

SOUTH AFRICA / JUDGMENT

Rand Water SOC Ltd v SAMWU obo Members and Others (J491/21) [2021] ZALCJHB 81; (2021) 42 ILJ 1753 (LC) (31 May 2021)

[2021] ZALCJHB 81

COURT

Labour Court Johannesburg

BEFORE

D Mahosi

CASE / FILE NUMBER

J491/21

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Source record

In

The Labour Court of South Africa, JOHANNESBURG

Not Reportable

case

no: j 491/21

In

the matter between:

RAND
WATER SOC LTD
Applicant
and
SAMWU
OBO MEMBERS
First
Respondent
INDIVIDUALS
LISTED IN ANNEXURE A Second
to further Respondents

Heard:

27 May 2021

Delivered:

This judgment is handed electronically by circulation to the parties' legal representatives through email. The date for hand-down is deemed to be 31 May 2021.

JUDGMENT

MAHOSI, J

Introduction

- [1] The applicant seeks an order, on an urgent basis, that an order granted by Phehane AJ on 11 May 2021 be operational and enforceable pending the final determination of the application brought by the respondents for leave to appeal as well any subsequent appeal applications.

Background

- [2] On 07 May 2021, the applicant brought an application to this Court for an order declaring SAMWU's intended strike unprotected and interdicting and restraining the second to further respondents from participating in any unprotected strike action pursuant to their demands for the payment of short-term incentive bonus.
- [3] The applicant challenged the respondents' strike in two respects. The first being that the applicant constitutes an essential service as defined in terms of section 213 of the Labour Relations Act[1] (LRA) and the second being that the substance of the dispute between the parties constitutes a right dispute, which ought to be referred to arbitration.
- [4] On 11 May 2021 this Court, per Phehane AJ, issued an order declaring the intended strike action that was scheduled to commence on 13 May 2021 unprotected. The Court further interdicted and restrained the respondents from participating in any unprotected strike action in support of their demand.
- [5] On 13 May 2021, the respondents brought an application for leave to appeal against the aforementioned order, the result of which was the suspension of the operation and execution of the order.
- [6] On 20 May 2021, the respondent's served the applicant with a notification indicating that they intended to engage in a strike action which is scheduled to commence on 01 June 2021. The applicant's attorneys of record addressed a correspondence on 21 June 2021 to the respondents requesting an undertaking that the strike action would not take place. No such undertaking was forthcoming from SAMWU.
- [7] It was for this reason that the applicant brought the current application for the aforementioned order to be operational and enforceable pending the final determination of the present and future applications for leave to appeal and appeals.
- [8] SAMWU opposed this application on the basis that the requirements of section 18 of the Superior Court Act[2] have not been met and that it lacks urgency. However, during the hearing the respondents' counsel conceded that applications of this nature are urgent.

Applicable law and analysis

[9] The application is premised on the provisions of section 18 of the Superior Court Act, which reads:

‘(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1)—

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.’

[10] It is trite that for the relief in terms of section 18(1) and (3) to be granted, an applicant is required to firstly establish the existence of exceptional circumstances. Secondly, the applicant must prove, on a balance of probabilities, that it will suffer irreparable harm if the Court does not grant the order and that the respondent will not suffer irreparable harm if the Court grants the order.[3] There is a further requirement of prospect of success in the appeal, depending on whether the Court seized with application to enforce or execute the judgment does have the entire record that is subject of the appeal.[4]

Exceptional Circumstances

[11] In examining what constituted exceptional circumstances, the Court in *Incubeta Holdings and Another v Ellis and Another*[5] stated the following:

[17] What constitutes “exceptional circumstances has been addressed by Thring J in *MV Ais Mamas* 2002 (6) SA 150 (C), where a summation of the meaning of the phrase is given as follows at 156I – 157C:

“What does emerge from an examination of the authorities, however, seems to be the following:

1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or especially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.”

[18] Significantly, although it is accepted in that Judgment that what is cognisable as ‘exceptional circumstances’ may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case, is not a product of a discretion, but a finding of fact.

[12] In the current matter, the purpose of the order obtained was to interdict an unprotected strike. To an extent that the Court has already considered the basis of a strike and declared that the issue in dispute is one which the respondents cannot strike on, it is apparent that if the interim enforcement is not granted, the respondents will be allowed to engage in an unprotected strike and the applicant will have no remedy as any application to interdict the strike will be met with a potential argument that the case is *res judicata*. It follows that should the interim order not be granted, the applicant will find itself in the predicament of being left with no relief. Thus, there is merit to the applicant’s contention that the respondents’ intend to engage in a strike action, which is in direct defiance of the order interdicting it, patently raises exceptional circumstances that warrant interim enforcement.

[13] It is further apparent that failure to grant the interim enforcement would undermine the credibility and the standing of the Court order and would send a message that approaching this Court for interdict in unprotected strikes is of no consequence given that the application for leave to appeal can be used as a tool to allow workers and trade unions to participate in

unprotected strike action all the while avoiding the consequences of contempt proceedings or possibly dismissal, given that at the time of the strike the order declaring the strike unprotected, was suspended.

[14] In fact, although the respondents contend that they have not launched an application for leave to appeal solely for the purpose of avoiding the effect of the order interdicting the strike, it's submissions that the intended strike action is protected and complies with the certificate of non-resolution and the provisions of the LRA and that the second to further respondents are within their rights not to have a condition incorporated in their employment agreement ignored and deviated from implementation displays the attitude of undermining the court order. This attitude is further evidenced in the respondents' submission that the current protest action is aimed at resolving the current impasse between the parties and will inevitably result in the applicant finally tabling the issue for discussion before the bargaining forum, where the parties are likely to find each other much sooner than the finalization of any ongoing litigation between the parties. This Court has a duty to promote the purpose of the LRA by ensuring labour peace, effective resolution of labour disputes and orderly collective bargaining and this, in the

current matter, can only be achieved by granting of the interim relief sought by the applicant.

Irreparable harm

[15] In relation to the factual enquiry the Court in Incubeta stated the following:

'[24] The second leg of the Section 18 test, in my view, does introduce a novel dimension. On the South Cape test, number 4, (cited supra) an even handed balance is aimed for; best expressed as a balance of convenience or of hardship. In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. But Section 18(3) seems to require a different approach. The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm the order must remained stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the South Cape test. Two distinct findings of fact must now be made, rather than a weighing up to discern a "preponderance of equities". The discretion is indeed absent, in the sense articulated in South Cape. What remains intriguing however, is the extent to which even a finding of fact as to irreparable harm, is a qualitative decision admitting of

some scope for reasonable people to disagree about the presence of the so called "fact" of 'irreparability'.

[16] In the current matter, the applicant, on the one hand, contends that the harm it will suffer is irreparable in that if the order is not granted, the applicant will effectively be restricted to perform its constitutional and statutory duties of providing potable water to the vast majority of the populace, who are mostly poor. According to the applicant, the disruption of the provision of water services will be mostly felt by the most vulnerable members of the

community and will affect life, personal safety and health. This, argued the applicant, should be seen in the serious light of the current state of Disaster and Covid-19 pandemic, where the washing of hands with soap and water for 20 seconds has been recognized by the World Health Organisation as one of the primary and most effective ways of curbing the transmission of the Covid-19 virus.

- [17] The applicant further contents that, if an order for interim enforcement is not granted, it will be required to endure an unprotected strike and not have any remedy to approach the Court for the interdict against the unprotected strike pending the determination of the appeal.
- [18] On the other hand, the respondent dismissed the applicant's reliance on the fact that it provides essential services on the basis that the second to further respondents are not essential and that there is no proof that the strike action will cause any harm at all. In essence, the respondents contention is that the intended strike would not interrupt the applicant's services of water because their services are not essential. I find this contention disingenuous. The applicant correctly submitted that strikes are by their very nature intended, as part of power play, to cause interruption and disruptions. It is for this reason that the LRA requires that the strikes must comply with its provisions.
- [19] It is apparent that for as long the respondents delay the execution of this Court's order through the potential prolonged appeal processes, the longer they will continue to engage in strike action and the longer the applicant will be hampered in its ability to provide an essential service, being the supply and distribution of water. Given the importance of the applicant's duty to provide water without any interruption or disruption, particularly during this period in which the world is facing the Covid-19 pandemic, not granting the interim order will obviously not only cause irreparable harm to the applicant but to the larger community it serves.
- [20] The respondents contend that they will suffer irreparable harm in that they would not be able to exercise their right to compel the applicant to comply with the terms and conditions of their contracts. In support of its contention, SAMWU submitted that the R74 million which should be allocated towards the payment of the bonuses and which has instead been unlawfully, without legal cause and against accounting, auditing, bookkeeping principles diverted to fund a contingent legal liability, would be lost to the budget if this contingent liability becomes due and payable and the applicant would plead poverty and hardship, should it be forced to pay the respondents. There is no merit to the respondents' contention as the harm that they stand to suffer is clearly not irreparable. If the interim enforcement is granted, the respondents would not lose their right to strike. Instead, their right would be suspended pending the determination of their application for leave to appeal.

Conclusion

[21] In this matter, the applicant has succeeded in establishing exceptional circumstances to justify the extraordinary and exceptional relief that it seeks, has shown that it will suffer irreparable harm and further that the respondents will not suffer irreparable harm if leave to execute were granted. Therefore, the application must succeed.

Costs

[22] This Court has a wide discretion in awarding costs. The guiding principle is that of equity and fairness. In this matter, it is my view that this is a case where the interests of justice and fairness will be best served by making no order as to costs.

[23] Accordingly, the following order is made:

Order

1. The order granted by Phehane AJ on 11 May 2021 is not suspended by any application for leave to appeal or any appeal and therefore, continues to be operational and enforceable in full pending the determination of any application for leave to appeals as well as any subsequent appeals.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

Counsels for the Applicant: Advocate A. Mosam SC and Advocate Z. Ngwenya Instructed by:

Cliffe Dekker Hofmeyer Incorporated Attorneys

Counsels for the Respondent: Advocate W.R. Mokhare SC, Advocate E.M. Masombuka and Advocate C Lithole

Instructed by:

Madlela Gwebu Mashamba Attorneys

[1] No. 66 of 1995, as amended.

[2] Act 10 of 2013, as amended.

[3] Incubeta Holdings and another v Ellis and another 2014

(3) SA 189 (GJ) at para 16

[4] See: University of Free State v Afriforum and another [2017] 1 All SA 79 (SCA).

[5] 2014 (3) SA 189 (GSJ).

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