IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT DURBAN)

CASE NO: D 440/09
Not Reportable

In the matter between

RIPPLE EFFECT 40 (PTY) LTD t/a
MKUZE BUS SERVICE **Applicant**

And

SATAWU **First respondent**

COMMISSIONER J VERMAAK **Second respondent**

CCMA **Third respondent**

JUDGMENT

VAN NIEKERK J

[1] On 15 June 2009, this court granted an order in the following terms:

> *1. The first respondent and it members is hereby interdicted to refrain from embarking upon a protected strike and/or any other industrial action relating to this dispute until the 29th*

June 2009, being the date to which the conciliation had been postponed to.

2. *the first respondent is hereby called upon, in the event of them intending to oppose the interdict, to give reasons why the certificate under case number KNRB 824-09 as issued on the 11th June 2009 should not be set aside. In the event of the first respondent intending to anticipate the rule nisi granted herein, notice of 48 hours must be given to the Applicant herein of their intention to do so, in terms of the rules of the court.*
3. *The first respondent to show reasons why cost should not be awarded against them and their members in this application"* (sic).

[2] On 22 June 2009, the first respondent in the urgent application, to which I shall refer as "the union", gave notice to anticipate the return day and set down that application for hearing on 24 June 2009. In this application, the union seeks to have the order discharged, with costs. I make the assumption for the purposes of these proceedings (the parties intimated that I should) that the order granted on 14 June 2009 is cast in the form of a rule nisi with a return date of 29 June 2009, and that the issue for determination is whether what amounts to a temporary interdict against strike action by the union should be confirmed. The applicant did not pursue specifically the application to review and set aside the certificate of outcome under case number 824-09.

[3] The facts are briefly as follows. On 13 April 2009, the union referred a dispute to the CCMA, alleging that the company had refused to bargain with it. The referral was allocated case number KNRB 582-09. A conciliation meeting was scheduled for 4 May 2009. The conciliation did not proceed on that date, and was rescheduled for 29 May 2009. That

notwithstanding, on 5 May 2009, the parties commenced negotiations on improvements to the terms and conditions of employment of the union's members. Those negotiations deadlocked on the same date. On 6 May 2009, the union referred a second dispute to the CCMA, in which the union recorded that it had engaged in negotiations with the company but that no agreement had been reached. That referral was allocated case number KNRB 824-09.

[4] On 28 May 2009, the second respondent (to whom I shall refer as "the commissioner") wrote a letter to the union. The letter reads as follows:

> "*Please take note the matter (Refusal to Bargain) was heard under case KNRB582-09 on 4 May 2009.*
>
> *The matter remained unresolved and the parties agreed to consult with one another and revert back to the commissioner regarding settlement of the matter. However nothing was forthcoming, hence the matter was rescheduled for 29 May 2009.*
>
> *Further please note a second referral 7.11 was received on 6 May 2009 (case reference KNRB824-09). Scrutiny of both referrals indicates that nature of the dispute appears to be the same.*
>
> *As a result of the duplication, the matter under case KNRB824-09 shall not proceed.*
>
> *Parties may in writing request the CCMA to issue the relevant certificate or an advisory award on case KNRB582-09."*

[5] Why the commissioner considered the nature of the two disputes to be similar or identical, is beyond comprehension. The first dispute was clearly

one that concerned a refusal to bargain; the second concerned what amount to a wage dispute after the bargaining that took place on 5 May 2009 had deadlocked. Be that as it may, on 1 June 2009, the commissioner issued a certificate of outcome to the effect that the refusal to bargain dispute (case number 582-09) referred to the CCMA on 14 April 2009, was resolved on 1 June 2009.

[6] On 9 June 2009, the CCMA issued a notice in respect of case number 824-09 (classifying the dispute as one concerning "other mutual interest issues"), and setting the matter down for conciliation on 29 June 2009, in Pongola.

[7] On 11 June 2009, the commissioner issued a certificate of outcome in respect of case number 824-09, dated 11 June 2009, in which the commissioner certified that the dispute referred to conciliation on 6 May 2009 remained unresolved. Why or at whose instance the commissioner issued the certificate at this juncture remains a mystery, but this is the certificate that the applicant sought to review in terms of its notice of motion in the urgent application.

[8] On 13 June 2009, the union issued a strike notice in terms of s 64 (1) (b) of the LRA. The notice advised the company that a strike would commence at 10h00 on 15 June 2009, consequent on the company's failure to meet the union members' demands.

[9] On 15 June 2009, the company filed an urgent application in terms of s 158 (1) in terms of which it sought, as a matter of urgency, the setting aside of the certificate of outcome under case number 824-09 dated 11 June 2009. In the founding affidavit, the deponent (Kruger) records the referral of the two disputes to the CCMA, the first concerning the refusal to bargain, the second the dispute over wages. Kruger did not consider the

latter referral to be material to the application. Kruger records the issuing of the certificate of outcome under case number 582-09, which indicates that the matter was settled. He records receiving the notice of set down in relation to case number 824-09 (the wage dispute) for conciliation on 29 June 2009. In this regard, Kruger states the following:

> *"On or about the 09th of June 2009 our offices received a notice of set down under case number KNRB824-09 indicating that the mater would be conciliated on the 29th of June 2009 at Pongola. The venue was placed at Pongola on First Respondent's insistence in that its members would have difficulty in travelling to Richards Bay. I thought that the notice was an administrative error from the Third Respondent in that the case was already dismissed as indicated in paragraph 10 (Annexure D). I respectfully attached hereto a true copy of the notice of set down marked Annexure "F"."*

Annexure "D" is the commissioner's letter dated 28 May 2009, advising the union *inter alia* that the matter under case number KNRB 824-09 "shall not proceed".

[10] Kruger avers further that on 12 June 2009, there were rumours of a strike. He advised the manager of the company, a Mr Moodley, that there was no basis for a strike in that the dispute under case number 582-09 had been resolved and that the dispute under case number 824-09 would "only be heard" on 29 June 2009. Kruger avers that despite a telephone conversation with a union official on 12 June during which he was assured that there would be no unprotected strike, the company received a letter the following morning (13 June) stating that the union would commence a strike on 15 June 2009. The strike notice attached the certificate of outcome issued under case number 824-09.

[11] Two legal submissions are made in the founding affidavit. First, the applicant submits that the union did not inform the applicant's employers' organisation of the proposed strike as required by s 64 (1)(b)(ii) of the LRA, and secondly, it submits that the union had received notice of the scheduled conciliation under case number 824-09 on 9 June 2009, a date prior to the date on which the certificate of outcome was issued.

[12] Frankly, neither submission had any merit. In regard to the first point, s 64 (1) (b) (ii) requires notice of a strike to be given to an employer's organisation only if the employer is a member of an employers' organisation that is a party to the dispute. In the present instance, Kruger describes himself in the founding affidavit as a labour consultant and a member of Allied Werkgewers Konsultante PTA CC t/a Kruger & Associates. Kruger avers that the closed corporation is a member of the AHI Employers' Organisation, as is the applicant. Kruger & Associates is manifestly a business, not an employers' organisation. Kruger & Associates, like any labour consultancy, acquires none of the rights that the LRA confers on registered employers' organisation solely by virtue of its membership of one. Its membership of the AHI. Kruger refers throughout the founding affidavit to "the applicants' employers organisation" (sic), clearly holding out that Kruger & Associates is such an organisation. This is nothing short of disingenuous - its association with a registered employers' organisation in the form of the AHI does not by osmosis or otherwise confer on Kruger & Associates the status of an employers' organisation for the purposes of the Act. I fail to appreciate on what basis Kruger and/or Kruger & Associates is permitted to represent the applicant in the CCMA. The founding and the supplementary affidavits clearly disclose that Kruger represents the applicant at conciliations and arbitrations. This is a clear violation of the Act. Be that as it may, the simple objection to the applicant's contention is that there is no indication whatever on the papers that the AHI (the only legitimate employers'

organisation on the horizon) was ever a party to either dispute referred by the union to the CCMA. The applicant's contention in regard to the addressee of the strike notice should have been dismissed.

[13] In regard to the second legal submission, Kruger states the following in the founding affidavit:

> *"First Respondent received notice of the scheduled conciliation under case number KNRB824-09 at the same time Applicant received notice thereof, to wit the 09th of June 2009. This happened prior to the certificate in question was issued. This clearly indicates the mala fide conduct of First Respondent in handling the dispute to date. (sic)"*

This as a not a legal submission, despite the label to that effect that the deponent to the founding affidavit optimistically attaches to it. Rather, it is an incomprehensible and impenetrable statement that bears no relation to the primary relief sought by the applicant i.e. the review and setting aside of the certificate issued by the commissioner on 9 June 2009. The founding affidavit simply fails to establish the factual and legal foundation for the order sought. In short, the application ought to have been dismissed. On this basis, the rule nisi stands to be set aside.

[14] In these proceedings, Adv. Schumann, who appeared for the union, submitted that any dispute about the status of the certificate of outcome was irrelevant - the certificate simply records that on 11 June 2009, the dispute referred to the CCMA on 6 May 2009 remained unresolved. What mattered, he contended, was that 30 days had elapsed since the referral of the dispute, and that proper notice of an intention to strike had been given after the elapse of that period. The fulfilment of the latter requirement was not disputed in these proceedings. In regard to the

former requirement, the applicant does not dispute that at the time the strike notice was issued, 30 days had elapsed since the referral of the dispute to the CCMA. Kruger avers in a supplementary affidavit that he filed on the day of the hearing that that the 30- day period was extended by agreement between the parties, on 21 May 2009. This, of course, would render the strike unprotected - s 64 (1) reads as follows:

> *"Every employee has the right to strike and every employer has recourse to lock-out if-*
>
> *(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and -*
>
> *(i) a certificate stating that the dispute remains unresolved has been issued; or*
>
> *(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission…"*

[15] Kruger proffers the following version:

> *"3. I need to explain what transpired on the 29th of May 2009.*
>
> *I attended the conciliation proceedings on the 29th of May 2009 as set down by the CCMA, Annexure "C" to the application. Mr Colin Moodley, manager of Mhuze Bus was on his way to the CCMA.*
>
> *4. I was then handed the letter marked "D". On receipt of the letter I approached Commissioner Joanne Vermaak informing her that the contents of the letter is not a correct representation of the factual circumstances. I explained to her that the dispute set down for the*

29th of May 2009 is a newly referred dispute by the First Respondent that still needs to be conciliated.

5. In the presence of Commissioner Vermaak I phoned Mr Guqani Mholongo informing him of the matter set down in Richards Bay whilst he requested the matter to be dealt with by the CCMA in Pongola. I suggested that the matter is set down in Pongola to coincide with other matters set down in Pongola (these were after the 6th June 2009).

This would only occur after the 30 day period, and he was acutely aware thereof. He agreed thereto. He proposed the matters be set down with alternative times.

We then awaited the CCMA to set the matters down in Pongola on a given date and time. The subsequent events are dealt with in my Supporting Affidavit.

In the circumstances Mhlongo accepted that conciliation was necessary and that this would only occur after the 30-day period. He accordingly agreed to the extension of the 30 day period"

[16] Section 158 (1) (a) (i) of the LRA empowers this court to grant urgent interim relief. This implies that the court may, in appropriate circumstances, issue a rule nisi. Rule 8 (1)) of the Rules of this court acknowledge this power, and provide that unless otherwise ordered, a respondent may anticipate the return day of an interim interdict on not less than 48 hours notice. These provisions have the capacity to be abused, as they were in the present instance. A rule nisi is not granted as a matter of course, but only if the court is satisfied that it is warranted. It follows that, in granting a rule nisi, the court must reach a decision on the applicable law since a

court cannot decide a question of law, as opposed to a question of fact, on a prima facie basis (see *Safcor Fowarding (Pty) Ltd v NTC* 1982 (3) SA 661 (AD, at 660A). The court ought not in the exercise of its review jurisdiction grant interim orders that have the effect of setting aside decisions made by commissioners - there is no such thing as a prima facie or interim review (*Safcor Forwarding* (supra) at 660G). It follows that the court ought not to have entertained the application in so far as it sought to review and set aside, on an interim basis, the certificate of outcome. I leave aside the issue of whether the applicant is entitled, effectively by way of a replying affidavit, to raise new matters and in particular, whether an applicant is entitled on the return day of a rule nisi to raise an entirely new basis for the order that it then seeks to have confirmed. It seems to me that a respondent is obliged, on a return day, to show no more than that the order should not have been granted at the outset because there was no proper case made out for that order on the papers (see *Lourenco & others v Ferela (Pty) Ltd & others* (1) 1998 (3) SA 281 (T), at 289 I-J).

[17] I intend to dispose of this matter on the basis that the above explanation is wholly at odds with the content of the founding affidavit, and that the two versions proffered by the applicant are mutually destructive. In the founding affidavit, it will be recalled, Kruger states that the setting down of the dispute referred under case number 824-09 in Pongola on 29 June 2009 was “an administrative error”, in that “the case was already dismissed”, or, out another way, that the dispute was incapable of set down for conciliation. In the supplementary affidavit, Kruger avers that the same dispute is one that required conciliation, and that specific and detailed arrangements were made to facilitate that process. On this basis alone, the union’s version must prevail, and the rule nisi stands to be set aside.

[18] In any event, the s 64 (1) requires either the issuing of a certificate stating that a dispute referred to conciliation has been unresolved, or the expiry of a period of 30 days or any agreed extension of that period. The applicant failed to establish, either in the founding affidavit or in the supplementary affidavit, any basis on which the commissioner's certificate of outcome issued on 11 June 2009 should be reviewed and set aside. The certificate therefore stands, and serves (together with the union's undisputed compliance with the other requirements of s 64(1)) to give rise to a protected strike.

For the above reasons, I make the following order:

1. The rule nisi issued on 15 June 2009 is set aside.
2. The applicant is to pay the costs of these proceedings.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application : 24 June 2009
Date of judgment : 25 June 2009

Appearances:
For the applicant
Adv P Schumann, instructed by PKX Attorneys

For the respondent:
Adv I Pillay, instructed by Riaan Kruger Attorneys