IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: JA 6/2010

MULTICHOICE AFRICA (PTY) LTD	**Appellant**
and	
BROADCASTING, ELECTRONIC MEDIA	**First Respondent**
ALLIED WORKERS UNION	**Second Respondent**

JUDGMENT

DAVIS JA:

Introduction

[1] This is an appeal against a judgment of Sangoni AJ, which was delivered on 24 February 2005. The appellant approaches this court on appeal, leave having been granted on petition.

Factual Background

[2] The appellant is a distributor of digital satellite television throughout South Africa and Southern Africa. It engages in a business described as 'a pay television operator'.

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[3] First applicant approached the court *a quo* for relief which was couched in the following terms:

> "*2. Declaring that the implementation of the new shift system in the call centre at the respondent ("the call centre") constitutes a unilateral change to the terms and conditions of employment of the second to further applicants ("the individual applicant") as contemplated in s 64(4) of the Labour Relations Act 66 of 1995 ("the LRA")*
>
> *3. Interdicting and restraining the respondents from implementing the new shift system in the call centre for a period of 30 days calculated form 27 January 2005;*
>
> *4. Alternatively to prayer 3 above and in the event of the respondent having already implemented the new shift system in the call centre, directing the respondent to restore the old shift system in the call centre for a period of 30 days calculated from 27 January 2005."*

[4] The relief, which was so sought, was based on the following facts which, in the main, are common cause: On 7 February 2005 appellant implemented a new shift system in its call centre department. As a result of this system, employees would be required to work 176 hours per month instead of 155 hours, which was the prescribed limit prior to the introduction of the new system. In addition, they would receive no additional remuneration. First respondent averred that this system constituted a unilateral change to the terms and conditions of the employment of

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their members who were employees of appellant. Appellant denied this categorisation and insisted that it was entitled to restructure the shift roosters and rotation system as necessitated by its operational requirements. In addition, it contended that all employees had agreed to work 180 hours per month.

[5] Notwithstanding this averred agreement, appellant contended that it consulted extensively with its employees as from June to October 2004. At the end of this process, the relevant employees were requested to indicate in writing whether they accepted the proposal to change the roster system. A significant number of employees did consent to this change. On 1 November 2004, all employees were notified that the implementation of the new system would take place in February 2005.

[6] In terms of correspondence which was addressed on 2 November 2004 by appellant to the employees, the proposed changes were set out thus:

- *"An increase of monthly hours for Permanent Employees from 155 hours to 176 hours.*
- *Change from currently working one Saturday a month till 13h00 - to work two Saturdays a month till 21h30.*
- *Change from being off two days every week – to being off one long weekend a month.*
- *Complete Flexibility initially for Temporary Employees and a migration from the current rotational Rosters to a Scheduling format where an e-*

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Workforce Management System can forecast the monthly, weekly, daily and 30-minute intervals staffing requirements, based on historical and current patterns and schedule terms accordingly."

[7] On 27 January 2005, first respondent referred a dispute to the Commission for Conciliation, Mediation and Arbitration ('CCMA'). On 28 January 2005, appellant generated a letter to first respondent advising that these changes would be implemented.

[8] On 4 February 2005, first respondent replied to the appellant and called upon it to honour the 30 day period which was prescribed in section 64 (1)(a)(ii) of the Labour Relations Act 66 of 1995 ('LRA') and thus not implement the proposed changes. This letter did not meet with a positive response from appellant and, accordingly, an application was launched on 8 February 2005 for relief in the form set out above.

The finding of the court *a quo*

[9] Sangoni AJ framed the critical question thus:

"*Why had respondent consulted extensively with the employees, including the individual applicants as it claims it did, yet there was no legal obligation for it to have done so*?"

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[10] The learned judge then held that the appellant had clearly recognised that the introduction of a new shift system would result in an increase in working hours without additional pay, a change from working one Saturday a month until 13h00 to two Saturdays a month, working until 21h30 and a further change from not working on two days per week to being given one long weekend a month. In the view of the learned judge, these changes placed additional burdens on the respondents and thus caused a change to the terms and conditions of employment, which changes had been affected unilaterally.

[11] In the result, an order was granted which directed appellant to restore the old shift system which operated in its call centre for a period of 30 days as from 27 January 2005.

The proceedings on appeal

[12] On appeal, Mr van der Riet, who appeared on the behalf of the appellant, submitted that the court *a quo* erred in finding that the matter should be enrolled on the basis of urgency. In his view, respondents were not able to provide any explanation as to why the application could not have been brought earlier rather than as a case of 'self induced urgency'. It was common cause that respondents had known in November 2004 that the proposed changes would be implemented in February 2005, but had provided no explanation why it took until 28 January 2005 before they lodged their application. In his view therefore, the court *a quo* should

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have found that the delay was unjustified and that respondents had been guilty of 'self induced urgency'.

[13] Given the interim nature of the relief, Mr van der Riet was required to confront the argument that the dispute had become academic. In response, he contended that, there was a real possibility that the judgment of the court *a quo* could be employed in the future to support the contention that appellant was not entitled to alter its shift system unless there had been consent by the employees.

[14] At the hearing on 11 May 2011, as a result of the debate in this Court on the submissions of appellant, this Court requested the parties to deliver further written submissions on two essential issues:

"*1.1 whether the pronouncement of the Constitutional Court in the decision of National Coalition for Gay and Lesbian Equality on mootness implies that the Court should dismiss the appeal on the basis that the issues in the appeal have become moot;*

1.2 whether the appeal should not be dismissed on the basis that the Labour Court wrongly held that sections 64(4) and (95) empowers the Labour Court to grant interdictory relief if an employer fails to comply with a requirement made in terms of sub-section(4)."

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[15] In the light of this request, I propose to deal firstly with the question of mootness.

Mootness

[16] Mr van der Riet was constrained to accept that in **National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs** 2002 (2) SA (CC) the Constitutional Court at para 21 had held that:

> "*A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law*."

[17] However, Mr van der Riet referred to a further judgment of the Constitutional Court in **MEC for Education, Kwazulu-Natal and others v Pillay** 2008 (1) SA 474 (CC) where Langa CJ said at para 32:

> "*With regard to mootness, this court has held that '(a) case is moot and therefore not justitiable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law. Sunali is no longer at DGHS and the issue is therefore moot. This court has however held that it may be in the interests of justice to hear a matter even if it is moot if 'any order which [it] may make will have some practical effect either on the parties or on others."*

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[18] On the basis that the Constitutional Court's approach to mootness applies to an appeal before this Court, Mr van der Riet submitted then this court should hear this appeal since the approach adopted by the court *a quo* continued to have a practical effect on the parties in particular, and on the labour relations community in general. Not only did the dispute concern the implementation of a new shift system and whether it involved a change to the terms and conditions of employees, but the further important issue was raised in debate before this Court, whether section 64(4) and (5) of the LRA empowers the Labour Court to grant interdictory relief, where an employee does not comply with requirements in terms of subsection (4) within the 48 hour period specified in subsection (5) or whether the failure to comply simply entitles the employees concerned to commence strike action, without complying with requirements of sections 64(1) read with section 64(3)(e) of the LRA.

Evaluation

[19] A case which is closer to the facts of the present dispute are those which presented themselves in **Radio Pretoria v Chairman, Independent Communications Authority of South Africa and another** 2005 (1) SA 47 (SCA). In this case, appellant was granted a temporary one year license to conduct business as a community radio station and broadcaster. In 1996, 1997 and 1998 further annual licenses were granted to appellant to continue its broadcasting. For reasons which are not entirely relevant to the present dispute, a further application for a temporary license was refused. An application to set aside the first decision of respondent to refuse the temporary license was dismissed with costs by the High

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Court. The judgments and order were then appealed to the Supreme Court of Appeal. Some seven months after the decision of the High Court, appellant submitted an application for a four year license which was also refused. That decision was taken on review and, on 30 June 2004, the High Court granted an order permitting appellant to continue broadcasting on the same terms and conditions as had been provided to it in its last temporary license pending the final determination of respondent's decision in respect of the four year license application.

[20] The Supreme Court of Appeal was required to examine whether the first decision to refuse the application to grant the temporary license remained a live dispute which should be decided on appeal. After examining the jurisprudence of the Constitutional Court, Navsa JA concluded at para 41:

> "*It is clear that the question of a temporary licence is no longer a live issue. That question is moot. No order by us will impact on Radio Pretoria's ability to continue broadcasting until the litigation concerning ICASA's decision to refuse the four-year licence application has been finally resolved. Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise (see the* Coin Security *case,* supra*, at para [7] (875 A-D)). Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation.*"

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[21] This approach was followed by the Constitutional Court in **Radio Pretoria v Chairman, Independent Communications Authority of South Africa and another** 2005 (4) SA 319 (CC).

[22] The present dispute, which gave rise to the temporary order of the court *a quo* took place in the early part of 2005, more than six years ago. The order which was granted was of a temporary nature. It may well be that appellant is anxious to gain advice as to whether a change to its shift system will create further difficulties. However courts, as is made clear from the jurisprudence that I have set out, do not provide legal advice in an abstract context.

[22] The factual matrix of a case dealing with a future dispute about a change of shifts, which might come before another court, may be very different, or could raise, at least, one or other different issue. This could cause another court to come to a conclusion of a different kind to that arrived at by the court *a quo*. This is, of course, cause for speculation. The crisp point is that there is no live issue which calls for this court to determine an appeal. Indeed, to entertain an appeal of an order of so temporary a nature, which is predicated on a dispute which took place more than six years ago, would result in a veritable flood of academic disputes being brought before these courts.

[23] I am mindful of the need to deal with the problems of sections 64(3)(4) and (5) of the LRA within the context of the distinction drawn by the LRA between

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disputes of interests and disputes of rights and, thus, where court intervention is required in terms of the LRA. However, given that the present dispute is moot, it is preferable to wait until a live dispute confronts this Court before determining this question.

[24] In the result, the appeal is dismissed with costs.

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DAVIS JA

I Agree

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WAGLAY DJP

I Agree

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SANDI AJA

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Appearances

For the appellant: Adv. J G Van Der Riet SC Instructed by Eversheds attorneys

For the Respondent: Mr. G N Moshoana of Mohlabe & Moshoana Inc.

Date of Hearing: 19 May 2011

Date of Judgement: 25 August 2011

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