THE REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable
Of interest to other judges

Case no: J 599/13

In the matter between:

THE TRUSTEES OF THE LEKOA

TRANSPORT TRUST REPRESENTED

BY F VORSTER IN HIS CAPACITY

AS TRUSTEE **Applicant**

And

TRANSPORT AND ALLIED WORKERS UNION **First Respondent**

INDIVIDUAL RESPONDENTS LISTED ON
ANNEXURE "A" TO THE NOTICE OF MOTION **Second Respondent**

Date heard: **18 May 2013**

Date delivered: 28 may 2013

Summary: Return day- unprotected industrial action: *Locus standi* of trustees. Trustee not producing letter of authorisation from the Master.

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant having obtained an interim order from this Court on 26 March 2013 is now seeking the confirmation thereof. In the interim order the refusal by the individual respondents to operate special hire trips was declared to be an unprotected strike action as contemplated in section 68 of the Labour Relations Act of 1995 (the LRA).

[2] The application is opposed by the first and further respondents.

Background facts

[3] It is common cause that the applicant conducts the business of the public passenger bus under the name Mqibelo Transport. The applicant receives a subsidy from the Gauteng government for providing scheduled bus services to commuters. The business of the applicant includes providing services to customers who hires the buses for purposes such as funeral and wedding events.

[4] The dispute between the parties arose from the issue of including in the drivers' duties performance of "special hires." In insisting that the drivers' duties includes performance of "special hires" the applicant relies on the written contract of employment which, amongst others provide under the heading "HOURS OF WORK," that:

> "45 hours per week. Six days a week, Monday to Saturday. From time to time you will be required to work overtime and operate special hires."

[5] It seems common cause that the special hire trips are done over the weekends. On 6 March 2013, the drivers addressed a letter to the applicant "requesting" that:

> "Lekoa Transport Trust Drivers request cash payment of special hires; since the Company does not have special Hires.
>
> Please see below table of destination and cash payment
>
> 1. Local special hire = R 250;00 each special
> 2. Soweto/Avelon =R 300;00 each special
> 3. Pretoria =R 400;00 each special
>
> Please take note that this is the urgent and the reply is requested on or before Friday 08-03-2013."

[6] In response to the above the applicant indicated to the individual respondents that in terms of the contract of employment they are obliged to work a six days in a week and the demand not to operate the special hires would result in no work no pay and discipline.

[7] On 9, 16 and 23 March 2013, the individual respondents refused to operate the special hire trips. An attempt to obtain an undertaking by the applicant for the respondents to perform their duties of special hire was unsuccessful.

<u>The contention of the parties</u>

[8] In the heads of argument for the respondents, Mr Memani, contended that Mr Voster the deponent to the founding affidavit did not have *locus standi* to institute the proceedings for and on behalf of trust. It is further submitted in the heads of argument that except for Mr Voster other trustees have not been cited. This point was not pursued further as the resolution authorising

the institution of these proceedings was subsequent to the interim order filed with the Court.

[9] The other point raised on behalf of the respondents on the day of the hearing concerned failure to produce a letter of authorisation of the trustees by the Master of the High Court. This point was not raised in the papers but from the bar.

[10] Mr Memani in opposing the submission of the letter from the Master contended that the applicant was not entitled to do so as it ought to have dealt with that in the papers. He submitted in this respect that the trustees ought to have indicated in their papers that they had the authority from the Master.

[11] Although, no reference was made as to the law upon which the respondent relied on in raising the point, it would appear that that point has its source in section 6(1) of the Trust Property Control Act 57 of 1988 (the Act). In terms of section 6(1) of the Act, a trustee can only perform his or her duties once he or she has the letter of authority from the Master. Section 6(1) of the Act reads as follows:

> "Any person whose appointment as a trustee in terms of the trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master."

[12] There has been over the years conflicting judgments in terms of the approach to be adopted when dealing with trustees who act as such prior to the formal authorisation by the Master. On the one hand, there are those

cases that followed the approach in *Schierhout v Minister of Justice*[1], wherein Innes CJ, in dealing with this issue had the following to say:

> "It is a fundamental principle of law that a thing done contrary to the direct prohibition of the law is void and of no effect."

[13] The other approach is that which was adopted in *Kropman NNO v Nysschen*[2], where it was held that;

> "Having regard to the purpose of the legislation, which is clearly designed to protect those who will ultimately benefit from the trust, there seems no reason why a Court in exercising the discretion cannot retrospectively validate any such actions in the circumstances deem it fit."

[14] The issue of *locus standi* in the context of section 6 (1) of the Act received attention in *Watt v Sea Plant Products Bpk*[3], where the capacity of the defendants who did not have the Master's letter of authority, was raised. In dealing with the issue the Court, per Conradie J held that:

> "*Locus standi in iudicio* is an access mechanism controlled by the court itself. The standing of a person does not depend on authority to act. It depends on whether the litigating is guided by the court as having sufficient close interest in the litigation.''

[15] The Court further stated that:

> ". . . the appointment is not void pending authorisation by the Master in terms of section 6 (1) of the Act."

[16] The approach to adopt when dealing with the issue of the capacity to act by a the trustees in terms of section 6(1) of the Act was clarified by the

[1] 1926 AD 99 at 109
[2] 1999 (2) SA 567 (T) at 576F
[3] [1998] 4 All SA 109 (C),

Supreme Court of Appeal in the matter of *Gabrielle Lupacchini NO v Minister of Safety and Security* .[4] In interpreting section 6(1) Nugent JA held that:

> "The section makes it clear that a trustee may not act in the capacity at all without the requisites authorisation. If we were to find that acts performed in conflict of the section are valid it seems to me that we would be giving the legal sanction to the various situations that the legislator wished to prevent. *Parker* makes it clear that legal proceedings commenced by persons who lack capacity to act for the trusts are a nullity and I see nothing in the section that suggests that trustees who are prohibited from acting in that capacity are in a better position."

[17] The issue of whether a person has the capacity to act as a trustee in terms of section 6 (1) of the Act is a factual question. In essence the question is whether or not the trustee has been authorised to act as a trustee by the Master. In this respect production of the letter from the Master is sufficient proof that a person has complied with the requirements of section 6 (1) of the Act.

[18] In the present instance the respondents did not challenge the validity of the letter of the Master authorising the trustees of the Lekoa Trust which the applicant's councel tendered in Court. The contention that the trustees do not have capacity to act on behalf of the Trust is based on of failure to make averments in that regard.

[19] My view is that this approach is highly technical and places form above substance particularly when regard is had to the context in which this proceedings were launched. It is also important to note that the point was not raised in the answering affidavits but rather during the course of the hearing.

[4] [2010] ZASCA 108.

It is for this reason that I accept that the trustees have complied with the requirement of section 6 (1) of the Act. The point raised by the respondent concerning the capacity of the trustee to instituting these proceedings accordingly stands to fail.

[20] Turning to the issue of whether the interim order should be confirmed, it is trite that in order to succeed in an application like this the applicant has to show the following:

a. A clear right;

b. An act of interference with the right/s possessed by the applicant and;

c. That there is no other satisfactory remedy available to the applicant.

[21] According to the respondents the first time when the issue of payment for special hire arose, they informed Mr Berning that they would not operate the function unless they were paid R 350, 00.

[22] The respondent further states that on 20 December they under took special hire for Trust Bus Africa and transported passengers to Rustenburg. According to them the applicant refused to pay for the special hire which took place on 20, 21, 22 and 24 December 2012. The applicant refused to pay the respondents and told them to claim the payment from the Trust Bus Africa. The drivers who undertook that trip were paid by Trust Bus Africa.

[23] The respondent complained that they were at times accused of being absent without authority whenever they were doing special hire trips.

[24] On the face value there is a dispute of facts in this matter. On the one hand the applicant contends that the respondents refused to perform special hire trips, the administration of which it contended it had outsourced to a third party.

[25] The applicant further contends that the special hire trips function is part of the individual respondent's duty in terms of the contract of employment.

[26] The picture presented by the respondents on the one hand is that the special hire trips are performed for other trust businesses and whenever they did that they were not paid for the work done or if they were to be paid it would be by the third party and not the applicant. The individual respondents further complained that whenever they transported passengers under the special hire trips arrangements they would be accused by the applicant for being absent without authorisation.

[27] The applicant is on the other hand disputes the allegations made by the respondents and contends that the special hire is part of their duties which they normally performed on Saturdays. The payment for performing the function is according to the applicant part of the overall salary payment of the respondents and in addition they were up paid allowances for such trips. In others words the payment for the special hire is incorporated into the salary of the individual respondents.

Evaluation

[28] In my view, there exists no dispute of facts in this matter. The picture which the respondents sought to create of the dispute the fact is unsustainable for the following reasons: The case of the applicant is that special hire trips are part of the contract of employment and more specifically the clause dealing with the hours of work. In this respect the applicant's case is stated in the founding affidavit at paragraph 12 in the following terms:

> "The applicant's employees are employed subject to certain standard terms and conditions. The drivers are required to work 45 hours per week, six days

a week. The individual respondents are required to fulfil their duties and to drive shifts or special hire trips allocated to them so that the applicants can operate the subsidised bus trips and special hire trips. A copy of a specimen contract of employment is attached marked “FV1”. Driving special hires forms part of the duties of the drivers in terms of their contracts of employment”

[29] In response to the above the respondents state:

"6.11.1 Save to admit the contents of annexure “FV1” the rest of the allegations are denied.”

[30] In admitting the contents of annexure “FV1” the respondents accepted that the applicant is entitled, "from time to time you (the individual respondents) will be required to work overtime and operate special hire." There is also nothing in the agreement that says payment for special hire will be made separate from the basic salary of the respondents. The salary to be paid to each of the respondents is stated in the contract of employment under the heading "PAY" as "R128.60 per week (R28.48 Hourly Rate) prorated for the period worked.”

[31] In my view the probabilities do not support the version of the respondents. Thus even if it was to be concluded that a dispute of fact exists, resort to the respondents version would not assist the case of the respondents as the version is not reliable. On their own version special hire is part of the employment contract with the applicant. They have in this respect presented a contradicted version as far as the issue of special hire is concerned.

[32] On one hand they say that the contents of the employment contract of employment, which makes provision for the special hire trips is a part of their employment contract. And on the other hand the first respondent in the e-

mail dated 20 March 2013, which it addressed to the applicant regarding the same issue says the following:

> "We want to point out that your instruction to all members to operate special hire is unreasonable as they (are) not required to do so in terms of the contract of employment."

[33] The applicant contends that there is a collective agreement which was concluded at SARPBAC, regulating the terms and conditions of employment including wages. This has not been disputed by the respondents.

[34] The question that needs to be answered in light of the above findings is whether the refusal to operate special hire trips by the individual respondents amounted to a strike.

[35] A strike is defined in the Labour Relations Act as follows:

> "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"

[36] In interpreting the decision in *Gobile v BP Southern Africa (Pty) Ltd and others*[5], John Grogan in Workplace Law correctly says:

> "employees will be deemed to be on strike even if the mistakenly believe that they are not contractually obliged to do work they have declined to perform, provided that they have the prolific was seeking attention to induce the employer to comply with some, demand."

[5] (1999) 20 ILJ 2027 (LAC)

[37] It follows from the above that the only reasonable conclusion to draw is that the special hire trips are part of the duties of the individual respondents and that is in accordance with the provisions of their employment contracts. Accordingly, refusal to perform that function accompanied by the demand that they be paid a separate amount from their salaries whenever they are called upon to perform that function amount to a strike.

[38] It has to be noted that the respondents' demand is made despite the existence of the collective bargaining agreement which regulates the terms and conditions of employment in the sector which includes wages. The strike by the respondents is further unprotected because they have not complied with the provisions of section 64 of the Labour Relations Act.

[39] I now turn to deal with the issue of the availability of other appropriate remedies. Although the respondents did not pursue this point in the heads of argument or their submission there is some suggestion in the papers that the matter could have been referred to arbitration.

[40] The issue of arbitration as an alternative remedy arose in the context where a proposal was made to refer the matter to arbitration and it would appear in principle the parties were in agreement in this regard. However, the applicant indicated that it was willing to submit the issue to arbitration subject to the respondent withdrawing the demand for payment for waiting special hire, pending the outcome of the arbitration. In my view, in the absence of an agreement between the parties to refer the matter to arbitration the arbitration process cannot be regarded as an alternative remedy.

Conclusion

[41] For the above reasons, I am of the view that, in refusing to carry out the instruction to do the special hire trips and demanding additional payment if they were to perform that function, the individual respondents embarked on an unprotected industrial action. In my view, the applicant was entitled to approach this court for a remedy in the form of an interdict. In the circumstances of this matter, the applicant had a right not to be faced with an unprotected industrial action.

[42] The remaining issue for determination relates to cost. It is not clear from the papers as to whether or not the parties have a recognition agreement. It however is apparent that the parties have in general a cordial relationship and have been engaging with each other in a constructive manner with regard to this matter. Imposing an order of costs in the circumstances does not seem to be appropriate as it would not assist in building the relationship between the parties.

Order

[43] In the premises, the *rule nisi* made on 26 March 2013, is confirmed with no order as to costs.

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Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Orr Instructed by Bowman Gilfillan Attorneys

For the Respondent: Mr Lehong of Medupi Lehong Attorneys