REPUBLIC OF SOUTH AFRICA

Reportable
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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 3124/12

In the matter between:

COWUSA obo individual applicants	**Applicants**
and	
CCMA	**First Respondent**
COMMISSIONER JOSIAH MAAKE	**Second Respondent**
RUSTENBURG PLATINUM MINES	**Third Respondent**
BOWER & ASSOCIATES	**Fourth Respondent**

Heard: **17 January 2013**
Delivered: **23 January 2013**

Summary: Urgent application for review of picketing rules made by CCMA in terms of LRA s 69(5). Union members employed by labour broker on protected strike. Allowed to picket at premises of employer (TES), more than 30 km away from workplace. No record of proceedings or reasons by commissioner. Remitted to CCMA.

JUDGMENT

STEENKAMP J

Introduction

[1] This case brings into sharp relief, yet again, the anomalies thrown up by the practice of labour broking. It arises in the context of an urgent application for review in terms of s 158(1)(g) of the Labour Relations Act[1]. It is a legality review aimed at setting aside the picketing rules established by the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) in terms of s 69(5) of the LRA.

Background facts

[2] The members of the applicant union, COWUSA (the Consolidated Workers' Union of South Africa) are on a protected strike. They all work at the Mogalakwena Mine of the third respondent, Rustenburg Platinum Mines ("RPM"). However, they are employed by the fourth respondent, Bower & Associates cc ("Bower"). Bower is a labour broker or temporary employment service ("TES") as defined in the LRA.

[3] The union's members started picketing at their workplace, i.e. on the mine, in support of the protected strike. Violence occurred and RPM obtained an urgent interim interdict aimed at preventing further violence. As part of the rule *nisi* granted by Rabkin-Naicker J on 26 November 2013, the union, RPM and Bower had to attend at the CCMA in Polokwane to determine picketing rules. The union's members were interdicted from picketing at RPM's premises pending the determination of picketing rules.

[4] The parties met at the CCMA. They could not agree on picketing rules. The second respondent (the commissioner) therefore established picketing rules in terms of s 69(5) of the LRA.

[5] The commissioner imposed, *inter alia,* the following picketing rules:

> "The picketers shall have the right to sing, chant, sloganeer, and toyi-toyi outside the Employer's premises to wit, no 63 Sussex Street, Mokopane.
>
> The picketers are prohibited from picketing on the Mogalakwena Platinum Mine's premises."

[1] Act 66 of 1995 ("the LRA").

[6] The "employer's premises" referred to are those of Bower's head office in Mokopane, more than 30 km away from the mine where the union members work. The union wishes to have the picketing rules reviewed and set aside on an urgent basis. It asks the court to substitute the picketing rules with rules that allow its members to picket at or outside the premises of the mine where its members work. RPM opposes the application; Bower abides the decision of the court.

Evaluation / Analysis

[7] RPM raises a number of defences. Firstly, the issue of urgency needs to be decided.

Urgency

[8] The picketing rules were determined on 26 November 2012. This application was heard on 17 January 2013. At first blush, it does not appear to be urgent. However, the further litigation after the rule *nisi* was granted by Rabkin-Naicker J on 26 November 2013[2] needs to be considered.

[9] The union initially launched an urgent application to have the picketing rules set aside on 30 November 2012. It was due to be heard on 5 December 2012; however, it appears that the union failed to enrol it. The parties nevertheless agreed, on that day, on a timeframe for the filing of further pleadings. The union delivered a fresh application on 7 December 2012; answering and replying affidavits were delivered by 10 December; and the matter was set down for hearing on 12 December 2012. Lagrange J dismissed the application because the union had not cited the commissioner and had launched the application in terms of s 145 instead of s 158(1)(g) of the LRA. He ruled that the union could launch a fresh application to cure these defects within two days. The union did so on 14 December 2012. It was enrolled for hearing on 20 December 2012. On 21 December 2012, Lallie J struck the matter off the roll because the union had not filed the record of proceedings in terms of rule 7A.

[2] Returnable on 25 January 2013.

[10] The union requested the record from the CCMA in terms of rule 7A. The CCMA filed the record – such as it was – on 10 January 2013 in terms of rule 7A(3). It comprised only the picketing rules (already attached to the union's earlier application) and the commissioner's handwritten version of the same picketing rules. It appeared that the proceedings had not been recorded, nor did the commissioner provide any other handwritten note of the proceedings. The commissioner also declined to provide reasons for his determination. The CCMA delivered a notice under the heading, "reasons", stating:

> "We have read the notice of motion and founding affidavit in the abovementioned review application.
>
> We have nothing further to add to the picketing rules in terms of section 60 [*sic*] of the LRA dated 26 November 2012.
>
> We will abide by the decision of the Honourable Court."

[11] The union delivered the record in terms of rule 7A(6) together with a notice in terms of rule 7A(8)(b), stating that it stands by its notice of motion, on 11 January 2013. The matter was enrolled for hearing on 17 January 2013.

[12] Given the history of the matter, it appears that the union did attempt to act urgently. It launched the first application immediately after the picketing rules had been issued. It was misguided in doing so in terms of the wrong section of the LRA and without joining the commissioner; but having been alerted to these defects by Lagrange J, it launched fresh proceedings within two days, as directed. It was, again, misguided in its attempts by failing to file the record in terms of rule 7A; but, after the matter had been struck off the roll, the union and its attorneys did once again act expeditiously to cure this remaining defect. As it happens, no record exists; more of this aspect later. I accept, though, that the applicants did attempt to launch these proceedings expeditiously. The strike is ongoing. The matter is sufficiently urgent to be heard on that basis.

Review in terms of s 158(1)(g)

[13] The applicants seek to have the decision of the commissioner (and, therefore, of the CCMA) reviewed and set aside in terms of s 158(1)(g) of the LRA. It is, in other words, a legality review.

[14] The principles pertaining to this type of review were set out in *POPCRU v Minister of Correctional Services.*[3]

[15] *Hoexter*[4] explains that the fundamental idea underlying the principle of legality is that the legislature and executive in every sphere of government are constrained by the principle that it may exercise no power and perform a function beyond that conferred by law. It may only act within the powers lawfully conferred on it and the exercise of public power is only legitimate when it is lawful. It is the obverse facet of the *ultra vires* doctrine and an aspect of the rule of law.

[16] The legality principle is exemplified in the post-constitutional context in the *Pharmaceutical Manufacturers*[5] judgment of the Constitutional Court. As Chaskalson P explained:

> "[50] What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution, according to the doctrine of legality."

[17] The court further pointed out that the exercise of public power must be lawful; and it must not be arbitrary or irrational.[6]

[18] In this application, the union contends that the determination of the commissioner was irrational and unreasonable.

[19] In *Shoprite Checkers (Pty) Ltd v CCMA*[7] this court accepted that the determination of picketing rules in terms of s 69(5) was reviewable under section 158(1)(g).

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[3] [2011] 10 BLLR 996 (LC); (2011) 32 ILJ 2541 (LC).

[4] Cora Hoexter, *Administrative Law in South Africa* (2007) at 116-7.

[5] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC).

[6] Paras [51], [85] and [90]. See also *Minister of Correctional Services & others v Kwakwa and another* 2002 (4) SA 455 (SCA); [2002] 3 All SA 242 (A) paras [35] – [36].

[7] [2007] 5 BLLR 473 (LC).

Absence of record

[20] The task of the court has been rendered even more difficult than it normally is in urgent circumstances because of the absence of a record of proceedings. It is common cause that no such record exists; the proceedings were not electronically recorded and the only handwritten notes provided by the CCMA are those comprising the handwritten precursor to the typed up picketing rules.

[21] In these circumstances, it is impossible for the court to consider whether the commissioner complied with the provisions of section 69(2) by considering the proper place for picketing, i.e. a place where the public has access; whether the union had asked for permission to picket inside the employer's premises; and whether that permission had been withheld. It is also impossible to ascertain whether the commissioner considered the anomalous situation where the employer (the TES) had a head office 30 km away and an office on the premises of the mine, where the striking workers usually reported for work. The mine, in turn, leases its premises from the local municipality. The commissioner would have had to consider all these factors in deciding where the picket would be most effective, giving expression to the constitutional rights to strike[8] and to picket[9].

[22] It is also impossible to ascertain whether the commissioner considered the peremptory provisions of section 69(5) of the LRA, i.e. the particular circumstances of the workplace as alluded to above; and the Code of Good Practice on Picketing[10]. The fact that the "reasons" provided by the CCMA – in which it declines to furnish reasons – wrongly refers to section 60[11] of the LRA does not inspire confidence.

[23] What is the court to do in these circumstances? Mr *Malan*, who appeared for RPM, submitted that this court is bound by the decision in *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO & Others*[12]. In that case, the court *a*

[8] Constitution of the Republic of South Africa s 23(2)(c).

[9] Constitution s 17.

[10] GN 765 of 1998, *Government Gazette* 18887 of 15 May 1998.

[11] This section deals with the winding-up of a bargaining council by reason of insolvency.

[12] [2001] 3 BLLR 300 (LAC).

quo amended an arbitration award without the benefit of the arbitration record. The Labour Appeal Court expressed the following view[13]:

> "In terms of Rule 7A(5), (6) and (7) the appellant was obliged to have transcribed the hand-written record and also the contents of the cassette tapes. Arguably, if the latter proved to be complete, it may have proved unnecessary to transcribe the hand-written notes. The appellant failed to have either the hand-written record or the tapes transcribed.
>
> In the absence of the transcribed record of the proceedings before the first respondent, the court a quo was in no position to adjudicate properly on the application before it and ought accordingly to have dismissed it."

[24] What is apparent from *JDG Trading*, though, is that in that case, a record (in the form of an electronic recording and handwritten notes) did exist. The applicant failed to transcribe it and thus did not comply with rule 7A(6). In the present case, there was no record to transcribe. It would also have been nigh impossible for the parties to reconstruct the record on an urgent basis without the benefit of handwritten notes, as the LAC suggested in *Lifecare Special Health Services (Pty) Ltd v Ekuhlengeni Care Centre v CCMA & others*[14]. In *Lifecare*, the case was postponed *sine die* for an investigation and a reconstruction of the record of the arbitration procedure.

[25] In this case, given the urgency of the matter in the context of an ongoing strike and the complete absence of a record, such a course of action would not be feasible. Instead, this case is akin to that of *Department of Justice v Hartzenberg* [15] where most of the record of the evidence before the Industrial Court was indisputably lost and where a reconstruction of the record was not considered to be feasible. In that case, the matter was remitted to the CCMA for a re-hearing *de novo.*

[26] It seems to me that justice would be served if the court were to follow a similar route in this instance. The matter should, in my view, be remitted to the CCMA for a re-hearing where the parties' evidence and submissions

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[13] Paras [12] – [13].

[14] [2003] 5 BLLR 416 (LAC).

[15] [2001] 9 BLLR 986 (LAC): 2002 (1) SA 103 (LAC), alluded to in *Lifecare (supra)* para [15].

should be properly recorded. This is all the more so where the commissioner has declined to provide reasons – an aspect to which I now turn.

Absence of reasons

[27] After having heard oral argument, and whilst considering the application, the court was faced with a conundrum that it did not debate with the parties in oral argument. That is that the commissioner failed to give reasons for his determination, even when called upon to do so in terms of rule 7A(2)(b). (Although the initial notice of motion did call upon the CCMA and the commissioner to provide the record and reasons, the union also asked the court to dispense with the provisions of rule 7A(2)(b). It is only after Lallie J had struck the matter from the roll because the record had not been filed, that the rule was complied with).

[28] I therefore asked the parties to deliver further written submissions on this question:

Should the determination of picketing rules be remitted to the CCMA, given that:

- the determination of picketing rules by the first and second respondents is an administrative act; and
- the second respondent (the commissioner) did not provide reasons for his determination?

[29] In *Shoprite Checkers*[16] Pillay J stated that, as an adjudicative administrative act, a commissioner should give reasons for the picketing rules. In the case before me, he did not do so.

[30] This in itself is a reviewable irregularity. The rules made by the commissioner are far from self-explanatory – the one exception seemingly foreseen by Pillay J. I agree with her that this court has the power to review picketing rules in terms of s 158(1)(g). I also agree that the commissioner should have provided reasons in circumstances where it is not self-explanatory, for example, why he did not allow the striking workers to picket outside their workplace.

[16] *Supra* para [14].

Conclusion

[31] For the reasons set out above, the picketing rules ought to be reviewed and set aside.

The appropriate remedy: substitute or remit?

[32] Given the absence of a record and reasons, though, the appropriate remedy is to remit the matter to the CCMA in order for the commissioner (or another commissioner appointed by the CCMA) to consider the determination of picketing rules afresh. The court will not take up the applicants' invitation to determine those picketing rules. I cannot do so in the absence of a record. It is for the parties to place (properly recorded) evidence and argument before the CCMA, and for the commissioner to determine picketing rules afresh, taking into account the provisions of section 69(5), and especially the peculiar circumstances of the striking workers' workplace and the code of good practice.

[33] When making a determination in terms of section 69(5), I agree with Pillay J in *Shoprite Checkers*[17] that the commissioner must provide brief reasons for the determination, unless the reasons are self-explanatory from the picketing rules. Given the unique circumstances of this case, I doubt that it would be self-explanatory. The commissioner should, as suggested by Pillay J, provide reasons for any new picketing rules established in an accompanying memorandum.

[34] The strike is still ongoing. The matter is urgent. I shall therefore direct the parties to meet and the CCMA to determine new picketing rules by no later than Friday 25 January 2013. Until new picketing rules are agreed to or determined by the CCMA, the current picketing rules will remain in force.

Costs

[35] There is an ongoing dispute and an ongoing relationship between the parties. Although they have been ultimately successful, the applicants and their attorneys have caused delays in the hearing of this application. In law and fairness, they are not entitled to their costs.

[17] *Supra* para [14].

Order

[36] For these reasons, I make the following order:

36.1 The picketing rules established by the first and second respondents on 26 November 2012 are reviewed and set aside.

36.2 The effect of this order is suspended until new picketing rules are either agreed to or established by the CCMA.

36.3 The applicant (COWUSA) and the third respondent (RPM) are ordered to attend at the premises of the first respondent (the CCMA) on or before Friday 25 January 2013 in order to establish picketing rules.

36.4 The CCMA (the first respondent) is ordered to convene a meeting before the second respondent (commissioner Maake) or another commissioner by no later than Friday 25 January 2013 in order to establish picketing rules on terms of section 69(4) and, failing that, in terms of section 69(5) of the Labour Relations Act.

36.5 There is no order as to costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Mpho Mamatela of Mamatela & Majang, Johannesburg.
THIRD RESPONDENT:	Fritz Malan of Edward Nathan Sonnenbergs, Johannesburg.