

SOUTH AFRICA / JUDGMENT

**SACTWU obo Members v KZN Marketing
(PTY) Limited and Another (D292/2022)
[2022] ZALCD 31; [2023] 1 BLLR 83 (LC);
(2023) 44 ILJ 828 (LC) (1 August 2022)
[2022] ZALCD 31**

COURT

Labour Court Durban

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

D292/2022

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IN

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case

no: D292/2022

In

the matter between:

SACTWU
obo
MEMBERS
Applicant
And
KZN
MARKETING (PTY) LIMITED
First Respondent
BHEKI
KHUMALO
N.O.
Second Respondent

Heard:

July 2022

Delivered:	01 August 2022 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 01 August 2022.)
Summary:	Incomplete disciplinary enquiry - the matter presents exceptional circumstances which warrant this Court's intervention. Declaratory relief – exercise of judicial discretion is warranted as the declaratory order will settle the dispute between the parties. Lawfulness of a strike – an unlawful picket cannot affect the lawfulness of a strike that complies with section 64 of the LRA or constitute a secondary strike.

JUDGMENT

NKUTHA-NKONTWANA, J

[1] The applicant (SACTWU) is in a collective bargaining relationship with the first respondent (KZN Marketing). SACTWU referred a mutual interest dispute to the Commission for Conciliation, Mediation and

Arbitration (CCMA) in relation to wages and conditions of employment on behalf of its members in the employ of KZN Marketing. The dispute was unsuccessfully conciliated and the certificate of outcome was issued accordingly.

[2] SACTWU served KZN Marketing with a strike notice. On 18 January 2022, the members of SACTWU embarked on a strike. It is common cause that the commissioner who conciliated the dispute did not issue any picketing rules.

[3] It is not in dispute that KZN Marketing does not own premises but uses sites and depots from which its employees take instructions and thereafter report to various retail stores where they are deployed.

SACTWU contends that KZN Marketing is associated with Orange Grove Dairy (Pty) Ltd (Orange Grove) whose employees are also SACTWU

members. The Orange Grove employees also embarked on a strike called by SACTWU at about the same time. Some of the striking employees of KZN Marketing joined the Orange Grove striking employees at their various picketing sites. It also bears mentioning that the CCMA did issue the picketing rules in relation to the Orange Grove strike.

[4] KZN Marketing took a view that the strike is unprotected because no picketing rules had been issued by the CCMA. It then issued the striking employees with various ultimatums to return to work but to no avail. SACTWU was adamant that the strike is protected and persists with this view in these proceedings.

[5] KZN Marketing took a disciplinary action against all the striking employees whilst the strike was persisting. They were mainly charged for participating in and/or instigating an unprotected strike. The second respondent (Mr Khumalo) was appointed as the chairperson of the disciplinary enquiry. At the commencement of the disciplinary proceedings, SACTWU's legal representative raised a point in limine to the effect that the strike was protected and thus the disciplinary action against all the striking employees was impermissible. Mr Khumalo dismissed the point in limine and proceeded with the disciplinary enquiry. SACTWU participated.

[6] On 18 May 2022, Mr Khumalo issued his verdict wherein he found as follows:

6.1. The striking employees embarked on an unprotected secondary strike when they joined the Orange Grove employees during their picket. That is so because they failed to notify KZN Marketing of their intention to join the picket by the Orange Grove employees.

6.2. Since the issuing of the picking rule is peremptory, failure by the CCMA to issue same rendered the strike unprotected. He opined that a picket is an act in furtherance or in contemplation of a strike and could not be separated.

6.3. The striking employees were not remorseful, blatantly disregarded the ultimatums, and engaged in a prolonged strike that caused enormous financial stress to the employees, employer and public.

[7] Yet, when deciding on the appropriate sanction, Mr Khumalo found that the striking employees were led to honestly believe that their strike was protected. As a result, he made the following order:[1]

7.1. The striking employee are guilty as charged;

7.2. Dismissal is the appropriate sanction;

7.3. The dismissal be suspended pending the striking employees' unconditional return to work on acceptance of the KZN Marketing's terms for such return work within four weeks of their receipt of this decision but not later than 16 June 2022; and

7.4. The striking employee be issued with final written warnings valid for twelve (12) months from the date of the ruling.

[8] SACTWU approached this Court on an urgent basis seeking an order in the following terms:

‘1. ...

2. declaring that the strike which the Applicant and its members embarked upon on 18th January 2022 was a protected strike as defined in Section 64 of the Labour Relations Act; and
3. declaring the Second Respondent’s Ruling unlawful, a nullity and of no force and effect, and which appears at paragraph 26.3, namely: -

“26.3 Order that dismissal be suspended pending the striking employees’ unconditional return to work on acceptance of the KZN Marketing’s terms for such return work within four weeks of their receipt of this decision but not later than 16 June 2022.”[2]

[9] KZN Marketing is vigorously opposing the application and in turn, takes two points in limine. Firstly, that the matter is not urgent, and secondly, that this Court has no jurisdiction to entertain the matter. Without further ado, I deal with the points in limine.

Urgency

[10] KZN Marketing contends that urgency is self-created as SACTWU knew as early as 1 March 2022, when the striking employees were served with notices to attend the disciplinary enquiry, that it was resolute in its view that the strike is unprotected.

[11] SACTWU, on the other hand, contends that, from 18 May 2022 to 20 June 2022, it was engaged in discussions with KZN Marketing, mainly in relation to Mr Khumalo’s findings and the sanction which required clarity. KZN Marketing concedes that there was engagement and that clarity was correctly sought as the sanction is ex facie equivocal.

[12] In my view, SACTWU was correct to first raise its impugn on the allegation that the strike is unprotected with Mr Khumalo and, in doing so, it avoided a premature recourse to Court. Moreover, as it will become clear later in the judgment, this matter presents a unique set of facts which warrants this Court’s urgent attention.

Jurisdiction of this Court

[13] KZN Marketing impugns this Court’s jurisdiction to entertain this matter mainly because the declaratory relief sought by SACTWU pertains to the fairness of the future conduct in the implementation of the recommendations made following the disciplinary enquiry. It further contends that, in the event it decides to dismiss the striking employees, they have a recourse to refer a dispute to the CCMA.

[14] Obviously, KZN Marketing conflates the issue of jurisdiction and that of relief. While this Court has jurisdiction to issue a declaratory order in terms of section 158(1)(a)(iv) of the Labour Relations Act[3] (LRA), it is a discretionary power. As such, it is well accepted that when the Court decides to exercise its discretion in terms of 158(1)(a)(iv) of the LRA, it must be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation;

and if so, the Court must decide whether the case is a proper one for the exercise of its discretion.

[4] Factors courts have considered to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief include:[5]

14.1. the existence or absence of a dispute;

14.2. the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties;

14.3. whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;

14.4. considerations of public policy, justice and convenience;

14.5. the practical significance of the order; and

14.6. the availability of other remedies.

[15] In my view, this matter likewise warrants the exercise of judicial discretion positively as the declaratory order will settle the dispute between the parties pertaining to the lawfulness of the strike embarked on by the SACTWU members.

[16] To the extent that KZN Marking contends that the disciplinary enquiry is incomplete as it has not decided on the recommendations issued by Mr Khumalo, this matter presents exceptional circumstances which warrants this Court's intervention. In *McBride v Minister of Police and Another*, [6] where, confronted with a similar issue, this Court, per Basson, J, stated that:

'[13] The further point was raised that the Labour Court should not intervene in incomplete disciplinary proceedings. It is clear from various cases that the Labour Court is not precluded from intervening in incomplete disciplinary proceedings provided that the court will only in exceptional circumstances. What these exceptional circumstances are is left to the discretion of the Court. In this regard, the Labour Appeal Court in *Booyesen v The Minister of Safety and Security*, [7] made it clear that this Court has the power to intervene in incomplete disciplinary proceedings to prevent a serious injustice.

The Court will therefore only intervene "in exceptional cases".

"It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would... be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive." [8]

[14] The Labour Appeal Court further expressly rejected the notion that judicial oversight of the conduct of disciplinary proceedings would necessarily be “costly, time consuming, disruptive and [a] duplication of proceedings” and recognised the fact that judicial intervention may in fact prove to be time-saving and less costly:

“... judicial intervention may prove to be time saving and less costly if the process is not proceeded with. It may also prevent costly

litigation. The very fact that the Labour Court has the power to issue interdictory relief suggests that the legislature was aware

that the exercise of such power might interfere with the freedom of employer’s to contract and the employer’s business in deserving cases”.[9]

[15] The LAC in Booyesen also specifically endorsed the decision by the Labour Court in *Mortimer v Municipality of Stellenbosch and Another*...where the court held as follows:[10]

“Where a person in truly extraordinary circumstances (...) approaches the Labour Court on the basis that a disciplinary inquiry was for instance, about to commence or was conducted in the hands of a biased or unqualified presiding officer, or on another factual basis so serious as to vitiate in law the enquiry, I have little doubt that the Labour Court would in law exercise these powers to stop it.”[11]’ (Emphasis added)

Lawfulness of the strike

[17] At heart in this matter is whether the strike is protected. KZN Marketing persists with the view that the strike is unprotected because there are no picketing rules. While it is common cause that there are no picketing rules issued by the CCMA, the real issue is whether SACTWU did call for a picket. If so, did the picket render the strike unprotected.

[18] SACTWU contends that it did not intend to call a picket because of the peculiar nature of the business operations of KZN Marketing. It would seem that there is some form of a business relationship between Orange Grove and KZN Marketing. In fact, the substantive issues on wages and conditions of employment, that are the subject of the strike, are the same in respect of both entities. Moreover, both companies negotiated with SACTWU as if they are a single entity. Mr Andreas Nxumalo (Mr Nxumalo), SACTWU’s official and deponent to the founding affidavit, asserts that during wage negotiations with

the two entities priority was given to Orange Grove employees. When SACTWU challenged this turn of events, it was informed that whatever outcome in relation to Orange Grove would apply to the employees of KZN Marketing. Indeed, it would seem that the deadlock in relation to the demands by the employees of Orange Grove equally applied to the demands of the employees of KZN Marketing.

[19] SACTWU contends that there was no need to obtain the picketing rules from the CCMA because it had no intention to call a picket given the nature of KZN Marketing’s business and operations. Notwithstanding, on 15 January 2022, SACTWU’s attorneys of record, acting on

behalf of its client, served KZN Marketing with their client's notice to commence a picket at 06h00 at the commencement of the strike on 18 January 2022. What is also apparent from the letter of 15 January 2022 is that SACTWU and its attorneys were alive to the fact that a picket had to be preceded by the issuing of the picketing rules and intimated that same was expected from the CCMA. When challenged to produce the picketing rules by Mr Hueben Vorster (Mr Voster), KZN Marketing's consultant from Corporate Employer Solutions, Mr Nxumalo referred him to the relevant

forum; I assume it's the CCMA. So, it is disingenuous for SACTWU to now contend that it never intended to call a picket.

- [20] Section 69(6C)(b) of the LRA provides that no picket in support of a protected strike may take place unless picketing rules have been agreed to or have been determined by the CCMA in terms of section 69(5) of the LRA. It follows that the picket called by SACTWU was unprotected.
- [21] The next question is whether the striking employees did heed SACTWU's call to picket. Innate in that question is whether the striking employees embarked on a secondary strike. SACTWU contends that the striking employees withheld their labour only. Nonetheless, it is not disputed that some of the striking employees participated in the picket alongside the Orange Grove's striking employees and in contravention of section 69(5) read with the Picketing Regulations.[12]
- [22] It is not easily discernible from the pleadings as to whether the KZN Marketing striking employees were picketing in their own right or in support of the Orange Grove employees. However, Mr Nxumalo conceded during the disciplinary enquiry that the striking employees were picketing in support of their own demands and that they chose to picket at Orange Grove premises to exert pressure on KZN Marketing. In any event, to extent that the demands were similar and the wage negotiations were conducted in tandem, it is inconceivable that the KZN Marketing striking employees were merely supporting the Orange Grove striking employee.
- [23] That takes me to the crux of this matter which is whether the strike can lose its lawfulness because the striking employees participated in an unlawful picket. KZN Marketing contends that the securing of picketing rules prior to the commencement of a strike is a peremptory requirement. Therefore, SACTWU should have secured, or even reasonably attempted to secure, picketing rules prior to issuing the strike notice. I disagree. A strike notice is regulated by section 64(1)(b) which provides that it should be issued at least 48 hours prior to the commencement of the strike. While the notice to call a picket is regulated by section 69(1) and (2) which provide:

'(1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating –

- (a) in support of any protected strike; or

(b) in opposition to any lock-out.

(2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1) may be held –

(a) in any place to which the public has access but outside the premises of an employer; or

(b) with the permission of the employer, inside the employer's premises.

[24] In fact, in terms of section 69(6A), the commissioner who is conciliating the dispute must determine the picketing rules contemplated in section 69(5) at the same time as issuing any certificate contemplated in section 64(1)(a). In terms of regulation 5(2) of the Picketing Regulations, the conciliating commissioner is enjoined to give copies of the picketing rules to the parties to the dispute. In the present instance, it is incomprehensible that the conciliating commissioner issued the outcome certificate without a determination on the picketing rules as formally sought by SACTWU.

[25] Notably, KZC Marketing did not avail itself to the dispute resolution scheme provided for in terms of section 69(8) to (11) which provide that:

‘(8) Any party to a dispute about any of the following issues, including a person contemplated in subsection (6)(a), may refer the dispute in writing to the Commission –

(a) an allegation the effective use of the right to picket is being undermined;

(b) an alleged material contravention of subsection (1) or (2);

(c) ...

(9) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(10) The Commission must attempt to resolve the dispute through conciliation.

(11) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.’

[26] Then the task at hand is about the interpretation of the strike and picketing provisions. The interpretative approach outlined by the Supreme Court of Appeal (SCA) in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*,^[13] is well accepted and aptly elucidated in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*^[14] (Capitec Bank), as follows:

[49] ...Endumeni has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither Endumeni, nor its reception in the Constitutional Court, most recently in *University of Johannesburg*, evince skepticism that the words and terms used in a contract have meaning.

- [50] Endumeni simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose.

Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

- [51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.’ (Emphasis added)
- [27] In the present instance, it is clear that a picket is not a strike. A strike is defined in section 213 of the LRA as “the partial or complete concerted 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, and every reference to ‘work’ in this definition includes overtime work, whether it is voluntary or compulsory”.
- [28] Conversely, a picket is a peaceful demonstration in support of any protected strike or lockout. In essence, a picket by the striking employees constitutes an exercise of the rights in terms of section 17 of the Constitution.[15] Accordingly, the object of section 69 of the LRA, as read with the Picketing Regulations, is to regulate the exercise of the rights in terms of section 17 of the Constitution during the protected strike.
- [29] To enjoy protection from undue interference and disciplinary action, a picket must be lawful and peaceful. It is apparent from section 69(12) that the Labour Court may suspend a picket in instances where it no longer serves the purpose it was intended to, namely to support the protected strike.
- [30] So, in my view, picketing does not in and of itself constitute a strike. Of course, if employees stop work in order to picket, the stoppage will very likely be a strike and its lawfulness or otherwise will depend on whether it complies with section 64. Tellingly, it is not KZN Marketing’s case that there is non-compliance with section
64. Therefore, the contention that, because there is a nexus between a strike and picket, then a picket is tantamount to a strike

is fallacious. Clearly, while it is true that a picket constitutes an action in furtherance of a strike, the two actions are regulated

separately. Any interpretation that conflates the two stands to be rejected as it does not accord with the structure, context and

purpose of sections 64 and 69 of the LRA.

[31] Equally, KZN Marketing's contention that the striking employees embarked on a secondary strike is ill-conceived. I struggle to understand how it is possible that the striking employees could be accused of embarking on a secondary strike when they are already on strike in support of their own demands. As mentioned above, these striking employees who joined the Orange Grove picket did so unlawfully. Put otherwise, the picket was unlawful. Nonetheless, the striking employees are assured of protection for the exercise of the right to strike simply because the strike complies with section 64.

[32] KZN Marketing also impugns the lawfulness of the strike on the basis that SACTWU failed to produce proof the strike it did conduct a strike ballot. This contention is not persisted with in the pleadings. Nonetheless, I deem it expedient to quickly dispose of it. The Guidelines on Balloting for Strikes and Lockouts (Guidelines) in terms of section 95(8) of the LRA, which made it mandatory for a trade to conduct a secret ballot before calling a strike, has been reviewed and set aside in *Association of Mine Workers and Construction Union v Minister of Employment and Labour*.^[16]

[33] In sum, it cannot be overemphasised that a right to strike is a fundamental constitutional right that cannot be interfered with willy-nilly. As stated in *Association of Mineworkers & Construction Union & others v AngloGold Ashanti Ltd t/a AngloGold Ashanti & others*:^[17]

'The scheme of the LRA, in regulating strikes, aims to provide clear procedural requirements. Once they are met, employees may lawfully embark on peaceful strikes. Interference in the power-play between parties engaged in a lawful strike is off limits and limiting collective bargaining that complies with the rules of engagement is a hard row to hoe under the LRA.'

[34] It follows that Mr Khumlo's ruling unlawfully interfered with the exercise of the right to strike and, in turn, the power play which is essential for a successful collective bargaining scheme. Notwithstanding, there is nothing preventing KZN Marketing from taking disciplinary action against the striking employees who participated in the unlawful picket.

Conclusion

[35] In all circumstances, I am thus satisfied that SACTWU has made out a proper case for the grant of a declaratory relief.

Costs

[36] It is well accepted that costs do not follow the result in this Court, particularly when the parties have a persisting collective bargaining relationship.

[37] I, accordingly, make the following order:

Order

1. This application is heard as one of urgency and the applicant's failure to comply with the normal time periods is condoned.
2. The strike which the applicant's members embarked on which commenced on 19 January 2022 is declared lawful as it complies with section 64 of the Labour Relations Act and the striking employees have protection in terms of section 67 of the Labour Relations Act.
3. The second respondent's ruling is declared unlawful, a nullity and of no force and effect.
4. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:
For the Applicant:

Kurshivan Rama Attorneys

Instructed by:

Advocate J Nxusani SC

For the First Respondent:

Jacque Roos Attorneys

Instructed by:

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[1] See para 2 of the ruling of 18 May 2022.

[2] See: Notice of Motion.

[3] Act 66 of 1995, as amended.

[4] See: *Minister of Finance v Oakbay Investments (Pty) Ltd and others; Oakbay Investments (Pty) Ltd and others v Director of the Financial Intelligence Centre*

[2017] 4 All SA 150 (GP) at paras [51] to [85].

[5] See: A. Ciliers, C. Loots et al, "Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa", 5ed, 2009, pp 1438-1440.

[6] Unreported judgment under case no: J1396/15 delivered on 24 July 2015 at paras [13] – [15].

[7]

(2011) 32 ILJ 112 (LAC).

[8] Ibid at para [54].

[9] Ibid at para [51].

[10] Ibid at para [53].

[11] Unreported judgment under case no: 18243/2003 delivered on 27 November 2008.

[12] Government Gazette No. 42121, 19 December 2018.

[13] 2012 (4) SA 593 (SCA) at para [18].

[14] 2022 (1) SA 100 (SCA) at paras [49] - [51].

[15] Section 17 of the Constitution of the Republic of South Africa, 1996 provides that: “Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”.

[16] Unreported judgment under case no: 78915/2019 delivered on 6 April 2021.

[17]

(2022) 43 ILJ 291 (CC) at paras [63]. See para [147]. See also: National Union of Metalworkers of SA and others v Bader Bop (Pty) Ltd at

(2003) 24 ILJ 305 (CC) at [67].

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