



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J 1180/21

In the matter between:

GIBELA RAIL TRANSPORT CONSORTIUM (PTY) LTD

Applicant

and

NATIONAL TRANSPORT MOVEMENT obo

T.M KHUMALO & 436 MEMBERS

First Respondent

Heard: 23 & 29 September 2021 (Virtual hearing)

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 18 October 2021 at 10:00

JUDGMENT

TLHOTLHALEMAJE, J

- [1] The applicant had approached this Court seeking a final order to interdict the members of the respondent, National Transport Movement (NTM), from embarking on any industrial action including a strike scheduled to commence on 27 September 2021. On the hearing date on 23 September 2021, the matter was postponed to 29 September 2021, with an interim order being granted to interdict the strike action until the final determination of this matter. The parties were further afforded an opportunity to exchange pleadings within certain time frames.

- [2] NTM issued a strike Notice on 21 September 2021, notifying the applicant of the intention to embark on strike action within 48 hours. The demands set out in the Strike Notice related to the alleged refusal of the applicant to suspend and investigate its senior employees, viz, Ms Modiba and Mr Mashiane.
- [3] It was alleged that Modiba had assaulted a member of NTM (a Mr Mama) at the workplace. Mashiane was alleged to have intimidated and coerced Mama to withdraw a grievance lodged against Modiba. Further demands related to the alleged harassment of employees who had lodged grievances against Managers, and the applicant's alleged refusal to 'resolve outstanding matters as set out in the document dated 14 November [2021]'. The applicant contends that NTM has not made out a case that it is entitled to embark on the intended strike action in terms of the provisions of the Labour Relations Act¹ (LRA).
- [4] On or about 30 August 2020, NTM had referred a dispute to the Metal and Engineering Industries Bargaining Council (MEIBC), essentially demanding that Mashiane be suspended for allegedly coercing, harassing and persecuting employees. It was alleged that the dispute in regards to Mashiane arose on 3 March 2020².
- [5] On 19 October 2020, NTM referred another dispute to the MEIBC, alleging that the applicant refused to suspend and investigate Modiba. It was alleged that this dispute arose on the same date that it was referred. There is a dispute in regards to what transpired when the referred disputes initially came before the MEIBC in December 2020. The applicant's contention is that at the time, the Commissioner did not issue a certificate of outcome since the Picketing Rules had not been agreed upon. In this regard, reliance was placed by the applicant on a ruling issued on 10 December 2020³, in which Commissioner Smith had indicated that the certificate of outcome would be issued once the picketing rules were issued. This was in respect of a matter under case number MEGA56910. The Court is however not placed in a position to determine which dispute this case number pertained to, i.e., whether Modiba or Mashiane.

¹ Act 66 of 1995, as amended

² Annexure 'RA1' to the Founding Affidavit

³ Annexure 'FA3' to the Founding Affidavit

- [6] It was submitted that since December 2020, NTM did nothing in respect of the dispute surrounding Mashiane until 14 September 2021 when it sought to revive the matter by seeking a meeting with the applicant. The applicant had declined the invitation to *inter alia* discuss Picketing Rules. Its contention was there had been substantial passage of time since the dispute was referred for conciliation in October 2020, and that if NTM was intent on having the matter resolved, it could have pursued picketing rules and strike action then, and that its sudden desire to revive the dispute in order to embark of strike action was disingenuous, and did not accord with the spirit, purport and objects of the LRA, which required expeditious resolution of disputes.
- [7] Regarding the Modiba dispute, the applicant's contention was that the matter was sufficiently dealt with in the form of a grievance hearing and a disciplinary hearing, and where NTM was fully represented. Those processes had resulted in both a grievance and disciplinary hearing outcome as far back as October 2019. It was submitted that NTM was aware that Modiba was issued with a final written warning, and that if it was not satisfied with the outcome, it ought to have referred the matter for arbitration, rather than waited for almost two years to revive the matter. In this regard, it was submitted that it was not reasonable long after a certificate of outcome was issued, for a strike notice to be suddenly issued.
- [8] The applicant further submitted that to the extent that NTM sought to embark on strike action in relation to the alleged harassment of employees, or issues surrounding mandatory vaccines, no referral was lodged in that regard to either the Commission for Conciliation Mediation and Arbitration (CCMA) or MEIBC, and further that there was no certificate of outcome in respect of any dispute related to Mashiane. In fact, in regards to Mashiane, it was submitted that NTM had withdrawn a dispute in that regard that was also referred to the CCMA, and that there was therefore no live dispute.
- [9] In the end, the applicant submitted that NTM only sought to utilise an old certificate of outcome issued on 23 November 2020, to revive matters pertaining to Modiba that were addressed and finalised in September 2019 by

way of a grievance outcome, and a final written warning issued to her in October 2019. It was contended that the intention was merely a bullying tactic.

[10] In opposing the application, NTM's submissions were that the intended strike action was protected in that;

10.1 It was in support of a lawful demand for the suspension and/or investigation of Modiba and Mashiane, and that the refusal by the applicant to accede to the demand constituted a mutual interest dispute which its members were entitled to resolve through strike action.

10.2 The dispute between the parties remained live and unresolved, and there was never an indication of an intention to abandon it or the demands in respect of the two individuals.

10.3 Reliance was further placed on the certificate of outcome that was issued on 23 November 2020 by the MEIBC under case number MEGA56814, which did not expire for the purposes of embarking on strike action. In this regard, it was submitted that there was no provision in the LRA regulating the validity of the period of a certificate of outcome, and that the employees were entitled to embark on strike action regardless of the date on which the certificate was issued.

10.4 The certificate of outcome was not at any stage contested, and the applicant was aware as far as November 2020 that NTM sought to pursue the matter. It contended that the delays in pursuing strike action were occasioned by strict lockdowns enforced resulting from the Covid-19 pandemic.

10.5 It was denied that the grievances in regard to Modiba and Mashiane were at any stage resolved. This was so in that there was no investigation report, and further that it was not correct that the dispute in regard to Mashiane was withdrawn, since any withdrawal was in reference to another unrelated dispute.

- [11] In dealing with the issues for determination, the enquiry is whether this matter deserved the urgent attention of this Court, since it was submitted by NTM that the applicant has not established the basis for urgent relief.
- [12] There is no merit in NTM's contentions that this matter is not urgent. It is common cause that the Strike Notice was issued on 21 September 2021, with the intention to embark of strike action with effect from 27 September 2021. On 22 September 2021, the applicant had sent correspondence to NTM, putting it on terms as to why the strike action could not proceed, and further demanding a withdrawal of the Strike Notice.
- [13] When there was no such undertaking at the timelines set, this application was served on NTM on the same date being 22 September 2021, and filed the following day. Clearly the applicant had acted with the necessary haste, which is but one of the elements of establishing urgency.
- [14] The strike notice was issued on 21 September 2021, whilst a public holiday fell on 24 September 2021. The applicant can therefore not be blamed for approaching the Court in the manner that it did when the undertaking was not forthcoming, and further where the strike action would have commenced on the Monday of 27 September 2021 after the long weekend.
- [15] Furthermore, any prejudice to NTM as a result of the abridgment of the time period within which the matter was brought before the Court dissipated when the hearing was in any event postponed on 23 September 2021, and when the parties were afforded an opportunity to file further papers. Thus where the strike action was imminent, I fail to appreciate what possible substantial relief can be obtained by the applicant should the matter not be treated as urgent. To this end, I am satisfied that the applicant has met the requirements of urgency as contemplated in Rule 8 of the Rules of this Court.
- [16] Insofar as the merits of this application are concerned, it is common cause that NTM seeks to have its members to embark on strike action in pursuance of its demands for the precautionary suspension of Modiba and Mashiane and investigations into their alleged conduct.

- [17] Flowing from *TSI Holdings (Pty) Ltd & others v NUMSA & others*⁴ and *City of Johannesburg Metropolitan Municipality v South African Municipal Workers' Union*⁵, it can be accepted that to the extent that NTM only seeks a suspension and an investigation of the individuals concerned on the basis of their alleged conduct, the demands cannot be deemed unlawful to fall foul of those individual's rights to fair labour practices. Therefore, the intended strike action would ordinarily be protected.
- [18] The question that arises however is whether the applicant has not addressed the demands of NTM as alleged, and furthermore, whether even if the disputes were to be said to have been properly before the MEIBC, the NTM and its members are entitled to embark on strike action based on the certificate of outcome that was issued on 23 November 2020.
- [19] Various disputes of facts were raised in regards to whether the demands were addressed; whether the issues in dispute were properly referred to the MEIBC or the CCMA; and whether the intended strike action can be embarked upon in the light of the delays in between the issuing of the certificate of outcome relied upon, and the Strike Notice.
- [20] The obvious concern to be raised is that before the Court are copies of a certificate of outcome and referral forms in respect of the allegations both against Modiba and Mashiane. In the light of the disputes of fact that were to arise from the answering affidavit, one would have expected NTM to have at least, made an attempt to furnish further clarity in regard to which dispute was covered by the certificate of outcome relied upon in seeking to embark on strike action. To the extent that it is not easily discernible from the answering papers nor from the annexures to the founding affidavit as to which dispute forms part of the certificate of outcome for the purposes of a strike, the Court is inclined to agree that it cannot be said that the certificate covers all the demands set out in the Strike Notice.

⁴ (2004) 25 ILJ 1080 (LC)

⁵ (J60/09) [2009] ZALC 15; [2009] 5 BLLR 431 (LC); (2009) 30 ILJ 2064 (LC)

[21] The disputed facts in regards to whether the grievances and the demands were attended to, and whether all the disputes and the demands are covered by the Strike Notice or certificate of outcome, can easily be resolved and disposed of on the basis of the *Plascon Evans*⁶ Rule. This exercise however will be pointless to the extent that a certificate of outcome was issued, which ordinarily entitled NTM to embark on strike action, and the enquiry should revolve around whether it is in fact and law, entitled to do so, especially in the light of the delays between the issuance of that certificate and the Strike Notice.

[22] It is trite that central to the principal objectives of the grand scheme of the dispute resolution mechanism of the LRA is expeditious resolution of labour disputes⁷. More pertinently, it was held in *National Education Health and Allied Workers Union v University of Cape Town and Others*⁸ that;

‘By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily ...’.

[23] With the above principles in mind, the approach followed in *Passenger Rail Agency of SA t/a Metrorail v SA Transport & Allied Workers Union & others*⁹ becomes even more apposite to the facts of this case. To the extent that the applicant had pointed out the delays between the issuing of the certificate and the Strike Notice, Rabkin-Naicker J in that judgment held that;

‘In my view, with respect, the enquiry should not centre on a waiver of the right to strike. Rather it is the failure to rely on a specific certificate of outcome that is discernible in a case such as that before me, ie that the union did not elect to strike on the basis of the certificate within a reasonable period of time. The right to strike is retained, but after an unreasonable delay in acting on the issuing of a certificate, a union is required to go through the procedural steps

⁶ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd*. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620

⁷ See *Khumalo and Another v Member of the Executive Council for Education: KwaZulu- Natal* (2014) 35 ILJ 613 (CC) at para 42; *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* (2011) 32 ILJ 2861 (CC) at para 76;

⁸ (2003) 24 ILJ 95 (CC) at para 31

⁹ (2018) 39 ILJ 2733 (LC)

set out in s 64 of the LRA once more. This approach accords with the principle of speedy resolution of disputes on which the LRA is premised. It is also eminently sensible: over a period of 18 months such as occurred in this matter, there are likely to have been changes in the collective bargaining relationship. The procedural requirements clothing strike action with protection, which include the opportunity for the parties to reach a settlement through the conciliation process, may produce a different outcome, given the effluxion of time.¹⁰

- [24] Other than the issue of the almost ten months of delay between the certificate of outcome and the Strike Notice, I have already pointed out the disputes of fact in regards to which issues were covered by the certificate of outcome, and worst still, the Strike Notice also contains demands that were either vague or not referred for conciliation. In this regard, two specific demands were made, *i.e.*, the alleged harassment of employees who lodge grievances against managers, or in relation to alleged refusal to resolve outstanding matters as set out in correspondence dated 14 November 2020. The latter issue also lends credence to the applicant's contentions in regards to the motives behind the intended strike. If the dispute could not be raised in November 2020, it is still unclear as to what steps were taken to resolve these, and how they could suddenly have become so pressing as to necessitate a strike action.
- [25] Other than the above issues however, the mere fact that NTM suddenly in regards to matters that originated in 2019 and other unspecified demands which were not referred for conciliation, seeks to embark on strike, and further seeks to utilise a certificate of outcome issued in November 2020, cannot by all accounts be in the interests of expeditious resolution of any disputes between the parties.
- [26] In any event, to the extent that NTM remains aggrieved by the alleged conduct of the two individuals concerned, its right to strike remains intact. But it can however not be on the basis of the certificate of outcome issued in November 2020 in the light of the unreasonable passage of time, coupled with the demands in the Strike Notice that were not referred for conciliation, and

¹⁰ At para 8

worst still, which remain vague and unexplained. The mere fact that NTM at these proceedings sought to abandon those demands is not sufficient. Furthermore, the mere fact that the LRA does not made provision for the invalidation of the certificate of outcome through passage of time, cannot on its own entitle a Union to place the employer in limbo, and then thereafter spring a surprise when this fits its end.

- [27] It follows that in the light of these unreasonable delays, NTM is now required to go through the procedural steps set out in section 64 of the LRA once more. The excuses surrounding Covid-19 and lock-down regulations cannot in my view come to NTM's assistance, as clearly the applicant was reasonable in assuming that the demands were not to be pursued. Where these disputes for whatever reason now suddenly surfaced, the applicant is entitled to be afforded an opportunity through the conciliation processes, to attempt to resolve the matter.
- [28] In the end, the applicant has demonstrated a right to final relief against the intended strike being interdicted. It equally cannot be said that the applicant has any other satisfactory remedy other than approaching the Court at this stage. As further indicated above, there is no prejudice to NTM in the light of its right to strike remaining intact over the issues in question, to the extent that they remain in dispute. Clearly it is the applicant that stands to suffer prejudice should the strike action be permissible, in circumstances where it held the view that either the grievances leading to the demands were resolved or where it has a right to conduct its affairs without threats of industrial action, and to be afforded an opportunity to re-address issues which it assumed had been resolved.
- [29] The applicant sought a costs order to the extent that it was compelled to approach the Court in circumstances where the intended strike action was impermissible. I have had regard to the requirements of law and fairness in regards to an award of costs. Inasmuch as I agree that NTM had acted unreasonably in seeking to pursue the strike action in circumstances already detailed in this judgment, I am of the view that a costs order is nonetheless not warranted in this case.

[30] Accordingly, the following order is made;

Order:

1. The non-compliance with the forms and service contemplated in the Rules of this Court is condoned and this matter is heard as one of urgency in terms of Rule 8 of the Rules of this Court.
2. The Respondent and its members are interdicted from embarking on any industrial action including a strike, based on the 'Notice of Contemplated Strike Action' dated 21 September 2021, and/or based on the Certificate of Outcome issued by the MEIBC dated 23 November 2020.
3. There is no order as to costs.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv. G. Rautenbach SC, instructed by
Tshisevhe Gwina Ratshimbilani INC

For the Respondent:

Mr E Mphahlele, NTM General Secretary

LABOUR COURT