



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 3803/18

In the matter between:

CENTLEC (SOC) LTD

Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Respondent

LERENTON NKALAI

Second Respondent

MHLUPHEKI KHANDA

Third Respondent

K M K MOTLHALE

Fourth Respondent

M. MOENG

Fifth Respondent

J. LEEUW

Sixth Respondent

'THE REMAINING UNLAWFUL STRIKERS'

Seventh Respondent

Heard: 29 October 2018

Delivered: 07 November 2018

JUDGMENT

TLHOTLHALEMAJE, J

[1] The applicant approached this Court on an urgent basis to seek interdictory and declaratory orders against the first respondent (SAMWU) and its members, who had embarked on an unprotected strike. In its original notice of motion, the applicant sought an order in the following terms:

2. A *Rule nisi* is issued, returnable on Thursday, 13 December 2018, in terms of which the Respondents are called upon to show cause, if any, why the following order should not be made final:

- 2.1 the strike action embarked upon by the Respondents is declared unlawful and unprotected;
- 2.2 Respondents are ordered to immediately disperse and interdicted further from participating in the unlawful strike action and performing any act in continuance thereof;
- 2.3 the Respondents are further interdicted from performing any act of intimidation to any of the Applicant's employees and/or the Applicant's patrons;

...

- [2] The application initially came before Prinsloo J on 25 October 2018 and was removed from the roll on account of the applicant's non-compliance with the provisions of section 68(2) of the Labour Relations (LRA)¹. The matter was then re-enrolled for 29 October 2018.
- [3] On 26 October 2018, the applicant filed an amended notice of motion together with a supporting supplementary affidavit wherein it averred that the striking employees had dispersed and had returned to their working stations. The applicant nevertheless persists with the prayer 2.1 and 2.3 in its original notice of motion.
- [4] The respondents opposed the application on the basis that it was not urgent, and further that since on the applicant's own version, the employees had voluntarily returned to their normal duties after they were served with the original notice of motion. It was contended that the culminating effect thereof was that the application had become academic, as there was no conduct to interdict.
- [5] The urgency of the matter has to be determined against the following background;

- 5.1 The applicant is a state owned company licenced by the National Energy Regulator of South Africa (NERSA) to distribute electricity to

¹ Act 66 of 1995 (as amended)

municipal authorities including the Mangaung Metropolitan Municipality and other local municipalities in the Free State Province. It performs an essential function in the supply of electricity and has been declared a national key point in terms of the National Key Points Act.²

- 5.2 SAMWU organises within municipalities and similar local authorities. It represents the majority of employees at the applicant. The second to sixth respondents are SAMWU shop stewards employed at the applicant.
- 5.3 On 9 October 2018, SAMWU made a written request to the applicant in terms of clause 11.4.7.1 of the Main Collective Agreement to hold a meeting with its members at the premises on 17 October 2018. Contrary to the conditions set in the applicant's approval, the meeting was convened at 08h00 instead of 14h00. At the conclusion of the meeting, the employees refused to return to their normal duties for the remainder of the day.
- 5.4 The employees according to the applicant thereafter assembled inside the premises and conducted themselves in a general threatening manner in furtherance of the unprotected industrial action. This had resulted in an ultimatum being issued instructing them to resume their duties on or before 18 October 2018 at 07:30.
- 5.5 On 18 October 2018, the employees handed over a memorandum to the Executive Mayor of Mangaung Metropolitan Municipality, demanding the removal of the applicant's Chief Executive Officer, and Executive Manager: Human Resources. The memorandum was however not delivered directly to the representatives of the applicant.
- 5.6 The employees heeded the ultimatum issued on 17 October 2018, but only resumed their duties on 19 October 2018. On Monday, 22 October 2018, the employees again abandoned their working stations. On 23 October 2018, another ultimatum was issued,

² Act 102 of 1980

instructing them to immediately resume their duties on 23 October 2018 before 13:00. On the same date, SAMWU informed the applicant that it was in possession of a copy of the ultimatum and would conduct its own investigation in respect of the purported industrial action.

5.7 The notice of application was given on 24 October 2018 whilst the initial application was served on the urgent roll on 25 October 2018.

- [6] Given the timeline of events as described above, it cannot be said that the applicant had not acted with the necessary haste at the time it did in approaching the court. Further given the nature of the applicant's operations, which have been classified as essential service, and the clearly unprotected nature of the strike and the effect it may have had on the applicant's operations and the communities it serviced, there is no basis upon which it can be concluded that the matter was not urgent. In my view, the fact that the applicant had not complied with the requirements of section 68(2) of the LRA when initially launching this application, which had necessitated the removal of the matter from the roll, did not in any event erode the urgency of the matter.
- [7] SAMWU however contends that the matter has since become moot, as there is no live controversy since the employees have resumed their duties. Given the common cause fact that the strike has since ceased, the issue is whether any purpose would be served by granting the applicant the orders it seeks.
- [8] It has been held that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.³ The principles related to mootness were succinctly restated by Moshoana J in *Koko v Eskom Holdings Soc Limited*⁴, and it would be appropriate to cite therefore at large as follows;

³ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs*, 2000 (2) SA 1; 2000 (1) BCLR 39 at para 21

⁴ (J200/18) [2018] ZALCJHB 76 (21 February 2018)

“[21] The doctrine of mootness is well developed in the American constitutional law jurisprudence. A case becomes moot if a party seeks to obtain judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which when rendered, for any reason, cannot have any practical effect upon an existing controversy. Courts exists to resolve controversies and not abstract issues. As I see it, for a court to intervene and assist the warring parties, there must be controversy between the parties. The dictionary meaning of the term controversy is a dispute, argument, or debate, especially one concerning a matter about which there is a strong disagreement. Further, the controversy must be a live one. Put differently it must exist between the warring parties. A case would be moot if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision. It is moot, if it no longer presents an existing or live controversy or the prejudice or threat of prejudice, which to an applicant, no longer exists.

[22] The mere fact that the matter is moot does not constitute an absolute bar for a court to hear a matter. The overriding factor is that the order will have some practical effect on the parties or others. The Constitutional Court had set out the following as potentially relevant factors: the nature and extent of the practical effect that any possible order might have; the importance of the issue; the complexity of the issue; the fullness or otherwise of the argument advanced and resolving disputes between different courts. Added to the factors is the interest of justice.

[23] Quiet recently the Constitutional Court in *Pheko v Ekurhuleni Metropolitan Municipality* had the following to say:

‘[32] Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot. It is also live because if we find that the removal of the applicants was unlawful, it would not be

necessary to consider their claim for restitutionary relief.’ [My own underlining and emphasis]

- [24] Determining whether a case is moot requires consideration of the evidence placed before a court. It is not a principle that is to be plugged from the vacuum. Also, of importance is the relief that is being sought by a party. In *Tshwane University of Technology v All Members of the Central Student Representative Council of the Applicant*, Acting Justice Wentzel had the following to say before declining to grant the relief sought:

‘[23] To my mind, it is not the function of the courts to make blanket interdicts. What the respondents in a sense want is restraining order to preclude any decision to close the residences without a Court order. It is a matter of law that this must be done lawfully and no order declaring this is necessary. If this is done unlawfully in the future, the respondents will have recourse to the courts.’

- [25] Recently, the High Court, in *Afriforum NPC and Others v Eskom Holdings SOC Ltd and others*, had the following to say:

‘[107] The mootness barrier therefore usually arises from events arising or occurring after an adverse decision has been taken or a lawsuit has gotten underway, usually involving a change in the facts or the law, which allegedly deprived the litigant of the necessary stake in the pursued outcome or relief. The doctrine requires that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made.

[110] An application for an interdict or other relief with continuing force is not rendered moot solely by the voluntary cessation of allegedly unconstitutional, illegal, unreasonable or unfair conduct, since the offending party may return to its old ways. An issue will normally not be deemed moot if it is capable of repetition, yet evading review. The court should enquire into whether the claim has been mooted because the respondent has voluntarily, but not necessarily permanently, acquiesced. So long as the person mounting the legal challenge confronts continuing harm, collateral harmful consequences that continue to endure, or a significant prospect of future harm, the case cannot be deemed moot. By similar token, in the event of a voluntary cessation of wrongful conduct, a case might well be moot if subsequent

events make it sufficiently clear that the allegedly unlawful behaviour may not reasonably be expected to recur.

[115] The essential question for decision in relation to the justiciability of the issues and the relief sought in these applications, therefore, is whether the voluntary cessation of Eskom's alleged wrongful conduct has rendered the applications moot. As just said, applications for interdictory relief or review should not be rendered moot solely by the voluntary cessation of allegedly wrongful conduct where it appears that the offending party may return to its old ways...Put differently, do the applicants still face continuing harm, enduring collateral harmful consequences or a significant prospect of future harm? Does the evidence make it sufficiently clear that the allegedly wrongful conduct may not reasonably expected to recur?" [Citations omitted]

[9] Applying the above principles to the facts of this case, and given the respondents' responses to the applicant's supplementary affidavit, it can be accepted that SAMWU does not dispute the fact that its members had embarked on an unprotected strike, and also that they had conducted themselves in the manner described by the applicant in the course of that strike. The applicant has correctly abandoned its prayer 2.2 in that it obviously pertained to a live issue at the time that the application was initially brought before the court. It nonetheless persist seeking that the strike action be declared unlawful and unprotected, and a further order interdicting the respondents from performing any act of intimidation to any of its employees and/or patrons 'henceforth'.

[10] In my view, the interdictory relief sought by the applicant under prayer 2.3 of its Notice of Motion pertained to an issue which is no longer live in that since the strike action ceased, there can be no talk of acts of intimidation being performed by SAMWU members that can practically be interdicted to cease 'henceforth'. I further did not understand the applicant's case to be that despite the strike having ended, the intimidation complained of continued to persist or that there was a likelihood that it may persist.

- [11] It follows that the only issue that needs further consideration by the Court is whether any purpose would be served by declaring the strike action embarked by SAMWU members which has since ceased, unlawful and protected.
- [12] Central to the applicant's argument was that the strike action embarked upon was not only unprotected, but was a stop/start affair which had ceased upon the issuing of ultimatums and the launching of these proceedings. It was further argued that in the light of the demands that remained live (which are the subject of ongoing negotiations), and further in the absence of any undertakings by the respondents, there was no guarantee that the employees would not embark on similar strike action again and continue to disrupt its essential operations.
- [13] It was submitted on behalf of the respondents that the relief sought by the applicants was academic in the light of the strike having ceased, and that all that the applicant seeks was a guarantee that the employees would not down tools again. The essence of the relief sought according to the respondents, was to obtain an order interdicting and declaring unlawful future strike action which the employees might embark upon. Furthermore, the effect of the order if granted would be to shut the door on the respondents with regard to their right to be heard before an order was granted against them, making any such orders unlawful and against the principles of legality. To that end, it was submitted there was no longer any reasonable apprehension of harm which was a cardinal requirement for the grant of an interim order.
- [14] In this case, it is worth repeating that members of SAMWU had embarked on an unprotected strike action on two different occasions within a short period of time, and in a work environment that has been declared as essential services. The employees had on the occasions that they had resumed their duties, done so following upon ultimatum or the launching of these proceedings. In the answering affidavit, the respondents do not put up any defense to the applicant's contentions that the consequences of any such industrial action are dire, including that;

- a) There will be interruption of distribution of electricity in the municipalities and communities they service;
- b) There will be interference with the applicant's statutory obligations which may result in the rescission of its operating licence;
- c) There would be loss of prepaid electricity revenue on account of the non-availability of personnel at the point of sale at the applicant's offices in the event of an unlawful and unprotected strike;
- d) There would be interference with the applicant's maintenance schedules, which exposes the electricity distribution equipment to damage and even explosions.

[15] In my view, it cannot be in the interests of justice for this Court to close its eyes to the fact that the unprotected strike did take place, that the issues that led to that strike remains live, and further that no attempt has been made to make any undertaking that any such strike action would not take place, whilst the employees' demands remains live.

[16] In my view, although the unprotected strike action has ceased, the unresolved demands still presents a live controversy regarding whether the strike embarked upon in that regard was unlawful and unprotected at the time it took place, but for the fact that the matter had to be removed from the roll.

[17] It cannot be correct as argued on behalf of the respondents, that what the applicant seek is to effectively erode their rights to a fair hearing before any order as sought in this regard can be made. The order as sought in this case is merely to confirm by way of a declaratory order, that indeed the strike was unlawful and unprotected. Given the nature of the applicant's operations, the employees are not entitled to simply embark on any form of industrial action. Even if they were, as long as the provisions of section 64 of the LRA would have complied with, then no order declaring that action unlawful and unprotected would have been necessary.

- [18] The granting of an order to declare the industrial action in question in my view will clearly have a practical effect, which is that SAMWU or its members as they should know, cannot willy-nilly embark on unprotected strike actions, heed the call to return to work, and then immediately thereafter engage in similar conduct. The conduct in question is inimical to the rule of law.
- [19] It cannot also be in the interests of justice and the proper functioning of this Court for parties such as the applicant to constantly approach the Court simply to interdict sporadic industrial actions, and as and when they take place. In this case, the mere fact that the employees had voluntarily ceased the unprotected industrial action is cold comfort for the applicant, as in the light of the live controversy, there is no guarantee that they may not repeat the conduct in question. In my view, the apprehension of harm, prejudice or threat of prejudice in this case is not hypothetical or imagined. It has been demonstrated as real, and entitles the applicant to the relief that it seeks.
- [20] It is accepted that what the applicant sought in this case is *interim* relief. The issue is whether in the light of the answering affidavit and the applicant's waiver to file a replying affidavit, any *interim* order would serve any purpose.
- [21] In *Metsimaholo Local Municipality v South African Municipal Workers Union and Others*⁵, it was held that in urgent applications of this nature, because the respondents had filed an answering affidavit, it was in that affidavit that they were supposed to show that the *rule nisi* ought not to be granted because, *inter alia*, the applicant had not shown that it had a *prima facie* or clear right. It was further held that a *rule nisi* should only be granted as *interim* relief pending the institution of judicial proceedings or because the other side has not been given proper opportunity to challenge the allegations in the application for a *rule nisi*⁶.
- [22] In this case, the respondents had filed an answering affidavit. They had not however responded to the averments made in the founding affidavit as they reserved their rights to do so should the interim order be granted. In my view,

⁵ (JA123/2014) [2016] ZALAC 19 (11 May 2016)

⁶ *Metsimaholo Local Municipality v South African Municipal Workers Union and Others supra* at paras 10 and 23

it is doubted whether any further opportunity to respond to the averments in regards to the lawfulness of the strike would sway any court hearing the matter in due course to reach a conclusion that the strike was protected. Furthermore, it is doubted that SAMWU can allege that the strike was provoked. This is so in that the request for the meeting that resulted in the strike was made on 9 October 2018. Flowing from that meeting on 17 October 2018, the unprotected strike had commenced thereafter. Rather than the strike being provoked, at the very least in the light of this time-line, it appears to have been premeditated.

[23] In the end, I am satisfied that all the issues were properly ventilated at the hearing of this application, and nothing further that will be placed before the Court in due course can change the character of the strike in question, to that of a protected and lawful one. In the circumstances, it would be appropriate to dispose of this matter with a final order.

[24] I have further had regard to the requirements of law and fairness in respect of an award of costs. It is my view that the circumstances of this case are such that a costs order is not warranted and each party must be burdened with its own costs.

[25] Accordingly, the following order is made;

Order:

1. The matter is heard as one of urgency.
2. The strike action embarked upon by the respondents is declared unlawful and unprotected.
3. There is no order as to costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

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Instructed by:

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For the Respondents:

Z Feni

Instructed by:

Qhali Attorneys

LABOUR COURT