

SOUTH AFRICA / JUDGMENT

AMCU v Verulam Sawmills (Pty) Ltd and Another; In re: Verulam Sawmills (Pty) Ltd v Magagula and Others (82258/2015) [2015] ZAGPPHC 991; (2016) 37 ILJ 1325 (GP) (4 December 2015)

[2015] ZAGPPHC 991

COURT

North Gauteng High Court, Pretoria

BEFORE

Msimeki

CASE / FILE NUMBER

82258/2015

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

Case number: 82258/2015

DATE: 4 DECEMBER 2015

In Matter between:

AMCU.....APPLICANT
And
VERULAM SAWMILLS (PTY)
LTD.....FIRST
RESPONDENT
SAMUEL DECEMBER MAGAGULA & 158
OTHERS.....SECOND
RESPONDENT

In re:

In the action between:

VERULAM SAWMILLS (PTY)
LTD.....APPLICANT
SAMUEL DECEMBER MAGAGULA & 158
OTHERS.....RESPONDENT

JUDGMENT

MSIMEKI J

- [1] There are two applications before this court. The main application, brought by applicant in an urgent court, seeks an urgent interdict against its previous employees who are engaged in a strike. The second application, brought by the Association of Mine workers and Construction Union (AMCU), seeks an order permitting it to intervene in the main application as respondent in the main application are its members. The other reason for the intervention, according to it, is that it has a direct and substantial interest in the main application.
- [2] Applicant in the main application, sought an order:
1. That the rules pertaining to forms and services be dispensed with and that this application be heard as one of urgency in terms of rule 6(12);
 2. That the respondents be interdicted and restrained from preventing access to or egress from the applicant's business premises and the applicant's accommodation facility situated at Verulam Farm, Portion 351, Kaapmuiden Road, Barberton ("Verulam Farm");
 3. That the respondents be interdicted and restrained from committing any acts of violence, damage to property, intimidation or the like at or near any of the applicant's business premises and accommodation facility situated at Verulam Farm;
 4. That the respondents be ordered not to come within 500m of the applicant's business premises and accommodation facility, situated at the Farm;
 5. In the alternative to the relief sought in prayers 2 to 4 above, the applicant seeks an interim order, pending the final determination of this matter, in these terms:
 - 5.1. The respondents are interdicted and restrained from preventing access or egress from the applicant's business premises and accommodation facility situated at Verulam Farm, Portion 351 Kaapmuiden Road, Barberton ("Verulam Farm");
 - 5.2. The respondents are interdicted and restrained from committing any acts of violence, damage to property, intimidation or the like at or near the applicant's business premises and accommodation facility situated at Verulam Farm;
 - 5.3. The respondents are ordered not to come within 500m of any of the applicant's business premises and accommodation facility situated at Verulam Farm;
 - 5.4. The costs are reserved for the court that finally determines this application.
 6. That the respondents be ordered to pay the costs of this application, jointly and severally, on the scale as between attorney and client.

7. That further and/or alternative relief be granted to the applicant [3] The main application, on 27 October 2015, served before my brother Ranchod J. My brother, on the same day, was provided with a draft order marked “X” which was made an order of the court.

The order reads:

“1. The intervening party shall deliver its application for leave to intervene and an affidavit dealing with the merits of the application, on or before 28 October 2015;

2. The applicant shall deliver its affidavit on the merits and its answering affidavit to the application for leave to intervene, on or before 10am on 30 October 2015;
3. The intervening party shall deliver its replying affidavit in the application for leave to intervene on or before 10am on 2 November 2015;
4. The application may be enrolled to be heard on 5 November 2015;
5. Pending the determination of this application in this court on 5 November 2015, the following interim order shall apply

5.1 The respondents are interdicted and restrained from preventing access or egress to any of the applicant’s business premises, and in particular that situated at Verulam Farm, Portion 351, Kaapmuiden Road, Barberton (“Verulam Farm”);

5.2 The respondents are interdicted and restrained from committing any acts of violence, damage to property, intimidation or the like at or near the applicant's business premises and accommodation facility situated at Verulam Farm;

5.3 The respondents are ordered to comply with the terms of the agreement that was made and order of the Labour Court on 7 August 2015, subject thereto that those of the respondents who are presently in occupation of housing facilities provided by the applicant on Verulam Farm, shall remain entitled to continue in occupation of those facilities and to access those facilities.

6. Costs are reserved for determination of the court hearing this application on 5 November 2015.”

- [4] The intervening party (AMCU), in the intervening application, sought an order:

“1. Joining the Applicant, in the above-named application, as the Second Respondent in the above-named main application instituted by the Second Respondent against the above-named First Respondent;

2. Directing that the costs of this application be costs in the cause, save that in the event of the First Respondent opposing this application, directing such Respondent to pay the costs of this application;
3. The main application brought by the First Respondent be dismissed.
4. The costs of the main application on an opposed scale.

5. Further or alternative relief.”

- [5] The parties complied with paragraphs 1,2, 3, and 4 of the draft order of 27 October 2015 and this resulted in the applications which now serve before me.
- [6] The parties provided me with their heads of argument, for which I thank them, and argued the matter.
- [7] Applicant, in the main application, is represented by Advocate H A Van Der Merwe (Mr Van Der Merwe) while Advocate C J Malan (Ms Malan) represented the intervening party (AMCU) when the matter was argued.
- [8] I allowed the intervening party which, in my view, has a direct and substantial interest in the matter to intervene in the main application and promised to give reasons in this judgment.
- [9] Applicant can obtain leave to intervene at any stage of the proceedings and this can also be after judgment. See *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 766 (TK) at 679C; *Baard v Estate Board* 1928 CPD 505 and *Jenner v Van Rensburg* 1957 (2) SA 236 (E).
- [10] Applicant need not be overconcerned with the intrinsic merits of the dispute which can fully be canvassed in the main application. The party seeking leave to intervene can rely on allegations which, if proved in the main application, would entitle it to succeed. See *Ex parte Moosa: In re Hassim v Harrop-Allin* 1974 (4) SA 412 (T) at 416F and *Minister of Local Government and Land Tenure* (supra) at 678J-679A.)

The court, in a case where applicants base their claim to intervene on a direct and substantial interest in the subject matter of the dispute, must allow the parties to intervene as the court will best be advised to proceed in the presence of parties having such legally recognized interests.

- [11] Ms Malan argued that AMCU is involved in the wage negotiations; is involved in the picketing rules; is involved in the disciplinary matter; has referred the unlawful dismissal issue to the CCMA and has referred the hearing which was followed by dismissals. AMCU, according to Ms Malan, is involved in the issue. She submitted that the strike, to date, has not been disrupted.
- [12] AMCU, according to Ms Malan, engages in collective bargaining with its members and the employer. It represents its members in grievances and disciplinary matters. It protects its members' existing rights and endeavours to improve those rights. AMCU, Ms Malan submitted, is involved in an application which relates to the continued strike action. AMCU, during this time, according to her, represents its members. It is for this reason that she submitted that it could not be said that AMCU does not have direct and substantial interest. The submission, in my view, appears sound.

- [13] Mr Van Der Merwe submitted that if the Union is entitled to intervene as a respondent then it has to be established if respondent's conduct can be said to be a "strike" for purposes of section 213 of the Labour Relations Act 66 Of 1995 (LRA). If, indeed, it is found that respondent's conduct amounts to a strike then, and in that event, this court does not have jurisdiction to deal with the main application. The court will only have jurisdiction if it is found that the conduct does not amount to a "strike". This is common cause.
- [14] Given the relationship between AMCU and the respondent and the fact that AMCU was cited as First respondent under case number J1580/15 in the Labour Court which made an order on 7 August 2015 while respondent was cited as 166 employees of the applicant and members of the applicant, I gave leave for the intervening applicant to be allowed to intervene as Second respondent. I was convinced in my mind that it would be prudent for the matter to be dealt with in the presence of the intervening party. (AMCU)
- [15] Having given such leave, the remaining issue was whether first respondent is busy with a strike action. This, as the parties agreed, is dispositive of the matter because this court will then have no jurisdiction to deal with the main application.
- [16] To determine whether or not the conduct amounts to a "strike" the definition of "strike" in terms of section 213 of the LRA has to be considered. The section defines "strike" as:
- "the partial or complete refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee."*(my emphasis)
- [17] This brings us to the question whether dismissed employees can still be regarded as employees for purposes of the LRA. At the same time the question as to when a strike ends becomes important.
- [18] Ms Malan submitted that the court does not have jurisdiction to hear the matter. If she is correct, the main application, on this basis, should be dismissed. AMCU, the intervening party, also raised, inter alia, the following points in limine : *Lis alibi pendens* ; lack of urgency; non compliance with the requirements of an interdict; presence of alternative remedies; abuse of court process and unreasonableness of the distance at which first respondent should picket from applicant's business premises.
- [19] Mr Van Der Merwe holds the view that first respondent is dismissed and that that in itself brings to an end the employer-employee relationship. This, according to him, has the effect of ending the strike in the absence of the employer-employee relationship. The further result, according to him, is that the Labour Court stops having jurisdiction over issues involving the relationship. Once the Labour Court stops having such jurisdiction, this court then acquires it. AMCU and first respondent, according to Mr Van Der Merwe, are precluded from approaching this court in terms of section 200 of the LRA.

[20] Ms Malan, on the other hand, submitted that AMCU approached the court in terms of sections 23 (2) and 38(e) of Act 108 of 1996 (the Constitution of the Republic of South Africa) as well as Rule 12 of the Uniform Rules of Court.

Section 23 (2) provides:

Labour relations “23 (1) Everyone has the right to fair labour practices.

(2) Every worker has the right -

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike (my emphasis)

Ms Malan referred to section 38(e) of the Constitution. The section provides that:

Enforcement of rights

“38 Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

(a) —

(b) —

(c) —

(d) —

(e) An association acting in the interest of its members.”(mv emphasis)

[21] In *National Automobile and Allied Workers Union v Borg - Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A) 6 1994 (3) SA 15 (AD)16, the court held that the employment relationship may endure beyond the termination of the employment contract ,and the definition of unfair Labour practice in section 186

(2) (c)

[22] In *Picardi Hotels Ltd v FGWU*

[2005] ZALC 25; [1999] 6 BLLR 601 (LC) the court held that employees could strike beyond the point of dismissal. Zondo J reasoned that that was to avoid the dismissal of employees by employers who are intent on avoiding strikes by dismissing their employees before the strike starts or shortly thereafter. This, in my view, is similar to a case where employees are dismissed by an employer who then runs to a High Court and claim that employees and their trade unions are precluded from approaching the High Court. This would be very much unfair, unjust and unreasonable. The main application in this matter seems to be a case in point.

[23] In *FGWU v Minister of Safety and Security* [1999] 20 ILJ 1258 (LC)

the court had to determine whether dismissal prevented the continuation of a strike on the basis that the dismissed strikers had ceased to be employees. According to Gagan AJ, this depends on whether the dismissal was a contravention of section 67 (4) of the LRA. If a contravention was established, the dismissal according to the court, would be a nullity and without effect on the employment relationship or the strike.

[24] Du Toit and Others in their work *Labour Relations Law*, Fifth Edition at P93 under “persons who are or have been employed” state that “have been” covers the position of “employees” whose status as “employees” has been terminated and this, according to them”, is not accidental.” In their view, employees whose contracts of employment had lawfully terminated could engage in strike action. (See *NAAWU v Borg-Warner SA (Pty) Ltd* (supra), it would seem according to them, that courts need to clarify this vexed

issues.

[25] Of significance is the fact that the existence of grievance or dispute determines the continuation of a strike as its purpose is to remedy a grievance or resolve a dispute. The strike will therefore terminate where the employer accedes to the demands of the employees. Once the *casus belli* or the stratum of the strike disappears the strike terminates. (See *Afrox Ltd v SACWU and Others*

(1) (1997) 18 ILJ 399 (LC) at 406.

[26] The court in *Parcadi Hotels v Food and General Workers Union and Others* [1999] 20 ILJ 1915 (LC) said that the definition of “strike” shows beyond doubt that persons who are former employees of an employer fall under the category of those who can engage in a strike. Dismissed strikers are not precluded from engaging in a strike.

[27] AMCU has been heavily involved in the affairs of first respondent. It was cited as first respondent in the Labour Court while the employees were cited as the second respondent. To suggest that AMCU should not intervene as second respondent in the main application will, in my view,

not be proper. Its inputs and submissions in the main application have considerable value.

[28] The facts of the matter evince that first respondent (employees) in the main application were and are engaged in a protected strike. They were dismissed and still proceeded with the strike unhindered. Indeed, as Ms Malan correctly submitted, applicant in the main application does not seem to be wanting to deal with unlawful gathering. Unlike in the Labour Court where the strikers were ordered to picket from a designated area, applicant, in the current application, seems to be recognizing the protected and protracted strike as it is happy with the employees picketing from a distance of 500 meters from its business premises. The dispute that led to the protected strike is still in existence and much alive. The employees are busy with a strike. This is the view of Ms Malan which, in my view, has merit.

- [29] Having found that the employees are busy with a strike I must also find that this court does not have jurisdiction to deal with the matter. It is, indeed, divested of this jurisdiction which now vests in the Labour Court.
- [30] I find it unnecessary to deal with the other issues as the parties themselves conceded that this finding is dispositive of the issue of jurisdiction.
- [31] I, need, only mention that the matter is not urgent. This is borne out by the applicant's delay in bringing this application. Again the parties agreed that this aspect as well would lead to the striking off of the application. This is so because the matter is not urgent as demonstrated by its facts.
- [32] Indeed, as Ms Malan correctly submitted, applicant has various alternative remedies. It is armed with a valid order of the Labour Court. Paragraph 5.3 of Ranchod J's order acknowledges the existence of the Labour Court's order of 7 August
2015. Applicant, in my view, can still approach the Labour Court and ask it to enforce compliance therewith. The police were approached and there are those employees who seem to have been identified and arrested. Non compliance with the order which involves damages to property and intimidation of people could be properly dealt with by getting those responsible arrested or rearrested whereafter the arrested would be dealt with by the criminal courts. There is no evidence demonstrating that all employees were and are involved in the unlawful acts. The state may also be requested to oppose bail in appropriate cases.
- [33] The order, in respect of the 500 meter distance, if granted, would in my view, be unreasonable as the strikers would, then, be thrown onto the street or road as correctly submitted by Ms Malan.
- [34] The application as shown above should fail.

COSTS

- [35] Ms Malan submitted that costs should follow the result. AMCU also indicated that in the event that the application became opposed such
- opposing party would be held liable for costs. I do not think that there is anything wrong with such suggestion.
- [36] I have already granted AMCU leave to join as the second respondent in the main application.
- [37] Ranchod J reserved costs on 27 October 2015. These costs, In my view, should also follow the result.
- [38] I, in the result, make the following order:
1. The main application is dismissed.

2. Applicant is ordered to pay the costs which include the reserved costs of 27 October 2015.
3. Applicant is further ordered to pay the costs of the intervening application.

JUDGE OF THE GAUTENG DIVISION HIGH COURT, PRETORIA

APPLICANTS REPRESENTATIVES

ADVOCATE H A VAN DER MERWE

INSTRUCTING ATTORNEY LARRY DAVE INCORPORATED

RESPONDENT'S REPRESENTATIVES

ADVOCATE C J MALAN

INSTRUCTING ATTORNEY FLUXMANS INC

HEARD ON 05 NOVEMBER 2015

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