IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

CASE NUMBER: C671/2011

DATE: 2 SEPTEMBER 2011

Reportable

In the matter between:

ADT SECURITY (PTY) LIMITED Applicant

and

THE NATIONAL SECURITY & UNQUALIFIED WORKERS UNION & OTHERS Respondents

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J U D G M E N T

STEENKAMP, J:

This is an urgent application between ADT Security (Pty) Limited, the applicant, and the National Security & Unqualified Workers Union and Others. It is an urgent application brought this morning to grant final relief against the Union and its members in terms of which a march scheduled to take place on Monday 5 September 2011 between 09:30 and 13:30 at the applicant's place of business is sought to be interdicted. It is now 15:00 on Friday, 2 September. Given that the march is

due to take place on Monday, I will give judgment *ex tempore*, and will give brief reasons for my judgment.

Firstly, concerning urgency, it is clear, given that the march is to take place on Monday, that the matter is urgent. I will return to the events leading up to the march in a moment. The prior question though is whether this court has jurisdiction to hear the present application.

In its argument that the court does have jurisdiction, Mr Venter, for the applicant, referred, *inter alia,* to the judgment of the Constitutional Court in Gcaba v Minister of Safety & Security 2010 (1) SA 238 (CC) and Chirwa v Transnet 2008 (4) SA 368 (CC).

In considering the question of jurisdiction, I have considered the dicta of the Constitutional Court in those cases, but the question goes further, also when considering the merits of the application itself. In that regard I wish to refer to the dictum of Nugent JA in Makhanya v University of Zululand 2010 (1) SA 62 (SCA). In Makhanya, Nugent JA distinguished that case from the ratio in Chirwa. On his reading of Chirwa the issue was essentially not one of jurisdiction, but relating to the cause of action. Nugent JA referred to the rights that the

Labour Relations Act[1] creates for employees, including the right not to be unfairly dismissed and not to be subjected to unfair labour practices, as "LRA rights". Yet, he pointed out, employees also have other rights arising from general law. One is the right that everyone has emanating from the common law to insist on performance of a contract. Another is the right that everyone has (emanating from section 33 of the Constitution and elaborated upon in the Promotion of Administrative Justice Act[2]) to just administrative action.[3]

An LRA right, he says, is enforceable only in the CCMA or in the Labour Court. The common law right is enforceable in the High Court and in the Labour Court. The constitutional right is enforceable in the High Court and in the Labour Court. Nugent JA commented that it is not unusual for two rights to be asserted arising from the same facts. A claimant could assert two claims, each of which is capable of being brought in a different forum. Whether the claim will succeed is another matter, but that is irrelevant to the jurisdictional question.[4] He made two further observations[5]:

[1] Act 66 0f 1995 (the LRA).
[2] Act 3 of 2000 (PAJA).
[3] *Makhanya* para [11].
[4] *Makhanya* para [39].
[5] Para [71].

> "The first is that the claim that is before a court is a matter of fact. When a claimant says that the claim arises from the infringement of the common law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point."

It may also be useful to refer to the more recent judgment of South African Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA). In a unanimous judgment of the Supreme Court of Appeal, Wallis AJA[6] commented as follows[7]:

> "Once more, as in other cases that have come before this court, the plea, so far as it purports to raise a jurisdictional challenge, is misdirected. As the Constitutional Court has reiterated in Gcaba v Minister of Safety & Security & Others, the question in such a case is whether the court has jurisdiction over the pleaded claim and not whether it has jurisdiction over some other claim that has not been pleaded, but could

[6] As he then was.
[7] *SAMSA v McKenzie* para [7].

> possibly arise from the same facts. In this case the particulars of claim could not have made it clearer that Mr McKenzie's claim is for damages for breach of contract."

He further noted[8]:

> "We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under the statute, that other remedies are necessarily excluded."

I refer to these judgments both in relation to jurisdiction and to the merits of the application before me. The Union, represented by its general secretary, Mr Mdineka, raised the question as to whether this court has jurisdiction. It appears to me that the nature of this application is framed, specifically when one has regard to the accompanying founding affidavit, in a context where the applicant suggests that the underlying reason for the march that forms the subject of the interdict relates to the relationship between employer and employee. In

[8] *SAMSA v McKenzie* para [12].

those circumstances it would appear to me that this court does have jurisdiction. At the very least it may have concurrent jurisdiction with the High Court as explained by Nugent JA in *Makhanya*. Whether the applicant is entitled to the relief it seeks, is a different question.

Turning then to the merits of the application, it is useful to set out the background to the application. After the Union had sought organisational rights from the applicant, it became clear that the applicant would not grant those rights on the basis that the Union was not sufficiently representative. The Union, however, rather than resorting to power play in terms of the Labour Relations Act or referring a dispute to the CCMA in terms of section 21 of that Act, applied to the Cape Town Municipality, which is the third respondent, on 8 August 2011 to have a gathering in terms of the Regulation of Gatherings Act[9]. The date of commencement of that Act was 15 November 1996. Contrary to what Mr Venter argued, therefore, it is not a pre-constitutional piece of legislation. I will return to that aspect later.

In terms of the Gatherings Act, a "gathering" is defined as any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act 29 of

[9] Act 205 of 1993.

1989 or any other public place or premises, wholly or partly open to the air, and it includes, *inter alia*, a gathering held to hand over petitions to any person or to mobilise or demonstrate support for, or opposition to the views, principles, policies, actions or omissions of any person or body of persons or institution, including any government administration or governmental institution.

The Union applied to march to the premises of the applicant on Monday, 5 September 2011, in terms of section 3 of that Act. It was given permission by the City on 29 August 2011. In terms of section 4(4) of the Gatherings Act, an agreement was reached between the responsible officer, as defined in the Act, and the convenor, as well as authorised members of the South African Police Services and the Metro Police and the traffic services. The agreement sets out that the gathering shall be in the form of a procession and that it must strictly follow a defined route.

It further specifies that one marshal must be appointed for every 10 participants in the procession and that all participants in the procession must remain unarmed and unmasked for the duration thereof. It further specifies that participants in the procession shall adhere to all reasonable instructions relating to the free flow of traffic issued by traffic officers en route and

that the convenor of the gathering, or his delegate, shall remain available for the duration of the procession to liaise with the operational commander of the South African Police Services contingent monitoring the procession.

Although there is some dispute as to how the applicant became aware of the planned gathering, it is common cause that it was so aware at least by 29 August. The applicant requested the Union to cancel the march and a meeting was held between the parties on 31 August 2011. No resolution could be reached and on 1 September, that is yesterday, the Union confirmed the following in a letter to the applicant:

> "Re March on ADT Cape Town Offices
>
> We refer to the above and hereby wish to inform you that all ADT officers who will be off on 5 September 2011, and those who will be working nightshift on that day, will be marching to your offices to hand over a memorandum. Please avail somebody from your office to accept our memorandum at 13:00 on 5 September 2011."

It is common cause, as explained by Mr Mdineka at the hearing today, that only those employees who are not on duty during the day on 5 September 2011 will take part in the gathering.

The applicant seeks to interdict the gathering on the basis that it is unlawful. I will deal with that contention under the question whether the applicant has demonstrated a clear right, as it has to in order to obtain final interdictory relief.

The basis for the applicant's contention as set out in its founding affidavit, is that although the Union obtained permission under the Gatherings Act:

> "(i) The filing of a notice by [the Union] in terms of section 3 of the Gatherings Act, is a contrived attempt to circumvent the scheme of the LRA and its specialised regulation of the mechanisms of collective bargaining (such as conciliations, arbitrations, mediations, picketing and protest); and
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> (ii) The "march" cannot be permitted in terms of the Gatherings Act, in that this would be unlawful upon a proper construction of the LRA read together with the Gatherings Act."

The starting point in considering whether the planned gathering is indeed unlawful, is the Constitution. Section 17 of the Bill of Rights in the Constitution provides that:

> "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

It is clear that this right is extended to everyone and not just to employees. The right is, however, limited by the provisions of the Gatherings Act. One of those limitations is the prerequisite to give notice and to provide the necessary information to the relevant local authority. It is common cause that in this case such notice has been given and that in fact the local authority, that is the Cape Town Municipality, has in fact agreed that the march or gathering can proceed on Monday.

A further limitation imposed on gatherings by the Gatherings Act, other than that it must be peaceful and unarmed, is set out in section 11 of that Act. That is that if any riot damage occurs as a result of such a gathering, the organisation under the auspices of which that gathering was held, will be liable for that riot damage.

The applicant submits that the Union does not have the required representation to validate organisational rights in terms of the Labour Relations Act. That factual contention is quite irrelevant to the present case. That is something that

must be decided in terms of section 21 of the Labour Relations Act.

In the case before me, the Union has specifically disavowed any reliance on the Labour Relations Act. The right it seeks to exercise is not premised on section 21 or section 64 or indeed any other provision of the LRA. Instead the Union relies on section 17 of the Constitution as given effect to by the Gatherings Act. In this regard the present case is distinguishable from those cases to which Cele AJ referred in the unreported case of ADT Security (Pty) Limited v Satawu & Others[10]. In that case, which appears at first glance to be on all fours with the present ones, Cele AJ pointed out that the demands of the union in that case appeared to be demands that may be described as matters of mutual interest and that they are work related demands.

In holding that a planned march in those circumstances would be unlawful, the learned judge relied on the cases of TSI Holdings (Pty) Limited v Numsa & Others [2006] 7 BLLR 631 (LAC) and SANDU v The Minister of Defence & Others [2007] 9 BLLR 785 (CC). In TSI Holdings the Labour Appeal court held that a demand by the trade union that a supervisor should be dismissed, falls outside the category of demands that can be

[10] Case number J1099/08 of 13 June 2008 (Labour Court, Johannesburg).

supported by a concerted refusal to work, retardation or obstruction of work envisaged in the definition of the word "strike" in section 213 of the LRA. Accordingly it held that a strike in support of that demand would not be protected.

In the case before me, as I have pointed out, the Union does not seek to embark on strike action; nor does the applicant contend that the gathering planned for Monday, 5 September 2011, falls within the definition of a strike and that because the Union has not followed the procedure set out in section 64 of the LRA, such a strike would be unprotected. The applicant simply contends that the planned march is unlawful. This case is, therefore, distinguishable from that in TSI Holdings. In SANDU v The Minister of Defence, the question before the Constitutional Court turned on the constitutional right to collective bargaining as set out in section 23(5) of the Constitution. As O'Regan J pointed out in SANDU at paragraphs [51]-[52]:

> "[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 rely directly on the Constitution. In NAPTOSA & Others v Minister of Education of Western Cape & Others, the Cape High

Court held that a litigant may not bypass the provisions of the Labour Relations Act 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 subsequent occasions. Then, in Minister of Health v New Clicks South Africa (Pty) Limited (Treatment Action Campaign and another as *amici curiae*), Ncgobo 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 of 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 has fallen 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 direction 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."

In the present case the Union, as I have said, does not rely on its rights protected by the Labour Relations Act, neither does it rely on the constitutional right to fair labour practices set out in section 23 of the Constitution. It does rely on section 17 of the Constitution, but it does not do so directly -- it relies on the applicable legislation which regulates the rights to assembly, demonstration, picket and petition as set out in section 17 of the Constitution, namely the Gatherings Act. It has complied with the provisions of the Gatherings Act. If it does not adhere to the provisions of that Act, *inter alia* by its members wreaking havoc, damaging property or otherwise causing damage, then the applicant has its remedies under section 11 of the Gatherings Act.

Despite what the applicant says, the Union in this case has carefully stated that it is not relying on the right to collective

bargaining. It is relying on the right to demonstration and gathering. On a factual basis, this case may also be distinguished from that in Cele J's judgment in ADT v Satawu, in that the Union has pointed out in a letter to the applicant on 1 September 2011 that the issues behind its contemplated gathering or march are not limited to Labour Relations Act issues -- the Union contended that there are further issues that will be detailed in the memorandum to be handed over on the day of the march.

A further relevant factor to take into account is that, as I have pointed out before, the workers that will take part in the march on Monday 5 September will be off duty. Therefore, their participation in such a march will not be a breach of contract; neither will it form part of a strike as defined in the LRA. The workers will not be withholding their labour. It appears to me, therefore, that the planned gathering may be inconvenient to the applicant and it may even be said to be contrary to the spirit of the Labour Relations Act insofar as the Union could also have sought to embark on a protected strike and did not do so, but that does not make the planned gathering unlawful. The gathering is clearly lawful in terms of the provisions of the Gatherings Act. That Act limits the constitutional rights set out in section 17, only to the extent necessary. It would be undesirable for this court, where legislation exists that limits a

constitutional right, to limit that right further.

As Stuart Woolman points out in the chapter on Freedom of Assembly in The Constitutional Law of South Africa[11], and also in The Bill of Rights Handbook[12]:

> "Protests, assemblies and mass demonstrations played a central role in South African liberation politics. Now that the battle for liberation has been won and all possess the franchise, there might be a sense that demonstrations have diminished. In reach and frequency, they have. Nevertheless, mass protests continue to be an important form for political engagement. Organised labour, landless people, anti-privatisation movements, students, squatters and even the police have used demonstrations to press their demands. The continued vitality of assembly in the newish South Africa testifies to its essential role in any liberal democracy."

And in a different context he then quotes from the Constitutional Court *dictum* in S v Mamobolo 2001 (3) SA 409 (CC) at paragraph [50]:

[11] 2nd ed p 43.1.
[12] Ian Curry and Johan de Waal, 5th Edition 2005, at paragraph 17.1 on page 396.

> "That freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15-19 of the Bill of Rights."

Given that those protected constitutional rights are limited by the Gatherings Act, it is not open to this court to limit the right further and I conclude that the planned gathering is not unlawful.

There is also the further question of whether there is a real apprehension of irreparable harm. In this regard the applicant says in its founding affidavit that the harm it foresees is that it will be disrupted in the performance of its obligations to provide security services to its customers as the march may prevent call centre and control room employees from entering the company's premises. That harm, although foreseeable, appears to me to be remote. This is not an uncontrolled gathering, but one that has been agreed to by the relevant enforcement authorities and will be closely monitored by the South African Police Services, the Metro Police and the traffic police.

If the marshals appointed by the Union do not abide by their obligations under the agreement and the Act, any harm caused is not irreparable in that the applicant can resort to the provisions of section 11 of the Gatherings Act to hold the Union responsible for any damages suffered. That factor is also to be considered under the heading of whether the applicant has an alternative remedy:

1. The applicant had an alternative remedy in that it could have sought to review the permission granted by the City Council and to have it set aside. It has elected not to do so.

2. Should any harm be caused, as I have pointed out, it has its remedies under section 11 of the Gatherings Act.

3. Should any employees, who are meant to be on duty, take part in the gathering, those employees can be disciplined in the normal course, as they would be absent from their workplace without permission. It is common cause that they will not be participating in a protected strike and, therefore, they would not enjoy the protections set out in section 67 of the Labour Relations Act.

In conclusion then, even if this court does have jurisdiction to hear the present application, the applicant has not satisfied the requirements for a final interdict.[13]

IN THOSE CIRCUMSTANCES THE APPLICATION IS DISMISSED. There is no order as to costs.

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STEENKAMP, J

For the applicant: Adv PA Venter instructed by Eversheds.

For the respondents: Mr H Mdineka (trade union official).

[1313] As summarised in *Setlogelo v Setlogelo* 1914 AD 221 and followed by this court in innumerable subsequent cases.