

SOUTH AFRICA / JUDGMENT

City of Matlosana v South African Local Government Bargaining Council (JR1626/08) [2008] ZALC 139; (2009) 30 ILJ 1293 (LC) (5 September 2008) [2008] ZALC 139

COURT

Labour Court

BEFORE

Pillay D

CASE / FILE NUMBER

JR1626/08

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IN THE LABOUR COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

BRAAMFONTEIN

DATE: 05/09/2008

CASE NO: JR1626/08

REPORTABLE

In the matter between:

CITY OF MATLOSANA Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL First Respondent

SOUTH AFRICAN MUNICIPAL

WORKERS' UNION Second Respondent

M E MITSHANE and OTHERS Third Respondent

J U D G M E N T

PILLAY D, J:

The first ground on which the application to interdict a strike by the second respondent trade union and its members, who are the third and further respondents in this application, is that the union did not give seven days notice of its intention to strike. Did the union have to give seven days or 48 hours notice to strike? The applicant employer submitted that section 64 (1)(d) of the Labour Relations Act 66 of 1995 (the LRA) prescribes seven days notice be given to the State as employer.

Mr van Graan appearing for the employer, referred the court to SA Agricultural Plantation and Allied Worker's Union and Others v Premier of the Eastern Cape and Others 1997 (18) ILJ 1317 (LC). Ms Barnes, appearing for the union and its members, relied on the judgment of Mcosini v Mankotywa and Another 1998

(19) ILJ 1413 (Transkei).

The meaning of State

Section 40 of the Constitution of the Republic of South Africa Act 108 of 1996 constitutes local authorities as follows:

"In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated."

Chapter 7 of the Constitution affirms the status, objectives, duties, composition and procedures of local governments. In essence, chapter 7 establishes municipalities as representative of government at local level. Chapters 4 and 6 establish parliament as the representative of government at national level and the provincial legislatures as representative of government at provincial level. Together, the three tiers form the government of the Republic of South Africa.

In Black's Law Dictionary (seventh edition) edited by Brian A Garner "State" means:

"The political system of a body of people who are politically organised; the system of rules by which jurisdiction and authority are exercised over such a body of people."

According to LAWSA, the term "state" may be used as a collective noun for the collective wealth and liabilities of the Republic, which are not owned or owed by private individuals or corporations, as well as the conglomeration of organs, instruments and institutions which have as their common purpose the management of the public affairs in the public interest¹.

According to Klaassen, Dictionary of Legal Words and Phrases "State" means the Union of South Africa. This was the view of the Appellate Division in Rex v Vorster 1941 AD 472 when it had to interpret section 1 and 2 of the Official Secrets Act of 1911 to determine whether "State" in that Act referred to the British Empire or to independent dominions.

The question whether the State can reside in a province was considered in the high treason case of *Rex v Neumann* 1949 (3) SA 1238 (SCC) in which the Special Criminal Court, Transvaal, had to decide whether the accused “owed allegiance to His Majesty King George VI and his Government of the Union of South Africa, hereafter referred to as the State”. The court determined that “State” in that context, meant the State itself as the sovereign body possessing majestas, and not merely to two separate portions or organs.

Section 239 defines “organ of state” as

“any . . . functionary or institution . . . (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

Davis J in *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others* 2000 (3) SA 119 (C) found that the Truth and Reconciliation Commission, as an organ of State, was part of the State because an element of the State constitutes the State².

The LRA does not define "State". It defines "public service" as follows:

"The national department, provincial, administration provincial department and organisation of employment contemplated in Section 7(2) of the Public Services Act 1994, promulgated by proclamation 103 of 1994 but excluding (a) the members themselves of the National Defence Force

(b) the National Intelligence Agency and (c) the South African Secret Service."

The Public Service Act 1994 promulgated by proclamation 103 of 1994 establishes national and provincial services. The public service is not the whole of the State. It is a part of it. Nothing in section 157(2) of the LRA suggests that "State" means the public service only.

The Local Government Municipal Systems Act No 32 of 2000 governs services at local government level. This difference in legislation for the public service, as defined, and local government does not justify differentiating on the one hand services rendered at national and provincial levels as State services and, on the other hand, services rendered at local government level as non State services. Services rendered at all three levels are services rendered on behalf of the State to the public.

In *Transnet Ltd And Another V SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) Howie P was confronted with a situation similar to this case in that the Promotion of Access to Information Act 2 of 2000 (PAIA) did not define "State". However, because section 1 of PAIA defined “public body” to mean not only an organ of State but also a department of State, the Supreme Court of Appeal (SCA) read "State" in s 9 to mean "public body."

Similarly, in *Claase v Transnet Bpk En 'N Ander* 1999 (3) SA 1012 (T) the court found that as the State controlled Transnet and as Transnet performed a public function, it was an organ of State as defined in the Constitution. Consequently, the reference to “State” in s 157(2) of the Labour Relations Act included Transnet.

Another case in which the word state was given a broad meaning includes *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC). For the purposes of the Education Labour Relations Act No 146 of 1993, the erstwhile Industrial Court (per Landman and Basson AM) defined the State to be an employer of educators employed in state aided Model C schools.

Being in agreement with the judgments in *SA Agricultural Plantation and Allied Worker's Union and Others v The Premier of the Eastern Cape and Others* and *Claase v Transnet Bpk and Association of Professional Teachers & Another v Minister of Education & Others* above this Court supports the view that the word "State" in section 157 should be given a broad meaning. This court is therefore in respectful disagreement with the judgment in *Mcosini v Mankotywa and Another*.

A case which is on all fours with the question in this case is *Greater Johannesburg Transitional Metropolitan Council V Eskom* 2000 (1) SA 866 (SCA). Neither party referred to this case. The SCA had to decide whether the expression “the State” in s 24 of the Eskom Act No 40 of 1989 included the Central Witwatersrand Regional Services Council (the CWRSC) and the appellant Council.

The SCA dealt with the issue by considering (1) the status and functions of regional service councils and local transitional metropolitan councils; (2) whether the test of control was the correct yardstick to apply; and (3) the meaning to be ascribed to the expression “the State” in s 24.

It concluded that while the control test was appropriate for the purpose of deciding whether a public corporation was the alter ego of the government or a separate institution, the decisive question was whether they carried out the functions of government at a local level.

The SCA concluded that the expression “the State” as used in s 24 of the Eskom Act was not limited to central and provincial government but covered the State in all of its manifestations, including bodies such as regional service councils and transitional metropolitan councils. A municipality, such as the employer in this case, must therefore also be the State at local government level.

Seven Day Notice

Another consideration for the seven day notice is its rational. One of the reasons for giving notice is that the State provides essential and necessary services to the public. As discussed above, such services are rendered at national, provincial and local levels. No alternative provider of many components of such services is readily available, especially to poor communities. There is therefore a rational basis for requiring seven days notice for strikes in all three tiers of government. In the circumstances, the court finds that the union has to give seven days notice to the employer.

The second question is whether, in this case, the strike notice issued in May 2008 complied with the seven day notice. The

union submitted that it suspended the strike in May. The employer, relying on *Transportation Motor Spares v NUMSA and Others* (1999) 20 ILJ 690 (LC), contended that the union did not embark on any strike at all pursuant to the May notice; therefore it did not suspend and resume a strike.

The facts in the judgment of Zondo J (as he then was) in *Transportation Motor Spares* are distinguishable. In that case, notice was given on 21 August for a strike that was to commence on 1 September 1998. There was some confusion about the status of the strike and the employees returned to work. They resumed the strike on 10 September 1998. In those circumstances the court found that the LRA did not expressly require that a new notice be given before the resumption of the suspended strike.

In this case it was common cause that the union did not embark on the strike at all. It suspended the strike without embarking on it. Whether it suspended the strike and intended to resume it is irrelevant if the purpose of the seven day notice rule is considered. The purpose of the rule is inter alia to enable the employer to prepare for the disruption of necessary public services and to possibly avoid the strike by further bargaining. Given the delay between May and July, and the further negotiations between the parties, by August the union was obliged to give a fresh seven day notice to strike in support of demands that then remained outstanding.

Significantly, there was a substantial lapse of time between the original notice and the notice under consideration. The union

apparently realised the need to give seven days notice and has undertaken to do so. A fresh notice is required in any event because

the date for commencing the strike on 4 August 2008 has passed. Furthermore the unions demands have diminished. It is to these demands that the court now turns.

Demands

The question was whether the demands were such that the union could strike in support of them. The union's demands had initially been about issues in a memorandum of 29 November 2007. The employer knew those to be the union's demands and referred to them as such in its founding Affidavit.

Only in reply did the employer contend that the union also recorded its demands in its memorandum of 15 November 2007. This prompted the union to deliver a supplementary Affidavit to explain that it had inadvertently referred to the memorandum of 15 November instead of 29 November 2007 in its May strike notice.

The court accepts the union's explanation, especially as it was common cause that it had not presented the demands in the 15 November memorandum to the employer, who had obtained a copy of that memorandum informally.

Turning to the list of demands, the following remained unresolved on the union's version:

- "1. That primary and environment health care transfers should be stopped and consultation with unions start and be presided over by SALGBC.
2. Memorandums of understanding by municipalities with the provincial department of health be scrapped immediately.
4. We demand an immediate stop to all privatization taking place with immediate effect.
6. LLF'S should sit with negotiations on policies and organogram starting earnestly.
7. We demand permanent employment of all casuals and temporary workers.
9. Selective dismissals and favoritism must come to an end.
12. Establishment of proper EAP Unit with full staff and also HIV Coordinator
13. Role of workers in Agenda 16 programme and support.
14. Resolving the issue of Municipal Security." (sic)

The employer contended that these demands were resolved, alternatively, that they were refusal to bargain disputes which must be preceded by advisory arbitration; further alternatively, that they were issues about which the union could not strike.

The employer did not prove that any of the issues had been resolved. The court disagrees with the union that item 6 is not a refusal to bargain dispute. The substance of the demand is that the union wanted the employer to attend the negotiations for the purpose of negotiating. Its attendance would otherwise have served no purpose. The employer signaled its refusal to bargain by not attending the negotiations. The union cannot strike in support of the demand in item 6 without first obtaining an advisory award.

The remaining demands listed above are strikeable issues. The union has to give seven days notice to the employer before embarking on a strike in support of these demands.

In view of the court's findings and the ongoing relationship between the parties, the court declines to make any order as to costs. The order that the court grants therefore is the following:

The application is dismissed with no order as to costs.

PILLAY D, J

Judge of the Labour Court

Date of Hearing: 04 September 2008

Date of Judgment: 05 September 2008

Date of Editing: 24 October 2008

Appearances

For the Applicant: Adv ESJ Van Graan Sc with Adv O I Morapedi

Instructed by LB & V Attorneys

For the Respondent: Adv H Barnes

Instructed by Cheadle Thompson & Haysom Inc.

1 Baxter (1982) 99 SALJ 212 225.

2 Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others 2000 (3) SA 119 (C) Pg 131 D-E

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