IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 2871/17

In the matter between:

THE SOUTH AFRICAN POSTAL WORKERS UNION **Applicant**

and

THE SOUTH AFRICAN POST OFFICE (SOC) LIMITED **Respondent**

Heard: **16 November 2017**

Delivered: **28 November 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] South African Post Office (SOC) Limited (SAPO) issued a notice on 31 November 2017 informing the applicant, the South African Postal Workers Union (SAPWU) of its intention to terminate the recognition agreement entered into between the parties on 14 February 2013 (as amended on 30 May 2014). SAPWU approached this Court on an urgent basis seeking an order to set aside that notice.

[2] SAPWU further seeks a declaratory order preserving its status and bargaining rights within the bargaining unit of SAPO, pending the final determination of

the dispute referred to the Commission for Conciliation Mediation and Arbitration (CCMA).

Background:

[3] The purpose of the recognition agreement as per its clause 1.1 is *inter alia,* to establish harmonious industrial relations between the parties to the recognition agreement, and to facilitate orderly resolution of disputes, grievances and general complaints. The recognition agreement stipulates that any other issue not contemplated in the recognition agreement shall be dealt with in terms of the provisions of the Labour Relations Act (LRA)[1] and the Basic Conditions of Employment Act (BCEA).[2]

[4] In terms of the provisions of clause 1.5, SAPO undertook to grant any union organisational rights under sections 12, 13, 14 and 15 of the LRA, that can demonstrate that it is sufficiently representative, or which has a membership of less than 50% plus one (1) but more than 35% plus one (1) in the bargaining unit.

[5] It terms of clause 3.1, the parties recognised that SAPWU had sufficient representation within the bargaining unit. The bargaining unit is defined by the recognition agreement as shall mean all permanent employees of SAPO on the salary scale A1 up to C5, with the exclusion of employees who are on a total cost to company. SAPWU's recognition in terms of the agreement was dependent on it maintaining a membership threshold of 35% plus one (1).

[6] In terms of the provisions of clause 4.1, the recognition agreement commenced on 20 February 2013, and continued for an indefinite period. SAPO however, in terms of the provisions of clause 4.2 has a right to terminate the agreement by at giving at least a 90 days' written notice period to the Union of its' intention to do so. In the notice, SAPO must allege that the Union no longer meets its 35% plus one (1) threshold of membership within the bargaining unit. During the notice period, the Union must establish that it has the requisite representation threshold. In terms of the provisions of clause

[1] Act 66 of 1995, as amended
[2] Act 75 of 1997, as amended

4.3, should the Union fail to establish that it has maintained a representation of 35% plus one (1) during the notice period, it shall cease to enjoy the rights as contained in the recognition agreement with immediate effect from end of business day after the expiration of the notice period.

[7] The recognition agreement contains a built-in dispute resolution procedure. Clause 14 stipulates that should the parties to the agreement fail to reach consensus on the interpretation of the recognition agreement, the aggrieved party may declare a dispute in writing to the other party. The party to whom the notice has been issued, shall within five (5) days from the receipt of the notice of dispute, offer a reply thereto in writing setting out the proposed remedies, alternatives and proposed terms of settlement. The parties shall thereafter convene a meeting within 10 business days of receipt of the reply. If the parties fail to resolve the dispute, they may agree, in terms of the provisions of clause 14.5, to refer the matter for private mediation and arbitration, or refer the dispute in terms of the relevant dispute resolution mechanism in terms of the LRA.

[8] SAPO also has recognition agreements with two other unions operating within the bargaining unit, viz, Communication Workers Union (CWU), and the Democratic Postal and Communication Union (DEPACU).

[9] The background of the dispute between the parties, which does not appear to be seriously disputed is as follows:

9.1. During 2016, a dispute ensued in respect of the verification of SAPWU's membership. That dispute was in respect of stop order payments for the period between December 2015 and March 2016. The dispute was referred to the CCMA under case number GAJB 8223-16. The parties concluded the terms of reference, which included that the CCMA would conduct a verification exercise, and to advise the parties of the date and time of the verification process.

9.2. On 30 November 2016, the recognised trade unions attended a meeting with management of SAPO. During the meeting, the trade unions requested that the membership status of each recognised trade union be shared amongst each other. In response to the request, SAPO on 14 December 2016 sent written communication to all recognised trade unions. From the letter, it became apparent that none of the recognised unions met the threshold of 35% (plus one) for sufficient recognition.

9.3. It was established that CWU enjoyed 29% representation, SAPWU enjoyed 22% representation, and DEPACU enjoyed 19% representation. In the same letter, SAPO proposed, in an event of a dispute arising from the information provided relating to trade union membership status, that a membership audit should be undertaken through an independent auditing firm.

9.4. SAPWU according to SAPO, did not respond to the letter of 14 December 2016. It further did not dispute the contention that its membership stood at 22%, nor did it refer a dispute to any dispute resolution forum.

9.5. During April 2017, SAPO attempted to conclude a new recognition agreement with the recognised trade unions including SAPWU. These attempts however did not yield positive results and, the old recognition agreement remained in force.

9.6. On 9 June 2017, SAPO dispatched a letter to the Secretary General of SAPWU, stating the following;

> "The South African Post Office SOC Limited wishes to inform you that in terms of its records, the South African Postal Workers' Union does not have a representative status of 35% = 1 within the bargaining unit. [The] South African Postal Workers' Union's current membership as at May 2017 is at 23% within the Bargaining Unit.
>
> > The SA Post Office SOC Limited invokes clause 4.2 of the Recognition Agreement between the South African Workers' Union by serving you in writing with the notice of intention to terminate this agreement, giving 90 days to establish that you have a representation status of 35% = 1 (thirty five percent plus one) within the Bargaining Unit.

> If the trade union is unable to prove that it is sufficiently representative by 17 October 2017, then the recognition agreement terminates on 18 October 2017."

9.7. SAPWU replied in writing on 21 June 2017, and disputed the SAPO's numbers. It further stated that there was a pending dispute before the CCMA in respect of an alleged unilateral amendment to the recognition agreement by the post office. The letter *inter alia* reads as follows:

> "…
>
> 2. Not only does our client vehemently deny that your aforesaid contention are correct, but you are well aware that there is currently still a pending dispute at the CCMA pertaining to inter alia the unilateral amendment by you to the recognition agreement and the stop order verification process.
>
> 3. As such, your contentions pertaining to our client's representativeness is seriously questioned and disputed.
>
> 4. In the circumstance, you are requested to in writing withdraw your aforementioned letter within 7 days, failing which our client will approach the Labour Court for the relevant relief and seek a punitive cost order against you.
>
> …"

9.8. On 18 October 2017, a letter titled "*Termination of Recognition Agreement"* was addressed to SAPWU, wherein SAPO reminded it that it had been served with an intention to terminate the recognition agreement on 9 June 2017, and had failed to utilise the notice period of 90 days to establish its representativeness. The notice period accordingly expired on 17 October 2017. SAPO therefore undertook to determine the SAPWU' representativeness in the bargaining unit, and to thereafter communicate the numbers to it.

9.9. On 24 October 2017, SAPWU's attorneys of record sent a letter to SAPO, wherein it was disputed that it did not meet the 35% plus one

(1) threshold within the bargaining unit. Moreover, it was contended that on a proper reading of the letter dated 18 October 2017, SAPO did not terminate the recognition agreement, but had simply proceeded with the reconciliation of the membership numbers.

9.10. SAPWU in the same letter purported to declare a dispute in terms of the provisions of clause 14 of the agreement in respect of the membership numbers, the method of computing the numbers and the transparency of the verification process. It further requested an undertaking from SAPO, that it would retain its rights in terms of the recognition agreement pending the final determination of the dispute at the CCMA or this Court.

9.11. In a letter dated 31 October 2017 from SAPO titled "*Confirmation of Membership and Termination of Recognition Agreement*", the termination of the recognition agreement concluded with SAPWU was confirmed. The letter *inter alia* stated that:

> "…
>
> We can now confirm as at 17 October 2017, your membership stood at 24% (3720 members) you therefore do not meet the required threshold of 35% + 1 (thirty five percent plus one) as per notice and as such your Recognition agreement with SA Post Office terminates as per notice period."

The submissions:

[10] Obviously aggrieved by the termination agreement, SAPWU approached this Court on urgent basis on 3 November 2017, setting down the matter for a hearing on 16 November 2017. It contends that it has met the minimum required representative status of 35% +1, and that SAPO had to date, not been able to substantiate its allegations regarding its numbers.

[11] SAPWU bases its claim of a *prima facie* right or alternatively a clear right on the recognition agreement, which it contends allows it to raise any dispute arising from that agreement. It further contends that a well-grounded

apprehension of irreparable harm exists in the event that relief is not granted in that it would not be able to exercise any rights conferred on it despite it being the majority union in the bargaining unit, and thus be prevented from representing or assisting its members within the respondent. SAPWU further claims that it has no suitable remedy, and that the balance of convenience favoured it in view of the prejudice and/irreparable harm it stands to suffer should relief not be granted.

Evaluation:

[12] SAPO opposed the application on a number of grounds, chief of which was that there was no basis to treat the application as urgent. The principles applicable to urgent applications are trite. The provisions of Rule 8 in terms of which SAPWU approached the court for its urgent intervention have been interpreted to mean that a party seeking urgent relief must adequately and in detail, set out in the founding affidavit, the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due cause. The degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency, and applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules[3].

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[3] *Jiba v Minister: Department of Justice and Constitutional Development and Others 2010) 31 ILJ 112* at para 18. See also *Mimmo's Franchising CC v Spiro, Harry David (JA58/00) [2002] ZALAC 7 (29 March 2002)* at para 29 where it was held that;

> "A party applying for relief on an urgent basis must in the founding papers set out the reasons for urgency; state why urgent relief is necessary; and also set out why the requirements of the rules of court have not been complied with, if that is the case (sub-rules 8(2)(a) and (b)). The purpose of those sub-rules is self-evident. Considerations of fairness dictate that litigious matters should be heard in more or less the sequence in which they have become ripe for hearing. If it were to be otherwise, it will bring about additional delays in the hearing of matters already awaiting their turn and result in self-evident unfairness and the potential for prejudice. Sub-rule 8(2) requires an applicant to place such facts before the court as would be sufficient to enable it to exercise a judicial discretion in regard to whether sufficient and satisfactory grounds have been shown to exist to justify giving the particular matter preference. Urgency usually entails a deviation from the forms, time-limits and procedures prescribed by the rules or a departure from the established sitting times of the court (Cf: Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977(4) SA 135 (W) at 136 H). The factors that are usually taken into account in the exercise of such a discretion are a) any prejudice that an applicant might suffer if the application had to be dealt with in the ordinary course; b) any prejudice other parties awaiting the hearing of their matters might suffer if the particular application were to be given preference; and c) any prejudice that the respondent might suffer as a result of any deviation from the prescribed forms and procedures, the abridgement of any prescribed time-limits and an accelleration of the hearing

[13] A fundamental requirement in urgent applications is that an applicant seeking urgent relief must approach the court with the necessary haste, or as soon as the cause of discontentment arises. This is so in that a determination of whether a matter is urgent is linked to the haste with which the Court was approached for relief. Thus, if a party is hesitant, the urgency equally dissipates. As it was stated in *University of the Western Cape Academic Staff & others v University of the Western Cape*[4]*,* the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.

[14] Applying the above principles to the facts of this case, and to the extent that it can be established that SAPWU has not set out in its founding affidavit the grounds upon which this application should be treated as urgent, or has not acted with the necessary haste in approaching the court, it follows that the matter ought to be struck off the roll.

[15] In the founding affidavit, SAPWU stated that the matter is urgent on the basis that the situation it found itself in justified the urgency, and that it had taken steps immediately following the failure of SAPO to respond to disputes raised and/or the final termination letter of 31 October 2017. It further claimed that its existence was at stake, and that urgency was of the essence since it cannot obtain substantial redress in the normal course.

[16] It was common cause that SAPWU was made aware of the intention to terminate the recognition agreement as far back as 9 June 2017, when a notice was sent to it in that regard. In terms of that notice, and in accordance with the provisions of clause 4.2 of the agreement, SAPWU was afforded 90 days within which to establish that it has a representative status of 35%+1 within the bargaining unit.

(See: IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another: Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981(4) SA 108 (C) at 112 H – 113 A; 114 A – B). The provisions of Rule 8 clearly apply to all urgent applications, irrespective of whether the relief claimed is of an interim or final nature".

[4] *(1999) 20 ILJ 1300 (LC)* at para 15

[17] In its replying affidavit, SAPWU nonetheless claimed that the urgency arose once it followed through on the letter of 9 June 2017, whilst the actual process of termination commenced only on 18 October 2017. It had further contended that SAPO did not mention the fact that it had on at least three separate occasions since October 2015, invoked the provisions of clause 4.2 of the recognition agreement by alleging that it (SAPWU) did not meet the threshold. In every such instance, the correctness of the computation and the numbers was disputed, and SAPO had abandoned its stance and/ or failed to take further steps to give effect to the notice(s).

[18] It further contended that considering that SAPO had a history of invoking the provisions of clause 4.2 and the failing to act upon its previous notice(s), it had once again on 21 June 2017 disputed the correctness of the allegations based on its own numbers and lack of transparency and the failure to substantiate the allegations that it no longer met the threshold. SAPWU accordingly in the light of this history had expected that the SAPO would once again reconsider its allegations, conclude that its numbers were incorrect, and abandon the notice following the dispute raised in the letter dated 21 June 2017. According to SAPWU, it would have been premature for it to approach the Court immediately after 18 October 2017, as it had disputed SAPO's numbers.

[19] There are inherent difficulties with SAPWU's case on urgency, and it is my view that it has not demonstrated to the Court why the application should not be struck off the roll. My conclusions in this regard are fortified by the following;

23.1 Once SAPWU had accepted that the urgency arose on 9 June 2017, it was expected of it to take the necessary means to refute the allegations that it no longer met the threshold for continued recognition. It instead merely denied the contentions that it was no longer representative through its attorneys of record, demanding that SAPO should cease with the intended cancellation, failing which an urgent application would be brought. This response was some 11 days later since the letter of 9 June 2017.

23.2 SAPWU's view was that since SAPO had in the past made similar threats and not followed them through, there was no reason to believe that it would carry out the threat. Any Union concerned about its very existence would take such threats seriously, irrespective of whether they were carried out in the past or not. As correctly submitted on behalf of SAPO, the notice issued on 9 June 2017 was a fresh notice, and it was not for SAPWU to not bother to take steps to prove that SAPO had its numbers wrong, or to hold the view that the threats would not be carried out.

23.3 When SAPO did not respond to SAPWU's attorneys' letter, the message according to the submissions made on behalf of SAPO was that there was clearly no intention to comply with the demand to cease and desist from the intention to terminate the agreement. How SAPWU could have construed SAPO's silence after its attorneys of record letter of 21 June 2017 that the termination would not be carried out is beyond comprehension.

23.4 Other than the SAPWU's attorneys of record's response on 21 June 2017, in which it had also threatened to approach the court on an urgent basis, SAPWU only realised on 18 October 2017, and after the 90-days period that the SAPO's threats to terminate the agreement were real. In its letter confirming termination of the agreement, SAPO also advised SAPWU that it was in the process of reconciling its closing member account and that the recognition agreement was to be terminated.

23.5 Even then, SAPWU through its attorneys only reacted on 24 October 2017, raising a variety of issues including that SAPO's letter of 18 October 2017 could not have been confirmation of the termination, and was merely viewed as a reconciliation of the Union's membership. SAPWU again disputed the numbers relied upon by SAPO in wishing to terminate the agreement, without providing its own numbers to refute the allegations.

23.6 It was only in the letter of 24 October 2017 that SAPWU declared a dispute in terms of the provisions of clause 14 of the agreement, and further demanded written confirmation and/or undertaking that SAPWU continued to enjoy recognition, pending the finalisation of the dispute declared, and further processes at the CCMA or this Court. SAPU was given until 27 October 2017 to respond. In that letter, again a threat was made that SAPWU would approach the court on an urgent basis should the required confirmation or undertaking not be forthcoming.

23.7 SAPO only approached the court with this application on 3 November 2017, some nine days after its second threat to do so. I agree with the submissions made on behalf of SAPO that the urgency claimed in this case is clearly self-created. If SAPWU was serious about disputing the numbers that SAPO relied upon, it had 90 days within which to challenge those numbers and had instead simply made a bare denial and continued as if there was no threat to its very existence. No urgency was shown on its part in dealing with this threat between 9 June 2017 and 3 November 2017.

23.8 All that SAPWU needed to do to the extent that it disputed SAPO's figures from 9 June 2017, was to produce its own figures, and where there was still a dispute, to declare a dispute in accordance with the provisions of clause 14 of the then existing agreement. Where the dispute could not be resolved, SAPWU still had an option to refer it in terms of clause 14.5 to private mediation/arbitration, or to the CCMA. As correctly submitted on behalf of SAPO, SAPWU seeks the assistance of the Court in circumstances where it had adopted a passive approach to the available internal dispute resolution mechanisms available in terms of the agreement.

23.9 It was correctly submitted on behalf of SAPWU that it is not for the court to determine whether it remained representative or not. This was after it was raised with it that it had even failed in its application to demonstrate that it at least met the threshold. The difficulty with

SAPWU's case is that to the extent that it had contended that its clear or *prima facie* right was grounded in the agreement, that right cannot by all accounts be established by a mere denial, and thus a basis for that right ought to have been laid in its founding papers, by showing that indeed the threshold was made, *albeit* on a *prima facie* basis.

23.10 Furthermore, by virtue of the provisions of clause 4.3 of the recognition agreement, once it is terminated in accordance with the provisions of clause 4.2, and once the union has not established that it met the threshold within the 90-day period, it cannot exercise any rights conferred in terms of the agreement. In this case, and as already indicated, SAPWU failed to take any steps between 9 June and 18 October 2017 to demonstrate that it met the threshold. It cannot therefore claim urgency on a right that no longer exists in view of its belated declaration of a dispute on 24 October 2017. To the extent that it was submitted on behalf of SAPWU that the *prima facie* right was grounded in the provisions of section 24 of the LRA, that is an issue that can be dealt with within the context of the alternative remedy available to it at the CCMA.

23.11 It is further trite that urgent relief will be refused in instances where the applicant has suitable alternative remedies. SAPWU's declaration of a dispute in its letter of 24 October 2017, and long after the 90-day grace period came to an end was clearly belated as already indicated, and it cannot now claim to be prejudiced when it is its very dilatory conduct that clearly contributed to the conundrum it finds itself in. SAPWU has an alternative remedy in the form of dispute resolution mechanisms under the LRA, and there is therefore no basis for the Court to intervene on an urgent basis.

[20] In the light of the above conclusions, it follows that the application ought to be struck off the roll for lack of urgency. I have further had regard to the requirements of law and fairness, and I am not satisfied that a cost order is warranted in this case.

Order:

[21] In the premises, the following order is made;

1. The Applicant's application is struck-off from the roll for lack of urgency;

2. There is no order as to costs.

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E Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mr. J Nysschens of Johan Nysschens Attorneys
For the Respondent:	Adv. M. Sibanda
Instructed by:	Bowman Gilfillan Incorporated