, Respondent demanded proof that the second and further Applicants were indeed members of the union and / or that its attorney, Cheadle, Thompson and Hayson Inc had authority to act on behalf of the Applicants.
- [13] Respondent's attorneys, Erasmus- Scheepers Attorneys, invited the Union's attorneys to furnish proof that they were acting on behalf of the second and further Applicants, the Applicant's attorneys addressed a letter to stating amongst others;

“We deny that, at this time, we must furnish your client with proof of our authority or powers of attorney from each applicant. The Rules do not permit you to challenge our authority in this manner or at this time. Nevertheless, we will furnish you with proof of our authority before the dispute is enrolled for trial. If you intend challenging the union membership of the individual applicants in your client's statement of response, we will lead evidence concerning the issue at trial. (or we will file powers of attorney from each applicant beforehand). It is clear that in our client's

statement of claim it is alleged that the individual applicants are members of the first applicant, a registered trade union. Section 200(1)(b) of the Labour Relations Act 66 of 1965 permits a registered trade union to represent its members in proceedings of this nature.

We therefore do not intend to deliver powers of attorney or proof of union membership (from each of the individual applicants) at this point. There is no basis for your client to take an exception on this basis. This would clearly stratagem to delay the proceedings. We will oppose such step and seek costs on a punitive scale, possibly against you directly.”

[14] The Respondent’s attorneys instituted a notice to remove cause of complaint in the Court. It duly informed the Union’s attorneys of same in a letter dated 22 February 2010. The relevant paragraphs of the letter are 2.2, 2.3 and 3 which read:

2.2 Our notice, in regards to your and the union’s authority, was informed by Rule 17 of the Uniform Rules of the High Court. Whilst you are quite correct in asserting that the Rules of the Labour Court have no express provision for this procedure, the “catch all” provision in Rule 11(3) of the Rules of the Labour Court enables it to adopt the Rules of the High Court, in cases such as this. The purpose of adopting this procedure, at this stage, is to preclude unnecessary costs should there indeed be no mandate to your firm or the union.

2.3 We might add that your allegation, that this is a strategy to delay the proceedings, is rejected. None of the individuals identified as Applicants were members of the First Applicant when they went on

strike and none of them had stop-orders in favour of such union with our client. Our notice is thus not a delaying tactic but a genuine attempt to address the probability that none of the individual Applicants are members of the First Applicant.

3. We accordingly suggest that you supply us with a power of attorney, from First Applicant in favour of your firm, and also copies of stop-orders or other proof of membership of First Applicant in respect of the individual Applicants. Should you fail to do so we shall apply for an order, to prevent you from taking any further steps in this litigation.

[15] The Applicants attorneys remained adamant that they were under no obligation to furnish the proof required by the Respondent. The Respondent then moved the instant interlocutory application.

[16] The Respondent's founding affidavit, deposed to by Lilo Chantal Van Rooyen, insists the Court to utilise Rule 7 of the High Court.

[17] In its answering affidavit, deposed to by one Melatelo Makhura, the Applicant's attorneys submit that Rule 7 of the High Court being "imported" to the Labour Court is not part of practice and has no application in the present matter. Paragraphs 4 and 5 of Mr Makhura's affidavit read,

*"I submit that there is no merit to this application whatsoever. Rule 7 of the Uniform Rules applicable to the High Court is of no application in the present matter. Rather, the point raised by the respondent is regulated by section 200 of the Labour Relations Act 66 of 1965 (the LRA). This section has been authoritatively interpreted by the Labour Appeal Court in the case of **National***

Union of Mineworkers v Hernic Exploration (Pty) Ltd (2003) 24 ILJ 787 (LAC) at 8020 – 801, paras [39 and 41].

The practice in this Court regarding a registered trade union proving its authority to litigate and seek relief on behalf of its members is clear, established and well known. There is thus no reason to import Rule 7 of the Uniform Rules into this or any other matter. The respondent's alleged point makes even less sense in the context of the present case, as the union's dismissed members are, cited as individual applicants in their own right."

- [18] Of the 205 Applicants only 83 have signed powers of attorney to be represented by the first Applicant's attorneys. The bulk of Applicants have not signed any powers of attorney nor was there proof that they were in fact members of CEPPWAWU, the Applicant Union.
- [19] It was argued by the Respondent's Counsel that at the time the Applicants were employees of the Respondent they were not members of the Applicant Union. This was not disproved by Applicant's attorneys or their counsel. There was not even an affidavit by the union secretary, to prove such membership that was tabled before the Court.
- [20] In reply, it was argued on behalf of the Applicants that the interlocutory application is a ploy by the Respondent, to delay the matter. For over a year the Respondent had not filed a statement of case.

[21] The Applicant's counsel argued, further that Rule 11(3) of the Labour Court does not enjoin the Court to adapt Rule 7 where there is no need to do so. The need to prove that all the Applicants are members of the Union would arise only at the discovery stage of the main application. Rule 7 should only be adopted where it would lead to expeditious resolution of the matter. Counsel submitted that *in casu* it had merely slowed the matter down.

Analysis

[22] The matter has been dragging on for close to a year without resolution. From the outset the Respondent requested proof that the first Applicant's attorneys had a mandate to act on behalf of all the dismissed Applicants. The Applicant's attorneys attitude was that there was no need to prove that they had authority to act on behalf of all the Applicants and that the issue should be raised only at the discovery stage of the main application.

[23] If the Applicant is interested in the expeditious resolution of the dispute, as argued by Counsel, the question to ask is why did they not merely produce the power of attorney that proves their mandate to act on behalf of the Applicants, other than the 83 that have been verified as having given Applicant's attorneys the mandate to act on their behalf.

[24] I agree with Applicant's submission that Rule 11(3) has to be used where it will lead to the expeditious resolution of a matter. I, however, differ from Counsel in that I believe that it has now

slowed down the process.

[25] The question to be asked is whether Rule 11(3) which reads:

(3).If a situation for which there rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that deems appropriate in the circumstance.

[26] Can Rule 11(3) be used to adopt the procedure for Rule 7(1) of the High Court Rules in the instant application? The answer has to be in the positive. Rule 11 was meant for exactly the situation that the present parties find themselves in. There is a demand for proof of Applicant's and its attorneys authority to act on behalf of all the Applicants. It is common cause that the Labour Court Rules do not make provision for such proof. To cure such a "*lacuna*" in the Labour Court Rules, nothing precludes the adoption of the Rules of the High Court.

[27] It was argued by the Counsel for the Applicants that Rule 7(1) does not apply between litigants but applies to a litigant and his attorney. For this counsel relied on the comment by the authors on page 268 of **Herbstein and Van Winsen**¹. I do not read the commentary to mean that the Rule applies to an attorney and his client. If the client did not have an attorney why would the attorney issue formal court process on behalf of a party unknown to him. The Counsel for Applicant has clearly misinterpreted **Herbstein and Van Winsens** commentary in this regard.

[28] On the same page (268) of the learned author's commentary, the

¹ The Civil Practice of the High Court of South Africa, 5th Edition. Juta

issue is dealt with further. The relevant paragraph reads:

It is submitted that the effect of Rule 7(1) as substituted is to dispense with powers of attorney in all cases (subject to the provisions of rule 7(2) and 7(3)) until the authority of anyone acting on behalf of a party is disputed. In that event the court has to be satisfied that the person concerned “is authorised so to act”. This can be effected either by the production of a power of attorney or by some other mode of proof.

[29] In view of the aforementioned commentary and the cases cited, it does allow Respondent to demand proof of authority to act on behalf of the members that are not part of the 83 who have signed the power of attorney. The Respondent, in his papers, has no quarrel with the Applicant’s attorneys acting on behalf of the members that have been identified as having given such authority to the attorneys. The demand for proof pertains to the remainder of the Applicants cited in the main application.

[30] The Resolution and power of attorney referred to in paragraph 8 of the answering affidavit of Mr Makhura, pertains to the Union members that have been identified.

[31] If there was no need for the remainder of the Applicants to produce individual powers of attorney then, I believe, paragraph 9 would not have been incorporated into the affidavit. Clearly when the Applicants acknowledge that there is a need to furnish the powers of attorney by the outstanding litigants.

[32] The paragraph reads:

In addition, on 30 March 2010, CTH forwarded 83 powers of attorney from the union's members who are also the individual applicants cited in this matter to the respondent's attorneys. In our covering letter of this date, we advised the Respondent's attorneys that further powers of attorney covering the remainder of the individual applicants will be forwarded to them in due course, as and when they were to hand.

[33] There is no explanation as to why these powers of attorney have not been forwarded one year after the affidavit was deposed to. The only reasonable conclusion to drama is that it did not exist.

[34] The Applicant's counsel submitted that section 200(1) of the Labour Relations Act 66 of 1965 would have adequately dealt with the issue without Rule 7(1) of the High Court being "imported" as it were. In the **National Union of Mine Workers v Hernic Exploration (Pty) Ltd** (*supra*) the Labour Appeal Court (at paragraphs 39 – 41) dealt with the instances where section 200(1) of the LRA would be relevant.

[35] Zondo JP (as he was then) in paragraph 40 page 801 states that:

"I conclude in the end that on the basis of section 200(1) of the Act a trade union has a right to refer a dismissal dispute relating to its members to the CCMA for conciliation and to the Labour Court for adjudication as the referring party or as applicant without citing its dismissed members as co-applicants."

[36] This shows that the Union or its attorneys cannot be denied the opportunity to represent the Union's members. This is what

distinguishes the **Hernic** case from the instant one. The Respondent “*in casu*” wants proof of membership. As has been stated earlier in this judgement, the Applicants’ attorneys may represent the members who have signed the powers of attorney but should not extend its mandate to the dismissed employees who have not given such mandate. In the **Hernic** case (*supra*) the objection was that the appellant had no right refer the dispute to the CCMA but in the present application, the Applicant is asked to prove that all the employees are its members and is has a right to represent them.

- [37] The instant matter has dragged on purely because the first Applicant and its attorneys did not want to prove that it had a mandate to act on behalf of all the cited Applicants. There is no justification for the parties to wait until the “discovery stage” to raise the issue of authority to act.
- [38] The only solution to expedite proceedings in the main dispute is to import Rule 7 of the High Court Rules, in accordance with Rule 11 of the Labour Court Rules, and demand that the first Applicant and its attorneys provide proof of authority to act on behalf of the Applicants that have not signed any powers of attorney.
- [39] With regards to costs I have reason to believe that the Applicants delayed the prosecution of the dispute by not providing the

mandate to act on behalf of all the Applicants. This means, therefore that costs should follow the suit.

[40] In the result I make the following order:

1. The Interlocutory application succeeds
2. The First Applicant is to pay Respondent's costs

CAWE AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Enijen M

Instructed by: R.D. Daniels CT & H

For the Respondent: Beaton R.G SC

Instructed by: Erasmus Scheepers Attorneys

Date of hearing: 05 May 2011

Date of Judgment: 20 July 2011