LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J1099/08

2008-06-13

NOT REPORTABLE

In the matter between:

ADT SECURITY (PTY) LIMITED Applicant

and

THE SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS' UNION 1st Respondent

THE PERSONS WHOSE NAMES APPEAR

IN ANNEXURE "A" 2nd Respondent

THE CITY OF JOHANNESBURG 3rd respondent

INSPECTOR MAAKE *N.O.* 4th Respondent

J U D G M E N T

CELE, AJ:

The applicant has approached this Court on an urgent basis, seeking this Court to dispense the provisions of the rules of this Court, relating to the time and manner of service that is applicable here. Secondly, they seek a declaration that the gathering and or the march and or picket called upon by the first respondent at the applicant's place of business, Part 1 Charles Crescent, East Gate, Extension 4, Sandton, the premises, on 17 June 2008 be declared to be unlawful. They seek this Court to grant a final and in this instance, a final interdict as the matter has now become opposed, interdicting the first and or second respondent from gathering and or marching and or picketing between 09:00 and 15:00 or at any other time at the premises on 17 June 2008.

The prayer for the *rule nisi* has fallen on the wayside as the matter has become opposed. They also seek this Court to give directions to the further conduct of the proceedings and then they pray for a costs order which is jointly and severally based if the matter is opposed.

At the inception of these proceedings this morning, Adv Boda appeared for the applicant, Mr Daniels appeared for the first and second respondent, the third and fourth respondents were not represented but I was made to understand that they would not be opposing this application but now just after lunch, there has now been appearance led by **Mr** Memane. Mr Memane has had the disadvantage in that he did not hear the submissions made by the other counsel.

Perhaps if I can start with what he has said even at this late hour, he asked that if I should find in favour of the first and second respondents, I should confirm the conditions of this picketing to allay any fears or any doubt. He seeks a costs order against the applicant for perusal and consultation and even for appearance in this court. Adv Boda in this respect has opposed such a costs order, saying that he was bound to cite the third and fourth respondents because the order likely to be issued would affect the third and fourth respondents.

When I go back to the issues that concern me, the first and second respondents filed their answering affidavit but when they did so, they made it clear that they would not address the factual issues as have been clearly canvassed by the applicant and they point out that this is due to the shortage of time that they had. To the extent that I am able to do so, I will summarise the facts that led to the present application and I will attempt to as best I can, to avoid including what appears to me to be common cause when it is in dispute, but therefore in the main because of the attitude taken by the first and second respondents, I will therefore rely in the main on the founding affidavit insofar as I attempt to outline facts that are common cause.

The second to further respondents are members of the first respondent. The first respondent shall be referred to as SATAWU or the union henceforth. The second to further respondents are also employees of the applicant. On 9 June 2008, SATAWU advised the company that it

would be organising a march/picket at the company's head office situated at the premises that have already been described. On the same day, SATAWU on behalf of its members set out a list of employees' grievances and of demands against the employer. These appear in the papers before me, they are outlined in paragraph 6.1, 7 of the founding affidavit, and they read:

"1. Duty Roster system to be same as one used by Reaction Officers and Head Office workers 7 - 4 and 7 - 3 system.
2. Recognition of Service and service awards to be awarded to all staff members who qualified for it as it has been a norm over the years.
3. We demand that the following managers Mr J Seyfferdt, Paul Rossouw, J J Barnard must mend their attitude towards black employees or resign.
4. Sundays and public holidays to be paid double even if the employee is on duty as per roster.
5. Transportation from home to work places to be allowed to employer who works nightshift and transport allowances.
6. Standardised salary to be amended as a matter of effect to employees who are doing the same job.
7. Nightshift allowance to be negotiated and implemented as a matter of urgency.
8. All nightshift employees to be backdated from the date of employment up until today (also to be negotiated).
9. Appeal process needs to be amended as a matter of urgency.
10. Failure to comply with the deduction of stop order forms delivered with

a result into a dispute.

11. Every employee that exceeds nine hours to be paid overtime on each hour worked.
12. Pay query to be paid back within 24 hours with interest and need to be attended immediately by the Company.
13. Bicycle rider to be paid of the salary of the Reaction Officer, riding and driving the reaction car is the same, Personnel using clocking machines, dogs, fire-arm must be paid allowances or the highest grade from job description."

The demands that I have just read out, in my view appear to be work related demands. They appear to be demands that may easily be described as matters of mutual interest. The first and second respondents, have not in their papers suggested otherwise and that is why, without much I do, I come to that conclusion.

SATAWU then proceeded to obtain permission from the Johannesburg Metropolitan City to stage a gathering and this permission was obtained under section 4 of the Regulations of Gatherings Act of 1993. A notice was then given to the applicant of this intended picketing or march. In that notice, it was indicated that the purpose of the gathering was to submit the memorandum to the applicant and that the gathering would commence at about 09:00 on that day, 17 June 2008 for a duration of about five hours but in the answering affidavit it has been indicated now that it will commence at 09:00 but will be ending at about 12:00. It is indicated that it is expected that there will be about 1 000 people who

would be participating in that march or picket. There would be about 50 marshals that would be taking care of the 1 000 people and these particulars appear in the bundle before me.

On 9 June 2008, the company wrote back, which is the applicant, to SATAWU to confirm that the memorandum that SATAWU wish to present to the company, related to those issues set out in SATAWU's notice dated 6 June 2008 wherein the employee's demands were set out. It was then on 11 June, that is two days ago, that the applicant's attorneys requested an undertaking from SATAWU that it would withdraw its notice filed in terms of the Gatherings Act. There was another letter that was sent to the Commissioner of the police in the same spirit, which was dated 11 June 2008. They were indicating that the applicant's view was that the matter was covered by the Labour Relations Act and not the Gatherings Act, in other words, the dispute between the parties.

On 11 June 2008, SATAWU left no doubt that they will proceed with the gathering or the picketing as had then been arranged. There is a notice which is marked here C11 which raises issues concerning unilateral change to terms and conditions of employment and then the sexual harassment, skills development and equipment and complaints about promotions for white employees and the removal of certain managers from the company premises, that is what I have referred thereto. Then the parties proceeded to make their submissions.

From the side of the first and second respondents, the issue that was raised by Mr Daniels was that this court has no jurisdiction because the first and second respondents have complied with the appropriate Act which they have brought into action by the intended picketing. They are making out that this court should not find in favour of the applicant because there is no right of the applicant which has been shown to have been violated by the first and second respondents, who want to picket and when such picketing will not amount to the withdrawal of labour.

The respondent's case is simply that participants will be coming from the employees that will be off duty and those that will be working nightshift and that therefore there will not be a strike as defined and that being the case, that this matter has wrongly been brought to this court.

To this, the applicant's retorted by saying that it is an invite to disaster to allow a picketing such as this one to take place because it flies directly on the face of the clear provisions of the Labour Relations Act. And this, the applicant says, it is because they demand that the respondents seek to make a demand that is clearly covered by the Labour Relations Act. Such is a dispute that has unfolded before me if I were to put it in a summarised manner.

I have been referred to various decisions, I will obviously not be able to go through each of the cases to which reference has been made, but I

have taken particular note of the decision in the case of *TSI Holdings (Pty) Ltd & Others v NUMSA & Others,* 2006 (7) BLLR 631 (LAC). What is more important emanating from that decision, relates to the nature of a demand that employees might make. If a demand that is made by employees for which they want to engage in a picket or for instance if they had wanted to strike, would be a demand that is unlawful such as, insisting on the dismissal of an employee under circumstances where such dismissal would not be in conformity with the Labour Relations Act, that such a demand would be unlawful. That would be the essence of that decision summarised as it were.

But I want to direct my particular attention in this matter, to the decision in *SANDU v The Minister of Defence & Others*, 2007 (9) BLLR 785 (CC). I want to refer particularly to paragraphs, beginning with paragraph 50 right through to paragraph 52, to make sense of this; I need to quote these provisions:

Paragraph 50 reads:

> "Section 23(5) provides:
>
> > "Every trade union employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

It is clear that at the minimum, section 23(5) confers a right on trade unions, employers' organisations and employers to engage in collective bargaining that may not be abolished by legislature, unless it can be shown that such abolition passes the test for justification established in section 36 of the Constitution. In recognising this, we should remember that in the past, Black workers and trade unions that represented them were prohibited from engaging in collective bargaining. Preventing a recurrence of this historical injustice is one of the purposes of section 23(5).

10

[51] Section 23(5) expressly provides that legislation may be enacted to regulate collective bargaining. The question that arises is whether a litigant may bypass any legislation so enacted and relied directly on the Constitution. In NAPTOSA & others v Minister of Education, Western Cape & others, the Cape High Court held that a litigant may not bypass the provisions of the Labour Relations Act 66 of 1995, and rely directly on the Constitution without challenging the provisions of the Labour Relations Act on constitutional grounds. The question of whether this approach is correct has since been left open by this court on two

20 subsequent occasions. Then, in Minister of Health & another NO v New Click South Africa (Pty) Ltd & others (Treatment Action Campaign and another as Amici Curiae), Ngcobo J, writing a separate judgment held that there was considerable force in the approach taken in NAPTOSA. He noted that if it were not to be followed, the result might well be the creation of dual systems or jurisprudence under the Constitution and under legislation. In my view, this approach is correct: where legislation is enacted to give effect to a constitutional right, a

litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.

[52] Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place, base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision, would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. The proper approach to be followed should legislation not have been enacted as contemplated by section 23(5) need not be considered now".

Then the Constitutional Court proceeded to deal with those issues.

Why would I consider in an application such as this a paragraph which seeks to place reliance on section 23(5)? This is because, it is clear that section 23(5) does relate to the issues around collective bargaining as it clearly states, every trade union, employers' organisation and employer has a right to engage in collective bargaining. Could it be said that participating in a picket or in a march on 17 June 2008 and giving a

list of demands to the employer without withholding labour, could be described as a process such as collective bargaining? I would say yes.

We have here employees who, if I have to accept their contention, will be out of duty on that day, will be working nightshift, but they will be going to the place of employment, in other words it is the head office, that is the place where their employer is based, they will be making demands that are work related, as these demands have been listed clearly here. Therefore in my view, the demands that they seek to make are indeed demands that can be made under the collective bargaining. If these employees had sought to go out and march, had sought to go out and picket on any other issues that are not employer/employee related, I would have seen the matter differently because at their time they would have been free to engage themselves under the protection they have, the right of assembly as is a right enshrined in the Constitution.

The Act that they are seeking to rely on is a 1999 Act and insofar as is relevant, I think it is appropriate for me then to look at another provision that will be of great guidance to me. It comes from the Constitutional Law of South Africa written by Chaskalson and others. I want to refer firstly to page 21-1 and thereafter 21-10, 21-10 is a provision that Mr Boda referred me to. In 21-1, I will just read the portion thereof not the whole introductory part of this, it reads:

"Protests, assemblies and mass demonstrations have played a central role in South African liberation politics. Now that political liberation has been won, and all possess the franchise, there might be a sense that assemblies and protests will diminish both in importance and frequency. But as the events following 27 April 1994 have demonstrated, mass protests will continue to be an important form of political engagement. Organized labour, municipal employees, students, squatters, and even the police, have used demonstrations to press their demands on the new government.

The continued vitality of assembly in South Africa reflects how important this freedom can be in a liberal democracy. This importance can be said to flow from several basic sources.

First, freedom of assembly helps create space for collective politics. This space for collective politics is crucial for any truly modern democratic polity: while a single voice is likely to be drowned out in our political community, a collective voice is far more likely to get its message across. In other words, in societies where power is concentrated in the hands of a few social entities, meaningful dialogue often requires collective interlocutors.

Secondly, the freedom of assembly permits us to meet with and talk to our fellow citizens. Assembly thereby provides an important medium for the collective engagement with and critical exploration of various believes and values which animate our political decisions. It is generally believed that the more we discuss the ideas we seek to put into practice, the better and the more legitimate our political decisions are likely to be.

> Thirdly, freedom of assembly is an important political tool for those who feel that their demands are not being given serious attention by the state. In large part, assembly is used by discrete minorities, or so-called 'out-groups', which find it difficult to organize and present their concerns within the confines of representative politics. For them the freedom to assemble makes democracy visible and legitimate, in addition, to countering feelings of helplessness and isolation. One of the primary consequences of minorities' subjective experience of empowerment is that minority rule is stabilized: by allowing minorities to influence the majority's decision, the state's general exercise of power becomes more legitimate".

I then leave those provisions. That quotation gives us an introductory part of the role played by and large by the exercise of a right to assembly.

The first and second respondents, as I have indicated, during their spare time are free to do what they want in terms of the right to assembly but to the extent that they seek to exercise a right which is related to the employer/employee relationship, that right flows from the Labour Relations Act.

In my view, the applicant has satisfied me that, it will be incorrect of the first and second respondents to be permitted to proceed and picket on this day, 17 June 2008 when such picketing or such marching is intended to be a presentation of a memorandum or of whatever

document which seeks to be a demand for employer/employee related issues such as, have been listed out in the papers before me.

Clearly the respondents in this respect are circumventing the clear provisions of the Labour Relations Act without challenging the Act. The Act is there, it is capable of addressing all their concerns. It therefore is available for them to make use of, to go and use the other Act and say that they have a right of assembly and yet present a labour related issue, would in my view be reprehensible, would be contrary to the good morals of society and as a conclusion, I do find that such would be unlawful in the circumstances.

I therefore sustain the application that has been brought by the applicant, in the terms that I drafted in the notice of motion. The **application is therefore granted**, however I come now to the issue of the costs.

This is not a very usual case, in fact it is a very unique one. In fact when parties have sought to act in compliance with a particular Act in the country, believing that they are acting lawfully, it would be unfair to punish them with a costs order and indeed **no costs order is consequently made**.

_____

CELE, AJ

Acting Judge of the labour Court

Date of hearing: 13 June 2008

Date of Judgment: 13 June 2008

Date of Editing: 20 January 2009

APPEARANCES

For the Applicant	:	Advocate Boda
Instructed by	:	Routledge Modise

10

For the Respondents	:	Mr Daniels – Cheadle Thompson & Haysom