IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Reportable
Case No: J1426/2011

In the matter between:

SOUTH AFRICAN POST OFFICE LIMITED — Applicant

and

L MOLOI N.O — 1st Respondent

COMMISSION FOR CONCILIATION ARBITRATION AND MEDIATION ("CCMA") — 2nd Respondent

SOUTH AFRICAN POSTAL WORKERS UNION obo MEMBERS ("SAPWU") — 3st Respondent

Date of Reasons: 12 October 2011

REASONS FOR ORDER

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the certificate of outcome issued by the First Respondent (the Commissioner) under case number GAJB 11574-11. The applicant seeks to review the certificate of outcome because of the recording by the Commissioner that the dispute concerns "(Section) 64(4) Unilateral change to the terms and conditions of employment."

[2] Based on that certificate, Third Respondent (the respondent) notified the applicant of its intention to embark on an industrial action. In this respect, the applicant sought and obtained an interim order interdicting and restraining the

respondent together with its members from embarking on an alleged unprotected strike which had been planned to commence on 25th July 2011.

[3] The applicant now seeks to have the interim order made on 23rd July 2011 by Basson J confirmed and made a final order. An interim order made on that day reads as follows:

> "1.1 That the certificate of outcome issued by the first respondent on the 19th July 2011 under case number GAJB11574-11 of the second respondent in terms of which a dispute concerning the unilateral change to the terms and conditions between the applicant and the third respondent remained unresolved, be reviewed and set aside;
>
> 1.2 That it be declared that any industrial action that may be embarked upon by the third respondent on the strength of the certificate of outcome, will be unprotected;
>
> 1.3 That any industrial action by the third respondent on the strength of the certificate of outcome, be stayed pending the final outcome of this application.
>
> 1.4 That the dispute be remitted to the CCMA to be considered de novo."

[4] On the return date, on 9th September 2011, the matter was postponed to 28th September 2011 to afford the applicant the opportunity to verify the authenticity of annexure "**TMM1"** introduced by the Respondent after the pleadings were closed. The applicant has now confirmed that "**TMM1**" which is titled "Take Note" is indeed an official document issued by the applicant and it confirms in essence what is contained in annexure "**TMM1."**

[5] In light of the conclusion reached in this judgement there is no need to deal with the question of whether a case has been out for the admission of the additional affidavit of the respondent.

Background Facts

[6] It is common cause that the respondent referred a dispute to the Second Respondent (the CCMA) concerning an alleged change in the terms and conditions of employment on 10th May 2011. The nature of the dispute as summarised in the LRA form 7.11 reads as follows:

> "The employer has withdrawn a Group Funeral Scheme that has been in (enstamed) employees as its benefits should you die as a result of an accident which was a term and condition of employment."

[7] The conciliation process having failed to produce the desired result the Commissioner issued a certificate of outcome and categorised the dispute as concerning unilateral change to the terms and conditions of employment in terms of section 64(4) of the Labour Relations Act (the LRA)[1].

[8] Arising from the certificate of outcome, the respondent issued the applicant with notice of intention to commence with industrial action on 25th July 2011.

Grounds for Review

[1] Act 66 of 1995.

[9] The applicant contends that the certificate of outcome is reviewable because the Commissioner failed to apply his mind to the true nature of the dispute. In this respect, the applicant contends that the Group Funeral Cover Scheme upon which the respondent based their demand is not a term and condition of employment. The applicant further states in its founding affidavit that it never cancelled or withdrew Group Funeral Cover Scheme and that that cover is still in place.

[10] According to the respondent, the applicant has changed the above policy through “Take Note” dated 13th July 2006. There was apparently an earlier agreement between the parties regarding the changes which were according to the respondent was due to the applicant’s operational requirements.

[11] The changes to the group scheme which led to the dispute were however unilaterally introduced by the applicant says the respondent. The effect of the changes was that the group scheme altered the conditions of employment by limiting the right to benefit under the group scheme to those who are injured or die during working hours. The respondent says that it discovered the change in the terms and conditions of employment after one of its members approached it concerning a claim that was repudiated in respect of an employee who suffered death as a result of unnatural causes. The affected member had informed the respondent that the reasons given for declining the claim was that the group scheme covers only death occurring during working hours and no longer any other time.

[12] Subsequent to the notice of intention to embark on an industrial action, the parties met on 21st July 2011 with the view to averting the industrial action. The attempt at settlement was unsuccessful.

[13] On 22nd July 2011, the respondent distributed flyers at the work place urging its members to embark on an industrial action commencing on 25th July 2011.

[14] On the same day, 22nd July 2011, the applicant informed the respondent that it intends bringing an urgent application to be heard on 28th July 2011 and required the respondent to stay its industrial action pending the outcome of that application.

[15] In the founding affidavit of the initial application which the applicant had intended to enrol for the 28th July 2011, the reasons for urgency are set out as follows:

> "The reasons for the urgency of the initial application which was intended to be enrolled for 28 July 2011, is set out at paragraphs 24 to 28 of the applicant's founding affidavit. The essential reason for the urgency was because Applicant wanted "afford, the Third Respondent sufficient notice of the urgent application and to make provision for adequate time to file opposing papers and to avoid unnecessary delays."
> The other reason was because the Applicant had requested the Third Respondent to suspend the intended strike action pending the hearing of the urgent matter on the 28th July 2011."

[16] I assume the above reasons were given with the view to complying with the provisions of Rule 8 of the Rules of the Labour Court which reads as follows:

> "**8 Urgent relief**
>
> (1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).
>
> (2) The affidavit in support of the application must also contain-
>
> *(a)* the reasons for urgency and why urgent relief is necessary;
>
> *(b)* the reasons why the requirements of the rules were not complied with, if that is the case; and
>
> *(c)* if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted."

[17] The issue of the requirements of Rule 8 of the Rules of the Court does not arise in relation to the initial application, the matter having not been prosecuted any further. The issue does however arise in relation to the amended Notice as will be seen later.

[18] *The enrolment of the matter on the basis of the amended Notice of Motion:* The amended notice of motion amended only the date of the hearing; otherwise the rest of the contents thereof remained the same. It would appear that the reasons for the enrolment of the matter earlier than 28th July 2011 was because the respondent failed or refused to accede to the request of the applicant to stay their strike action, which was to commence on 25th July 2011, pending the outcome of the review application.

[19] In opposing the confirmation of the rule, the respondent contends that the Court was still faced with having to determine the issues which the Court was faced with when considering whether to grant the interim relief and further that if it was to be found that the requirements of an interim relief on an urgent basis was not satisfied, the Court should discharge the rule *nisi*. In this regard, the two points which the respondent specifically emphasises concerned urgency and whether the matter was properly before the Court. In respect to whether the matter was properly before the Court, the respondent contends that there was no proper service of the application on it.

[20] The issue of what approach is to be adopted on the return day of a rule *nisi* received attention recently in this Court in the matter of *Oupa Lucas Phakedi v Dr Kenneth Kaunda District Municipality and Others.*[2] It was held in that case that it was trite that on the return date of the rule *nisi,* the Court will consider all aspects raised by the parties including the issue of urgency. The Court in arriving at that conclusion relied on the decision in *SAFCOR Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission,*[3] where the Appellant Division held that:

> "Nor am I impressed by the argument that the Judge issuing the rule might be called upon to give a ruling on a matter of law which would be binding on the Judge who finally heard the matter, unless clearly wrong. Very often legal rulings are inextricably bound up with the facts placed before the Court. Obviously in such a case a ruling at the rule <u>*nisi* stage could not bind the Court finally hearing the matter on a more broadly-based factual foundation</u>. In some instances

[2] J1461/11.
[3] 1982(3) SA 654(A) at 676 C-E.

> the ruling of law might transcend the particular facts and be applicable both at the rule *nisi* and the final stages."(My underlining)

[21] The approach to be adopted on the return day was also dealt with in *Cekeshe and others v Premier, Eastern Cape, and Others.*[4] The approach in that case was put by van Zyl J as follows

> "The Court hearing the application thereupon granted the rule *nisi* to which I have referred to hereinbefore and gave the applicants leave to bring the application in accordance with the provisions of Rule 6(12)(a) of the Rules of this Court. The fact that such leave was granted by the Court hearing the application for the issuing of the rule *nisi* does not in my view in any way preclude me from reconsidering the question of urgency at this stage, as the respondents have now had an opportunity to fully deal therewith."

[22] In applying the above principle, it means that in the present instance, the issue before this Court entails having to determine all the issues raised before it including those raised during the application for the rule *nisi*. This includes *inter alia* the issue of urgency and whether the matter was properly before the Court.

[23] The key question as far as the issue of service is concerned, is whether the applicant has complied with the requirements of the rules 4(2) (b) of the Rules of the Court. If found that the applicant has indeed failed to comply with the provisions of that rule, then it would mean that the interim order would have been made in error

[4] 1998 (4) SA 935 at 947 E-G.

because the Court would not have been aware of this fatal defect or irregularity. Rule 4(2)(b) of the Rules of this Court reads as follows:

> "(2) Service is proved in court in any one of the following ways-
> *(a)*.....
> *(b)* if service was effected by fax, by an affidavit of the person who effected service, which must provide proof of the correct fax number and confirmation that the whole of the transmission was completed."

[24] The applicant does not deal with this issue in the heads of argument. The issue was also not dealt with in any detail by Counsel for the applicant during the hearing. The issue is however dealt with in the affidavit in support of the service, which was deposed to by Ms Maganbhai-Mooloo of the attorneys of record of the applicant wherein it is stated that:

> "3. On the 22nd July 2011 I served the Urgent Application: Notice of Motion and Founding Affidavit with annexures thereto on the First Respondent by way of personal service.
> 4. On the 22nd July 2011 I served the Urgent Application: Notice of Motion and Founding Affidavit with annexures thereto on the Second Respondent by way of personal service.
> 5. On the 22nd July 2011 I served the Urgent Application: Notice of Motion and founding affidavits with annexures thereto on the Third Respondent by way of facsimile. Appended hereto as annexure "**MMM1**" is the transmission slip and I confirm that the documents so faxed contain the said Urgent Application and its annexure.

> 6. On the 22nd July 2011 I served the Urgent Application: Notice of Motion and founding affidavit with annexures thereto on the Third Respondent by way of electronic mail. Appended hereto is annexure "**MMM2"** is proved that the document so e-mailed contained the said Urgent Application and its annexures."

[25] Paragraphs 3 and 4 quoted above say that the notice of motion and the founding affidavits with annexures were served on the third respondent. There are two main bundles in the Court file; paginated and the unpaginated. The amended index together with the amended notice has the Court's stamp reflecting 2011/09/07. The unpaginated bundle the front page of which has the amended notice of motion has the Court's stamp dated as 2011/07/22.

[26] It has to be pointed out that the original notice of motion and the amended notice of motion are the same in both bundles. It is important to note that both bundles reflect that the amended Notice of Motion was served on the CCMA and the Commissioner. The CCMA's date stamp is not very clear as far as the date of service is concerned but would appear to be 22nd July 2011. The same applies in as far as the original notice of motion is concerned.

[27] There is however no evidence in both bundles indicating that the documents in the two bundles were served on the respondent personally. Paragraph 5 of the affidavit in support of the service says that the papers were served on the third respondent by facsimile. In support of this allegation, the applicant relies on annexure "MMM1" Annexure MMM1 is a facsimile delivery report which reflects that the amended notice of motion (LT339) was successfully transmitted to the fax

number 086 6940 496. More importantly the report reflects that the transmission took place on "2011/7/22 02:29:04PM" and that "items sent 5", namely 5 pages were transmitted.

[28] Contrary to what is stated in the affidavit in support of service, the evidence from the fax transmission report reflects that in all probabilities the only document which was faxed to the respondent was the amended notice of motion together with the covering page making it 5 pages.

[29] Annexure MMM2 is an e-mail which was sent to the respondent by the deponent to the affidavit in support of service which reads as follows:

> "Manisha Maganbhai-Mooloo sapwu@yahoo.com
> Subject: NOTICE OF MOTION
> Attachment: Notice of Motion- amended 22/07/2011pdf;
> Notice of Motion as annexures pdf
> Delivery Report Labour Court. PDF
> **Important:** Hi
> 1. 22 July 2011 SA/11 transmit herewith copies of the following documents: 1. Notice of Motion. Kindly take note that this Notice of Motion is also faxed to fax number 086 6940 496 and we are currently awaiting proof of transmission.
> 2. Deliver report as proof that the Notice of Motion was faxed to the Labour Court.
> 3. Amended Notice of Motion. Kindly note that the Amended of Notice of Motion was faxed to fax number 086 6940 496 on 22 July 2011 at 2:29 PM and we are in a possession of the delivery report.
> 4. Please note further that the application will be heard on **Saturday, 23 July 2011at 13h00.**"

[30] It should be noted that our Rules do not provide for service by way of e-mails. However even if that was the case, this would not have assisted the case of the applicant. There is no proof in terms of the e-mail as to how many pages of the transmitted attachments were sent to the respondent.

[31] Following the above discussion, I am of the view that the applicant has failed to show that there was proper compliance with the provisions of rule 4(2) (b) of the Rules of the Court and further that the probabilities strongly supports the view that there was no proper service of the papers on the respondent. The consequence of failure to prove that proper service was effected on the respondent is fatal. Accordingly, the applicant was not entitled to the interim order for that reason alone. There is no evidence in the applicant's papers indicating why it was never brought to the attention of the Court on the day the urgent application was moved that annexure MMM1 reflects only five pages whereas the application itself consisted of more than fifty pages. As indicated above, this defect could not in terms of the rules be remedied by the e-mail which was sent to the respondent as there is no provision for service by way of an e-mail. The case of the applicant would still however be unsustainable in as far as this issue is concerned because there is no indication in the e-mail as to how many pages of the attached PDF files were e-mailed through to the respondent.

[32] The case of the applicant would still stand to fail even if it was to be found that there was proper service on the respondent, for the following reasons: failure to comply with the provision of section 68 (2) and failure to show that the applicant had

a clear right on the return day not to be faced with a strike action by members of the respondent. Section 68(2) of the LRA provides:

> "**68 Strike or lock-out not in compliance with this Act**
> (2) The Labour Court may not grant any order in terms of subsection (1) *(a)* unless 48 hours' notice of the application has been given to the respondent: However, the Court may permit a shorter period of notice if-
> *(a)* the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;
> *(b)* the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and
> *(c)* the applicant has shown good cause why a period shorter than 48 hours should be permitted."

[33] In my view, the reasons for bringing the application on a notice less than 24 hours are not satisfactory. In fact the proper analysis of the applicant's explanation reveals that the applicant in its founding and supplementary affidavits deals with the broader issue of urgency and not with why the matter was enrolled on less than 48 hours notice.

[34] The starting point in considering whether the applicant has shown that it has a clear right on the return day on this matter has to be considered in the context of prayers in the notice of motion. The prayers in the notice of motion read as follows:

> "1.1 The certificate of outcome issued by the First Respondent on the 19th July 2011 under case

number GAJB11574-11 OF The Second Respondent in terms of which a dispute concerning the unilateral change to the terms and conditions between the Applicant and the Third Respondent remained unresolved, be reviewed and set aside;

1.2 That it be declared that any industrial action that may be embarked upon by the Third Respondent on the strength of the certificate of outcome, will be unprotected;

1.3 That any industrial action by the Third Respondent on the strength of the certificate of outcome, be stayed pending the final outcome of this application.

1.4 That the dispute be remitted to the CCMA to be considered de novo."

[35] In the present instance, for the applicant to succeed, it has to show that it has a right not to be faced with an unprotected or unlawful strike by the members of the respondent. The applicant has to do that by showing that the intended strike does not comply with both the procedural and/or substantive requirements for a protected strike as set out in the LRA. The procedural requirements for a protected strike are set out in section 64 of the LRA[5] which essentially requires that the issue

[5] Section 64 reads 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

in dispute should have been referred to the bargaining council or the CCMA or whichever of the institution has the jurisdiction. The second aspect of the procedural requirement is that the employees are not entitled to embark on a strike until a certificate of outcome has been issued by the Commissioner confirming that the dispute remains unresolved after conciliation or until 30 days have lapsed since the date of the referral.

(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)*.
(2) If the *issue in dispute* concerns a refusal to bargain, an advisory award must have been made in terms of section 135 (3) *(c)* before notice is given in terms of subsection (1) *(b)* or *(c)*. A refusal to bargain includes-
(a) a refusal-
(i) to recognise a *trade union* as a collective bargaining agent; or
(ii) to agree to establish a *bargaining council*;
(b) a withdrawal of recognition of a collective bargaining agent;
(c) a resignation of a party from a *bargaining council*;
(d) a *dispute* about-
(i) appropriate bargaining units;
(ii) appropriate bargaining levels; or
(iii) bargaining subjects.
(3) The requirements of subsection (1) do not apply to a *strike* or a *lock-out* if-
(a) the parties to the *dispute* are members of a *council*, and the *dispute* has been dealt with by that *council* in accordance with its constitution;
(b) the *strike* or *lock-out* conforms with the procedures in a *collective agreement*;
(c) the *employees strike* in response to a *lock-out* by their employer that does not comply with the provisions of this Chapter;
(d) the employer locks out its *employees* in response to their taking part in a *strike* that does not conform with the provisions of this Chapter; or
(e) the employer fails to comply with the requirements of subsections (4) and (5).
(4) Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions of employment to a *council* or the Commission in terms of subsection (1) *(a)* may, in the referral, and for the period referred to in subsection (1) *(a)*-
(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.
(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of *service* of the referral on the employer.

[36] The substantive limitation to the right to strike is governed by the provisions of section 65 of the LRA[6]. In terms of the substantive limitation, the employees are prohibited from embarking on a strike action if:

1 Employees are bound by a collective agreement prohibiting striking over the dispute in issue.

2 Collective agreement requires the issue in dispute to be arbitrated upon.

3 The issue in dispute can be arbitrated or litigated upon in Court.

4 Employees are engaged in essential or maintenance services.

5 The work stoppage does not comply with the definition of a strike in terms of the LRA.

[37] The status of the certificate of outcome has received attention in a number of cases in the Labour and in the Labour Appeal Court. Although the status of the certificate of outcome was dealt with in the context of unfair dismissal cases, in my view the same principle applies in cases involving disputes of mutual interests. In this respect, I align myself with what Van Niekerk J, in *Bombardier Transportation (Pty) Ltd v Mtiya NO and Others,*[7] when he said:

> " In other words, a certificate of outcome is no more than a document issued by a commissioner stating that on a particular date, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not empowered to do, nor does it

[6] The limitation under section 65 cannot be trumped by compliance with section 64.

[7] (2010) 8 BLLR 840 (LC) at para 15.

> preclude the CCMA from exercising any of its statutory powers. In short, a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA's jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not a certificate of outcome has been issued. Jurisdiction is not granted or afforded by a CCMA commissioner issuing a certificate of outcome. Jurisdiction either exists as a fact or it does not."

[38] In the present matter, the cause of action is based on the provisions of section 145 and not section 65 of the LRA. There is no provision in section 145 that limits or restrains a right to strike[8]. As far as the procedural requirements are concerned, there is no doubt on the facts before this Court that the respondent complied with the requirements of section 64 in that the dispute was referred to the CCMA for conciliation, and that the Commissioner after attempting conciliation issued a certificate of outcome indicating that the matter remains unresolved. After receipt of the certificate of outcome, the respondent issued the applicant with the

[8] Section 145 reads as follows: Review of arbitration awards
(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.
(2) A defect referred to in subsection (1), means-
(a) that the commissioner-
(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner's powers; or
(b) that an award has been improperly obtained.
(3) The Labour Court may stay the enforcement of the award pending its decision.
(4) If the award is set aside, the Labour Court may-
(a) determine the dispute in the manner it considers appropriate; or
(b) make any order it considers appropriate about the procedures to be followed to determine the dispute.

notice of intention to embark on the strike action which was supposed to have commenced 25th July 2011.

[39] As concerning the costs, the facts and the circumstances of this case requires the Court to show its disapproval of the conduct of the applicant regarding the manner in which it prosecuted these preceding.

[40] It was for the above reasons that I made the order dismissing the applicant's application, discharging the rule *nisi* and ordered the applicant to pay the costs on an attorney and client basis.

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Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Adv M. Habedi
	Instructed by: Jerry Nkeli Attorneys
For the respondent:	Adv. C. Prinsloo
	Instructed by: Adams and Adams Attorneys