IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: **JA26/07**

In the matter between:

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION Appellant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION Respondent

JUDGMENT

Introduction

[1] This is an appeal against the judgment of the Labour Court (per Van Niekerk AJ) delivered after an urgent application was brought by the appellant against the respondent (the union), seeking to interdict the union's members from embarking on a secondary strike.[1] The union represents employees in the municipal sphere of government. It called the secondary strike in support of a

[1] The judgment is reported at [2008] 1 BLLR 66 (LC).

protected primary strike by employees in the national and provincial spheres of government who were in dispute with their employer over wages and other conditions of employment. The court *a quo* granted an order in positive terms, declaring that a one day strike excluding employees engaged in essential services was protected, thus effectively dismissing the application. The court further ordered the appellant to pay the costs of the application.

Material facts and the judgment of the court *a quo*

[2] The material facts are not in dispute. On 1 June 2007, the union addressed a letter to the appellant stating that it intended calling a secondary strike in support of wage demands made by employees engaged in national and provincial government. On 6 June 2007, the union formally gave notice in terms of s 66 (2) of the Labour Relations Act no.66 of 1995 ("the Act") that its members would embark on secondary strike action *"in support of the public servants wage demands as from 12: 01 midnight on Wednesday, 13 June 2007"*. While the strike notice was silent on the extent of the strike, the affidavits filed in the proceedings made it clear that the proposed strike called by the union was a one-day strike, scheduled to take place on 13 June 2007, and that those employees engaged in essential services would not participate in the strike.

[3] It was common cause before the court *a quo* that the first two conditions established by s 66(2) of the Act had been met, i.e. the primary strike was

protected, and proper notice of the secondary strike had been given. The issue before the court *a quo* was whether the secondary strike called by the union met the requirements of s 66 (2) (c), which provided as follows:

> "(2) no person may take part in a secondary strike unless
>
> *(a) …...*
>
> *(b) …...*
>
> *(c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer"*

[4] The court *a quo* observed that in the founding affidavit, the appellant's case comprised no more than a bland statement that the withdrawal of labour in the municipal sector would have no direct or indirect effect on the business of the national or provincial government, and that the effect of the proposed strike would only grossly inconvenience members of the public. In addition, the appellant averred that the business of the national and provincial government was not dependent in any way on the functions carried out by the municipalities, and that the source of authority of local government is the Constitution of the Republic of South Africa 1996 (the Constitution) and not the national or provincial government. There was no further elucidation of these averments in the papers, nor any further factual foundation laid for them.

[5] The court *a quo* held that an assessment of the nature and extent of the secondary strike clearly contemplated that its impact on the business of the secondary employer was a fundamental factor, and that an assessment of that impact was required[2]. It further stated that the use of the words '*reasonable in relation to*' in s 66 (2) (c) imported a proportionality assessment. The test to be applied was expressed in the following terms:

> *"In short, whether or not a secondary strike is protected is determined by weighing up two factors – the reasonableness of the nature and extent of the secondary strike (this is an enquiry into the effect of the strike on the secondary employer and will require consideration, inter alia, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strikes impact on the second employer and the sector in which it occurs) and, secondly, the effect of the secondary strike on the business of the primary employer, which is, in essence, an enquiry into the extent of the pressure that is placed on the primary employer"*[3].

[6] Applying the aforestated test to the facts, the court *a quo* noted that the strike called by the union was neither continuous nor intermittent: it was limited to a single day. While the impact of the withdrawal of labour for a day by those of the union's members not engaged in essential services would obviously be felt by the municipalities affiliated to the appellant and also by members of the

[2] see paragraph [14] of the judgment of the Court *a quo*
[3] at paragraph [16] supra

public, any inconvenience to the latter would be limited to a single day. Turning to the possible effect that the proposed strike would have on the business of the primary employer, the court referred to those provisions of the Constitution establishing the three tiers of government and observed that government at all levels is in the business of providing services. Municipalities play a role in the activities of national and provincial departments and the municipal sector provides operational and administrative services to the national and provincial spheres of government. This had the result that:

> *"Given the integrated, coordinated and cooperative structure of government as a whole, it is entirely possible that the withdrawal of municipal services will have, at least, an indirect, if not a direct effect on the business of those high levels of government engaged in the primary strike, and will, at least, place pressure on them in the national bargaining process currently underway"*[4].

[7] On the above basis, the court *a quo* concluded that the union had succeeded in establishing that the nature and extent of the secondary strike was reasonable in relation to its effect on the business of national government and that the appellant had accordingly failed to establish a clear right to the relief that it sought.

[8] The decision of the Court a quo was contrary to other decisions of the Labour Court which had rejected proportionality as a relevant factor in determining

[4] at paragraph [21] of the judgment

the reasonableness or otherwise of the nature and extent of the secondary strike on the business of the primary employer in terms of Sec 66 (2) (c) of the Act.

The appeal

[9] This Court has not yet had an opportunity to consider the meaning of s 66(2)(c) of the Act, which requires that "*the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer".* In these proceedings, quite properly, neither the appellant nor the union contest the proposition that section 66(2)(c) of the Act, imports a proportionality test. What is required to be determined, as the court *a quo* correctly observed, is the reasonableness of the nature and extent of the secondary strike (which inevitably involves an enquiry into the effect of the strike on the secondary employer) in relation to the effect on the business of the primary employer (which inevitably involves an enquiry into the extent of the pressure placed on the primary employer).

[10] Under the head of proportionality, the court must weigh the effect of the secondary strike on the secondary employer and the effect of the nature and extent of the secondary strike on the business of the primary employer. The sub-section does not require actual harm to be suffered by the primary employer but that there must be the possibility that it may. The harm that the employer may suffer is not required to be direct. It may be harm that indirectly

affects the business of the primary employer. It would, therefore, in every case require a factual inquiry to determine whether or not the possible effect the secondary strike will have on the business of the primary employer is reasonable. The harm that may be suffered by the secondary employer must be proportional to the possible effect the secondary strike may have on the business of the primary employer.

[11] The notice of appeal sets out a number of grounds on which the appeal is brought, but only the following were pursued:

(i) that the true issue in striking the balance postulated by the principles of proportionality is the extent to which the secondary employer can exert influence on the primary employer in order to encourage it to compromise or capitulate in the dispute;

(ii) that the relationship between local government on the one hand and provincial and national government on the other was but one factor to be taken into account in determining the legitimacy of the strike;

(iii) that the degree of integration, co-ordination and co-operation between local and central government was too slight to legitimate a secondary strike against municipalities and that in any event, municipalities were provided with too little power to enable them to influence decisions of national government in the collective bargaining process; and

(iv) that the court ought to have held, in determining the legitimacy of the secondary strike, that the interests of third parties deserve at least as

much consideration and weight as the interests of the secondary employer and the striking union and its members.

[12] In his argument Mr. Brassey, counsel for the appellant, made reference to the distinction between a sympathy and a secondary strike. I do not propose to go into that distinction because in the case of a strike dealt with in s66 of the Act what is important in the context of the requirement contained in s66 (2) (c) is the reasonableness or otherwise of the nature and extent of the secondary strike in relation to the possible direct or indirect effect that such strike may have on the business of the primary employer. Since it is common cause that the requirement contained in s66 (2) (c) of the Act is the only requirement in issue in this matter the question for determination is whether the appellant has shown that the nature and extent of the secondary strike is unreasonable in relation to the possible effect it may have on the business of the primary employer.

[13] In the present instance, Mr Brassey submitted that the secondary strike was called with the object of giving emotional support to the primary strikers and place the national and provincial government under greater socio-economic pressure. These objects, while not in themselves illegitimate, failed, he argued, to pass the test of reasonableness under s 66(2) of the Act.

[14] I disagree. The clear aim of those employees participating in the secondary strike was to support the primary strike in order to have some impact on the bargaining process between the primary employer and the trade union engaged in the primary strike. The secondary strike was confined to a single day. While there was harm done to municipalities that are members of the appellant and their residents for the day of the strike, the harm was not excessive. Essential services continued to operate. The only factual basis that the appellant laid for the relief it sought was a blanket statement that the withdrawal of labour in the municipalities would have no direct or indirect effect on the business of the national or provincial government, and that the business of the national or provincial government was not dependent in any way on the functions carried out by local government.

[15] In the answering affidavit of the union, the linkages between national, provincial and local government were explored in some detail. Apart from the fact that the state provides services through all three spheres of government, the union observed that all three spheres form part of the public administration as envisaged by s195 of the Constitution and in that sense, the proposed strike was an extension of the primary strike. The constitutional imperative of co-operative governance entrenched in the Constitution was canvassed in some detail. In the replying affidavit, the appellant described these averments as vague generalities, and submitted that an obligation to co-operate fails to explain why a strike in one sector necessarily had an adverse effect on the

business or functions of another. From the papers before this Court, I am of the view that the court *a quo* correctly found that municipalities play a role in the activities of national and provincial governments, and that they provide operational and administrative services to the national and provincial spheres of government. In the context of the system of co-operative governance established by the Constitution, in my view, the court *a quo* correctly assessed the possible impact of the secondary strike on the business of the primary employer and its finding that the secondary strike would have some impact on the bargaining process between the primary employer and the trade union involved in the primary strike was justified.

[16] Mr. Brassey also submitted that the secondary strike must bring its influence to bear in some tangible or material way on the secondary employer who must then put pressure on the primary employer to compromise or capitulate to the demands of its workers. I cannot agree. There is no requirement in s66 of the Act that the secondary employer should exert influence on the primary employer or that the secondary employer should have the capacity to exert influence on the primary employer in order to encourage it to compromise or capitulate to the demands of the workers. What sec 66 requires is that the secondary strike should have a possible direct or indirect effect on the business of the primary employer and that the nature and extent of the secondary strike should be reasonable in relation to the possible direct or indirect effect on the business of the primary employer.

[17] In conclusion the contention by the appellant that the secondary strike was unreasonable falls to be rejected. Accordingly, the appeal must fail. With regard to costs, I am of the view that the requirements of the law and fairness dictate that there should be no order as to costs in the appeal.

[18] In the result I make the following order:

"**The appeal is dismissed with no order as to costs."**

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Waglay JA

I agree

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Zondo JP

I agree

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Kruger AJA

Appearances

For the Appellant:	Adv MSM Brassey SC
	with him Adv W.R Mokhare
Instructed by:	Werkmans Inc
For the Respondent:	Adv J.G Van der Riet SC
Instructed by:	Cheadle Thompson & Haysom
Date of Judgment:	29 March 2011