



IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1780/14

In the matter between:

BARBERTON MINES (PTY) LTD

Applicant

and

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION UNION**

First Respondent

THE PERSONS LISTED IN ANNEXURE "A" **Second to Further Respondents**

Heard: 14 November 2014

Delivered: 25 August 2015

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

[1] In this application the Applicant seeks confirmation of the rule *nisi* issued by this court on the 7th of August 2014 as amended in the draft order. In terms of the draft order issued on the 7th of August 2014, the Respondents were called to

show cause why the following order should not be granted in terms of Section 158 or Section 68(1)(a) of the Labour Relations Act, 66 of 1995 (*“the LRA”*) in the following terms:

- “2.1 Declaring that the First Respondent’s conduct in calling for industrial action in support of its demand to be granted statutory organisational rights to constitute unlawful conduct giving its failure to have demonstrated that it is sufficiently representative as required in terms of the collective agreement entered into between the Applicant and the National Union of Mineworkers (NUM) established threshold for the granting of organisational rights to any trade union;*
- 2.2 Declaring any strike action by the Second to Further Respondents in support of the First Respondent’s demand to be granted organisational rights as set out in paragraph 2.1 above as constituting unlawful industrial action with the meaning of Section 65(3)(a)(i) of the Labour Relations Act, 66 of 1995 (LRA);*
- 2.3 Interdicting and restraining the First Respondent from calling for, encouraging or supporting any industrial action by and of the Second to the Further Respondents for the granting of the statutory organisational rights by Applicant to, the First Respondent;*
- 2.4 Interdicting and restraining any of the Second to Further Respondents from participating in industrial action of support of the First Respondent’s demand and that the Applicant grants the First Respondent statutory organisational rights;*
- 2.5 Ordering the First Respondent to intervene and to take all reasonable steps to ensure that their members who participate in unprotected industrial action in support of the First Respondent’s demand and that the Applicant be granted*

statutory organisational rights desists from any further participation in such industrial action;

2.6 *Ordering the rule nisi due issue remain enforce until the return date or the return date being anticipated by the First Respondent;”*

[2] Subsequent to the granting of the above order, the Applicant supplemented its papers and is now requesting confirmation of the rule subject to the amendments which are contained in the draft order. The Respondents consent to the confirmation of the draft orders 1.1 and 1.2 which are exactly the same as orders 1.1 and 1.2 of the rule. However, they are opposing the confirmation of the draft orders 1.3, 1.4 and 1.5 which seek to amend the original orders as follows:

“1.3 *INTERDICTING and RESTRAINING the 1st Respondent from calling for, encouraging or supporting any industrial action by and of at the 2nd to Further Respondents for the granting of statutory organisational right to; the 1st Respondent by the Applicant until the 1st Respondent has obtained the threshold for the granting of such organisational rights in accordance with collective agreement concluded between the Applicant and NUM;*

1.4 *INTERDICTING and RESTRAINING any of the 2nd Respondent to Further Respondents from participating in industrial action of support of the 1st Respondent’s demand that the Applicant grants the 1st Respondent statutory organisational rights until it has obtained the threshold for the granting of such organisational rights in accordance with the collective agreement concluded between Applicant and NUM;*

1.5 *DIRECTING that the 1st Respondent and/or the 2nd to Further Respondents in not exercise their right to refer the dispute concerning 1st Respondent’s entitlement to organisational rights under Section 12 to 15 of the Labour Relations Act to*

arbitration in terms of Section 21 of the Labour Relations Act for a period of 12 months from the 4th of August 2014;”

Factual background

- [3] The genesis of this matter is the referral of a dispute in terms of Section 21 of the LRA to the CCMA under case number MP259/14 by the First Respondent (*“the AMCU”*) wherein it sought to obtain organisational rights.
- [4] The dispute was unsuccessfully conciliated by the CCMA and a certificate of non-resolution was issued on 4 August 2014. I need to backtrack and state that there were several engagements between the parties leading to the CCMA conciliation regarding AMCU's eligibility to organisational rights. The Applicant was adamant that AMCU was not eligible solely because it did not meet the threshold set in the collective agreement entered into between itself and the National Union of Mineworkers (*“the NUM”*). The threshold is as follows:

“5. THRESHOLD

5.1 It is agreed that the threshold established by this agreement in respect of those organisational rights regulated by Section 12, 13 and 15 of the Act is 45% (forty five per centum) plus 1 [one] of the employees employed by the company in the bargaining unit.

5.2 It is further agreed that the threshold established by this agreement in respect of the organisational rights regulated by Section 14 and 16 of the Act is 50% (fifty per centum) plus 1 [one] of the employees employed by the company in the bargaining unit.”

- [5] After being served with the notice of intention to embark on a strike action by the Respondents, the Applicant launched the urgent application and the interim order was granted on 7 August 2014 as alluded to above.

- [6] The conduct of the parties subsequent to the granting of the rule is dealt with in the Applicant's supplementary affidavit and the Respondents' answering affidavit. I have taken notice of the exchange of numerous letters between the parties during the period of August to November 2014. The most pertinent one though is the Respondents' letter dated 5 November 2014, through their attorneys of record, addressed to the Applicant's attorneys of record and, for completeness sake, its contents are as follows:

"Dear Sirs

***BARBERTON MINES (PTY) LTD / AMCU & OTHERS – LABOUR COURT
CASE NUMBER J1780/14***

1. *We refer to the above matter.*
2. *We refer to the writer's telephone discussion with Mr St Elmo Wilken today.*
3. *We confirm as follows:*
 - 3.1 *our client hereby withdraws the dispute referred to the CCMA under case number MP4259-14. Our client's notice of withdrawal in this regard is attached; and*
 - 3.2 *our client hereby withdraws its strike notice issued on 4 August 2014 in respect of the above-mentioned CCMA dispute.*
4. *In the light of the above developments, there is no on-going threat of strike action in respect of above dispute; there is no reasonable prospect whatsoever of strike action resuming; and the dispute has become academic.*
5. *In the circumstances, please confirm whether your client would be amenable to having paragraphs 2.3, 2.4, 2.5 of the interim order granted under Labour Court case number J1780/14 discharged on the return date of 14 November 2014.*
6. *Furthermore paragraphs 2.3, 2.4 and 2.5 of the interim order constitute wide, indefinite and general injunctions which could*

preclude our client and its members from engaging in a lawful strike in future. This would obviously not be an acceptable situation.

7. *We kindly request that you indicate your client's confirmation of the above by no later than business day on Thursday, 6 November 2014.*
8. *In the event no confirmation of the above is received, or in the event that you indicate that your client intends to confirm the abovementioned paragraphs of the interim order, then it is our instruction to appear on the return date to argue that in the circumstances, the interim interdict should be discharged insofar as these paragraphs are concerned.*
9. *Please note that we are advised by our client that from the time the interim order was granted to date our client has undertaken a recruitment exercise resulting in a significant increase in AMCU membership at your client. Our client is in the process of processing and calculating its increased membership numbers, and will revert to your client in this regard once it has finalised the process. Our client reserves the right should it be necessary, to refer a fresh dispute to the CCMA in terms of Section 21 of the LRA.*
10. *We trust that the above is in order and await your response herein."*

[7] The Applicant responded to the above letter as follows:

"We refer to your letter dated 5 November 2014.

We have taken instructions from our client regarding your proposal that our client discharges the rule on 14 November 2014.

Our client is not prepared to discharge the rule especially since it is now apparent from your letter that the issue of your client being granted organisational rights is an ongoing matter and given the history of your client's refusing to participate in any independent verification or verification under the auspices of the CCMA of its membership, there remains an ongoing threat of your client engaging in an industrial action.

We attach a draft order setting out terms of confirmation of the rule we will be seeking on 14 November. We invite you to make proposal in respect of the

draft order with a view to ascertain whether it is still possible to obtain an Order by consent. We however reserve our client's rights to proceed to have the rule confirmed in terms of the proposed draft order or as may be amended by the Court when the matter is argued if no agreement can be reached concerning the terms of this order."

[8] In a last bid to have the rule discharged by consent, the Respondents made the following undertakings:

- 8.1 That they would not refer a further dispute to the CCMA in terms of Section 21 of the LRA until such time the First Respondent is in a position to demonstrate that it has obtained the requisite threshold in terms of the collective agreement concluded between the Applicant and NUM; and
- 8.2 That they would not seek to embark on a strike action until such time the First Respondent is in a position to demonstrate that it has obtained the requisite threshold.

[9] The Applicant maintained its stance. Therefore, the main issue for determination is whether the matter has since become moot.

Legal principles

[10] The principles relating to mootness of a matter were solidly established in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*¹ where the Constitutional Court stated that:

"A case is moot and therefore not justifiable, if no longer presents an existing or live controversy which should exist if a Court is to avoid giving advisory opinions or abstract propositions of law."

[11] Whilst in *NEASA v MEIBC & Others*,² the Labour Appeal Court, dealing with intervening events that have an effect on the life of the issues before the court, *stated that:*

¹ 2000 (1) BCLR 39 (CC).

² JA02/25/2015 ZA LAC 11 at para 7.

“...the mootness of this appeal is plain. The interdictory relief sought has been overtaken by events. The action which it was formulated to prevent has occurred. The relief which was sought is now perfectly academic.”

[12] Nonetheless, it is trite that mootness is not an absolute bar to deciding an issue. The next question to be asked is whether the interest of justice requires the matter to be decided and whether the order will have any practical effect on either of the parties or others.³

[13] The Respondents referred me to the case of *Ekurhuleni Metropolitan Municipality v SAMWU & Others*⁴ where the court discharged the rule on the basis that there was no reasonable possibility of the occurrence of the conduct interdicted by the interim order. In that regard, the court said the following:

“The applicant does not seek any declaratory relief, but rather seeks an interdict which amounts to a general injunction to workers not to engage in unlawful misconduct, which is not linked to any concurrent industrial action. Unlike typical injunctions of this nature, it is not time bound by the duration of the industrial action. In this case the context in which the actions occurred was a protected national strike. However the form of relief sought is of indefinite duration and in principle would be equally enforceable in industrial action occurring two years hence, without any need to give notice of the applicant's intention to obtain a court order on that occasion.

But if the rule is confirmed in this instance it is not merely reaffirming whether or not the applicant was indeed entitled to their relief at the time when it was a live issue: it also will have the prospective effect of imposing a court order barring such conduct on all future occasions when it cannot be said on any reasonable basis that such possible future events were live issues at that time the matter was argued on the return day. In the case just cited, the effect of the court order dismissing the application to set aside the magistrate decision had no prospective effect, whatever the significance of its declaratory importance may have been.”

³ *Sebola & Others v Standard Bank of South Africa Ltd & Another* 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 32.

⁴ 2011 (5) BLLR 516 (LC) paras 20 and 27.

[14] It was argued, however, on behalf of the Applicant that the matter is ongoing simply because the Respondents persist with being granted organisational rights despite having refused to participate in any independent verification or verification under the auspices of the CCMA of its membership. In that regard, paragraph 25.2 and 25.3 of the replying affidavit the Applicant states the following:

"25.2 ... the withdrawal of the strike notice issued on the 4th of August is of no moment since a Court order had been obtained declaring the strike called for an unprotected strike. Furthermore the withdrawal of the CCMA dispute is also of no consequence given that Section 65(2)(b) of the Labour Relations Act, 66 of 1995 ("LRA") applies which renders the dispute as not capable of being pursued and exhausted for a period of twelve (12) months from the date of issuing of the strike notice.

25.3 I respectfully refer the Honourable Court to what I have stated in my supplementary affidavit under the heading ongoing dispute in paragraphs 14 to 31 and verily believe that there is a threat of ongoing strike action."

[15] It is true that it is not the duty of the court to answer moot questions and, as such when pending proceedings, an event occurs which renders the relief sought academic; the court will dismiss the application. However, in this case a question that arises is whether a mere voluntary cessation of allegedly illegal conduct would moot a case.

[16] In my view the Respondents' position implies no concession that their conduct not in line with to their undertakings would be unlawful. Therefore, it is most conceivable that if the rule, as the amended by the draft order, were to be discharged, there would be no legally binding injunction preventing the Respondents from immediately pursuing a similar dispute and embarking on strike action on similar grounds. In fact, the Respondents are on record having expressed their intention to exactly do that without any expressed commitment to a particular verification process; hence the Applicant is adamant that the rule be confirmed as amended.

[17] I now deal with the effect of the Respondents' withdrawal of both the dispute referred to the CCMA under case number MP4259-14 and the strike notice issued on 4 August 2014 that ensued therefrom. In *Ncaphayi v Commission for Conciliation, Mediation and Arbitration and Others*⁵ the court, dealing with the effect of a withdrawal of a referral to conciliation, said the following:

"...The LRA does not deal with the withdrawal of matters referred to the CCMA and neither do the rules of the CCMA. Rule 13 of the Labour Court merely deals with the procedure to be followed if a party wishes to withdraw proceedings. It is instructive to note how the High Court has considered the effect of a withdrawal of a matter. It has been held that the withdrawal of a matter by a party is akin to an order of absolution from the instance. Ordinarily, an order of absolution from the instance does not prevent a party from reinstituting proceedings and the defendant absolved in the first proceedings will not be able to raise the exceptio rei judicatae if sued again on the same cause of action.

If the withdrawal of a matter in the High Court at a stage when it is ripe for hearing does not necessarily prevent the institution of fresh proceedings, it would be anomalous if the withdrawal of a matter at the conciliation stage of dispute resolution under the LRA – when no decision on the merits of the dispute is even possible - precluded a party from making a fresh referral. Obviously, if the withdrawal under consideration is part and parcel of a final settlement of the dispute the situation would be quite different. However, in this case, the withdrawal was at the applicant's own instance and not an intrinsic part of a settlement agreement..." [Emphasis added]

[18] I am in agreement with the view expressed in the above case that withdrawal of a matter at the conciliation stage of dispute does not precluded a party from making a fresh referral of a dispute. In this instance, it stands to reason, therefore, that in the absence of a legally enforceable injunction, the Applicant would perpetually be at the mercy of the Respondents, who could bail out from their assurances alluded to above anytime and with impunity.

[19] Accordingly, it is my view that, until the Respondents are in a position to prove that they have met the threshold for representatively, consequent to a

⁵ [2010] ZALC 118; (2011) 32 ILJ 402 (LC) at paras 27 and 28

verification exercise, this matter is far from moot. Clearly, the Applicant successfully established that a reasonable apprehension of injury exist as a result of the Respondents' conduct on the basis similar to those that were dealt with in *Libanon Gold Mining Co Ltd & others v National Union of Mine Workers & another*⁶ discussed and distinguished in the case of *Ekurhuleni* referred to above ardently relied upon by the Respondents. *Ekurhuleni* is, however, distinguishable from this case since the Applicant in that case failed to prove that the 'possible future events were live issues at that time the matter was argued on the return day'.⁷

[20] Furthermore, I do not agree with the Respondents' submission that if draft orders 1.3 and 1.4 were to be confirmed, they would not be able to seek organisational rights in future even if they did follow correct procedures in terms of Section 21 of the LRA and again seek to go on a strike simply because the Applicant will institute contempt proceedings against them. On the contrary, the amended draft order clearly deals with their concern by limiting the interdict to a strike action in support of a demand for organisational rights only if the Respondents are not in a position to prove that they do comply with the threshold provided for in the collective agreement.

[21] I now deal with order 1.5 of the draft order which is clearly different from order 2.5 of the rule. The Applicant now seeks to specifically interdict the Respondents from referring any dispute concerning the First Respondent's entitlement to Sections 12 to 15 organisational rights to arbitration in accordance with Section 21 of the LRA for a period of 12 months. In my view, this issue has been rendered academic by the Respondents' withdrawal of the CCMA referral that led to the issuing of a certificate. As stated above, a fresh dispute would have to be referred to the CCMA and, typically, an arbitration hearing would be preceded by a conciliation hearing.

[22] In any event, the Applicant diverged from the original orders in the rule and chose to persist only with orders as contained in the draft order. Effectively, it

⁶ (1985) 6 ILJ 180 (W).

⁷ Above n 5.

has abandoned order 2.5 of the rule. Consequently, order 1.5 and/or as amended by 2.5 of the draft order must be discharged.

Costs

[23] On the issue of costs, in the light of the persisting relationship between the parties I am not inclined to grant cost.

Order

[24] In the circumstances, I make the following order:

1. The rule *nisi* issued on 7 August 2014 is confirmed in accordance with the draft order attached hereto and marked "X" as amended to exclude orders 1.5 and 1.6 thereof.
2. There is no order as to costs.

Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Adv. C E Watt-Pringle SC

Instructed by: Mervyn Taback Inc

FOR THE RESPONDENTS: Adv. S Collet

Instructed by: Larry Dave Incorporated