



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J1940-15

Not Reportable

In the matter between:

SWISSPORT (SA) PTY LTD

Applicant

And

NATIONAL TRANSPORT MOVEMENT

First Respondent

EMPLOYEES LOISTED IN ANNEXURE "A"

Second Respondent

Heard: 10 October 2015

Delivered: 12 October 2015

Summary: Urgent application to interdict the strike pending the outcome of appeal.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] This is an application in terms of which the applicant seeks an interim order in the following terms:

- ‘4.1 Declaring that the action and/or the proposed strike action contemplated for 10 October 2015 constitute an unprotected strike action in terms of section 68 of the Labour Relations Act 66 of 1995 as amended;
- 4.2 Interdicting the Respondents from participating in any such unlawful and unprotected strike action;
- 4.3 Interdicting and restraining the Respondents from committing any act of violence, intimidation and threat any and all employees of the Applicant in any way whatsoever including but not limited to intimidating them to participate and join in.
- 5. Ordering the provisions of paragraph 4.1. 24.3. above operate as an interim order pending the outcome of the application for leave to appeal...’

The history of litigation

[2] This application was launched by the applicant on 9 October 2015 and enrolled for hearing on Saturday, 10 October 2015. On the same day, the applicant launched an application for leave to appeal against a judgment made by Rabkin-Naicker, J discharging a *rule nisi* interdicting and restraining the respondents from engaging in a strike action. The order in that judgment reads as follows:

- ‘i The *rule nisi* is discharged.
- li The parties are ordered to jointly approach the CCMA not later than Monday, 12 October 2015 in order to obtain assistance for verification process under case number GAEK 6217 – 15.’

[3] The *rule nisi* was issued by Whitcher, J on 23 September 2015 and was returnable on 4 December 2015. The applicant anticipated the return day and, accordingly, the matter was heard on 29 September 2015.

[4] The respondent had prior to commencing with the strike action, on the 23 September 2015, referred the dispute concerning an alleged “refusal to bargain” to the CCMA for conciliation. The conciliation having failed, the matter was referred to arbitration. The outcome of that process was that the Commissioner issued an award reads as follows:

‘[14] The parties to engage in a joint verification exercise, which is to commence within 14 days hereof.

[15] In view of the fact that it is common cause that NTM have more membership than any other Union currently at the Respondent’s workplace, the Respondent should not reduce to bargain with the Applicant. This should be the case even prior to the finalisation of the verification exercise, and irrespective of whether or not it results in a collective agreement.’

[5] On the same day, that the judgment discharging the *rule nisi* was made, 9 October 2015, the applicant addressed the letter to the respondents which reads as follows:

- ‘1. We refer to the above matter.
2. We confirm that our client’s application for leave to appeal has been served and filed and accordingly, the order handed down by Honourable Rabkin-Naiker J has been suspended.
3. In light of the aforesaid- any strike action, pending the outcome of the appeal will be unlawful until such time as the appeal has been finalised.
4. We are instructed that our client has been informed that you intend to strike tomorrow and that such strike will be used to intimidate non-participating employees.

5. In light of the above, please provide us with a written undertaking that you will not partake in any strike activity and/or industrial action until such time as a find has been made in respect of the appeal proceedings.
6. Should we not receive the above-mentioned written undertaking by 22:00 today, we hold instructions to launch the appropriate legal proceedings in the circumstances including but not limited to interdictory relief.
7. In the interim, all our clients rights are and remain strictly reserved in full.

Yours faithfully”

[6] The first respondent replied to the above letter by stating the following:

‘The leadership of NTM has noted the contents of your correspondence dated 9th October 2015.

We however reject with contempt your assertion that a any NTM’s strike pending the outcome of appeal will be unlawful.

We place it on record that the Labour Court Order had confirmed content that NTM’s strike is protected.

We dispute the fact that we have to serve a second notice of our intention to embark on a protected strike.

...

We place it on record that the CCMA had contacted NTM for the meeting, which will take place on Monday 12th October 2015 at 10h 00 this meeting takes place at the CCMA Office....’

The applicant’s case.

[7] The applicant’s case is based mainly on the fact that the respondents have, pending the outcome of the appeal process, lost their right to strike which had been confirmed by the judgment of Rabkin-Naiker, J. The applicant is, in this regard, correct. It is a trite principle of our law that leave to appeal suspends any

judgment or order made by the Court. This principle is, however, not absolute in the sense that the party in whose favour judgment or order was made is entitled to approach the Court for an order directing that the judgment be given effect despite the pending appeal.

- [8] The issue that needs consideration concerns the urgency of the matter. In this respect, the applicant relies both on the respondents' letter and what is stated in the founding affidavit. The relevant portion of the founding affidavit in relation to seeking to substantiate urgency of the matter reads as follows:

'6.3 It came to my attention via meeting with representatives of SAA (to whom NTM also enjoys membership); that despite the appeal proceedings having been launched that the First Respondent intends to proceed, without issuing a new strike notice, and without honouring the appeal process, to proceed with a strike tomorrow morning on Saturday, 10 October 2015.

6.4 I instructed representatives of the Applicant to "keep their ear to the ground" tp (sic) confirmed the reliability of the information.

6.5 I was advised by Masala NemaKonde that he heard members of NTM after the granting of the Honourable Judge Rabikin- Naiker; saying that "we will teach them a lesson tomorrow", and that "they should be scared". He also heard them laughing and made references to "Marikana last time."

6.6 ...

6.7 I take these statements in the most serious light.'

- [9] The applicant also relies on what it alleges happened on the 22 September 2015 to support its averment that the matter is urgent. It is stated, in that respect, that:

'6.8 The history of NTM (as with the strike that occurred on 22 September 2015 – whereby knopkirries were used to threaten and intimidate other

employees, and the property was damaged and trespassing of restricted areas occurred) reflect and maintain and intimidate the attitude.’

- [10] It is apparent that the above is also used to support the averments that the 48-hours’ notice prescribed by the LRA should be abridged by the Court.

The law

- [11] It is trite that in an urgent application the party that applies for an urgent relief must in terms of Rule 8 of the Rules of the Court set out the reasons for the urgency and why urgent relief is necessary. In the case where the application is brought on period shorter than 48 hours as provided for in section 68 (2) of the LRA, that party must provide reasons why a shorter period should be permitted.

- [12] In *National Union of Metal Workers of South Africa (NUMSA) obo its Members v Murray Roberts*,¹ Whitcher, AJ, as she then was observed that:

‘[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 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

¹ (2012) 33 ILJ 2642 (LC) at paras 11-13.

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.’

[13] In *Tantsi v Member of the Executive Council of Health-Eastern Cape Province and Others*,² Lallie J held that:

‘[7] The necessity to prove urgency in urgent application cannot be overlooked. In *Mimmo’s Franchising CC and Others v Spiro and Others* (footnote omitted) the Labour Appeal Court made it clear that the provisions of Rule 8 which require the applicant to prove urgency, apply to all urgent applications, irrespective of whether the relief claimed is of an interim or final relief.’

Evaluation

[14] It is common cause that the notice in these proceedings was served on the respondent in less than 48 hours. In fact, according to the submission made by Mr Mphahlele for the respondents, they were given less than five-hours notice. According to him, they were served with the papers on Saturday, 10 October 2015 at 10h00, the matter set down for hearing at 12:00 on the same day.

[15] At paragraph 3.5 of the founding affidavit, the applicant states that the Court should dispense with the requirements of the 48-hours notice as provided for in section 68 (2) of the LRA. The affidavit then deals, in about twenty pages with the history of the matter and matters canvassed in the judgment of Rabkin-Naiker, J. Most of the points raised in the affidavit are irrelevant to the consideration of this matter. For instance paragraph 5.67 of the founding affidavit makes reference to a letter addressed to the Honourable Judge regarding *locus standi* of Mr Maphahlele. As pointed out to Counsel, I did not understand why the applicant was resorting to litigation through correspondence with a Judge. The proper approach, as I see it, was for the applicant to have raised the issue of

² (P 02/14) [2014] ZALCPE 1 (31 January 2014).

locus standi in the pleadings and substantiated the same in the founding affidavit. Applicant did not, however, pursue this point in the present matter.

- [16] Turning back to the issue of the 48-hours' notice, the applicant has not made out a case for the Court to indulge it and condone the non-compliance with the time-frame as required by the LRA. It is apparent from the reading of the founding affidavit that the reason for non-compliance with the 48-hours' notice was due to the information which Mr Subrugen received from Mr NemaKonde, the HR manager.
- [17] In my view, the allegations made by Mr NemaKonde are broad, general and unsubstantiated. The allegations lack in details and substance in that, amongst others, those who are alleged to have made the threats have not been identified, neither is there evidence that it was stated that the strike would commence the following day. There is also no evidence that the alleged threats were made for and on behalf of the first respondent.
- [18] In addition to the above, the applicant has failed to satisfy the requirements of Rule 8 of the Rules of the Court. In this respect, there is no satisfactory explanation as to why it is alleged that the matter is urgent and why the relief is sought on an urgent basis.
- [19] In contending that it was faced with an imminent strike action, the following day after the judgment was made, the applicant relies on a letter from the first respondent. There is nothing in the letter stating that the first respondent intended commencing with the strike action on the following day. All what is contained in the respondents letter is a legal contention that their right to strike has been confirmed by the judgment. There is nothing expressly stating that the strike would commence the following day. It should be noted that the rule suspending the coming into operation of the judgment pending leave to appeal is not absolute. The respondents are entitled to approach the Court and seek an order to have the judgment implemented despite the pending appeal.

[20] I accordingly find that the applicant has failed to provide a satisfactory explanation as to why the application was served on a less than 48 hours' notice. The applicant has also failed to make out a case for urgency. As concerning the issue of costs, both parties agreed that cost should follow the results. In the interest of building and improving on their fragile relationship, it seems to me that it would be inappropriate in the circumstances to allow cost to follow the results.

Order

[21] In the premises, the applicant's application is struck off the roll with no order as to costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv H Van Beek

Instructed by: C De Villiers Attorneys

For the Respondent: Union official