



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 410/13

In the matter between:

NELSON MANDELA BAY MUNICIPALITY

Applicant

~~and~~ And

SOUTH AFRICAN MUNICIPAL WORKERS UNION

(“SAMWU”)

First Respondent

INDEPENDENT MUNICIPAL WORKERS UNION

(“IMATU”)

Second Respondent

THE PERSONS REFERRED

TO IN SCHEDULE “A” AND

SCHEDULE “B” TO THE

NOTICE OF APPLICATION

Further Respondents

Heard: 19 November 2013

Delivered: 13 February 2015

Summary: An interim order interdicting an unprotected strike cannot be confirmed when the strike has ceased.

JUDGMENT

LALLIE J

Introduction

[1] On 18 September 2013, this court granted an interim order in the following terms:

- '1. That the Applicant's failure to comply with the provisions of Section 68(2) of the Labour Relations Act, 1995 (*the "Act"*) is condoned and that this application is heard as one of urgency, in accordance with the provisions of Rule 8 of the Rules of the above Honourable Court, and that the non-compliance of the Rule of Court which relate to the time limits for service and opposition of this application be condoned accordingly;
2. That a Rule *Nisi* do hereby issue calling upon the Respondents, to show cause, if any, on Thursday, 7th November 2013, why a final order should not be granted in the following terms:
 - 2.1. Declaring that the acts of the Further Respondents, in refusing to work in accordance with their contracts of employment, constitutes an unprotected strike, in accordance with the provisions of the Act;
 - 2.2 Interdicting and restraining the First and/or Second Respondents from promoting, encouraging or facilitating any strike action such as that threatened on 13 September 2013,

or in any way conducting or participating in the furtherance of a strike or in the contemplation of such strike;

2.3 Interdicting and restraining the Further Respondents from taking part in any strike action, or in any conduct in the furtherance or contemplation of such strike in respect of the conduct declared to be an unprotected strike in terms of this order.

3. That the provisions of sub-paragraphs 2.1, 2.2 and 2.3 above operate as an interim order with immediate effect pending the return day of this application.”

Paragraph 4 of the order provides for service of the interim order. The respondents were granted leave to anticipate the return date on not less than 48 hours' written notice to the applicant. Costs were reserved for argument on the return date.

[2] The applicant sought confirmation of the *rule nisi*. The first and second respondents filed opposing papers. By agreement between the applicant and the second respondent, the relief against the second respondent was withdrawn with no order as to costs.

[3] The applicant attached schedule A and B to its founding papers. Schedule A relates to the applicant's employees who are stationed at its Sidwell, Korsten and Uitenhage Traffic Departments (the traffic departments) Schedule B relates to employees stationed at the applicant's Despatch, Uitenhage, Walmer, Newton Park, North End, Goven Mbeki, New Brighton, Zwide, Motherwell, Kwamagxaki and Linton Grange libraries (the libraries). All the employees in question are members of the first and second respondent. Giving an account of the events which culminated in the granting of the interim order the applicant submitted that the dispute between the parties relates to the re-evaluation or re-grading of positions of the applicant's administration staff at the traffic departments and libraries. The parties agreed

that approval of the regarding of the employees be sought from the Council of the first respondent (the Council) for the salary increments to be implemented before 25 August 2013. For a number of reasons, the Council did not meet before 25 August 2013. The respondents' patience got exhausted and on 13 September 2013 the respondents served the applicant with a strike notice regarding privatisation and outsourcing of municipal services.

- [4] The applicant submitted that since 23 August 2013, the further respondents who work in the libraries embarked on an unlawful strike. After clocking in, they locked the doors to the entrances of the libraries and did not render services as required in their contracts of employment. The unprotected strike action of the further respondents who work at the traffic departments took the form of preventing members of the public from gaining access to the traffic departments. During the last week of August and the first week of September 2013, the applicant, through its supervisors instructed the further applicants to stop participating in the unprotected strike action and return to their work stations. The instruction was disregarded. On 30 August 2013, the applicant instructed the further respondents who are stationed at the traffic departments, to return to work no later than 11h00 of the same day. They refused. On 9 September 2013, the acting Municipal Manager addressed a circular to the striking employees pertaining to their conduct and on 13 September 2013, he gave the striking employees an ultimatum to resume their duties by 16 September 2013, failing which an application to compel them would be made. When they did not heed it, a further ultimatum was issued for the striking employees to resume their duties by 08h00 the following day. The unprotected strike was accompanied by violence which prevented those applicant's employees who were not participating in the unprotected strike from performing their duties. The urgent application was served via email at 08h48 on 18 September 2013 and set down for hearing on the same day at 14h00. The interim order with a *rule nisi* returnable on 7 November 2013 was granted on the same day. On 7 November 2013, the *rule nisi* was extended to 19 November 2013.

Application to amend the rule nisi

- [5] On 19 November 2013, the applicant filed an application to effectively amend the *rule nisi* by deleting the sub-paragraphs 2.1, 2.2 and 2.3 of the notice of motion and substituting them with the following:

‘Declaring that the strike, on 25 August 2013 to 12 September 2013, and that the applicant’s libraries and Traffic Departments in Uitenhage, Despatch and Port Elizabeth constitutes an unprotected strike.’

It was argued on behalf of the applicant that by seeking the amendment, they wished to confirm and make final the declaratory relief as the interim order no longer suited the needs of the parties. The applicant no longer sought both the injunctive and declaratory relief it originally sought.

- [6] The application is opposed by the first respondent; firstly, on the grounds that the proposed amend order would serve no purpose as the applicant had failed to identify the employees who participated in the unprotected strike. It was further argued on behalf of the first respondent that this court cannot allow an amendment which completely and fundamentally changed the relief sought in the interim order. The amendment would afford the applicant an unfair opportunity to correct the flaws in its original claim and its failure to serve the interim order on most of the further applicants.
- [7] The purpose of granting an amendment is to obtain a proper ventilation of the dispute and to determine the real issues between the parties so that justice can be done.¹ An application for amendment is not granted if it is *mala fide* or if it would cause an injustice to the other side which cannot be compensated by costs.
- [8] The effect of the amendment would be that three prayers will be deleted from the interim order. They are, firstly, the order declaring the acts of the further respondents in refusing to work in accordance with their contracts of employment constitute an unprotected strike. Secondly, the paragraph interdicting and restraining the first and second respondents from promoting,

¹ *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 ALL SA 129 (SCA) at 133 H-I.

encouraging or facilitating any strike action such as that threatened on 13 September 2013 or in any way conducting or participating in the furtherance of a strike or in contemplation of such strike. The last paragraph the applicant seeks to delete is the one interdicting and restraining the further respondents from taking part in any strike action or any conduct in furtherance or contemplation of such strike in respect of the conduct declared to be an unprotected strike in terms of the order. After the three sub-paragraphs have been deleted, the applicant seeks an order declaring the strike from 25 August 2013 to 12 September 2013 at the applicant's libraries and Traffic Departments in Uitenhage, Despatch and Port Elizabeth to constitute an unprotected strike.

- [9] The effect of the amendment, should it be granted would be the omission of the applicant to disclose the identity of the persons against whom the final order should be granted. The applicant no longer seeks an interdict restraining the first and/or second respondent from promoting or facilitating strike action such as the one threatened on 13 September 2013. It seeks to have the strike action which its employees at the libraries and traffic department embarked on from 25 August to 12 September 2013, which are dates before the 13 September 2013 to be declared to constitute an unprotected strike. In the interim order, it is the conduct that was merely threatened on 13 September 2013 that was interdicted and in the proposed amendment, it is the conduct before the threatened one which the applicant seeks to have declared an unprotected strike. Effectively, the applicant seeks to have its relief back-dated.
- [10] When the test for granting an amendment is considered against the applicant's submissions of its intention to amend, the only conclusion that can reasonably be reached is its refusal. The proposed amendment is not even remotely related to a proper ventilation of the dispute before me. It will also not assist in the determination of real issues. It is an attempt by the applicant to cure defects in its case which include its omission to identify the employees who participated in the unprotected strike and its omission to serve the interim

order on most of the further respondents. The application for amendment can, in the circumstance, not succeed.

- [11] The applicant further filed an application to strike out three annexures SN1, SN2 and SN7 to the first respondent's answering affidavit on the grounds that they contain privileged material. In SN1, the first respondent's attorney's letter dated 15 October 2013, the applicant's attorneys are informed that the first respondent intimated that the events which necessitated the applicant obtaining the interdict as against the first respondent have been resolved, alternatively, come to an end. The applicant is further asked to confirm that it would attend at Court on 7 November 2013 to discharge the Rule with each party to pay their costs. In SN2, the applicant's attorneys reply to SN1 in a letter dated 18 October 2013, by conveying the applicant's unwillingness to agree to the proposal regarding the discharge of the Rule referred to in SN1. They further ask the first respondent to file its answering affidavit by close of business. In SN7, the first respondent makes an undertaking to the applicant in a letter dated 18 September 2013, that its striking members would be at their work stations on or before 14h00 on 18 September 2013. It further requests the applicant not to pursue the application for an interdict as there are discussions between the parties which seek to find a permanent solution to the matter relating to the grading of the employees.
- [12] It was argued on behalf of the applicant that statements made expressly or impliedly without prejudice in the course of *bona fide* negotiation for the settlement of the dispute may not be disclosed in evidence without the consent of both parties. The purpose of this principle is to allow people to try to settle their disputes without the fear that the contents of their negotiations will be used against them should the negotiation break down.² The applicant, therefore, sought a costs order against the first respondent for disclosing settlement negotiations.
- [13] The first respondent denied any wrong doing in disclosing the correspondence. It was argued on behalf of the first respondent that the *Naidoo* judgment (*supra*) is distinguishable from the matter at hand as it

² *Naidoo v Marine Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677.

referred to a substantial offer made by an insurance company to make the matter go away. In the present matter, the first respondent alleged that it received a curt response. It, therefore, sought its costs for the return day. The Naidoo judgment is distinguishable in that it refers to *bona fide* efforts by both parties to settle the claim. In the matter at hand there was no effort on the part of the applicant to settle the dispute. The application to strike out the annexures cannot succeed as their contents are not privileged.

[14] The first respondent argued that the *rule nisi* should be discharged on the grounds that the interim order should not have been granted as the application for the interdict did not comply with section 68 (2) of the Labour Relation Act 66 of 1995 (the LRA) which provides as follows:

- '(2) The Labour Court may not grant any order in terms of subsection (1)
 - (a) unless 48 hours' notice of the application has been given to the respondent: However, the Court may permit a shorter period of notice if-
 - (a) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;
 - (b) the respondent has given a reasonable opportunity to be heard before a decision concerning that application is taken; and
 - (c) the applicant has shown good cause why a period shorter than 48 hours should be permitted'.

Section 68 1(a) grants the Labour Court exclusive jurisdiction to grant an interdict or order to restrain any person from participating in an unprotected strike or any conduct in contemplation or in furtherance of an unprotected strike. This flies in the face of the ultimatum addressed to the first and second respondent by the applicant on 13 September 2013 in which the applicant requests the first and second respondent to facilitate the return of their members to work by 08h00 on 16 September 2013. The applicant further informs the first and second respondent that failure to adhere to the ultimatum would lead to litigation in that the municipality would apply for an interdict to prohibit the first and second respondent's members from striking.

- [15] The first respondent submitted that another reason which militated towards the discharge of the rule is that the strike ceased a day after the interim order was granted. There is no danger that it will break out again and the rule has become academic. It relied on *Ekurhuleni Municipality v SAMWU and Others*,³ in arguing that an interim order is discharged or confirmed on the facts pertaining on the return date. The applicant argued that *Ekurhuleni (supra)* is distinguished from the present matter in that the applicant seeks confirmation of declarative and injunctive relief against the first respondent. The applicant further sought to rely on paragraph 19 of the *Ekurhuleni (supra)* where the court expressed the view that there would be merit in confirming declarative relief against the parties especially where the lawfulness of any strike is disputed by the respondent. I am not persuaded by the applicant's argument because the lawfulness of the present strike is not in dispute.
- [16] I have considered the applicant's argument as well as the authority it sought to rely on that an existing dispute is not an essential pre requisite for the granting of a declaratory order. Where litigation has commenced, so went the argument, and at a time where there was a live dispute between the parties, the court will proceed to decide the issues, even though at the time of the hearing no actual dispute remains between the parties. The applicant needs to have an interest to protect or a matter in which a real question is involved and on which the Court's decision gives practical guidance. Each case is decided on its merits. The principles the applicant sought to rely on are not relevant to the facts and circumstance of the dispute at hand. It is not in dispute that the strike is unprotected and there is therefore no need for guidance. The applicant has no interest that needs to be protected. It cannot seek protection against only a portion of the faceless employees who embarked on an unprotected strike. The applicant's efforts to create an impression that it was impossible to identify the striking employees were unsuccessful.
- [17] I agree with the first respondent that the rule is too wide. It is not limited to the unprotected strike which triggered the urgent application but prohibits,

³ [2011] 5 BLLR 516 (LC) at para 27.

indefinitely, the first respondent from encouraging or facilitating any strike such as that threatened on 13 September 2013. Such a wide order encroaches on the right to strike and cannot be confirmed. The unprotected strike has ceased and there is no conduct to be interdicted. The order declaring the strike action of 25 August to 12 September 2012, at the libraries and traffic departments, can also not be granted. The applicant has not identified the employees the order is directed to. Although, the names of the employees who are targeted in the proposed declaratory order are not disclosed should it be granted, it will automatically affect, *inter alia*, the first respondent's members as strike action at the libraries and traffic departments from 25 August to 12 September 2013 cannot exist without employees who participate in it. The applicant failed to establish a basis for the declaratory relief and it can therefore not be granted.

- [18] Lastly, the first respondent submitted that the application is not urgent. The applicant threatened to take disciplinary action against further respondents for not heeding the ultimata to return to their work stations. The threat illustrates that taking disciplinary action against the further respondents was alternative remedy to the urgent application. The applicant's urgency is self-created in that by its own admission, the unprotected strike commenced on 23 August 2013 but it filed its urgent application on 18 September 2013. I have taken cognisance of the applicant's argument that it attempted to resolve the dispute and avoided rushing to court. The striking employees' refusal to heed the ultimata was expressed shortly after the first was issued. As early as 30 August 2013, the applicant threatened to take whatever action it deemed necessary to ensure service delivery. It, therefore, did not deem it necessary to launch its urgent application shortly thereafter. There was no impediment to the applicant's ability to launch the urgent application shortly after the commencement of the strike. It, therefore, has itself to blame for the delay. Rule 8 requires applicants for urgent relief to give reasons for urgency and disclose why urgent relief is necessary. Urgent relief cannot be necessary when the applicant has delayed in approaching the court. This application stands to be dismissed because it is academic and for lack of urgency.

[19] The applicant sought a costs order against the respondent for disclosing privileged correspondence without its consent. It however failed to establish privilege. The unprotected strike action the applicant sought to interdict ceased a day after the interim order was granted. There is no merit in the applicant's argument that it was necessary to pursue the issue of declaratory relief on grounds of public policy. The first respondent opposed this application in an effort to assert its right to strike. Considerations of the law and fairness justify an appropriate costs order in favour of the first respondent.

[20] In the premises the following order is granted:

20.1 The application for amendment is dismissed.

20.2 The application to strike out is dismissed.

20.3 The urgent application is dismissed.

20.4 The applicant is directed pay the first respondent's costs of 19 November 2013.

Lallie J

Judge of the Labour Court of South Africa

Appearance

For the Applicant: Advocate Smith

Instructed by: Joubert Galpin & Searle Inc

For the First Respondent: Advocate Grogan

Instructed by: SAMWU

LABOUR COURT