



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other Judges

Case no. J1056/12

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA

(NUMSA) obo ITS MEMBERS

Applicant

and

MURRAY ROBERSTS PROJECTS (PTY) LTD

Respondent

Heard: 26 April 2012

Delivered: 10 May 2012

Summary: The court found that the applicant had not complied with the provisions of section 68(2) of the LRA in that it had not given 48 hours' notice of the urgent application and had not applied for condonation for that non-compliance. The rationale for the Act's notice and time periods is discussed.

JUDGMENT

Whitcher AJ

Introduction

- [1] On 26 April 2012, the applicant brought an urgent application on less than 48 hours notice to the respondent to declare unprotected and to stop the lock-out instituted by the respondent against the applicant's members on 23 April 2012.
- [2] I dismissed the application with no order as to costs, mainly because in my view the applicant had not complied with section 68(2) (b) and (c) of the Labour Relations Act, 1995 ("the Act").¹ I further found that the respondent's answering affidavit had given rise to a material dispute of fact on whether the lock-out was unprotected and had put forward an opposing version that could not be described as implausible, especially in the absence of a replying affidavit.
- [3] I said that I would provide written detailed reasons for the order that I made. These are my reasons.

Background

- [4] On 23 April 2012, the respondent instituted a lockout against the applicant's members. On 23 and 24 April 2012, the applicant sent a letter to the respondent wherein it warned the respondent that it intended to approach this Court on an urgent basis to interdict the lock-out. The respondent denied the lockout was unprotected.
- [5] On 25 April 2012 at 11h20, the applicant served its interdict application. The respondent served an answering affidavit on 26 April 2012 at 08h41.

¹ 66 of 1995.

- [6] In the answering affidavit, the respondent warned the applicant that it intended to apply for the application to be dismissed on the basis that the applicant had not complied with section 68(2) (b) to (c) of the Act. The applicant had given it less than 24 hours notice of the application and had not set out a factual justification for this in the founding affidavit. The short time period had further prevented it from obtaining relevant evidence from deponents who were five hours drive away.
- [7] In the answering affidavit, the respondent denied that it had embarked on an offensive lock-out. It set out a detailed sequence of events which appeared to indicate that the lock-out was in response to ongoing and current intermittent strike action. A replying affidavit disputing these allegations was not filed.
- [8] In its founding affidavit, the applicant submitted that the application was urgent because the ongoing lock-out was depriving the individual applicants of their income. This was essentially the sum total of its submissions on urgency and its non-compliance with the time periods.
- [9] At the hearing, the applicant contended that the alleged defects, if any, of the application were cured by its written warning to the respondent on 23 and 24 April 2012 that it intended to make application to this Court on an urgent basis if the lock-out was not terminated. Moreover the application was set down on less than 48 hours notice because the registrar had indicated that the set down date of the hearing was the only available date left in the week. The statement attributed to the registrar was not set out in the founding affidavit.

The Law

- [10] Section 68 of the Act empowers the Labour Court to grant urgent interim relief interdicting unprotected industrial action. Section 68(2) requires the applicant to give the relevant respondents 48 hours notice of the application,² but the Court may permit a shorter period of notice if-

² In *Automobile Manufacturing Employers' Organisation v NUMSA* [1998] 11 BLLR 1116 (LC), Landman J held that 'notice' means the respondent must receive the applicant's *notice of motion and supporting affidavits* at least 48 hours before the application is to be heard.

‘(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.’ (Emphasis added)

[11] Rule 8 of the Labour Court rules also provides that if a party brings an urgent application, the affidavit in support of the application must contain reasons why urgent relief is necessary and if the application is brought on less than 48 hours notice, the reasons why a shorter period of notice should be permitted.

[12] The rules thus strike a balance between the recognition that in some instances the application of the prescribed time limits or any time limits at all might occasion injustice ³ and the right of the respondent to a reasonable opportunity to be heard before any adverse decision is made against it.

[13] The fact that a matter may require very urgent attention by the court does not relieve a party from the obligation to give respondents 48 hours notice or provide proper reasons in the founding affidavit why a period of notice shorter than 48 hours should be permitted. The applicant should also in its founding affidavit set out a factual basis which shows that respondents have been given a reasonable opportunity to be heard on the application. Rule 8 makes this perfectly clear. It is also apparent from the conjunction “and” which joins subsections (a), (b) and (c) of section 68 of the LRA.

[14] At stake is the ability of any respondent, including often trade unions themselves, to come before the Labour Court sufficiently advised and reasonably prepared to oppose the granting of relief, even if interim in nature, that could have a significant impact on its rights and interests. This is especially so in the arena of collective bargaining and power-play, where the

³ *National Police Services Union and Others v National Negotiating Forum and Others* (1999) 20 ILJ 1081 (LC).

interruption or delay of a strike or lock-out can have significant effects on its outcome. Should orders be granted on less than 48 hours notice, without very good reasons being advanced therefore, it may lead to a situation where a rule *nisi* issued from this Court flows not from the merits of the application but from the administrative disadvantage the respondent suffered in not being able to mount a considered and proper defence under unreasonably tight time-frames. It strikes me as being particularly important in the realm of collective labour law not to allow any party to obtain the upper hand in delaying the timing of industrial action through a weakly motivated deviation from set notice periods.

- [15] In *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union*,⁴ the Court noted that the applicant had not given the required 48 hours notice and had not applied for condonation. Though it did not rest its decision to refuse the application on this basis, it implied that it may have done so had there not been another basis to dismiss the application for an interdict.

Analysis of Evidence and Argument

- [16] In this case, the application was brought on less than 48 hours notice. The applicant thus sought an exception to be made within an already exceptional situation. One would thus have expected to see in its papers a particularly thorough motivation for the latitude it expects, which addressed not only urgency in general but motivation for condonation of an even shorter period of notice than usually applies. The explanation it provided in the founding affidavit did not in my view provide this Court with sufficient reasons to permit the exceptional latitude it requested. Moreover, the respondent essentially warned the applicant about this problem hours before the matter was heard. The prudent thing the applicant should have done was to remove the matter from the roll, cure the defects and reinstate the application on 48 hours notice.
- [17] The respondent did manage to compose an answering affidavit under prohibitive time-frames. It was also given an opportunity to be heard by this

⁴ (2011) 32 ILJ 730 (LC).

Court. However, this is not to say that, were the respondent to have been provided with a full 48 hours notice its approach might have been different or more comprehensive

[18] In any event, the respondent's answering affidavit introduced a dispute of fact material to the determination, namely whether the applicants' employees were on a strike just before or at the commencement of the lock-out.

[19] In accordance with the guidelines formulated by Corbett JA in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,⁵ in a case of a "genuine dispute of fact" on the papers, the matter must be decided on the version presented by the respondent, unless that version can be described as 'so far-fetched and clearly untenable that the court is justified in rejecting [it] merely on the papers'. I was unable to reject the respondent's version that a strike had already commenced merely on the papers.

[20] It was for these reasons that I made the order referred to in paragraph 1 above.

Whitcher AJ

Acting Judge of the Labour Court

⁵ 1984 (3) SA 623 (A) at 634 E–635 D.

APPERANCES:

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