



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1561/2014

METSIMAHOLO LOCAL MUNICIPALITY

Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Respondent

THE PERSONS MENTIONED IN ANNEXURE 'A' Second to Further Respondents

Heard: 26 June 2014

Delivered: 27 June 2014

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant approached the Court on an urgent basis to seek an interim order declaring the strike embarked upon by the Respondents as prohibited or in breach of sections 64 and 65 of the Labour relations Act 66 of 1995 (The LRA); declaring the refusal or failure of the Second to Further Respondents to tender their services and work in terms of their respective contracts of employment applicable to them as a strike that is unlawful and unprotected for want of compliance with sections 64 and 65 of the LRA; and restraining and interdicting the Respondents from engaging in certain actions or conduct.

Background:

[2] The Second to Further Applicants have embarked on a complete work stoppage with effect from 17 June 2014. The strike action followed upon the following sequence of events;

2.1 On 17 January 2014, the First Respondent (SAMWU) had referred a dispute of mutual interest to the South African Local Bargaining Council (SALGBC) for conciliation. The issue in dispute pertained to the Applicant's alleged refusal to implement the resolutions of the Local Labour Forum with regard to salary disparities and Group Scheme. At about the same time, SAMWU had also referred a dispute pertaining to interpretation and/or application of a collective agreement.

2.2 A conciliation hearing in respect of the first dispute was held on 17 March 2014 before Commissioner M Mohlala of the SALGBC. Following the failure to resolve the dispute, Mohlala had then issued a certificate of outcome, enabling SAMWU to exercise the right to strike. The parties had nevertheless agreed to a process of private mediation under Mohlala outside of the SALGBC.

2.3 The private mediation process took place on 19th, 20th and 23rd of March 2014. Mohlala was to compile a report recording the issues discussed and agreed upon. Such a report was compiled and submitted on or around 23 March 2014.

2.3 The status of the report was placed in dispute. Amongst the 'agreements' Mohlala had noted was that the Respondents would not exercise their right to strike at least until 30 June 2014. The Applicant held the view that arising from the report, the issues that were the subject-matter of the dispute in respect of which the certificate of outcome was issued on 17 March 2014 were resolved. The Respondents' view on the other hand was that Mohlala had invited the parties to comment on the report, and having perused it, they were not satisfied that the report correctly recorded the agreement reached between the parties. Even though some of these issues were

highlighted by the First Respondent in its correspondence with Mohlala and the Applicant, the Respondent did not appear to have issues with the 'agreement' pertaining to withholding of strike action until 30 June 2014, whilst the parties addressed any outstanding issues. SAMWU further held the view that attempts to have those issues resolved had not succeeded as the parties never reconvened to finalise the agreement reached at private mediation. On 13 June 2014 SAMWU had issued a strike notice, indicating that its strike was to commence on 17 June 2014

Urgency:

- [3] The Applicant submitted that the application should be dealt with on an urgent basis in that any unlawful violation of rights of individuals and / or community members requires and justifies an urgent redress from the Courts; that an unlawful strike coupled with threats and intimidation of others not participating in the strike disturbs labour peace as well as peace in the broader community, and that there was no justification for communities relying on the Applicant for vital services to suffer extreme prejudice as a result of unlawful strike.
- [4] The Respondents on the other hand denied that the application was urgent in that there was no unlawful violation of rights for individuals and/or the community members at all; that the strike was not unlawful and that there are no threats and intimidation of others at all. In this regard, it was submitted that the allegations made by the Applicant regarding intimidation were vague and unsubstantiated. Furthermore, it was submitted that all services are still being rendered by other employees who are not on strike.
- [5] It is accepted that this Court has powers to grant urgent interim relief in terms of the provisions of section 158 (1) (a) (i) of the Act. Urgent applications are further dealt with in terms of Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court. The requirements of this rule were explained by the Labour Appeal Court in *Jiba v Minister: Department of*

*Justice and Constitutional Development and Others 2010 31 ILJ 112*¹ as follows;

“Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules”.

[6] In dealing with the requirement of urgency, this Court in *BIFAWU v South African Football Association and Another*², per the Honourable Basson J had held the following;

‘It is trite that an applicant who approaches this Court on the basis of urgency must make out a case for urgent relief on papers in sufficient particularity (See in this regard: *National Union of Mineworkers v Black Mountain - A Division of Anglo Operations Ltd* (Citation omitted) where the legal position has been summarized as follows:

‘[11] It is trite that an applicant who approaches this court on an urgent basis must make out a case for urgent relief on the papers in sufficient particularity. This much is clear from rule 8 of the Rules of the Labour Court which expressly states that a party that applies for urgent relief must file an application that complies with the requirements of Rule 7 (1); 7 (2) and 7(3) and if applicable 7(7) of the rules. Rule 7 (2) expressly requires that the affidavit in support of the application *must* contain the following:

(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 s 68 (2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.

¹ 2010) 31 ILJ 112 at para 18

² (J 2986/2012) [2013] ZALCJHB 200 (26 July 2013) at para 4

[12] Urgency in itself does not relieve a party from this obligation and the applicant should, in as much detail as possible, place such facts that are necessary before the court and which will enable this court to decide whether the forms and service provided for in the rules should be dispensed with. Only once an applicant has persuaded the court that sufficient grounds exist which necessitates a relaxation of the rules and ordinary practice, will the court proceed to consider the matter as one of urgency. The extent to which the court will allow parties to dispense with the rules relating to time periods will depend, on the degree of urgency in the matter. (footnote omitted)

[7] In argument, Mr. Venter on behalf of the Respondents had submitted that not every strike situation should be treated as urgent, and that the circumstances of each case should be looked at. I am in agreement with the Respondents in this case that the averments made on behalf of the Applicant as to the reason the application should be treated with urgency are indeed vague and lacking in detail and particularity, more particularly in respect of allegations relating to acts of misconduct. It is common knowledge that strikes in our country are generally characterised by violence and other unacceptable forms of conduct on the part of the striking employees. However, prior to a strike being interdicted, considerations of the employees' right to strike as enshrined in section 23 (2) (c) of the Constitution, and whether the requirements of sections 64 and 65 have been met should be taken into account. In this regard then, it is not sufficient in the light of what is known to be the characteristics of these strike actions to simply grant an interdict in the absence of details surrounding acts of violence and intimidation.

[8] In this case, the Applicant had in its founding affidavit, merely asserted *inter alia* that 'some leaders of the Second Respondent (who are trade union representatives or shop stewards of the First Respondent)' have already threatened to commit acts of sabotage. Furthermore, Mr. Hutchinson on behalf of the Applicant had submitted a letter from the Applicant's attorneys of record highlighting alleged acts of criminality and a photograph of evidence of damage to a vehicle. These items in my view do not take the matter any further as on their own they do not prove anything, especially since they were

not produced by way of affidavit. These unsubstantiated assertions on their own are not sufficient to enable the Court to determine whether the application is indeed urgent.

[9] Notwithstanding the above, it is further trite that the applicant approaching the court on an urgent basis must demonstrate that it had done so timeously. In further explaining the need for the application to be treated with urgency, the Applicant had submitted that having issued an ultimatum on 17 June 2014, the First Respondent had not responded to requests for its intervention in dissuading and stopping the Second to Further Respondents from continuing with the strike. Furthermore, meetings were arranged with the First Respondent's shop stewards on 20th and 21st June 2014 to discuss and resolve the new issues emanating from the private mediation. The shop stewards had made an undertaking that they would revert to the Applicant after seeking a mandate from the Second to Further Respondents. They did so on 22 June 2014 and informed the Applicant that the strike would continue. The Respondents had denied that there was any engagement between the parties on 22 June 2014. Be that as it may, the Applicant had only approached its attorneys of record on 22 June 2014 to arrange for consultations, which were scheduled for 23 June 2014. The application was filed with the Court on 25 June 2014.

[10] Inasmuch as I am not satisfied that the Applicant has not provided details in regard to allegations of misconduct and acts of violence and intimidation on the part of the striking employees, I am however satisfied that in the light of the history of this dispute between the parties, and concerted efforts to find a solution to the dispute, the Applicant had acted in due haste in approaching the Court following the issuing of the strike notice. In this regard, in the light of the timing of the issuing of the notice of intention to strike, the ultimatum issued by the Applicant, and attempts between the parties to resolve the dispute between 20 and 22 June 2014, it cannot be said that the Applicant was dilatory in approaching the Court. To this end, it is further my view that the Court should permit shorter periods as contemplated in section 68 (2) of the LRA, more particularly since the Respondents were able to file an

answering affidavit and given an opportunity to respond and be heard as contemplated in s68 92) (b) of the LRA.

The Strike notice:

- [11] Central to this application in my view is the issue of whether the Respondent had properly notified the Applicant of its intention to embark on the strike action. Thus even if I am incorrect in my findings regarding the issue of urgency, the issue of the timing of the notice takes precedence.
- [12] The Applicant had raised issue with the fact that the Respondents had instead of giving 7 days' notice of the commencement of the strike, only given four days' notice in breach of the provisions of section 64 (1) (d) of the LRA, and further that the alleged issues in dispute on which the strike was embarked upon do not pertain to the issues that were referred for conciliation, but to new issues emanating from the agreement facilitated by Mohlala through private mediation. In the light of what the Applicant perceived to be an illegal strike, an ultimatum was issued on 17 June 2014 after the commencement of the strike.
- [13] The Respondents had conceded that as notice of intention to strike was issued on 13 June 2014, and since the strike action had commenced on 17 June 2014, only four days' notice was issued. It was however contended that section 64 (3) provided for exceptions for the requirements of section 64 (1), and further that the provisions of sections 64 (3) (a) and (b) were applicable in this instance. Furthermore, the Respondents had submitted that the parties were members of the SALGBC and that the strike conformed with the procedures in the Main Collective Agreement.
- [14] This Court in *City of Matlosana v SALGBC and others*³ confirmed that a municipality, such as the employer in this case, is a State at local government level as contemplated in section 64 (1) (d) for the purposes of issuing a notice of intention to strike. The Court in that matter had concluded that a notice of intention to strike had to be in compliance with section 64 (1) (d) of the LRA,

³ (2009) 30 ILJ 1293 (LC)

more particularly when the rationale for the seven days notice had to be looked at. In this regard, the Court per Pillay J held as follows;

‘One of the reasons for giving notice is that the State provides essential and necessary services to the public. As discussed above, such services are rendered at national, provincial and local levels. No alternative provider of many components of such services is readily available, especially to poor communities. There is therefore a rational basis for requiring seven days notice for strikes in all three tiers of government. In the circumstances, the court finds that the union has to give seven days notice to the employer’⁴

- [15] In this case, one of the concerns raised surrounding the strike action was that some employees, who performed essential services functions have also joined the strike. The Respondents had conceded that this was indeed the case, and these employees could embark on strike action as the agreement on essential and minimum services had lapsed on 31 December 2013. A similar argument was raised in *SAMWU v City of Tshwane and Another*⁵, and the Honourable Molahlehi J had dealt with the issue in the following terms;

‘It is trite that the terms of a collective agreement are not only binding on the individual employees but as a matter of law are incorporated into the employees’ contract of employment (Reference omitted). It is therefore my view that even though the 2006 collective agreement lapsed, its provisions having been incorporated into the employment contracts of the individual members of the applicant continued beyond the life span of the collective agreement. The shift system remained as was before the lapse of the collective agreement because its provisions became part of the individual employees’ employment contracts. In other words those terms and conditions set out in the collective agreement remained in force even after the lapse of the collective agreement and would remain as such until another collective agreement was concluded changing those provisions that had been incorporated into individuals’ contracts’

- [16] In the light of the circumstances of this case, and in line with the authorities referred to above, the Respondents were obliged to give seven days’ notice of

⁴ At page 7

⁵ (2014) 35 ILJ 241 (LC) at para 18

intention to strike as contemplated in s64 (1) (d) of the LRA. The exceptions in s64 (3) of the LRA do not find application in this case. Secondly, by virtue of non-compliance with the provisions of section 64 (1) (d) of the LRA, it follows that the strike action embarked upon by the Respondents is unlawful and unprotected, and the question as to whether the issues in dispute were resolved or not become moot for the purposes of this application. In the light of these conclusions, it is not deemed necessary to deal with other aspects or factors applicable to such applications. To this end, the following order is deemed to be appropriate;

Order:

- i. The draft order submitted on behalf of the Applicants which is marked 'X' is made an order of court.
- ii. The return date is set at 9 October 2014.
- iii. There is no order as to cost

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv. W. Hutchinson

Instructed by: Lebea & Associates

For the Respondent: Adv. R Venter

Instructed by: Maenetja Attorneys