



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, IN PORT ELIZABETH

JUDGMENT

Reportable

Case No: P 562/11

In the matter between:

MAWETHU CIVILS (PTY) LTD

FIRST Applicant

MAWETHU PLANT (PTY) LTD

SECOND APPLICANT

And

NATIONAL UNION OF MINeworkERS

1ST RESPONDENT

EMPLOYEES OF THE FIRST AND SECOND

APPLICANT THAT ARE MEMBERS OF NUM

2ND RESPONDENT

AND FURTHER RESPONDENTS

Heard: 29 November 2012 and 23 January 2013

Delivered: 12 February 2013

Summary: Section 65 (1)(c) of the LRA must be given a literal interpretation. It exclude disputes which a party has the right to refer to the Labour Court in terms of legislation other than the LRA from the category of disputes people may not take part in a strike for.

JUDGMENT

LALLIE, J

[1] The applicants approached this order on an urgent basis for interim relief and on 29 November 2012 I granted an order in the following terms:

- 1.1 That the provisions of Section 68(2) pertaining to the giving of 48 (fourty eight) hours prior notice of this application, is dispensed with and that the applicants have shown good cause as contemplated by Section 68(2) (c) as to why this matter is considered and dealt with as a the matter of urgency notwithstanding the fact that the applicants have not given such 48 hours' notices,
- 1.2 That the *Rule Nisi* is hereby issued calling upon the respondents herein to appear on 23 January 2013 at 10h00 to give reasons why a final order should not be granted in terms of the provisions of Section 68 of the Labour Relation Act No 66 of 1995("the Act") which order shall be in the following terms:
 - (a) Declaring the conduct called by the first respondent and embarked upon by the second and further respondents, in terms of the first respondent's notice in terms of section 64(1)(b) dated 23 November 2012, be declared to constitute strike action as envisaged by Chapter IV of the LRA and that such strike be declared to unprotected in that;
 - (b) The strike called by the first respondent to be embarked upon by the second and further respondent is prohibited by law in that the issue in dispute forming the subject matter of the strike relates to alleged non-payment of wages and is determinable through litigation;
 - (c) The strike called by the first respondent to be embarked upon by the second and further respondents is prohibited by law in that the issue in dispute forming the subject matter of the strike does in fact not concern an issue of matters of mutual interest.

- 1.3 That the first respondent and or the second and further respondents are interdicted and restrained from supporting, promoting, instigating, advancing, embarking upon or participating in, any such unprotected strike action of any nature at the workplace of the applicant pursuant to the notice in terms of section 64(1)(b) issued by the first respondent on 23 November 2012 and/or any of the issues in dispute reflected in such notice.
- 1.4 That the second and further respondent properly and without reservation perform and fulfil all of their lawful obligations in terms of their individual contracts of employment and their employment with the applicants,
- 1.5 That the first respondent takes all reasonable steps to ensure that the second to further respondent comply with this order.
- 1.6 Costs are reserved for argument on the return date.

[2] On the return date, the respondents persisted with opposing the application consistent with their stance on the day the interim order was granted. The respondents did not file opposing papers but argued on the applicants' papers. The applicants' unchallenged factual background of this matter is that a practice developed at the applicants in terms of which prior to any public holiday, workers work extra hours in order not to attend work on the day before or after the public holiday and have a long weekend. Consistent with the practice, a week preceding the public holiday of 9 August 2012 employees were reminded to work in approximately five hours in order not to attend work on Friday 10 August 2012. The second and further respondents refused and failed to report for duty on 10 August 2012. They subsequently demanded payment for the five hours they refused to work in. When the applicants refused to accede to their demand they referred a dispute to the CCMA and the relief they were seeking was for the applicant to pay second and further respondents five hours' remuneration.

- [3] The dispute was not resolved and an outcome certificate to that effect was issued. Notwithstanding the letter warning them not to embark on strike action on the basis that the dispute related to an alleged non-payment of wages, on 23 November 2012 the first respondent issued the applicants with a 48 hours' notice of the second and further respondents' intention to strike in terms of section 64 (1) (b) of the Labour Relation act 66 of 1995 (LRA).
- [4] On 26 November 2012, the second and further respondents embarked on a strike and the applicants issued the respondents with a number of ultimatums warning them to abandon the strike as it was illegal. The first respondent responded that the strike was legal and the respondents did not heed the applicants' warning and continued with the strike action.
- [5] The applicants' case was that the issue the second and further respondents were striking for related to non-payment of wages and therefore a matter of mutual interest and not a matter of right. The applicant sought to rely on section 65 (1) (c) of the LRA in arguing that the dispute could be entertained by the Department of Labour or this Court in terms of section 77 of the Basic Conditions of Employment Act 75 of 1997 (BCEA). The applicants submitted that the strike was unprotected as contemplated in section 68 of the LRA either because it did not comply with sections 64 and 65 of the LRA or the absence of a legitimate issue in dispute as contemplated by law.
- [6] The respondents denied that their strike was unprotected. They submitted that on a literal reading, section 65 (1) (c) of the LRA contemplated and embraces only disputes which may be referred for arbitration or adjudication in terms of the LRA. They argued that no legislation confers jurisdiction on the labour court over a dispute referred to in section 65 (1) (c) of the LRA and highlighted that disputes concerning only claims for money cannot be referred to arbitration or this court under any provision of LRA.
- [7] The applicants argued that section 65(1) (c) needs to be given a wide interpretation which encompasses the jurisdiction of this court as

contemplated in section 157 of the LRA which grants this court exclusive jurisdiction in respect of all matters than elsewhere in the LRA or in terms of any other law. This interpretation, so went the argument is also purposive as it is consistent with the spirit of the LRA which does not intend to extend the right to strike to disputes which may be adjudicated by this court of terms of legislation other than the LRA. The argument flies in the face of a number of judgments of our courts which require provision of section 65 (1) (c) to be given a strict interpretation because the right to strike is guaranteed in the constitution. In this regard see *NUMSA and Others v Bader Bop (Pty)Ltd Another*¹ and *SATAWU and Others v Moloto NO and Another*.²

- [8] Section 65(1)(c) prohibits any person from taking part in a strike if the issue in dispute is one that a party has a right to refer to arbitration or to the Labour Court in terms of the LRA. This section is clear, it limits issues in dispute to those that may be referred to arbitration in terms of the LRA it therefore excludes issues which may be adjudicated or arbitrated in terms of other labour legislation. I am not convinced that the existence of other legislation in terms of which industrial dispute can be arbitrated or adjudicated had escaped the legislature's mind when enacting section 64 (1) (c) of the LRA. I am of the view that as the legislature was limiting the constitutional right to strike it was mindful of not limiting it to a point of obliterating it.
- [9] The weakness of the applicant's argument is that it removes the certainty created by section 65 (1)(c) on the issues on which employees may not strike on and introduces uncertainty which may have disastrous consequences. As the right to strike is the most powerful weapon employees have which has the ability to cripple business it is important for its limitation be specific. It is important for employees to be aware of protected and unprotected strikes before hand to enable them take conscious decisions and not just find themselves unknowingly, in the middle of an unprotected strike and having to deal with its serious

¹ [2003] 2 BLLR 103 (CC)

² [2012] 12 BLLR 1193 (CC).

consequences. Precision in determining conduct which renders a strike protected or un protected cannot be compromised.

[10] The rules of interpretation of statutes are clear they require literal interpretation to be given to statutes unless doing so would lead to an absurdity. In this regard see *Poswa v MEC for Environmental Affairs and Tourism, Eastern Cape*.³ I could find no reason for section 65 (1) (c) not to be given its literal meaning.

[11] On the applicants' own version, the issue in dispute can be referred to this court in terms of the BCEA. It therefore falls outside the purview of section 65 (1) (c). In the circumstances, the applicants failed to prove that they have a right to have the respondents interdicted from participating in the strike. The interim order granted on 29 November is therefore discharge. There is no reason for costs not to follow the result.

[12] In the premises, the following order is made:

12.1 The rule is discharged.

12.2 The applicants pay the respondents' cost.

Lallie, J

Judge of the Labour Court

³ 2001 (3) SA 582 (SCA) at paras 10-11.

Appearances

For the Applicant: Advocate Grobler

Instructed by: Snyman attorneys

For the Respondent: Advocate Grogan

Instructed by: Wesley Pretorius and Associates