



REPUBLIC OF SOUTH AFRICA

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

Of interest to other judges

CASE NO: J 406/14

In the matter between:

**HOTEL LIQUOR CATERING,
COMMERCIAL AND ALLIED
WORKERS UNION**

Applicant

and

THE SHERIFF, JOHANNESBURG

First Respondent

GOOD LOGISTICS SOLUTIONS

Second Respondent

CARELSE KHAN ATTORNEYS

Third Respondent

Heard : 29 May 2014

Delivered : 24 June 2014

**Summary : (Stay of writ based on alleged invalidity of underlying order
– proper procedure – appropriate alternative relief).**

JUDGMENT

LAGRANGE, J

Introduction

[1] This matter came before the Court on the return date of an interim order granted on 4 March 2014. In the interim order the respondents were restrained on an urgent basis from attaching the assets of the applicant ('the union') pending the final outcome of the application. On 29 November 2013, a writ was issued by the Labour Court in respect of a taxed bill of costs issued by the taxing master of the Labour Court in Cape Town on 19 November 2013.

[2] The bill of costs arose out of a review application brought under case number C440/2010, in which the parties were cited as:

"Hotellica obo Mercia Marlese Groenewald (Applicant)

and

Good Logistics Solutions (First Respondent)

CCMA (Second Respondent)

Commissioner Alviso Adams (Third Respondent)"

[3] The bill of costs records a taxed amount of R 226,921.94 derived from the attorney and client costs as between the second and third respondents in this application. On receiving the bill of taxation the Secretary General of the applicant, Mr T Zulu, asked staff in the Cape Town office of the union to investigate. He was advised that they had no knowledge of the union having acted in the matter for the individual applicant Marlese Groenewald, who is cited in the judgement. He was also advised that the CCMA had noticed persons acting as representatives of the union, which was a matter it was still investigating. He complained that a letter was sent to the third respondents requesting information about the matter but no response was received.

- [4] Apart from disputing that the union had acted in any capacity in the review application in question, the union submitted that, as a matter of law, the cost order was not made against itself as such, but against the individual applicant, Groenewald. In so far as the union had been correctly cited as acting on her behalf, which it disputed, that could only have been construed as acting in a representative capacity in terms of section 200 (1) (b) of the Labour Relations Act 66 of 1995 ('the LRA'). In the absence of the court having made a cost award against the union *de bonis propriis*, the cost award would not be enforceable against the union even if it had been acting in terms of s 200(1)(b).
- [5] The judgment handed down by the honourable Justice Steenkamp, J on 31 May 2013 appears to have been an *ex tempore* one and merely recorded that the review application was "dismissed with costs on an attorney-client scale". There is no mention on the face of the judgment that the cost order was made *de bonis propriis*. However the respondents claimed that the order of costs on an attorney-client scale was "a direct result of the conduct of the union and the union official, a Mr Khaya Somdyala".
- [6] The respondents further contended that Mr Somdyala was a recognised union official and representative of the union as evidenced by various arbitration awards handed down by the CCMA in Cape Town. In support of this contention the respondents submitted arbitration awards dated 15 July 2002 and 17 May 2013 in which he was cited as the union representative from Hotellica. In reply, the union claimed that Somdyala or 'Somtyalo' had resigned from the union in 2004 and did not act as an official of the applicant thereafter.
- [7] The union's replying affidavit ostensibly attaches "the award" alleging that the address used by 'Somtyalo' was not the same address as the union's Cape Town offices which are situated at Premier Centre, Victoria Road, Observatory. It appears from the affidavits and a letter attached to the respondents' answering affidavit that a written request was indeed made by the union to the third respondent, the second respondent's attorneys of record, to provide details of the address it had used to address documents

to Hotellica in the course of the review application, went unanswered. No explanation for the apparent lack of response to this request was provided by the third respondent. Although the award in question which gave rise to the review application was not provided by either party, other awards in which Somdyala appears to have represented employees, ostensibly on behalf of the applicant, do indicate that the address he used for communications with the CCMA was 7th Floor, 106 Adderley Street, Cape Town.

- [8] Although, the applicant could have provided more corroboratory material about its actual office address in Cape Town, it does appear from the affidavits that the address used by the putative official Somdyala, when he corresponded with the CCMA is a different one. In my view this does raise a genuine concern whether or not this individual was fraudulently holding himself out as an organiser of the applicant and appearing in CCMA and court proceedings. Given the apparent frequency of his participation in arbitration proceedings, judging from the CCMA awards lodged in the court file, in which his name appears as a union representative, and given that he operates using an identifiable address, it must be said that the applicant appears to have been quite remiss in failing to try and rectify matters by notifying the CCMA and the Labour Court that Somdyala or 'Somtyalo' is not an official of the union. It could have done a lot more than merely conduct investigations by this stage.
- [9] Nonetheless, the applicant has raised sufficient doubt in my mind that the person appearing in the Labour Court proceedings under consideration was an official of the applicant who was entitled to appear in its name as a representative of the applicant's members in the Labour Court. If Steenkamp, J had been aware of these question marks over Somdyala's status at the time he dismissed the review application it is possible that he might well have issued a different cost order, irrespective of the merits of the review application.
- [10] If there was no doubt about Somdyala's identity as an official of the applicant and that the union had acted in some capacity in the matter, would the cost order necessarily have been enforceable against the union

as a party to the proceedings in its own right, or could it contend that in acting 'on behalf of' Groenewald, it would simply have been performing the same role that might be performed by an attorney acting on behalf of an employee who has initiated review proceedings? Section 200 of the LRA provides:

'200 Representation of employees or employers. — (1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party —

- (a) in its own interest;*
- (b) on behalf of any of its members ;*
- (c) in the interest of any of its members .*

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings.'

(emphasis added)

[11] Section 161 of the LRA which deals more specifically with who may appear as a representative in Labour Court proceedings states:

'In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by - A

- (a) a legal practitioner;*
- (b) a director or employee of the party;*
- (c) any member , office-bearer or official of that party's registered trade union or registered employers' organisation....'*

(emphasis added)

[12] The applicant submits that when a union acts on behalf of a member under s 200(1)(b), it is not a party to the proceedings but appears purely in a representative capacity. However, the weight of Labour Court authority¹ relying on the judgment of Sutherland, AJ as he then was in **Manyele's** case is that:

“This role of the official [as a representative of the member in terms of s 161(c)] is to be contrasted with the role of the union itself when it is a party to proceedings, as contemplated in s 200(1) (b) 'on behalf of any of its members' (emphasis added)”²

[13] If there was no material dispute about Somdyala's identity as official of the applicant at the time he appeared or the applicant's participation in the proceedings, I would be inclined to agree that, on the interpretation of s 200(1)(b) above, the applicant would be a party to the proceedings and would be liable for costs in the review application.

[14] However, on the papers before me, which frankly leave much to be desired in terms of properly canvassing the material issues in sufficient detail, I am not satisfied that there is sufficient evidence for the Court to determine the true status of Somdyala as an official of the applicant or whether the applicant was acting in some capacity in the proceedings. While there is some basis for doubting that he was representing the applicant as a party in the review proceedings, I am not satisfied that the evidence for and against his representative capacity has been adequately canvassed in the papers before the court. I am also mindful that the

¹ See e.g **Fakude and others v Kwikot (Pty) Ltd (2013) 34 ILJ 2024 (LC)**, at 2031, para [26] and, more particularly **Simelane and others v Letamo Estate (2007) 28 ILJ 2053 (LC)** at paras [41] –[42]. In the latter case a cost order was made against a union acting on behalf of its members under s 200(3) on the basis that it was a party to the dispute.

² **Manyele and others v Maizecor (Pty) Ltd and another (2002) 23 ILJ 1578 (LC)** at 1584, para [16].

monetary value of the cost award is far from trivial and it is important to both parties to obtain a final resolution on the matter.

- [15] In the circumstances, though I believe there is reason to be concerned about whether the union ought to have been mulcted with costs in the matter, I do not wish to deprive the respondents of the cost order if there is no reason for the order not to have been granted. This might ordinarily be one of those rare instances in which the court *mero motu* refers the matter to oral evidence.³
- [16] However, it appears that the any judgment I might make in these proceedings would effectively entail second guessing whether the cost order made by Steenkamp J ought properly to have been granted, bearing in mind that, on the face of the order it could be enforced against the union in light of the interpretation of s 200(1)(b) above. In effect, the applicant is saying that the order was erroneously granted in its absence as an affected party. The appropriate procedure for dealing with that is by way of a rescission application under s 165 of the LRA, even though an interim interdict may have been warranted to stay the writ on an urgent basis pending the final determination of the union's claim that Somdyala effectively misrepresented its involvement in the matter.
- [17] In light of the above, it is apparent that it is not an alleged defect in the writ which the applicant seeks to rely on to set it aside but an alleged problem with the underlying *causa* for the writ, which is the cost order itself. It would be inappropriate for the reasons stated, for this court to determine that in these proceedings, but at the same time, the applicant has raised sufficient doubt in my mind about whether the cost order against it ought properly to have been made. It seems more appropriate therefore to stay the execution of the writ pending the determination of the real cause of complaint in the proper forum, rather than granting an order which indirectly has the effect of placing the legal validity of the order in doubt.

³ See e.g. *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ)

[18] An order to give effect to this appears to me, to be the competent alternative relief on the evidence before me, coupled with suitable protection of the respondents' interests.

Costs

[19] It should be apparent that the applicant has approached its application for final relief in this matter using an inappropriate procedure to indirectly set aside not simply the writ but the original cost order, even if urgent interim relief might have been justified. In the circumstances, it should not be entitled to its costs, in my view.

Order

[20] In light of the above analysis,

20.1 The execution of the writ issued under case number C 440/2010 on 29 November 2013 is stayed pending the outcome of an application to rescind the cost order in the same matter, which must be filed with the registrar of the Labour Court in Cape Town.

20.2 The order in paragraph 20.1 above shall lapse automatically if the applicant fails to file the said rescission application by 24 July 2014.

20.3 No order is made as to costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: J Nkosi instructed by Nkabinde Attorneys

FIRST RESPONDENT: C de Kock instructed by C K Attorneys