IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D725/16

In the matter between:

LIBERTY LIQUORS (PTY) LTD	**Applicant**
and	
SACTWU	**First Respondent**
MXOLISI VUSUMUZI and 25 Others	**Furthers Respondents**

Heard: **29 July 2016**

Delivered: **4 August 2016**

JUDGMENT

WHITCHER J

[1] Following an unsuccessful conciliation hearing on a wage dispute, the first respondent, on behalf of the further respondents, sent three strike notices to the applicant. The first notice which was sent at 10h43 on 29 June 2016 stated that the strike would commence on 30 June 2016. When the applicant

pointed out that the notice was defective, the respondent sent a second notice at 12h45 which stated the strike would commence on 1 July at 12h45. Later that day, the respondent transmitted a third notice which stated the strike would commence on 1 July at 10h45.

[2] At 2pm on 29 June 2016 the applicant made application on an urgent basis for a strike interdict against the respondents. A rule *nisi* returnable on 29 July 2016 was granted in the absence of the respondents on 30 June 2016. In terms thereof the further respondents were interdicted "from participating in a strike or any conduct in contemplation or furtherance of a strike in contravention of the provisions of section 64 and 65 of the Labour Relations Act" ("LRA"), pending the return date of the order. In compliance with the order, the strike did not proceed. This is an opposed application to confirm the rule.

[3] The applicant submitted that in its application for the *rule nisi* it had relied upon two grounds, the first being that the further respondents, as members of SACTWU, were precluded from participating in a strike in terms of section 65(3)(a)(i) of the LRA as they are bound by a collective agreement that regulated the issue in dispute, that being a wage dispute, and the second ground being the respondents' failure to provide at least 48 hours' notice of the commencement of the strike in terms of section 64(1)(b)(i) of the LRA.

[4] In its heads of argument, the applicant submitted that its reliance upon the provisions of section 65(1)(a) was "erroneous" as, contrary to what was alleged in the founding affidavit, SACCAWU with whom the applicant had concluded the collective agreement did not represent the majority of employees in the workplace. The applicant submitted that it was nonetheless entitled to confirmation of the rule *nisi* on the second ground.

[5] The respondents submitted that the strike notices, taken cumulatively, gave the applicant at least 48 hours' notice of the commencement of the strike. But their main contention is that it is impermissible for the applicant to rely on the strike notices to confirm the rule. Firstly, because the applicant did not obtain the rule *nisi* on the ground that the strike notices were invalid, but on the

allegation that the respondents were bound by a collective agreement that regulated the issue in dispute. Secondly, the strike notices *as an issue,* together with the material factual averments which purport to substantiate this issue was belatedly raised for the first time in the applicant's replying affidavit. And, this was done after the respondents had demonstrated in their opposing affidavit that the allegation regarding the collective agreement was false and without any merit. In other words, the applicant, in an effort to cure a defective case in the founding affidavit had raised a completely new case in the replying affidavit, which it is not permitted to do.

[6] The general rule which is well established in our law is that in motion proceedings the applicant is required to make out his or her case in the founding papers and not in reply. Rule 7 (4) of the Rules of the Labour Court confirms this rules in that it provides that the replying affidavit must address only those issues raised in the answering affidavit and may not introduce new issues of fact or of law. The rule is not rigid and inflexible and a party is allowed to raise a new matter in reply if there are special circumstances. Broom J explained the position as follows:

> "It is true in certain circumstances it would be unjust to confine an applicant to the contents of his founding affidavit. An example of further highly relevant facts coming to light later, and being introduced despite objection, is to be found in *Registrar of Insurance v JHB Insurance Co Ltd* (1) 1962 (4) SA 546 (W) where in an application made by the Registrar of Insurance for the liquidation of the respondent company, a report prepared by a firm of accountants was admitted. Another example of the Court authorizing an applicant to introduce new material in reply is to be found in *Kleynhans v van der Westhuizen NO* 1970 (1) SA 565 (O) where the Court considered that, as the ramifications of the respondent's affairs were extensive and complex, it was impossible for the applicant to have had all the facts at his disposal before he launched sequestration proceedings… *But none of these cases go to the length of permitting an applicant to make a case in reply when no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply.* In my

view it is essential for applicants to make out a prima facie case in its founding affidavit."[1]

[7] In response the applicant contended as follows. Firstly, the relief sought in the notice of motion does not confine its case to the provisions of section 65(3)(a) of the LRA. The order prayed was for the further respondents to be interdicted from participating in a strike or any conduct in contemplation or furtherance of a strike in contravention of the provisions of "*section 64 and* 65" of the LRA. Secondly, the first strike notice was raised in para 17 of the founding affidavit and a copy of the notice was attached as an annexure thereto. It is apparent from this that a case of non-compliance with section 64(1)(b)(i) was made out. Thirdly, the respondents were invited in the replying affidavit to file a supplementary answering affidavit, which they failed to do. In any event, the issue about the strike notices concerns a point of law, which can be raised at any time. In *CUSA v Tao Ying Metal Industries and Others,*[2] the Constitutional Court held as follows at para 68:

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require argument thereon."

<u>Analysis</u>

[8] To my mind the rule falls to be discharged just on the fact that any issue which may have existed on the strike notices is moot (not a live issue) and this Court should not concern itself with disputes that are moot. The issue is moot because, as a result of the rule *nisi*, the strike never proceeded and the notices expired. In these circumstances, the applicant should not have proceeded with an application to confirm the rule *nisi.*

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[1] My emphasis.
[2] 2009 (2) SA 204 (CC); 2009 (1) BCLR 1(CC)

[9] The issue of mootness was considered by the Labour Appeal Court in *Potgietersrust Platinum Ltd v Ditsela and Others* [3] where Ndlovu JA held that:

> '[9] It is trite that, save in exceptional circumstances, a court will only entertain a dispute as long as such dispute remains live between the parties. It is so because a court does not need to make an order that will be incapable of execution by virtue of the matter having become academic. In *Geldenhuys & Neethling v Beuthin*, the Appellate Division (*per* Innes CJ) stated the following:
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> > "After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.''
>
> [10] Recently, the Legislature promulgated the Superior Courts Act, section 16(2) (a) of which provides as follows:
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> > "(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
> >
> > (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."'[4]

<u>Costs</u>

[10] A cost order against the applicant is appropriate in this case for the reasons that follow.

[11] It is clear that the applicant obtained the rule *nisi* on a misrepresentation of the case. In this regard, I reject the applicant's contention that its reliance on the collective agreement was merely "erroneous" and its application was also based on the ground that the strike notices were invalid. The applicant knew

[3] Case No JA66/12 delivered on 2 July 2015.
[4] At paras 9 and 10.

from the start that SACCAWU was not the majority union at any material time. This is evident from their own papers. That the applicant relied solely on the ground of the collective agreement is evident from the following.

[12] In the founding affidavit, the applicant stated that:

> *"The purpose of the application is to seek an urgent order for an interdict against the SACTWU members participating in an unprotected strike which is due to commenced on Thursday 30 June 2016. The basis of the application is that the SACTWU members are precluded from participating in a strike in terms of section 65(3)(a)(i) of the LRA as they are bound by a collective agreement that regulates the issue in dispute, that being a wage dispute". The applicant claimed that the further respondents were bound by the collective agreement because the applicant had concluded it with SACCAWU and that "at the time of the conclusion of the said agreement" SACCAWU was a majority union in the workplace and the agreement specifically provided that it applied to all permanent employees.*

[13] The applicant then went on in detail trying to establish the above claim and to establish that it had repeatedly warned the respondents in writing that their intended strike would be unprotected on the ground described above.

[14] The applicant only mentions a strike notice in the context of notifying the court that the strike was due to commence. A cause of action ordinarily means *"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court"*.[5] The reference to section 64 in the notice of motion was thus completely inconsistent with the factual statements and the terms of the express claim.

[15] In any event, even before the application for the rule *nisi* was heard, the respondent had sent the third strike notice to the applicant and counsel for the

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[5] *MacKenzie v Farmers Cooperative Meat Industries Ltd.* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd.* 1980 (2) SA 815 (A).

applicant agreed during the hearing before me that the cumulative effect of the notices was such that the applicant had been given at least 48 hours' notice of the strike.[6] He did go on to argue that the notices were invalid because they were confusing. However, in terms of the applicant's heads of argument, the only issue was whether it had received at least 48 hours' notice. Accordingly, when the application was heard, the applicant must have appreciated that it had received at least 48 hours' notice of the strike. For the sake of completeness, I add that although the strike notices are not above criticism, they complied with the Act and were not confusing. They stated clearly when the strike was due to commence.

[16] Finally, the applicant brought the application for the rule *nisi* on 45 minutes notice to the respondents.[7] This in circumstances where it failed to establish grounds for the short notice. The respondents were accordingly denied any opportunity to oppose the application before the rule *nisi* was issued.

Order

[17] The rule *nisi* issued on 30 June 2016 is discharged with costs. The costs are to be paid on an attorney-and-client basis.

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Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Adv G O van Niekerk, SC instructed by Millar & Reardon

For the respondents: Brett Purdon Attorneys.

[6] See: *SACTWU v Stuttafords Department Stores* (1999) 20 ILJ 2692 (LC).

[7] The notice of motion and the founding affidavit was only served on the respondents 45 minutes before 2pm on 29 June 2016.